

DRAWING A LINE: THE NEED TO RETHINK
REMEDIES UNDER THE AGE DISCRIMINATION
IN EMPLOYMENT ACT

JUSTIN A. WALTERS*

This Note considers the circuit split regarding the treatment of front-pay damages under the Age Discrimination in Employment Act (ADEA). Specifically, courts disagree as to whether a liquidated damages award should affect the determination of front-pay damages. This Note begins with an analysis of the remedies available under the ADEA and the nature of punitive damages. Drawing on this background, the author explains the rationales underlying the two approaches for determining front pay—either considering liquidated damages when determining front pay or independently considering front-pay damages. The author concludes that a fear of overcompensating the plaintiff motivates the former approach, while an emphasis on the different rationales for the remedies—compensatory and punitive—underlies the latter. To suggest a resolution to this disagreement, the author analyzes liquidated damages and then weighs the strengths and weakness of both methods. This Note concludes with the proposition that liquidated damages and front-pay damages should be considered independently in order to further the purpose of the ADEA and to maintain the integrity of the underlying rationales for the awards.

I. INTRODUCTION

Salesman Richard Newhouse worked for McCormick and Company for many years, consistently receiving excellent assessments of his work.¹ When Richard was sixty-one years old, however, he was forced to leave the company as a result of a reduction in force.² Sometime later, he applied for an opening with McCormick in a position that was substantially similar to the one he had held prior to his discharge.³ When filling this

* J.D. Candidate 2012, University of Illinois College of Law; B.A. 2009, Political Science, Cleveland State University. I am grateful to Andrew Morriss, whose research assignments led me to this topic, and to my notes editors, Tanner Warnick and Laura Campbell, for their comments and suggestions. Special thanks to my wife Jessica for her constant support.

1. *Newhouse v. McCormick & Co., Inc.*, 910 F. Supp. 1451, 1456 (D. Neb. 1996), *rev'd on other grounds*, 110 F.3d 635 (8th Cir. 1997).

2. *Id.* at 1453.

3. *Id.*

and other vacancies, McCormick and its officers demonstrated their reluctance to rehire older employees, failing to follow the proper recall procedure and adjusting the applicant pools so that each contained only one older applicant.⁴ In fact, McCormick's hiring manager told one applicant that he preferred hiring younger workers and went out of his way to avoid hiring any "older" candidates.⁵ Perhaps most egregiously, McCormick scheduled Richard for an interview only after the position had already been filled.⁶ During that interview, the hiring manager took interview notes, even though he had not done so for any other applicants.⁷ In the end, the company chose to bring on a "much younger man" instead of rehiring Richard.⁸ Throughout the rehiring process, McCormick's hiring manager had full knowledge of the protections afforded by the Age Discrimination in Employment Act (ADEA).⁹

Richard sued the company under the ADEA and Nebraska's employment discrimination statute, alleging that McCormick's failure to rehire him amounted to age discrimination.¹⁰ At trial, the jury awarded \$59,426 in back pay, representing what Richard would have earned in the position through the date of the verdict.¹¹ Because the jury determined that McCormick's discrimination was "willful," the Court granted an additional \$59,426 in statutory liquidated damages.¹² Finally, the jury awarded Richard \$206,359 in front pay, which the district judge reduced to \$158,365.¹³

For Richard, "front-pay" damages constituted the most substantial portion of his award under the ADEA. They represented what he would have earned in the future but for his discriminatory termination.¹⁴ These damages were essential in Richard's case, as he was very near retirement and would face significant difficulty finding alternative employment. But in three federal circuits, he likely would not have recovered those damages because the court may have deemed them "excessive" in light of the liquidated damages award.¹⁵ In these circuits, a plaintiff like Richard may receive only his "back pay," the amount he would have earned through the date of judgment,¹⁶ along with his liquidated award, which

4. *Id.* at 1453 n.1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1453 n.1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The reduced figure represents the amount that Richard would have earned had he continued to work until age seventy. *Id.* at 1456. Although the district judge found this figure to be reasonable, he found that there was insufficient evidence to support a finding that Richard would have worked beyond that date. *Id.* at 1458.

14. *Infra* note 61 and accompanying text.

15. *See infra* Part II.B.1.

16. *Infra* note 47 and accompanying text.

could not exceed his level of back-pay compensation.¹⁷ This would be the case even if Richard could prove that, in the absence of discrimination, he would have remained employed until reaching retirement. This approach not only misconceives the role of punitive damages generally, but it undercuts the deterrent effect of liquidated damages under the ADEA. In practical terms, the First, Fifth, and Seventh Circuits routinely deny victims of age discrimination the compensation to which they are entitled. Other circuits, including the Eleventh Circuit, have rejected this principle.¹⁸ Those circuits recognize that liquidated damages are “punitive in nature” and have no bearing on the amount of the compensatory award.¹⁹

This Note examines the relationship between front pay and liquidated damages under the ADEA and argues for a reconciliation of the current circuit split. Part II provides a brief overview of the remedies recoverable under the ADEA, outlines the common-law approach to punitive damages, and surveys the current split among federal courts regarding front pay’s relationship to liquidated damages. Part III considers the nature of liquidated damages under the ADEA, then sets forth the rationale for and assesses the efficacy of each approach. Finally, Part IV recommends the ideal relationship between front pay and liquidated damages, in light of the purpose of the ADEA.

II. BACKGROUND

The ADEA remedial framework is somewhat convoluted. The statute begins by incorporating remedial mechanisms that were first developed under the Fair Labor Standards Act (FLSA), including the concept of “liquidated damages.”²⁰ It then adds a “catchall” provision that grants courts a high level of discretion to provide alternative relief where necessary.²¹ Unlike the FLSA, however, the ADEA requires a heightened level of culpability before statutory liquidated damages may be awarded.²² This distinction matters. As discussed below, the Supreme Court has interpreted the ADEA’s liquidated damages provision to be a punitive measure, unlike its FLSA counterpart.²³

As a prelude to a more in-depth discussion of the current controversy over front-pay awards, a brief outline of the protections granted by the ADEA is offered below. Section A discusses the history and purpose of the ADEA and provides an overview of the various forms of legal and equitable relief available to victims of age discrimination. Section B lays

17. *Infra* notes 52–53 and accompanying text.

18. *See infra* Part II.B.2.

19. *See, e.g.*, *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988).

20. *See infra* note 52 and accompanying text.

21. *See infra* note 43 and accompanying text.

22. *See infra* note 55 and accompanying text.

23. *See infra* Part III.B.

out an overview of the two major approaches that federal courts have taken when determining the relationship between liquidated and front-pay damages.

A. *An Overview of the ADEA*

1. *The History and Substance of the ADEA*

At common law, all employment for an indefinite term was presumed to be “at will,” where an employee could be terminated for any reason, even if that reason was discriminatory.²⁴ Title VII of the Civil Rights Act of 1964, however, created a statutory exception to the common-law employment-at-will doctrine.²⁵ Title VII made it unlawful for an employer to carry out an adverse employment action with respect to an individual employee because of that employee’s color, race, sex, religion, or national origin.²⁶ In 1967, with the passage of the ADEA, Congress extended substantially similar protections to victims of age discrimination.²⁷ Under the statute, an employer may not discriminate against any employee over forty because of his or her age.²⁸

Congress enacted the ADEA “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”²⁹ The statute, however, contains several built-in defenses that allow employers to institute reasonable employment policies without fear of incurring ADEA liability. First, a policy that has a disparate impact on employees over the age of forty is not deemed unlawful if it is “based on reasonable factors other than age.”³⁰ This standard is not difficult for an employer to meet, unlike the more stringent “business necessity” test employed in Title VII disparate-impact cases, which examines whether the employer could have achieved its business objectives in a less discriminatory manner.³¹ Second, like Title VII, the ADEA exempts age

24. See MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* xxviii (7th ed. 2008) (“Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages.” (quoting *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967))).

25. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e) (2006)).

26. 42 U.S.C. § 2000e-2(a).

27. Age Discrimination in Employment Act (ADEA) of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2006)).

28. 29 U.S.C. § 631(a).

29. *Id.* § 621(b).

30. *Id.* § 623(f)(1).

31. See *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (noting that the “reasonable factors other than age” defense does not require the employer to explore less discriminatory alternatives).

discrimination from coverage where “age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”³² Third, the statute specifically authorizes age discrimination for firefighters and law enforcement officers, provided that certain statutory criteria are met.³³ As a result of these defenses, which show a high degree of deference to business judgment, ADEA plaintiffs face a harder road to recovery compared to their Title VII counterparts.

The enhanced protections that employers enjoy under the ADEA are due in part to societal perceptions of age discrimination. In *Smith v. City of Jackson*, the Court discussed the perceived differences that exist between age and other protected traits.³⁴ The court noted that, unlike race, an employee’s age is often relevant to one’s ability to do the job.³⁵ It further asserted that “intentional discrimination on the basis of age has not occurred on the same levels as discrimination against [other protected classes].”³⁶

This presumption of validity that employers enjoy under the ADEA is relevant to the controversy over front-pay awards. Once an employee has overcome the employer’s evidence of a reasonable business explanation for a discriminatory practice and cleared the hurdle of showing willful conduct, the majority approach would still determine the availability of future damages based upon the amount of the liquidated damages award.³⁷

2. *The Rights and Remedies of the Individual Employee*

Any person who has been discriminated against in violation of the ADEA may bring suit against one’s employer, provided that an employee complies with the administrative requirements outlined in the statute.³⁸ This private right of action gets its teeth from the Act’s damages provision, which provides that employers who violate substantive ADEA law are liable for “unpaid minimum wages or unpaid overtime compensation.”³⁹ This item of damages is referred to as “back pay.”⁴⁰ “Willful” violators are also liable for “liquidated damages,”⁴¹ defined as

32. 29 U.S.C. § 623(f)(1).

33. *Id.* § 623(j) (providing that it is not unlawful to take an adverse employment action with respect to an individual firefighter or law enforcement officer because of his or her age, provided that the worker has reached the locally mandated age of retirement “pursuant to a bona fide hiring or retirement plan”).

34. 544 U.S. at 240–41.

35. *Id.*

36. *Id.* at 241.

37. *See infra* Part II.B.1.

38. 29 U.S.C. § 626(d) (prohibiting a civil action by an individual “until . . . after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission,” which must be filed “within 180 days after the alleged unlawful practice occurred”).

39. *Id.* § 626(b).

40. *See, e.g., Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980).

41. 29 U.S.C. § 626(b).

an additional amount equal to the back-pay award.⁴² In addition to the remedies explicitly authorized, the statute leaves judges with a great deal of freedom to fashion alternative relief on a case-by-case basis. The Act's catchall provision stipulates that "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion."⁴³ Unlike Title VII,⁴⁴ the ADEA does not provide for compensatory or punitive damages.⁴⁵

Thus, a plaintiff in an ADEA action has access to three major remedies: back pay, liquidated damages, and equitable relief. Each form of relief is outlined in detail below.

a. Back Pay

Under the ADEA, back pay is a legal compensatory remedy aimed at putting the plaintiff in his or her rightful position.⁴⁶ It includes "earnings and benefits" that the plaintiff would have collected but for the defendant's discriminatory act and is calculated up to the date of judgment.⁴⁷ Recoverable benefits include bonuses, retirement benefits, and vacation pay.⁴⁸ In the case of "willful" violations, the net back-pay award is the figure that is doubled to determine liquidated damages.⁴⁹ As in the common law, plaintiffs in ADEA actions have a duty to mitigate back-pay damages by seeking alternative employment.⁵⁰ Any wages or benefits received through other employment are typically offset against the back-pay award.⁵¹

42. *See id.* The ADEA incorporates the definition of "liquidated damages" used in the FLSA, even though employees suing under the FLSA need not show that the violations were willful. *See* 29 U.S.C. § 216(b) (2006).

43. 29 U.S.C. § 626(b).

44. *See* 42 U.S.C. § 1981a(a)(1) (2006) (authorizing "compensatory and punitive damages" for victims of employment discrimination under Title VII "in addition to any relief authorized" by that statute's remedial provision). In this context, "compensatory damages" would include recovery for emotional distress, *see Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), or other expenses incurred as a result of the discharge, such as the costs of seeking alternative employment. *See Knapp v. Whitaker*, 757 F.2d 827, 846–48 (7th Cir. 1985).

45. *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1059 (9th Cir. 2009) ("Compensatory damages for pain and suffering and punitive damages are not available under the ADEA . . .").

46. *See Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry*, 232 P.3d 277, 283 (Colo. App. 2010) ("Back pay is a 'make whole' remedy intended to restore the employee to the financial situation that would have existed but for the employer's wrongful conduct.").

47. *See Taylor v. Home Ins. Co.*, 777 F.2d 849, 858 (4th Cir. 1985) (affirming an award of back pay based on a comparison to a similarly situated employee in another office).

48. *ZIMMER ET AL.*, *supra* note 24, at 670 (citing *United States v. Burke*, 504 U.S. 229, 239 (1992)).

49. 29 U.S.C. § 626(b) (2006) (providing for a liquidated damages award in an amount equal to "unpaid minimum wages or unpaid overtime compensation").

50. *See Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 426 (6th Cir. 1999).

51. *See Meschino v. Int'l Tel. & Tel. Corp.*, 661 F. Supp. 254, 259 (S.D.N.Y. 1987) (allowing pension benefits to be deducted from the back-pay award).

b. Liquidated Damages

The ADEA incorporates the concept of liquidated damages employed under the FLSA.⁵² Liquidated damages are defined by the statute as a sum equal to the amount owing, which includes unpaid wages or unpaid overtime compensation.⁵³ In effect, therefore, liquidated damages double the back-pay award. Courts have consistently held, however, that front pay is not an amount owing and therefore does not figure into the liquidated damages calculation.⁵⁴

Unlike the FLSA, which authorizes liquidated damages in all cases, the ADEA permits such awards only where the employer willfully violates the statute.⁵⁵ Where the jury does find a willful violation, however, a district court may not reduce the liquidated damages award below the statutory level; back-pay damages “must be doubled.”⁵⁶ By extension, if the plaintiff suffers no pecuniary loss and thereby incurs no back-pay damages, that employee is not entitled to a liquidated award.⁵⁷

c. Front Pay

Along with its explicit authorization of an award of unpaid wages and overtime compensation,⁵⁸ the ADEA grants courts broad equitable powers to fashion relief.⁵⁹ Although Congress did not specify whether future losses were available under the statute, a majority of federal appeals courts have allowed employees to recover front-pay damages.⁶⁰ “Front pay” refers generally to “prospective lost earnings” and covers wages that the employee would have earned beyond the date of judgment; it represents the amount necessary to place the plaintiff in the position that he or she would have occupied in the future but for the discriminatory termination.⁶¹

Although front pay takes the form of a monetary award, it is commonly considered an equitable remedy because it serves as a substitute

52. See 29 U.S.C. § 626(b); see also 29 U.S.C. § 216(b) (2006).

53. 29 U.S.C. § 216(b).

54. See *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1479 (5th Cir. 1992); *Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1163 n.2 (6th Cir. 1991); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1556–57 (10th Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 382–83 (3d Cir. 1987); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1348–49 (9th Cir. 1987).

55. Compare 29 U.S.C. § 626(b), with 29 U.S.C. § 216(b).

56. See *Spanier v. Morrison’s Mgmt. Servs., Inc.*, 822 F.2d 975, 979 (11th Cir. 1987).

57. *Brown v. M & M/Mars*, 883 F.2d 505, 515 (7th Cir. 1989).

58. See *supra* note 39 and accompanying text.

59. 29 U.S.C. § 626(b) (“[T]he court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA], including without limitation judgments compelling employment, reinstatement or promotion”); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (recounting legislative history indicating that Congress “intended to give the courts . . . discretion . . . to fashion the most complete relief possible”).

60. Timothy E. Hawks, *Future Damages in ADEA Cases*, 69 MARQ. L. REV. 357, 362 (1986).

61. See *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985).

for reinstatement.⁶² Generally, reinstatement is the preferred remedy, “because it offers the most likely means of making a plaintiff whole.”⁶³ In theory, an award of reinstatement allows the plaintiff to pick up from where he or she left off and put the experience of discrimination behind.⁶⁴ In practice, however, reinstatement is often an impracticable solution. Once the plaintiff’s suit has reached final judgment, it is likely that the relationship with the employer has been significantly damaged.⁶⁵ For this reason, front pay often represents a plaintiff’s most feasible opportunity for prospective relief.

Courts generally recognize a “strong presumption” in favor of future damages where reinstatement cannot be granted.⁶⁶ Because reinstatement is the preferred remedy, however, and because future losses are inherently speculative, courts have developed fairly rigid standards that must be met before front pay may be awarded.⁶⁷ Front-pay damages are appropriate only where reinstatement is not feasible,⁶⁸ such as when the plaintiff’s relationship with his or her employer has been “irreparably damaged by animosity associated with the litigation.”⁶⁹ Further, courts generally examine multiple factors to determine whether front pay is inappropriately speculative under the totality of the circumstances.⁷⁰ Important factors include the plaintiff’s future job prospects, the period of time covered by the front-pay award,⁷¹ the employer’s likelihood of staying in business,⁷² and “the employee’s work and life expectancy.”⁷³

62. See Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 706 (2010) (“The remedy of front pay is also considered to be tied to the equitable remedy of reinstatement.”).

63. *Id.* (citing *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999) (internal quotation marks omitted)); see also *O’Neal v. Fla. A & M Univ.*, 989 So. 2d 6, 12 n.3 (Fla. Dist. Ct. App. 2008) (“Front pay is considered equitable because it is awarded in lieu of an injunction requiring reinstatement, where reinstatement is impossible or inadvisable. Injunctive relief is quintessentially equitable and front pay is its monetary equivalent.” (citation omitted)).

64. See Sperino, *supra* note 62, at 706.

65. See ZIMMER ET AL., *supra* note 24, at 680.

66. See *id.* at 682 n.1; see also *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1397 (6th Cir. 1990) (“[F]ront pay is a remedy presumed appropriate unless record evidence clearly demonstrates the contrary.”); *King v. Staley*, 849 F.2d 1143, 1144 (8th Cir. 1988) (holding that it was an abuse of discretion for the district court to deny back pay, motivated in part by the “strong presumption that persons who have been discriminated against are entitled under Title VII to [back pay]” (quoting *Equal Emp’t Opportunity Comm’n v. Rath Packing Co.*, 787 F.2d 318, 329 (8th Cir. 1986))).

67. See ZIMMER ET AL., *supra* note 24, at 682 n.3; see also *Dominic v. Consol. Edison Co.*, 822 F.2d 1249, 1258 (2d Cir. 1987) (“In calculating the size of a front-pay award the court must estimate the plaintiff’s ability to mitigate damages in the future.”).

68. Sperino, *supra* note 62, at 706.

69. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984).

70. See, e.g., *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1332 (7th Cir. 1987).

71. See *id.*

72. See *Kelewae v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992) (“In view of the present adverse financial position of the defendant, we do not believe equitable relief is appropriate at this time . . .”).

73. *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 332 (Tenn. 1996) (quoting *Sasser v. Averitt Express, Inc.*, 839 S.W.2d 422, 434 (Tenn. Ct. App. 1992)).

Although a plaintiff must show future damages with reasonable certainty, front pay has been recognized as an essential piece of the ADEA remedial framework.⁷⁴ In *Whittlesey v. Union Carbide Corp.*, the Second Circuit considered, as an issue of first impression, whether front pay was an available remedy under the ADEA.⁷⁵ Noting the “broad grant of remedial authority” contained within the Act’s damages provision, the court held that an ADEA plaintiff could recover future damages.⁷⁶ Fundamentally, the court was concerned that denying reinstatement where it is infeasible, “without an award of reasonable, offsetting compensation, would leave the plaintiff irreparably harmed in the future by the employer’s discriminatory discharge, and would permit the defendant’s liability for its unlawful action to end at the time of judgment.”⁷⁷

Thus, although front pay should only be awarded after careful consideration of the circumstances of the case, it is an indispensable tool for ensuring that the plaintiff is fully compensated for the employer’s discriminatory employment decision.

B. *The Current Controversy over Front-Pay Awards*

Federal courts are split over whether a liquidated damages award should affect the availability of front-pay damages. The two major approaches to the problem, which will hereafter be referred to as the “majority approach” (First, Fifth, and Seventh Circuits) and the “traditional approach” (Eighth and Eleventh Circuits), are outlined below.

1. *The Majority Approach*

Of the federal courts that have considered the relationship between front pay and liquidated damages awards, most have shown hostility to front-pay awards where plaintiffs were able to show a willful violation and recover double back-pay damages.⁷⁸ The First, Fifth, and Seventh Circuits have held that a large liquidated damages award may render front pay excessive.⁷⁹

74. *Whittlesey*, 742 F.2d at 728 (interpreting 29 U.S.C. § 626(b) (2006)). Acknowledging the speculative nature of future damages, the *Whittlesey* court nevertheless felt confident that courts could “adapt” their experience with future damages in other contexts to the “special needs” of the ADEA. *Id.*

75. *Id.* at 727.

76. *Id.* at 727–28.

77. *Id.* at 728.

78. See *Coffey*, 929 S.W.2d at 332. Although the *Coffey* court refers to this as the “majority” approach, it notes that few courts have actually passed on the issue. *Id.*

79. See *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) (“[T]he district court does not appear to have considered the fact that liquidated damages were awarded to [the plaintiff] in assessing whether front pay is proper. We agree with the Seventh and First Circuits that a substantial liquidated damage award may indicate that an additional award of front pay is inappropriate or excessive.”); *Tennes v. Mass., Dep’t of Revenue*, 944 F.2d 372, 381 (7th Cir. 1991) (“[F]ront pay is less appropriate when (as in this case) liquidated damages are awarded.”); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 n.35 (1st Cir. 1979) (“[W]here the value of reinstatement is highly speculative, the availabil-

The Fifth Circuit endorsed the majority approach in *Walther v. Lone Star Gas Co.*⁸⁰ There, the plaintiff worked in a managerial position with the defendant for thirty years, consistently receiving favorable assessments of his work.⁸¹ He later was fired due to a reduction in force, believing that his position had been eliminated.⁸² The plaintiff eventually discovered, however, that the defendant gave his job to an employee from another office.⁸³ The plaintiff sued under the ADEA, alleging that “younger, less qualified employees whose positions had been eliminated were retained and transferred . . . to positions that [he] was qualified to fill.”⁸⁴ The plaintiff also introduced evidence that in the reduction, the company eliminated a much higher percentage of employees within the ADEA’s protected age group than those who were not.⁸⁵ At trial, the jury found for the plaintiff and awarded back pay, front pay, and liquidated damages.⁸⁶ Although the Fifth Circuit affirmed the verdict, it vacated the award of front pay, in part because “the district court [did] not appear to have considered the fact that liquidated damages were awarded to [the plaintiff] in assessing whether front pay [was] proper.”⁸⁷ With little explanation, the court simply declared that “a substantial liquidated damages award may indicate that an additional award of front pay is inappropriate or excessive.”⁸⁸

The Seventh Circuit used similar reasoning in *Tennes v. Massachusetts, Department of Revenue*.⁸⁹ There, the plaintiff worked as auditor for the Massachusetts Department of Revenue.⁹⁰ A new chief took over the plaintiff’s office and began making derogatory comments about the plaintiff’s age, including references to sexual impotence.⁹¹ When the plaintiff complained about the chief’s behavior, the chief issued a vague disciplinary notice, which later ended up in the plaintiff’s personnel file.⁹² Soon thereafter, when the plaintiff was delayed in returning from a business trip, he came back to the office to find four more disciplinary memos.⁹³ Eventually, due in large part to the contents of the chief’s discipli-

ity of a substantial liquidated damages award under the ADEA may be a proper consideration in denying additional damages in lieu of reinstatement.”); *Shove v. Prescott, Inc.*, No. 93-31-B-H, 1994 WL 247769, at *1 (D. Me. May 4, 1994) (“I conclude that the appropriate remedy here is not reinstatement or front pay. The award of liquidated damages furnishes fully appropriate relief.”).

80. 952 F.2d at 127.

81. *Id.* at 121.

82. *Id.*

83. *Id.*

84. *Id.* at 122.

85. *Id.*

86. *Id.* at 127.

87. *Id.*

88. *Id.*

89. 944 F.2d 372, 381–82 (7th Cir. 1991).

90. *Id.* at 374.

91. *Id.* On one occasion, the plaintiff was greeted with the following welcome: “There he is, grey hair, false teeth Probably can’t get it up.” *Id.* (internal quotation marks omitted).

92. *Id.*

93. *Id.* at 375.

nary notices, the plaintiff was fired.⁹⁴ He then sued the state under the ADEA and won, with the jury awarding almost \$249,000 in back pay and liquidated damages.⁹⁵ The district court, however, denied front pay.⁹⁶ On appeal, the Seventh Circuit affirmed the award of liquidated damages but declined to reverse the denial of future damages, noting that such awards are not required under the ADEA.⁹⁷ Further, like the Fifth Circuit, the court opined that “front pay is less appropriate when (as in this case) liquidated damages are awarded.”⁹⁸

The First Circuit has also endorsed the majority approach. In *Loeb v. Textron, Inc.*, the plaintiff worked as the international sales manager for the defendant, consistently earning positive performance reviews.⁹⁹ The defendant implemented a plan to ensure that it would continue to have an appropriate level of management personnel in the future.¹⁰⁰ After reviewing an “[a]ging chart” of the company’s officers, the defendant’s executive vice president of operations “warn[ed]” other executives about the large proportion of management positions held by employees over fifty-five.¹⁰¹ Thereafter, the defendant installed a new supervisor in the plaintiff’s department who began to assume the plaintiff’s responsibilities.¹⁰² Eventually, this supervisor discharged the plaintiff, citing his inability to produce sufficient revenue for the corporation.¹⁰³ The plaintiff’s replacement, however, did not fare much better.¹⁰⁴

The plaintiff then sued the defendant for age discrimination.¹⁰⁵ At trial, the jury found that the defendant had violated the ADEA, awarding \$90,700 in back pay.¹⁰⁶ The district court doubled the back-pay award in light of the defendant’s willful violation and granted an additional \$90,000 in future damages.¹⁰⁷ On appeal, however, the First Circuit remanded the case, noting that “the availability of a substantial liquidated damages award . . . may be a proper consideration in denying [front pay].”¹⁰⁸

Thus, when determining the availability of front pay, the majority approach considers not only the speculative nature of future damages,

94. *Id.* at 376.

95. *Id.* at 377. This total included the back-pay award of \$124,497.76 and the matching liquidated damages amount for the defendant’s willful conduct. *Id.* The jury also awarded attorneys’ fees. *Id.*

96. *Id.*

97. *Id.* at 381–82.

98. *Id.* at 381.

99. 600 F.2d 1003, 1007 (1st Cir. 1979).

100. *Id.*

101. *Id.*

102. *Id.* at 1007–08.

103. *Id.* at 1008.

104. *Id.* In fact, the replacement failed to produce enough business to cover the plaintiff’s prior salary. *Id.*

105. *Id.* at 1007.

106. *Id.* at 1009.

107. *Id.*

108. *Id.* at 1023 n.35.

but also whether the plaintiff has received liquidated damages due to the defendant's willful conduct.

2. *The Traditional Approach*

Other federal courts have held that liquidated damages should not factor into the front-pay analysis. The Eighth and Eleventh Circuits have flatly rejected the approach taken by the First, Fifth, and Seventh Circuits.¹⁰⁹ In *Dickerson v. Deluxe Check Printers, Inc.*, for example, the plaintiff sued the defendant under the ADEA, alleging that she had been denied a job because of her age.¹¹⁰ The jury found for the plaintiff and awarded \$62,000 in back pay and liquidated damages.¹¹¹ The district court, however, denied equitable relief due to the "large damage award."¹¹² The Eighth Circuit rejected this reasoning, noting that the award of liquidated damages was "not intended to take the place of equitable relief."¹¹³

The Eleventh Circuit renounced the majority approach on similar grounds.¹¹⁴ In *Castle v. Sangamo Weston, Inc.*, the defendant's new general manager implemented a plan to streamline the defendant's workforce.¹¹⁵ He lamented the presence of the "old guard" in the defendant's higher paid positions and expressed his desire for "young blood."¹¹⁶ During his time at the company, he seemingly went out of his way to give the plaintiffs the best employment discrimination case possible, referring to his older employees as "'old farts,' 'old bastards,' and 'old cows.'"¹¹⁷ They were, in his opinion, a "cancer" in the business that needed to be replaced by younger employees.¹¹⁸ During a later reduction in force, the plaintiffs, all of whom were above the ADEA's minimum age requirements, were fired or demoted.¹¹⁹ The district court refused to award front pay, finding that back pay and liquidated damages under the statute fur-

109. See *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988) ("A district court may not factor in the liquidated damages award when considering equitable relief because liquidated damages are punitive in nature."); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983); *Hipp v. Liberty Nat'l Life Ins. Co.*, 29 F. Supp. 2d 1314, 1319 (M.D. Fla. 1998) ("Because the determination of future damages has no necessary relationship to the determination of punitive damages, the reasoning used by the First, Fifth, and Seventh Circuits is flawed. Moreover, the assessment of front pay is compensatory, it is not intended to punish or deter a defendant, but rather, to make the victims of discrimination whole again." (citation omitted)); *Newhouse v. McCormick & Co.*, 910 F. Supp. 1451, 1459 (D. Neb. 1996) ("I am aware of no law in this circuit which holds that an award of liquidated damages precludes an award of front pay.").

110. 703 F.2d at 278-79.

111. *Id.* at 279.

112. *Id.*

113. *Id.* at 280.

114. *Castle*, 837 F.2d at 1562.

115. *Id.* at 1553.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1553-54.

nished “sufficient relief.”¹²⁰ The Eleventh Circuit roundly dismissed this analysis, noting that liquidated damages are granted to plaintiffs “*in addition to* compensatory or actual damages” and “are not meant to replace equitable relief under the ADEA.”¹²¹

This conceptual distinction between liquidated damages and front-pay awards is based primarily on the goals that each form of relief attempts to achieve. In *Hipp v. Liberty National Life Insurance Co.*, for example, the plaintiffs sued their former employer under the ADEA, alleging that they had been replaced by less qualified, younger employees.¹²² The jury returned a verdict for the plaintiffs and awarded front pay and liquidated damages.¹²³ Citing the First, Fifth, and Seventh Circuits, the defendant argued that the liquidated damages precluded an award of front pay.¹²⁴ The court disagreed, noting that “the amount valued by the trier of fact to *compensate* Plaintiffs for their future injuries should not be dependent on the amount the legislature or the jury has determined is necessary to *punish and deter* Defendant.”¹²⁵

The traditional approach, therefore, holds that regardless of the amount of liquidated damages received by the plaintiff, such awards should not be considered when determining the appropriateness of prospective relief.

3. *The Issue*

Thus, the federal circuit courts’ approaches to the damages analysis under the ADEA are entirely inconsistent. One group holds that a plaintiff may be “sufficiently relieved” by a substantial liquidated damages award and should not be overcompensated through front pay.¹²⁶ The other group maintains that the presence of a liquidated damages award is irrelevant to the front-pay analysis.¹²⁷ These divergent approaches implicate not only the remedies available under the ADEA but the fundamental remedial principles of compensation and punishment.

120. *Id.* at 1562.

121. *Id.*

122. 29 F. Supp. 2d 1314, 1316–17 (M.D. Fla. 1998).

123. *Id.* at 1316.

124. *Id.* at 1319–20.

125. *Id.* at 1319 (emphasis added).

126. See *supra* Part II.B.1; see also *Shove v. Prescott, Inc.*, No. 93-31-B-H, 1994 WL 247769, at *1 (D. Me. May 4, 1994) (holding that front pay was not required because liquidated damages and front pay furnished “fully appropriate relief”).

127. See *supra* Part II.B.2.

III. ANALYSIS

Through case law, statutory language, and legislative history, this Part distills an underlying theory of liquidated damages. Section A outlines the history of punitive damages generally, focusing on the bright dividing line that courts have drawn between the purposes of punitive and compensatory awards.¹²⁸ Section B discusses the nature of liquidated damages under the ADEA.¹²⁹ Specifically, it argues that, notwithstanding contrary legislative history, these awards are primarily punitive in nature and serve a purpose that is unrelated to the underlying goals of compensatory relief.¹³⁰ Finally, Section C weighs the strengths and weaknesses of the two major approaches to liquidated damages in light of their punitive goal.¹³¹

A. *Punitive Damages Generally*

As discussed in Section B, the history surrounding liquidated damages demonstrates that these remedies are primarily designed to deter and punish willful violators of the ADEA. An examination of the nature and purpose of punitive damages, therefore, illustrates the principles that should guide courts in determining how liquidated damages fit into the ADEA remedial scheme.

1. *The History and Purpose of Punitive Damages*

The concept of punitive damages has well-established historical roots. In ancient Rome, the law imposed similar penalties upon those who committed dignitary harms as a means of “express[ing] society’s distaste for [the] offense.”¹³² In Medieval England, punitive damages were authorized by statute.¹³³ In Anglo-American law, punitive damages began with exemplary damages, a remedy that arose in eighteenth-century England as a “means to punish the abuse of governmental power.”¹³⁴ In *Wilkes v. Wood*, for example, the secretary of state improperly searched the plaintiff’s home and seized some of the plaintiff’s papers.¹³⁵ The court allowed an award of exemplary damages to express public outrage and deter similar abuse in the future.¹³⁶ Eventually, courts began to im-

128. See *infra* Part III.A.

129. See *infra* Part III.B.

130. See *infra* Part III.B.

131. See *infra* Part III.C.

132. Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 780 (2010).

133. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614 (2003).

134. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 469 (2005).

135. *Wilkes v. Wood*, [1763] 98 Eng. Rep. 489, 489–91 (C.P.); Calandrillo, *supra* note 132, at 780.

136. *Wilkes*, 98 Eng. Rep. at 498–99 (“I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more

pose exemplary damages on “wealthy elites who abused their position of power by breaching mores of the local community.”¹³⁷ Even at this early stage of development, punitive damages were “decoupled from the amount of compensatory damages because [they] disregarded the principle of compensation.”¹³⁸

In the United States, the use of punitive damages dates back as early as 1791, with *Coryell v. Colbaugh*.¹³⁹ Many early U.S. cases that awarded punitive damages were aimed at punishing the defendant for societal harm as well as the injury to the individual plaintiff.¹⁴⁰ Today, courts acknowledge that punitive damages are “a part of traditional state tort law.”¹⁴¹

The Supreme Court has noted that as recently as the nineteenth century, punitive damages did not serve a purely punitive purpose.¹⁴² Rather, they often provided compensation for “intangible injuries” that were not yet covered by tort law.¹⁴³ The emphasis that courts placed on plaintiffs’ social standing illustrates this conception of punitive damages as a measure of compensation for dignitary harms.¹⁴⁴ In 1869, for example, the Illinois Supreme Court compassionately noted that “[i]t is not expected of a jury that, for a mere personal wrong, . . . if done to a vagrant, or to a person of but little character in the community, they should award to him the same damages they would give a man whose station and respectability were unquestioned.”¹⁴⁵ Over time, however, as pain and suffering and other intangible losses were folded into common-law compensatory damages, the compensatory purpose of punitive damages was deemphasized by courts and commentators, and punitive damages jurisprudence turned “toward a more purely punitive . . . understanding.”¹⁴⁶

than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.” (citation omitted)).

137. Rustad, *supra* note 134, at 471.

138. *Id.* at 469.

139. 1 N.J.L. 77, 77 (N.J. Sup. Ct. 1791) (upholding an exemplary award “not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example’s* sake, [and] to prevent such offenses in [the] future”); see also Robert W. Pritchard, Comment, *The Due Process Implications of Ohio’s Punitive Damages Law—A Change Must Be Made*, 19 U. DAYTON L. REV. 1207, 1210 (1994).

140. Rustad, *supra* note 134, at 475. The Supreme Court has recently disclaimed this view of punitive damages, finding that it fails to comport with due process. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“In our view, the Constitution’s due process clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . .”).

141. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

142. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n.11 (2001).

143. *Id.*; see also *Colby, supra* note 133, at 615.

144. *Colby, supra* note 133, at 616–17.

145. *Walker v. Martin*, 52 Ill. 347, 351 (1869); *Colby, supra* note 133, at 616–17.

146. *Cooper Indus.*, 532 U.S. at 438 n.11.

2. *The Traditional Relationship Between Punitive and Compensatory Damages*

The Supreme Court has acknowledged that today's compensatory and punitive damages, although "typically awarded at the same time by the same decisionmaker . . . serve distinct purposes."¹⁴⁷ Compensatory damages are intended to relieve the "concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."¹⁴⁸ Punitive damages, on the other hand, serve as a means of deterring unlawful behavior before it occurs and punishing that behavior when it does.¹⁴⁹ Thus, punitive damages serve a role that is separate and distinct from that of compensatory damages; a plaintiff's ability to recover punitive damages hinges not on his or her actual loss, but on the defendant's egregious behavior.¹⁵⁰ Because punitive damages are aimed at a different end, courts have struggled with establishing appropriate limits on punitive relief.

Traditionally, the excessiveness of punitive-damages awards has been viewed in light of compensatory damages, not the other way around. It is well established that the due process clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."¹⁵¹ As early as the nineteenth century, courts recognized the importance of limiting the exemplary damages award to a level proportionate to compensatory damages.¹⁵²

In recent years, the Supreme Court has attempted to articulate more easily applicable principles for determining whether a punitive damages award is "grossly excessive." In *BMW of North America, Inc. v. Gore*, the plaintiff sued a U.S. BMW distributor for fraud, alleging that it failed to disclose presale repairs conducted on his new car.¹⁵³ During the trial, BMW admitted that it had a formal policy of not disclosing such repairs to its dealers.¹⁵⁴ The jury found for the plaintiff and awarded \$4000 in compensatory damages, along with \$4,000,000 in punitive damages.¹⁵⁵

147. *Id.* at 432.

148. *Id.*

149. Nina Lempert, Comment, *Punitive Damages—The Dischargeability Debate Continues*, 11 *BANKR. DEV. J.* 707, 713 (1995).

150. See *Coryel v. Colbaugh*, 1 N.J.L. 77, 77 (N.J. Sup. Ct. 1791) (upholding a punitive award, "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offenses in [the] future").

151. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001)).

152. See *Saunders v. Mullen*, 24 N.W. 529, 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large."); *McCarthy v. Niskern*, 22 *Minn.* 90, 92 (1875) (setting aside excessive exemplary damages "in order to prevent injustice").

153. 517 U.S. 559, 563 (1996).

154. *Id.* at 563–64.

155. *Id.* at 565. There was evidence that the jury came to its punitive damages figure by multiplying the compensatory damages by "the number of similar sales in other jurisdictions." *Id.* at 567.

The Alabama Supreme Court granted remittitur, finding that the appropriate level of punitive damages was \$2,000,000.¹⁵⁶

As a starting principle, the Supreme Court noted that “state sovereignty and comity” prohibited Alabama from imposing punitive damages on tortfeasors “to punish . . . conduct . . . that had no impact on Alabama or its residents.”¹⁵⁷ To help guide states in determining the appropriate level of punitive damages awards and ensure that potential defendants would receive “fair notice . . . of the severity of the penalty” for violating state law, the Court formulated three “guideposts” for determining the excessiveness of a punitive damages award: (1) the reprehensibility of the defendant’s conduct, (2) the ratio between the actual damages and the punitive award, and (3) the disparity between the punitive award and the “civil penalties authorized or imposed in comparable cases.”¹⁵⁸

In light of those factors, the *Gore* Court found the \$2,000,000 punitive damage figure to be “grossly excessive.”¹⁵⁹ It determined that the reprehensibility of BMW’s conduct was rather minor, because the harm the plaintiff suffered was “purely economic in nature,” and the defendant’s conduct did not exhibit a reckless disregard for safety.¹⁶⁰ With regard to the ratio between punitive and compensatory damages, the Court attempted to avoid a “simple mathematical formula;” it found it self-evident that the “breathtaking” five hundred to one ratio was sufficient to “raise a suspicious judicial eyebrow.”¹⁶¹ Finally, the Court noted that the punitive award greatly exceeded the civil penalty authorized in Alabama for the same offense: \$2000.¹⁶²

In *State Farm Mutual Auto Insurance Co. v. Campbell*, the Court further restricted state court discretion over punitive damages awards and moved toward the “simple mathematical formula” it had disclaimed in *Gore*.¹⁶³ In *Campbell*, the plaintiff brought suit against his insurer for its bad-faith failure to settle a wrongful death lawsuit within policy lim-

156. *Id.* Although the court found that multiplying the plaintiff’s actual damages by sales outside of the state would have been improper, it nevertheless maintained this high punitive award after a “comparative analysis” of “cases from other jurisdictions.” *Id.* (quotation omitted).

157. *Id.* at 572–73.

158. *Id.* at 574–75.

159. *Id.*

160. *Id.* at 575–76. The Court noted that this factor was likely the “most important indicium” in the excessiveness inquiry, relying on the nineteenth-century view that exemplary damages “should reflect the enormity of the offense.” *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852) (internal quotation marks omitted)). This piece of the excessiveness equation has its own subfactors, including whether the wrong caused physical or merely financial harm and whether the defendant’s conduct was intentional or merely negligent. *See id.* at 575–76.

161. *Id.* at 582–83 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting) (internal quotations omitted)).

162. *Id.* at 584. The value of this factor is uncertain, particularly when comparing punitive damages to analogous criminal penalties. The Court itself later noted this problem. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003) (“When used to determine the dollar amount of the award, . . . the criminal penalty has less utility.”).

163. 538 U.S. at 424.

its.¹⁶⁴ At trial, the jury awarded the plaintiff \$145,000,000 in punitive damages but only \$2,600,000 in compensatory damages.¹⁶⁵ The Court held that the punitive damages award was unreasonably high.¹⁶⁶ After applying the *Gore* guideposts, the Court went so far as to state that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁶⁷

As these cases illustrate, the reasonableness of a punitive award is often tested against the amount awarded in compensatory damages. Outside of the age-discrimination context, however, “the reasonableness of a compensatory award, the jury’s valuation of the plaintiff’s harm, is *never* tested by its relationship to the punitive award.”¹⁶⁸

When judged against this framework, the majority approach to liquidated damages under the ADEA seems out of sync with Supreme Court jurisprudence on punitive damages. ADEA liquidated damages are statutorily set at an amount equal to back-pay damages.¹⁶⁹ Courts need not, and indeed may not, balance the level of liquidated damages with the amount awarded in lost wages and overtime.¹⁷⁰ Any concern over excessive damages, therefore, seems misplaced in the ADEA context.

B. *The Nature of Liquidated Damages Under the ADEA*

As discussed above, liquidated damages under the ADEA are set by the statute at an amount equal to the back-pay award, which is a measure of unpaid wages and overtime compensation through the date of judgment.¹⁷¹ The ADEA itself does not clarify the role of liquidated damages. Instead, it incorporates the damages scheme laid out in the FLSA.¹⁷² A brief overview of liquidated damages in that context provides a helpful framework for understanding those remedies under the ADEA.

164. *Id.* at 413–14.

165. *Id.* at 415. The trial court reduced the compensatory figure to \$1 million and the punitive figure to \$25 million. *Id.* The state Supreme Court “reinstated the \$145 million punitive damages award,” making this a 145:1 ratio. *Id.*

166. *Id.* at 429.

167. *Id.* at 425. This is not a black-letter rule, however. The Court acknowledged that “ratios greater than those [it had] previously upheld [could] comport with due process where a ‘particularly egregious act has resulted in only a small amount of economic damages.’” *Id.* at 425 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)). Likewise, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*

168. *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 332–33 (Tenn. 1996).

169. *See supra* note 53 and accompanying text. Recall further that unlike Title VII, the ADEA does not authorize compensatory or punitive damages. *See supra* note 45 and accompanying text.

170. *See supra* note 56 and accompanying text.

171. *See supra* note 53 and accompanying text.

172. *See supra* note 52 and accompanying text.

1. *Liquidated Damages Under the FLSA*

In the context of the FLSA, liquidated damages serve a compensatory purpose. In *Brooklyn Savings Bank v. O'Neil*, the plaintiff sued his employer for its failure to pay overtime compensation as required under the Act.¹⁷³ The trial court dismissed the case, relying in part on a release signed by the plaintiff which purported to disclaim his rights under the FLSA.¹⁷⁴ In determining whether such rights could properly be waived, the Supreme Court noted that FLSA liquidated damages are “not penal in . . . nature,” but are meant to compensate for losses flowing from the delayed payment of statutory minimum compensation that may be too difficult for the plaintiff to prove in court.¹⁷⁵ The Court held, however, that the employee could not contractually waive his right to liquidated damages, in part due to the “private-public character” of that right.¹⁷⁶ An employer who fails to pay statutory minimum compensation hinders the “free flow of commerce”—liquidated damages act as an incentive for wronged employees to serve as private attorneys general and as a deterrent for employers who “gamble[] on evading the Act.”¹⁷⁷

Despite key differences in the treatment of liquidated damages under the ADEA, the FLSA’s compensatory deterrent framework is relevant when analyzing the relationship between front pay and liquidated damages. It demonstrates that even though FLSA liquidated damages were considered a form of compensatory relief, the Court acknowledged that they serve a punitive function by ensuring compliance with the Act’s substantive provisions.

2. *The Supreme Court Articulates a Willfulness Standard for ADEA Liquidated Damages*

Although the ADEA adopts the damages provision of the FLSA, it makes one important break with that statute in its treatment of liquidated damages. Unlike the FLSA, the ADEA only allows for double recovery in cases involving “willful” violations.¹⁷⁸ On its face, this alteration suggests that liquidated damages serve a different purpose in the age-discrimination context.

The Supreme Court recognized this distinction in *Trans World Airlines, Inc. v. Thurston*.¹⁷⁹ There, the Court interpreted the ADEA’s liqui-

173. 324 U.S. 697, 699–700 (1945).

174. *Id.* at 700.

175. *Id.* at 707. The Court further acknowledged that an employer’s failure to pay just compensation on time could be “so detrimental to maintenance of the minimum standard of living . . . that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being.” *Id.*

176. *Id.* at 708–09.

177. *Id.* at 708–10.

178. 29 U.S.C. § 626(b) (2006).

179. 469 U.S. 111, 125 (1985).

dated damages provision and articulated a standard for identifying “willful” conduct.¹⁸⁰ The defendant airline had three classes of “cockpit positions”: captain, first officer, and flight engineer.¹⁸¹ It implemented a policy in which flight engineers could continue to work in that capacity after reaching age sixty, while captains would be mandatorily retired unless they were fortunate enough to be assigned a flight engineer position through the company’s bidding process.¹⁸² Captains who became medically disabled or whose positions were eliminated, however, were given automatic bumping rights to displace incumbent flight engineers.¹⁸³ The plaintiffs, former captains who had been mandatorily retired, sued the defendant claiming that this policy violated the ADEA.¹⁸⁴

Significantly, the *Thurston* Court noted that “[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature.”¹⁸⁵ The proposed bill originally incorporated the FLSA’s criminal liability provision, but some lawmakers worried that such a provision would present employees with “problems of proof” and allow employers to hide behind the Fifth Amendment.¹⁸⁶ Liquidated damages allowed for a similar deterrence mechanism without those complications.¹⁸⁷

After determining that the ADEA’s liquidated damages provision was meant to be punitive, the Court upheld the Second Circuit’s restrictive definition of “willful” conduct. Under that formulation, conduct is “willful” when the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.”¹⁸⁸ Therefore, the liquidated damages clause applies only to “bad” actors and cannot be invoked where the employer was merely negligent or *should have been aware* of the protections afforded by the ADEA.

Applying that standard, the *Thurston* Court found that the airline’s conduct was not willful.¹⁸⁹ It had initially attempted to offer the same bumping rights to all cockpit personnel but was denied by the pilots’ union.¹⁹⁰ In an attempt to maintain compliance with the ADEA, the airline compromised by allowing those rights only to flight engineers.¹⁹¹ Because of these voluntary efforts toward compliance, the Supreme Court found it reasonable to assume that the defendant “simply overlooked the chal-

180. *Id.* at 128.

181. *Id.* at 114.

182. *Id.* at 116.

183. *Id.* at 116–17.

184. *Id.* at 117–18.

185. *Id.* at 125.

186. *Id.* (quoting 113 CONG. REC. 7076 (1967)).

187. *Id.*

188. *Id.* at 119 (quoting *Air Line Pilots Ass’n, Int’l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)).

189. *Id.* at 129–30.

190. *Id.*

191. *Id.* at 130.

lenged aspect of the new plan;” this conduct was insufficient to meet the “reckless disregard” standard approved by the Court.¹⁹²

Thurston’s emphasis on egregious conduct and stringent application of that requirement reinforce the notion that liquidated damages are distinct from front-pay damages and are aimed at deterrence rather than compensation.

3. *Judicial Confusion over the Nature of Liquidated Damages*

Surprisingly, the *Thurston* decision was not the final word on the matter. After it was announced, it encountered a fair degree of criticism in light of seemingly inconsistent legislative history. The house report accompanying the 1978 amendments stated that the ADEA’s damages provision “includes liquidated damages . . . which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.”¹⁹³ In fact, that same report stated that “[t]he ADEA as amended by this act does not provide remedies of a punitive nature.”¹⁹⁴

Because of that conflicting language, some courts initially rejected the *Thurston* Court’s assertion that ADEA liquidated damages are primarily punitive. In *Powers v. Grinnell Corp.*, the plaintiff challenged the First Circuit’s rule that prejudgment interest could not be recovered in ADEA cases where liquidated damages were awarded.¹⁹⁵ The rationale for the rule was that such awards would amount to a double recovery in light of the compensatory nature of liquidated damages.¹⁹⁶ Prior to *Thurston*, in fact, most courts followed the same rule.¹⁹⁷ The plaintiff argued that the rule was no longer valid because the Court had held that liquidated damages were punitive in nature.¹⁹⁸ The First Circuit, however, did not feel compelled to adjust the rule based on the *Thurston* decision; it did not view the punitive and compensatory interpretations of liquidated damages as mutually exclusive.¹⁹⁹ For the First Circuit, the no-

192. *Id.*

193. H.R. REP. NO. 95-950, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 535. Other language in the house report, however, provides some indication that the classification of liquidated damages as legal relief was based in part on the desire to ensure plaintiffs’ rights to a jury trial on the issue. *See id.* (“The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear than [sic] an award of liquidated damages under the FLSA is not a penalty . . .”).

194. *Id.*

195. 915 F.2d 34, 40–41 (1st Cir. 1990); *see also* *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982).

196. *Powers*, 915 F.2d at 40.

197. *See id.* at 39–40; *Blim v. W. Elec. Co.*, 731 F.2d 1473, 1479–80 (10th Cir. 1984); *O’Donnell v. Ga. Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1552 (11th Cir. 1984); *Rose v. Nat’l Cash Register Corp.*, 703 F.2d 225, 230 (6th Cir. 1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101–03 (8th Cir. 1982); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981).

198. *Powers*, 915 F.2d at 39–40. The defendant took a similar approach to the traditional approach to front pay, arguing that liquidated damages and prejudgment interest served different purposes; deterrence and compensation, respectively. *Id.*

199. *Id.* at 40 (“Had the Court intended for so much to turn on its characterization of liquidated damages, it seems reasonable to assume it would have mentioned contrary legislative history, and in

tion that liquidated damages served *only* a punitive function was “simply inaccurate.”²⁰⁰ If punitive at all, the First Circuit believed that they could serve a punitive and compensatory function simultaneously.²⁰¹ In light of this conclusion, the court declined to overturn the rule and reaffirmed its prior position that liquidated damages may be considered in determining whether an award of front pay is appropriate.²⁰²

Like the First Circuit in *Powers*, other circuits have suggested that liquidated damages serve both functions.²⁰³ In *Blum v. Witco Chemical*, for example, the jury returned a verdict for the plaintiffs on their ADEA claims and found that the defendant’s actions were “willful.”²⁰⁴ The district court, however, refused to award liquidated damages on the ground that there was no delay in receiving compensatory relief.²⁰⁵ In the court’s opinion, the liquidated damages provision was meant to “ensure that plaintiffs [were] compensated for the loss due to *delay* in receiving back wages.”²⁰⁶ The Third Circuit agreed with the result but not with the reasoning.²⁰⁷ Although the court acknowledged that “*one purpose* of the liquidated damage award is to compensate the plaintiff,” it asserted that it is also “punitive in nature, intended to deter future violations.”²⁰⁸

These decisions, when viewed in light of the Court’s contrary statements in *Thurston*, only made the purpose of liquidated damages more opaque. Fortunately, the Supreme Court clarified its position.

4. *The Supreme Court Puts Its Foot Down*

In *Commissioner v. Schleier*, the Supreme Court reaffirmed and clarified the comments it made in *Thurston*, rejecting the First Circuit’s notion that liquidated damages serve a dual purpose.²⁰⁹ In *Schleier*, to se-

particular would have reconciled its position with the House Conference Report to the 1978 amendments, relied upon so heavily by circuit courts in concluding that liquidated damages are compensatory.” (quoting *Linn v. Andover Newton Theological Sch., Inc.*, 874 F.2d 1, 7 n.9 (1st Cir. 1989)).

200. *Id.* at 41 n.11.

201. *Id.* The court further noted that it had “never held that the *only* function served by liquidated damages is to compensate for loss due to delay in payment.” *Id.* at 42 (citations omitted).

202. *See id.* at 43 (“Since we adhere to our rationale that liquidated damages under the ADEA serve a compensatory function, aside from any punitive function, the district court properly considered the liquidated damages award in its ‘front pay’ analysis.” (citations omitted)).

203. *See id.* at 42; *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990) (“[The Clayton Act’s damages] provisions, like that for liquidated damages under the ADEA, play an important role in deterrence. . . . In fact, it would be the unusual statute whose remedial provisions did not serve both compensatory and deterrent purposes.”); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 382 (3d Cir. 1987). *Cf. Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ([W]hile liquidated damages serve a deterrent or punitive function, Congress also intended liquidated damages to serve as compensation for a discharged employee’s nonpecuniary losses arising from the employer’s willful misconduct.”).

204. *Blum*, 829 F.2d at 382.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (emphasis added) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985)).

209. 515 U.S. 323, 331–32 (1995).

cure a tax deduction, the employee argued that the liquidated damages she received in her ADEA suit were, in part, compensation for personal injuries, relying on arguments similar to those in *Powers*.²¹⁰ The Court noted that liquidated damages under the ADEA are “a significant departure from those in the FLSA” and reaffirmed that those awards are meant to be “punitive in nature.”²¹¹ It acknowledged the existence of contrary legislative history but stated that it “did not find it persuasive.”²¹² The Court even rejected a “hybrid” approach, indicating that liquidated damages are *exclusively* punitive in nature.²¹³

Thus, under current Supreme Court jurisprudence, liquidated damages under the ADEA are *exclusively* intended to deter and punish willful violators. On a purely theoretical level, notwithstanding contrary legislative history, this conclusion makes sense. If one begins with the assumption that ADEA liquidated damages serve a similar purpose to those under the FLSA, the statutory requirement of willful conduct seems unprincipled. After all, an employer who violates the FLSA is liable for double back-pay damages, regardless of his or her mental state.²¹⁴ If Congress was simply concerned with compensating uncertain damages flowing from unemployment, it would have allowed liquidated damages in all ADEA cases.²¹⁵ Unfortunately, the First, Fifth, and Seventh Circuits have not yet overruled their prior decisions adopting the majority approach in light of the *Schleier* case, even though those decisions rest primarily upon the compensatory nature of liquidated damages.²¹⁶

210. *Id.* at 331.

211. *Id.* at 331–32 (citing *Thurston*, 469 U.S. at 125).

212. *Id.* at 332 n.5. The Court’s blunt rejection of the statements in the house report makes sense in light of a trend that has occurred during the last two decades. During the 1981–1982 Term, the Court cited legislative history in almost every case of statutory interpretation. Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?*, 1994 PUB. INT. L. REV. 57, 64 (1994). By contrast, in the 1992–1993 Term, the Court only cited legislative history in around forty-three percent of its statutory interpretation cases. *See id.* Professor Maggs argues that this phenomenon can be explained by Justice Scalia’s presence on the court; because of his strict textualist approach to interpretation, the other Justices present alternative arguments in order to avoid conflict. *Id.* at 67.

213. *Schleier*, 515 U.S. at 332 n.5 (“[T]he Court in *Thurston* was presented with many of the arguments offered by respondent today. . . . Against this background, the Court’s statement that ‘Congress intended for liquidated damages to be punitive in nature’ can only be taken as a rejection of the argument that those damages are *also* (or are exclusively) compensatory.” (emphasis added)).

214. 29 U.S.C. § 216(b) (2006) (“Any employer who violates the provisions of section 206 or section 207 of this title *shall be liable* to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, . . . *and in an additional equal amount as liquidated damages.*” (emphasis added)).

215. *See Schleier*, 515 U.S. at 332 n.5.

216. *See Palasota v. Haggard Clothing Co.*, 499 F.3d 474, 491 (5th Cir. 2007) (remanding the case to district court to “consider whether the liquidated damages award should preclude or mitigate an award of front pay”); *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 68 n.15 (1st Cir. 2005) (noting that liquidated damages awards “can render front pay unnecessary”); *Moore v. Univ. of Notre Dame*, 22 F. Supp. 2d 896, 905 (N.D. Ind. 1998) (reiterating that, in the Seventh Circuit, “[f]ront pay may be less appropriate when liquidated damages are awarded”).

With the punitive purpose of ADEA liquidated damages in mind, one can more adequately analyze the controversy among the circuit courts. The two dominant approaches are revisited and discussed below.

C. *Weighing the Approaches*

As discussed above, a slim majority of circuit courts that have considered the issue have held that a substantial liquidated damages award may preclude an award of front pay.²¹⁷ In contrast, the traditional approach holds that the front pay analysis should be entirely divorced from the award of liquidated damages because the two modes of recovery serve different goals.²¹⁸ Below, the advantages and drawbacks of each approach are examined in detail.

1. *The “Majority” Approach Revisited*

Perhaps the strongest argument in favor of the majority approach is that there is, in fact, no controversy, because district courts are left relatively unfettered to determine the availability of front pay.²¹⁹ The ADEA grants courts broad discretion to tailor an appropriate remedy under the circumstances of each case,²²⁰ “[n]either reinstatement nor front pay are mandatory relief for a prevailing plaintiff under the ADEA.”²²¹ Therefore, when determining whether to award front pay, a court should be free to consider whatever factors it chooses, including the availability of a substantial liquidated damages award. Further, federal courts of appeals review decisions to award front pay under an abuse of discretion standard.²²² Under such stringent review, it is more difficult to justify reversing a district court’s denial of front-pay damages.

Furthermore, any court awarding damages for future economic loss will be concerned with the speculative nature of the award, especially in the employment context, because of the “possibilities of promotions or legitimate demotions or terminations” that could have occurred in the absence of discrimination.²²³ The possibility of an overly generous front-pay award is further exacerbated when a court awards liquidated damages. Although remedies under the ADEA should aim to make the victim of discrimination “whole,” damages should be “calculated in order to

217. *See supra* Part II.B.1.

218. *See supra* Part II.B.2.

219. *See* 29 U.S.C. § 626(b).

220. *See id.*

221. *Tennes v. Mass. Dep’t of Revenue*, 944 F.2d 372, 381 (7th Cir. 1991).

222. *See id.* at 381; *see also* *Chalfant v. Titan Distrib., Inc.*, 475 F.3d 982, 988 (8th Cir. 2007); *Abuan v. Level 3 Commc’ns, Inc.*, 353 F.3d 1158, 1177 (10th Cir. 2003); *Arban v. W. Publ’g Corp.*, 345 F.3d 390, 406 (6th Cir. 2003); *Julian v. City of Hous., Tex.*, 314 F.3d 721, 728 (5th Cir. 2002); *Muñoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1349 (11th Cir. 2000); *Gotthardt v. Nat’l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999); *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727, 733 (1st Cir. 1999); *Pierce v. Atchison, Topeka, & Santa Fe Ry. Co.*, 65 F.3d 562, 574 (7th Cir. 1995).

223. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979).

prevent plaintiffs from receiving an unwarranted windfall.”²²⁴ Courts following the majority approach believe that such a windfall could occur if the liquidated damages are not factored into the front-pay analysis.²²⁵

The majority approach, however, is inconsistent with traditional punitive damages jurisprudence. As noted above, the Supreme Court has explicitly held that liquidated damages are exclusively punitive in nature.²²⁶ In effect, the majority approach turns the traditional relationship between compensatory and punitive damages on its head. While the Supreme Court has articulated limits on punitive damages under the due process clause, such limits are never applied to compensatory damages.²²⁷ Not only is there no precedent in punitive damages jurisprudence for this relationship, but the statute itself places a hard limit on the liquidated damages award, which necessarily represents a one-to-one ratio to back-pay damages.²²⁸ This limitation provides a sufficient backstop to protect against overcompensation. Further, unlike plaintiffs in Title VII actions, ADEA plaintiffs have no statutory recourse to punitive damages; liquidated damages represent the only deterrence mechanism available.²²⁹

The disadvantages of following the approach taken by the First, Fifth, and Seventh Circuits go beyond technical and doctrinal concerns. Such a restrictive view of the available remedies under the ADEA could have far-reaching effects, undermining the fundamental purpose of the statute: “to prohibit arbitrary age discrimination in employment.”²³⁰ Punitive damages have long been recognized as “one of the single greatest motivators in preventing employers from discriminating against their workers.”²³¹ As noted above, many plaintiffs receive their most substantial award through front pay, especially if they are nearing retirement.²³² Under the majority approach, a court may deny front-pay damages if it finds that the plaintiff is “adequately compensated” by the liquidated damages award. This policy has the potential to close the gap between the consequences for “willful” and merely negligent employment discrimination, and greatly weaken the deterrent effect of liquidated damages. In light of the Court’s reaffirmation of the principle that liquidated damages are “punitive in nature,” this result seems unjustifiable.²³³

224. *Munnely v. Mem’l Sloan Kettering Cancer Ctr.*, 741 F. Supp. 60, 62 (S.D.N.Y. 1990).

225. *See Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 332 (Tenn. 1996) (noting that courts taking the “majority” approach “generally support this conclusion by arguing that front pay is an inherently speculative remedy and that if the punitive award is not taken into account in setting the amount, the plaintiff could receive a windfall”).

226. *See supra* Part III.B.4.

227. *See Coffey*, 929 S.W.2d at 332–33.

228. *See supra* note 53 and accompanying text.

229. *See supra* notes 44–45 and accompanying text.

230. 29 U.S.C. § 621 (2006).

231. Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 740 (2008).

232. *See supra* Part I.

233. *See Comm’r v. Schleier*, 515 U.S. 323, 332 n.5 (1995).

2. *The Traditional Approach Revisited*

The traditional approach, to a far greater degree than the majority approach, gives ADEA plaintiffs a fair shot at receiving complete make-whole relief. As noted above, front pay has been recognized as essential equitable relief that is necessary “to effectuate the purposes of the [ADEA].”²³⁴ To that end, the traditional approach aims to ensure that victims of discrimination have access to the complete range of equitable remedies under the statute, regardless of whether they receive liquidated damages; “[t]he purpose of the ADEA, insofar as the individual plaintiff is concerned, is to make the plaintiff ‘whole.’”²³⁵ Granted, in some instances, liquidated damages may exceed what the plaintiff would have recovered in front pay. Even in those rare cases, however, “[l]iquidated damages are not meant to replace equitable relief under the ADEA.”²³⁶

The traditional approach is particularly appealing because it conforms most closely with well-established remedial principles. Unlike front-pay damages, liquidated and punitive damages are not aimed at compensation; they are imposed on a defendant “to prevent such offenses in [the] future.”²³⁷ Therefore, there is little to no conceptual relationship between the two remedies. While it is true that the Supreme Court has set up a regime governing due process limits over punitive damages awards, this regime only comes into play once the full measure of compensatory damages has been determined.²³⁸ As discussed, “the reasonableness of a compensatory award . . . is *never* tested by its relationship to the punitive award.”²³⁹ The rationale for this pattern was outlined in *Coffey v. Fayette Tubular Products*, in which the Tennessee Supreme Court considered and rejected the “majority” approach:

[T]he defendant’s actions may have been relatively blameless and worthy of little or no punitive response from the jury, and yet the plaintiff may have suffered a large amount of economic damages; on the other hand, the defendant’s actions may have been particularly egregious and worthy of a substantial punitive response, yet the plaintiff may have suffered only a small amount of economic damages.²⁴⁰

Courts are not unfamiliar with this sort of remedial bifurcation and are often required to segregate compensatory and punitive considerations. In a tort action, for example, it would seem illogical to allow an award of

234. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984) (quoting 29 U.S.C. § 626(b) (2006) (internal quotations omitted)).

235. *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

236. *Id.* at 1562 (citing *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983)).

237. *Coryel v. Colbaugh*, 1 N.J.L. 77, 77 (N.J. Sup. Ct. 1791).

238. *See Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 332 (Tenn. 1996) (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 577–83 (1996)).

239. *Id.* 232–33.

240. *Id.* at 333.

punitive damages, only to subsequently reduce the compensatory award in order to ensure that the plaintiff is not overcompensated. The traditional approach recognizes that this absurd result is not made any more palatable by the fact that ADEA liquidated damages are authorized by statute rather than the common law.

Finally, the liquidated awards given in ADEA cases are tied directly to the amount of back-pay damages and are mandated by the statute.²⁴¹ Therefore, unlike punitive damages awards in the context of tort law, there is little risk of excessive liquidated damages verdicts.

IV. RESOLUTION

Courts should abandon the approach taken by the First, Fifth, and Seventh Circuits in favor of the more traditional approach adopted by the Eighth and Eleventh Circuits. The traditional approach comports most closely with well-established remedial principles, while the majority approach undermines the purpose of the ADEA and places a thumb on the scale in favor of egregious violators. In order to avert the prospect of other federal courts following the lead of the First, Fifth, and Seventh Circuits, Congress should pass a clarifying amendment to the ADEA. Ideally, such an amendment would clarify the nature of liquidated damages, be it compensatory, punitive, or both. Further, the amendment would definitively provide that liquidated damages allowed under the Act have no effect on the legal or equitable relief that would otherwise be available. For their part, courts should adhere to Supreme Court precedent regarding the punitive nature of liquidated damages and abandon the arbitrary insistence upon coupling the availability of front-pay damages to the liquidated award.

The traditional approach accords most closely with Congress's goals in enacting the ADEA. While the ADEA's damages provision gives courts broad discretion to fashion appropriate relief,²⁴² that discretion should not be left unchecked, free to eviscerate the protections granted under the statute. Rather, discretion is dependent upon the court's "judgment; and its judgment is to be guided by sound legal principles."²⁴³ In *Dickerson v. Deluxe Check Printers, Inc.*, the Eighth Circuit noted that a "court may refuse equitable relief . . . '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.'"²⁴⁴ It strains reason to suggest that a rule in which a plaintiff can be denied full measure of

241. *Supra* note 53 and accompanying text.

242. *Supra* note 43 and accompanying text.

243. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (discussing the remedy of back pay under Title VII which, like front-pay damages under the ADEA, is considered equitable relief).

244. 703 F.2d 276, 280 (8th Cir. 1983) (quoting *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir. 1981), *cert. denied* 454 U.S. 969 (1981)).

compensation because his or her employer behaved with *reckless disregard* for the protections offered under the ADEA comports with the purposes of the statute.²⁴⁵ If applied generally, the majority approach would undermine the deterrent effect of ADEA liquidated damages. It would send a signal to willful violators that a liquidated damages penalty could potentially cancel out any front-pay obligations.

Further, the traditional approach is more consistent with general jurisprudence regarding compensatory damages because it is more likely to make the plaintiff “whole.” Outside of the ADEA context, courts have consistently recognized that the primary purpose of compensatory damages is to put the plaintiff in his or her rightful position: that is, the position that he or she would have occupied had the harm never occurred.²⁴⁶ In *Albemarle Paper Co. v. Moody*, one of the leading cases on remedies under the antidiscrimination statutes, the Supreme Court reiterated this longstanding remedial principle:

[W]hen a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he [or she] would have occupied if the wrong had not been committed.²⁴⁷

This make-whole principle of compensation was foremost in Congress’s mind when it drafted the ADEA’s remedial provisions. The language used in section 626(b) is substantially similar to that employed in Title VII, the legislative history of which indicates that Congress “intended to give the courts . . . discretion . . . to fashion the *most complete relief possible*.”²⁴⁸ For many plaintiffs, front pay is an essential element of “complete relief,” particularly if they are nearing the age of retirement. The traditional approach recognizes this, while the majority approach places another roadblock in the way of recovery.

Granted, the majority courts are understandably wary of the speculative nature of future damages. Courts often overstate this concern, however, and they could mitigate it more appropriately outside of the context of liquidated damages. Front pay is an inherently speculative remedy, and the fact that some future losses may be too uncertain to impose upon a defendant is a rational basis for refusing to award front pay. If the potential losses are unclear, front-pay damages may place the plaintiff in a better position than he or she would have occupied if the harm had never occurred. It is important to note, however, that both parties bear the risk of this uncertainty; plaintiffs who are denied front

245. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985).

246. *See Albemarle*, 422 U.S. at 418–19.

247. *Id.* at 419 (quoting *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)).

248. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (emphasis added) (citing 118 CONG. REC. 7166, 7168 (1972)).

pay and fail to find alternative employment receive less than complete relief.²⁴⁹

The concern over speculative future damages awards is further undercut by the substantial safeguards that federal courts have constructed to avoid unwarranted results. A plaintiff faces a number of hurdles that must be passed before a court will award front-pay damages.²⁵⁰ Recall that a court will carefully consider the employee's work and life expectancy, his or her likelihood of mitigating damages through alternative employment, and the employer's financial state when determining the appropriate time period for the front-pay award.²⁵¹ Further, front pay is only deemed appropriate where reinstatement would be an infeasible remedy.²⁵² These principles, which guide the front-pay determination, sufficiently guard against excessive or speculative awards. Courts need not erect another obstacle by tying the availability of front pay to the existence of a liquidated damages award. Even if more stringent protections against uncertain damages were necessary, the existence of a substantial liquidated award bears little relationship to the speculative nature of future damages. It should not, therefore, serve as a means of short changing the front-pay analysis. In any case, district courts are not unfamiliar with awarding future damages in other contexts in which the amount of the punitive damages award does not affect the availability of prospective relief.²⁵³

The majority approach also fails to recognize the traditional distinction that courts have drawn between compensatory and punitive damages. Liquidated damages are conceptually distinct from compensatory relief. The ADEA's remedial provision reserves such awards for instances in which the defendant willfully violates the statute.²⁵⁴ On its face, therefore, the Act imposes double back-pay penalties on only the most egregious violators. Under Supreme Court jurisprudence, only defendants that "[know] or show[] reckless disregard" for the ADEA's protections meet this willfulness standard.²⁵⁵ The reservation of liquidated awards for intentional and reckless conduct strongly indicates that liquidated damages were designed to be a punitive measure. Whereas front pay aims to make the plaintiff whole, liquidated damages aim to punish and deter egregious violations.

249. See *Coffey v. Fayette Tubular Prod.*, 929 S.W.2d 326, 333 (Tenn. 1996) ("[T]he speculative nature of the front pay remedy carries just as much potential to shortchange the plaintiff as it does to grant it a windfall.").

250. See *supra* notes 67–73 and accompanying text.

251. See *supra* notes 71–73 and accompanying text.

252. See *supra* note 68 and accompanying text.

253. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984) ("District courts have had considerable experience with damages for future wages in employment contract and personal injury cases . . . as well as front pay cases under Title VII . . ." (citations omitted)).

254. 29 U.S.C. § 626(b) (2006).

255. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (quoting *Air Line Pilots Ass'n, Int'l. v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)).

The traditional approach recognizes that liquidated damages and front pay serve different purposes and appropriately bifurcates their analyses. Compensatory damages are *awarded* to the plaintiff to compensate for his or her loss. Liquidated damages, on the other hand, are *imposed* upon the defendant to deter future violations. This deterrent effect would be significantly undermined if future damages could be canceled out by an award of liquidated damages. Under the majority approach, if the potential front-pay award is substantial, a willful violator could potentially pay out less than a negligent offender, as the court may find that the liquidated damages award obviates the need for prospective relief. In most other contexts where punitive damages are available, a sufficient showing of future loss would warrant a *higher* level of punitive relief, as substantial front-pay awards would impact the ratio between compensatory and punitive damages under the *Gore* guideposts.²⁵⁶

Granted, some legislative history undermines the notion that liquidated damages are meant to be punitive.²⁵⁷ In *Thurston*, however, the Supreme Court stated in clear terms that liquidated damages were “punitive in nature,” relying on legislative history that supported that interpretation.²⁵⁸ Although some circuit courts continue to cling to the notion that liquidated damages serve a hybrid purpose,²⁵⁹ the Court clarified in *Schleier* that no compensatory goal was recognized.²⁶⁰ In light of the fact that the decisions announced by the majority circuits were strongly influenced by this now outdated conception of liquidated damages as means of compensating intangible losses, they no longer have a firm leg to stand on. Even before the *Schleier* decision, the majority circuits never entirely disclaimed the punitive nature of liquidated damages. The First Circuit left open the possibility that they serve both punitive and compensatory functions,²⁶¹ and the Seventh Circuit expressly acknowledged that they have “a deterrent or punitive function.”²⁶²

Even if the FLSA-inspired view of liquidated damages still predominated,²⁶³ the conclusion reached by the majority circuits would be untenable. When it interpreted the purpose of FLSA liquidated damages, the *Oneil* Court acknowledged their compensatory function but made clear that they also served a public purpose in encouraging private suits and deterring unlawful behavior; allowing employees to waive their rights to

256. See Sperino, *supra* note 62, at 709 (“The second *Gore* guidepost requires courts to consider the ratio of compensatory to punitive damages. In making this inquiry, some courts mishandle back pay, front pay, and other remedies in two important ways. First, some courts exclude the amounts of front pay and back pay when calculating compensatory damages.”).

257. See *supra* Part III.B.4.

258. *Thurston*, 469 U.S. at 125.

259. See *supra* Part III.B.3.

260. See *supra* note 213 and accompanying text.

261. *Powers v. Grinnell Corp.*, 915 F.2d 34, 42 (1st Cir. 1990).

262. *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989).

263. See *supra* Part III.B.1.

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liquidated damages would defeat that purpose.²⁶⁴ It would similarly defeat that purpose if the effect of ADEA liquidated damages could be diluted, not through contractual agreement, but through the employer's unilateral willful conduct.

V. CONCLUSION

The approach to front-pay awards the First, Fifth, and Seventh Circuits have taken not only undermines the purpose of the ADEA, but misconceives the role of punitive damages generally. The traditional approach, on the other hand, accords more closely with established punitive damages jurisprudence and more faithfully serves the purpose of the ADEA. To ensure full compensation under the ADEA, and to sufficiently deter egregious discrimination, an award of liquidated damages should not factor into the front-pay analysis.

264. See *supra* notes 173–77 and accompanying text.

