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REMEDIES UNDER THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

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INTRODUCTION

Employment discrimination, in its various forms, was a topic accorded much attention within the political agenda of the administration of President Johnson. Along with the host of legislation passed to address racial, religious and sexual discrimination, Congress in 1967 enacted the Age Discrimination in Employment Act (ADEA).[1] At the heart of the ADEA are provisions which prohibited age discrimination.[2] In addition to educational programs designed to reduce barriers to employment,[3] the Act also contained an enforcement mechanism which allowed suit by the aggrieved employee.[4]

The prohibitions against age discrimination found in the ADEA were patterned after the substantive provisions of Title VII of the Civil Rights Act of 1964 (Title VII).[5] As a result, many issues arising under the ADEA have been resolved by resort to cases decided under Title VII. The remedial provisions of the ADEA[6] were patterned, not after Title VII, but after the Fair Labor Standards Act (FLSA).[7] Hence, the ADEA vests broad discretion in the trial court to fashion whatever legal

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1. 29 U.S.C. §§ 621-34 (1982). President Johnson was particularly concerned with age discrimination. In January of 1967, the president publically endorsed the concept of remedial legislation in what has become known as the Older Americans Message. Statistics quoted by the president indicated that persons over age 45 comprised 27 percent of the unemployed and accounted for over three-quarters of a billion dollars in unemployment compensation annually. *See* H. REP. No. 90-805, 90th Cong., 1st Sess. *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214. The ADEA applies to individuals in the 40 to 70 year age range. 29 U.S.C. § 631 (1982).

2. 29 U.S.C. § 623 (1982). In pertinent part the legislation states:

(a) it shall be unlawful for an employer—

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

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

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

3. 29 U.S.C. § 622 (1982).

4. 29 U.S.C. § 626 (1982).

5. 42 U.S.C. §§ 2000e-2000e-17 (1982).

6. 29 U.S.C. § 626 (1982). *See also* H. REP. No. 90-805, 90th Cong., 1st Sess. *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS at 2218 and 2222-3.

7. 29 U.S.C. §§ 201-19 (1982).

or equitable relief is deemed appropriate to effectuate the purpose of the Act.[8] This is in sharp contrast to Title VII, which provides only for equitable relief.[9]

The ADEA has become a fertile source of litigation,[10] but very few of the remedial issues raised by the ADEA have been addressed by the Supreme Court. Unfortunately the Circuit Courts of Appeals have reached varying solutions to many of the central issues. The ADEA practitioner is faced with a morass of cases suggesting various approaches to the determination of appropriate relief under the ADEA. The confusion in this area is compounded by the fact that some courts rather blindly adhere to Title VII principles, while others attempt to draw from FLSA precedent in determining remedial issues under the ADEA. As stated, the remedial provisions of Title VII vary substantially from those of the ADEA. The FLSA, on the other hand, was not drafted to deal with the problem of the employee who is discharged for discriminatory reasons. Therefore, neither statute provides a perfect model for resolution of ADEA remedial problems.[11]

Due to the divergence of judicial approaches to ADEA remedial issues, evaluation of the potential recovery by a plaintiff-employee and of the corresponding potential exposure of a defendant-employer is problematical. In an effort to provide some guidance to the practitioner in this area, this article will survey the judicial resolution of various remedy issues arising under the ADEA. The focus of the article will be on the remedies available to an individual employee who is discharged in violation of the ADEA. Discussion will be limited, for the most part, to issues of monetary relief.[12]

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8. 29 U.S.C. § 626(b) and (c) (1982).

9. 42 U.S.C. § 2000e-5(g) (1982). The equitable nature of back pay awards under the Civil Rights Act is discussed in Albermarle Paper Co. v. Moody, 422 U.S. 405, 415-25 (1975).

10. Statistics released by the Equal Employment Opportunity Commission (EEOC) show that the Commission filed 89 lawsuits under the ADEA during fiscal year 1981. This is the largest number of ADEA suits filed by the government in one year. EQUAL EMPLOYMENT OPPORTUNITY NEWS, 10/6/81. An informal survey of cases filed in the United States District Court for the District of Colorado from January 1982 through October 1984 also reveals a continuing substantial increase in the number of age discrimination cases. The survey consisted of a review of the civil cover sheets filed in that court. In 1982, 20 lawsuits which included a claim of violation of ADEA were filed. In 1984, as of October 15th, 39 such lawsuits had been filed. This represents an increase of approximately fifty percent in the number of age discrimination cases filed in the District of Colorado during that period.

11. For general discussions of ADEA remedies, *see* Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305 (1976); Comment, *Damages in Age Discrimination Cases - The Need for a Closer Look*, 17 U. RICH. L. REV. 573 (1983); Comment, *Age Discrimination: Monetary Damages Under the Federal Age Discrimination in Employment Act*, 58 NEB. L. REV. 214 (1979); Note, *Damages Remedies Under the Age Discrimination in Employment Act*, 43 BROOKLYN L. REV. 47 (1976). For a broader coverage of issues arising out of all facets of the ADEA, *see Age Discrimination: A Symposium* 32 HASTINGS L.J. 1111 (1981); *Symposium: Age Discrimination*, 57 CHI [-] KENT L. REV. 805 (1981).

12. The issue of reinstatement will also be addressed insofar as it is related to the availability of front pay.

I. STATUTORY PROVISION

The basic remedial provision of the ADEA is found in 29 U.S.C. § 626(b), and states:

> The 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. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter, 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 employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.[13]

The first interpretive difficulty encountered in construing this provision is the omission of any specific definition of the term "amounts owing as a result of violation."[14] Thus, the statute vests the trial court with extraordinary latitude to fashion remedies which will effectuate the purposes of the Act.[15]

The courts are in basic agreement that the "make-whole standard of

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13. 29 U.S.C. § 626(b) (1982) (emphasis in the original). By way of contrast the Fair Labor Standards Act, 29 U.S.C. § 216(b) provides in relevant part:

> Any employer who violates the provisions of Section 206 or 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys' fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (1982).

14. The language "[a]mounts owing . . . as a result of a violation . . . shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purpose of sections 216 and 217 of this title," means only that "amounts owing" as a result of an ADEA violation are to be treated as if they were "unpaid minimum wages or unpaid overtime compensation" for the purposes of applying sections 216 and 217 of the FLSA, which are incorporated into the ADEA.

15. The Congressional Statement of Purpose is found in 29 U.S.C. § 621(b) (1982):

> It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. Further details concerning the congressional purpose in enacting the ADEA may be determined

relief", as set forth in *Franks v. Bowman Transp. Co.*,[16] should be the touchstone in fashioning legal and equitable relief for victims of age discrimination. In addition, the courts generally recite the perceived policies of encouraging voluntary compliance and of avoiding litigation by fostering conciliation between employer and employee.[17] At least one court has explicitly acknowledged that monetary awards in ADEA cases serve the dual function of compensating the employee for injuries caused by the discriminatory conduct, and deterring future violations.[18]

The basic remedies most frequently discussed by the courts in ADEA cases are back pay, front pay, damages for emotional distress, punitive and/or liquidated damages, and attorneys' fees. Each of these will be addressed in turn.

II. BACK PAY

The basic remedy for an employee who is discharged in violation of the ADEA is back pay. While all courts presume that an award of back pay is appropriate, others have gone farther and held that it is mandatory.[19]

The first step in calculating a back pay award is to determine the value of the compensation to which the plaintiff-employee would have been entitled absent the discharge. Because the purpose of a back pay award is to put the employee in the economic position she would have occupied but for the discrimination, back pay awards generally include the value of job related benefits that would have been received during the back pay period. The value of benefits such as pension benefits, vacation pay, health and life insurance benefits, and profit sharing are usually added to the award.[20] Prospective raises and commissions have also been included in computing back pay.[21]

The usual time period for computing back pay runs from the date of

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from the legislative history, *see* H. REP. No. 90-805, 90th Cong., 1st Sess. *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213.

16. 424 U.S. 747 (1976) (decided under Title VII of the Civil Rights Act).

17. Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686-7 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); Slatin v. Stanford Research Institute, 590 F.2d 1292, 1295-96 (4th Cir. 1979); Dean v. American Security Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

18. Rodriguez v. Taylor, 569 F.2d 1231, 1237 (3rd Cir. 1977) *cert. denied*, 436 U.S. 913 (1978).

19. McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217 (3rd Cir. 1984) (relying upon dictim in Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

20. *See, e.g.*, Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1980) (pension benefits); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976) (insurance benefits); Whatley v. Skaggs, 508 F. Supp. 302 (D. Colo. 1981) (profit sharing), *aff'd in part on other grounds*, 707 F.2d 1129 (10th Cir.), *cert. denied*, 104 S. Ct. 349 (1983); Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981) (pension rights and fringe benefits).

21. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 160-61 (future wage increases); Kelly v. American Standard, Inc., 640 F.2d 974, 985-86 (9th Cir. 1981) (salary increases); Loubrido v. Hull Dobbs Co., 526 F. Supp. 1055 (D. P. R. 1981) (commissions). *See also* Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982) (reducing trial court's award, holding that a projection of raises must be based on expert testimony, patterns of past increases, or similar evidence).

discharge to the date of trial.[22] However, in certain circumstances it has been held that back pay should be computed from the date of discharge to:

> (1) the date upon which the employee reached an age beyond the protection of the ADEA;[23] (2) the date upon which the employee would have been discharged for nondiscriminatory reasons;[24](3) the date upon which the employee, in a subsequent job, obtained the same income level as that of the job held prior to the discriminatory discharge;[25](4) the date of reinstatement by the defendant-employer;[26] or, (5) the date of the unreasonable refusal of a good faith offer of reinstatement.[27]

Once the amount of lost salary and job related benefits has been determined, certain amounts are then deducted from the back pay award. These "set-offs" usually fall into one of three categories: interim earnings; amounts received directly from the defendant-employer at or after termination; and amounts received from other sources following termination.[28]

A. *Interim Earnings*

In contrast to Title VII, the ADEA contains no specific provisions regarding set-offs.[29] Nonetheless, those courts which have specifically addressed this issue under the ADEA have held that an award of back pay should be reduced by the wages actually earned by the plaintiff-employee following the unlawful discharge.[30] While some courts apparently view the deduction of interim earnings as automatic, other courts have qualified the operation of the rule, allowing set-off only of those interim earnings which actually mitigated the plaintiff-employee's loss. For example, the Sixth Circuit has held that interim earnings from a part time job that had been performed concurrently with the job from which the plaintiff-employee had been unlawfully terminated should not be set-off.[31] The court reasoned that such earnings would not actually mit-

22. *See, e.g.*, Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Combes v. Griffin Television, Inc. 421 F. Supp. 841 (W.D. Okla. 1976).

23. Brennan v. Western Operations, Inc., Consent Decree No. C-74-1039 (D. Cal., March 15, 1974).

24. Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983); Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982).

25. Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982).

26. Bishop v. Jelleff Associates, 398 F. Supp. 579 (D. D. C. 1974).

27. Fiedler v. Indianhead Truck Line, 670 F.2d 806, 808 (8th Cir. 1982); Coates v. National Cash Register Co., 433 F. Supp. 655 (W. D. Va. 1977).

28. *See* Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981) (author proposes categorization of potential set-offs in accordance with "make whole" theory of damages) (hereinafter cited as *Set-offs*).

29. Title VII expressly requires that interim earnings or amounts earnable with reasonable diligence be set-off against back pay otherwise owing. 42 U.S.C. § 2000e-5(g) (1982).

30. *See, e.g.*, Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975).

31. Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975).

igate the plaintiff-employee's loss because those wages would have been received even if the plaintiff-employee had not been terminated in violation of the Act.[32]

In view of the inclusion of the value of fringe benefits in the computation of back pay, logic and equity would demand the set-off not only of wages earned by the plaintiff-employee during the back pay period, but also of the value of fringe benefits received during that period.[33] This issue is seldom addressed in reported decisions.

Clearly, calculation and set-off of a plaintiff-employee's actual interim earnings, including finge benefits received, are a prerequisite to an accurate determination of the appropriate back pay award in an ADEA action. Moreover, counsel should be cognizant of the fact that the court may demand a showing as to whether the interim earnings actually mitigated the plaintiff-employee's loss. The time and effort expended in discovery of interim earnings is well spent, for such information is also helpful in determining whether the plaintiff-employee has exercised reasonable diligence in mitigating losses.[34]

B. *Amounts Received from the Defendant-Employer*

In deciding whether to set-off amounts received directly from the defendant-employer at the time of or after termination, courts generally look to the nature of the payment. Such amounts usually will be set-off if the payment was one occasioned only by the wrongful termination. If, on the other hand, the payment represents an amount actually earned by the plaintiff-employee, it will not be set-off.[35]

For instance, in *Laugesen v. Anaconda Company*[36] the court held that if severance pay received by the plaintiff-employee was a payment that

32. *Id. See also* Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3rd Cir. 1977) (holding that wages actually earned from other employment that could not have been simultaneously performed with the job sought by the applicant-plaintiff should be set-off). In Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), the court held that the period for measuring back pay should end on the date when the plaintiff-employee's earnings at his new job exceeded those which he would have earned at his previous job, because "to continue the period to the date of judgment would arbitrarily reduce the award." *Id.* at 874. Thus, not all interim earnings were set-off.

In a recent case, decided under Title VII, the Eleventh Circuit adopted a rather novel approach to the set-off of interim earnings. In Darnell v. City of Jasper, 730 F.2d 653 (11th Cir. 1984), the court held that interim earnings are to be set-off against that amount of back pay on a periodic as opposed to aggregate basis. In *Darnell*, this allowed plaintiff to recover despite the fact that in seven of the nine years in question he earned more at his subsequent job, and actually earned more in total than he would have earned as a police officer. General adoption of this test in ADEA cases could serve to substantially increase some ADEA back pay awards.

33. *See* Loubrido v. Hull-Dobbs Co. of Puerto Rico, 526 F. Supp. 1055, 1058 (D. P.R. 1981); *see also Set-offs*, *supra* note 28 at 1121-2. In Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), the court indicated that "post termination economic benefits" should be subtracted from back pay awards, although apparently the bonuses received from the subsequent employer were not set-off from the back pay award.

34. The subject of mitigation is discussed *infra* notes 72-84 and accompanying text.

35. *See, e.g.*, Coleman v. City of Omaha, 714 F.2d 804, 808 n.5 (8th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980).

36. 510 F.2d 307 (6th Cir. 1975).

would not have been received by the employee but for the termination, then it should be set-off.[37] The court stated that even though severance pay may be measured by length of past service, it was nonetheless a payment occasioned by an involuntary termination.[38] The court distinguished severance pay from vacation pay, stating that the latter was an amount actually earned by the employee and, therefore, vacation pay should not be set-off.[39]

However, in *Naton v. Bank of California*,[40] the Ninth Circuit held that amounts paid by the defendant-employer at the time of termination for accumulated sick leave and vacation pay benefits were properly deducted from a back pay award.[41] The Ninth Circuit reasoned that the plaintiff-employee would not have been entitled to receive the monetary value of those benefits had he teminated his employment through normal retirement.[42] Instead, he would have been required to use those accrued benefits by ceasing work prior to his retirement date.[43] Therefore, the Ninth Circuit held that the trial court had properly deducted those benefits from the back pay award.

It is more difficult to resolve the issue of set-off regarding this type of payment in cases where reinstatement is offered by the employer or is ordered by the court. In *Cline v. Roadway Express, Inc.*,[44] the court recognized that its decision to allow or disallow set-off of a stock bonus received at termination could result in a windfall to the plaintiff-employee or alternatively promote under-recovery.[45] The court remanded with instructions to structure a decree avoiding either possibility.[46]

As the facts of the *Cline* case demonstrate, a simple inquiry into whether the payment was "occasioned by" termination will not always be sufficient. The courts must be willing to tailor their orders regarding set-offs in such cases to avoid the award of either a windfall or an inadequate amount.

C. *Collateral Benefits*

One of the most troublesome remedy issues under the ADEA is the propriety of deducting from a back pay award any post-termination payments received by the plaintiff-employee from sources other than the defendant-employer. Some courts apply the common law collateral

37. *Id.* at 317.
38. *Id.*
39. *Id.* (citing Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971)).
40. 649 F.2d 691 (9th Cir. 1981).
41. *Id.* at 700.
42. *Id.*
43. *Id.* However, the court indicated that this result would have been different if the employee had a "cash-out" option available.
44. 689 F.2d 481 (4th Cir. 1982).
45. *Id.* at 490.
46. *Id.* The crux of the issue was the plaintiffs ability to accept reinstatement and then to voluntarily separate himself from the firm at a later date. If this was done absent an offset of the stock bonus, plaintiff would reap a windfall. Thus the trial court was instructed to fashion a decree that would preclude manipulation by either party.

source rule in deciding whether to set-off such benefits from a back pay award.[47] Under the collateral source rule, amounts received by an injured party from a source independent of the wrongdoer are not credited against the damages owed by the wrongdoer. The rationale of this rule is that the wrongdoer should not reap the benefit of payments made by a third party.

The application of this rule to preclude set-off in ADEA cases, without regard to the realities of the employment situation, can overcompensate the plaintiff-employee and penalize the defendant-employer in a manner never intended by Congress. On the other hand, if such benefits are set-off, then the employer's liability is significantly reduced; regardless of the nature or severity of the ADEA violation. Arguably, this may reduce the incentives for voluntary compliance with the ADEA.

There is no clear concensus on the issue of set-off of collateral benefits. The Third Circuit has held that unemployment compensation benefits may not be deducted from back-pay awards.[48] Similarly, a number of courts have affirmed where the trial court, in its discretion, has refused to set-off unemployment compensation benefits from an ADEA award.[49] The Seventh Circuit has, in dictum, approved a trial court's decision to set-off both unemployment compensation and retirement pension benefits from an ADEA award.[50]

In *Naton v. Bank of California*[51] the Ninth Circuit held that "even if the district court was authorized to treat unemployment compensation as a collateral benefit, it retained the discretion under the ADEA to deduct the compensation from the back pay award."[52] However in a later case decided under Title VII, *Kauffman v. Sidereal Corp.*,[53] the same court held that "unemployment benefits received by a successful plaintiff in an employment discrimination action are not off-sets against a back pay

47. *See, e.g.*, EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979). The collateral source rule has not, however, been applied to preclude the set-off of interim earnings, which are truly "collateral" benefits.

48. McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217 (3rd Cir. 1984) (no deduction regardless of whether the benefits are funded by the employer). Other courts have adhered to the same rule in the context of Title VII cases. *See, e.g.*, Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549 (11th Cir. 1983); Kauffman v. Sidereal Corp., 695 F.2d 343 (9th Cir. 1982); EEOC v. Ford Motor Co., 645 F.2d 183 (4th Cir. 1981), *rev'd on other grounds*, 458 U.S. 219 (1982), *original position adhered to on remand*, 688 F.2d 951 (4th Cir. 1982).

49. Orzel v. City of Wauwatosa Fire Dep't., 697 F.2d 743, 756 (7th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600, 624-6 (10th Cir. 1980); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). These courts fail to indicate whether it is also within the discretion of the trial court to allow set-off of such benefits.

50. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161-2 (7th Cir. 1981). *See also* EEOC v. Enterprise Ass'n Steamfitters Local No. 638, 542 F.2d 579 (2d Cir. 1976) (decided under Title VII) *cert. denied, sub nom* Rio v. Enterprise Ass'n Steamfitters, 430 U.S. 911 (1977); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *aff'd in part and vacated in part on other grounds*, 434 U.S. 136 (1977) (decided under Title VII), *superceded by statute as stated in* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984) (Pregnancy Discrimination Act case).

51. 649 F.2d 691 (9th Cir. 1981).

52. *Id.* at 700.

53. 659 F.2d 343 (9th Cir. 1982).

award."[54] The court left open the issue of whether the collateral source rule would apply if the unemployment compensation was funded "directly" by the plaintiff's employer, rather than through a state fund supported by a tax on employers.[55]

In *EEOC v. Sandia Corp.*,[56] the Tenth Circuit acknowledged that some courts had upheld the set-off of such amounts. The court termed that position "somewhat questionable," and noted that such set-offs would result in unjust enrichment for employers who have violated the Act.[57] In those states where, upon receipt of a back pay award, employees are required by statute to repay to the state all benefits (such as unemployment compensation) received during the back pay period, there is no danger of double recovery, and the courts are likely to refuse to set-off such benefits.[58]

In many circuits, however, the issue remains unsettled. The suggestion of one author that all employment related benefits that represent a true gain to the plaintiff-employee should be set-off is one worth of serious consideration.[59] The focus of the courts should be upon the "make-whole" purpose of the ADEA, and decisions regarding set-off of collateral benefits should be made in such a way as to effectuate that goal.

III. FRONT PAY

Under the ADEA, the trial court may in its discretion order the reinstatement of a plaintiff-employee who has been discharged in violation of the Act. There are, nonetheless, numerous situations in which the courts have found that reinstatement is not possible or appropriate. For example, the position may have been filled by another innocent employee, or there may be extreme hostility between the plaintiff-employee and the defendant-employer. In such circumstances, some courts have granted an award of monetary relief in lieu of reinstatement. Such future damages are commonly referred to as "front pay." The concept of "front pay" is fairly simple; its application to the facts of a particular case however can be extremely difficult, creating numerous problems for practitioners and the courts.

As the First Circuit noted in *Loeb v. Textron, Inc.*,[60] front pay constitutes payment for services not rendered and, more importantly, "any assessment of what an individual might have earned had he been reinstated usually is highly speculative, given the possibilities of promotions or legitimate demotions or terminations."[61] The speculative nature of such awards reaches awesome proportions when the employee is at the

54. *Id.* at 347.
55. *Id.* at 347 n.2.
56. 639 F.2d 600 (10th Cir. 1980).
57. *Id.* at 625.
58. *See, e.g.*, Wise v. Olan Mills, Inc., 495 F. Supp. 257, 259 n.3 (D. Colo. 1980).
59. *Set-offs*, *supra* note 28 at 1121-28.
60. 600 F.2d 1003 (1st Cir. 1979).
61. *Id.* at 1023. (Footnote omitted).

low end of the broad age group protected by the ADEA.[62]

Several courts, including the First and Third Circuits, have shown a distinct reluctance to grant front pay damages.[63] These courts have reasoned that such awards are highy speculative and that the possibility of an award of front pay might make it less likely that plaintiff-employees would settle short of litigation.[64]

However, awards of front pay have received approval in the Second, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeals, and in numerous district courts.[65] Those circuit courts which have allowed an award of front pay have cautioned that there must be specific findings made by the trial court as to why reinstatement is not appropriate.[66] Such awards should only be made where calculation of the award does not require undue speculation, either as to the possibility of future employment and mitigation of damages, or as to the amount of money that the employee would have received had she not been discriminatorily discharged.[67]

These courts have reasoned that if front pay was not available in lieu of reinstatement, the defendant-employer could significantly reduce its liability by making the possibility of reinstatement unattractive for the employee.[68] Concerns regarding the speculative nature of front pay have been dismissed as insufficient to preclude such an award, due to the experience of courts in calculating damages for future wages in employment contract and personal injury cases.[69] The requirement that the plaintiff-employee mitigate damages, and the fact that front pay may only be awarded in those limited situations where truly necessary to compensate the plaintiff-employee have also been cited as justifications for front pay awards.[70]

In view of the fact that front pay is an award made in lieu of reinstatement, which is an equitable remedy, the award should be made by

62. The protected age group under the ADEA consists of individuals between the ages of 40 and 70. 29 U.S.C. § 631 (1982).

63. Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982) (citing to *Wehr*); Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980) (holding that future damages could not be awarded where the plaintiff had impliedly disclaimed any desire for reinstatement); Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696, 700-1 (S.D.N.Y. 1980) (citing lack of support in a legislative history); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971) (holding front pay not an appropriate remedy).

64. Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696, 701 (S.D.N.Y. 1980) (discusses problem of settlement, but admits rationale weak); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971) (noting speculative nature of damage).

65. Davis v. Combustion Eng'g Inc., 742 F.2d 916, 922-3 (6th Cir. 1984); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-9 (2d Cir. 1984); EEOC v. Prudential Fed. Sav. and Loan Ass'n, 741 F.2d 1225, 1230-3 (10th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982); Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1319 (9th Cir.) *cert. denied*, 459 U.S. 859 (1982). *See also* O'Donnell v. Georgia Osteopathic Hosp. Inc., 574 F. Supp. 214 (N.D. Ga. 1983); Ventura v. Federal Life Ins. Co., 571 F. Supp. 48 (N.D. Ill. 1983); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161 (S.D.N.Y. 1983); Hoffman v. Nissan Motor Corp., 511 F. Supp. 352 (D.N.H. 1981).

66. *See* EEOC v. Prudential, at 1233.

67. *Whittlesey*, at 729.

68. EEOC v. Prudential, at 1232.

69. *Whittlesey*, at 728-9.

70. *Id.* at 729; *Davis*, at 923.

the trial court, rather than by the jury.[71] This arguably reduces the possibility of a large, completely speculative award of a punitive nature.

IV. MITIGATION

As noted previously, Title VII expressly requires the set-off of amounts "earnable with reasonable diligence."[72] The ADEA has no such express language, yet the courts have uniformly held that an employee who is discharged in violation of the ADEA is required to use reasonable efforts to mitigate damages.[73] It is not required that such efforts be successful, so long as the employee makes an honest, good faith attempt to obtain other employment.[74]

The burden is on the employer to demonstrate that suitable positions existed which the plaintiff-employee could have discovered and for which plaintiff was qualified, and that the plaintiff-employee failed to exercise reasonable diligence in seeking such positions.[75] If the defendant carries this burden the amount of the back pay award is reduced by those amounts that the plaintiff-employee would have earned, had she used reasonable diligence.

In determining mitigation issues under the ADEA, the focus is upon the reasonableness of the plaintiff-employee's actions. It has been held that a plaintiff-employee discharged her obligations to use reasonable efforts to mitigate in situations where she had regular contact with an unemployment board and held a part time job during the back pay period,[76] or where the employee accepted a lower paying position in a field outside of her usual type of employment.[77] Nonetheless, it is not unreasonable for a plaintiff-employee to reject the offer of a job in a distant city.[78]

In the situation where, prior to the time of trial, the defendant-employer has offered to reinstate the plaintiff-employee to her former position, such an offer of reinstatement has been held to cut off the time for calculating back pay.[79] However, if the plaintiff-employee's refusal to accept the offer of reinstatement is reasonable, then such refusal does not constitute a failure to mitigate, and therefore does not toll the back pay period.[80] For example, where the offer of reinstatement is conditioned in a way that could affect the plaintiff's claim, or the offer is to reemploy

71. *Gibson*, at 1100-1; *Ventura*, at 51.

72. 42 U.S.C. § 2000e-5(g) (1982).

73. *See, e.g.*, Cline v. Roadway Express, Inc., 689 F.2d 481, 488 (4th Cir. 1982); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809 (8th Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980).

74. *Sandia*, at 627.

75. *Id. See also* Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983); Wehr v. Burroughs Corp., 619 F.2d 276, 278 n.3 (3d Cir. 1980).

76. Orsel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 756-57 (7th Cir. 1983).

77. Cline v. Roadway Express, Inc., 689 F.2d 481, 488-89 (4th Cir. 1982).

78. Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 119 (4th Cir. 1983). The court noted that relocation is particularly unwelcome for victims of age discrimination.

79. *See* cases discussed at note 27 *supra*.

80. Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 282 (8th Cir. 1983).

in a different job with less status, fewer prospects for future advancement, and less compensation, the offer does not automatically cut off the back pay period.[81] On the other hand, it has been held that the mere fact that there is some friction between the parties because of the pending litigation is, by itself, an insufficient basis for refusal of an offer of reinstatement.[82] It is generally for the jury to determine whether the reasons for refusal of the offer of reinstatement were reasonable.[83]

The issue of mitigation is crucial to a determination not only of the proper amount of back pay, but also as to the appropriate amount of front pay. Courts which have allowed front pay have indicated that the employee's duty to mitigate continues beyond the time of the trial.[84] These courts have not, however, dealt with the problematic issues of proof created by allowance of front pay. For example, the burden will remain on the defendant-employer to prove the amount that the plaintiff-employee can be expected to earn in the future. It is not clear whether the courts will go so far as to require the defendant-employer to demonstrate, by the use of expert testimony, the projected availability of jobs in those fields in which the plaintiff-employee is qualified in order to limit the front pay award. Obvious difficulties present themselves in the situation where the plaintiff-employee has been terminated from a job which is obsolete. Must the defendant-employer prove the availability of training in fields other than those in which it had employed the plaintiff?

In sum, despite statutory silence plaintiff-employees discharged in violation of the ADEA are required to mitigate their damages. The burden of proving a failure to mitigate rests on the employer. Issues of proof of future mitigation in connection with a claim for front pay promise to create numerous, complex problems for practitioners and courts in the future.

V. PAIN AND SUFFERING

All appellate courts which have ruled upon the availability of damages for emotional distress caused by an ADEA violation have held that such damages are not recoverable,[85] although at least two district courts

81. Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983); Orzel v. City of Wauwatosa Fire Dep't., 697 F.2d 743 (7th Cir. 1983).

82. *Cf.* Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 282 (8th Cir. 1983).

83. *Id.*, Fiedler v. Indianhead Truck Line Inc., 670 F.2d 806, 808-09 (8th Cir. 1982).

84. *See* cases discussed at note 65 *supra*.

85. Perrell v. Financeamerica Corp., 726 F.2d 654 (10th Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233 (6th Cir. 1983); Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806 (8th Cir. 1982); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Slatin v. Stanford Research Ins., 590 F.2d 1292 (4th Cir. 1979); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036 (5th Cir. 1977) *cert. denied* 434 U.S. 1066 (1978); Rogers v. Exxon Research and Eng'g Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). *See also* Waters & Pursell, *Emotional Distress: The Battle Over a New Tort Under Age Discrimination Continues*, 30 LAB. L.J. 667 (1979); Comment, *Awarding Compensatory Damages for Pain and Suffering in Age Discrimination Cases: A Proper Reading of the Statute?*, 29 S.C.L. REV. 705 (1978).

have awarded such damages.[86]

In denying damages for pain and suffering, the courts generally have relied upon the ADEA's silence on the availability of such damages and upon the adverse effect that the availability of awards might have on the administrative conciliation process.[87] Some courts have based their refusal upon perceptions of congressional intent. In *Slatin v. Stanford Research Institute*,[88] the Fourth Circuit focused on the incorporation of certain FLSA provisions into the ADEA. The court reasoned that Congress had implied knowledge of judicial interpretations of the FLSA which uniformity failed to permit recovery of compensatory damages for pain and suffering. Hence, Congress must have intended a similar result under the ADEA.[89]

Countervailing arguments exist. As the courts have acknowledged in other contexts, the remedies specifically listed in the ADEA were not intended to be as an exhaustive list.[90] Instead, the courts are given the power to grant whatever legal or equitable relief as appropriate to effectuate the purposes of the Act. It is interesting to note that the Tenth Circuit in *Perrell v. Financeamerica Corp.*,[91] in denying damages for pain and suffering, stated, "[w]e can but conclude that the trial court erred in allowing jury consideration of *any item of damage except those specifically provided* within the enforcement scheme of the ADEA."[92] However, in holding that an award of front pay in lieu of reinstatement was an appropriate remedy under the ADEA, the Tenth Circuit in *EEOC v. Prudential Federal Sav. and Loan Assn.*,[93] stated, "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, so long as the relief if 'appropriate to effectuate the purposes of [the Act]'."[94]

It might be argued that the refusal to award damages for pain and suffering is inconsistent with the oft-stated goal of the ADEA; that is, to counteract the adverse effects of age discrimination and to make the plaintiff-employee whole for whatever losses were caused by the violation of the Act. However, it is fairly clear that damages for pain and suffering and for emotional distress are not available under the ADEA.

VI. Liquidated Damages

29 U.S.C. § 216(b) provides, in part:

86. *See, e.g.*, Wise v. Olan Mills, Inc., 485 F. Supp. 542 (D. Colo. 1980); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978).

87. *See, e.g.*, Perrell v. Financeamerica Corp., 726 F.2d 654 (10th Cir. 1984); Rogers v. Exxon Research and Eng'g Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

88. 590 F.2d 1292 (4th Cir. 1979).

89. *Id.* at 1293.

90. *See, e.g.*, EEOC v. Prudential Fed. Sav. and Loan Ass'n, 741 F.2d 1225 (10th Cir. 1984).

91. 726 F.2d 654 (10th Cir. 1984).

92. *Id.* at 657 (emphasis added).

93. 741 F.2d 1225 (10th Cir. 1984).

94. *Id.* at 1232 (emphasis added).

> Any employer who violates the provisions of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation . . . and in an additional amount as liquidated damages.

The ADEA also provides that "amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of §§ 216 and 217 of this title . . .,"[95] and that liquidated damages shall be payable only in cases of willful violations of the ADEA. Therefore, an employer who willfully violates the ADEA is liable not only for "amounts owing", but for an additional equal amount.

The liquidated damages provision of the ADEA has raised numerous issues which have been resolved in varying ways by the courts. Some courts have held that, in the event of a willful violation, the employee is automatically entitled to the maximum amount of liquidated damages,[96] rejecting the argument that the good faith defense in Section 11 of the Portal-to-Portal Act[97] applies in cases under the ADEA. The courts have reasoned that Congress specifically selected those portions of the Portal-to-Portal Act which it wished to incorporate into the ADEA and that those provisions not expressly incorporated do not apply.[98] The First Circuit, in *Loeb v. Textron*,[99] reasoned that on its face, 29 U.S.C. § 216(b) required that liquidated damages be awarded once a violation is shown. "Section 11 mitigates this result in FLSA cases . . .[i]n ADEA cases the 'willfulness' test serves the same function and renders § 11 superfluous."[100] Other courts, however, have indicated that there is some discretion in the trial court to determine whether the full liquidated damage award shall be made.[101] At least one court has held that the maximum liquidated damage award is twice the amount of the back pay award, and that front pay should not be included in the calculation.[102]

The courts have also taken different positions as to the nature of an award of liquidated damages. Some courts have held that the purpose of such a liquidated damage award is punitive; and have thus denied recovery of punitive damages.[103] Other courts, however, have charac-

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95. 29 U.S.C. § 626(b) (1982).

96. EEOC v. Prudential Fed. Sav. and Loan Ass'n, 741 F.2d 1225, 1234 (10th Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233, 238 (6th Cir. 1983); Kelly v. American Standard Inc., 640 F.2d 974, 981-(9th Cir. 1981); Loeb v. Textron Inc., 600 F.2d 1003, 1020 (1st Cir. 1979).

97. 29 U.S.C. §§ 216, 251-62 (1982).

98. *See* 29 U.S.C. § 626(e) (1982), expressly incorporating §§ 6 and 10 of the Portal-to-Portal Pay Act.

99. 600 F.2d 1003 (1st Cir. 1979).

100. *Id.* at 1020. *See also* Wehr v. Burroughs Corp., 619 F.2d 276, 279 n.5 (3rd Cir. 1980) (citing Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979)).

101. Elliott v. Group Medical and Surgical Serv., 714 F.2d 556, 558 n.2 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984); Hayes v. Republic Steel Corp., 531 F.2d 1307, 1311-12 (5th Cir. 1976); O'Donnell v. Georgia Osteopathic Hosp., 574 F. Supp. 214, 223 (N.D. Ga. 1982).

102. O'Donnell v. Georgia Osteopathic Hosp., 574 F. Supp. 214, 223 (N.D. Ga. 1982).

103. Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981); Dean v.

terized liquidated damages as compensatory rather than a punitive,[104] relying upon the House Conference Report regarding the 1978 amendments to the ADEA:

> The ADEA as amended by the Act does not provide remedies of a punitive nature. The conferees therefore agree 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 to prove for estimate other than by liquidated damages."[105]

Under this view, liquidated damages compensate the plaintiff-employee for losses that are difficult of certain calculation, such as pre-judgment interest. Therefore, to prevent double recovery by the plaintiff-employee, most courts have held that a plaintiff-employee cannot recover both liquidated damages and pre-judgment interest, at least absent exceptional circumstances.[106] Recently, however, in *Trans World Airlines, Inc. v. Thurston*,[107] the Supreme Court held that "Congress intended for liquidated damages to be punitive in nature."[108]

Even those courts, which prior to *Transworld Airlines*, characterized the liquidated damage award as non-punitive in nature usually refused to allow recovery of punitive damages. These courts reasoned that: such damages are not expressly provided in the ADEA; Congress presumably had knowledge that the FLSA had been interpreted as disallowing punitive damages when it incorporated the remedial provisions of the FLSA into the ADEA; and, an award of punitive damages would undermine the administrative conciliation process.[109]

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

104. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982). *See also* Blim v. Western Elec. Co. Inc., 731 F.2d 1473, 1479 (10th Cir. 1984), *cert. denied, sub nom* A.T.&T. Technologies, Inc. v. Blim, 53 U.S.L.W. 3241 (1984).

105. H. CONF. REP. No. 95-950, 95th Cong., 2nd Sess. 13-14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 535. (Citation omitted).

106. *See, e.g.*, Blim v. Western Elec. Co., Inc., 731 F.2d 1473, 1479 (10th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114 (4th Cir.) *cert. denied*, 454 U.S. 860 (1981). *Contra* Criswell v. Western Airlines, 709 F.2d 544 (9th Cir. 1983) *appeal pending*, 104 S. Ct. 2340 (1984); O'Donnell v. Georgia Osteopathic Hosp., Inc., 574 F. Supp. 214 (N.D. Ga. 1982).

107. 53 U.S.L.W. 4024 (1985).

108. *Id.* at 4027. The Court, in *Trans World Airlines*, also adopted the "reckless disregard" standard for the application of liquidated damages. If the employer knew his conduct was prohibited or showed reckless disregard as to whether his conduct was prohibited, he committed a "willful" violation thus entitling the plaintiff to liquidated damages. *Id.* at 4028. The Court also concluded that § 11 of the Portal-to-Portal Act was not incorporated into the ADEA, but stated that, "[n]evertheless, we think that the same concerns are reflected in the proviso to § 7(b) of the ADEA." *Id.* at 4028 n.22.

109. Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686-7 (7th Cir.) *cert. denied*, 459 U.S. 1039 (1982). *Cf.* Johnson v. Altech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984); Rogers v. Exxon Research and Eng'g Co., 550 F.2d 834 (3rd Cir. 1977) *cert. denied*, 434 U.S. 1022 (1978).

VII. Attorney's Fees

The Fair Labor Standards Act,[110] which is incorporated by the ADEA,[111] provides that in an action under the FLSA the court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by defendant, and costs of the action."[112]

Based on the statutory language "shall", most courts have viewed the award of attorney's fees to a successful plaintiff-employee as mandatory.[113] The amount of any attorney's fee award is within the discretion of the trial court. An award of attorney's fees for the costs of prosecuting an appeal under the ADEA may also be awarded.[114] It should be noted that the language of the FLSA regarding attorney's fees is more restrictive than that of Title VII insofar as, under the FLSA, attorney's fees are to be awarded in addition to any *judgment* awarded to the plaintiff.[115] Thus, there is no provision for the award of attorney's fees in connection with administrative proceedings, and it is questionable whether attorney's fees would be awarded in a case where the plaintiff succeeded in obtaining a favorable settlement.[116] There is also no provision in the ADEA for an award of attorney's fees to a successful defendant.[117]

VIII. Conclusion

The types and amounts of damages available in an ADEA action remains a confusing area for the practitioner. The Circuit Courts of Appeals remain divided on many of the central issues and the Supreme Court has made few moves to resolve the resulting tangle of conflicting authority. Over the near term, the law of the relevant circuit often will remain the primary authority in the resolution of many issues; particularly questions regarding front pay, mitigation and aspects of liquidated damages remaining unresolved in the wake of *Trans World Airlines*.

110. 29 U.S.C. §§ 201-19 (1982).
111. 29 U.S.C. § 626(b) (1982).
112. 29 U.S.C. § 216 (1982).
113. Weisel v. Singapore Joint Venture Inc., 602 F.2d 1185, 1191 n.18 (5th Cir. 1979); Rodriguez v. Taylor, 569 F.2d 1231, 1244 (3rd Cir. 1977) *cert. denied*, 436 U.S. 913 (1978).
114. Goodman v. Heublein, Inc., 682 F.2d 44, 48 (2nd Cir. 1982); Hecrick v. Hercules, Inc., 658 F.2d 1088, 1097-98 (5th Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974, 986 (9th Cir. 1981); Cleverly v. Western Elec. Co., 594 F.2d 638, 643 (8th Cir. 1979) (per curiam), *aff'g* 450 F. Supp. 507 (W.D. Miss. 1978).
115. *Compare* 29 U.S.C. § 216(b) (1982) *with* 42 U.S.C. § 2000e-5(k) (1982).
116. *See, e.g.*, Vocca v. Playboy Hotel, 686 F.2d 605, 607 (7th Cir. 1982).
117. *See* EEOC v. Western Elec., Co. 33 Fair Empl. Prac. Cases 1259, 1260 (1983).