ADEA Front Pay Awards: Who Should Determine the Amount?

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I. INTRODUCTION

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA).1 The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment."2 These purposes are achieved through ADEA provisions which make it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against any individual with respect to his or her employment based on the individual's age.3

The ADEA states that its remedial provisions are enforceable through either governmental intervention4 or a civil action by any aggrieved person.5 In a civil action under the ADEA, "any court of competent jurisdiction" is authorized to render "such legal or equitable relief as will effectuate the purposes of this chapter."6 Among the relief granted by courts to ADEA plaintiffs is that of "front pay." Front pay is the present value of future income that an improperly discharged employee would have earned if she were to continue working for her employer for the balance of her working life.7

The ADEA does not, however, specifically provide for the award of front pay to age discrimination victims,8 and many courts rebuffed early attempts by plaintiffs to obtain front pay awards under the ADEA.9 Nevertheless, every federal circuit

2. Id. § 621(b).
3. Id. § 623(a).
4. Id. § 626(b).
5. Id. § 626(c)(1).
6. Id.
court that has considered the issue now holds that front pay is a remedy available to plaintiffs in ADEA suits.\textsuperscript{10} The issue currently facing the various circuits is whether the amount of a front pay award should be determined by juries or by judges.\textsuperscript{11} The circuits are clearly divided on this issue.\textsuperscript{12}

This comment examines the nature of front pay awards in ADEA proceedings. Part II sets forth the background leading up to the present split among the circuits regarding the determination of the amount of a front pay award. Part III summarizes the present case law in support of allowing juries to determine the amount of front pay to award in ADEA suits. Part IV examines the reasoning of those courts which hold that the amount of front pay should be determined by judges rather than juries. Part V analyzes the jury trial provisions of the Seventh Amendment and of Supreme Court case law. Part V concludes that juries, rather than judges, should be permitted to determine the amount of front pay in ADEA actions.

II. BACKGROUND

The remedial provisions of the ADEA\textsuperscript{13} do not provide explicitly for front pay as a remedy in age discrimination suits. Instead, the granting of front pay arises from the notion that courts should seek "to make persons whole for injuries suffered on account of unlawful employment discrimination."\textsuperscript{14}


\textsuperscript{11}. See generally Richard J. Seryak, \textit{Front-Pay Awards in Employment Litigation: An Issue for the Judge or Jury?} 17 EMPLOYEE REL. L.J. 131 (1991) (pointing out split in circuits concerning whether judges or juries should determine amount of ADEA front pay awards).

\textsuperscript{12}. Id.


\textsuperscript{14}. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added).
A. "Make Whole" Standard of Relief

The "make whole" standard of relief is considered "the touchstone for courts in fashioning both legal and equitable remedies in employment discrimination actions."15 Courts are encouraged to use the ADEA's broad grant of remedial authority to re-create the circumstances which would have existed, or rather persisted, but for the unlawful discrimination.16 To that end, courts routinely award back pay to victims of age discrimination for damages they have suffered up to the time of judgment.17 However, back pay does not make an injured party whole for damages suffered, or which will be suffered, after the time of judgment. Therefore, another remedy is required to compensate an age discrimination victim for damages during the gap between the final judgment and the time the employee returns to gainful employment. In fact, the gap may extend until the employee would have retired. Reinstatement of the employee is a remedy which can fill that gap.

B. Reinstatement as a Remedy for Prospective Damages

The ADEA explicitly provides for the equitable remedy of reinstatement of an employee to his former position with the employer when the employee is wrongfully discharged on the basis of age.18 Naturally, reinstating an employee to his former position makes him "whole" by returning him to the same economic position he occupied before being wrongfully discharged. The federal circuits agree with this proposition and uniformly hold that reinstatement is the preferred form of relief for prospective damages ADEA plaintiffs may suffer.19

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18. "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b) (1988) (emphasis added).
19. Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) ("Reinstatement is generally the preferred remedy for a discriminatory discharge.")
Reinstatement, however, is not possible in all cases. Courts have recognized several circumstances under which reinstatement of an age discrimination victim would be impossible or undesirable. For example, requiring reinstatement of an employee may be undesirable if the relationship between the employer and the employee has become so hostile and antagonistic as to be neither beneficial nor productive. Furthermore, the employee's former position of employment may have been filled by another employee who is innocent of any wrongdoing; displacing the innocent employee simply perpetuates an injustice. Finally, reinstatement is not possible when a company is no longer in business or has ceased to operate that portion of its enterprise for which the wrongfully discharged employee was qualified.

C. Front Pay as an Alternative Remedy

If reinstatement of the employee is not feasible, an alternative remedy must be found to fill the gap in the damage award for injury suffered between judgment and the employee's retirement. Front pay is such an alternative. In fact, front pay is


20. See, e.g., Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984) (employer-employee relationship may be "irreparably damaged by animosity associated with the litigation").


An employee's health has also been cited as a significant factor in denying an age discrimination victim's request for reinstatement. See, e.g., Houghton v. McDonnell Douglas Corp., 627 F.2d 858, 865-67 (8th Cir. 1980) (affirming denial of reinstatement of test pilot due to expert testimony that he was unable to safely perform the job).

23. See, e.g., Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469-70 (5th Cir.), cert. denied, 493 U.S. 842 (1989) ("district court's award of front pay in this case was improper without a precedent finding that reinstatement was not feasible"); Berndt v. Kaiser Aluminum & Chem. Sales Inc., 789 F.2d 253, 261 (3d Cir. 1986) ("[W]hen circumstances prevent reinstatement, front pay may be an
said to be given in lieu of reinstatement24 so that the "make whole" objective of the ADEA's remedial provisions is not frustrated.25

The federal circuits agree that the decision to grant or to deny the remedy of reinstatement of an employee wrongfully discharged on the basis of age rests with the judge.26 Such a

alternative remedy") (citing Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986)); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1448-49 (11th Cir.), cert. denied, 474 U.S. 1005 (1985) ("[A]n award of front pay—i.e., prospective lost earnings—may be an appropriate remedy in an age discrimination suit because reinstatement would be impracticable or inadequate"); Chace v. Champion Spark Plug Co., 732 F. Supp. 605, 609 (D. Md. 1990) ("When reinstatement is inappropriate, the Court can consider front pay as an alternative"); Fortino v. Quasar Co., 751 F. Supp. 1306, 1317 (N.D. Ill. 1990), rev'd on other grounds, 950 F.2d 389 (7th Cir. 1991) ("The alternative remedies of reinstatement or front pay are available in the event that some further award is necessary to make the plaintiff whole.").

24. Wilson v. S & L Acquisition Co., 940 F.2d 1429, 1438 (11th Cir. 1991) ("prospective damages are awarded in lieu of reinstatement" when reinstatement is not feasible); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1065 (8th Cir. 1988) (front pay available "in lieu of reinstatement").

Note that a refusal by an ADEA plaintiff to accept reinstatement as a remedy will not necessarily be fatal to his or her claim for front pay. If the ADEA plaintiff "has reasonably refused reinstatement, frontpay [sic] is an available remedy under the ADEA." O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984); accord Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1203 (7th Cir. 1989); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553 (10th Cir. 1988); Lemons v. ICM Mortgage Corp., No. 90-1211, 1991 U.S. App. LEXIS 19754, at *7 (10th Cir. Aug. 22, 1991) (unpublished opinion).

Furthermore, a failure by an ADEA plaintiff to include in his or her pleadings a request for reinstatement or for front pay should not preclude a court from granting either. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 638 (10th Cir. 1988). "The trial court 'shall grant the relief to which the party in whose favor [a final judgment] is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.' " Id. (quoting FED. R. CIV. P. 54(c)).


25. Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991) ("Since reinstatement may not be feasible, front pay may make the plaintiff whole . . . ."); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (indicating that when reinstatement is infeasible or inappropriate, front pay may be awarded to make the plaintiff whole).

decision is an exercise of the judge's equitable powers. Because front pay is given in lieu of reinstatement—an equitable remedy—it follows that the judge should decide whether an award of front pay is warranted since the judge must determine that reinstatement is not feasible and that the employee would be left less than "whole." Although the circuits concur that a judge should decide whether to grant an award of front pay, they are split on whether the jury or the judge should determine the amount of front pay to award.

III. ALLOWING JURIES TO DETERMINE THE AMOUNT OF FRONT PAY TO AWARD

A. Federal Circuits That Permit Juries to Determine the Amount of Front Pay

Many of the federal circuits have struggled in deciding whether judges or juries should determine the amount of front pay to award in ADEA actions. Case law from seven circuits has indicated that juries should set the amount. However, only three of those circuits still clearly adhere to this rule, three circuits have rejected the rule, and one circuit has vacillated.

The Third, Sixth, and Ninth Circuits have held that juries should set the amount of front pay awards in ADEA actions. At one time, courts in the Fifth, Seventh, and

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28. See, e.g., Deloach v. Delchamps, Inc., 897 F.2d 815, 822-23 (5th Cir. 1990); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984).
29. See generally Seryak, supra note 11, at 134-35.
31. See, e.g., Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 893 (6th Cir. 1988).
32. See, e.g., Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1346-47 (9th Cir. 1987) (implicitly approving delegation of determination of amount of front pay to jury but reversing the trial court due to a flawed jury instruction).
33. The Fifth Circuit originally held in Hansard v. Pepsi-Cola Metro. Bottling Co., that "[i]f the trial court concludes that front pay is appropriate, then the jury should determine the amount of damages." 865 F.2d 1461, 1470 (5th Cir.), cert. denied, 493 U.S. 842 (1989).
34. The Seventh Circuit determined that "[a]uthority and reason both suggest that while the decision to award front pay is within the discretion of the trial court, the amount of damages available is a jury question." Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1333 n.4 (7th Cir. 1987), (dicta) (citing Mafield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985)), cert. denied, 474 U.S. 1057 (1986);
Tenth Circuits held that juries should determine the amount of front pay; they have since repudiated that view, indicating a clear trend away from allowing juries to determine the amount of front pay to award ADEA claimants.

Case law in the First Circuit suggests that juries should set the amount of front pay. However, that case law has been unsettled, even schizophrenic. The First Circuit initially held that front pay was not an allowable remedy in an ADEA suit, however, the court later reversed that position, ruling that front pay was available in lieu of reinstatement. In its first decision upholding an award of front pay to an ADEA plaintiff, the First Circuit hinted, in dictum, that the amount of front pay should be set by a judge. But the First Circuit ap-

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**see also** Fortino v. Quasar Co., 751 F. Supp. 1306, 1318 (N.D. Ill. 1990) (district court in 7th Circuit) ("[E]ven though front pay is an alternative remedy to reinstatement, it is a legal remedy, not an equitable one.").

35. A district court in the Tenth Circuit held that "although the court determines whether to award front pay, the jury properly decides upon the amount of front pay in the event that the court ultimately finds such damages recoverable." Eivins v. Adventist Health Sys., 660 F. Supp. 1255, 1261 (D. Kan. 1987).

36. The Fifth Circuit reversed itself in 1990, holding that "[a]s an equitable remedy under federal law, we believe that it was within the district court's discretion to determine the amount of the front pay award." Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990).

The Seventh Circuit decided in Graefenhain v. Pabst Brewing Co. that front pay is an equitable remedy. 870 F.2d 1198, 1201 (7th Cir. 1989) (affirming district court's award of front pay); see also Hybert v. Hearst Corp., 900 F.2d 1050, 1055-57 (7th Cir. 1990) (reversing and remanding court's award of front pay for being too speculative but permitting court to make determination of amount of front pay).

The Tenth Circuit decided in Denison v. Swaco Geolograph Co. that a judge should set the amount of front pay. 941 F.2d 1416 (10th Cir. 1991). The court held:

Because the cases holding that the calculation of front pay is a jury question do so primarily by adhering to earlier precedent assuming this was the jury's function, we will follow the more reasoned line of authority . . . which considers in detail the legislative history of the ADEA, the nature of the remedies it provides, and the traditional function of the court and jury.

Id. at 1426.


38. Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985).

39. Id. "Future damages should not be awarded unless reinstatement is impracticable or impossible; the district court, then, has discretion to award front pay. Because future damages are often speculative, the district court, in exercising its discretion, should consider the circumstances of the case, including the availability of liquidated damages." Id. (emphasis added). At least one commentator believed that the First Circuit would allow the amount of ADEA front pay awards to be determined by judges rather than juries. Seryak, supra note 11, at 138 n.15. The
parently reversed its position on this point by upholding a 1989 decision in which the district court permitted a jury to determine the amount of front pay. In upholding the decision, the First Circuit remanded the case for a new calculation of the amount of front pay that should be awarded. The court, however, did not explicitly decide whether the jury should set the amount of front pay; it merely remanded the case for a more appropriate calculation of damages. It would appear, although not conclusively, that the First Circuit regards the determination of the amount of front pay in ADEA actions as a matter within the jury's discretion.

B. Reasoning of Courts That Permit Juries to Determine the Amount of Front Pay

The circuits holding that juries should determine the amount of front pay in ADEA suits have not offered any substantial reasoning in support of such a holding. They merely assume that the responsibility of determining the amount of front pay is within the scope of the jury's duties. The explanation of the Third Circuit in *Maxfield v. Sinclair International* is typical. Maxfield, a salesman for Sinclair, was forced to retire one month after his sixty-fifth birthday and was replaced by a younger employee. The court concluded that Sinclair's actions violated the ADEA. The court noted that reinstatement was the preferable remedy for the violation, but said that front pay could be given in lieu of reinstatement since reinstatement was not feasible. The court then announced that "[o]f course the amount of damages available as front pay is a jury question." This is the court's reasoning, in its entirety. Other decisions by the Third, Sixth and Ninth Circuits have reached similar conclusions.

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reference to the district court's exercise of "discretion" indicated that the amount of front pay awarded would be set by juries in the First Circuit. *Id.*
40. *Linn v. Andover Newton Theological Sch., Inc.*, 874 F.2d 1, 6 (1st Cir. 1989).
41. *Id.* at 8-9.
42. *Id.*
43. *Id.* at 9.
44. 766 F.2d 788, 796 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986).
45. *Id.* at 790-91.
46. *Id.* at 790-92.
47. *Id.* at 796.
48. *Id.*
49. *Id.*
50. See, e.g., *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 772 n.11 (3d Cir.
cuits are equally unenlightening. In short, none of the circuits that permit juries to set the amount of front pay in ADEA actions provide any analysis that can be examined for soundness.

IV. ALLOWING JUDGES TO DETERMINE THE AMOUNT OF FRONT PAY TO AWARD

A. Federal Circuits That Permit Judges to Determine the Amount of Front Pay

In contrast to the cases allowing juries to determine the amount of front pay awards in ADEA suits, courts in six federal circuits have held—and continue to hold—that such awards should be set by the trial judge. These include the Courts of Appeals for the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits.

1989) ("The determination of the amount of front pay necessarily involves some imprecision. However, to permit the jury to undertake that calculation is not reversible error . . . ."); Anastasio v. Schering Corp., 838 F.2d 701, 704-05 (3d Cir. 1988) (affirming jury award of front pay); Blum v. Witco Chem. Corp., 829 F.2d 367, 374 (3d Cir. 1987).

51. See, e.g., Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984) ("[T]his Court now holds that the approval of the prospective damage award of $88,800 as returned by the jury was not an abuse of discretion."); Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 893 (6th Cir. 1988) (relying on Davis to allow jury to determine amount of front pay award).

52. See, e.g., Cassino v. Reichhold Chem., Inc., 817 F.2d 1338, 1347 (9th Cir. 1987) (permitting jury to establish amount of front pay).

53. In addition, one circuit has reached the same result in a case involving Louisiana's version of the ADEA. Deloach v. Delchamps, Inc., 897 F.2d 815, 824 (5th Cir. 1990) (determination of amount of front pay award within district court's discretion).


55. Duke v. Uniroyal Inc., 928 F.2d 1413, 1424 (4th Cir.), cert. denied, 112 S. Ct. 429 (1991) ("[T]he award [front pay] and amount is one for the court sitting in equity to consider and not the jury.").

56. See, e.g., Hybert v. Hearst Corp., 900 F.2d 1050 (7th Cir. 1990) (reversing and remanding district court's award of front pay as too speculative but permitting trial court to set the amount of front pay); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198 (7th Cir. 1989) (remanding case for reconsideration of events occurring after trial but permitting trial court to set the amount of front pay).

57. See, e.g., MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1060-61 (8th Cir. 1988) (affirming trial court's determination of amount of front pay); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061 (8th Cir. 1988) (affirming trial court's determination of amount of front pay).

58. Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1426 (10th Cir. 1991) ("[F]ollowing the more reasoned line of authority" that judges should set the amount of front pay awards in ADEA actions).

59. See, e.g., Wilson v. S & L Acquisition Co., 940 F.2d 1429, 1438 n.20 (11th
B. Reasoning of Courts That Permit Judges to Determine the Amount of Front Pay

1. The leading case: Dominic

Dominic v. Consolidated Edison Co., 60 decided by the Second Circuit, is the leading case holding that a determination of the amount of front pay in ADEA suits is an issue for the judge.61 Dominic, the plaintiff, was fired by Consolidated Edison in violation of the ADEA.62 The trial court decided that reinstatement was not an appropriate remedy in the case.63 Instead, the court held that Dominic was entitled to front pay.64 The jury awarded the plaintiff $378,000 in front pay. The trial judge, however, concluded that the determination of the amount of front pay was within the court's discretion rather than the jury's.65 Dominic asserted on appeal that the amount of front pay was a factual issue to be decided by the jury.66 The Second Circuit disagreed, holding that the determination of the amount of front pay is properly made by the judge.67

The Dominic court found support in the ADEA's statutory language and legislative history for its conclusion that judges should determine the amount of front pay awards in ADEA suits.68 The court identified two types of relief provided for in the statute.69 The first type of relief is that of "amounts owing," which includes "unpaid minimum wages or unpaid overtime compensation."70 The second type of relief consists of

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60. 822 F.2d 1249 (2d Cir. 1987).
62. Dominic, 822 F.2d at 1253.
63. Id.
64. Id.
65. Id. at 1253-54.
66. Id. at 1257.
67. Id. at 1258.
68. Id. at 1256-57.
69. Id. at 1257.
70. 29 U.S.C. § 626(b) (1982). The remedial provisions of the ADEA are as follows:
"such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA], including reinstatement.\textsuperscript{71} The statute provides for "a trial by jury of any issue of fact in any such action for recovery of amounts owing . . . regardless of whether equitable relief is sought by any party in such action."\textsuperscript{72} The statute is silent, however, with respect to a jury trial when courts consider granting other "legal or equitable relief." According to the \textit{Dominic} court, this indicates that "facts relevant to a plaintiff's legal recovery, [i.e.] 'amounts owing,' are to be tried by a jury even if equitable relief is also sought, but that issues concerning equitable relief are not to be tried by a jury."\textsuperscript{73} The court explained that the language of the statute demonstrates Congress's intent to maintain the Seventh Amendment's distinction between legal and equitable claims which provide the framework for the duties of the judge and the jury.\textsuperscript{74}

\begin{quote}
\textit{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 16 and 17 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion . . . .
\end{quote}

\textsuperscript{Id. (emphasis added).}
\textsuperscript{71. Id.}
\textsuperscript{72. Id. \S 626(c)(2) (emphasis added).}
\textsuperscript{73. \textit{Dominic}, 822 F.2d at 1257. In adopting this interpretation, the court rejected the alternative "interpretation that whenever some legal relief is sought, all factual issues in the action are to be tried by a jury." \textit{Id.}}
\textsuperscript{74. Id. The court explained, see \textit{id.}, that the legislative history of the ADEA supports this interpretation:

The House Conference Report (Report) indicates that the term "amounts owing"—the first type of remedy—was understood to mean "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits" and "liquidated damages." H.R. REP. No. 950, 96th Cong., 2d Sess. 13-14 (1978), reprinted in 1978 U.S.C.C.A.N. 504, 528, 535. Note that these are damages which are retrospective in nature. Front pay, on the other hand, is a prospective remedy; accordingly, an award of front pay is not an "amount owing" for purposes of section 626(b). See \textit{Graefenhain v. Pabst Brewing Co.}, 870 F.2d 1198, 1210 (7th Cir. 1989).

Congress explicitly provided for a jury trial when dealing with "amounts owing" under the ADEA, 29 U.S.C. \S 626(c)(2) (1982), and the language of the Report indicates that members of the House Conference Committee understood the significance of providing for a jury trial: "Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury." H.R. REP. No. 950, at 13-14 (emphasis added). The Report, as well as the ADEA itself, is silent with respect to jury trials regarding the second type of relief—"such legal and equitable relief as may be
The court further asserted that this is a "common sense result," since there is a good deal of overlap between the facts relevant to deciding whether to award front pay and the facts relevant to deciding the amount of front pay to award.\footnote{Dominic, 822 F.2d at 1257.} The court reasoned that dividing the fact-finding duties could lead to inconsistent decisions by the judge and the jury.\footnote{Id.} Therefore, the court concludes, the determination of the amount of front pay is a matter within the trial judge's equitable discretion.\footnote{Id. at 1258.}

2. A problem with the reasoning in Dominic: No resolution of the legal versus equitable dichotomy

The issue of who should make the determination of the amount of front pay turns on whether front pay is legal or equitable in nature. If it is "equitable," it is an issue for the judge;\footnote{Cf. Kenneth Vinson, Artificial World of Law and Fact, 11 Legal Stud. F. 311 (1987) (discussing the classification of remedies as either legal or equitable).} if it is "legal," it is for the jury.\footnote{Id.} The Dominic court never reaches the question of whether front pay is a legal or equitable issue. Instead, it simply assumes that it is equitable. This assumption is manifest in the court's analysis, which focuses on "amounts owing."\footnote{Id. at 1257-58.}

The court notes that the statute provides for a jury trial on the facts relevant to a plaintiff's recovery of "amounts owing."\footnote{Dominic, 822 F.2d at 1257.} This, the court states, is evidence of Congress's intent appropriate."

A fair reading of the ADEA and of the accompanying legislative history indicates that Congress intended "to comply with the seventh amendment by providing for a jury trial of factual issues underlying [ADEA] claims."\footnote{Id. at 1257.} Dominic, 822 F.2d at 1257. In addition, there is no evidence that Congress intended to provide for a jury trial for equitable relief under the ADEA.\footnote{Id.} Instead, it appears that Congress intended to maintain "the traditional distinction between legal and equitable claims embodied in the seventh amendment."\footnote{Id.} This conclusion is buttressed by Congress's insistence on the availability of "a trial by jury for any issue of fact in . . . an action for amounts owing . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2) (1982) (emphasis added). Congress's insistence that a jury trial be available despite the possibility that a court might face equitable issues in an ADEA case indicates Congress's understanding of the legal versus equitable dichotomy.\footnote{Dominic, 822 F.2d at 1257.}
to provide a jury trial in keeping with the requirements of the Sev-
enth Amendment.82 From there, the court jumps to an expla-
nation of how requiring judges to decide whether to permit
front pay and allowing juries to determine the amount of front
pay divides the fact-finding duties.83 Finally, the court con-
cludes that front pay is an equitable remedy within the discre-
tion of the judge.84 The court reaches this conclusion without
squarely deciding whether front pay is legal or equitable in
nature. Hence, the court never reaches the dispositive
issue—whether front pay is an equitable or legal remedy.

C. An Attempt to Solve the Legal Versus Equitable
       Dichotomy: Duke v. Uniroyal

1. The analysis in Duke v. Uniroyal

   The Fourth Circuit addressed the question of whether front
pay is a legal or equitable remedy in Duke v. Uniroyal.85 The
court began by stating that the question of who should deter-
mine the amount of front pay depends upon whether it is a
legal or an equitable remedy.86 The Fourth Circuit, quoting
from Curtis v. Loether, said that money damages were the
traditional "form of relief offered in the courts of law."87
Nevertheless, the Fourth Circuit pointed out that money dam-

82. Id.
83. Id. The court warns that splitting the fact-finding duties
    would be anomalous and would risk inconsistent decisions. A jury might
    conclude that the employee would never find other work and award a
    large sum in front pay, while the judge found that he or she would find
    work immediately and that no award was appropriate. Or, a judge might
    find front pay appropriate, but the jury might award only a nominal sum
    based on its belief that the employee could secure immediate employment.
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Id.; accord Denison v. Swaco Geograph Co., 941 F.2d 1416, 1426 (10th Cir. 1991);
Wildman v. Lerner Stores Corp., 771 F.2d 608, 616 (1st Cir. 1985). Contra Gibson
v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982).

The risk of inconsistent outcomes should not be sufficient, however, to overcome
the traditional functions of judge and jury. "Maintenance of the jury as a fact-
finding body is of such importance and occupies so firm a place in our history that
any seeming curtailment of the right to a jury trial should be scrutinized with the
(quoting Dimick v. Schiedt, 293 U.S. 524, 531 (1935)).
84. Dominic, 822 F.2d at 1258.
    Circuit's decision in Duke v. Uniroyal is apparently the only federal circuit decision
directly addressing the issue of whether front pay is a legal or equitable remedy.
86. Id. at 1424.
87. Id. (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974)).
ages are not always legal in nature. The court elaborated by quoting from Chauffeurs Local No. 391 v. Terry, which holds that money damages may be a type of equitable relief if they are "restitutionary" or "incidental to or intertwined with injunctive relief." And finally, the Fourth Circuit compared front pay under the ADEA to back pay under Title VII, which has been held to be equitable in nature. The court determined that the two remedies were analogous since both have a "restitutionary nature." Therefore, the court reasoned, front pay under the ADEA should be treated as an equitable remedy—the same as back pay under Title VII.

2. The flaws in the analysis of Duke v. Uniroyal

The analysis of the Fourth Circuit in Duke v. Uniroyal has three flaws: the suggestion that front pay is restitutionary, the analogy of ADEA front pay to Title VII back pay, and the proposition that front pay is "incidental to or intertwined with" equitable relief.

a. First flaw: Front pay equated with "restitution." The first flaw, the assertion that front pay is restitutionary in nature, is based on a misuse of the term "restitution." The Supreme Court explained that "restoring the status quo and ordering the return of that which rightfully belongs to [another]." Likewise, restoring the status quo is the basis of the "make whole" standard of relief in employment discrimination actions. However, the status quo in the law of restitution and the status quo in an ADEA action are not the same thing.

Restitution serves to return something to its rightful owner. It prevents an unjust enrichment. "A person who has been unjustly enriched at the expense of another is required to

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88. Id. (quoting Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 570-71 (1990)). Note that the quoted material attributed to Chauffeurs Local No. 391 is actually from Tull v. United States, 481 U.S. 412, 424 (1987).
89. Duke v. Uniroyal, 928 F.2d at 1424.
90. Id.
91. Id.
92. Id.
94. See discussion supra part II.A.
make restitution to the other.\textsuperscript{96} Restitution restores the status quo by returning a benefit,\textsuperscript{97} unjustly conferred upon another, to its rightful owner. For example, an action to compel the "disgorgement of improper profits" is restitutionary.\textsuperscript{98}

In an ADEA action, the status quo is restored by returning an aggrieved employee to the same economic position she would have occupied but for the wrongful discharge.\textsuperscript{99} This is accomplished by reinstating her to her former position of employment or by granting her money damages, such as front pay.\textsuperscript{100} Consequently, the employee is restored to her rightful economic position. Her employer, however, was not unjustly enriched. Unjust enrichment occurs when one has retained money or benefits which in justice and equity belong to another.\textsuperscript{101} The employer does not "retain" something belonging to the employee. The employer, therefore, does not make restitution to the employee when he is forced to reinstate the employee or to pay her front pay due to the wrongful discharge. Thus, front pay is not equivalent to restitution and equating front pay to restitution in order to find that front pay is equitable in nature is improper.

\textit{b. Second flaw: front pay analogous to back pay.} The Fourth Circuit's second flaw in \textit{Duke v. Uniroyal}\textsuperscript{102} was the analogy of ADEA front pay to Title VII back pay, which is an equitable remedy.\textsuperscript{103} The court believed the two types of awards were analogous for two reasons. The court's first reason is that back pay under Title VII is restitutionary in nature.\textsuperscript{104} As was explained above, front pay in ADEA actions is not

\begin{itemize}
\item \textsuperscript{96} \textbf{Restatement of Restitution} § 1 (1937).
\item \textsuperscript{97} A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage.
\item \textsuperscript{98} Id. § 1 cmt. b, at 12.
\item \textsuperscript{99} Flanagan, supra note 15, at 187.
\item \textsuperscript{100} Id. at 207-08.
\item \textsuperscript{101} Id. at 207-08.
\item \textsuperscript{102} Tull v. United States, 481 U.S. 412, 424 (1987).
\item \textsuperscript{103} Id. at 1424.
\item \textsuperscript{104} Id.
\end{itemize}
restitutionary in nature since it does not represent an employer’s return to the employee of an unjust enrichment. Furthermore, back pay represents wages which the employee should have received and were, therefore, “due and owing.” Front pay represents wages yet unearned and, necessarily, speculative in nature.

The court’s second reason for its analogy of ADEA front pay to Title VII back pay is that the decision whether to grant either of the awards is left to the decision of the trial court. While this is true, it does not further the analysis of the nature of the front pay award. This is especially true since front pay is actually a secondary, or default, award. It is granted only if reinstatement of an employee is not feasible. Consequently, the judge does not really choose from among the many remedies available to her when determining whether to award front pay; instead, she is forced to consider it when reinstatement, an equitable remedy, fails to fit the needs of the ADEA claimant.

c. Third flaw: front pay “incidental to or intertwined with” equitable relief. The Fourth Circuit’s third flaw in its analysis in Duke v. Uniroyal arises from its assertion that an award of money damages—in this case an award of front pay—may be equitable in nature if it is “‘incidental to or intertwined with injunctive relief.’” This assertion has two problems.

(1) Front pay is not “incidental to or intertwined with” equitable relief. Front pay in ADEA actions is not incidental to or intertwined with equitable relief. Instead, front pay is given in lieu of equitable relief (reinstatement) when the equitable relief is not an appropriate remedy. These two types of awards, front pay and reinstatement, are mutually exclusive, not intertwined remedies. Hence, front pay is not awarded when reinstatement of an employee is feasible.

(2) The clean-up doctrine. More problematic, however, is the Fourth Circuit’s contention that the nature of money damages changes from “legal” to “equitable” when those money

105. See supra text accompanying notes 95-101.
106. Duke v. Uniroyal, 928 F.2d at 1424.
107. See supra text accompanying notes 23-25.
109. Id. at 1424 (quoting Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 570 (1990)). Note that the quoted material attributed to Chauffeurs Local No. 391 is actually from Tull v. United States, 481 U.S. 412, 424 (1987).
110. See supra text accompanying notes 22-25.
damages are granted "incidental to or intertwined with" equitable relief. The result of this change in character is that a claimant may be denied his right to a jury trial since the remedy is characterized as equitable rather than legal in nature. This problem is a manifestation of the "clean-up doctrine."

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, suits in equity and suits at law proceeded separately. Claimants seeking both equitable and legal forms of relief from the same underlying facts usually had to pursue an action in equity and another action at law. The clean-up doctrine allowed a court of equity to dispose of legal issues in cases having both legal and equitable issues. This occurred when an action was predominantly equitable in nature but also gave rise to some legal relief which was "incidental to the equitable relief that the plaintiff sought." In such cases, the courts of equity would dispose of both the equitable and legal issues. Consequently, claimants were denied the opportunity to have these legal issues decided by a jury.

The Rules of Civil Procedure eliminated the distinction between legal and equitable actions. Instead, the Rules require that all claims arising from a single set of circumstances be raised in a single proceeding. In addition, Rule 38(a) provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate." The Rules, therefore, seemed to provide for a jury trial on all legal claims. In spite of the Rules' provision for jury trials, some confusion arose as to whether a jury trial was

111. Duke v. Uniroyal, 928 F.2d at 1124 (quoting Chauffeurs Local No. 391 v. Terry, 494 U.S. at 570 (1990)). Note that the quoted material attributed to Chauffeurs Local No. 391 is actually from Tull v. United States, 481 U.S. 412, 424 (1987).
114. 5 James W. Moore et al., Moore's Federal Practice § 38.03 (2d ed. 1988).
115. Id.
116. Id.
permitted in cases in which the clean-up doctrine was previously applied.  

The Supreme Court addressed this confusion regarding the vitality of the "clean-up doctrine" in *Beacon Theatres v. Westover.* There, the Court indicated that the right to a jury trial "cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

The Court continued this analysis in *Dairy Queen, Inc. v. Wood,* where it emphasized that

*Beacon Theatres*, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such "imperative circumstances," *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.

The Supreme Court in *Dairy Queen* virtually eliminated the possibility for a legal remedy to be recast as an equitable remedy merely because it is "incidental to or intertwined with" an equitable remedy. Therefore, front pay cannot be characterized as an equitable remedy simply because it is related to the equitable remedy of reinstatement. If front pay is legal in nature, it remains legal in nature. Of course, this begs the question: Is front pay properly characterized as a legal remedy which entitles an ADEA plaintiff to a jury trial?

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121. 359 U.S. 500 (1959).
123. 369 U.S. 469 (1962).
124. *Id.* at 473 (emphasis added).
V. ADEA FRONT PAY IS A LEGAL REMEDY
THAT ENTITLES ADEA PARTIES TO A JURY TRIAL

The Seventh Amendment preserves the right to a jury trial as it existed at common law: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The phrase "suits at common law" has been interpreted to mean suits in which legal rights are to be adjudicated, "in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." The analysis of "suits at common law" also applies to causes of action which are created by Congress.

The Supreme Court's two-part test for determining whether a statutory action is legal in nature was articulated in Tull v. United States:

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.

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126. U.S. CONST. amend. VII.
128. Curtis v. Loether, 415 U.S. 189, 193 (1974). "We recognize, of course, the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " Id. at 192 n.6 (quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971)). A determination that the ADEA does not clearly provide for a jury trial on the issue of the amount of front pay was made above. See supra part IV.B.
130. Id. at 417-18. In Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), Justice White had indicated that a three-part test should be used: "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."

Subsequent Supreme Court decisions have eliminated the third part of Justice White's test but retained the first two parts. See, e.g., Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (unanimously approving the use of only the two-part test in this case).
The first part of the test focuses on whether there was a common law equivalent to the statutory action at hand—an ADEA action. A review of common law actions in 1791 reveals that there was no proceeding equivalent to an ADEA suit for unlawful age discrimination in employment. The fact that an analogous action at law did not exist in 1791 is not dispositive. The Seventh Amendment "requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." Therefore, the outcome of the test is not dictated by an "abstruse historical" search for a common law analogue to an ADEA action.

The second part of the test is concerned with whether the remedy sought is legal or equitable in nature. The Supreme Court determined that the nature of the relief sought is more important than finding a precisely analogous common law cause of action. An action for money damages was "the traditional form of relief offered in the courts of law." In fact, the Supreme Court has held that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal." Of course, front pay is in the form of money damages. The fact that front pay is not available under the ADEA until the equitable remedy of reinstatement fails should not affect the determination that front pay is legal in nature.

The proposition that juries should be permitted to determine the amount of front pay in ADEA proceedings is buttressed by the Supreme Court’s discussion in *Beacon Theatres v. Westover*. In that case, the Court emphasized the importance of the right to a jury trial, stating that "[m]aintenance of the jury as a fact-finding body is of such importance and occu-

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134. *Id.* (citing *Curtis v. Loether*, 415 U.S. 189, 196 (1974)).
pies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.\textsuperscript{138} Furthermore, the Court said that the right to a jury trial cannot be assailed except "under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate."\textsuperscript{139}

A final obstacle to allowing juries to determine the amount of ADEA front pay has been suggested. The Fourth Circuit opined that the determination of the amount of front pay is too difficult a question for juries to handle.\textsuperscript{140} Another court reasoned that "if the jury is given the issue, it will be called upon to define a \textit{frozen image from fluid circumstances}."\textsuperscript{141} Admittedly, the determination of the amount of front pay is difficult and involves some imprecision.\textsuperscript{142} However, determining the amount of front pay to award an ADEA plaintiff is no more difficult or speculative than determining the amount of an award for personal injury, a determination routinely made by juries.\textsuperscript{143}

VI. CONCLUSION

The ADEA provides for reinstatement of workers wrongfully discharged on the basis of age. Since reinstatement of wrongfully discharged employees is sometimes impossible or impracticable, courts have awarded front pay in lieu of reinstatement in an attempt to "make whole" victims of age discrimination.

The federal courts of appeal agree that the decision of whether to award front pay in lieu of reinstatement is within the discretion of the trial court. The circuits split, however, over whether the determination of the amount of front pay is within the discretion of the trial judge or the jury. A majority of the circuits hold that judges should make the determination.

The Seventh Amendment, however, indicates that the right to a jury trial in legal matters is to be preserved. Because the

\textsuperscript{138} Id. at 501 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).
\textsuperscript{139} Id. at 510-11.
\textsuperscript{142} Bruno v. W.B. Saunders Co., 882 F.2d 760, 772 n.11 (3d Cir. 1989).
\textsuperscript{143} Maxfield v. Sinclair Intl, 766 F.2d 788, 796 (3d Cir. 1985), cert. denied, 474 U.S. 1057 (1986).
Supreme Court’s decisions indicate that front pay is properly characterized as a legal remedy, ADEA claimants should be permitted to have juries determine the amount of front pay in ADEA proceedings.

B. Todd Bailey