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LEGAL AND EQUITABLE REMEDIES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

J. Hardin Marion*

“You are old, Father William,” the young man said.**

Congress enacted the Age Discrimination in Employment Act (ADEA or the Act) in 1967 “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.” Among the factors prompting the passage of the ADEA were the difficulties faced by older workers in trying to retain their jobs and in finding new employment when displaced, the prevalent practice among employers of setting arbitrary age limits unrelated to the ability of employees to perform their jobs, and the high unemployment rate among older workers.

Remedies for violations of the Act are to have a restorative purpose. Courts are authorized to grant relief “to eliminate the unlawful practices and to restore aggrieved persons to the positions where they would have been if the illegal discrimination had not occurred.” The Act’s goal “is to make persons whole for injuries suffered as a result of unlawful employment discrimination.” Indeed, the Act’s restorative purpose was recently reaffirmed by the Fourth Circuit when it held that a court must “grant ‘the most complete relief possible’ toward putting the victim of age discrimination back

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4. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982). Accord Spagnuolo v. Whirlpool Corp., 727 F.2d 114, 120 n.3 (4th Cir. 1983) (“purpose behind the equitable relief” is “to put the injured party back into the position he would have been in but for the discrimination”).
5. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982). See also Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983) (citing Gibson and paraphrasing its language); Rodriguez v. Taylor, 569 F.2d 1231, 1238 (3d Cir. 1977) (“The make whole standard of relief should be the touchstone . . . in fashioning . . . remedies in age discrimination cases.”), cert. denied, 436 U.S. 913 (1978).

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into the position he would have been in but for the unlawful discrimination."6

This general restorative formula, however, is not self-explanatory. How is a person restored to the position he would have been in but for the discrimination? A variety of more specific questions arise in pursuit of this general aim: What is compensable by money damages? Is reinstatement to a former position sufficient? Is an employee always compensated for salary lost between the date of termination7 and the date of trial? What is includable in lost wages? What effect has the termination had on the employee's pension rights? The inquiry may be further complicated by factual circumstances peculiar to a particular case. For example, what if reinstatement to a former position is inappropriate or impossible? Should the employee then be compensated for lost salary until he reaches retirement age? Or perhaps the employee might have been terminated anyway, for a nondiscriminatory reason. How would this affect the remedy available?

Therefore, at some time in preparing for trial of a suit charging an ADEA violation, a practitioner pauses to consider the range of remedies available under the Act and to examine more closely issues related to those remedies. That time is usually after the plaintiff's charge has been prepared and filed with the Equal Employment Opportunity Commission (EEOC) and, if appropriate, with the applicable state agency.8 This pause for consideration may well arise after


7. For the sake of simplicity, "termination" is often used here to include not only the termination of an employee's job, but also other possible types of employment discrimination (e.g., refusal to hire, refusal to promote, and demotion).

8. A charge must be filed with the EEOC within 180 days of the alleged violation; or, in "deferral states" (i.e., states that have laws prohibiting the unlawful employment practice alleged and agencies empowered to seek to grant relief from the discriminatory practice, see 29 U.S.C. § 633(b) (1982); Naton v. Bank of Cal., 649 F.2d 691, 694 n.2 (9th Cir. 1981); Mistretta v. Sandia Corp., 639 F.2d 588, 595 n.2 (10th Cir. 1980)), within 300 days of the alleged unlawful practice, or within 30 days after receipt of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d) (1982). In deferral states the claimant is required to pursue administrative state remedies before filing suit. The federal and state administrative remedies may be pursued simultaneously. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 757-58 (1979). Indeed, the state filing need not be timely under state law in order to permit the claimant to proceed
the suit is at issue in federal district court. Not only will it be necessary to determine whether certain remedies are available and how damages should be assessed, but also, if the matter is to be tried before a jury, which issues should go to the jury and which should be resolved by the judge. This article will address these and other questions through a detailed examination of the legal and equitable remedies available under the Act.

I. Background

A. Statutory Framework

"The ADEA broadly prohibits arbitrary discrimination in the workplace based on age." Section 4 of the Act makes it unlawful for an employer 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." This broad proscription is enforced through the remedies contained in section 7(b), but in part because of the Act's express incorporation of the remedial provisions and procedures of in federal court. Id. at 759. The claimant "need only commence the state action, even though that action is subject to dismissal because of the late filing." Goodman v. Heublein, Inc., 645 F.2d 127, 132 (2d Cir. 1981). But see Borowski v. Vitro Corp., 40 Fair Empl. Prac. Cas. (BNA) 1056, 1058-59 & n.4 (D. Md. 1986) (holding, despite several circuit court decisions to the contrary, that as long as the state limitations period is at least 180 days "a timely state filing is a prerequisite for the availability of the 300 day federal filing period under the ADEA or Title VII").


10. This article assumes that the plaintiff has chosen a jury trial. Although the range of remedies discussed here is applicable to all ADEA trials, jury and nonjury, a practitioner facing a court trial will not have to contend with decisions as to which remedies should be considered by the court and which by the jury.

13. Section 7(b) of the ADEA (codified at 29 U.S.C. § 626(b) (1982)) states, in pertinent part, the following:

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:
the Fair Labor Standards Act (FLSA), the language of that section is not a model of clarity. One court, in fact, has uncharitably described the relevant provisions of the Act as "a model in imprecision." The Supreme Court less caustically has characterized the Act's enforcement scheme as "complex" and "a hybrid."

The remedies set forth in section 7(b) include (a) "judgments compelling employment, reinstatement or promotion"; (b) "judgments . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation"; and (c) "liquidated damages . . . in cases of willful violations." In addition, because the FLSA section is incorporated by reference, "[t]he court in such action shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Complications arise, however, not only from the incorporation of the FLSA provisions, but also because the ADEA provides that a

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.

court may grant "such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." This sweeping authorization is not limited by the types of relief spelled out in the Act, which are exemplary only. And the Act does not provide the practitioner or the courts much help in distinguishing between legal and equitable relief for purposes of a jury trial.

B. Right To Jury Trial

As originally enacted, the ADEA was silent as to whether a jury trial was available in an age discrimination suit. Most courts favored the ability of a party to pray a jury trial. Those ruling to the contrary reasoned that Congress had modeled the ADEA after Title VII and, therefore, that a jury trial, unavailable in Title VII actions, should likewise be unavailable in actions brought under the ADEA.

22. Indeed, the relief that is specified is stated to be "without limitation." 29 U.S.C § 626(b) (1982).
23. The Supreme Court offered, at least as a helpful start, the following comment in Lorillard v. Pons:
   Section 7(b), 29 U.S.C. § 626(b), does not specify which of the listed categories of relief are legal and which are equitable. However, since it is clear that judgments compelling "employment, reinstatement or promotion" are equitable, see 5 J. Moore, Federal Practice ¶ 38.21 (1977), Congress must have meant the phrase "legal relief" to refer to judgments "enforcing ... liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."
In 1978 the Supreme Court settled the issue when it affirmed the Fourth Circuit's decision in *Pons v. Lorillard*\(^\text{27}\) and held that a jury trial is available to a private sector employee seeking lost wages under the ADEA.\(^\text{28}\) Congress had intended that FLSA procedures be followed in enforcing the ADEA, the Court held, and because a jury trial was permitted under the FLSA, an ADEA party could also ask for a jury trial, at least as to "legal" issues such as a claim for lost wages.\(^\text{29}\) In that same year, Congress amended the ADEA and added a provision specifically authorizing a jury trial.\(^\text{30}\)

Subsequent cases have made clear that when a jury trial is prayed, the jury hears and determines the legal issues and assesses legal damages but the court determines equitable issues and awards equitable relief.\(^\text{31}\) However, the roles of the court and of the jury are not always so neatly separated.\(^\text{32}\)

\(^\text{27}\) 549 F.2d 950 (4th Cir. 1977), aff'd, 434 U.S. 575 (1978).


\(^\text{30}\) In an action brought under [section 7(c)(1)], a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action. 29 U.S.C. § 626(c)(2) (1982).

\(^\text{31}\) See, e.g., *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 279-80 (8th Cir. 1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097, 1100 (8th Cir. 1982); see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1009 (1st Cir. 1979) (statement of district court's action shows that jury dealt with legal issues and that equitable relief was awarded by court).

\(^\text{32}\) Various approaches have been taken in allocating responsibilities between court and jury, often at the suggestion or with the consent of counsel. See, e.g., *O'Donnell v. Georgia Osteopathic Hosp.*, Inc., 748 F.2d 1543, 1546, 1550 (11th Cir. 1984) (after jury returned special verdict on liability and willfulness, district judge determined damages by agreement of parties); *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 214-15 (3d Cir. 1984) (jury decided liability, damages issues submitted to a magistrate by stipulation of parties), vacated and remanded on other grounds, 105 S. Ct. 1159 (1985); *Sylvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 151 (7th Cir. 1981) (liability and issue of willfulness tried to a jury; judge ruled on post-trial motions before commencing damages phase of trial, then judge conducted a "bench trial on damages"); *Naton v. Bank of Cal.*, 649 F.2d 691, 694, 701 n.8 (9th Cir. 1981) (special jury verdict was limited to two factual issues relating to liability; remaining issues were reserved to the court, which conducted "further proceedings" on damages); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 977, 978 n.4 (9th Cir. 1981) (jury awarded damages; by agreement of parties, issue of willfulness and amount of liquidated damages determined by court, along with items of equitable relief); *Cleverly v. Western Elec. Co.*, 594 F.2d 638, 640 (8th Cir. 1979) (jury determined liability, damages, and issue of willfulness; equitable issues submitted to the court on record made in jury trial and in supplemental nonjury evidentiary hearing).
II. LEGAL DAMAGES

A. Amounts Owing—Back Pay and Benefits

Once liability is established, the most basic element to be determined by the jury is damages to compensate the plaintiff for "amounts owing," i.e., back pay and lost benefits. In Kolb v. Goldring, Inc., the First Circuit pointed out that, in essence, an ADEA case is "identical to a common law suit for back wages for breach of contract," and requires "a simple tabulation of 'items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.'" Back pay is mandatory under the ADEA—in contrast to Title VII, which leaves an award of back pay to the trial judge's discretion—and basic employee benefits are also typically considered in calculating "amounts owing." However, in addition to the question of what is included in "amounts owing," the practitioner must confront the issue of how those damages are to be calculated. For although the jury, as trier of fact, will assess damages for the amount due a victim of age discrimination in a jury trial, the court must instruct the jury as to the proper method of calculating that amount.

1. Calculation of Back Pay.—Back pay is normally recoverable from the date of the violation, but may be calculated to a variety of termination dates. Depending upon the circumstances, courts have held that back pay ceases on (1) the date of trial (or judgment); (2)
the date on which the employee accepts or unreasonably declines reinstatement;\(^{39}\) (3) the date on which the court’s order can be implemented by having the employee reinstated into an appropriate vacant position;\(^{40}\) (4) the date of reemployment by another employer in a comparable position;\(^{41}\) (5) the date on which the employee’s salary in a subsequent position equals or surpasses the salary he was receiving at the time of termination;\(^{42}\) (6) the date on which the employee tells the employer he will not be returning to work;\(^{43}\) (7) the date the employee reaches the normal retirement age;\(^{44}\) (8) the date the employee reaches the maximum age protected by the ADEA;\(^{45}\) (9) the date the employee dies;\(^{46}\) or (10) the


39. See, e.g., Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 808 (8th Cir. 1982) (but reasonable rejection of offer of reinstatement does not terminate back pay); Coates v. National Cash Register Co., 433 F. Supp. 655, 662-63 (W.D. Va. 1977) (offer of reinstatement must be a bona fide offer to resume the former position or a comparable one); Bishop v. Jelleff Assocs., 398 F. Supp. 579, 597 (D.D.C. 1974); see also O’Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1550-51 (11th Cir. 1984) (remanded to district court to determine reasonableness of employee’s refusal of offer of reinstatement); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 282 (8th Cir. 1983) (lower court instructed jury that back pay award must end if employees unreasonably rejected good faith offer of employment, but jury found no unreasonable rejection); Orzel v. City of Wauwatosa Fire Dep’t, 697 F.2d 743, 757 (7th Cir.) (back pay damages not terminated by offer of reinstatement because not unreasonable for employee to refuse offer), cert. denied, 464 U.S. 992 (1983).

40. See Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 122 (4th Cir. 1983) (court remanded to district court for hearing on employer’s delay in complying with earlier reinstatement order; if no immediate vacancy, back pay was to continue until employer “finds an appropriate vacancy” to which to reinstate employee).


42. Kolb v. Goldring, Inc., 694 F.2d 869, 874 (1st Cir. 1982) (“At that point, the damages from his termination were complete and settled.”).

43. Smith v. Office of Personnel Management, 778 F.2d 258, 259, 260 (5th Cir. 1985) (federal employee not selected for promotion, subsequently left job for medical reasons; back pay held to terminate when he gave notice that he was not returning to employment due to conditions of his health). 44. Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730 (E.D.N.Y. 1978), aff’d in part, rev’d in part, remanded mem., 608 F.2d 1369 (2d Cir. 1979).

45. See Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 712 (E.D. Wis. 1978) (facts show that employee reached age 62 in February 1974; back pay terminated on February 28, 1977, when employee reached age 65, the maximum age then protected by ADEA). Currently, the ADEA protects those “who are at least 40 years of age but less than 70 years of age.” 29 U.S.C. § 631(a) (1982). The protected age was raised from 65 to 70 by the ADEA Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978),
date on which the employee would have been terminated for a non-
nondiscriminatory reason.\footnote{47} Thus, for example, if between discharge
and trial the employee’s job is eliminated by a plant closing or even
by a mere work force reduction, the back pay recovery may be lim-
ited. Whether the employee would have been retained after the
plant closing or the reduction in force is a question of fact for the
jury.\footnote{48}

Problems of calculation can be particularly difficult when termi-
nated employees obtain other employment. Suppose, for example,
victims of age discrimination earn less during the first year of subse-
quent employment than they would have earned in the job from
which they were terminated, and yet by the time of trial several years
later, their total earnings from the new job exceed that which they
would have earned had they not been terminated. Are they then
entitled to a back pay award? Presented with this question, the
Eighth Circuit rejected the district court’s determination that the
sum of the plaintiff’s back pay had been completely offset by the
total salary he had earned in alternative employment and, in re-
manding, directed the lower court to enter judgment for back pay
calculated on a year-by-year basis.\footnote{49}

Should back pay be adjusted to take into account the tax effects
of the award? For example, is the “gross” amount of lost wages
recoverable, or should the court give the employer credit for that
portion that the employee would have paid in taxes and order that
the employee be paid only a “net” back pay amount? Conversely,
should the court increase the back pay award to compensate for a
larger tax payment due on a lump sum award? These questions
have rarely arisen, but the authority that exists suggests that tax ef-
fects are not considered in determining back pay awards. For exa-
ample, in \textit{EEOC v. Riss International Corp.},\footnote{50} a Title VII case, the district

\footnote{46. Hodgson v. Ideal Corrugated Box Co., 10 Fair Empl. Prac. Cas. (BNA) 744, 752-
53 (N.D.W. Va. 1974).}
\footnote{47. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982). \textit{See also}
Geller v. Markham, 635 F.2d 1027, 1031, 1036 (2d Cir. 1980) (affirming a jury back pay
award equal to one year’s salary, concluding that teacher had not been hired on perma-
nent basis but for one year only), \textit{cert. denied}, 451 U.S. 945 (1981).}
\footnote{48. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1098-99 (8th Cir. 1982).}
\footnote{49. Leftwich v. Harris-Stowe State College, 702 F.2d 686, 693-94 (8th Cir. 1983). \textit{But see}
employee’s back pay for period of 42 months, subtracted total salary earned in 42
months, and awarded employee the difference).}
\footnote{50. 35 Fair Empl. Prac. Cas. (BNA) 423 (W.D. Mo. 1982).}
court rejected the employer's contention that back pay should be calculated by reducing the employee's hypothetical earnings by amounts that "would have been withheld for taxes and social security," pointing out that "[t]here is little support for this method of calculation."

The court observed that taxes "will be paid upon payment of the back pay award." In *Blim v. Western Electric Co.*, the Tenth Circuit reversed as improper a district court's inclusion in the employee's back pay award of an additional amount for "increased tax liability caused by the receipt of damages in a lump sum." The court of appeals noted that even though back pay will be paid and taxed in a single year, "the tax laws contain five year averaging provisions that will eliminate nearly all of any penalty that would otherwise result from receipt of a lump sum payment."

2. Prospective Salary Increases, Bonuses, and Commissions.—The "amounts owing" to terminated employees may include not only the wages actually lost, based upon their salaries at the time of the violation, but also expected salary increases. Courts have upheld the inclusion of prospective raises in back pay awards if the plaintiffs could show that they might reasonably have received such raises had they not been wrongfully discharged. In *Kolb*, the plaintiff did not

51. *Id. at* 425. *But see* Cross v. United States Postal Serv., 34 Fair Empl. Prac. Cas. (BNA) 1442, 1446 (E.D. Mo. 1983) (court ordered that 10% of employee's Title VII back pay award be withheld "for income tax purposes"), *aff'd on other grounds*, 733 F.2d 1327 (8th Cir. 1984).


54. *Id. at* 1480. *But see* Sears v. Atchison, Topeka & Santa Fe Ry., 749 F.2d 1451, 1456 (10th Cir. 1984) (district court did not abuse its discretion in including a "tax component" in the Title VII back pay award to compensate class members for "additional tax liability" that would result from receiving over 17 years of back pay in one lump sum; court distinguished *Blim* and pointed out that income averaging now permits consideration of only three preceding years, that many class members had died, and that estates are not eligible for income averaging), *cert. denied sub nom.* United Transp. Union v. Sears, 105 S. Ct. 2322 (1985).


56. *See, e.g.*, Taylor v. Home Ins. Co., 777 F.2d 849, 857-58 (4th Cir. 1985) (in demotion case, employee's back pay claim based on what "he would have earned in salary increases, bonuses, and promotions if the company had operated under a neutral policy with regard to age"); award based on expert's testimony affirmed on appeal); Kolb v. Goldring, Inc., 694 F.2d 869, 872-73 (1st Cir. 1982) (raise reduced on appeal to amount reasonably supported by evidence); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 1986
introduce any evidence of company practice or policy from which it could have been inferred that someone in his position would have received a raise equal to the figure of $8,000 per year that the jury included in its assessment of damages. Nor did he introduce expert testimony showing comparable salary increases in the industry. He did, however, show that his salary had increased dramatically in his new job, that his successor was paid $6,000 per year more than he had been paid, and that he had performed very well before being fired. In holding that the raise component of the damages award should be limited to $6,000 per year, the First Circuit emphasized that convincing testimony was needed to support prospective raises, pointing out that when courts have approved awards including prospective raises, “the projection has been based on expert testimony, patterns of past increases, or similar evidence.”57

Based upon evidence of company policy and the treatment of other employees, prospective bonuses may also be included in a calculation of an employee’s damages,58 and commission income is likewise recoverable as back pay if established with sufficient certainty.59 In fact, in Goldstein v. Manhattan Industries, Inc., a salesman’s

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160-61 (7th Cir. 1981) (court, not jury, made damage calculations; raises calculated by using former co-worker’s subsequent earnings as benchmark); Kelly v. American Standard, Inc., 640 F.2d 974, 985-86 (9th Cir. 1981) (prospective raises based upon expert economic testimony); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1164 & n.14 (S.D.N.Y. 1983) (6% annual increases held to be “normal incident” of job); Combes v. Griffin Television, Inc., 421 F. Supp. 841, 844 (W.D. Okla. 1976) (based upon formula that would have determined pay had plaintiff remained on the job, court held plaintiff entitled to “minimum 6% increases and cost of living increases”); cf. Mistretta v. Sandia Corp., 639 F.2d 588, 595-96 (10th Cir. 1980) (damages included compensation for the continuing effect of the company “stretch out” policy, which prohibited salary increases to employees in protected class equal to increases to employees outside the class).


lost commissions from noncompeting outside apparel lines were recovered as “lost earnings.” In affirming the recovery on appeal, the Eleventh Circuit characterized those commissions as a “concomitant” of the plaintiff’s employment.

3. **Life Insurance Benefits.**—Compensation for the loss of life insurance provided as a fringe benefit of employment may also be a factor in making whole an employee unlawfully discharged because of age, but courts have not agreed on how to measure the loss of that benefit. For example, the Fourth Circuit regards the premiums that the employer would have had to pay for the terminated employee’s life insurance policy to be the appropriate measure because Congress did not intend “to transform employers into insurers merely because an insurance policy is part of the compensation for employment.” On the other hand, the United States District Court for the District of New Mexico held that unlawfully discharged employees are entitled to recover as a lost benefit the value of their increased paid-up life insurance.

4. **Pension Benefits.**—Although an award of pension benefits is “plainly authorized under the ADEA,” compensating the discharged employee for the loss presents special problems. In order to fulfill the Act’s purpose of making the employee whole, the back pay award might include a damage factor to compensate the employee for the loss of pension benefits resulting from his termination. Alternatively, the court might order the employer to pay into

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60. 758 F.2d 1435, 1446-47 (11th Cir. 1985).
61. Id. at 1446.
64. Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979). The court explained: “Congress intended that the calculation of ‘amounts owing’ to a prevailing plaintiff include ‘items of pecuniary or economic loss such as wages, fringe, and other job-related benefits.’ . . . Pension benefits are part of an individual’s compensation and, like an award of back pay, should be awarded under 29 U.S.C. § 626(b).” Id. (citation omitted).
65. That was the approach taken at trial in Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981). Included in the jury’s award of damages was an amount specifically to compensate the employee for lost pension benefits. Id. at 977. That aspect of the award was affirmed on appeal. Id. at 985-86. The court noted that “pension rights are proper elements of damage under the ADEA, and their present value is recoverable based on expert testimony.” Id. at 986 n.20. See also Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161 (7th Cir. 1981) (lower court correctly added to back pay award contributions employer would have made to pension fund); Merkel v. Scovill, Inc., 570 F. Supp. 141, 145 (S.D. Ohio 1983) (employees entitled to have amounts that would have been contributed from date of discharge posted to pension plan as part of
the pension plan an amount sufficient to provide the employee with the same pension that he would have received had he not been discriminatorily discharged.\textsuperscript{66} The first approach treats the pension loss as legal damages and requires presenting the issue to the jury.\textsuperscript{67} The alternative approach treats the pension plan adjustment as equitable relief and requires the court to deal with it during the equitable phase of the case.\textsuperscript{68} Sometimes both legal and equitable aspects are present in the same case.\textsuperscript{69}

back pay award; although paid to plan, amounts were included in back pay award in determining amount of liquidated damages), \textit{rev'd on other grounds}, 781 F.2d 174 (6th Cir. 1986); Bleakley v. Jekyll Island-State Park Auth., 536 F. Supp. 236, 245 (S.D. Ga. 1982) ("a successful ADEA plaintiff is entitled to the present discounted value of a pension award based on employment from when the plaintiff was first hired until the date of the trial"); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730 (E.D.N.Y. 1978) ("the appropriate measure of relief is the amount of salary lost . . . increased by the value of her pension benefits"), \textit{aff'd in part, rev'd in part, remanded mem.}, 608 F.2d 1369 (2d Cir. 1979); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wis. 1978) (employee entitled to recover pension benefits "as if he had been permitted to work" during the back pay period); Fellows v. Medford Corp., 431 F. Supp. 199, 201 (D. Or. 1977) ("Lost wages, benefits, and pension rights are the types of legal damages which a jury may assess in ADEA actions.").

66. \textit{See} Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1099 n.5 (8th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), \textit{cert. denied}, 451 U.S. 945 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) ("If a prevailing plaintiff is returned to the defendant's employment, this award will consist of payments to the pension fund on plaintiff's behalf, bringing plaintiff's pension interest to the level it would have reached absent discrimination."). \textit{See also} EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1168, 1173 (10th Cir.) (parties stipulated that a specific amount be paid to employee as "additional equitable relief" in order to provide employee "the same pension upon retirement that he would have received had he not been illegally discharged"), \textit{cert. denied}, 106 S. Ct. 312 (1985); McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 215 (3d Cir. 1984) (parties stipulated to payment into pension plan), \textit{vacated and remanded on other grounds}, 105 S. Ct. 1159 (1985); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 n.15 (6th Cir. 1983) (employee had not requested reinstatement; if he had, and had the district court granted reinstatement, "[p]erhaps, under those circumstances, an equitable solution would be to provide that Sun post to the plaintiff's pension plan the amount that would have been contributed in the period between the unlawful discharge and reinstatement").

67. Kelly v. American Standard, Inc., 640 F.2d 974, 985-86 (9th Cir. 1981); Fellows v. Medford Corp., 431 F. Supp. 199, 201 (D. Or. 1977). \textit{See also} Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982) (holding that on remand the jury should determine damages to compensate the employee "for the wages and specific monetary benefits, such as pension benefits, that he would have received but for Mohawk's violation of the ADEA").

68. Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 279 n.2, 281 (8th Cir. 1983); Loeb v. Textron, Inc., 600 F.2d 1003, 1009, 1021 (1st Cir. 1979); Cleverly v. Western Elec. Co., 594 F.2d 638, 640 (8th Cir. 1979).

69. In Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982), the case was remanded to the district court for a determination of both legal and equitable relief. The jury was to award damages to compensate the plaintiff for lost wages and specific
5. Other Lost Benefits.—As with any damage award, recovery in an age discrimination case of an amount to compensate for various lost employment benefits appears to depend not so much on the name of the benefit as on the precision with which the value of the lost benefit is proven. Thus, in one reported case a district judge, sitting without a jury, awarded the plaintiff as an element of damages the unrealized profit he lost on unexercised stock options. Accrued sick leave has been included in a computation of back pay, as have an employee expense account, a clothing discount, and even something characterized as "business start-up costs." A back pay award may also include, if appropriate, compensation for the value of "health insurance, seniority, leave-time, or other fringe benefits which the employee would have accrued during the back pay period but for the violation of the Act."
B. Mitigation of Damages and Set Offs

Although many elements of compensation other than base salary may be included in determining an ADEA plaintiff’s lost wages and benefits, certain other items are properly subtracted from back pay in fixing the amount of recoverable damages. 77

1. Employee’s Duty to Mitigate.—Even though terminated because of age, an employee has a duty to mitigate damages by making reasonable efforts to seek alternative employment. 78 Thus, the most common offsets are amounts earned by the plaintiff in subsequent employment. 79 The remedial “make whole” purpose of the ADEA


In Buchholz, the court implied that vacation time may be a compensable item if not already included in income used to compute the back pay award. 445 F. Supp. at 713.

77. The ADEA does not contain language equivalent to 42 U.S.C. § 2000e-5(g) (1982) [Title VII], which provides: “Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.” See, e.g., Merkel v. Scovill, Inc., 570 F. Supp. 141, 149 (S.D. Ohio 1983), rev’d on other grounds, 781 F.2d 174 (6th Cir. 1986). In effectuating the ADEA’s objective of make-whole relief, even though not mandated by the Act, courts have applied a set off requirement that ADEA back pay awards be similarly reduced. See, e.g., Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).


is fulfilled if terminated employees are permitted to recover an amount sufficient to put them in the economic position in which they would have been had the discriminatory act not occurred. But the employee is not entitled to a windfall. Thus, when the plaintiffs have received a subsequent salary in an interim position, to permit a full recovery from the discriminating employer of back pay lost from the job in which they had been terminated would make the employees better than "whole," because they would be placed in a better position economically than had they not been the victims of discrimination.

Because of the employee's duty to mitigate, the employer may also be entitled to offset an amount that terminated employees could have earned had they sought alternative employment with reasonable diligence. If mitigation is an issue at trial, the burden

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81. Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); Merkel v. Scovill, Inc., 570 F. Supp. 141, 149 (S.D. Ohio 1983), rev'd on other grounds, 781 F.2d 174 (6th Cir. 1986). However, in a situation in which the employee received income from teaching and lecturing between the time of his discharge and trial, the Sixth Circuit held that the set off was proper only to the extent that the amount actually received exceeded that which the employee would have received had he continued to be employed by the discharging employer. Laugesen v. Anaconda Co., 510 F.2d 307, 317-18 (6th Cir. 1975). Similarly, the Third Circuit observed that a deduction for interim wages was proper if earned from other employment that the employee "could not have simultaneously performed." Rodriguez v. Taylor, 569 F.2d 1231, 1243 & n.23 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978). An Illinois district court declined to deduct from the back pay award overtime compensation received by the employee (while continuing to work in a position from which she had been denied a promotion), equating the overtime compensation to "earnings derived from moonlighting." Even though the employee's additional earnings came from her regular job in overtime hours rather than from a second job, "the policy remains the same. The plaintiff should not be punished for additional earnings if she could earn them while holding the desired position and if there is reason to believe she would do so." DeFries v. Haarhues, 488 F. Supp. 1037, 1043-44 (C.D. Ill. 1980).

of showing failure to mitigate is on the employer.\textsuperscript{83} More is required, of course, than a showing that the terminated employee remained unemployed. The employer may seek to reduce the back pay award by producing evidence that positions were available for which the employee was qualified and which he or she could have obtained, and that the employee failed to use reasonable diligence in seeking such a position.\textsuperscript{84} The terminated employee is required to look for and accept employment only in a comparable or “substantially equivalent” position,\textsuperscript{85} i.e., one that is similar in terms of “status, salary, benefits, and potential for advancement” to the job from which he or she was terminated.\textsuperscript{86} Indeed, an employee is not required to pursue every possible job opportunity. In \textit{Marshall v. Arlene Knitwear, Inc.},\textsuperscript{87} for example, the district court found that a terminated employee’s failure to respond to several job advertisements did not constitute a failure to mitigate when the employer failed to show either that the openings were “comparable in pay, status and other factors” or that they were suitable for a person of the employee’s qualifications.\textsuperscript{88} In seeking a comparable position, the employee is not held to the highest standard; instead, applying the test of reasonable diligence, the employee must make “only an honest good faith effort.”\textsuperscript{89}

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\item \textsuperscript{83} Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983); Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983); Cline v. Roadway Express, Inc., 689 F.2d 481, 489 n.8 (4th Cir. 1982); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 159-60 (7th Cir. 1981).
\item \textsuperscript{84} Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980).
\item \textsuperscript{85} See Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983); EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980); cf. Coates v. National Cash Register Co., 433 F. Supp. 655, 662-63 (W.D. Va. 1977) (to be bona fide, offer of reemployment must be to comparable position).
\item \textsuperscript{87} 454 F. Supp. 715 (E.D.N.Y. 1978), aff'd in part, rev'd in part, remanded mem., 608 F.2d 1369 (2d Cir. 1979).
\item \textsuperscript{88} Id. at 730. The flexibility of the “reasonable diligence” standard is apparent in the court’s explanation that behavior not entirely reasonable may be reasonable enough for purposes of “reasonable diligence.” Even if there had been comparable positions advertised, the court noted, failure to pursue them would not have been fatal if, as the court held it did, the plaintiff’s conduct “came within the range of reason, even if the full light of reason was not, in fact, brought to bear.” Id. at 731 (quoting Ellerman Lines, Ltd. v. The President Harding, 288 F.2d 288, 290 (2d Cir. 1961)). See also Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 756-57 (7th Cir.) (employee’s efforts, though “less than vigorous,” did not constitute a failure to mitigate), cert. denied, 464 U.S. 992 (1983).
\item \textsuperscript{89} EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980) (quoting United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 938 (10th Cir. 1979), a Title VII case).
\end{itemize}
The plaintiff is not required to be successful in finding another job. Nor does "reasonable diligence" require that terminated employees exert unusual efforts in seeking employment. For example, they are not expected to accept a job that is located an unreasonable distance from their home. Nor are they expected to pursue a job opportunity that would require them to relocate within three years of their anticipated retirement. Similarly, the Fourth Circuit has determined that terminated employees do not fail in their duty to mitigate merely by switching to another business after being discharged from a higher paying job. The "reasonable diligence" standard does, of course, require some reasonable effort on the part of the employee. For example, the Seventh Circuit has upheld the conclusion of a district court judge that an employee did not act with reasonable diligence and failed to mitigate his damages by taking what was characterized as "a sabbatical" from work while collecting unemployment compensation. In any event, the reasonableness of the employee's efforts at mitigation is a jury question.

2. Set Offs.—Courts have had difficulty in fashioning clear rules on whether the employer is entitled to set off against an award of back pay amounts collected by the employee from the terminating employer during the back pay period, such as severance or vacation pay, or payments derived from other sources, such as unemployment compensation or social security benefits. Severance pay received from the terminating employer is generally held to be properly deductible from the back pay award on the theory that it is

90. Id.
91. Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 119 (4th Cir. 1983); Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983).
95. Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983). The issue of what is reasonable diligence in mitigating damages may be complicated in a situation in which the employees are bound by a noncompetition agreement with their employer, particularly if they know only the business in which they have worked for the employer. The employees find themselves in a "catch-22" position if, as is frequently the case, employment with a competing employer constitutes a violation of the noncompetition agreement that results in the loss or postponement of pension benefits. Reasonable diligence in mitigating damages should not require those employees to seek employment in the same industry and thus expose themselves to loss of pension benefits.
"an incident of termination" that the employee would not have received had his or her employment continued.96 Vacation pay or accumulated leave time, on the other hand, because earned by the employee, does not result from the termination and should not be offset against the back pay award.97 Although severance pay and vacation pay have been contrasted,98 at least one court treated them identically in deferring the date for beginning the computation of back pay.99

Some courts have drawn distinctions between benefits received from the employer and those originating elsewhere by applying the "collateral source" rule,100 and have held that an employer is not entitled to benefit by taking a deduction for amounts the employee received from a collateral source. In Maxfield v. Sinclair International,101 for example, the Third Circuit held:

Under the collateral source rule payments under Social Security, welfare programs, unemployment compensation and similar programs have all been treated as collateral benefits which would not ordinarily be set off against damages awarded. . . .


97. 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). But see Naton v. Bank of Cal., 649 F.2d 691, 700 (9th Cir. 1981), affirming the district court's deduction of accumulated sick leave and vacation pay benefits because the Bank's policy did not permit those benefits to be "cashed out," but required retiring workers to use them. Thus, the benefits could not have resulted in additional compensation to the employee in the event of normal retirement, and but for his termination he would not have received them.


100. "Under the collateral source rule, benefits received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the damages that the wrongdoer otherwise is compelled to pay the injured party." Naton v. Bank of Cal., 649 F.2d 691, 699 (9th Cir. 1981). "This rule holds even though the benefits are payable to the plaintiff because of the defendant's actionable conduct and even though the benefits are measured by the plaintiff's losses." D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.6 (1973).

101. 766 F.2d 788 (3d Cir. 1985).
We see no reason why the benefit of the collateral funds should shift to the defendant. As between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer.102

On the other hand, if the source of the benefit is not collateral, courts have allowed the employer to set off the benefit amount in order that the employee not be permitted a windfall or a double recovery.103 The goal, of course, in making the employee whole is to permit recovery of only that which the employee would have received but for the violation of the Act.

Unemployment compensation received by a terminated employee subsequent to discharge has been the subject of similar analysis, but with varying results. The earlier decisions tended, without discussion, to give the employer the benefit of an offset and permit the amount received to be deducted from the award of back pay.104 (Indeed, in one case the parties agreed that the proper measure of back pay required the deduction of unemployment benefits.)105 In 1977, however, the Fifth Circuit reached a different result in Marshall v. Goodyear Tire & Rubber Co.106 Relying on the Supreme Court’s decision in NLRB v. Gullett Gin Co.,107 which arose in a different context, the Fifth Circuit held that the district court had not abused its discretion by declining to deduct from the back pay award

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102. Id. at 793-95. See also, EEOC v. Sandia Corp., 639 F.2d 600, 625, 626-27 (10th Cir. 1980) (unemployment compensation collateral, not deducted; severance pay and layoff allowances not collateral, employer entitled to deduct); Wise v. Olan Mills Inc., 495 F. Supp. 257, 259-60 (D. Colo. 1980) (social security benefits collateral, not deducted; pension or retirement payments not collateral, employer entitled to deduct).


106. 554 F.2d 730 (5th Cir. 1977).

payments received by the employee as unemployment compensation after his discharge. Subsequent cases have divided on whether unemployment compensation should be offset. In 1980 the Tenth Circuit reviewed a number of cases and decided that "unemployment compensation is purely a collateral source and is peculiarly the property of the claimant," and therefore that such benefits should not be deducted. The Ninth Circuit has acknowledged some doubt about the applicability of the collateral source rule to unemployment compensation benefits because the employer contributes to the unemployment compensation fund. Without resolving this doubt, it has held that the ADEA authorizes a district court to exercise its discretion in fashioning a remedy and that a district court does not abuse its discretion by deducting unemployment compensation from a back pay award. Similarly, the Seventh Circuit has held that the deduction of unemployment compensation benefits by the trial court is not an abuse of discretion. Most recently, however, the Third Circuit rejected the concept of discretion in this context, holding that "unemployment compensation benefits, even if supported by contributions by the employer, may not be deducted from a ADEA back pay award."

The question of whether an employee's receipt of social security benefits entitles the employer to an offset has been considered

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108. 554 F.2d at 736.
109. EEOC v. Sandia Corp., 639 F.2d 600, 624-26 (10th Cir. 1980).
110. Id. at 625. The Tenth Circuit was concerned that permitting an offset "may well result in a windfall to the employer." Id. at 626. See also Wise v. Olan Mills Inc., 495 F. Supp. 257, 259 (D. Colo. 1980) (following Sandia as to unemployment compensation; holding social security benefits nondeductible by analogy to unemployment compensation).
112. Id. at 700.
113. Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 756 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161-62 & n.17 (7th Cir. 1981) (court noted that either employer or employee would receive a "windfall").
infrequently. In two reported decisions courts have held that an employer is not entitled to such a deduction, applying the reasoning of those courts that have refused to permit an offset for unemployment compensation.\textsuperscript{115} Although the Third Circuit has recently held that an employer is not entitled to offset pension plan benefits received by the employee,\textsuperscript{116} most courts that have considered the matter have concluded that retirement and pension benefits are properly deducted from back pay.\textsuperscript{117} And in a case in which the employee had become totally disabled and unable to work, the court offset against back pay the disability compensation received by the employee.\textsuperscript{118}

In sum, an employee's award of back pay may be reduced by earnings received from interim employment, by amounts "earnable" (even though not earned) in fulfilling the duty to mitigate damages, and by such other amounts received by the employee after termination as the court finds appropriately deductible. However, whereas questions relating to mitigation of damages are properly presented to the jury, the court itself must determine as a matter of law whether deductions or offsets should be permitted for unemployment compensation, social security benefits, pension benefits, and the like. Although the court might instruct the jury either to deduct or not to deduct, the better practice is to have the court make the deduction itself from the jury's back pay award.\textsuperscript{119}

\textsuperscript{115} Maxfield v. Sinclair Int'l, 766 F.2d 788, 793-95 (3d Cir. 1985) ("There are no significant discernible differences between Social Security benefits, unemployment benefits and pension benefits for this purpose."); Wise v. Olan Mills Inc., 496 F. Supp. 257, 260 (D. Colo. 1980) (social security payments held to be collateral and as much "social insurance" benefits as unemployment compensation). But see EEOC v. Wyoming Retirement Sys., 711 F.2d 1425, 1451-32 (10th Cir. 1985) (not abuse of discretion for trial judge to deduct claimants' social security payments from back pay award, even though from collateral source; because state was a party and tax funds were at stake, trial court identified a "clear public interest" in deducting payments).


\textsuperscript{117} See, e.g., Fariss v. Lynchburg Foundry, 769 F.2d 958, 966 (4th Cir. 1985) (employee had died, and court noted that had he continued working until he died, pension would not have been paid at all); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86-87 (2d Cir. 1983) (employer properly credited with that portion of lump sum pension payment that represented difference between amount employee in fact received at age 63 and lesser amount he would have received at age 65); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 756 (7th Cir.), cert. denied, 464 U.S. 992 (1983); Wise v. Olan Mills Inc., 495 F. Supp. 257, 260 (D. Colo. 1980).

\textsuperscript{118} Smith v. Office of Personnel Management, 778 F.2d 258, 262 (5th Cir. 1985).

\textsuperscript{119} See, e.g., Hagelthorn v. Kennecott Corp., 710 F.2d 76, 80, 86-87 (2d Cir. 1983). See also Fariss v. Lynchburg Foundry, 769 F.2d 958, 961, 967-68 (4th Cir. 1985) (grant of
C. Liquidated Damages

If the jury finds that an employer has violated the ADEA, it must first determine the appropriate amount of monetary damages to compensate the plaintiff for lost wages and benefits. If there are facts that justify the finding, the jury may also be asked to determine whether the employer's actions were willful. If the jury finds the employer's conduct to have been willful, the plaintiff is entitled to recover liquidated damages in an additional amount equal to the back pay award. In effect, the back pay award is doubled.

For several years the courts of appeals wrestled with the meaning of "willfulness" in the ADEA context, and trial courts were without clear guidance in framing an appropriate jury instruction defining willful conduct. Finally, in 1985 the Supreme Court approved a definition of "willfulness" in Trans World Airlines, Inc. v.
To find willfulness, the Court held, the jury must decide that the employer knew its conduct violated the Act, or, in committing the discriminatory action, that the employer showed reckless disregard for whether its conduct was prohibited by the Act.

Even though they result from the employer’s willful conduct, liquidated damages have been held to be compensatory. They "are intended to provide compensation for losses that cannot be calculated with certainty," such as the value attributable to the loss of use of unpaid wages after an employee has been unlawfully discharged. The Ninth Circuit has reasoned, however, that “[t]he award of liquidated damages is in effect a substitute for punitive damages and is intended to deter intentional violations of the ADEA.” In deciding the Thurston case, the Supreme Court observed that "Congress intended for liquidated damages to be punitive in nature.

If willfulness is found, is the back pay award doubled before or after deducting any amounts to which the employer is entitled as an offset? In Fariss v. Lynchburg Foundry, the Fourth Circuit recently answered that question by holding that “liquidated damages should be assessed only upon the net loss after offsets.” In Fariss no liquidated damages were awarded because the employee’s claim for


126. Id. at 625-26. See Fariss v. Lynchburg Foundry, 769 F.2d 958, 967 (4th Cir. 1985).
128. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982).
131. 769 F.2d 958 (4th Cir. 1985).
132. Id. at 967. In Hagelthorn v. Kennecott Corp., 710 F.2d 76, 80 (2d Cir. 1983), the district court had deducted pension payments "and then doubled the remainder." The appellate court affirmed without commenting on the procedure. See also McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 218 (3d Cir. 1984) (deducting pension benefits from a back pay award gives the employer a double deduction if liquidated damages are awarded; because liquidated damages are measured by doubling the back pay award (after deductions), "for every dollar deducted from back pay a dollar is deducted from the liquidated damages award"), vacated and remanded on other grounds, 105 S. Ct. 1159 (1985).
back wages and benefits was more than offset by the lump sum pension benefit he received as a result of his termination. 133

Although the issue of willfulness is to be submitted to the jury, 134 the courts have not been consistent on whether the jury or the court assesses the "additional equal amount as liquidated damages." 135 It should not matter, of course, because the amount to be awarded as liquidated damages is the same as the damages assessed for lost wages and other benefits. The Sixth Circuit has observed that the district court is "without discretion, once the jury found willfulness, to award liquidated damages in an amount other than that equal to the award for compensatory damages." 136 The better

133. 769 F.2d at 967.
134. The Third Circuit rejected an employer's contention that "procedurally, the final decision to award liquidated damages properly rested with the court rather than the jury." Wehr v. Burroughs Corp., 619 F.2d 276, 279 (3d Cir. 1980).
135. In Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982), for example, the jury found willfulness and, as part of its verdict, awarded the plaintiff the additional equal amount in liquidated damages. In other cases, however, courts have assessed the amount of liquidated damages after the jury returned a finding of willfulness. See, e.g., Taylor v. Home Ins. Co., 777 F.2d 849, 851 (4th Cir. 1985); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 279 (8th Cir. 1983); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1009 (1st Cir. 1979). In a Ninth Circuit case, the jury returned a general verdict that included compensatory and liquidated damages under the ADEA as well as damages on pendent state claims. Although it affirmed on appeal, the Ninth Circuit stated a strong preference for a separate verdict for each claim. Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1317 (9th Cir.), cert. denied, 459 U.S. 859 (1982). The Sixth Circuit noted in Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 n.13 (6th Cir. 1983), that the preferable practice is "to submit the willfulness issue to the jury by special interrogatory." That practice had been followed by the trial court in Loeb. See Loeb v. Textron, Inc., 600 F.2d 1003, 1009 (1st Cir. 1979).
136. Hill v. Spiegel, Inc., 708 F.2d 233, 238 (6th Cir. 1983). But see Davis v. Combustion Eng'g. Inc., 742 F.2d 916, 918 (6th Cir. 1984) (jury awarded $22,200 in back pay, district court awarded $20,000 in liquidated damages; award affirmed on appeal without comment); Rodriguez v. Taylor, 569 F.2d 1231, 1244 (3d Cir. 1977) (leaving the award of liquidated damages to the trial judge's discretion on remand), cert. denied, 436 U.S. 913 (1978); Combes v. Griffin Television, Inc., 421 F. Supp. 841, 844-45 (W.D. Okla. 1976) (court concluded that it had discretion "to award no liquidated damages or to award liquidated damages in a lesser sum than the entire amount of back wages and benefits").

The Fifth Circuit, apparently alone among the circuits, takes the position that liquidated damages are not mandatory but permissive. Hence if, after a jury finding of willfulness, the trial court makes a finding that the employer acted in good faith and had reasonable grounds for believing that its actions were not violative of the ADEA, the trial court possesses the discretion to determine the amount, if any, of a liquidated damages award.

procedure is to have the question of willfulness presented to the jury by special interrogatory. Then, if the jury finds willfulness, the court will assess liquidated damages as part of its overall award of damages and other relief.

To the extent that liquidated damages can be considered punitive in nature, a plaintiff may request such damages for willful conduct by the employer occurring after the plaintiff initiates the lawsuit. At least one court has indicated that post-trial liquidated damages might be awarded in an appropriate case for willfulness such as "the prosecution of a patently frivolous appeal or extensive and unwarranted dilatory tactics on the part of a defendant in the face of a clear violation of the ADEA."137

D. Damages for Pain and Suffering and Punitive Damages

Compensatory damages for pain and suffering are not included among the available remedies enumerated in the ADEA.138 Employee plaintiffs, however, have frequently sought to recover damages for pain and suffering, claiming that the availability of such damages may be inferred from the Act's broad provision for "legal and equitable relief."139 All circuit courts that have addressed the issue have determined that damages for pain and suffering are not available to a wronged employee under the Act.140 The reasoning has been criticized. See Wehr v. Burroughs Corp., 619 F.2d 276, 279 n.5 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1020 & n.26 (1st Cir. 1979); Babb v. Sun Co., Inc., 562 F. Supp. 491, 495 (D. Minn. 1983) ("[I]t is difficult to comprehend how an employer can willfully violate the ADEA while at the same time acting in good faith."). In a recent case arising subsequent to the Supreme Court's definition of "willfulness" in Thurston, the Fifth Circuit has retreated from its rule that liquidated damages are discretionary when willfulness is found. "Prior to Thurston, it was possible to find a willful violation, and also find that the employer had acted in 'good faith.' . . . Under the Thurston rule, however, 'good faith' can no longer coexist with 'willfulness.' " Powell v. Rockwell Int'l Corp., 788 F.2d 279, 287 (5th Cir. 1986).

137. Dickerson v. Deluxe Check Printers, Inc., 783 F.2d 149, 150 (8th Cir. 1986) (plaintiff not entitled to post-trial liquidated damages because employer made reasonable, good faith attempt to comply with both district court's judgment and mandate of court of appeals).

138. See 29 U.S.C. § 626 (1982) (the only section of the Act that addresses remedies). "The statute does not specifically mention damages for pain and suffering or other general compensatory damages, and such damages are conspicuously omitted from the definition of 'amounts owing.' " Naton v. Bank of Cal., 649 F.2d 691, 699 (9th Cir. 1981).

139. 29 U.S.C. § 626(b),(c) (1982).

usually offered for denying damages for pain and suffering are that because those damages are not available under the FLSA, on which the ADEA’s remedial provisions are based, they are not recoverable under the ADEA;\textsuperscript{141} that the possibility of recovering damages for pain and suffering would impair the EEOC’s mediation and conciliation efforts in ADEA cases;\textsuperscript{142} and that damages for pain and suffering are inconsistent with the Act’s goal of putting the ADEA plaintiffs in the economic position they would have occupied but for the discrimination.\textsuperscript{143}

Using similar reasoning, most courts have concluded that punitive damages are not authorized under the ADEA.\textsuperscript{144} However, because the Act requires a doubling of damages in cases of willful violations, the Ninth Circuit has noted that the provision for liquidated damages operates as a substitute for punitive damages.\textsuperscript{145}


\textsuperscript{143} See, e.g., Kolb v. Goldring, Inc., 694 F.2d 869, 872 (1st Cir. 1982).


\textsuperscript{145} See supra note 129 and accompanying text. See also Gifford v. B.D. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978) ("The limitation of liquidated damage awards to compensation for 'willful' violations indicates that they have the effect of penalty.").
E. Other Compensatory Damages

In the occasional case in which an aggrieved employee has sought non-pain-and-suffering compensatory damages under the ADEA, the attempt has been unsuccessful. For example, one plaintiff sought compensation for moving expenses, increased commuting expenses, and increased payments on his new house due to a higher interest rate, all because he had to sell his house and secure employment in another state after a discriminatory discharge. The district court held that recovery for those consequential damages was not permitted by the Act.  \(^{146}\) Similarly, the Fifth Circuit affirmed the denial of damages for an employee’s loss of income from a part-time consulting practice because of a medical disability allegedly caused by the employer’s discrimination.  \(^{147}\)

III. Equitable Relief

Although the cases do not establish a clear procedure for determining equitable relief in an age discrimination case, they do suggest that following a jury verdict for the plaintiff on liability, the court should conduct a further hearing with respect to equitable relief. That was the procedure followed by the district court in *Gibson v. Mohawk Rubber Co.* \(^{148}\) and later expressly approved by the Eighth Circuit. \(^{149}\) Other circuits have utilized similar procedures and have variously characterized the hearing on equitable relief after a jury verdict on liability as a “bench trial on damages,” “post-trial motions . . . for equitable relief,” “further proceedings” on damages, \(^{150}\) or as “a separate trial for damages.” \(^{151}\)

In contrast to an award of back pay, which is mandatory under
the ADEA, the award of equitable relief is within the district court's discretion. However, the court may refuse to grant equitable relief only if its refusal is sufficiently justified. In Dickerson v. Deluxe Check Printers, Inc., for example, the Eighth Circuit held that neither a "large damage award" nor an award of liquidated damages was a sufficient basis for the denial of equitable relief. A court's discretion in this regard is also limited, as a practical matter, by certain general assumptions. For example, "[i]n determining whether to award equitable relief and, if so, what kind, a district court generally will assume, absent evidence to the contrary, that the illegally discharged employee would have continued working for the employer until he or she reached normal retirement age." Although in fashioning appropriate relief the court may resolve conflicts and make findings, "it cannot base its decision on its own factual findings that conflict with those expressly made by the jury." Absent exceptional circumstances, the jury's verdict on the issue of age discrimination is res judicata for purposes of awarding equitable relief.

The types of equitable relief that courts have held to be appropriate to a prevailing plaintiff in an ADEA case include at least the following: reinstatement, front pay, prejudgment interest, and

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154. See supra note 37 and accompanying text.
157. Id. at 280. But see Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.) (availability of a substantial liquidated damages award may be a proper consideration in denying additional damages in lieu of reinstatement), cert. denied, 459 U.S. 859 (1982).
162. See infra notes 168-202 and accompanying text.
163. See infra notes 203-49 and accompanying text.
164. See infra notes 250-57 and accompanying text.
compensation for loss of pension rights, various forms of injunctive relief, and the award of reasonable attorneys’ fees and costs.

A. Reinstatement

Among the remedies specifically set out in the Act is the court’s power to grant “judgments compelling employment, reinstatement or promotion.” Reinstatement is clearly an equitable remedy. Although reinstatement to a former position is not an absolute right of a victim of age discrimination, it has been held to be the “preferred remedy under the ADEA.” The district court’s refusal to require the plaintiff’s employment prompted the Eighth Circuit in Dickerson to remand with directions to enter an order compelling the defendant to employ the plaintiff. In Blim v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983), aff’d, 105 S. Ct. 2743 (1985). In a more general sense, it may also include reinstatement to a comparable position, see, e.g., Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114-15 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1217 (N.D. Ga. 1973) (plaintiff ordered reinstated to his former position or to one “most comparable” thereto); promotion to a position to which the plaintiff should have been promoted, but for age discrimination, Taylor v. Home Ins. Co., 777 F.2d 849, 859-60 (4th Cir. 1985); DeFries v. Haahr, 488 F. Supp. 1037, 1043 (C.D. Ill. 1980); or “promotion” to a position from which the plaintiff has been demoted. Blim v. Western Elec. Co., 731 F.2d 1473, 1478-79 (10th Cir.), cert. denied sub nom. AT&T Technologies, Inc. v. Blim, 105 S. Ct. 293 (1984). The Act also authorizes “employment,” and the same principles apply to “placement in a job which [the employee] has been denied, rather than reinstatement to a job previously held.” Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 280 (8th Cir. 1983).

165. See infra notes 258-67 and accompanying text.
166. See infra notes 268-86 and accompanying text.
167. See infra notes 287-316 and accompanying text.
169. “Reinstatement,” as the term is used here, usually means reinstatement to the position from which the plaintiff has been terminated. See, e.g., Stone v. Western Air Lines, Inc., 544 F. Supp. 33, 38 n.5 (C.D. Cal. 1982) (“reinstatement” not an accurate characterization of relief sought, since plaintiffs were terminated from positions as captains but sought reinstatement as second officers), aff’d sub nom. Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983), aff’d, 105 S. Ct. 2743 (1985). In a more general sense, it may also include reinstatement to a comparable position, see, e.g., Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1114-15 (4th Cir.), cert. denied, 454 U.S. 860 (1981); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1217 (N.D. Ga. 1973) (plaintiff ordered reinstated to his former position or to one “most comparable” thereto); promotion to a position to which the plaintiff should have been promoted, but for age discrimination, Taylor v. Home Ins. Co., 777 F.2d 849, 859-60 (4th Cir. 1985); DeFries v. Haahr, 488 F. Supp. 1037, 1043 (C.D. Ill. 1980); or “promotion” to a position from which the plaintiff has been demoted. Blim v. Western Elec. Co., 731 F.2d 1473, 1478-79 (10th Cir.), cert. denied sub nom. AT&T Technologies, Inc. v. Blim, 105 S. Ct. 233 (1984). The Act also authorizes “employment,” and the same principles apply to “placement in a job which [the employee] has been denied, rather than reinstatement to a job previously held.” Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 280 (8th Cir. 1983).
172. 703 F.2d 276 (8th Cir. 1983).
173. Id. at 279-81.
Electric Co., the Tenth Circuit held that "courts should order reinstatement under the ADEA whenever it is an appropriate remedy."\

When is reinstatement the "appropriate remedy"? First of all, a court need address the question of reinstatement only if the jury has not foreclosed the issue in some fashion, as, for example, by finding that the employee's employment contract was of limited duration, or that the employee would have lost his or her job in any event for legitimate, nondiscriminatory reasons such as the closing of a facility or a work force reduction. Similarly, the employee's health might preclude consideration of reinstatement. In deciding whether reinstatement is appropriate, courts have looked to whether the previous position is unique, unusual, or sensitive, such as that of a news anchorman at a television station; whether it is a high level or executive position in the employer's organization, or whether it is a temporary position or a permanent one. A threshold determination, of course, is whether a position is available at the time of judgment to which the employee might be reinstated. Another important consideration is the degree of animosity or antagonism that exists between employer and employee. "Reinstatement may not be appropriate... when the employer has exhibited such extreme hostility that, as a practical

175. See, e.g., Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).
176. See, e.g., Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100-01 (8th Cir. 1982); cf. Cleverly v. Western Elec. Co., 450 F. Supp. 507, 511 (W.D. Mo. 1978) (continued reduction in work force sufficient evidence to conclude that reinstatement was not appropriate; partial retroactive "reinstatement" ordered to qualify employee for pension rights), aff'd, 594 F.2d 638 (8th Cir. 1979).
177. See Smith v. Office of Personnel Management, 778 F.2d 258, 260 (5th Cir. 1985) (federal employee totally disabled and unable to work, thus reinstatement not a consideration).
matter, a productive and amicable working relationship would be impossible."  In addition, the Fourth Circuit has followed the guidance of Title VII cases in holding that a reinstatement order should not be implemented when it would require displacing another person from the plaintiff's former job.

Although the preferences of the parties may assist the court in fashioning an appropriate reinstatement remedy, they are not controlling. Thus, plaintiffs' statements that they would prefer damages in lieu of reinstatement, that reinstatement is inappropriate, and even that they would not accept reemployment if offered, have not been viewed as sufficient justification for denial of reinstatement. In Cline v. Roadway Express, Inc., the Fourth Circuit upheld the reinstatement of an ADEA plaintiff over the employer's objections as to the plaintiff's "incompatibility . . . and his long absence from the trucking industry." Likewise, in Spagnuolo v. Whirlpool Corp., the Fourth Circuit affirmed the district court's reinstatement order over vigorous objections by the employer that the employee lacked the proper qualifications for a new position that had been created by merging the employee's previous position with another, and that "animosities and tensions between the parties made reinstatement infeasible."


188. EEOC v. Sandia Corp., 639 F.2d 600, 627-28 (10th Cir. 1980).

189. 689 F.2d 481 (4th Cir. 1982).

190. Id. at 489.


192. Id. at 1114-15.
As illustrated by the history of the Spagnuolo case, which was twice reviewed by the Fourth Circuit, implementing an order for reinstatement can be difficult. In Spagnuolo, the district court had ordered the plaintiff reinstated to a job comparable to his previous one, and that order was affirmed on appeal. By the time the case was before the Fourth Circuit on appeal for the second time, however, the employer had decided neither to place the plaintiff in the newly created position that encompassed his old job nor to uncouple the newly created combined position in order to give him back his old job. The employer continued to delay offering him a job and finally offered him three nonequivalent positions. One was a position involving less supervisory responsibility and less stature, less prospect for advancement, less overall compensation, and more travel than the former job. The other two positions would have required that the plaintiff move to a distant city. Upon review of the district court's order either to uncouple the combined job or to "bump" the person who had replaced the plaintiff in his former position, the Fourth Circuit acknowledged the problem facing the district court in trying to ensure compliance with its reinstatement order, but remanded the case for further proceedings, holding that "the innocent unknowing beneficiary of the original discrimination" should not be "bumped." Instead, it gave the trial court two options that could be pursued simultaneously. First, upon appropriate motion, the district court could require that the employer disclose which present positions it considered to be equivalent to the employee's former position, whether anyone had been promoted to any of those positions since the reinstatement order took effect, and why certain other positions were not appropriate. Second, the district court could inquire into whether the employer had taken measures to accommodate both the plaintiff and his replacement by offering the replacement comparable jobs in other locations. If the first inquiry revealed that the employer had since filled a vacancy in a comparable job, the district court was then empowered to "bump" the person in that job on the presumption that

194. 641 F.2d at 1114-15.
195. 717 F.2d at 117.
196. Id. at 119-22.
197. Id. at 122.
198. Id. at 121-22.
199. Id. at 122.
"the employee who is promoted or hired after the judicial pronouncement of discrimination is no longer an innocent beneficiary." No specific direction was given as to how the district court should evaluate the employer's response to the second inquiry, but the district court's contempt powers were noted. The court of appeals reminded the district court that until its reinstatement order could be implemented, "the original order must remain in effect, with the back pay awards continuing until [the employer] finds an appropriate vacancy."

B. Front Pay

For several years a hotly contested issue in ADEA cases has been whether "front pay"—i.e., the recovery of future lost earnings—is an available remedy under the Act if reinstatement is determined to be impracticable. The weight of authority now clearly holds that it is. In 1985 the First and Third Circuits became the seventh and eighth of the twelve circuit courts of appeals to hold that front pay may be awarded as a remedy in lieu of reinstatement. In doing so, those courts joined ranks with the Second Circuit, the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, and the Eleventh Circuit, all of

200. Id.
201. "If [the employer] fails or refuses to demonstrate its efforts to comply with the rightful place order, the district court, of course, may utilize its powers of contempt against it." Id. at 122 n.4.
202. Id. at 122.
203. Wildman v. Lerner Stores Corp., 771 F.2d 605, 614-16 (1st Cir. 1985); Maxfield v. Sinclair Int'l, 766 F.2d 788, 795-97 (3d Cir. 1985). In acknowledging that front pay is a remedy available under the ADEA, the First Circuit stated in Wildman that it had "never ruled squarely" on the issue, although it had "used language from which it could be inferred that such damages would probably not be approved." 771 F.2d at 614. Other courts, however, had read a footnote in the First Circuit's opinion in Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982), as a holding disapproving front pay recovery. See, e.g., EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1172 (10th Cir.), cert. denied, 106 S. Ct. 312 (1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727 (2d Cir. 1984). The First Circuit had earlier discussed the issue of front pay, without deciding it, in Loeb v. Textron, Inc., 600 F.2d 1003, 1021-23 (1st Cir. 1979).

The Third Circuit addressed the issue of front pay directly for the first time in Maxfield, 766 F.2d at 795-97, having previously reserved decision on that issue in Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980).
204. In Whittlesey v. Union Carbide Corp., 742 F.2d 724, 726 (2d Cir. 1984), the Second Circuit wrote its opinion "primarily to make clear, as a matter of precedent, our approval of 'front pay' as a permissible remedy under the ADEA."
205. Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984).
207. Cancellier v. Federated Dept Stores, 672 F.2d 1312, 1319 (9th Cir.), cert. denied,
which had previously determined that front pay is a remedy available under the ADEA. In addition, the Fifth Circuit recently suggested in dicta that it would likely approve front pay in a proper case.\textsuperscript{210}

The earlier appellate opinions on front pay tended either to avoid deciding the question,\textsuperscript{211} or to approve the principle of front pay only in the abstract.\textsuperscript{212} More recently, however, as more district courts have concluded that front pay is authorized by the Act, specific awards of front pay have been approved on appeal in cases in which the issue has been presented squarely for decision.\textsuperscript{213}

\textsuperscript{210} EEOC v. Prudential Fed. Sav. & Loan Ass’n, 741 F.2d 1225, 1232 (10th Cir. 1984). This opinion, the Tenth Circuit’s first opinion in the case, was withdrawn, 753 F.2d 851 (10th Cir. 1985), for further consideration after the Supreme Court had vacated and remanded, 105 S. Ct. 896 (1985), in light of its decision in Trans World Airlines, Inc. v. Thurston, 105 S. Ct. 613 (1985). The Tenth Circuit subsequently filed an amended opinion, modified as to the willfulness issue in light of Thurston, but restating its previous position on front pay, 763 F.2d 1166 (10th Cir.), cert. denied, 106 S. Ct. 312 (1985). As a result, the Tenth Circuit adhered to its 1984 opinion that an award of front pay is authorized by the ADEA in appropriate instances, but it remanded to the trial court the question of whether front pay was more appropriate than reinstatement. 763 F.2d at 1171-73. The Tenth Circuit had considered the front pay issue in an earlier case in which the district court had awarded front pay; in remanding that case, however, the court declined to decide the availability of front pay as a remedy. Blim v. Western Elec. Co., 731 F.2d 1473, 1478-79 (10th Cir.), cert. denied sub nom. AT&T Technologies, Inc. v. Blim, 105 S. Ct. 233 (1984).


\textsuperscript{212} Smith v. Office of Personnel Management, 778 F.2d 258, 262 n.2 (5th Cir. 1985). The court noted that it “need not decide the question whether a federal ADEA claimant is entitled to back pay,” because the tax-free disability compensation the plaintiff is receiving exceeds any possible front pay award to which he might be entitled. Id. The court continued:

This question rarely arises because in most cases a prevailing plaintiff is reinstated and there is no need to award front pay. However, we note that, in a case such as Smith’s where the plaintiff is unable as a result of discrimination to earn his livelihood, an award of front pay probably would be necessary to “effectuate the purposes of the Act.”

\textbf{Id.}

\textsuperscript{213} Maxfield v. Sinclair Int’l, 766 F.2d 788, 795-97 (3d Cir. 1985); Whittlesey v.
Courts approving front pay have concluded that front pay is authorized by the Act's broad authorization to grant "such legal or equitable relief" as is appropriate;\textsuperscript{214} that the remedy is a necessary part of the equitable relief available to a district court under the ADEA;\textsuperscript{215} that when reinstatement is inappropriate, front pay serves the congressional intent of making whole victims of age discrimination by restoring them to the positions they would have been in had the discrimination not occurred;\textsuperscript{216} and that without an award of reasonable offsetting compensation the discharged employee would be irreparably harmed in the future.\textsuperscript{217} One court pointed out that if front pay were not available as a remedy in lieu of reinstatement, "an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return."\textsuperscript{218} When there is no available position to which an employee might be ordered reinstated, or when the relationship between employer and employee has been so damaged as to make reinstatement impracticable, courts have concluded that the employee would be left without an adequate remedy unless front pay could be granted.\textsuperscript{219}

Aside from questions that arise because the Act contains no clear authorization for the award of front pay in lieu of reinstatement,\textsuperscript{220} the principal objection to front pay has been that an award
for future lost earnings is too speculative. \footnote{221} The younger the employee seeking front pay damages in lieu of reinstatement, the greater is the element of speculation in fashioning an appropriate award. For example, plaintiffs in their forties have many years before reaching age seventy in which they might or might not receive raises or salary reductions, change jobs, get fired, become incapacitated, or be subject to a nondiscriminatory reduction in force. \footnote{222} Conversely, the closer the plaintiffs are to age seventy, at which they no longer fall within the Act’s protected class, the less speculative is a front pay award. \footnote{223} Particularly in approving awards of front pay to older employees, courts have rejected employers’ arguments that those awards are too speculative. \footnote{224} Moreover, the Third Circuit has observed that ADEA front pay awards are “no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases” and added that unjustified damage awards should be effectively controlled by the plaintiff’s duty to mitigate damages. \footnote{225}

Some courts have held that plaintiffs who fail to seek reinstatement or who disclaim a desire for reinstatement thereby waive their


\footnote{222}{See, e.g., Davis v. Combustion Eng’g, Inc., 742 F.2d 916, 923 (6th Cir. 1984) (“For example, the award of front pay to a discriminatorily discharged 41 year old employee until such time as he qualifies for a pension might be unwarranted.”); Loeb v. Textron, Inc., 600 F.2d 1003, 1023 (1st Cir. 1979); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 235 (N.D. Ga. 1971); cf. Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984).}

\footnote{223}{See, e.g., Davis v. Combustion Eng’g, Inc., 742 F.2d 916, 923 (6th Cir. 1984) (“On the other hand, the failure to make such an award for an employee age 63, likewise discriminatorily discharged, might be an abuse of discretion.”); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983) (“at his age [68] the likelihood of re-employment is minimal”).}

\footnote{224}{Maxfield v. Sinclair Int’l, 766 F.2d 788, 796 (3d Cir. 1985) (employee in late 60’s); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984) (employee in late 60’s; “time period was relatively short”); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983) (employee one month past 68th birthday).}

\footnote{225}{Maxfield v. Sinclair Int’l, 766 F.2d 788, 796 (3d Cir. 1985). See also Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984) (risk of uncertainty may exist in awarding future damages but it is not “so great as to preclude automatically front pay in every case”); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168-69 (S.D.N.Y. 1983) (future damages should be awarded in appropriate cases; the amount of the award depends on a variety of factors, including the availability of alternate employment opportunities, employee’s life expectancy, and present value tables).}
right to front pay damages in lieu of reinstatement. The better reasoning, however, holds that prospective damage awards should not be so foreclosed, particularly if a climate of hostility in the workplace would make reinstatement undesirable or unwarranted.

When appropriate, an award of front pay is typically a lump sum award calculated from the date of judgment to age seventy or to normal retirement age adjusted to reflect potential earnings in mitigation of damages, and discounted to present value. Unlike back pay, front pay is not mandatory, even though reinstatement may be unavailable or inappropriate, but lies within the district court's discretion. Therefore, "[b]ecause 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."

Although front pay results in a monetary award, it is a form of equitable rather than legal relief and should be determined by the

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228. See Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100-01 & n.8 (8th Cir. 1982) ("[A] district court generally will assume, absent evidence to the contrary, that the illegally discharged employee would have continued working for the employer until he or she reached normal retirement age."); see, e.g., Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984); Naton v. Bank of Cal., 649 F.2d 691, 694 (9th Cir. 1981); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).
231. See supra note 37 and accompanying text.
232. Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984) (award of front pay governed by sound discretion of court and may not be appropriate in all cases, but failure to award under proper circumstances "might be an abuse of discretion").
233. Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985). See also Cancellier v. Federated Dept Stores, 672 F.2d 1312, 1319 (9th Cir.) ("availability of a substantial liquidated damages award may be a proper consideration in denying additional damages in lieu of reinstatement"), cert. denied, 459 U.S. 859 (1982); Loeb v. Textron, Inc., 600 F.2d 1003, 1023 n.35 (1st Cir. 1979) ("[W]here the value of reinstatement is highly speculative, the availability of a substantial liquidated damages award under the ADEA may be a proper consideration in denying additional damages in lieu of reinstatement."). But see Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 280 (8th Cir. 1983) ("[L]iquidated damages are not intended to take the place of equitable relief.").
court rather than the jury.\textsuperscript{234} Because front pay is an alternative equitable remedy to reinstatement, the court will consider an award of front pay or other monetary damages only if it concludes that reinstatement is inappropriate.\textsuperscript{235}

The Fourth Circuit has yet to rule squarely on the availability of front pay as a remedy for an ADEA violation,\textsuperscript{236} but the United States District Court for the District of Maryland has addressed the issue in several reported cases decided from 1977 to 1983. In each instance the district judge held that front pay is not authorized by the ADEA, despite the broad remedial language of the statute authorizing "such legal or equitable relief as may be appropriate."\textsuperscript{237}

All of the Maryland District Court's subsequent decisions on front pay have cited and relied on Judge Joseph H. Young's decision in Covey v. Robert A. Johnston Co.\textsuperscript{238} In reaching his conclusion that front pay is not authorized by the ADEA, the district judge held that the "legal or equitable relief" provision of the ADEA could not encompass "front pay," even though the ADEA authorizes "such legal or equitable relief as may be appropriate."
pay is not available under the Act, Judge Young relied heavily on dicta in *Monroe v. Penn-Dixie Cement Corp.*,\(^{239}\) noting in his opinion that "existing law on the question is not extensive, but it is uniformly contrary to plaintiff's position."\(^{240}\) Writing in 1977, Judge Young observed that "there is no authority supporting [front pay] awards."\(^{241}\)

The line of Maryland District Court opinions rejecting front pay is out of step with the developing trend of circuit court holdings to the contrary. Six circuits addressed the issue in 1984 and 1985, all after the most recent front pay decision of the Maryland District Court, and each has expressly authorized front pay as an appropriate remedy in lieu of reinstatement.\(^{242}\) Contrary to Judge Young's observation in 1977, there is now substantial authority supporting front pay awards.\(^{243}\)

Language in the Fourth Circuit's 1982 decision in *Cline v. Roadway Express, Inc.*\(^{244}\) can be read to suggest a willingness to approve front pay when the issue is presented. The court specifically approved the district court's "opting for reinstatement as an appropriate remedy."\(^{245}\) In so doing, however, the court seemed to acknowledge that front pay was among "the broad equitable powers conferred by 29 U.S.C. § 626(b)" when it pointed to "the difficulties of fashioning an appropriate monetary award if reinstatement were not ordered."\(^{246}\) And in its recent opinion in *Taylor v. Home Insurance Co.*,\(^{247}\) although the Fourth Circuit did not discuss front pay as an issue, it affirmed the district court's decree that included front pay awards.

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240. 19 Fair Empl. Prac. Cas. (BNA) at 1191.
241. Id. at 1192 (emphasis in original).
242. See supra notes 203-205 and 208-209.
244. 689 F.2d 481 (4th Cir. 1982).
245. Id. at 489.
246. Id. In an earlier case, the Fourth Circuit noted that should the district court find it necessary to revise the portion of its judgment relating to reinstatement, "it may then consider granting substitute equitable relief." Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1115 (4th Cir.), cert. denied, 454 U.S. 860 (1981).
247. 777 F.2d 849 (4th Cir. 1985).
pay as an element of equitable relief. Unless the Supreme Court rules to the contrary, therefore, it seems likely that the Fourth Circuit, when the issue is presented for decision, will join the eight circuits that have so ruled and will support the applicability of front pay awards in ADEA cases.

C. Prejudgment Interest

As equitable relief, a court may grant a victorious ADEA plaintiff prejudgment interest pursuant to the FLSA remedies incorporated into the ADEA and the broad equitable powers conferred on the courts by 29 U.S.C. § 626(c). Most courts hold that the award of prejudgment interest is within the trial court’s discretion.

An award of prejudgment interest has been held necessary to make employees whole, at least in the absence of liquidated damages, by compensating them for the loss of use of money during the period payments were withheld. Following the practice under the FLSA, most courts do not allow prejudgment interest when liquidated damages are awarded. The Ninth Circuit, based

248. Id. at 859-60.

249. Judge Norman H. Ramsey opined to the contrary in 1983 in MacGill v. Johns Hopkins Univ., 33 Fair Empl. Prac. Cas. (BNA) 1254 (D. Md. 1983), albeit without the benefit of seeing the trend develop during the last three years. He observed in that case that “this Court concludes that were the issue presented to the Fourth Circuit, it would hold that front pay is not recoverable in an action brought under the ADEA.” Id. at 1259.

250. Cline v. Roadway Express, Inc., 689 F.2d 481, 489 (4th Cir. 1982); Kelly v. American Standard, Inc., 640 F.2d 974, 982-83 & n.13 (9th Cir. 1981). But see Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (suggesting that plaintiffs are barred from seeking prejudgment interest from the court if they had not requested it from the jury).

251. O’Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1552 (11th Cir. 1984); Cline v. Roadway Express, Inc., 689 F.2d 481, 489 (4th Cir. 1982); Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162 (7th Cir. 1981). See also Heiar v. Crawford County, Wis., 746 F.2d 1190, 1201-03 (7th Cir. 1984) (prejudgment interest not awarded; case remanded because trial judge “has not yet adequately exercised his discretion”), cert. denied, 105 S. Ct. 3500 (1985); Kolb v. Goldring, Inc., 694 F.2d 869, 875 n.6 (1st Cir. 1982); cf. Kelly v. American Standard, Inc., 640 F.2d 974, 982 (9th Cir. 1981) (employee “should be compensated”; 6% rate applied in accordance with state statute and agreement of parties).


upon its view that liquidated damages have a punitive purpose and thus serve a function different from prejudgment interest,\textsuperscript{255} permits prejudgment interest even when liquidated damages are also awarded.\textsuperscript{256} For the majority of courts, however, the make-whole purpose of the Act is deemed to be satisfied by liquidated damages doubling the plaintiff’s back pay damages, and prejudgment interest on the amount awarded as back pay is viewed as giving the plaintiff a recovery in excess of that which the Act’s purpose requires.\textsuperscript{257}

### D. Pension Rights

Compensation for the loss of pension benefits resulting from termination of an employee has been treated variously as legal damages or as equitable relief, and sometimes as both.\textsuperscript{258} The treatment may depend upon the facts of the particular case.\textsuperscript{259} If the issue involved is a monetary claim for lost pension benefits, in the

\textsuperscript{255} See supra note 129.


\textsuperscript{257} An award of both prejudgment interest and liquidated damages has been characterized as “double recovery.” O’Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1552 (11th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982). In Gibson, however, the Eighth Circuit suggested that “exceptional circumstances” might entitle the successful plaintiff to an award of both, id. at 1102, noting particularly that prejudgment interest would be appropriate “if the liquidated damages given are less than the interest that would have been due from the date the claim for back pay accrued.” Id. at 1102 n.9. See also Heiar v. Crawford County, Wis., 746 F.2d 1190, 1202 (7th Cir. 1984) (“[I]f the judge can award less than double damages in a case of willful violation . . . , he can award prejudgment interest as well in such a case, provided that the total award does not exceed double damages.”), cert. denied, 105 S. Ct. 3500 (1985).

\textsuperscript{258} See supra notes 64-69 and accompanying text.

\textsuperscript{259} In Quinn v. Bowmar Publishing Co., 445 F. Supp. 780, 788-89 (D. Md. 1978), for example, Judge Joseph H. Young was asked to rule on a motion to strike the plaintiff’s demand for jury trial. He had to determine, in the context of that case, which of the plaintiff’s claims were for legal damages and triable by a jury and which were for equitable relief and thus to be determined by the court. In considering the plaintiff’s claim for restoration of pension rights, Judge Young distinguished Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); and Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977), cases in which the plaintiff demanded monetary damages for lost benefits, including pension benefits, and in which a pension claim was treated as legal damages. “The plaintiff in this case requests the non-monetary and non-legal relief of restoration of his pension status prior to his discharge, an equitable remedy for which he is not entitled to a jury trial.” 445 F. Supp. at 789.
sense that claims for other lost fringe benefits are monetary claims, then it may be treated as a legal claim triable to the jury. If the claim is for restoration of pension rights or pension status, or for adjustment of a pension plan, the claim is equitable in nature and should be resolved by the court. The exact nature of the pension claim and whether the claim is a jury issue are matters that ought to be addressed as soon as possible after the case is at issue and resolved certainly no later than during the pretrial conference. Then, to the extent that issues relating to pension rights are not decided by the jury's award of back pay, the court should consider them during the equitable phase of the case.

Most commonly, the court might order that a pension plan payment be made by the employer to raise the employee’s “pension interest to the level it would have reached absent discrimination.” The adjustment may be relatively simple and straightforward if the terminated employee has not yet begun to receive benefits from the employer’s pension plan. Matters become more complicated,


261. See, e.g., Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1449 (11th Cir.), cert. denied, 106 S. Ct. 525 (1985); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 279 n.2 (8th Cir. 1983); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 n.15 (6th Cir. 1983); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097, 1099 & n.5 (8th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979); cf. Cleverly v. Western Elec. Co., 594 F.2d 638, 640 (8th Cir. 1979) (claim for lost pension benefits treated as equitable issue; trial court awarded “retroactive reinstatement” for approximately 18 months to permit vesting of employee’s pension rights).


263. See, e.g., Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1449 (11th Cir.) (affirming the district court’s order of reinstatement, which directed the employer to restore to the employee all pension benefits to which he would have been entitled if he had not been terminated), cert. denied, 106 S. Ct. 525 (1985); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 n.15 (6th Cir. 1983); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097, 1099 & n.5 (8th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wis. 1978).
however, if those benefits have begun being paid by the time the case comes to trial. Then, the jury's back pay award may have to be offset by the amount of benefits received, and the court might also require that the plan be adjusted for the future. The equitable adjustment might differ depending upon the type of plan, and upon whether the court orders the employee reinstated and whether the employee's rights in the plan had vested at the time of the discriminatory termination.

E. Injunctive Relief

If appropriate, injunctive relief is available as an ADEA

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264. See supra notes 115-117 and accompanying text. See also Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86-87 (2d Cir. 1983) (district court properly offset that portion of lump sum pension payment that represented difference between amount employee in fact received at age 63 and lesser amount he would have received at age 65); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 756 (7th Cir.) (not abuse of discretion to deduct retirement pension benefits), cert. denied, 464 U.S. 992 (1983). But see McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 217-18 (3d Cir. 1984) (improper for a court to permit pension plan benefits to be deducted from an ADEA back pay award), vacated and remanded on other grounds, 105 S. Ct. 1159 (1985).


266. See, e.g., Geller v. Markham, 635 F.2d 1027, 1036 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979); Cleverly v. Western Elec. Co., 594 F.2d 638, 640 (8th Cir. 1979); Merkel v. Scovill, Inc., 570 F. Supp. 141, 145 (S.D. Ohio 1983), rev'd on other grounds, 781 F.2d 174 (6th Cir. 1986). When the employee seeks reinstatement, an equitable remedy, it is "particularly appropriate" to characterize as an equitable issue the resolution of the employee's pension and profit sharing benefit status as part of the reinstatement request. Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 279 n.2 (8th Cir. 1983) (citing Quinn v. Bowmar Publishing Co., 445 F. Supp. 780, 789 (D. Md. 1978)). If reinstatement is inappropriate and front pay relief is awarded, the court may have to consider pension rights and benefits as part of the front pay award. See, e.g., EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1171, 1173 (10th Cir.), cert. denied, 106 S. Ct. 312 (1985); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979).

267. Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 (6th Cir. 1983) (employee not entitled to pension benefits because not vested at time of discharge); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (even though vesting requirements not met, "some pension award may still be appropriate"); court observed that this is "a matter of some technicality"). In cases in which the employee's pension rights were not vested at the time of discharge, some courts have ordered payment into the plan sufficient to vest the employee's pension, e.g., Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1099 n.5 (8th Cir. 1982); or have granted "retroactive reinstatement" from the date of discharge until the date on which pension rights would have vested, e.g., Cleverly v. Western Elec. Co., 450 F. Supp. 507, 511 (W.D. Mo. 1978), aff'd, 594 F.2d 638 (8th Cir. 1979); Bishop v. Jelleff Assocs., 398 F. Supp. 579, 594-96 (D.D.C. 1974).
remedy. Authority may be found in the Act's general statement permitting a court to grant such "equitable relief as may be appropriate to effectuate" its purposes. Although other types of equitable relief are occasionally characterized as "injunctive," such as when an employer is ordered to make payments of amounts owing or to reinstate an employee, individual employees who sue to remedy the termination of their employment because of age discrimination rarely seek injunctive relief in its stricter sense. Somewhat more common are suits seeking "class-wide" injunctive relief, or suits brought by the Secretary of Labor (now the EEOC) seeking,

268. Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1320 (9th Cir.), cert. denied, 459 U.S. 859 (1982).


271. In one such case, Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), cert. denied, 459 U.S. 859 (1982), the three plaintiffs sought unsuccessfully to enjoin future violations by their former employer. The trial judge found that the substantial judgment against the employer was sufficient to discourage it from practicing age discrimination in the future. The court of appeals held that the trial judge did not abuse his discretion in denying the injunction. Id. at 1320. In another case the plaintiff sought an injunction to prevent further discriminatory acts against him by the employer. Having denied reinstatement, however, the court denied injunctive relief as moot. Combes v. Griffin Television, Inc., 421 F. Supp. 841, 847 (W.D. Okla. 1976). In Taylor v. Home Ins. Co., 777 F.2d 849, 859 (4th Cir. 1985), the plaintiff sought to enjoin his employer "from engaging in unlawful practices and from continuing other unlawful practices against him." The appellate court never mentioned whether any such injunction was included in the district court's award of equitable relief, which it affirmed. Id. at 859-60.

272. See, e.g., Criswell v. Western Airlines, Inc., 709 F.2d 544, 558 (9th Cir. 1983) (holding that "the same standards for class-wide relief should be applied in ADEA cases as are applicable under Title VII"), aff'd, 105 S. Ct. 2743 (1985); Rodriguez v. Taylor, 569 F.2d 1231, 1235 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733-35 (5th Cir. 1977).

273. On July 1, 1979, the enforcement responsibilities originally given by the ADEA to the Secretary of Labor were transferred to the EEOC by § 2 of the Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807, 92 Stat. 5781 (1978). See EEOC v. Sandia Corp., 639 F.2d
among other things, to enjoin future violations of the ADEA.\textsuperscript{274}

A preliminary injunction may issue to preserve the status quo and to prohibit threatened or existing violations of the ADEA if the plaintiff can show a likelihood of prevailing on the merits, if in the absence of such an injunction the plaintiff would suffer irreparable injury, and if the potential harm to the plaintiff outweighs that which would befall the defendant were the injunction to be granted.\textsuperscript{275}

Permanent injunctive relief granted under the ADEA has varied in character from broad prohibitions against continued unlawful private conduct to at least one instance in which a federal court has enjoined the enforcement of a discriminatory state statute. In general, however, the availability of injunctive relief in a particular case will depend upon the nature of the violation, the extent of the resulting injury, and the availability of other remedies. For example, in \textit{Hodgson v. First Federal Savings & Loan Association},\textsuperscript{276} a case in which the evidence disclosed a discriminatory hiring policy on the part of the employer, the Fifth Circuit held inadequate a district court’s injunction prohibiting future violations of the Act only with respect to the hiring of bank tellers and ordered the injunction broadened to

\begin{footnotesize}
\bibitem{274} See, e.g., \textit{Marshall v. Airpax Elecs., Inc.}, 595 F.2d 1043 (5th Cir. 1979); \textit{Hodgson v. Approved Personnel Serv., Inc.}, 529 F.2d 760, 764 (4th Cir. 1975); \textit{Hodgson v. First Fed. Sav. & Loan Ass’n}, 455 F.2d 818, 820-21, 825-27 (5th Cir. 1972).

\bibitem{275} Compare \textit{Farkas v. New York State Dep’t of Health}, 554 F. Supp. 24 (N.D.N.Y. 1982) (preliminary injunction granted because of showing of irreparable injury and prima facie showing of discriminatory treatment), \textit{aff’d mem.}, 767 F.2d 907 (2d Cir. 1985) and \textit{Cannistra v. FAA}, 24 Fair Empl. Prac. Cas. (BNA) 1621, 1622-24 (D.D.C. 1979) (preliminary injunction granted to employees who showed that age-related transfer of their divisions while awaiting trial would result in irreparable economic harm, while employer did not show that it would be injured if transfer were blocked) \textit{with EEOC v. City of Janesville}, 630 F.2d 1254, 1257-59 (7th Cir. 1980) (preliminary injunction reversed as abuse of discretion; court of appeals concluded plaintiff not likely to prevail on merits and irreparable injury not shown); \textit{Whittlesey v. Union Carbide Corp.}, 567 F. Supp. 1320, 1321 (S.D.N.Y. 1983) (preliminary injunction denied because no showing of irreparable injury, there being no proof that other employment was not available to plaintiff), \textit{aff’d}, 742 F.2d 724 (2d Cir. 1984); \textit{Stone v. Western Air Lines, Inc.}, 544 F. Supp. 33 (C.D. Cal. 1982) (although preliminary injunction granted as to one plaintiff, a second officer, it was denied as to eight captains because requested relief exceeded injury and balance of hardship did not tip in their favor), \textit{aff’d sub nom. Criswell v. Western Airlines, Inc.}, 709 F.2d 544 (9th Cir. 1983), \textit{aff’d}, 105 S. Ct. 2743 (1985) and \textit{EEOC v. City of Cleveland Heights}, 28 Fair Empl. Prac. Cas. (BNA) 367 (N.D. Ohio 1981) (upon showing of critical manpower shortage, court refused to restrain city from giving police entry examination, even though it had been improperly advertised to exclude persons protected by ADEA).

\bibitem{276} 455 F.2d 818 (5th Cir. 1972).
\end{footnotesize}
cover all categories of jobs.277 In such a situation, "courts should not be loathe to issue injunctions of general applicability."278 The Fourth Circuit took similar measures in Hodgson v. Approved Personnel Service, Inc.,279 when it held that the district court should have granted broad injunctive relief against an employment agency that had advertised in violation of the Act, in light of the agency's repeated violations, its repeated failure to fulfill promises of compliance, and its refusal to discontinue use of the prohibited advertisements until after suit had been filed.280 Likewise, in Criswell v. Western Airlines, Inc.,281 the Ninth Circuit affirmed a district court's "system-wide injunctive relief" based upon a finding that "clear and willful violations" of the ADEA had resulted from the defendant company's policy.282 And in EEOC v. Wyoming Retirement System,283 the Tenth Circuit affirmed the judgment of a district court that included a permanent injunction preventing the State of Wyoming from enforcing a statute that discriminated against protected individuals on the basis of age.284

Unless a pattern or practice of ADEA violations has been shown, however, it is unlikely that broad injunctive relief will be appropriate. For example, the Fifth Circuit ordered a company-wide injunction modified on remand in Marshall v. Goodyear Tire & Rubber Co.285 because the violation had been committed by only one store manager and had not resulted from a discriminatory company policy.286

F. Attorneys' Fees and Costs

The ADEA has incorporated by reference section 16(b) of the FLSA, which provides, in part, that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and

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277. Id. at 825-27.
278. Id. at 826. The court noted that "an injunction in this type of case is not a burdensome thing; it simply requires the employer to obey the law." Id.
279. 529 F.2d 760 (4th Cir. 1975).
280. Id. at 762-64.
281. 709 F.2d 544 (9th Cir. 1983), aff'd, 105 S. Ct. 2743 (1985).
282. Id. at 558.
283. 771 F.2d 1425 (10th Cir. 1985).
284. Id. at 1427-28, 1432.
285. 554 F.2d 730 (5th Cir. 1977).
286. Id. at 735. The court observed that "injunctive relief is a drastic remedy, not to be applied as a matter of course." Id. at 733. See also Marshall v. Airpax Elecs., Inc., 595 F.2d 1043, 1045 (5th Cir. 1979) (upholding district court's determination that injunctive relief was not needed when only two ADEA violations had been disclosed).
costs of the action." This language has been interpreted as making mandatory an award of attorneys' fees to the plaintiff who prevails at trial, even if that plaintiff is represented by a publicly funded legal services organization. The amount of fees awarded, however, is subject to the trial court's discretion.

Rarely does a trial court refuse to award attorneys' fees. Issues frequently arise, however, with respect to the criteria to be employed in arriving at an award of fees, claims of excessiveness or


291. In one such case, the trial court denied attorneys' fees, concluding, erroneously, that the decision whether to award any fee at all was within its discretion. The Second Circuit remanded for determination of a reasonable fee. Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86-87 (2d Cir. 1983).

292. Courts have considered such matters as the results obtained, see, e.g., Frith v. Eastern Air Lines, Inc., 611 F.2d 950, 951 (4th Cir. 1979); Cleverly v. Western Elec. Co., 594 F.2d 638, 642 (8th Cir. 1979); the claims on which the plaintiff prevailed, see, e.g., Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 162-65 (7th Cir. 1981); the appropriateness of an hourly rate, see, e.g., Rodriguez v. Taylor, 569 F.2d 1231, 1247-50 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); whether the time spent was reasonably and necessarily required, see, e.g., Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1171 (S.D.N.Y. 1983) (noting that "one may not indulge in the luxurious practice of law at the expense of the other side"); whether fees may be awarded in accordance with, or in excess of, the fee agreement between the plaintiff and his or her attorneys, see, e.g., Cleverly v. Western Elec. Co., 594 F.2d 638, 642, 643 (8th Cir. 1979) (holding that court is not bound to limit award to amount provided in contingent fee arrangement, particularly when considering value of pension rights granted in addition to amount of jury's award); Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696, 702 (S.D.N.Y. 1980) (holding that it was appropriate to award fees in accordance with the agreement); and the appropriateness of an upward adjustment of the "lodestar" amount—i.e., the figure determined by multiplying the reasonable number of hours by a reasonable hourly
inadequacy of fees,\textsuperscript{293} and even the timeliness of the application for fees.\textsuperscript{294}

Attorneys' fees may also be awarded for legal services rendered to a prevailing plaintiff on appeal.\textsuperscript{295} In contrast to attorneys' fees at trial, to which the prevailing plaintiff is entitled, an award of attorneys' fees on appeal is said to be discretionary.\textsuperscript{296} Such awards may rate—to reflect such factors as contingent-fee risk, difficulty of issues, quality of representation, etc., see, e.g., Wildman v. Lerner Stores Corp., 771 F.2d 605, 609-14 (1st Cir. 1985) (remanding for reconsideration of upward adjustment); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923-24 (6th Cir. 1984) (remanding for reconsideration of upward adjustment, but disallowing additional fees for contingency factor and quality of representation); Wehr v. Burroughs Corp., 619 F.2d 276, 284 (3d Cir. 1980) (affirming trial court's refusal to augment the lodestar by a multiplier).

When the result on appeal is modified, thus changing the premises on which the district court originally awarded fees, the district court will generally be invited on remand to reexamine its award of fees. See, e.g., Blim v. Western Elec. Co., 731 F.2d 1473, 1480 (10th Cir.), cert. denied sub nom. AT&T Technologies, Inc. v. Blim, 105 S. Ct. 235 (1984); Frith v. Eastern Air Lines, Inc., 611 F.2d 950, 951 (4th Cir. 1979); Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 842 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).


\textsuperscript{294} See, e.g., O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1555 (11th Cir. 1984); cf. Leftwich v. Harris-Stowe State College, 702 F.2d 686, 694-95 (8th Cir. 1983).


\textsuperscript{296} See, e.g., O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1553 (11th Cir. 1984); Cancellier v. Federated Dept Stores, 672 F.2d 1312, 1320 (9th Cir.), cert. denied, 459 U.S. 859 (1982); 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).
reflect successful defense of the trial verdict, successful prosecution of the appeal, or the mastery of complex issues on appeal. The appellate court may make its own assessment of the amount of fees to be awarded on appeal. More commonly, however, the district court is instructed on remand to determine and award a reasonable fee for appellate legal services.

Questions have occasionally arisen as to whether an ADEA plaintiff is entitled to an award of attorneys' fees for legal services performed at the administrative level. In 1981, in New York Gaslight Club, Inc. v. Carey, the Supreme Court decided that Title VII authorized an award of attorneys' fees for work done on behalf of the prevailing complainant in state administrative proceedings. In Kennedy v. Whitehurst, however, the Court of Appeals for the District of Columbia Circuit held that a federal employee who secures relief solely through administrative processes is not entitled...
to an award of attorneys' fees and costs under ADEA.\textsuperscript{306} In reaching that result, the court relied upon "the vague authorizing language" of section 15(c) of the ADEA,\textsuperscript{307} "the more circumscribed role of administrative proceedings under the ADEA enforcement scheme,"\textsuperscript{308} and distinctions between the statutory language of Title VII and that of the ADEA.\textsuperscript{309} By contrast, district courts have reached differing decisions on whether a private employee is entitled to attorneys' fees for representation before the EEOC or a state administrative agency.\textsuperscript{310}

In addition to attorneys' fees, costs of suit may be awarded to successful ADEA plaintiffs.\textsuperscript{311} However, despite occasional efforts to expand the scope of costs to include all "out-of-pocket expenses," courts have limited recoverable costs to those permitted by 28 U.S.C. § 1920,\textsuperscript{312} the federal statute generally governing the

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\item federal employee. Smith v. Office of Personnel Management, 778 F.2d 258, 263 (5th Cir. 1985).
\item 306. Kennedy v. Whitehurst, 690 F.2d 951, 966 (D.C. Cir. 1982). Despite some differences between the enforcement provisions pertaining to federal and private employees, a prevailing federal ADEA plaintiff has been held entitled under § 15(c) of the ADEA to an award of attorneys' fees and costs for successful litigation services on the ground that such an award "effectuates the purposes" of the ADEA. DeFries v. Haarhues, 488 F. Supp. 1037, 1044-45 (C.D. Ill. 1980).
\item 307. 690 F.2d at 962, 965.
\item 308. Id. at 965. The court pointed out that Title VII complainants must exhaust certain administrative remedies as a precondition to filing an action in federal court. For ADEA complainants, by contrast, pursuit of administrative remedies is optional and not a mandatory prerequisite to filing suit. Id. at 964. The court concluded, therefore, that administrative proceedings under the ADEA are not a "pervasive and integral part of the overall scheme of enforcement," and, thus, because they are optional, could not "effectuate the purposes" of the ADEA in any significant way, as required for relief to be granted under § 15(c), 29 U.S.C. § 633a(c) (1982). Id. at 962, 964 (quoting Kennedy v. Whitehurst, 509 F. Supp. 226, 231 (D.D.C. 1981)).
\item 309. Id. at 957, 962, 965. The court observed that "while Title VII permits fee awards in any 'action or proceeding,' the FLSA language contained in the ADEA authorizes awards only to a 'plaintiff or plaintiffs' who secure a 'judgment' in an 'action.'" Id. at 957. In a note the court invited comparison of § 706(k) of Title VII (42 U.S.C. § 2000e-5(k) (1982)) with § 16(b) of the FLSA (29 U.S.C. § 216(b) (1982)). Id. at 957 n.12.
\item 311. 29 U.S.C. § 216(b) (1982), incorporated by reference into the ADEA by 29 U.S.C. § 626(b) (1982), provides in pertinent part that the court shall, "in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."
\item 312. The statute provides:
recovery of costs.313

Because of the FLSA language incorporated by reference into the ADEA,314 courts have held that the ADEA does not authorize the award of attorneys' fees to prevailing defendants.315 Even so, costs have been awarded to a defendant as the prevailing party.316

IV. Conclusion

Based upon the discussion above, the proper procedure when a jury trial is prayed in ADEA cases is as follows:

A. Liability, Back Pay, Willfulness

The issue of liability and the question of damages for back pay and lost benefits should be tried to the jury. If the jury determines that the plaintiff was discriminated against because of his or her age, it should award an appropriate amount of damages for back pay and lost benefits, less deductions for interim earnings and other proper set offs, from the date of the discriminatory act through trial, unless

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.


313. See, e.g., Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696, 702-03 (S.D.N.Y. 1980); Wehr v. Burroughs Corp., 477 F. Supp. 1012, 1021-22 & n.8 (E.D. Pa. 1979) (plaintiff's attorney argued that "costs" is not so limited, but conceded that "he could find no authority for his position"), aff'd, 619 F.2d 276 (3d Cir. 1980). The cost of computer-aided legal research, denied by the trial court in Wehr, was deemed recoverable, if reasonable, by the Third Circuit. Wehr v. Burroughs Corp., 619 F.2d 276, 285 (3d Cir. 1980). The Eighth Circuit, on the other hand, reversed the inclusion of such an item in a district judge's award of costs, calling it a "component of attorneys' fees," as is other legal research. Leftwich v. Harris-Stowe State College, 702 F.2d 686, 695 (8th Cir. 1983).

314. See supra note 311.


316. Matthews v. Allis-Chalmers, 769 F.2d 1215, 1219 (7th Cir. 1985) (pursuant to Fed. R. Civ. P. 54(d)).
Thus, for example, if the jury determines from the evidence that the plaintiff's employment would have been terminated before the date of trial for a nondiscriminatory reason, then it may calculate back pay only through that earlier date. Similarly, if the jury determines from the evidence that the plaintiff rejected a bona fide offer of reinstatement, then it may calculate back pay only through the date upon which the offer was made. Such issues are best presented to the jury by special interrogatory.

As part of the back pay damages, the jury should consider any raises or bonuses that the plaintiff might reasonably have anticipated, and it should include other adequately proven lost monetary benefits. In addition, the jury should consider any issues relating to the plaintiff's duty to mitigate damages, and, to the extent that it finds that the defendant has carried its burden of showing that the plaintiff failed to mitigate, it may reduce the back pay award accordingly.

If there are facts that justify the finding, the jury should also determine whether the defendant's conduct was willful. This issue should be submitted to the jury by special interrogatory to enable the court to assess liquidated damages as part of the plaintiff's overall relief.

B. Equitable Relief

If the jury decides for the plaintiff on liability, the court should conduct a subsequent hearing to determine equitable relief.

If the jury finds by special interrogatory that the defendant's conduct was willful, the court should assess the additional equal amount in liquidated damages, thereby doubling the damages award. If the jury does not find the defendant's conduct to have been willful, the court should consider assessing prejudgment interest on the jury's award of damages.

Unless the issue is foreclosed by the jury's verdict, the court should consider whether reinstatement of the plaintiff to the same or a substantially similar job is appropriate. If the court grants reinstatement, provisions should be made to adjust the plaintiff's pension rights accordingly.

If reinstatement is not an appropriate remedy, the court should

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317. For example, a finding that the plaintiff would have been terminated before trial for a nondiscriminatory reason effectively forecloses the reinstatement issue.
determine and award monetary damages in lieu of reinstatement as front pay in order to compensate for lost wages from the date of trial through the date on which the plaintiff might have been expected to retire and to compensate for the pension benefits that the plaintiff will have lost by not having been permitted to work until retirement.

Finally, after judgment is entered, if the plaintiff prevails, the court must award costs and a reasonable amount as attorneys' fees.