South Carolina Law Review

Volume 29 | Issue 4 Article 7

9-1978

Employment Discrimination - Damages - Awarding Compensatory Damages for Pain and Suffering in Age Discrimination Cases: A Proper Reading of the Statute?

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COMMENT

EMPLOYMENT DISCRIMINATION—DAMAGES—AWARDING COMPENSATORY DAMAGES FOR PAIN AND SUFFERING IN AGE DISCRIMINATION CASES: A PROPER READING OF THE STATUTE?

With enactment of a statute to bar discrimination based on age,[1] the Ninetieth Congress succeeded where earlier sessions had failed.[2] Analogizing the Age Discrimination in Employment Act of 1967 (ADEA) to earlier legislation barring discrimination based upon race, religion, color, and sex,[3] and further citing President Lyndon Johnson's support for the legislation,[4] Congress stated the purpose of the Act to be the promotion of "employment of older persons based on their ability rather than age."[5]

The press scarcely acknowledged enactment of the ADEA,[6] and reaction was similar in the courts for several years following its passage. Over four years after the bill's enactment, a federal district judge declared that "[t]here appear to be only two reported cases under the Age Discrimination in Employment Act of 1967."[7]

After a period of dormancy, growing public awareness of what is prohibited by the ADEA and stronger governmental interest in its enforcement have brought about a sharp increase in ADEA litigation.[8] Decisions interpreting the language of several provisions of the statute have produced divergent opinions.[9] This

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1. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, *as amended*, Pub. L. No. 93-259, 88 Stat. 74, *and* Act of April 6, 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified at 29 U.S.C. §§ 621-634 (1970)) [hereinafter referred to as ADEA].

2. H.R. REP. No. 805, 90th Cong., 1st Sess. 1, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214.

3. *Id.*

4. *Id.* at 2.

5. *Id.* at 8. *See also* 29 U.S.C. § 621(b) (1970).

6. Buried in the back pages of the next day's *New York Times* was a three column inch wire story, *Bill to Help Older Workers Approved by Both Houses*. N.Y. Times, Dec. 7, 1967, at 32, col. 8.

7. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 233 n.1 (N.D. Ga. 1971).

8. Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227 (1974).

9. Judge Hemphill, in Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977), noted "it is apparent that, throughout the nation and in this Circuit in particular, [this area of law] is in a total state of disarray." *Id.* at 732.

The Supreme Court has recently held that jury trials are available under the ADEA. Lorillard v. Pons, 98 S. Ct. 866 (1978). *Accord*, Bertrand v. Orkin Exterminating Co.,

comment considers the question of whether awards for pain and suffering in ADEA suits are proper in light of the Act's enforcement provisions.

To accomplish its goal of eliminating discrimination based on age, the ADEA prohibits arbitrary age discrimination by employers, employment agencies, and labor organizations against "individuals who are at least forty . . . but less than seventy years of age."[10] The statutory language expressly extends its protection to the hiring and discharging of employees as well as to virtually every other matter connected with the employment relationship.[11] Several matters, however, are excepted from the

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419 F. Supp. 1123 (N.D. Ill. 1976); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976). *Contra*, Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976); Looney v. Commercial Union Assurance Cos., 428 F. Supp. 533 (E.D. Mich. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976).

Punitive damages in excess of the double back pay provisions of the ADEA have generally been held to be unavailable in suits brought under the Act. *See, e.g.*, Dean v. American Security Ins. Co., 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977) (the district court had allowed a claim for punitive damages in excess of the liquidated damages provided in the statute); Looney v. Commercial Union Assurance Cos., 428 F. Supp. 533 (E.D. Mich. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (E.D. Pa. 1976); Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

10. 29 U.S.C. § 631 (Supp. V 1975), *as amended by* Act of April 6, 1978, Pub. L. No. 95-256, 92 Stat. 189.

11. *Id.* § 623(a)-(c) (1970). These sections specify the prohibitions of the ADEA:

Employer practices

(a) It shall be unlawful for an employer—

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

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

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

Employment agency practices

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

Labor organization practices

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportun-

ADEA proscription of age discrimination. Equality of treatment is not required when age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[12] or where the differentiation is "based on reasonable factors other than age."[13] Furthermore, if the inequality is based on observance of terms of a bona fide seniority system or requirements of an employee retirement, pension, or insurance plan that is not a pretense to avoid compliance with the Act, differentiation is allowed.[14] Moreover, it is not unlawful to discharge or discipline an employee "for good cause."[15]

Procedurally, the ADEA requires a private individual seeking redress under the Act to seek administrative remedies first. An aggrieved party must notify the Secretary of Labor not less than sixty days prior to the commencement of any civil action.[16] Upon notification that the claimant intends to sue, the Secretary must "notify all persons named therein as prospective defendants . . . and promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."[17]

If attempts at conciliation succeed in obtaining voluntary compliance and the employee agrees to accept the amount agreed upon, his right to sue terminates.[18] Likewise, should conciliation efforts fail and the employee consents to an action brought by the Secretary, the claimant waives his right of private action.[19] Finally, if the Secretary sues to enjoin the discrimination and to restrain further delay in payment of the amount owing because of unlawful discrimination, the individual's right to sue is extinguished.[20]

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ities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

12. 29 U.S.C. § 623(f)(1) (1970). For a discussion of what constitutes a "bona fide occupational qualification" under Title VII, see International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

13. 29 U.S.C. § 623(f)(1) (1970).

14. *Id.* § 623(f)(2). *See* United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

15. 29 U.S.C. § 623(f)(3)(1970).

16. *Id.* § 626(d). *See* Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974).

17. 29 U.S.C. § 626(d) (1970).

18. *Id.* § 626(b) (incorporating 29 U.S.C. § 216(c) (1970) (Fair Labor Standards Act)).

19. *Id.* and 29 U.S.C. § 626(c).

20. *Id.* § 626(b) (incorporating 29 U.S.C. § 217 (1970) (Fair Labor Standards Act)). *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820-21 (5th Cir. 1972).

The enforcement provisions of the ADEA[21] incorporate certain enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA),[22] including awards of reasonable attorney's fees and double back pay upon wilful violation.[23] The ADEA further provides:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of [the FLSA]: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgment compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[24]

Whether this language permits damages beyond the back wages and liquidated damages available under the FLSA[25] for wilful violations is a question that has produced divergent opinions in the federal courts.[26] Many courts have vigorously supported the contention that compensatory damages for pain and suffering are proper under the language of the statute; other courts have offered equally vigorous challenges to this opinion.[27]

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21. 29 U.S.C. § 626(b) (1970).

22. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1970)) [hereinafter referred to as FLSA].

23. The ADEA enforcement provisions expressly incorporate these sections of the FLSA: 29 U.S.C. § 211(b) (1970) (encouraging utilization of the services of state and local agencies and providing for reimbursement for their service); *id.* § 216(b)-(d) (dealing with penalties; employer's civil liability including the awarding of attorney's fees and, for wilful violations, liquidated damages in the amount equal to the unpaid back pay; injunctions; termination of right of action; waiver of claims; actions by the Secretary; and limitation of actions); *id.* § 217 (providing for injunction proceedings and giving jurisdiction to district courts).

24. 29 U.S.C. § 626(b) (1970).

25. *Id.* § 216(b) (1970).

26. *E.g.,* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Wishiewski v. All-Star Ins. Corp., [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 231, Coates v. NCR Co., 433 F. Supp. 655 (W.D. Va. 1977); Buchholz v. Symons Mfg. Co., [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 1084.

27. *E.g.,* Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Rodriguez v. Taylor, [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 533; Postemski v. Pratt & Whitney Aircraft, [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 565; Cavanaugh v. Texas Instruments, Inc., [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 463; Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977); Rechstei-

The case of *Rogers v. Exxon Research & Engineering Co.*[28] graphically illustrates the confusion in this area. In that case a bifurcated trial produced a jury verdict for plaintiff on the issue of liability arising out of his forced retirement at age sixty. Prior to the hearing on the issue of damages, the judge granted plaintiff's motion to include a claim for compensatory damages for pain and suffering arising out of the employer's ADEA violations, despite the absence of express statutory language authorizing such a recovery. The jury returned a verdict for plaintiff, the amount of which was reduced on remittitur from $750,000 to $200,000.[29] On appeal, the Third Circuit vacated the judgment of the district court, holding, in part, that damages for pain and suffering cannot be awarded in an ADEA case.[30]

In permitting the damages award for pain and suffering, the district court noted the lack of precedent authorizing such a recovery under the ADEA.[31] For authority, the court relied upon a Supreme Court case involving a claim under Title VIII of the Civil Rights Act of 1964 where the cause of action was compared to an action in tort.[32] The district court concluded that "the ADEA essentially establishes a new statutory tort . . ."; once liability is ascertained, "the panoply of usual tort remedies is available to recompense injured parties for all provable damages."[33]

The district court further compared the ADEA "in both purpose and scope" to Title VII of the 1964 Civil Rights Act[34] and

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ner v. Madison Fund, 75 F.R.D. 497 (D.D.C. 1977); Jaeger v. American Cyanamid Co., [1977] 7 LAB. REL. REP. (BNA) (16 Fair Empl. Prac. Cas.) 568.

28. 404 F. Supp. 324 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978).

29. 404 F. Supp. at 326.

30. 550 F.2d at 842.

31. 404 F. Supp. at 331.

32. *Id.* at 327, *citing* Curtis v. Loether, 415 U.S. 189 (1974) (decided under Title VIII (Fair Housing Act), codified at 42 U.S.C. § 3612 (1970)). The district court quoted directly from *Curtis:*

> "A damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As one Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law."

404 F. Supp. at 327. *Accord,* Coates v. NCR Co., 433 F. Supp. 665 (D. Va. 1977).

33. 404 F. Supp. at 327.

34. *Id.* at 328. *Accord,* Morelock v. NCR Corp., 546 F.2d 682, 686 (6th Cir. 1976). *See generally* Note, *Damage Remedies Under the Age Discrimination in Employment Act,* 43 BROOKLYN L. REV. 47 (1976); Note, *Age Discrimination—Compensatory Damages for Pain*

observed that "[w]ith a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII . . . except that 'age' has been substituted for 'race, color, religion, sex, or national origin.' "[35]

The district court correctly stated that the activities proscribed under the ADEA and the prohibitions of Title VII are almost identical;[36] however, the language of the *enforcement* provisions of the two acts is quite different. The enforcement machinery of the ADEA essentially follows that of the Fair Labor Standards Act.[37] In its lengthy discussion of the legislative history,[38]

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and Suffering Held Recoverable Under the Age Discrimination in Employment Act of 1967, 7 SETON HALL L. REV. 642 (1976).

35. 404 F. Supp. at 328 (quoting Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972)). *Accord,* Laugesen v. Anaconda Co., 510 F.2d 307, 311 (6th Cir. 1975).

36. 42 U.S.C. § 2000e-2(a) to (c) (1970). These sections delineate the prohibitions of Title VII:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
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> **Employment agency practices**
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> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.
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> **Labor organization practices**
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> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Note the resemblance of this language to the language of the ADEA prohibitions as set out in note 11 *supra.*

37. *Compare* ADEA, 29 U.S.C. § 626 (1970) *with* FLSA, 29 U.S.C. § 216 (1970). *See* Levien, note 8 *supra,* at 247.

38. 404 F. Supp. at 330-31 n.3.

however, the district court failed to acknowledge a statement made by a major sponsor of the ADEA bill.[39] In pointing out the distinctions between the ADEA and Title VII, Senator Jacob Javits expressly noted that "[t]he Civil Rights Act of 1964 does not cover age discrimination and [the ADEA bill] does not cover racial or religious discrimination. The laws will operate completely independently of each other, *as will the enforcement procedures.*"[40]

In reviewing the district court's decision, the Third Circuit soundly rejected the appropriateness of applying Title VII case law to ADEA cases:

> The two statutes are not consistent because Congress made the ADEA enforcement provisions a hybrid of the Fair Labor Standards Act and Title VII. Thus, it is possible to have lost earnings doubled because of discrimination based on age, but not on race or religion. While it is logically beguiling to interpret the statutes in harmony, their clear language often will not permit it.[41]

The Supreme Court recently addressed the issue of equating the ADEA to Title VII in a case involving jury trials under the ADEA and found the contention that the two statutes were analogous "unavailing."[42] Noting that the statutes were similar in their aims and prohibitions,[43] the Court found that there were "significant differences" in the "remedial and procedural provisions of the two laws that are crucial."[44] The Court concluded that "reliance on Title VII, therefore, is misplaced"[45] in suits involving

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39. "It is the sponsors that we look to when the meaning of the statutory language is in doubt." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). For the importance of the statements of sponsors of legislation in statutory interpretation, *see generally* G. FOLSOM, LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS at 34-35 (1972).

40. 113 CONG. REC. 31255 (1967) (remarks of Sen. Jacob Javits in response to the question of conflicts in administration of the ADEA as related to the Civil Rights Act of 1964) (emphasis added).

41. Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 840 n.10 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 749 (1978). Significantly, the district court, in deciding whether to award attorney's fees to plaintiff, had pointed out the incorporation of the FLSA enforcement provisions in the corresponding section of the ADEA. 404 F. Supp. at 334. The court failed to note the importance of this point in its earlier discussion of the damages issue.

42. Lorillard v. Pons, 98 S. Ct. 866 (1978). See text accompanying notes 79-83 *infra*.

43. "In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Id.*

44. *Id.*

45. *Id.*

claims under the ADEA.

The ADEA, unlike the FLSA, authorizes the federal courts to "grant such legal or equitable relief as may be appropriate to effectuate the purposes [of the Act]."[46] In interpreting this language many courts have held that the ADEA expressly allows the award of damages for pain and suffering. The opinions of neither of the courts in *Rogers* focused on this obviously critical language, nor the extent to which it varies from the enforcement provisions of Title VII. Other courts have looked solely to this language in the statute's enforcement provisions in deciding the type of damages recoverable.

In granting an award for pain and suffering, the court in *Bertrand v. Orkin Exterminating Co.*[47] relied heavily on the district court's opinion in *Rogers*. After the Third Circuit's reversal of *Rogers*, the *Bertrand* court reconsidered its decision and expressly rejected the reasoning of the circuit court.[48] In supporting its earlier conclusion the *Bertrand* court observed: "So long as the relief effectuates the [ADEA] statutory purpose, the court may grant such 'legal relief as may be appropriate.' Indeed, the breadth of the available remedies is underscored by the words 'without limitation' in the subsequent listing of possible means of relief."[49]

Another reading of the statutory language was presented in *Looney v. Commercial Union Assurance Cos.*[50] The ADEA permits a tribunal "to grant such legal or equitable relief as may be appropriate"; following this language, the statute provides a list of equitable remedies.[51] The court in *Looney* interpreted the word "legal" as a reference to the liquidated damages award in the Act's preceding sentence and concluded that since the statute listed only equitable remedies "the principle of *ejusdem generis*[52]

46. 29 U.S.C. § 626(b) (1970). *See* Lorillard v. Pons, 98 S. Ct. 866 (1978).

47. 419 F. Supp. 1123 (N.D. Ill. 1976), *aff'd mem.*, 432 F. Supp. 952 (N.D. Ill. 1977). *Accord,* Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976).

48. 432 F. Supp. at 956.

49. *Id.* at 953.

50. 428 F. Supp. 533 (E.D. Mich. 1977).

51. 29 U.S.C. § 626(b) (1970).

52. (Footnote added.) BLACK'S LAW DICTIONARY 608 (4th rev. ed. 1968) defines this term:

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

limits the available unlisted forms of relief to the same kind of relief as that enumerated."[53] Analogizing to the Sixth Circuit's decision in *EEOC v. Detroit Edison Co.*,[54] the court stated that recovery was limited solely to equitable remedies.[55]

In *Dean v. American Security Insurance Co.*[56] the district court recognized the incorporation of the FLSA enforcement provisions into the ADEA, but allowed a claim for punitive and compensatory pain and suffering damages[57] even though neither are available under the FLSA.[58] Citing dicta from an earlier ADEA case,[59] the *Dean* court noted that "[u]nlike FLSA, the Age Act is intended to do more than repay employees for unpaid minimum wages . . . ."[60] The Fifth Circuit reversed the district court and held that damages for pain and suffering were unavailable in a private action under the ADEA.[61] The court of appeals, citing section 7 of the ADEA[62] and the enforcement provisions of the FLSA, rejected the argument that the statutory language, "legal or equitable relief . . . without limitation,"[63] should be construed to include damages for pain and suffering. "The authorization of 'legal or equitable relief' must be read, not in isola-

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to persons or things of the same general kind or class as those specifically mentioned.

53. 428 F. Supp. at 537.

54. 515 F.2d 301, 308-09 (6th Cir. 1975). In Lorillard v. Pons, 98 S. Ct. 866 (1978), the Supreme Court, in deciding that jury trials were proper under the statute, noted:

> Section 7(b), 29 U.S.C. § 626(b), does not specify which of the listed categories of relief are legal and which are equitable. However, since it is clear that judgments compelling "employment, reinstatement, or promotion" are equitable . . . , Congress must have meant the phrase "legal relief" to refer to judgments "enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."

98 S. Ct. at 871 n.11.

55. 428 F. Supp. at 537.

56. 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977).

57. 429 F. Supp. at 4. The court noted, however, that "because there is substantial ground for difference of opinion on this issue, the court hereby CERTIFIES the issue for interlocutory appeal, 28 U.S.C. § 1292(b)." *Id. See also* Walker v. Pettit Constr. Co., 437 F. Supp. 730 (D.S.C. 1977), wherein Judge Hemphill, relying on the Georgia district court decision in *Dean*, denied defendant's motion to strike a claim for compensatory damages for pain and suffering, and certified the case for interlocutory appeal. *Id.* at 732.

58. 29 U.S.C. § 216(c) (1970).

59. Brennan v. Paragon Employment Agency, Inc., 356 F. Supp. 286, 288 (S.D.N.Y. 1973).

60. 429 F. Supp. at 4.

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

62. 29 U.S.C. § 626(b) (1970).

63. 559 F.2d at 1038.

tion, but in conjunction with the other provisions of the Act, the policies they further and the enforcement framework they envision."[64]

In *Sant v. Mack Trucks, Inc.*[65] the court recognized that the ADEA combines the available remedies under the ADEA with those of the FLSA, "requiring that both Acts be read together."[66] On this basis the court concluded that "[t]he language of both Acts makes it clear that any monetary recovery under either Act is limited to the amount of unpaid minimum wages, unpaid overtime compensation or . . . liquidated damages."[67] The thrust of the ADEA is to prohibit arbitrary age discrimination; most violations are remedied by compelling employment, reinstatement, or promotion coupled with back pay. The *Sant* court recognized this proposition:

> The Act draws its parameters of protected interests around the pecuniary employment relationship between the employer and the employee. Personal interests, such as bodily and mental integrity, are well outside the boundaries of the Act. . . . [T]o allow recovery for pain and suffering would transform the ADEA from an act that seeks to eliminate and redress age discrimination to one for personal injuries.[68]

The Third Circuit in *Rogers,* noting the ADEA-FLSA correlation, followed the *Sant* rationale and, in addition, pointed out the policy considerations behind the ADEA's remedial provisions.[69] The circuit court largely ignored the district court's reliance on statements made during congressional debates on the ADEA bill and observed that "there is no indication that Congress thought the means which it adopted to make employment a reality were inadequate to afford reasonable relief."[70] A crucial factor in the decision was that specific forms of remedies had been enumerated, while penalty provisions had been restricted to wilful violations. The court concluded that "[t]o allow psychic dis-

64. *Id. Accord,* Williams v. General Motors Corp., [1977] 7 LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 411; Cobb v. Chevron U.S.A., Inc., [1977] 7 LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 408; Crispen v. Southern Cross Indus., [1977] 7 LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 405.

65. 424 F. Supp. 621 (N.D. Cal. 1976).

66. *Id.* at 622.

67. *Id.*

68. 424 F. Supp. at 622.

69. 550 F.2d at 840.

70. *Id.*

tress awards in addition would in a very real sense thwart the limitation Congress thought advisable to impose."[71]

Administrative remedies are clearly preferred in proceedings under the ADEA. During hearings on the bill "the Congressional committees emphasized that the most favored method of enforcement was conciliation and mediation."[72] Furthermore, awards for pain and suffering are an unusual remedy in any administrative proceeding[73] and are only granted when clearly authorized by statutory language.[74] The ADEA is silent on the issue of whether pain and suffering damages may be granted at the administrative level. It follows that Congress did not contemplate this remedy when a case proceeds outside the administrative framework and into the courts. It is unlikely that Congress intended to encourage large recoveries of pain and suffering damages in civil actions when such amounts are unavailable at the administrative level.

> If large recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.[75]

The administrative system of mediation and conciliation so favored by Congress is jeopardized when awards are made for pain and suffering at the trial level.[76] An element of uncertainty, the possibility of recovering a larger amount of money in a private suit, is injected into a system that already provides an objective measure of damages—the amount of lost wages. The silence of the ADEA on the scope of the remedy further indicates that Congress did not intend to award such compensation. The Fifth Circuit, in reversing the district court in *Dean,* agreed that the ADEA's silence concerning these damages "is entirely consistent with legis-

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71. *Id.*

72. S. REP. No. 723, 90th Cong., 1st Sess. 5 (1967) (*quoted in* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 749 (1978)). *See generally* Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique,* 19 N.Y.L.F. 309, 319 (1973); Callahan and Richardson, *Protecting the Older Worker,* 6 U. MICH. J.L. REF. 214, 221 (1972); Charme, *Age Discrimination in Employment,* 11 COLUM. J.L. & SOC. PROB. 281, 291 (1975).

73. 550 F.2d at 841 (1977). *See* U.A.W.-C.I.O. v. Russell, 356 U.S. 634, 643 (1958).

74. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, §§ 200-212 (1976).

75. 424 F. Supp. at 622. *Accord,* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 749 (1978). Travers v. Corning Glass Works, 76 F.R.D. 431, 435-36 (S.D.N.Y. 1977).

76. The employee must consent to the administrative process. 29 U.S.C. § 626(b)-(c) (1970). *See* note 19 and accompanying text *supra.*

lative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving Secretary, employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."[77]

Those supporting the allowance of pain and suffering damages in ADEA cases consistently cite remarks made by Representative Dwyer before the House passed the bill:[78]

> When a man or woman of 55, for instance, loses his job, he faces the prospect of long months of *frustration, fear,* and *insecurity* as he searches for a new one. And the odds are heavily against his finding new employment similar in kind and pay to his former position—no matter how skilled and experienced and vigorous he may be. The cost of such an experience in terms of *mental anguish,* family *suffering,* lost income, and damaged self-respect is too high to measure. One must observe it at firsthand—as I am confident many of our colleagues have—to appreciate how *painful* and how unnecessary it all is.[79]

The contention by the proponents of pain and suffering awards that Representative Dwyer's statement denotes specific congressional intent to alleviate such suffering by allowing compensatory damages was succinctly rebutted in *Platt v. Burroughs Corp.*[80]

> The implication is, therefore, that the use of the italicized words conveyed the idea that the proposed statute provided for "tort" recovery for pain and suffering. On the contrary the conclusion is reasonable that the speaker was emphasizing the importance of passing a proposed statute, rather than speaking with respect to the remedies provided in it. If this is not so, how can we explain the failure of the House . . . to rewrite the proposed statute before passing it, to include specifically for the recovery of damages for pain and suffering? It is certainly not because the statute as drafted and passed so clearly provides for recovery of damages based upon pain and suffering . . . .[81]

The United States Supreme Court has not directly addressed

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77. Dean v. American Security Ins. Co., 559 F.2d 1036, 1039 (5th Cir. 1977).

78. *See, e.g.,* Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 331 n.3 (D.N.J. 1975), *vacated,* 550 F.2d 834 (3d Cir. 1977), *cert. denied,* 98 S. Ct. 749 (1978).

79. 113 CONG. REC. 34751 (1967), (remarks of Rep. Dwyer), *quoted in* Platt v. Burroughs Corp., 424 F. Supp. 1329, 1338 (E.D. Pa. 1976) (emphasis supplied by the *Platt* court).

80. 424 F. Supp. 1329 (E.D. Pa. 1976).

81. *Id.* at 1338.

the issue of whether to allow damages for pain and suffering in ADEA cases. Though the Court recently denied a petition for certiorari to review the circuit court's decision in *Rogers,*[82] the Court's analysis in the recent ADEA case of *Lorillard v. Pons,*[83] holding a jury trial available on the issue of lost wages, is applicable to the issue of pain and suffering damages.

In *Lorillard* the Court compared the ADEA with both Title VII and the FLSA, noting that the ADEA was "something of a hybrid" of these two statutes.[84] The Court, however, clearly distinguished the remedial provisions of Title VII from those of the ADEA.[85] The Court opined that Congress' incorporation of the FLSA provisions "strongly suggests that . . . it intended to incorporate fully the remedies and procedures of the FLSA"[86] and concluded that "violations of the ADEA generally are to be treated as violations of the FLSA."[87] The Court quoted the language of the ADEA: "Amounts owing . . . as a result of a violation of the ADEA are to be treated as 'unpaid minimum wages or overtime compensation' under the FLSA . . . ."[88]

The Court's opinion thus suggests that only those amounts available under the FLSA are allowed in remedying ADEA violations. Since awards for pain and suffering are not available under the FLSA,[89] they are not available under the ADEA. The

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82. 98 S. Ct. 749 (1978).

83. 98 S. Ct. 866 (1978).

84. *Id.* at 869.

85. *See* text accompanying notes 40-43 *supra.*

86. 98 S. Ct. at 871.

87. *Id.* at 869.

88. *Id.* (quoting 29 U.S.C. § 626(b) (1970)). The Conference Report on the ADEA Amendments of 1978 also reflects this interpretation:

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for *nonpecuniary losses* arising out of a willful violation of the ADEA. . . .
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> . . . .
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> . . . [The] Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."

H.R. REP. NO. 950, 95th Cong., 2d Sess., 13-14 *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 973, 1007 (emphasis added) (citations omitted). This reference may indicate a congressional intent that courts should not award damages for pain and suffering in ADEA cases.

89. 29 U.S.C. § 216(c) (1970).

Court's decision in *Lorillard*, as well as the statutory language, legislative history, and policy considerations developed in the case law, indicate that awards for pain and suffering are precluded in suits brought under the ADEA.

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