Nebraska Law Review

Volume 58 | Issue 1 Article 7

1978

Age Discrimination: Monetary Damages under the Federal Age Discrimination in Employment Act

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Comment

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I. INTRODUCTION

In 1967 Congress enacted the Age Discrimination in Employment Act (ADEA).[1] This Act "broadly prohibits arbitrary discrimination in the workplace based on age."[2] Although the ADEA was enacted over ten years ago, many aspects of the Act are not yet fully developed. One such aspect is the area of monetary damages. This article will focus on monetary damages under the ADEA and in particular deal with the following types of monetary relief: (1) back pay; (2) liquidated damages; (3) pain and suffering damages; and (4) punitive damages. As to each type of damages, the central questions examined will be when and to what extent relief is available under the ADEA.

Section 626(b)[3] of the ADEA sets forth the type of relief which may be available to a litigant under the act:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this sec-

1. 29 U.S.C. §§ 621-634 (1976).
2. Lorillard v. Pons, 434 U.S. 575, 577 (1978).
3. 29 U.S.C. § 626(b) (1976).

> tion, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.[4]

On its face this statutory provision does not provide a direct answer to many of the questions which arise in relation to monetary damages. For example, it does not specify whether pain and suffering or punitive damages should be allowable. Therefore, in attempting to construe the statute, courts have frequently inquired as to how the particular issue of damages involved has been resolved under similar statutes. In particular, the courts have focused on the statutes and case law relating to the Fair Labor Standards Act (FLSA),[5] Title VII of the Civil Rights Act of 1964 (Title VII),[6] and the National Labor Relations Act (NLRA)[7] for guidance. When such an approach has been used, the underlying question has been whether it is valid to analogize the relief provisions of the ADEA to each of these other acts.

Recently in a unanimous decision, *Lorillard v. Pons*,[8] the Supreme Court set forth some guidelines as to how the relief provisions of the ADEA should be construed. At issue in *Lorillard* was whether a plaintiff has a right to a jury trial on the issue of monetary damages under the ADEA. The defendant had argued that there was no right to a jury trial because there is no such right under the analogous discrimination law of Title VII. The Court rejected this argument and held that the ADEA does give rise to a right to a jury trial. In reaching this conclusion, the Court undertook a comparative analysis of the relief provisions of the ADEA, FLSA, Title VII and the NLRA.

The Court in *Lorillard* began by noting that the enforcement scheme of the ADEA is complex. It observed that during the congressional debates on the ADEA, several alternative enforcement schemes were considered by Congress. Provisions modeled after the NLRA, Title VII and the FLSA were all considered. The Court noted that, as enacted, the ADEA was somewhat of a hybrid of each of these proposals, but concluded that the ADEA was patterned more after the FLSA than any of the other acts and that in fact the FLSA was incorporated into the relief provisions of the ADEA to the greatest extent possible.[9]

The Court conceded that there are important similarities between Title VII and the ADEA, which are evidenced by their mu-

4. *Id.*
5. 29 U.S.C. §§ 201-219 (1976).
6. 42 U.S.C. § 2000e (1976).
7. 29 U.S.C. §§ 151-169 (1976).
8. 434 U.S. 575 (1978).
9. *Id.* at 580-82.

tual purpose of eliminating discrimination in employment and by their substantive prohibitions. However, due to several differences between the ADEA and Title VII, the Court refused to agree that the relief provisions of the ADEA parallel the relief provisions of Title VII.[10] Nonetheless, because the *Lorillard* decision arguably could be limited to the jury trial issue before the Court, comparisons to Title VII relief provisions may still be valid for other issues.

The NLRA was not discussed by the Court, other than a reference to the fact that the NLRA had been considered by Congress as an alternative enforcement scheme.[11] Due to this lack of treatment, and in view of the substantial connection established by the Court between the FLSA and the ADEA, it is a fair interpretation that the Court would generally view NLRA precedents as weak authority for resolving damage issues under the ADEA.

The differences and similarities between the ADEA, FLSA, Title VII and the NLRA which the Court in *Lorillard* examined will be more fully explored in the following discussions as to each type of monetary damages. For present purposes, the important point to be drawn from *Lorillard* is that a unanimous Supreme Court decision has raised serious doubts about the proposition that relief under the ADEA should be generally patterned after Title VII, while holding that the ADEA should be construed as more akin to the relief provisions of the FLSA.

II. BACK PAY

Back pay is the fundamental type of relief awardable to an individual who has been subjected to age discrimination in employment. The statutory source for such an award is found in 29 U.S.C. § 626(b), which states in part that "[a]mounts 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 the purpose of [the FLSA]."[12] On an initial reading, the statutory reference to unpaid minimum wages or unpaid overtime compensation makes the statute somewhat unclear as to its import. These are the terms which are used to designate a back pay award under the FLSA. Because the FLSA deals with the failure of an employer to pay an employee either a minimum wage or overtime compensation, in the context of the FLSA this language clearly translates to an award of back pay. However, in the context of the ADEA which also covers employees who do not work under a minimum wage or overtime structure, the meaning of these terms is not so readily

10. *Id.* at 583-85.
11. *Id.* at 578.
12. 29 U.S.C. § 626(b) (1976).

understood. Nonetheless, beginning with *Monroe v. Penn-Dixie Cement Corp.*,[13] the courts have consistently recognized that the statute authorizes back pay relief for actions brought under the ADEA.[14]

Four issues relating to a back pay award under the ADEA will be examined: (1) whether an award of back pay is mandatory or discretionary; (2) what elements make up an award of back pay; (3) what elements reduce an award of back pay; and (4) within what time period is a back pay award calculated?

A. Mandatory or Permissive

The ADEA does not expressly state whether a person who has been successful in an age discrimination claim is automatically entitled to a back pay award or whether, instead, the court has some degree of discretion in determining the propriety of such an award. Generally, courts have awarded back pay as a matter of course to successful litigants under the ADEA. However, until recently no court had expressly addressed the question of whether such awards were mandatory or discretionary.

An argument in favor of making back pay awards under the ADEA discretionary can be developed under the theories advanced in two Supreme Court cases. In *Mitchell v. DeMario Jewelry, Inc.*,[15] the issue was whether the Secretary of Labor, in an action brought under section 17 of the FLSA,[16] could obtain a court order directing an employer to reimburse employees for wages lost due to the employer's violation of the FLSA. Section 17 of the FLSA is silent on the question of back pay, and instead is addressed to the matter of injunctive relief. The Court held that, nonetheless, back pay could be recovered in an action under section 17.[17] However, it indicated that such awards would not be mandatory, although it did acknowledge that there is "little room for the exercise of discretion not to order reimbursement."[18]

A somewhat similar position has been reached in relation to back pay awards under Title VII. In *Albermarle Paper Co. v. Moody*,[19] the Supreme Court held that back pay awards under Title VII were not mandatory, but discretionary.[20] However, the

13. 335 F. Supp. 231 (N.D. Ga. 1971).
14. *See* § II-B of text *infra*.
15. 361 U.S. 288 (1960).
16. Fair Labor Standards Amendments of 1949, ch. 736, § 15, 63 Stat. 919 (current version codified at 29 U.S.C. § 217 (1976)).
17. 361 U.S. at 296.
18. *Id.*
19. 422 U.S. 405 (1975).
20. *Id.* at 421-22.

Court strongly indicated that only in rare instances would a court be justified in refusing to make a back pay award to a successful Title VII litigant.[21]

These two Supreme Court decisions appear to form a basis for the proposition that, by analogy, back pay awards under the ADEA should be discretionary rather than mandatory. However, this is not the state of the law. In the more recent Supreme Court decision of *Lorillard v. Pons*,[22] the Court concluded that back pay awards under the ADEA were mandatory not discretionary.[23] Apparently, the Court reached this conclusion by first examining section 16 of the FLSA which expressly states that an employer "shall be liable" for amounts deemed as unpaid minimum wages or overtime compensation.[24] The Court must then have noticed that the ADEA states the act "shall be enforced in accordance with the powers, remedies and procedures" provided in section 16 of the FLSA.[25] It therefore concluded that the ADEA incorporates the FLSA provision that employers shall be liable for back pay; hence, the award is mandatory not discretionary.[26]

The logic used by the Supreme Court in *Lorillard* stands on firmer ground than the counterarguments which had been developed pursuant to its previous decisions in *Mitchell v. DeMario Jewelery, Inc.*,[27] and *Albermarle Paper Co. v. Moody*.[28] *Mitchell* can be distinguished because it arose entirely under section 17 of the FLSA and, therefore, did not affect the mandatory nature of the provisions of section 16 of the FLSA. Similarly, *Albermarle* can be distinguished on the ground that Title VII by statute requires that back pay awards be discretionary.[29] Since the ADEA has no similar statutory requirement, *Lorillard* appears to take the appropriate position that back pay awards should be mandatory under the ADEA.

A somewhat related question is whether back pay awards should be awarded regardless of the type of employment the plaintiff previously held. The question arises from the commingling of the FLSA and ADEA remedial provisions. Under the FLSA, pro-

21. The court stated: "[B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421.
22. 434 U.S. 575 (1978).
23. *Id.* at 584.
24. 29 U.S.C. § 216(b) (1976).
25. *Id.* § 626(b).
26. 434 U.S. at 584.
27. 361 U.S. 288 (1960).
28. 422 U.S. 405 (1975).
29. 42 U.S.C. § 2000e-5(g) (1976).

fessionals, administrators and certain other types of employees are not entitled to back pay relief.[30] This is not because they are excluded from the remedial provisions of the FLSA, but because the FLSA provides an exemption from its minimum wage and overtime requirements for professional employees.

In *Cavanaugh v. Texas Instruments, Inc.*,[31] the employer asserted that the employee, who was an engineer, should not be awarded back pay under the ADEA because he would not have been entitled to back pay under the FLSA. The court rejected this argument on the basis that Congress did not intend to incorporate the exemptions of the FLSA into the ADEA.[32] The court reached the correct result because to do otherwise would severely limit the effective scope of the ADEA.

B. Computation of Back Pay

1. Elements Included

Once it is determined that a litigant is entitled to an award of back pay, the first step in computing the award is to establish what elements of earnings should be included. The basic formulation developed by the courts is that everything the employee would have earned had the discrimination not occurred should be included. Hence, the courts have awarded lost wages, in the form of salary or hourly compensation,[33] and commissions.[34] These amounts have also been incremented by cost of living increases.[35] In addition, the courts have allowed for the recovery of lost fringe benefits, such as increased pension benefits,[36] profit sharing benefits,[37] and insurance benefits.[38] Another item of compensation which may be recoverable under the ADEA is a lost bonus. However, there is no definitive authority as to whether bonuses are recoverable as an element of back pay under the ADEA if this

30. 29 U.S.C. § 213(a)(1) (1976).
31. 440 F. Supp. 1124 (S.D. Tex. 1977).
32. *Id.* at 1128.
33. Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974).
34. *See* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).
35. *Id.* at 844.
36. Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971).
37. Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).
38. Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

element of damage is established.[39]

2. Reductions

After the lost earnings amount has been determined, the second step in computing a back pay award is to determine what factors should operate to offset this amount. The relief provisions of the ADEA do not expressly state that lost earnings should be reduced by any factors. Nonetheless, the courts have carved out several items which operate to reduce the amount of a back pay award.

Actual interim earnings are one of the factors which the courts have used to offset the amount of lost earnings.[40] Hence, if the plaintiff lost two years of wages because of an employer's discriminatory acts, but worked full time at another position for one of those years, the back pay award would be reduced by the amount of earnings from the interim employment. This same rule is applicable in computing back pay awards under Title VII,[41] and the NLRA.[42] If Title VII is relied on as authority, it may be possible to lessen this reduction by expenses which the plaintiff incurred in finding the interim employment.[43]

One exception to the rule that actual interim earnings should reduce the amount of back pay has developed in the area of interim income from moonlighting. If the plaintiff has earned money during the interim from employment which he or she could have held in addition to working for the defendant employer, these earnings do not reduce the back pay award. Hence in *Laugesen v. Anaconda Co.*,[44] the court held that the plaintiff's back pay award should not be reduced by income which the plaintiff had earned in the interim from lecturing at night, because the plaintiff could have received this income even if he had been employed by the defendant during the same time period.[45] The moonlighting exception

39. There have been Title VII decisions allowing recovery of bonuses. *See, e.g.*, EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975). *But see* Holthaus v. Compton & Sons, Inc., 71 F.R.D. 18 (E.D. Mo. 1975) (plaintiff not entitled to Christmas bonuses even though he had received them in preceding years because the giving of Christmas bonuses was optional on the part of management). The decisions allowing recovery could be used by analogy to argue that bonuses should be recoverable under the ADEA.

40. Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971).

41. 42 U.S.C. § 2000e-5(g) (1976).

42. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). This result was reached even though the relief provisions of the NLRA, 29 U.S.C. § 160(c) (1976) do not expressly require mitigating a back pay award for interim earnings.

43. Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975).

44. 510 F.2d 307 (6th Cir. 1975).

45. *Id.* at 317-18.

has also been applied in Title VII cases.[46]

The courts have consistently held that under the ADEA any severance pay received by the plaintiff from the defendant employer should reduce the award of back pay.[47] However, they have split on whether vacation pay received from the former employer should reduce the award.[48] Similarly, the authorities are split as to whether unemployment benefits received should operate as an offset against lost earnings.[49] This same split is also evident in Title VII decisions.[50] In *NLRB v. Gullett Gin Co.*,[51] the Supreme Court held that under the NLRA, a reduction in a back pay award for unemployment benefits is discretionary. This decision was used in *Marshall v. Goodyear Tire & Rubber Co.*[52] as authority for the conclusion that under the ADEA a court has discretion to reduce a back pay award by the amount of unemployment benefits received.[53]

Another question that arises under the ADEA is whether back pay should be reduced by amounts earnable. Amounts earnable are not actual earnings but are instead those amounts which could have been earned by the plaintiff if due diligence had been exercised in seeking alternative employment. Once again the provisions of the ADEA are silent.

The issue primarily comes to the forefront because Title VII ex-

46. Thorton v. East Tex. Motor Freight, 497 F.2d 416 (6th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Smith v. Concordia Parish School Bd., 387 F. Supp. 887 (W.D. La. 1975).

47. Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va., 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

48. *Compare* Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) (no offset for vacation pay), *and* Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977) (no offset for vacation pay), *with* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976) (allowed offset for vacation pay).

49. *Compare* Hodgsen v. Ideal Corrugated Box Co., 10 Fair Empl. Prac. Cas. 744 (N.D.W. Va. 1974) (allowed offset for unemployment benefits) *and* Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973) (allowed offset for unemployment benefits) *with* Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977) (no offset for unemployment benefits).

50. Inda v. United Air Lines, Inc., 405 F. Supp. 426 (N.D. Cal. 1975) (unemployment benefits should not be deducted); Diaz v. Pan Am. World Airways, Inc., 346 F. Supp. 1301 (S.D. Fla. 1972) (unemployment benefits should be deducted); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) (unemployment benefits may be deducted); Mabin v. Lear Siegler, Inc., 4 Emp. Prac. Dec. ¶ 7768 (W.D. Mich. 1971), *aff'd*, 457 F.2d 806 (6th Cir. 1972) (unemployment benefits should not be deducted); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind.), *rev'd on other grounds*, 416 F.2d 711 (7th Cir. 1969) (unemployment benefits may be deducted).

51. 340 U.S. 361 (1951).

52. 554 F.2d 730 (5th Cir. 1977).

53. *Id.* at 736.

pressly provides that back pay awards are to be reduced by amounts earnable.[54] The argument is that by analogy, such amounts should be deducted under the ADEA. The weakness of this strict analogy lies in the fact that Title VII by statute specifically mandates this result[55] whereas the ADEA does not.

The silence of the ADEA is not as formidable a barrier to requiring reductions for amounts earnable as it might appear upon first impression. The NLRA, the Back Pay Act,[56] and other statutory remedial provisions, although similarly silent on this issue, have all been judicially interpreted to require reduction in back pay for amounts earnable.[57] There are also several policy arguments in favor of mitigating the damage award by amounts earnable. One argument is that a productive society should be encouraged; allowing reduction for amounts earnable facilitates productivity by providing the plaintiff incentive to find work. Another argument is that if the plaintiff is not working when he or she could be, to allow recovery for this period is to allow compensation for self-inflicted losses.

So far, very few courts have entertained the question of whether amounts earnable should reduce a back pay award under the ADEA. However, those opinions which have mentioned the issue have indicated a willingness to make an offset for such amounts.

In *Houghton v. McDonnell Douglas Corp.*,[58] the Eighth Circuit indicated that it may be willing to allow such an offset.[59] However, the opinion does not take a firm position on the matter and is therefore of questionable precedential value.[60] In *Coates v. National Cash Register Co.*,[61] the issue was squarely presented to the court and resolved in favor of reducing for such amounts. The ra-

54. 42 U.S.C. § 2000e-5(g) (1976).
55. *Id.*
56. 5 U.S.C. §§ 5595-5596 (1976).
57. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (NLRA); O'Neal v. Gresham, 519 F.2d 803 (4th Cir. 1975) (42 U.S.C. § 1983); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974) (Back Pay Act); Williams v. Albermarle City Bd. of Educ., 485 F.2d 232 (4th Cir. 1973) (42 U.S.C. § 1983); Urbina v. United States, 428 F.2d 1280 (Ct. Cl. 1970) (Back Pay Act).
58. 553 F.2d 561 (8th Cir. 1977).
59. *Id.* at 565.
60. Plaintiff had been terminated from his employment by defendant. Defendant offered plaintiff a different job within the company with a substantially lower salary, but plaintiff refused the offer. The Eighth Circuit held that the plaintiff had been terminated because of his age and remanded the case to the lower court for the computation of damages. *Id.* at 564. It gave instructions to the lower court to consider the salary plaintiff would have made in the offered position in computing the damages.
61. 433 F. Supp. 655 (W.D. Va. 1977).

tionale employed by the court was that because such amounts are deducted under Title VII, by analogy they should be offset under the ADEA. The basis for the decision may not withstand further judicial scrutiny, however, for strict analogies between the remedies of Title VII and the ADEA are subject to attack.[62] Nonetheless, since strict analogy to Title VII is not the only argument in favor of deducting amounts earnable under the ADEA, the holding of the court should not be readily dismissed.

If it is assumed that amounts earnable should enter into the calculation of a back pay award under the ADEA, the question arises as to under what circumstances a plaintiff has failed to exercise due diligence to find alternative employment. Obviously a plaintiff must actively seek alternative employment under this standard. The more specific question is when will a plaintiff be held to be justified or unjustified in refusing to accept an offer for alternative employment.

This issue was examined in *Coates v. National Cash Register Co.*[63] Therein the court set forth several tests which must be satisfied in order for a back pay award to be reduced because the plaintiff refused to accept an offer of alternative employment. First, the offer must present duties, status, responsibilities, working conditions, and opportunities for advancement comparable to those of the position the plaintiff has been denied because of age discrimination. Second, the offer of employment must be specific and concrete. Third, the plaintiff's refusal to accept the job must be unreasonable. Under this standard the court in *Coates* held that plaintiff's back pay award should not be reduced as a result of plaintiff's failure to accept alternative employment, because the job offer related to a non-existing job.[64]

Once it is determined which amounts fit into a back pay award and which amounts reduce the award, it becomes necessary to ascertain the time frame within which these figures are to be inserted. It is generally accepted that the beginning point for these computations is the date on which the plaintiff lost employment because of age discrimination. However, exactly what constitutes the final date which the award covers has provoked different responses.

Under Title VII the courts have alternatively held that the plaintiff is entitled to back pay up to the date (1) the complaint is filed,[65] (2) the trial begins,[66] (3) the court orders back pay or rein-

62. *See* text accompanying note 8 *supra*.
63. 433 F. Supp. 655 (W.D. Va. 1977).
64. *Id.* at 662.
65. Hester v. Southern Ry. Co., 349 F. Supp. 812 (N.D. Ga. 1972).
66. Doe v. Osteopathic Hosp., 333 F. Supp. 1357 (D. Kan. 1971).

statement,[67] or (4) the plaintiff actually receives his or her back pay or is reinstated.[68] The fourth alternative is the most recent and reflects a desire on the part of the courts to make plaintiff whole by compensating for the actual loss incurred and providing an incentive for defendant to effectuate the ordered relief as soon as possible.

Currently, the courts have developed only two alternative views for establishing the cut off point for back pay awards under the ADEA. The more widely accepted view is that a back pay award runs to the date the plaintiff either accepts or rejects reinstatement.[69] The alternative view is that the trial date is the cut off point.[70] Although neither view goes as far as those Title VII decisions which allow recovery up to the date plaintiff actually receives relief, there does not appear to be any reason for not extending the computational time period to such a date for an action under the ADEA. In fact, such an extension would serve policy reasons analogous to those recognized by the more lenient Title VII opinions. Therefore, it would seem worthy for future ADEA decisions to allow for the recovery of back pay up to the date when plaintiffs either actually receive their back pay award or assume the position they have been unlawfully denied.

III. LIQUIDATED DAMAGES

The ADEA expressly provides that in fashioning relief "liquidated damages shall be payable only in cases of willful violations of this chapter."[71] Liquidated damages double the back pay award, *i.e.*, they are an additional amount equal to the back pay.[72] The

67. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Francis v. AT & T, 55 F.R.D. 202 (D.D.C. 1972).

68. EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Inda v. United Air Lines, Inc., 405 F. Supp. 426 (N.D. Cal. 1975).

69. Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

70. Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971).

In Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976), the action was bifurcated. Trial on the issue of relief commenced two months after the trial on the issue of liability. The court held that the plaintiff was entitled to back pay up to the date of the trial on the issue of relief.

71. 29 U.S.C. § 626(b) (1976).

72. *See* Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). Liquidated damages do not include an additional amount equal to a pain and suffering award. *See* Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977).

provision for liquidated damages is one of the main differences between the type of relief available under the ADEA and that under Title VII or the FLSA. Liquidated damages are not available under Title VII.[73] They are available under the FLSA, but they are treated in a somewhat different fashion.[74]

Two interrelated issues arise with respect to the award of liquidated damages under the ADEA. One question is whether such awards are mandatory or discretionary when a willful violation is established. The second question is what constitutes a willful violation of the ADEA.

A. Discretionary or Mandatory

In order to understand whether liquidated damages are discretionary or mandatory under the ADEA, it is helpful to first understand the framework in which liquidated damages are awarded under the FLSA. Section 16 of the FLSA provides that any employer who violates the minimum wage or overtime requirements of the FLSA shall be liable for back pay and an additional amount for liquidated damages.[75] It is important to note that this section describes a liquidated damages award as mandatory. In 1947 this scheme was altered by the interposition of section 11 of the Portal to Portal Act (PPA).[76] The PPA provided that in an action for relief under the FLSA, the court no longer had to mandatorily award liquidated damages, but instead was empowered with discretion on the matter, if the employer could prove the violation of the Act occurred in good faith and that there were no reasonable grounds to believe that his or her actions would violate the FLSA.[77]

The question that arises in ADEA litigation is whether liquidated damages should be treated as mandatory by analogy to the

73. *See* 42 U.S.C. § 2000e-5(g) (1976).

74. 29 U.S.C. § 216(b) (1976). *See* notes 75-76 & accompanying text *infra*.

75. 29 U.S.C. § 216(b) (1976) provides: "Any employer who violates . . . this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

76. Section 11 of the PPA is codified at 29 U.S.C. § 260 (1976) and provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

77. *Id.*

provisions of section 16 of the FLSA, or whether they should be considered affected by section 11 of the PPA and thus discretionary when good faith and reasonable grounds are present. The courts have split on this issue. Those that have concluded that the ADEA incorporates the discretionary elements of the PPA have relied on two arguments to support this result. One is that the relief provisions of the ADEA state that the Act shall be enforced in accordance with the powers and remedies provided in section 16 of the FLSA *as amended*.[78] Since section 11 of the PPA amended section 16 of the FLSA, it is incorporated into the ADEA by the statutory reference to section 16 of the FLSA as amended.[79]

The second argument which has been advanced in favor of concluding that liquidated damages are discretionary under the ADEA, is that the legislative history of the Act supports this result. In *Hays v. Republic Steel Corp.*,[80] the court viewed the following excerpts from statements made by Senator Javits as indicating that liquidated damages should be awarded pursuant to the guidelines of the PPA:

> The enforcement techniques provided by S. 830 [the bill which became the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, *to the greatest extent possible*, the provisions of the Fair Labor Standards Act.
>
> . . . .
>
> We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business, and with complete fairness to the workers. I think that is one of the most important aspects of the bill.[81]

The court in *Hays* reasoned that "[t]he Senator's reference to 'the least overanxiety or difficulty on the part of American business' could hardly have been made if there were an absolute imposition of liquidated damages, the harshness of which prompted Congress

78. As passed by Congress, the ADEA, Pub. L. No. 90-202, § 7(b), 81 Stat. 604 (1967), referred to sections of the FLSA *as amended*. Section 7(b) stated: "The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended . . . ." As with other language in the statute, when the act was codified references to sections of the FLSA were deleted and replaced with references to the relevant sections of the United States Code. Therefore, as codified, 29 U.S.C. § 626(b) (1976) does not contain language referring to the FLSA *as amended*.

79. *See* Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974).

80. 531 F.2d 1307 (5th Cir. 1976). *See also* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

81. 113 CONG. REC. 31,254 (1967) (emphasis added).

to enact section 11 of the PPA."[82]

Two other courts have taken a contrary view on this issue relating to liquidated damages.[83] In both instances the issue arose in the context of whether there was a right to a jury trial on the issue of damages under the ADEA. The rationale employed to reach this result is best set forth in *Cleverly v. Western Electric Co.*,[84] in which the court stated:

> When Congress enacted the ADEA, it made the "powers, remedies, and procedures" of Section 216(b) of the FLSA applicable to ADEA actions, but it did not expressly or by implication, make Section 260 of the Portal-to-Portal Act applicable to such actions. Rather, Congress merely modified the strict liability for liquidated damages under Section 216(b) by providing in Section 626(b) of the ADEA that liquidated damages should be awarded ". . . only in cases of willful violations . . . ." That limitation would be mere surplusage if Section 260, *supra*, were intended to apply, and "[a] statute ought, upon the whole to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant."[85]

The courts which have concluded that the PPA should be incorporated into the ADEA have not provided persuasive arguments. The fact that the ADEA makes reference to section 216 of the FLSA "as amended," does not in and of itself compel the inference that the framers of the statute intended to bring in section 11 of the PPA. An alternative inference which can be drawn is that "as amended" refers to the various direct amendments which have been made to section 16 of the FLSA since its inception in 1938. This interpretation, which is more restrictive, is also supported by an analysis of section 626(e), which states that "section 255 and 259 of this title shall apply to actions under this chapter."[86] Both sections 255 and 259 are a part of the PPA. This is evidence that the drafters were aware of the existence of the PPA and that where it was intended to be incorporated, the framers did so expressly. It would seem that if the drafters had intended to incorporate section 11 of the PPA they would have done so in section 626(e).[87]

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82. 531 F.2d at 1311.
83. Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977); Cleverly v. Western Elec. Co., 69 F.R.D. 348 (W.D. Mo. 1975).
84. 69 F.R.D. 348 (W.D. Mo. 1975).
85. *Id.* at 352 (citations omitted).
86. 29 U.S.C. § 626(e) (1976).
87. In Lorillard v. Pons, 434 U.S. 575 (1978), the Court distinguished the remedies of the FLSA and the ADEA and observed:

> By its terms, 29 U.S.C. § 216(b) requires that liquidated damages be awarded as a matter of right for violations of the FLSA. However, in response to its dissatisfaction with that judicial interpretation of the provision, Congress enacted the Portal-to-Portal Pay Act of 1947 . . . which, *inter alia*, grants courts authority to deny or limit liquidated damages where the "employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good

Similarly unpersuasive is the congressional testimony which has been relied upon by some courts to support the incorporation of the discretionary provisions of the PPA into the ADEA.[88] The language relied on is too broad to support the specific issue in question. To say that courts have over relied on legislative history would be an understatement if relief under the ADEA is to be fashioned on the basis of one Senator's statement that the Act is designed to effectuate the "least overanxiety or difficulty on the part of American business."[89] This statement does not reflect the fact that the ADEA was created for the advancement of the interests of individuals, not business. In addition, it is an inaccurate representation of the Act because if its intent was to minimize an employer's concern for liability, the Act would surely not have empowered a court to award whatever "legal or equitable relief . . . may be appropriate" to effectuate the purposes of the Act.[90] Such broad statutory language is bound to create anxiety and difficulty for American businessmen.

The statement made by Senator Javits to the effect that the ADEA incorporates the FLSA "to the greatest extent possible,"[91] poses more serious problems. This statement was seized by the Supreme Court in *Lorillard v. Pons*[92] as a basis for concluding that the remedial provisions of the ADEA should be considered more analogous to the FLSA than to Title VII. However, it should not be readily assumed that the Supreme Court is likely to conclude that the PPA is incorporated into the FLSA merely because of this particular statement by Senator Javits.[93] There is still room for the argument that although the ADEA does incorporate provisions of the FLSA to a great extent, the PPA is one of the exceptions to this general rule.

Finally, although *Cleverly v. Western Electric Co.*[94] was probably incorrect in concluding that the incorporation of section 11 of

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> faith and that he had reasonable grounds for believing that his act or omission was not a violation of" the FLSA, § 11, 29 U.S.C. § 260. Although § 7(e) of the ADEA . . . expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act, . . . the ADEA does not make any reference to § 11, 29 U.S.C. § 260.

Id. at 581-82 n.8. Although the Court did not expressly state that section 11 of the PPA does not come into play under the ADEA, it has alluded to the possibility of such a conclusion.

88. *See* text accompanying notes 81-82 *supra*.
89. 113 CONG. REC. 31,254 (1967). For full text of quote, see text accompanying note 81 *supra*.
90. 29 U.S.C. § 626(b) (1976).
91. 113 CONG. REC. 31,254 (1967). For full text of quote, see text accompanying note 81 *supra*.
92. 434 U.S. at 582.
93. *See* note 87 *supra* (text of quote from Lorillard v. Pons, 434 U.S. at 581-82 n.8).
94. 69 F.R.D. 358 (W.D. Mo. 1975).

the PPA into the ADEA would make the willfulness test for liquidated damages superfluous,[95] the court's conclusion does raise a problem. The problem is whether it is desirable to impose a two tier test in deciding whether liquidated damages should be awarded. The ADEA expressly establishes one test requiring that the violation be willful in order for liquidated damages to be allowable.[96] The question is whether there should be an inquiry on a second level into whether the employer acted in good faith and with reasonable grounds for believing that he or she was not violating the Act. Such a two tier analysis would be an awkward way of deciding when liquidated damages should be awarded. It would appear that in departing from section 16 of the FLSA and by requiring that liquidated damages shall only be awarded under the ADEA when a willful violation has occured, the drafters of the ADEA envisioned a simpler one tier test approach. Therefore, the battle as to when liquidated damages should be awarded in a particular case under the ADEA should not be fought under the banner of the PPA, but instead won or lost by a determination of what constitutes a willful violation of the ADEA.

B. Willful Violations

The ADEA does not define what constitutes a willful violation of the Act. Therefore the courts have been left free to fashion their own definitions. Generally, in defining the term, the courts have sought guidance from decisions interpreting the FLSA.

Two provisions of the FLSA are concerned with whether an employer has willfully violated the Act. The first is section 16(a) which imposes a criminal penalty for willful violations.[97] The other is section 255 which extends the statute of limitations for bringing an action under the FLSA from two to three years if a willful violation has occurred.[98] It is the latter section which has received the most attention from the courts, and which has provided the framework within which most FLSA decisions defining willful have developed.

As promulgated by the courts deciding FLSA issues, the boiler-

95. The court apparently reasoned that if an employer has willfully violated the act, he or she must also have acted without good faith and without reasonable grounds for believing that he or she was not violating the act. This is not necessarily true since it depends on how the word "willful" is defined. For example, in Combes v. Griffin Television, Inc., 421 F. Supp. 841, 845 (W.D. Okla. 1976), the court held that the employer had both willfully violated the ADEA and also acted in good faith and with reasonable grounds for believing he was not violating the Act.

96. 29 U.S.C. § 626(b) (1976). *See* text accompanying note 4 *supra*.

97. *Id.* § 216(a).

98. *Id.* § 255(a).

plate definition of what constitutes a willful violation is that it is " 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right to so act.' "[99]

Two questions frequently arise when applying this standard to a specific fact situation. The first question is what type of knowledge is required. The second is whether it makes any difference if the employer acted in good or bad faith. The courts deciding FLSA cases have not always agreed concerning the answer to these two questions, although a majority view is emerging.

Some courts have required that an employer act with definite knowledge of the applicability of the FLSA and in bad faith in order for a violation of the FLSA to be willful.[100] However, the more modern view is that neither of these elements are required. The fact that the employer did not act in bad faith and perhaps in fact acted in good faith has been rejected as being determinative of whether an employer has committed a willful violation.[101] In other words, even if employers acted in good faith, they may still be held to have committed a willful violation of the FLSA.[102] Similarly, the emerging view is that definite knowledge of the FLSA is not required for a willful violation. Instead a broader view is taken that it is enough if employers knew or should have known that their actions were governed by the FLSA.[103] In the language of some courts, it is enough if employers have a general awareness of the

99. United States v. Illinois Cent. Ry. Co., 303 U.S. 239, 243 (1938). *See* Nabob Oil Co. v. United States, 190 F.2d 478 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951); Bailey v. Pilots' Ass'n, 406 F. Supp. 1302 (E.D. Pa. 1976); Hodgson v. Veterans Cleaning Serv., Inc., 351 F. Supp. 741 (M.D. Fla. 1972), *modified on other grounds sub nom.* Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362 (5th Cir. 1973); Hodgson v. Hyatt, 318 F. Supp. 390 (N.D. Fla. 1970).

100. *See* Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1141 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972) (discussion interpreting Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257 (E.D. Wis. 1970), Hodgson v. Hyatt, 318 F. Supp. 390 (N.D. Fla. 1970), and Dowd v. Blackstone Cleaners, Inc., 306 F. Supp. 1276 (N.D. Tex 1969) to require definite knowledge and bad faith).

101. Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 432 F. Supp. 843 (E.D. Mo. 1977); Bailey v. Pilots' Ass'n, 406 F. Supp. 1302 (E.D. Pa. 1976); Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090 (W.D. Ky. 1975); Hodgson v. Eunice Superette, Inc., 368 F. Supp. 639 (W.D. La. 1973); Shearer v. E. Brame Trucking Co., 69 Mich. App. 443, 245 N.W.2d 84 (1976).

102. For example, in Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972), the employer exercised good faith by acting under the advice of counsel but still was held to have committed a willful violation of the FLSA.

103. Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974); Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090 (W.D. Ky. 1975); Shearer v. E. Brame Trucking Co., 69 Mich. App. 443, 245 N.W.2d 84 (1976).

possible applicability of the FLSA to their actions.[104] Thus, where an employer knew of the existence of the FLSA,[105] or requested legal advice as to whether his or her actions would be lawful,[106] or had been subjected to previous investigations for violations of the FLSA,[107] it has been held that the employer had sufficient knowledge for a finding of a willful violation. Important in this regard is that it need not be shown that employers had knowledge that their actions would be contrary to the requirements of the FLSA, but only that they were aware that their actions were subject to the Act.[108]

As a general proposition the courts deciding cases under the ADEA have adopted the fundamental view promulgated under the FLSA that in order for a willful violation to have occurred, the employer must have acted intentionally, knowingly and voluntarily. However, there has been no clearcut agreement as to the degree of knowledge which is required or as to the importance of the employer's good or bad faith.

Two ADEA decisions have held that a bad faith evasion of the ADEA is required in order for a violation to be willful.[109] One court, following the more liberal view promulgated under the FLSA, has held that bad faith is not necessary and willfulness can be found even though the employer thought he was acting properly or was acting under advice of counsel.[110] Similarly, a split among the courts has developed as to the degree of knowledge

104. Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); Usery v. Goodwin Hardware, Inc., 426 F. Supp. 1243 (W.D. Mich. 1976).

105. Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974).

106. Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

107. Hodgson v. Veterans Cleaning Serv., Inc., 351 F. Supp. 741 (M.D. Fla. 1972), *modified on other grounds sub nom.* Brennan v. Veterans Cleaning Serv., 482 F.2d 1362 (5th Cir. 1973); Shearer v. E. Brame Trucking Co., 69 Mich. App. 443, 245 N.W.2d 84 (1976).

108. Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974).

109. The ADEA provides that the statute of limitations shall be extended from two to three years if a willful violation of the Act has occurred. 29 U.S.C. § 626(e) (1976). In Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974), the court was presented with the issue of whether there were grounds for invoking the three-year statute of limitations. The court held that the extended statute of limitations did not apply because a willful violation had not occurred. The court stated that "bad faith evasion of the Act and definite knowledge of its applicability" was needed in order to establish a willful violation. *Id.* at 593. In Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977), the jury was instructed on the issue of liquidated damages that it could find a willful violation if "the acts were 'done voluntarily and intentionally, and with the specific intent to do something which is forbidden by law.' " *Id.* at 664. No liquidated damages were awarded.

110. Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976).

which is required. One view has been that definite knowledge of the applicability of the ADEA is required.[111] Alternatively it has been indicated that awareness of the possible applicability of the Act is sufficient.[112] Other courts have not clearly articulated their position on the degree of knowledge and type of faith which is required.[113]

The judicial uncertainty surrounding this issue accents the need to search for a viable solution. As a starting point it should be noted that there are problems with a strict application in ADEA cases of the definition of willful as promulgated under the FLSA. The majority of the FLSA decisions defining willfulness arose in the context of whether or not the statute of limitations should be extended from two to three years. In ADEA cases, the concern is with the assessment of damages. In each situation, the outcome depends upon the definition of willfulness which is applied, but the inquiry in these two varying situations serves different purposes. Under the FLSA the underlying question is whether the court is going to allow individuals to have their day in court. Under the ADEA the underlying question is how reprehensible the defendant's actions were.[114] As a general proposition it would seem that the courts should be more liberal with a statute of limitations question than in awarding punitive damages. Moreover, some FLSA decisions have limited the applicability of their definition of willful to the context of the statute of limitations issue.[115] Therefore, extreme caution should be exercised in attempting to make a verbatim application of the FLSA definitions.

In view of the remedial nature of ADEA, an argument can be made that a liberal interpretation of willful should be applied. While this position carries some value, upon further analysis it encounters difficulties. For example, assume that the more liberal FLSA view is adopted and willful is defined to include any action taken by employers with the general understanding that their ac-

111. Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974).

112. Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976).

113. In Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976), the court held that a willful violation had occurred. The court went no further than defining willfulness in boilerplate terms. A similar result can be found in Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977).

114. Liquidated damages under the ADEA are punitive in nature. *See* note 179 *infra*.

115. In Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972), which is the leading FLSA case supporting a liberal interpretation of willful, the court expressly limited its holding. Section 216(a) of the FLSA provides a criminal penalty for willful violations. The court stated that its definition of willful was not intended to apply to Section 216(a). *Id.* at 1142.

tions might be subject to the ADEA. If this were the test, then for all practical purposes liquidated damages would have to be awarded in every case because the ADEA requires all employers to post notices of the ADEA in their place of business in order to inform employees of their rights under the Act.[116] Any employer who complies with this requirement, and all employers covered by the Act who are supposed to comply, will have a difficult time convincing the trier of fact that they had no idea that their actions would be governed by the ADEA. The requisite knowledge could be implied from the presence of the notices. Thus, all or almost all employers would be subject to liquidated damages. This is clearly not the result which the drafters of the ADEA intended. If it were the intended result there would have been no need to impose the qualification that liquidated damages can only be awarded where there is a willful violation. The drafters could have merely followed the language of section 216(b) of the FLSA and made liquidated damages automatic.

Another argument against adopting such a liberal definition of willful is based on the fact that if liquidated damages were to be de facto automatic, the nature of the award would lose part of its punitive nature. Every defendant would end up being treated similarly. An automatic award does not take into account the fact that one defendant's acts are more reprehensible than another's.

If it is assumed that the most liberal definition of willful should be rejected, the problem of defining the term still remains. The boilerplate language that an act must be intentional, knowing and voluntary[117] in order to be willful is probably an acceptable standard. The real issues come up in refining this test on the elements of knowledge and good or bad faith.

With regard to the element of knowledge, it has already been shown that the single requirement that employers have general knowledge that their actions are governed by the ADEA is probably unworkable. A similar result ensues if it is only required that employers definitely know that their actions are governed by the Act. Perhaps a more workable standard would be a requirement that employers have some knowledge that their actions are contrary to the requirements of the ADEA. In other words, that they knew that they were violating the ADEA. Such a standard would appear to reach those types of activities which should be punished while protecting those employers who have no idea that they are performing an unlawful act. A problem with this test is the matter of proof. It seems probable that no employers would admit a knowing violation of the law. Without such an admission it would

116. 29 U.S.C. § 627 (1976).
117. *See* text accompanying note 99 *supra*.

be difficult to establish the requisite knowledge.[118]

Another possible approach would be to couple a low threshold knowledge requirement with a requirement that the employer must have acted in bad faith or with a lack of good faith. Such a hybrid test allows the court to focus its inquiry more broadly. Employers who knew that their actions would violate the Act would be subjected to liquidated damages because that knowledge would also be evidence of bad faith. Additionally, other acts which are less flagrant but still reprehensible could also be subjected to liquidated damages. However, those individuals who could not be expected to anticipate the unlawful nature of their actions would be protected. For example, a person who acts in good faith on the advice of legal counsel that such actions would not be violative of the ADEA would be protected.

Because of the flexibility which the minimal knowledge-bad faith standard offers, it should be employed in determining whether a willful violation of the ADEA has occurred. It stands on the middle ground between the extremes of subjecting every employer who violates the ADEA to liquidated damages and holding practically no employer liable for liquidated damages.

IV. OTHER LEGAL OR EQUITABLE RELIEF

The remedial provisions of the ADEA expressly state:

> 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.[119]

This portion of the statute raises the issue whether the language granting the court power to award such legal or equitable relief as it deems appropriate allows awards of pain and suffering and/or punitive damages.

A. Pain and Suffering Damages

The courts deciding ADEA cases have split on whether the foregoing statutory provision authorizes an award for pain and suf-

118. One instance in which knowledge might be proved without an admission is when the same defendant has previously been held liable for a similar violation of the ADEA. Another possible instance would be situations in which employers have been given advice that their actions will violate the ADEA, but they ignore this advice and proceed to violate the Act. The advisor would be a source for evidence indicating that an employer knowingly violated the act.

119. 29 U.S.C. § 626(b) (1976) (emphasis added).

fering.[120] Currently the preferred view among the circuit courts of appeals is that such damages are not allowable.[121] Nonetheless, such damages should be recoverable under the ADEA.

Several arguments have been advanced for disallowing pain and suffering damages under the ADEA. Some of these arguments stem from an attempt at strict statutory analysis. For example, it has been reasoned that pain and suffering damages should be disallowed because the ADEA does not expressly state that they should be recoverable.[122] Similarly, it has been contended that the statutory provision for legal or equitable relief is not a grant of power to award additional types of relief, but is instead merely a restatement of the fact that the court may award liquidated damages or back pay.[123] The legal doctrine which embodies such a construction is known as *ejusdem generis*.[124] The doctrine was applied in *Looney v. Commercial Union Assurance Cos.*,[125] in which the court reasoned that the only legal relief expressly available under the ADEA is liquidated damages and that, *a fortiori*, damages for pain and suffering as a legal remedy are precluded.[126] A similar approach was employed by the Fifth Circuit in *Dean v. American Security Insurance Co.*,[127] with the slight variation that

120. The following courts have allowed awards for pain and suffering: Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977); Dean v. American Security Ins. Co., 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), *rev'd*, 550 F.2d 834 (3d Cir. 1977). In *Dean* and *Rogers*, the higher court reversed the lower court's holding that pain and suffering damages were recoverable.

The following courts have held that pain and suffering damages are not recoverable: Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124 (S.D. Tex. 1977); Looney v. Commercial Union Assurance Cos., 428 F. Supp. 533 (E.D. Mich. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976); Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976).

121. *See* Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977).

122. *See* Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977).

123. *See, e.g.*, Looney v. Commercial Union Assurance Cos., 428 F. Supp. 533 (E.D. Mich. 1977).

124. BLACK'S LAW DICTIONARY 608 (4th ed. 1968) states:

> In the construction of laws . . . , the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

125. 428 F. Supp. 533 (E.D. Mich. 1977).

126. *Id.* at 537.

127. 559 F.2d 1036 (5th Cir. 1977).

the court thought that the statutory reference to legal relief related to the express statutory authorization for back pay awards.[128]

A somewhat related argument was advanced in *Fellows v. Medford Corp.*,[129] in which the court reasoned that the drafters of the ADEA provided for liquidated damages as an alternative to allowing for the recovery of pain and suffering awards. The court believed that to allow both liquidated damages and pain and suffering damages would allow a double recovery by the plaintiff.[130]

Another argument against pain and suffering damages has been developed by analogy to Title VII. In *Hannon v. Continental National Bank*,[131] the court started with the premise that the ADEA and Title VII serve the same purpose of eliminating discrimination in employment.[132] It then observed that pain and suffering damages are not recoverable in Title VII actions. Because of the similar nature of the two acts, the court concluded that pain and suffering should not be a viable damage element under the ADEA.[133]

It has also been held that damages for pain and suffering should not be allowed because they are awardable for a type of injury which does not fall within the parameters of the ADEA. In *Sant v. Mack Trucks, Inc.*,[134] and *Platt v. Burroughs Corp.*,[135] the courts reasoned that the ADEA does not extend beyond concerns for the relationship between an employer and an employee. Pain and suffering awards, which by their nature relate to personal interests such as body or mental integrity, were disallowed because they relate to areas outside the purview of the Act.[136]

Receiving wider acceptance is the argument that pain and suffering awards should be disallowed on the ground that to allow them would thwart conciliation efforts. The ADEA follows a procedural scheme which is similar to that found under Title VII. A jurisdictional requirement to a private civil claim under the ADEA is that the aggrieved party must first advise the Department of Labor

128. *Id.* at 1038-39.
129. 431 F. Supp. 199 (D. Or. 1977).
130. *Id.* at 202. It should be noted that in expressing its view, the court was also ruling against allowing punitive damages under the ADEA. It is, therefore, difficult to discern whether the argument against double recovery was directed toward pain and suffering damages, punitive damages or both.
131. 427 F. Supp. 215 (D. Colo. 1977).
132. The soundness of this basic premise is supportable by Lorillard v. Pons, 434 U.S. 575, 584 (1978).
133. 427 F. Supp. at 217.
134. 424 F. Supp. 621 (N.D. Cal. 1976).
135. 424 F. Supp. 1329 (E.D. Pa. 1976).
136. Sant v. Mack Trucks, Inc., 424 F. Supp. at 622; Platt v. Burroughs Corp., 424 F. Supp. at 1336-38.

or the appropriate state agency of his or her complaint.[137] There is then a waiting period during which the governmental authorities are to attempt to effectuate a conciliation between the employer and the aggrieved party. If these attempts are unsuccessful, the government may proceed with an action against the employer. If the government does not bring an action, the aggrieved party may bring his or her own action against the employer. In view of this statutory scheme, some courts have concluded that there is a legislative preference that age discrimination problems be solved by conciliation rather than by private civil actions.[138] Allowing the plaintiff to recover pain and suffering damages in a private action is seen as contrary to such a preference.

Finally, two nonstatutory arguments have been promulgated in favor of disallowing pain and suffering awards. First, it has been contended that such damages should be avoided because the award may exceed the plaintiff's actual injury.[139] Second, it has been observed that the ADEA allows successful plaintiffs to be reinstated in their former positions. It is argued that the resumption of work would remove the anxiety and anguish which the plaintiff had experienced by reason of the discrimination and, therefore, obviate the need for pain and suffering awards.[140]

In summary, the following are arguments which have been used to support disallowing pain and suffering damages under the ADEA: (1) there is a lack of express statutory authority; (2) the rule of *ejusdem generis* is applicable; (3) liquidated damages are granted in lieu of allowing pain and suffering awards, (4) Title VII does not allow such recovery; (5) personal interests such as physical and mental integrity are outside the purview of the act; (6) allowing such damages would thwart the statutory preference for conciliation; (7) damages may exceed actual injury; and (8) resumption of work via reinstatement removes any anxiety and obviates the need for such damages.

For each of these arguments there is a counter argument. Thus, the task becomes one of deciding which argument carries greater merit. In most instances it will be seen that the counter arguments for allowing pain and suffering awards are more persuasive.

The fact that the ADEA does not expressly state that pain and suffering should be compensated does not provide a reason for dis-

137. 29 U.S.C. § 626(d) (1976).

138. *See* Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976); Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976).

139. Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977).

140. *Id.*

allowing such damages. The statute does not clearly delineate the answers to many questions pertaining to damages. For example, the Act does not expressly state that back pay is mandatory or that back pay should be reduced by interim earnings. Yet, the courts have read these concepts into the Act.[141]

In addition, in *Rogers v. Exxon Research & Engineering Co.*,[142] the court countered the argument that pain and suffering damages should not be recoverable because they are not expressly allowed by statute. The court reasoned that the ADEA created a new statutory tort,[143] and that a panoply of remedies should arise in relation to the tort.[144] Therefore, it stated that pain and suffering damages should be recoverable.[145] In conjunction with the statutory tort theory, it should also be noted that pain and suffering awards have been allowed in other types of discrimination cases, even though there was no express statutory authorization for such damages.[146] Therefore, the lack of explicitness in the statute should not form a basis for precluding pain and suffering damages.

Similarly, the doctrine of *ejusdem generis* should probably not be controlling. Two courts[147] have argued against its application because the statute states that a court may award legal relief

141. *See* § II of text *supra*.

142. 404 F. Supp. 324 (D.N.J. 1975), *rev'd*, 550 F.2d 834 (3d Cir. 1977).

143. This conclusion is supported by the fact that statutory discrimination actions have been characterized as sounding in tort. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974) (Title VIII); Monroe v. Pape, 365 U.S. 167, 187 (1961) (42 U.S.C. § 1983); Hague v. CIO, 101 F.2d 774 (3d Cir.), *modified*, 307 U.S. 496 (1939) (42 U.S.C. § 1983).

144. The court cited Bell v. Hood, 327 U.S. 678 (1946), in which the Supreme Court stated:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, the federal courts may use any available remedy to make good the wrong done.

Id. at 684.

145. 404 F. Supp. at 333.

146. *See* Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974) (Title VIII); Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert denied*, 419 U.S. 1021 (1974) (Title VIII); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971) (42 U.S.C. § 1982); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (42 U.S.C. § 1983); Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *modified*, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976) (42 U.S.C. § 1981); Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (42 U.S.C. § 1983). For Title VII decisions allowing recovery for pain and suffering, see note 152 *infra*.

147. Coates v. National Cash Register Co., 433 F. Supp. 655, 664 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952, 953 n.1 (N.D. Ill. 1977).

"without limitation."[148] Therefore, the courts concluded that "legal relief" should not be interpreted to refer only to back pay or liquidated damages. Instead this language was interpreted to allow additional remedies.[149]

The argument that liquidated damages are provided in lieu of pain and suffering damages, and that to allow both would permit double recovery is also erroneous. Since liquidated damages under the ADEA are punitive, not compensatory, in nature,[150] there is no danger of a double recovery because pain and suffering damages are not a punitive form of relief.

In addition, it is probably error to conclude by analogy to Title VII that pain and suffering damages should be disallowed under the ADEA. First, as brought out in *Coates v. National Cash Register Co.*,[151] pain and suffering damages have been allowed in some Title VII cases.[152] Second, strict analogy to Title VII on this point is not statutorily permissible. Title VII differs from the ADEA in that the former only empowers a court to award other appropriate equitable relief.[153] The importance of this distinction is revealed in the recent Supreme Court decision in *Lorillard v. Pons*,[154] in which the Court used this difference as a basis for refuting the argument that there should be no right to a jury trial under the ADEA because there is no such right in Title VII actions.[155] Moreover, some courts use this statutory difference between Title VII and the ADEA as a basis for distinguishing Title VII decisions

148. 29 U.S.C. § 626(b) (1976).
149. 433 F. Supp. at 664; 432 F. Supp. at 953 n.1.
150. *See* note 179 *infra*.
151. 433 F. Supp. 655, 664 (W.D. Va. 1977).
152. *See* Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 95-96 (3d Cir. 1973); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973). It would still be fair to say that the majority of Title VII decisions do not allow pain and suffering damages.
153. 42 U.S.C. § 2000e-5(g) (1976) states:

> The court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other *equitable relief* as the court deems appropriate.

(Emphasis added.)
154. 434 U.S. 575 (1978).
155. *Id.* at 583-85. *See* 29 U.S.C. § 626(b) (1976). At one point in the legislative development of the ADEA the statute only provided for other equitable relief. It was later amended to provide for both equitable and legal relief. *See* 113 CONG. REC. 2199 (1967); 113 CONG. REC. 2467 (1967); 113 CONG. REC. 31,248-49 (1967). In Dean v. American Security Ins. Co., 559 F.2d 1036, 1038 n.6 (5th Cir. 1977), the plaintiff was unsuccessful in arguing that this amendment indicated an intent to allow pain and suffering damages.

which have disallowed pain and suffering awards. The rationale is that because pain and suffering damages are a form of *legal* relief, they may not be perceived as under Title VII because Title VII only provides for other *equitable* forms of relief.[156] In sum, it can be seen that the argument that pain and suffering damages should not be allowed under the ADEA because they are not allowed under Title VII does not withstand close scrutiny.

Next there is the argument that pain and suffering damages should not be allowed because the ADEA is limited to the area of employer-employee relations and, therefore, does not encompass concern for an employee's physical or mental integrity. This argument flies in the face of the legislative history of the ADEA which is replete with references to a concern for the emotional and physical well-being of people who have been subjected to age discrimination.[157] In fact it is the legislative history of the ADEA which

156. Coates v. National Cash Register Co., 433 F. Supp. 655, 664 (W.D. Va. 1977); Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 333 (D.N.J. 1975) *rev'd*, 550 F.2d 834 (3d Cir. 1977).

157. Remarks made by legislators during the deliberations on the bill are indicative of this concern:

Senator Javits:

> Mr. President, it is a sad day indeed when a man realizes that the world has begun to pass him by . . . . But it is surely a much greater tragedy for a man to be told, arbitrarily, that the world has passed him by, merely because he was born in a certain year or earlier, when he still has the mental and physical capacity to participate in it as energetically and vigorously as anyone else.

113 CONG. REC. 31,254 (1967).

Senator Young:

> I long have felt it is a particular tragedy to amputate a human being's function, to strip productive persons of their skills, cheating them of the *dignity* of continued self-support. These are the consequences of a forced retirement.

Id. at 31,256 (emphasis added).

Rep. Eilberg:

> The financial and social costs, of course, are nothing compared with the costs in terms of human *suffering and welfare* which come about as the result of discriminatory practices in employment because of age . . . . *Self-esteem, self-satisfaction*, and *personal security* are important by products of employment in industrial America. To deny a person the opportunity to compete for jobs on the basis of ability and desire, solely because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.

Id. at 34,745 (emphasis added).

Representative Dent:

> Mr. Speaker, this waste of humanity is so indecent and unnecessary. It is indecent because pure and simple age discrimination is among the important factors that cause serious economic and *personal problems* of unemployed workers . . . .

Id. at 34,747 (emphasis added).

Representative Pepper:

> "[Although it] is difficult to prove that *physical or mental illness* can

several courts have used as a basis for their conclusion that pain and suffering damages should be recoverable.[158] In addition, the statutory statement of findings and purpose for the ADEA reflects that the Act encompasses concern for mental injury.[159] Therefore, it is apparent that the argument that the ADEA does not encompass concern for an employee's mental and physical well-being is not valid. Instead the legislative history of the Act reveals that the Act was intended to reach such interests.

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be directly caused by denial of employment opportunities . . . few physicians deny that such a relationship exists."

Id. at 34,751 (quoting position paper of the American Medical Association). Representative Dwyer:

> [I]t is up to Congress to help relieve the anxieties that beset millions of the middle-aged and eliminate the obstacles that stand in the way of full opportunity for all.
>
> When a man or woman of 55, for instance, loses his job, he faces the prospect of long months of frustration, *fear*, and insecurity as he searches for a new one. . . . The cost of such an experience in terms of *mental anguish*, family *suffering*, lost income and damaged *self-respect* is too high to measure. One must observe it at firsthand—as I am confident many of our colleagues have—to appreciate how *painful* and how unnecessary it all is.
>
> . . . .
>
> . . . [J]ob discrimination hurts not only the deprived applicants but the employers and our economy and society as well.
>
> This is especially true when discrimination consists of the blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be. As we have seen, such a closed-door policy only adds to long-term unemployment, higher relief costs, and extensive *human suffering* and *despair*.

Id. at 34,751-52 (emphasis added).

Two Presidents have also recognized that age discrimination results in injury to personal interests. In a speech on the problems of age discrimination, President Johnson remarked that "the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposed on these citizens and their families." 113 CONG. REC. 34,744 (1967) (Rep. Kelly quoting President Johnson, Older American Message to the Congress, Jan. 23, 1967).

In 1974 the ADEA was amended to extend its coverage to include state and local government employees. President Nixon supported this amendment and stated that age discrimination "is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [*sic*] the contribution they would make if they were working." H.R. REP. NO. 913, 93d Cong., 2d Sess. 40 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2849 (quoting President's Speech of Mar. 23, 1972).

158. Coates v. National Cash Register Co., 433 F. Supp. 655, 664 (W.D. Va. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952, 955-56 (N.D. Ill. 1977); Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 328-33 (D.N.J. 1975), *rev'd*, 550 F.2d 834 (3d Cir. 1977).

159. 29 U.S.C. § 621(a)(3) (1976) states: "[T]he incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, *morale*, and employer acceptability is, relative to younger ages, high among older workers." (Emphasis added.)

The contention that pain and suffering damages should be disallowed because they would thwart conciliation efforts has been refuted in several decisions. In *Coates v. National Cash Register Co.*,[160] this argument was dismissed by observing that "[d]amages for emotional distress have been held available under Titles VII and VIII of the Civil Rights [Acts] of 1964 and 1968, respectively, even though conciliation is the primary means of enforcement under these Acts."[161] In *Bertrand v. Orkin Exterminating Co.*,[162] the court promulgated an additional counter argument, stating that "the dangers of ineffective conciliation efforts must be balanced against the injustice of leaving without remedy a class of injuries recognized by Congress in drafting the ADEA . . . . Moreover, the statutory pattern cannot be truly said to reject private civil actions in favor of conciliation efforts."[163]

The position that pain and suffering damages should be denied because the award might exceed actual injury is also somewhat specious. If this were a valid reason for disallowing such relief, pain and suffering damages might be disallowed in many types of legal actions. Moreover, the legal system is designed with safeguards to protect against the possibility that an award for pain and suffering might exceed actual injury. First, the plaintiff has the burden of proving the existence of such damages before the issue may even get to the trier of fact. Second, in a jury trial, the jury instructions are a mechanism by which the actions of the jury can be restricted. Third, the trial court has the power to modify a verdict which is not supported by the evidence. In view of these safeguards the court in *Bertrand v. Orkin Exterminating Co.*,[164] was correct when it stated that "the possibility that a jury may misapply the law should not justify the abandonment of one of the objectives of the statute, nor the surrender of a legal weapon provided by Congress."[165]

Finally, there is the argument that pain and suffering damages are unnecessary because these injuries are rectified by reinstatement. The obvious fallacy with this argument is demonstrated in the following statement:

> It may be true that a return to work will go a long way towards halting the anxieties resulting from age-discrimination. But reinstatement or promotion serves primarily to put a temporal end to the illegal conduct, while an award of back pay acts to make the victim financially whole. Neither remedy compensates the *previously undergone* mental trauma and so-

160. 433 F. Supp. 655 (W.D. Va. 1977).
161. *Id.* at 664.
162. 432 F. Supp. 952 (N.D. Ill. 1977).
163. *Id.* at 955.
164. 432 F. Supp. 952 (N.D. Ill. 1977).
165. *Id.* at 954.

> matic effects of a prohibited discharge. Yet it is apparent that these matters are equally within the concern of Congress and covered by the statutory purpose. Whatever the prospective psychological effect of the remedies sanctioned by the Third Circuit panel, they will not work *ex post facto* to eradicate the prior mental and physical injury.[166]

In summary, it can be said that the statutory language of the ADEA does not expressly resolve the question whether pain and suffering damages should be allowed. The crucial factors are the statutory authorization for legal relief and the legislative history of the Act. In view of these two factors it would seem that pain and suffering damages should be allowed. This result is more favorable than to render the statutory language superfluous and to ignore the legislative history. If this result does not in fact comport with the intention of the drafters of the ADEA, they can more clearly express their intention by a legislative amendment.

B. Punitive Damages

Although some courts deciding ADEA cases have awarded punitive damages,[167] the clear majority have not.[168] The arguments for and against punitive damages are similar to those which have arisen in relation to pain and suffering damages, but with some new twists.

Punitive damages are a form of legal relief. Therefore, as with pain and suffering damages, the statutory touchstone for punitive damages is the provision for appropriate "legal relief." This statutory language permits the argument that punitive damages should not be deemed to be authorized by this provision because of the doctrine of *ejusdem generis*.[169] However, for the same reasons that this doctrine of statutory construction was rejected in the context of pain and suffering awards,[170] it should be rejected in the context of punitive damages. Similarly, the argument has been made that allowing punitive damages would thwart the statutory preference

166. *Id.* at 954.

167. Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977); Dean v. American Security Ins. Co., 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977); Murphy v. American Motor Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976), *rev'd*, 570 F.2d 1226 (5th Cir. 1978).

168. Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977); Looney v. Commercial Union Assurance Cos., 428 F. Supp. 533 (E.D. Mich. 1977); Jackson v. Illinois Cent. Gulf R.R., 14 Emp. Prac. Dec. ¶ 7784 (S.D. Ala. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).

169. The argument was employed in Jackson v. Illinois Cent. Gulf R.R., 14 Emp. Prac. Dec. ¶ 7784 (S.D. Ala. 1977), to reach the conclusion that punitive damages are not allowable.

170. *See* text accompanying note 147 *supra*.

for conciliation.[171] However, this argument is as unpersuasive in the context of punitive damages as it is in the context of pain and suffering damages.[172]

The arguments for allowing punitive damages under the ADEA also parallel some of the arguments that have been developed by proponents of pain and suffering awards. They are (1) that the statutory reference to appropriate legal relief allows for any type of legal relief including punitive damages;[173] (2) that because the ADEA creates a new statutory tort, a panoply of remedies should arise in conjunction with the tort;[174] and (3) that since punitive damages are allowed at common law unless restricted by statute, they should be made available to ADEA litigants because the statute does not prohibit them.[175] Although these latter two arguments have some merit, the best argument for allowing punitive damages is that the statute means what it says when it states the court has the power to award legal relief which it deems appropriate.

The arguments for allowing punitive damages are not as strong as those for allowing pain and suffering damages. Absent is a legislative history which clearly supports such awards. Similarly, there is a stronger argument that the absence of an express statutory statement authorizing punitive damages indicates that Congress did not intend that they should be available. Several cases[176] have seized on the fact that in Title VIII (Fair Housing)[177] and the Equal Credit Act,[178] which were enacted in relative proximity to the ADEA, Congress expressly provided for punitive damages. In view of this fact, these courts concluded that Congress must not have intended to allow punitive damages, or it would have expressly done so. This argument should probably not be dispositive on the issue of punitive damages under the ADEA since it assumes that Congress will act consistently in drafting legislation, a weak premise for any argument. Because the legislative process is flex-

171. Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Jackson v. Illinois Cent. Gulf R.R., 14 Emp. Prac. Dec. ¶ 7784 (S.D. Ala. 1977).
172. *See* text accompanying notes 161 & 163 *supra*.
173. *See* Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977); Dean v. American Security Ins. Co., 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977).
174. *See* Murphy v. American Motor Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976), *rev'd*, 570 F.2d 1226 (5th Cir. 1978).
175. *Id.*
176. Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Jackson v. Illinois Cent. Gulf R.R., 14 Emp. Prac. Dec. ¶ 7784 (S.D. Ala. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).
177. 42 U.S.C. § 3612(c) (1976).
178. 15 U.S.C. § 1691e(b) (1976).

ible, dynamic, and everchanging, it is unreasonable to assume that Congress will treat the question of punitive damages similarly in different items of legislation.

The most forceful argument against allowing punitive damages is that the ADEA expressly allows liquidated damages. Although there might be some question as to whether liquidated damages should be viewed as compensatory in nature, the better view is that liquidated damages under the ADEA are a form of punitive damages.[179] Because of the punitive nature of liquidated damages under the ADEA most courts have concluded that Congress provided for liquidated damages in lieu of punitive damages.[180] In conjunction with this it has been argued that to allow a plaintiff to recover liquidated damages and punitive damages would create a form of double recovery on the part of the plaintiff.[181]

If it were not for the presence of liquidated damages under the ADEA, there would be a good argument for punitive damages. The statutory basis for such an award is present. But the real dilemma which is presented is that to allow punitive damages creates the

179. In Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942), the Supreme Court held that liquidated damages under the FLSA were not punitive but compensatory in nature. The Court reasoned that liquidated damages were compensatory in that the "retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Id.* at 583-84. However, the *Overnight* holding predates the 1947 Portal to Portal Act modifications to liquidated damages under the FLSA and thus is probably no longer good law. *See* § II-A of text *supra*. The PPA modified liquidated damage awards under the FLSA to make them reducible if it is shown that the employer acted in good faith. As a result of the good faith test, liquidated damages under the FLSA now seem to be punitive rather than compensatory in nature. The present test focuses on the nature of the employer's actions rather than the employee's injury, and thus the award becomes a form of punishment for and a deterrent against reprehensible conduct of employers.

Similarly, liquidated damages under the ADEA focus on the nature of the employer's acts rather than the injury to the employee, and therefore are punitiye in nature. Liquidated damages are allowable under the ADEA only if the employer has "willfully" violated the Act. Supporting this conclusion is congressional testimony by Senator Javits. *See* text accompanying note 81 *supra*.

Under the FLSA there is a criminal penalty for a willful violation of the Act. 29 U.S.C. § 216(a) (1976). The original draft of the ADEA included a similar criminal provision. However, this was later eliminated by an amendment to the bill. The following statement by Senator Javits supporting this amendment buttresses the conclusion that liquidated damages were intended to serve a punitive purpose under the ADEA: "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations . . . ." 113 CONG. REC. 7076 (1967).

180. *See* note 168 *supra*.

181. *Id.*

potential injustice of double recovery, whereas in order to disallow punitive damages, the statutory language referring to appropriate legal relief must be rendered surplusage. The suggested resolution to this problem is that the focus of the courts should be on the statutory terms "appropriate legal relief" with the emphasis on the word "appropriate."

Consider the following hypothetical situation. An employer willfully violates the ADEA by firing an employee because of his age. The employer's acts are so outrageous that under normal circumstances an award of $25,000 in punitive damages would be appropriate. The employee was not earning much money at this job, so his back pay award amounted to only $10,000. Because the violation was willful, the employee would also be entitled to $10,000 in liquidated damages under the ADEA. This $10,000 which, in effect, represents a form of punitive damages, is $15,000 less than the $25,000 that normally would have been awarded as punitive damages. Conversely, if punitive damages were allowable, it would be appropriate to assess the employer an additional $15,000 in punitive damages. This would not be a double recovery although the employee would be receiving two amounts which reflect a punitive purpose, since the total amount would be $25,000, the amount the situation called for initially. Thus, it can be seen that the mere fact that Congress provided for liquidated damage awards does not preempt the need for a separate award of punitive damages. In addition, it can be seen that a separate award of punitive damages does not in all instances create a double recovery.

Now consider the same hypothetical with one slight variation. Assume that the employer's acts only merited a total punitive damages award of $5,000 to $10,000. The total amount of recovery would be encompassed by the award of liquidated damages. In this situation the court should not allow a separate award for punitive damages because it would, in effect, permit a double recovery.

The third situation which should be considered is one in which the employer violates the ADEA, but the violation is not willful. No award of liquidated damages could be made because the violation was not willful. Should a court be able, nonetheless, to make an award of punitive damages? The better answer would be no. If an employer could be monetarily punished regardless of whether he or she willfully violated the Act, the express provision of the ADEA that liquidated damages shall be awarded only in the event of a willful violation becomes meaningless.

The better rule would be that when a willful violation of the ADEA has occurred and liquidated damages are awardable, punitive damages may be awarded if appropriate, but not if they would create a double recovery. Conversely, where the violation is not

willful and no liquidated damages are awarded, punitive damages should not be allowable. This approach honors the fact that liquidated damages under the ADEA are punitive in nature and that double recovery should be disallowed. At the same time it gives meaning to the statutory grant of power to award appropriate legal relief.

There is some judicial authority for this approach. Two of the ADEA decisions which have allowed recovery of punitive damages have conditioned the award on the presence of a willful violation of the Act.[182] In another ADEA decision, which disallowed punitive damages, the court stated that it did so because there was no evidence that the defendant had acted in bad faith.[183] The decision implies that if bad faith had been shown, punitive damages might have been recoverable. Since a bad faith test is analogous to a willfulness test,[184] this decision probably supports the conclusion that punitive damages should only be available if a willful violation has occurred. However, neither of these decisions takes the additional step and limits punitive damages for willful violations to those instances in which the award would not create a double recovery.

In summary, punitive damages should be allowable under the ADEA, but only under limited circumstances—where a willful violation of the Act has occurred and liquidated damages are awarded, but are inadequate to punish the defendant to the extent he or she deserves.

V. CONCLUSION

This comment has examined the issues which arise in relation to monetary damages under the ADEA. In some instances the courts have been in harmony as to how a particular issue should be resolved, and the law is fairly well established. However, the courts have not been in complete harmony concerning most of the damage issues under the ADEA. This comment has advanced a somewhat liberal interpretation of the ADEA regarding these issues. It has been suggested that liquidated damages, pain and suffering awards, and punitive damages should be awarded, not only because they are supported by persuasive arguments but because it makes sense to make such damages available to a person who has been subjected to age discrimination. A wide spectrum of types of relief provides a degree of flexibility in fashioning awards which lends itself to the different factual circumstances in which

182. Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976), *rev'd*, 570 F.2d 1226 (5th Cir. 1978).

183. Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

184. *See* text accompanying note 182 *supra*.

age discrimination appears. Since the ADEA is a remedial act, a wide range of damages should be available in the absence of compelling arguments in favor of severely restricting the type of damages recoverable. It is not suggested that the doors should be opened wide to allow for liquidated damages, pain and suffering damages, and punitive damages in every instance. But it is contended that each of these types of damages should be available for application in appropriate circumstances. If Congress finds that a liberal judicial construction of the relief provisions of the ADEA is contrary to its original intent, a legislative amendment could always be advanced which more specifically limits the type of relief available under the ADEA.

Richard Butler '78