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FUTURE DAMAGES IN ADEA CASES

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I. INTRODUCTION

The purpose of the Age Discrimination in Employment Act of 1967[1] (ADEA) is to promote employment of older persons based on their ability rather than age and prohibit arbitrary age discrimination in employment.[2] The ADEA makes it unlawful for an employer to refuse to hire, discharge, or discriminate against an employee with respect to conditions of employment because of the employee's age.[3] Those who violate the ADEA are liable for a variety of damages set forth in both the ADEA[4] and the Fair Labor Standards Act (FLSA).[5] The statutory remedial framework is complex and has spawned substantial litigation. This article focuses on the recent ADEA developments involving the availability of relief for damages continuing beyond the date of trial.

"The purpose of the ADEA is to make persons whole for injuries suffered as a result of unlawful employment discrimination."[6] This elementary "make-whole" proposition has proved to be beguilingly deceptive in its application to individual ADEA cases.[7] One cause for difficulty in the application of "make-whole" relief is rooted in the difficult evidentiary problems of proving economic damage caused by the loss of employment. Although these problems with respect to damages occurring exist before[8] and after trial, they become most apparent when the plaintiff attempts to demonstrate prospective damage. They can be overcome, however, and determina-

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1. 29 U.S.C. §§ 621-34 (1982).
2. 29 U.S.C. § 621(b) (1982).
3. 29 U.S.C. § 623(a) (1982).
4. 29 U.S.C. § 626(b) (1982).
5. 29 U.S.C. §§ 201-19 (1982).
6. Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1097 (8th Cir. 1982), *cited in* Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922 (6th Cir. 1984).
7. *See* Comment, *Front Pay As a Remedy Under The Age Discrimination In Employment Act of 1967*, 19 U.S.F.L. REV. 187 (1984).
8. *See* Special Project, *Back Pay In Employment Discrimination Cases*, 35 VAND. L. REV. 893 (1982).

tions of future wage loss are common in personal injury, worker's compensation, and Title VII litigation.[9] A secondary cause for confusion lies in the ADEA's provision of liquidated (doubled) damages for *willful* violations of the Act.[10] These are "intended to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.' "[11] The interrelationship between awards of liquidated damages and future damages remains problematic.[12] However, if future damages are capable of proof, they ought not be offset by liquidated damages.

This article will review the statutory and judicial authority which allows, even requires in appropriate circumstances, an award of front pay. It will focus on the judicially imposed requirement that an ADEA plaintiff must be able to show that in order to recover front pay reinstatement is not equitably appropriate and that the damage stemming from the illegal act is reasonably ascertainable both in amount and in time beyond date of trial in order to recover front pay. Finally, it recommends a policy that the determination of entitlement to front pay and the assessment of its amount ought to be distinct from the allowance of liquidated damages.

II. THE STATUTORY FRAMEWORK

The remedies available under ADEA are statutorily provided:

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9. Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983): "Courts and juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases." *See, e.g.*, Balczewski v. DILHR, 76 Wis. 2d 487, 251 N.W.2d 794 (1977) (proof of future wage loss following a nonscheduled injury under Wisconsin worker's compensation law); *see also* Note, *Front Pay — Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211 (1976).

10. 29 U.S.C. § 626(b) (1982).

11. H.R. REP. NO. 950, 95th Cong., 2d Sess., 13-14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528-35 (citing Overnight Transp. Co. v. Missel, 316 U.S. 572, 583-84 (1942)).

12. *Compare* Davis v. Combustion Eng'g, Inc., 742 F.2d 916 (6th Cir. 1984) (allowing both liquidated and future damages) *with* Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (denying reinstatement, holding "front pay" available under ADEA, but affirming denial of "front pay" on grounds that plaintiff recovered liquidated damages under ADEA and similar damages under various Puerto Rican statutes).

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section 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 action under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[13]

Equitable relief is also countenanced:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.[14]

However, the Seventh Circuit rejected the above as a source of remedial power since in its view the "sole effect" of the above-cited section is "to give individuals the ability to take advantage of the relief conferred in § 626(b)."[15]

A brief synopsis of the provisions of the FLSA which are expressly incorporated within the ADEA is in order. Section 211(b) provides for federal and state cooperation in the enforcement of the FLSA.[16] Section 216 contains the heart of the FLSA remedial authority.[17] Its principal components rel-

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13. 29 U.S.C. § 626(b) (1982) (emphasis in original).
14. 29 U.S.C. § 626(c) (1982) (emphasis in original).
15. Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686 (7th Cir. 1982).
16. 29 U.S.C. § 211(b) (1982).
17. In relevant part, 29 U.S.C. § 216 (1982) provides:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the

evant to this article are as follows: (1) Any employer who violates the minimum wage or overtime provisions is liable for

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case may be, and additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. . . . The 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 costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be recovered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the com-

such amounts owing plus an additional equal amount for liquidated damages; (2) any employer who engages in retaliatory discrimination or discharge is liable for such legal or equitable relief as may be appropriate to effectuate the purposes of § 215(a)(3), including *without limitation*, employment, reinstatement, promotion and the payment of wages lost and an additional equal amount in liquidated damages; and (3) the employer is liable for a prevailing plaintiff's reasonable attorney's fees and costs of the action.[18] Section 217 provides the district courts with the authority to issue injunctions in order to restrain violations of the FLSA.[19]

Since 1960, it has been well settled that the FLSA clothed the courts with the authority to "provide complete relief in light of the statutory purposes."[20] This includes orders of reimbursement and reinstatement.[21] Moreover, the FLSA was amended, effective January 1, 1978, to specifically authorize the courts to use appropriate equitable relief to remedy retaliatory discharge cases.[22] The statutory examples of equitable relief do not expressly include compensation in lieu of reinstatement; however, the amendment specifically provides that the examples are "without limitation" on the courts' powers.[23]

In *Lorillard v. Pons*,[24] the Court analyzed the interrelationship between the FLSA and ADEA. It noted that "[t]his . . . selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it

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plaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such an action.

18. 29 U.S.C. § 216 (1982).

19. Injunction Proceedings, 29 U.S.C. § 217 (1982).

20. Mitchell v. De Mario Jewelry, 361 U.S. 288, 292 (1960).

21. *Id. See also* Reeves v. International Tel. and Tel. Corp., 616 F.2d 1342, 1354 (5th Cir. 1982); Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir.1962).

22. Pub. L. No. 95-151 §§ 10(a) & (c) (1977).

23. Fair Labor Standards Amendments of 1977, 29 U.S.C. § 216(b) provides:

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, *including without limitation* employment, reinstatement, promotion and the payment of wages lost and an additional equal amount as liquidated damages.

Id. (emphasis added).

24. 434 U.S. 575 (1978).

intended to incorporate fully the remedies and procedures of the FLSA."[25] At the time the Court issued *Lorillard*, the FLSA specifically provided for a broad grant of equitable powers to the courts to remedy retaliatory discharge and discrimination. Presumably, this grant was incorporated fully within the ADEA and corresponds to the ADEA's own broad authorization of equitable relief.

III. JUDICIAL ANALYSIS REGARDING THE RIGHT TO FRONT PAY UNDER THE ADEA

A. Decisions Holding that ADEA Relief Encompasses Front Pay

The First, Second, Third, Sixth, and Eighth through Eleventh Circuits have held that front pay is available under the ADEA.[26] None of the circuit courts have held to the contrary. Most decisions rely upon the notion that the purpose of the ADEA is "to make victims whole."[27] This may be accomplished by reinstatement; when reinstatement is not possible or practical, then it is appropriate to grant damages in lieu thereof. In all cases, the "make-whole" purpose imputed to the ADEA is grounded upon the provision of 29 U.S.C. § 626(b) which provides that the court "shall have jurisdiction to grant such equitable relief as may be appropriate to effectuate the purposes of this chapter."[28]

In a comment characteristic of a broad view of the scope of the ADEA, the Tenth Circuit noted that "the ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending

25. *Id.* at 582. The ADEA modified the FLSA by specifically allowing plaintiffs, other than the Secretary of Labor, to initiate actions seeking equitable relief; the ADEA unlike the FLSA requires a showing of willfulness in order to recover liquidated damages, and the ADEA does not incorporate the FLSA provision of criminal penalties for violation of the Act.

26. *See, e.g.*, *Wildman*, 771 F.2d 605 (1st Cir. 1985); Maxfield v. Sinclair Int'l, 766 F.2d 788 (3d Cir. 1985); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166 (10th Cir. 1985); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435 (11th Cir. 1985); Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir. 1984); Davis v. Combustion Eng'g, Inc., 742 F.2d 916 (6th Cir. 1984); O'Donnel v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543 (11th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982); Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982).

27. *Davis*, 742 F.2d at 922.

28. 29 U.S.C. § 626(b) (1982).

age discrimination in employment."[29] More pointedly, the Second Circuit noted:

> Denial of reinstatement in those situations [when impractical or impossible], without an award of reasonable offsetting compensation would leave the plaintiff irreparably harmed in the future by the employer's discriminatory discharge, and would permit the defendant's liability for its unlawful action to end at the time of judgment. To prevent this injustice a reasonable monetary award of front pay is necessary as "equitable relief . . . appropiate to effectuate the purpose of [the Act]."[30]

In the quote that follows, the Tenth Circuit incorporated and specifically agreed with the reasoning of the trial court in *Koyen v. Consolidated Edison Company*:[31]

> The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an employee for the economic injuries sustained by him. The power so granted is sufficient to authorize an award of future loss of earnings in appropriate cases. To deny that authority would defeat a purpose of the act to make a victim of discrimination "whole" and to restore him to the economic position he would have occupied but for the unlawful act of his employer. To deny such authority would remove a deterrent force against future violations.[32]

The First Circuit, which had been cited by a number of other courts[33] and commentators[34] as opposed to the award of

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29. Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976) (per curiam), *aff'd by an equally divided court*, 434 U.S. 99 (1977).

30. *Whittlesey*, 742 F.2d at 728.

31. 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

32. *Prudential*, 763 F.2d at 1172 (citing Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983) (footnotes omitted)).

33. In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), the First Circuit reserved decision on this issue, as the trial court had not passed on it, but suggested that prospective awards of continuing payments or substantial awards based on life expectancy would be inappropriate. *Id.* at 1022-23. Then, in Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), the court stated in a footnote that "damages are 'settled' on the date of judgment and the plaintiff cannot then recover damages for future economic loss, or front pay, even though the injury continues." *Id.* at 874 n.4. This ambivalent footnote *dicta* was reviewed by a number of subsequent decisions including, for example, Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922 (6th Cir. 1984). However, in Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985), the court held that front pay was available under the ADEA if reinstatement was not possible or practicable, but it cautioned that since future damages are often speculative, the trial court should con-

front pay in ADEA cases, has recently held to the contrary. Adopting the court's analogy it "bit the bullet" and adopted the following rule: "Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has the discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages."[35]

B. Decisions Holding that Front Pay is Not Allowed Under the ADEA

Several district court decisions have held that front pay is not available under the ADEA.[36] Typically their analyses are controlled by a restrictive reading of the remedies provided under the FLSA. In *Helwig v. Suburban Chevrolet*,[37] the court commented that the monetary awards recoverable under the FLSA are explicitly stated, and there is not a general damages provision which provides for remedies such as front pay. In *Monroe v. Penn-Dixie Cement Corp.*,[38] the court concluded that reinstatement was the solitary form of equitable relief allowed. If the plaintiff did not seek or refused an offer of reinstatement, any claim to future benefits was forfeited. In *Foit v. Suburban Bancorp*,[39] the court noted that the inherently speculative nature of future damages rendered them inappropriate under any circumstances.

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sider the circumstances of the case, including the availability of liquidated damages. *Id.* at 616.

34. *See, e.g.*, Comment, *supra* note 7, at 197.

35. *Wildman*, 771 F.2d at 616.

36. *See, e.g.*, Helwig v. Suburban Chevrolet, 33 FAIR EMPL. PRAC. CAS. (BNA) 1261 (D. Md. 1983); Foit v. Suburban Bancorp, 549 F. Supp. 264 (D. Md. 1982); Jaffee v. Plough Broadcasting Co., 19 FAIR EMPL. PRAC. CAS. (BNA) 1194 (D. Md. 1979); Price v. Maryland Casualty Co., 391 F. Supp. 613 (S.D. Miss. 1975), *aff'd*, 561 F.2d 609 (5th Cir. 1977); Monroe v. Penn Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971).

37. 33 FAIR EMPL. PRAC. CAS. (BNA) 1261 (D. Md. 1983).

38. 335 F. Supp. 231 (N.D. Ga. 1971).

39. 549 F. Supp. 264 (D. Md. 1982).

IV. CIRCUMSTANCES UNDER WHICH REINSTATEMENT IS NOT PRACTICABLE OR POSSIBLE

Reinstatement is the preferred remedy and front pay may be available only when reinstatement is not possible or practical. Two courts have held that reinstatement should be denied only under "exceptional circumstances."[40] The preference for reinstatement follows the intention of Congress in creating the ADEA.

A stated purpose of the Act is "to *promote employment* of older persons based on their ability rather than age."[41] It is to insure that "older individuals who desire to work will not be denied employment opportunities solely on the basis of age."[42] The trial court must fashion equitable relief in light of a statute's intent and purpose and may deny equitable relief only if it does not frustrate the statute's intent.[43] Therefore, ordering reemployment of older employees is ordinarily preferred under the statute.

The Tenth Circuit comments that reinstatement also serves to protect the discharged employee and demonstrates the employer's good faith to other employees.[44] A court which chooses not to order reinstatement must explain why that choice furthers the purposes of the ADEA.[45] The preference of the plaintiff for front pay rather than reinstatement is not enough in and of itself to justify a denial of reinstatement.[46] Antagonism between the parties which occurs as a "natural bi-product [sic] of any litigation" is also not adequate.[47] An apparent unavailability of jobs is not a basis to deny reinstatement, at least when defendant's counsel has assured the court that the defendant would find comparable jobs

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40. *See* Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276 (8th Cir. 1983); Babb v. Sun Co., 562 F. Supp. 491 (D. Minn. 1983).

41. 29 U.S.C. § 621(b) (emphasis added).

42. H.R. REP. NO. 950, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504.

43. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

44. EEOC v. Sandia Corp., 639 F.2d 600, 628 (10th Cir. 1980) (citing Local 883 UAW v. NLRB, 300 F.2d 699, 703 (D.C. Cir. 1962), *cert. denied*, 82 S. Ct. 1258 (1962)).

45. Blim v. Western Elec. Co., 731 F.2d 1473 (10th Cir. 1984).

46. *Id.*

47. Taylor v. Teletype Corp., 648 F.2d 1129, 1139 (8th Cir. 1981), *cert. denied*, 454 U.S. 969 (1981).

for the plaintiffs as close as possible to the region in which they worked.[48]

However, intense animosity between the parties justifies denying reinstatement.[49] Although reinstatement may pose difficulty in any employment dispute, it is particularly problematic in age cases. The cases frequently involve senior employees in managerial, supervisory, or administrative roles whose duties call for personal judgment in sensitive matters ranging from personnel decisions to the commitment of the employer's resources. They are likely to have access to highly confidential business information. In each of these situations, a rupture of trust between the employee and the employer is likely to impair the relationship to the extent that the employee would be foreclosed from performing substantial elements of former job duties.

Although the line between "natural antagonism" and "intense animosity" may not always be clear, record testimony may well provide a clue to the distinction. The trial court in *Whittlesley v. Union Carbide*[50] found the animosity between the plaintiff, an attorney, and his employer, Union Carbide Corporation, to be so intense that reinstatement was impossible. The court found that Union Carbide had exhibited "such hostility and outrage"[51] against the plaintiff that he would have difficulty functioning again in Union Carbide's law department and that he would be "ostracized and excluded from the functions of giving counsel."[52] In *Cancellier v. Federated Department Stores*,[53] testimony by an officer of the defendant that a plaintiff was a "cancer", coupled with numerous attacks by the defendant on plaintiff's abilities, was enough to convince a court that the plaintiff and defendant could no longer "coexist in a business relationship that would be productive to the consumer, community or to the business itself."[54] Consequently, reinstatement was denied.

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48. *Babb*, 562 F. Supp. at 493.

49. *See, e.g.*, Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir. 1984).

50. *Id.*

51. *Id.* at 729.

52. *Id.*

53. 672 F.2d 1312 (9th Cir. 1982).

54. *Id.* at 1319-20.

The unavailability of work may justify denying reinstatement. In *Davis v. Combustion Engineering*,[55] the Sixth Circuit denied reinstatement where the plaintiff was fifty-nine years old at the time of trial and had less than six years to mandatory retirement.[56] The defendant had substantial reductions in work force and suffered from continuing business declines making plaintiff's termination prior to retirement probable. In *Gibson v. Mohawk Rubber Company*,[57] the Eighth Circuit ruled implicitly that reinstatement may be denied if the jury concluded that the plaintiff would not have been retained by the defendant as a consequence of a plant closing.

None of the courts have suggested that hostility or unavailability of work are the exclusive circumstances in which reinstatement would be inappropriate. A plaintiff who becomes disabled subsequent to being discharged and is physically unable to perform former duties obviously could not be reinstated. However, if the plaintiff would have been entitled to long term disability insurance benefits[58] or an augmented pension benefit, but for the termination, an award of future pay in such amounts would seem appropriate.[59] Likewise, a discharged employee who has relocated in order to mitigate damages, albeit at a lesser income, might fairly argue that reinstatement which would require moving again, would be inappropriate. A plaintiff whose work involved customer or client service resulting in personal allegiances might fairly argue that reinstatement would be inappropriate if those relationships have been severed and would be difficult to renew, particularly if income would be premised upon fees for services rendered.

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55. 742 F.2d 916 (6th Cir. 1984).

56. *Id.* at 917.

57. 695 F.2d 1093 (8th Cir. 1982).

58. The treatment of insurance benefits remains problematic. The Seventh Circuit, in Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161 (7th Cir. 1981), affirmed a trial court's decision to deny the plaintiff's claim for reimbursement of medical expenses which would have been covered by the defendant's group health insurance benefits since plaintiff had not purchased health insurance following the discharge. Presumably, if the plaintiff had purchased insurance, the court would have allowed recovery for the cost of the health insurance premiums paid by the plaintiff.

59. *See, e.g., Loeb*, 600 F.2d 1003, 1021 (1st Cir. 1979).

Moreover, a court exercising its equitable power of reinstatement must be cognizant of the potential unintended victims of an order of reinstatement. Reinstatement of a plaintiff to a prior position is likely to result in the "bumping" of an employee. Although it is convenient to suggest that the replacement employee reaped a windfall opportunity by virtue of the employer's illegal conduct, the suggestion is simplistic. Judgment in an ADEA case may well follow the discharge by three to four years. In the interim, subsequent personnel changes are probable. Alternative career opportunities may have been foregone. In such a case, reinstatement may place the cost of the defendant's illegal conduct upon other parties.

The decision to reinstate, although preferred under the ADEA, is one calling for the sound discretion[60] of the court and turns on the application of a full range of equitable principles. It should not be mechanically applied nor casually reviewed. An order which creates hardship, not only for the defendant, but also for the plaintiff and the plaintiff's co-employees, does not further the purposes of the ADEA, but instead will erode public confidence in the Act.

V. PROVING FUTURE DAMAGES

The inherently speculative nature of future damages has led some courts to conclude that they are unavailable *per se*.[61] On the other hand, proponents of front pay argue that "the mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.' "[62] Moreover, risks of speculation may be minimized in light of the plaintiff's obligation to mitigate damages. In addition, after computing the employee's work and life expectancy, the court may use the discount tables to determine the present value of future damages.[63]

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60. *Gibson*, 695 F.2d at 1101.

61. *See, e.g.*, Foit v. Suburban Bancorp, 549 F. Supp. 264, 267 (D. Md. 1982) (citing Covey v. Robert A. Johnston Co., 19 FAIR EMPL. PRAC. CAS. (BNA) 1188 (D. Md. 1977)).

62. Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983) (citing Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 265 (1946)).

63. *Prudential*, 763 F.2d 1166, 1173 (10th Cir. 1984).

In those cases in which future damages have been allowed, courts have calculated the amount by computing the probable income from the defendant between trial and retirement. This sum is reduced by outside income and the discount for a lump sum payment of a future stream of income. For example, the court awarded $60,107 as front pay in *Koyen v. Consolidated Edison Company*.[64] It determined that the plaintiff, who was sixty-eight years old at the time of the jury's verdict, was unlikely to be reemployed. It then calculated the income that plaintiff would have received for twenty-three months between the date of the verdict and the date of the plaintiff's seventieth birthday using his pre-termination salary rate.[65] Additionally, the court added an amount which the parties acknowledged reflected the value of benefits for this period. From this sum the court deducted the value of monthly pension benefits received. This sum was then discounted by what the court identified as the current rate of interest.

In *Maxfield v. Lerner Stores, Inc.*,[66] the jury applied a similar analysis to find that the plaintiff was entitled to $7,500 in future damages. The defendant argued to the trial court that it was error for the jury to determine future damages without the benefit of expert testimony to establish the plaintiff's economic value in the labor market and the appropriate discount rate. The argument failed, however, as the court noted that the plaintiff had agreed to a discount rate of ten percent. According to the court, this was far in excess of the "real interest rate" approved in *Jones & Laughlin Steel Corporation v. Pfeiffer*,[67] which is defined as the difference between the market interest rate and the inflation rate. The *Maxfield* court also noted that there was a great deal of record evidence on the plaintiff's earnings at the time of discharge, his replacement's earnings, and the conditions of the industry. Thus, there was

64. 560 F. Supp. 1161 (S.D.N.Y. 1983).

65. *Id.* at 1169. This figure represents $38,050 per year ($3,170 per month) or $72,910 for twenty-three months.

66. 36 FAIR EMPL. PRAC. CAS. (BNA) 87 (E.D. Pa. 1984).

67. 462 U.S. 523 (1983).

more than an adequate basis to uphold the jury's determination.[68]

Prospective entitlement to pension benefits presents additional complex issues. In *Loeb v. Textron*,[69] the First Circuit ruled that the defendant may not rely upon its own illegal act to deny a claim that plaintiff's pension rights, which had not vested prior to discharge, may be deemed vested for the purpose of computing damages. A secondary, but potentially more important issue, centers upon the value of the pension benefits if it is assumed that the plaintiff would have continued to work until normal retirement. Plaintiff's evidence in such matters is greatly aided by expert testimony. In *Ventura v. Federal Life Insurance Company*,[70] the plaintiff, who was fifty-six years old and had vested pension rights at the time of the pretrial motion, asserted a claim for substantially augmented pension benefits premised upon the assumption that but for the illegal discharge, he would have worked for the defendant until his sixty-second birthday. In support of this position, the plaintiff submitted an exhibit prepared by a professionally trained actuarial and employee benefit consultant. The court, holding that front pay was available under the ADEA,[71] denied the defendant's motion to exclude the evidence.

The importance of this issue is best appreciated in context of the terms of a defined benefit pension plan. These plans typically compute monthly pension benefits by multiplying a constant factor by the employee's number of years of credited service and by the employee's average monthly earnings during the highest years of employment. Any plaintiff who was fifty-six years of age at the time of discharge will be eligible for an increase of six years credit for service if it is assumed that the employee would have worked for the defendant until age sixty-two. Even assuming thirty years of credited service

68. *Maxfield*, 36 FAIR EMPL. PRAC. CAS. (BNA) at 91.

The trial court also applied Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) and McDowell v. Avtex Fibers, Inc., 740 F.2d 214 (3d Cir. 1984), to bar the jury from offsetting social security benefits from the damage award, but it allowed an offset of other pension benefits.

69. 600 F.2d 1003 (1st Cir. 1979).

70. 571 F. Supp. 48 (N.D. Ill. 1983).

71. The court noted that the issue was one of first impression in the Seventh Circuit. *Id.*

prior to discharge, this increase alone would augment lifetime pension benefits by twenty percent. Moreover, the plaintiff's earnings during the years immediately preceding retirement are most likely to be substantially larger than earnings preceding the discharge. The difference in the value of these earnings is significant since these benefits are to be paid for the life of the plaintiff.

VI. A SUGGESTION FOR BROAD CORRELATION OF ADEA DAMAGES

As a consequence of the piecemeal statutory expression of ADEA damages and the issue-by-issue judicial analysis of individual claims, the picture of the ADEA damages has become quite impressionistic. One must keep in mind the following two fundamental propositions: (1) The illegally discharged employee is to be made whole, which includes being returned as near as possible to the position the employee would have been in but for the defendant's illegal action, and (2) the courts have been provided with broad equitable powers to remedy age discrimination. In light of the above propositions, the following ought to be the minimum measure of the "make-whole" components of an award:

(1) Reimbursement for those actual damages accrued prior to trial which are capable of proof, including lost wages, benefits, and direct costs, less income which would not have been received but for the illegal discharge.
(2) Liquidation of the above in the event of a willful violation of the Act.
(3) Unless waived, reinstatement, or in lieu thereof, reimbursement for future lost earnings and benefits.

Liquidated damages, if awarded, should not be used to offset entitlement to future damages. Several circuits have allowed liquidated damages to serve a restitutionary purpose and have offset entitlement to future damages.[72] As the Sev-

72. Two circuits which held that future damages are available under the ADEA, but were inappropriate in the circumstances before the court, included collateral causes of action upon which the plaintiff was successful and received additional recovery. *Cancellier*, 672 F.2d at 1318-19 n.8 (three plaintiffs received $338,786, $231,730 and $197,092 in actual past damages which were liquidated. They also received $260,000, $180,000 and $200,000 respectively as punitive damages under a pendent state claim); *Wildman*, 771 F.2d 605.

enth Circuit held in *Pfeiffer v. Essex*,[73] an ADEA plaintiff is not entitled to damages for "pain and suffering." This follows the congressional intent that the ADEA's incorporation of the FLSA's liquidated damages provision is to provide a means for recovery of sums to cover damages which are too obscure to be capable of proof. A plaintiff's pain and suffering which is an obscure damage, is therefore a "liquidated" damage under this framework. Economic loss following trial, when reinstatement is not practical or possible, is capable of proof. If those losses are offset by the value of a liquidated damages award, then the plaintiff may recover nothing for pain and suffering attributable to the defendant's willful violation of the ADEA.

The operation of the ADEA liquidated damages provision is arbitrary. Doubling the pretrial damages may result in grossly inadequate recovery for "pain and suffering" caused by a willful violation of the ADEA. On the other hand, it may overcompensate a plaintiff. The arbitrary operation of the provision was the choice of Congress. An attempt to minimize its possible excesses by reducing the plaintiff's recovery for future damages, in light of the receipt of liquidated damages, may accomplish a "rough justice," but at the expense of interfering with the statutorily mandated remedial scheme. At the same time, the practice leaves unavailable to the ADEA plaintiff any mechanism to alleviate potentially inadequate recovery for those damages "too obscure" to be capable of proof. Any change in the operation of this remedy ought to be accomplished by Congress and not the courts.

73. 682 F.2d 684 (7th Cir. 1982).