Denver Law Review

Volume 63 | Issue 1 Article 15

February 2021

Front Pay under the Age Discrimination in Employment Act

Arnold C. Macdonald

FRONT PAY UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT*

INTRODUCTION—HISTORICAL BACKGROUND

The Age Discrimination in Employment Act (ADEA)[1] was enacted in 1967 and amended in 1978 to ensure that employers would not discriminate against employees between the ages of forty and seventy.[2] The ADEA draws its enforcement provisions from the Fair Labor Standards Act[3] (FLSA), which allows discriminatees to recover lost wages. Under the ADEA, trial courts may also grant liquidated damages in cases of willful violation,[4] and they have "jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion."[5] Even within individual circuits, court interpretations of this language have varied widely.[6] The interpretations have been most varied in the area of "front pay"—awarding future damages in lieu of the specifically enumerated remedy of reinstatement.[7]

---

* The author gratefully acknowledges the assistance of Michael Nosler and Laura Wing of Rothgerber, Appel, Powers & Johnson, Denver, Colorado, in the preparation of this article.

1. 29 U.S.C. §§ 621-34 (1982).

2. 29 U.S.C. § 621 (1982); S. REP. No. 95-493, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504.

3. 29 U.S.C. §§ 201-19 (1982); Lorillard v. Pons, 434 U.S. 575, 580 (1978). In fact, the ADEA language "unpaid minimum wages or unpaid overtime compensation" (29 U.S.C. § 626(b)) is taken directly from the Fair Labor Standards Act and makes little sense in the context of age discrimination. Any minimum wage or overtime violations are tangential to age discrimination claims. *See* Pavlo v. Stiefel Laboratories, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489 (S.D.N.Y. 1979).

4. 29 U.S.C. § 626(b) (1982). In contrast, the FLSA provides for liquidated damages for all violations.

5. 29 U.S.C. § 626(b) (1982).

6. *See, e.g.*, Perrell v. Financeamerica Corp., 726 F.2d 654, 657 (10th Cir. 1984) ("the ADEA is limited to the damages specifically enumerated"); EEOC v. Prudential Fed. Sav. and Loan Ass'n, 741 F.2d 1225 (10th Cir. 1984) ("When we read this section as a whole and construe it liberally, as we must, . . . we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA. . . .") (citations omitted), *cert. granted and judgment vacated on other grounds*, 105 S. Ct. 896, *on remand and withdrawn in*, 753 F.2d 851 (10th Cir. 1985).

7. For opinions denying awards of front pay, see Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980); Foit v. Suburban Bancorp, 549 F. Supp. 264 (D. Md. 1982); Jaffee v. Plough Broadcasting Co., 19 Fair Empl. Prac. Cas. (BNA) 1194 (D. Md. 1979); Mader v. Control Data Corp., 19 Fair Empl. Prac. Cas. (BNA) 1192 (D. Md. 1978). Covey v. Robert A. Johnston, Co., 19 Fair Empl. Prac. Cas. (BNA) 1188 (D. Md. 1977); Price v. Maryland Casualty Co., 391 F. Supp. 613 (S.D. Miss. 1975), *aff'd*, 561 F.2d 609 (5th Cir. 1977); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971). For cases approving front pay awards, see Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985); Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985); Whittlesey v. Union Carbide, 742 F.2d 724 (2d Cir. 1984); Davis v. Combustion Eng'g Inc., 742 F.2d 916 (6th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Boyce v. Davis Oil Co., No. 83-M-179 (D. Colo. Oct. 9, 1984); Ventura v. Federal Life Ins. Co., 571 F. Supp. 48 (N.D. Ill. 1983);

In age discrimination cases, the courts must deal with a new and unique set of circumstances. Court ordered hiring, promotion or reinstatement is frequently impossible in age discrimination cases. Long periods of time usually lapse between the discriminatory act and the trial.[8] In the meantime, the employee discriminated against may have reached retirement age, or economic changes may have forced the employer to close plants, move or reduce staff.[9] In addition, the stress of litigation often heightens already acrimonious feelings, making reinstatement impossible. The more public contact an employee has, or the more the employee supervises or makes company policy, the less likely that courts will order reinstatement since a disgruntled employee can cause grave damage in those positions.[10] When reinstatement is impossible, an increasing number of courts are awarding front pay as an alternative to traditional remedies.

This article will discuss the older court decisions rejecting front pay as an element of damages and the more recent cases awarding front pay. The majority of circuits now recognize that front pay awards are valid under the ADEA, yet many trial courts have been careless both in awarding and measuring front pay damages. After examining the various factors courts have considered in awarding front pay, this article will conclude by listing the factors a court should consider in order to keep front pay awards from being too remote or speculative.

I. THE STATUTORY AUTHORITY FOR FRONT PAY AWARDS

The ADEA does not specifically include front pay as an element of damages, and the legislative history of the statute contains no reference to front pay.[11] Courts derive the power to award front pay from their

---

O'Donnell v. Georgia Osteopathic Hosp., 574 F. Supp. 214 (N.D. Ga. 1982), *aff'd in part, rev'd in part*, 748 F.2d 1543 (11th Cir. 1984); Hoffman v. Nissan Motor Corp., 511 F. Supp. 352 (D.N.H. 1981). *See also* Annot., 74 A.L.R. FED. 745 (1984).

8. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (in which the discriminatory act occurred in 1971, yet the District Court did not render its decision until 1977 (and the Supreme Court not until 1982), 11 years after the discriminatory act).

9. Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982). Mohawk closed its plant because of declining demand for its tires and high production costs at the facility.

10. Whittlesey v. Union Carbide, 742 F.2d 724 (2d Cir. 1984) (reinstatement inappropriate where plaintiff was corporation's chief labor counsel); *see also* Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985) (determination of whether reinstatement more appropriate within the discretion of the trial court); Hoffman v. Nissan Motor Corp., 511 F. Supp. 352 (D.N.H. 1981) (financial award appropriate in lieu of reinstatement); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976) (reinstatement inappropriate for television newscaster). *But c.f.* Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983) (ordering reinstatement unless the parties show it would be inappropriate; "[t]he friction arising from the litigation process itself is not alone sufficient to deny employment . . .").

11. The House and Senate Reports on the original ADEA contain no discussion of the damage provisions beyond the language of the statute. H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2218. The Conference agreement for the 1978 amendment contains the following discussion of damages:

> [The ADEA], which incorporates the remedial scheme of . . . the FLSA "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the

traditional equitable and remedial powers[12] to make plaintiffs whole in employment discrimination cases,[13] and the express language of the statute stating that "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation, judgments compelling . . . reinstatement."[14] The courts that have awarded front pay are not on totally new ground; there is some precedent for front pay under title VII of Civil Rights Act of 1964[15] and the FLSA. As early as 1962, the Fifth Circuit Court of Appeals encouraged front pay where reinstatement was impossible in a FLSA case.[16] A number of title VII cases approved front pay awards before front pay became a popular remedy under the ADEA,[17] however, its effectiveness as a remedy has been limited because title VII cases seldom award large amounts of front pay.[18] ADEA cases are substantially different than title VII or FLSA cases. Age discrimination cases are unique because elderly plaintiffs often have a limited amount of working years before their retirement. Older plaintiffs are more seriously damaged because it is difficult for them to find replacement jobs with similar salaries and responsibilities. To compensate for this, front pay awards under the ADEA are normally higher than those under title VII and the FLSA.[19]

A few courts, however, continue to reject front pay as an element of damages. The reasons cited fall into three major categories. First, front

---

pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. . . . The ADEA as amended by this act does not provide remedies of a punitive nature. . . . [T]he Supreme Court has made it 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.

H.R. CONF. REP. No. 950, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 535 (quoting Overnight Transp. Co. v. Missel, 316 U.S. 572, 583-84 (1942)).

12. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1022 (1st Cir. 1979).

13. *See Whittlesey*, 742 F.2d at 727-28; *Davis*, 742 F.2d at 923; Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

14. 29 U.S.C. § 626(b) (1982).

15. 42 U.S.C. §§ 2000e (1982). Under title VII, a person claiming to be injured as a result of discrimination in employment may sue the offending employer in federal district court. *Id.* § 2000e-5(f)(3).

16. Goldberg v. Bama Mfg., 302 F.2d 152 (5th Cir. 1962); *see also* Mitchell v. Dyess, 180 F. Supp. 852 (S.D. Ala. 1960).

17. *E.g.*, Hill v. Western Elec. Co., 596 F.2d 99, 104 (4th Cir. 1979); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); White v. Caroline Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977); Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Kallir, Philips, 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 (1977); Wirtz v. Atlas Roofing Mfg. Co., 377 F.2d 112, 115 n.5 (5th Cir. 1967); *see also* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); EEOC v. Safeway Stores, 634 F.2d 1273, 1281-82 (10th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980).

18. *E.g.*, *Fitzgerald*, 624 F.2d at 956 (lost wages until employee reaches rightful place: $20,478); *Kallir*, 420 F. Supp. at 927 (one year salary: $22,881); *Wirtz*, 377 F.2d at 115 n.5 (parties agree to $100).

19. *E.g.*, *Whittlesey*, 742 F.2d at 729 (senior in-house labor attorney awarded four years at full salary); *Davis*, 742 F.2d at 923 ($88,800 as front pay); *Ventura*, 571 F. Supp. at 50-51 (six years salary as front pay).

pay is speculative; it requires a court to consider factors such as the plaintiff's projected life span, the future job market in the plaintiff's profession, the likelihood of pay raises in the plaintiff's existing job, the likelihood of pay raises in the plaintiff's substitute job, and the probability that the defendant's business will close, move or reduce its staff for legitimate purposes, resulting in a legal termination of the plaintiff's job.[20] Second, if front pay is awarded, the defendant's huge potential liability discourages plaintiffs from settling because the potential benefit comes at no additional risk.[21] Finally, some courts reason that front pay is punitive because it is payment for services not rendered: Congress provided for punitive and speculative damages in the liquidated damages section of the ADEA[22] and would have specifically included front pay in that section if it had so desired.

The first case to discuss front pay under the ADEA, *Monroe v. Penn-Dixie Cement Corporation*,[23] denied the plaintiff all benefits because he was terminated before the ADEA was enacted.[24] In dictum, the court wrote that any projection of damages beyond the date of trial would be too speculative and that damages should be liquidated as of the date of trial. It noted that courts are specifically empowered to reinstate plaintiffs and a plaintiff who does not request reinstatement waives any right he may have against his employer.[25] The court concluded by stating that

---

20. *E.g.*, Foit v. Suburban Bancorp, 549 F. Supp. 264 (D. Md. 1982) (front pay too speculative, often resulting in a prospective windfall for plaintiffs); Covey v. Robert A. Johnston Co., 19 Fair Empl. Prac. Cas. (BNA) 1188 (D. Md. 1977) (front pay unprecedented, speculative, and would discourage courts from ordering reinstatement); *see also Gibson*, 695 F.2d at 1093 (plant closes, circuit remands for trial court to determine whether, absent discrimination, company would have transferred plaintiff). *But see Koyen*, 560 F. Supp. at 1161 (future damages not too difficult to calculate; wrongdoer should bear risk of uncertainty).

21. Mader v. Control Data Corp., 19 Fair Empl. Prac. Cas. (BNA) 1192 (D. Md. 1978) (awarding front pay discourages settlement by plaintiffs).

22. 29 U.S.C. § 626(b) (1982). *See Loeb*, 600 F.2d at 1023 (dictum) (front pay constitutes payment for services not rendered); *Covey*, 19 Fair Empl. Prac. Cas. (BNA) at 1192 (court does not want to discourage courts from denying reinstatement); *Jaffee*, 19 Fair Empl. Prac. Cas. (BNA) at 1194 (citing with approval the *Covey* decision denying front pay).

23. 335 F. Supp. 231 (N.D. Ga. 1971).

24. *Id.*

25. *Id.* at 235. A number of courts refuse to grant front pay where the plaintiff does not seek reinstatement. *E.g.*, Wehr v. Burroughs Corp., 619 F.2d 276; Ginsburg v. Burlington Industries, Inc., 500 F. Supp. 696 (S.D.N.Y. 1980). This ignores the possibility that plant closings, reduction in work force, or defendants' discrimination may make reinstatement impossible. There is no reason to expect plaintiffs to request reinstatement when all parties know it would be impossible. In Boyce v. Davis Oil Co., No. 83-M-179 (D.C. Colo. 1984), Judge Matsch found that there was "mutual dislike" and "animosity" between the plaintiff, Boyce, and her former employer, Davis Oil Company. The oil company had offered Boyce reinstatement in an inferior position. Judge Matsch wrote that

> [t]o require Margaret Boyce to return to Davis Oil Company under these circumstances would not only cause her difficulty; it would denigrate the purposes of the Act by requiring an elderly woman to undergo the stress of working where she isn't wanted. Accordingly, this is a case where the preferred remedy of reinstatement is inappropriate, and front pay should be awarded.

Boyce, 83-M-179, slip op. at 2. As long as there are sound reasons why reinstatement is inappropriate, there is no need to demand that plaintiffs file frivolous claims for reinstatement.

A 1982 Supreme Court case may confuse this area. In a title VII case, Ford Motor Co.

although plaintiffs lose some rights against their employers through their inability to sue for front pay, defendants correspondingly cannot show that plaintiffs obtained more lucrative positions in order to reduce their liability for back pay.[26]

The District of Maryland, following *Monroe*, denied front pay in three cases: *Covey v. Robert A. Johnson Co.*,[27] *Mader v. Control Data Corp.*,[28] and *Jaffee v. Plough Broadcasting Co.*[29] In each case, the court ruled that the trial date is the cutoff point for measuring monetary losses to the plaintiff, noting that it could find no authority for projecting lost income beyond trial. The court also reasoned that the potential for immense damages against an employer could discourage courts from ordering reinstatement and dissuade plaintiffs from settling cases.[30]

II. COURT AWARDS OF FRONT PAY

A. *Early Cases Discussing Front Pay*

The first case to raise the possibility of front pay as a damage award in lieu of reinstatement was *Loeb v. Textron, Inc.*[31] The plaintiff in *Loeb* was hired in 1971 when he was fifty years old and fired four years later.[32] The trial court decided that reinstatement was inappropriate and awarded Loeb $90,000 in front pay and vested pension rights.[33] The First Circuit Court of Appeals remanded the case for a new trial based on the jury instructions, but went ahead to discuss the damages issues raised by the trial court. The court examined the legislative history of the ADEA, finding that the award of pension benefits was "plainly authorized" under the statute, but left the actual reimbursement scheme up to the discretion of the trial court.[34] The court then discussed the award of front pay in lieu of reinstatement, and determined that front pay may be available in limited circumstances as an element of damages under "the traditional equitable powers of the federal courts and the

v. EEOC, 458 U.S. 219 (1982), the Court held that an offer of reinstatement terminated former employees' backpay damages, even though plaintiffs would have lost their seniority by accepting reinstatement (unless they continued the lawsuit). *Id.* at 231. The Court reaffirmed the rule that "the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position." *Id.* at 231-32. The decision may be read to require plaintiffs to plead and accept reinstatement where reinstatement cannot make them whole. However, in cases when reinstatement to a comparable position is impossible, front pay is essential to the "make whole" purposes of employment discrimination law.

26. 335 F. Supp. at 235.

27. 19 Fair Empl. Prac. Cas. (BNA) 1188 (D. Md. 1977).

28. 19 Fair Empl. Prac. Cas. (BNA) 1192 (D. Md. 1978).

29. 19 Fair Empl. Prac. Cas. (BNA) 1194 (D. Md. 1979).

30. *Covey*, 19 Fair Empl. Prac. Cas. (BNA) at 1191-93. The Southern District of Mississippi also followed *Monroe* in Price v. Maryland Casualty Co., 391 F. Supp. 613 (S.D. Miss. 1975).

31. 600 F.2d 1003 (1st Cir. 1979).

32. *Id.* at 1007-08.

33. *Id.* at 1021.

34. *Id.* (citing H.R. CONF. REP. No. 950, 95th Cong. 2d Sess. 13, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 535) (pension benefits are part of the "items of pecuniary or economic loss such as wages, fringe, and other job related benefits")).

remedies available under the FLSA."[35] The court limited its comments by noting that front pay awards in title VII and FLSA cases had been "relatively small" because front pay is both speculative and in return for "services not rendered," writing that "we suspect that both continuing payments and substantial awards calculated, for example, on the basis of life expectancy would be inappropriate."[36]

The first court to follow *Loeb* and award damages was the District of New Hampshire in *Hoffman v. Nissan Motor Corp.*[37] The court denied reinstatement to the plaintiff, stating that "to order the plaintiff reinstated would be a harbinger of disaster and a catalyst to more litigation,"[38] and that "the defendant's conduct placed the plaintiff who was in advanced middle age [fifty-three years old at the time of discharge and fifty-eight years old at the time of the decision] in a precarious position in the available job market."[39] The court quoted *Loeb* at length and awarded the plaintiff $20,000 damages in lieu of reinstatement. The court discussed front pay, but the $20,000 figure was not derived from the plaintiff's future potential income with the company. Instead, the damage award reflected money he had spent starting up his own business when he could not find a new job after he was wrongfully terminated.[40] The court also ordered that the plaintiff be treated as a vested employee for the pension plan.[41] Thus, the court approved the award of front pay in lieu of reinstatement, but did not actually award front pay.

The Ninth Circuit Court of Appeals also followed *Loeb* in *Cancellier v. Federated Department Stores*,[42] when it approved the concept of damages in lieu of reinstatement, but did not grant them because a large liquidated damages award made the plaintiff whole.[43] In *Cancellier*, reinstatement was inappropriate because of hostility between the parties as evidenced by one corporate officer referring to the plaintiff as "a cancer."[44] The Ninth Circuit affirmed the trial court's holding that the award of $2.3 million in damages to three plaintiffs made the plaintiffs whole without any award of front pay.[45]

B. *Cases Actually Awarding Front Pay*

One of the first cases specifically awarding front pay was *O'Donnell v. Georgia Osteopathic Hospital*.[46] In that case, the trial court followed *Hoffman* and awarded the plaintiff, a hospital employee, front pay. However,

35. *Loeb*, 600 F.2d at 1022.
36. *Id.* at 1023 (citing *Wirtz*, 377 F.2d at 115 n.5, and *Goldberg*, 302 F.2d at 152).
37. 511 F. Supp. 352 (D.N.H. 1981).
38. *Id.* at 355.
39. *Id.* at 357.
40. *Id.* at 355, 357.
41. *Id.* at 357.
42. 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).
43. *Id.* at 1319-20.
44. *Id.*
45. *Id.*
46. 574 F. Supp. 214 (N.D. Ga. 1982), *aff'd in part, rev'd in part*, 748 F.2d 1543 (11th Cir. 1984).

unlike *Hoffman*, in which the damage award reflected the cost of starting up a business, *O'Donnell* based its future damage award on the potential income of the plaintiff.[47] The court used a three part calculation to determine the amount of the damage award. First, the court projected the plaintiff's wage at the date of termination through the date of her retirement, and allowed her an eight percent annual pay raise based on the eight percent raise she received in the last year of her employment. Next, the trial court deducted the plaintiff's expected earnings from the date of trial through her projected retirement. It based this figure on plaintiff's earning an average of $229.82 per month from the time she left defendant's employ until the time of trial. The court did not factor any pay raise into the figure it deducted. Finally, it discounted the front pay award to its present value at an interest rate of five percent and awarded the plaintiff a lump sum.[48]

The trial court, however, did not explicitly find whether the hospital made a legitimate offer of reinstatement. Due to the animosity between the parties, it found that the defendant's offer was irrelevant, and that the plaintiff would not have to accept reinstatement. The court wrote that the plaintiff's desk was moved to face the wall, that she was given nothing to do, and that she was "harassed and shunned" by her supervisors.[49]

On appeal, the Eleventh Circuit Court of Appeals reversed based on the district court's findings on the reinstatement issue.[50] The employer had offered unrebutted testimony and affidavits that it made the plaintiff an offer of reinstatement to a different department at the same salary. The plaintiff testified that she would refuse any position at the hospital.[51] The circuit court remanded for a finding as to whether the plaintiff was justified in refusing the offer, writing that "the posture of this case mandates that front pay may be awarded only after reinstatement is dismissed as a reasonable alternative."[52]

The Eighth Circuit Court of Appeals addressed the front pay issue in a more complicated situation in *Gibson v. Mohawk Rubber Company*.[53] There, the court was presented with a situation where the plaintiff's plant had closed *after* he was fired. Unlike the previous cases, the court found that the parties were not so hostile that the plaintiff would no longer have been able to work for the defendant. Since the jury never addressed the issue, the court remanded the case for a jury trial on the issue of whether the defendant would have transferred the plaintiff to a different plant were it not for the age discrimination.[54] In discussing the

47. *Id.* at 222.
48. *Id.*
49. *Id.* at 221.
50. 748 F.2d 1543 (11th Cir. 1984).
51. *Id.* at 1551 n.9.
52. *Id.* at 1552. The holding was a narrow one, as the court reserved judgment on the issue of whether reinstatement is the preferred remedy under the ADEA. *Id.* at 1551-52.
53. 695 F.2d 1093 (8th Cir. 1982).
54. *Id.* at 1100.

possibility that the plaintiff could have been transferred instead of terminated, the court noted that there was evidence on the record that showed "competition in the tire industry for well-qualified managerial personnel was intense."[55] The court did not, however, discuss how this evidence would impact the plaintiff's duty to mitigate, using it only to show that Mohawk might have transferred the plaintiff absent the discriminatory firing.

The Southern District of New York discussed the issue of front pay at length in *Koyen v. Consolidated Edison*.[56] Koyen was sixty-eight years old, and the judge awarded him full front pay up to the date of his retirement at age seventy. The court discounted the award at the rate of eleven percent and awarded Koyen a lump sum at trial.[57] The court wrote that it was authorized under the ADEA to grant plaintiffs whatever remedies were necessary to compensate them fully and restore them to the economic position they would have occupied but for their employer's unlawful discrimination.[58] It dismissed the notion that front pay awards are too speculative, writing that:

> The problem is more imaginary than real. Courts and juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases. Each can readily be decided upon its individual facts. A discharged employee, however much he may be aggrieved by his alleged wrongful termination, cannot sit idly by. He is under a duty to mitigate damages by making reasonable efforts to obtain gainful employment in an available market. It is not difficult to determine the availability of employment opportunities, the period in which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards. The mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." Moreover, to restrict the employee to losses sustained from the date of discharge to the date of return of the verdict or entry of judgment would encourage the employee to delay the judgment date as long as possible. It would serve to encourage tactics of delay in order to obtain the benefit of increased verdicts by the mere passage of time.[59]

The court, however, gave no reason why the plaintiff should not have been reinstated, merely stating that the plaintiff withdrew his request for reinstatement and preferred an award of front pay. The plain-

55. *Id.* at 1098.
56. 560 F. Supp. 1161 (S.D.N.Y. 1983).
57. *Id.* at 1169.
58. *Id.* at 1168.
59. *Id.* at 1168-69 (quoting Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946)).

tiff's position did not require a great deal of public contact, and there was little evidence on the record to show that there was any great animosity between the parties.[60] This decision demonstrates that a front pay award may unduly punish the employer if the employee can elect front pay regardless of an offer of reinstatement. Although reinstatement may have been appropriate, if front pay is awarded the defendant employer is forced to pay the plaintiff and receive nothing in return. If the plaintiff were reinstated, the corporation would have paid out the same amount of money but would have received the plaintiff's labor in return.

In contrast to the *Koyen* opinion, the Eighth Circuit in *Dickerson v. Deluxe Check Printers, Inc.* rejected a trial court award of front pay when the trial court did not discuss why reinstatement was inappropriate.[61] The court wrote that "a district court must carefully articulate its rationale for refusing to compel employment of a plaintiff who has suffered discrimination."[62] The court also noted that "the friction arising from the litigation process itself is not alone sufficient to deny employment."[63]

The Second Circuit upheld an award of front pay in *Whittlesey v. Union Carbide Corp.*,[64] awarding the chief labor counsel of Union Carbide four years of front pay, covering the full period from the time of trial until plaintiff reached the age of seventy. The court cited *Koyen* for the proposition that future damages are not so speculative as to preclude plaintiffs from recovering front pay.[65] The court added that the "defendant's increased inclination to compromise when faced with the possible liability of front pay" would reduce the risk that possible front pay awards would discourage settlements by encouraging plaintiffs to hold out for greater amounts of damages.[66] The court also noted the plaintiff's duty to mitigate damages by seeking employment elsewhere as a factor limiting the amount of front pay trial courts could award.[67] Unlike the court in *Koyen*, the *Whittlesey* court stressed that reinstatement at Union Carbide was impossible because Whittlesey would probably be "ostracized and excluded from the functions of giving counsel," because the corporation had exhibited unjustified "hostility and outrage" toward Whittlesey.[68] The court also noted that Whittlesey was approaching retirement so the front pay would only cover a short period of time, and that the plaintiff probably could not find comparable alternative employment.[69]

60. *Id.*
61. 703 F.2d 276 (8th Cir. 1983).
62. *Id.* at 280 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1981)). *Accord* Blim v. Western Elec. Co., 731 F.2d 1473 (10th Cir. 1984).
63. 703 F.2d at 281.
64. 742 F.2d 724 (2d Cir. 1984).
65. *Id.* at 728.
66. *Id.*
67. *Id.*
68. *Id.* at 729.
69. *Id.*

The Sixth and Tenth Circuit Courts of Appeals in *Davis v. Combustion Engineering*[70] and *EEOC v. Prudential Savings and Loan Association*,[71] upheld front pay awards in decisions that were almost simultaneous with *Whittlesey*. The Sixth Circuit in *Davis* wrote: "we hold that front pay is a remedy available to the trial court for use, in its discretion, in fashioning relief," and upheld a jury award of $88,800 in front pay.[72] The court never articulated any reason why the plaintiff could not be reinstated. It offered no justification for the $88,800 figure, and the court never discussed the district court's finding that, due to reductions in force at the defendant's plant, it was possible that the plaintiff would be lawfully terminated before his mandatory retirement date.[73]

In *Prudential*, the Tenth Circuit approved future damage awards but remanded the case because the trial judge did not say why reinstatement was not appropriate.[74] The trial court had awarded the plaintiff $17,000 in lost retirement and pension benefits rather than reinstatement.[75] The court reiterated that reinstatement is always the preferred remedy under the ADEA, but also noted that front pay is available as an alternative under the ADEA's equitable relief provisions when the plaintiff can show that his employer has exhibited extreme hostility, making reinstatement impossible.[76] The plaintiff in *Prudential* argued that, due to the defendant's attitude, reinstatement was "a virtual impossibility," but the district court made no express statement on the issue. The Tenth Circuit remanded for a finding as to why future damages were more appropriate than reinstatement.[77] The Tenth Circuit also stressed that trial courts should consider a discharged employee's duty to mitigate when calculating his future damages.[78]

Since the *Davis*, *Prudential* and *Whittlesey* decisions, two more circuits have approved front pay awards. In *Maxfield v. Sinclair International*,[79] the

70. 742 F.2d 916 (6th Cir. 1984).

71. 741 F.2d 1225 (10th Cir. 1984). The Supreme Court vacated *Prudential* and remanded the case for reconsideration in light of Trans World Airlines v. Thurston, 105 S. Ct. 613 (1985). Prudential Fed. Sav. & Loan Ass'n v. EEOC, 105 S. Ct. 896 (1985). The Tenth Circuit withdrew its opinion. EEOC v. Prudential Fed. Sav. & Loan Ass'n, 753 F.2d 851 (10th Cir. 1985). This article will nonetheless discuss *Prudential* because *Thurston* only addressed the issue of willful violations of the ADEA; it did not discuss front pay. Presumably, the Tenth Circuit's opinion concerning front pay will not change upon reconsideration.

72. 742 F.2d at 923.

73. *Id. See also id.* at 924 (Wellford, J., concurring in part and dissenting in part). Front pay is a substitute for reinstatement under the ADEA. The ADEA states that reinstatement is an equitable remedy. 29 U.S.C. § 626(b) (1982). Thus, although the underlying claim of discrimination is a legal question, *Lorillard*, 434 U.S. 575, the issue of front pay is equitable. The question of front pay should be tried to the court after the jury has determined liability and legal damages. *See Ventura*, 571 F. Supp. at 51. *But see* Brenemer v. Great W. Sugar Co., 567 F. Supp. 218 (D. Colo. 1983).

74. *Prudential*, 741 F.2d at 1232.

75. *Id.* at 1233.

76. *Id.* (citing Blim v. Western Elec., 731 F.2d 1473 (10th Cir.), *cert. denied*, 105 S. Ct. 233 (1984)).

77. 741 F.2d at 1233.

78. *Id.* at 1232.

79. 766 F.2d 788 (3d Cir. 1985).

Third Circuit awarded front pay to a plaintiff who was fired at age sixty-five from a position selling parts to papermills. The evidence included a letter from the company to the plaintiff that said "You are beating a dead horse. I'm sorry you can't let it go and retire with dignity. . . . Please accept the fact that it is time for a change."[80] The Third Circuit Court of Appeals upheld the jury's award of $7,500 front pay.[81] The court noted that reinstatement is the preferred remedy, but the district courts may determine that reinstatement is not feasible.[82] In cases where reinstatement is not feasible, the court held that "an award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases."[83]

Finally, in August 1985, the First Circuit resolved the conflict that it had created with the *Loeb* opinion. In *Wildman v. Lerner Stores Corporation*,[84] the First Circuit apologized for "swallowing the bullet for another day, instead of biting it" in *Loeb*[85] and approved a front pay award. The court surveyed opinions from other circuits awarding front pay and adopted a succinct rule for front pay awards:

> Future damages should not be awarded unless reinstatement is impractical or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages.[86]

In this case, although reinstatement was inappropriate, the plaintiff had been fully compensated by awards of compensatory damages, liquidated damages and damages under local anti-discrimination statutes, so the First Circuit did not award front pay.[87]

CONCLUSION

The cases cited above clearly demonstrate that most of the circuits approve of front pay in ADEA cases, but the standards courts apply when determining if front pay is appropriate are inconsistent. Front pay is an appropriate remedy within the broad equitable powers granted to courts under the ADEA to make plaintiffs whole for the discrimination they have suffered. In awarding front pay, courts must be cognizant of the punitive and speculative nature of future damages. Courts must consider several factors before awarding front pay. Although almost every circuit has now approved of front pay or has indicated a willingness to approve front pay, few if any trial courts have adequately considered all of the relevant factors in calculating front pay awards.

---

80. *Id.* at 790.
81. *Id.* at 795.
82. *Id.* at 796.
83. *Id.*
84. 771 F.2d 605 (1st Cir. 1985).
85. *Id.* at 614 (citing Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979)).
86. 771 F.2d at 616.
87. *Id.* The plaintiff's damage award totalled $348,518. *Id.*

Before awarding front pay, courts must make the threshold determination that reinstatement is impossible.[88] Since front pay is compensation for "services not rendered,"[89] it is particularly punitive when a plaintiff could return to his former position. If, however, a plaintiff holds a supervisory position with a high degree of public contact, reinstatement may be inappropriate. If economic conditions have forced plant closings or legitimate reductions-in-force, reinstatement may be impossible.

The facts, however, are not always so clear. In many cases economic conditions force corporate "reorganizations" in which a disproportionate number of elderly employees are fired, often when their pension rights are about to vest.[90] The elderly plaintiff's former job may be divided between several employees. Courts are then in a gray area where reinstatement may indeed be possible, depending upon the facts of a particular case. One solution to this reinstatement dilemma may be to give the employer a choice between creating an equivalent position or paying future damages.

While many courts have denied front pay because it is too speculative, front pay is not too speculative if courts consider all of the relevant factors. First, the courts must examine both the economic climate of the industry in question, and the plaintiff's actual employment status at the time of trial. In a strong economy, a plaintiff may be able to find an equivalent or a better position with another firm.[91] In a poor economy, legitimate reductions-in-force could eliminate a plaintiff's position. Future damages are appropriate only to the extent that a plaintiff actually was damaged, and are inappropriate if a plaintiff can find a comparable position. When, however, plaintiffs have few years left before retirement, it may be impracticable and cruel to expect them to find new work.[92]

After showing that reinstatement is inappropriate and that the plaintiff was actually damaged by the termination, courts must calculate the front pay award. The court should begin with the amount of money the plaintiff would have earned absent the termination, then consider the possibility that the plaintiff would then have received pay raises in

88. *See Blim*, 731 F.2d 1473; *Dickerson*, 703 F.2d 276; *Boyce*, No. 83-M-179 (D. Colo. Oct. 9, 1984). Some courts, however, continue to refuse to consider whether reinstatement is possible. *See, e.g.*, *Davis*, 742 F.2d 724; *Koyen*, 560 F. Supp. 1161.

89. *Loeb*, 600 F.2d at 1023.

90. 600 F.2d 1003.

91. *E.g.*, Kolb v. Goldring, 694 F.2d 869 (1st Cir. 1982); Robb v. Chemetron Corp., 17 Fair Empl. Prac. Cas. (BNA) 1535 (S.D. Tex. 1978).

92. *Boyce*, No. 83-M-179 (D. Colo. Oct. 9, 1984). The jury found the defendant liable two years before the plaintiff's retirement date. The plaintiff had worked for Davis for over 14 years. In view of the size of plaintiff's former office and the animosity created by the suit, Judge Matsch held that reinstatement would "denigrate the purposes of the Act." *Boyce*, 83-M-179, slip. op. at 2. It is implicit that plaintiff would have been unable to find an equivalent position before her retirement, and Judge Matsch awarded full front pay through her retirement date. *Id.*

his former job.[93] The courts should offset that amount by prospective pay raises in his substitute job. Courts must then discount the award to present value. Finally, judges should deduct any liquidated damage awards that have made the plaintiff whole, thus reducing additional future damages to the extent that they are unnecessary.

Failure to consider all of these factors leads to confusion among practitioners and sets weak precedent for future awards. If trial judges carefully delineate their front pay calculations, they will encourage settlement by reducing uncertainty and more adequately assure both that plaintiffs are fully compensated and that defendants are not unduly punished.

Arnold C. Macdonald

93. *E.g., O'Donnell*, 574 F. Supp. 214. The author has found no cases that consider pay raises in plaintiff's substitute job.