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Federal Remedies in Employment Discrimination Actions

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- I. [9.1] Scope of Chapter**
 - II. [9.2] General Comments**
 - III. [9.3] Preliminary and Intermediary Relief: Temporary Restraining Orders and Preliminary Injunctions**
 - A. Preliminary Relief Under Title VII
 - 1. [9.4] Who May Seek Preliminary Relief
 - 2. [9.5] Standard for Granting Preliminary Relief in Discrimination Actions
 - a. [9.6] Substantial Likelihood That Plaintiff Will Prevail on the Merits
 - b. [9.7] Lack of Adequate Remedy at Law
 - c. [9.8] Irreparable Injury
 - d. [9.9] Comparison of Relative Hardships Imposed on Parties
 - 3. [9.10] Special Considerations Underlying Applications for Temporary Restraining Orders
 - B. [9.11] Preliminary Relief Under the Equal Pay Act
 - C. [9.12] Preliminary Relief Under the ADEA
 - D. [9.13] EEOC Enforcement of the ADEA and the Equal Pay Act
 - E. [9.14] Preliminary Relief Under 42 U.S.C. §1981 and/or 42 U.S.C. §1983
 - IV. Final Relief: Backpay, Front Pay, Permanent Injunctions and Other Affirmative Relief, Attorneys' Fees, Costs, Other Compensatory Damages, Punitive Damages, Liquidated Damages, and Interest**
 - A. Availability of Backpay
 - 1. [9.15] In General
 - a. [9.16] Who Is Entitled to Backpay
 - b. [9.17] After-Acquired Evidence of Employee Wrongdoing
 - c. [9.18] Computation of Backpay
 - (1) [9.19] What is included in backpay
 - (2) [9.20] What is deducted from backpay
 - (a) [9.21] Interim earnings
 - (b) [9.22] Requirement of mitigation
 - (c) [9.23] Unemployment compensation
 - (d) [9.24] Other deductions
 - (e) [9.25] Laches
 - d. [9.26] Taxation of Backpay Awards
 - e. [9.27] Comparative Analysis
 - 2. [9.28] Backpay Under the Equal Pay Act

3. [9.29] Backpay Under 42 U.S.C. §1981
4. [9.30] Backpay Under the ADA
- B. [9.31] Front Pay Under Title VII, the ADA, and the ADEA
 1. [9.32] Calculation of Front Pay Under Title VII and the ADEA
 2. [9.33] Who Determines Front Pay Under Title VII and the ADEA
- C. [9.34] Permanent Injunctions and Other Affirmative Relief
 1. [9.35] Injunctions Prohibiting Discriminatory Employment Practices
 2. [9.36] Instatement and Reinstatement
 3. [9.37] Other Affirmative Relief: Quotas and Preferential Relief
 4. [9.38] Affirmative Relief Other than Quotas and Preferential Relief
 5. [9.39] Injunctive Relief in Equal Pay Act Actions
 6. [9.40] Injunctive Relief in ADEA Actions
 7. [9.41] Injunctive Relief in 42 U.S.C. §1981 and/or 42 U.S.C. §1983 Actions
- D. Attorneys' Fees
 1. [9.42] Attorneys' Fees in Title VII Actions
 - a. [9.43] "Reasonable" Fees
 - b. [9.44] Calculation of Attorneys' Fees Award
 - c. [9.45] Right To Recover Attorneys' Fees Award
 - d. [9.46] Recoverability of Time Spent in Administrative Proceedings
 - e. [9.47] Interest on Attorneys' Fees Award
 - f. [9.48] "Prevailing Party" for Purposes of Attorneys' Fees Award
 - g. [9.49] Discovery and Hearing
 - h. [9.50] Taxability of Attorneys' Fees Award
 2. [9.51] Attorneys' Fees in Equal Pay Act Actions
 3. [9.52] Attorneys' Fees in ADEA Actions
 4. [9.53] Attorneys' Fees in ADA Actions
 5. [9.54] Attorneys' Fees in 42 U.S.C. §1981 Actions
 6. [9.55] Expert Witnesses' Fees
- E. [9.56] Costs
 1. [9.57] Costs in Title VII Actions
 2. [9.58] Costs in Equal Pay Act Actions
 3. [9.59] Costs in ADEA Actions
 4. [9.60] Costs in 42 U.S.C. §1981 Actions
- F. [9.61] Consequential and Compensatory Damages
 1. [9.62] Consequential and Compensatory Damages in Title VII and ADA Actions
 2. [9.63] Consequential and Compensatory Damages in Equal Pay Act Actions
 3. [9.64] Consequential and Compensatory Damages in ADEA Actions
 4. [9.65] Consequential and Compensatory Damages in 42 U.S.C. §1981 Actions

G. Punitive Damages

1. [9.66] Limitations
2. [9.67] Standard for Awarding
3. [9.68] Punitive Damages in ADEA Actions
4. [9.69] Punitive Damages in Equal Pay Act Actions
5. [9.70] Punitive Damages in 42 U.S.C. §1981 and/or 42 U.S.C. §1983 Actions

H. [9.71] Liquidated Damages

1. [9.72] Liquidated Damages in Equal Pay Act Actions
 - a. [9.73] “Good Faith”
 - b. [9.74] Reasonable Grounds
 - c. [9.75] Examples
 - d. [9.76] Discretionary Considerations
2. [9.77] Liquidated Damages in ADEA Actions

I. [9.78] Interest

1. [9.79] Prejudgment Interest in Title VII Actions
2. [9.80] Prejudgment Interest in Equal Pay Act Actions
 - a. [9.81] Prejudgment Interest in 29 U.S.C. §216 Actions
 - b. [9.82] Prejudgment Interest in 29 U.S.C. §217 Actions
3. Prejudgment Interest in ADEA Actions
 - a. [9.83] Prejudgment Interest in 29 U.S.C. §216 Actions
 - b. [9.84] Prejudgment Interest in 29 U.S.C. §217 Actions
4. [9.85] Postjudgment Interest
5. [9.86] Calculation of Interest

V. [9.87] Title VII: Right to Trial de Novo in Federal Court**VI. [9.88] Personal Liability**

I. [9.1] SCOPE OF CHAPTER

This chapter analyzes remedies available to a party claiming employment discrimination and defenses invoked to defeat entitlement to those remedies. The chapter reviews the remedial provisions authorized by the following statutes:

- a. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e, *et seq.*, as amended by the Civil Rights Act of 1991 (CRA '91), Pub.L. No. 102-166, 105 Stat. 1071, prohibiting discrimination in employment on the basis of race, color, religion, gender, or national origin (42 U.S.C. §2000e-5);
- b. the Equal Pay Act of 1963, 29 U.S.C. §206(d), prohibiting differences in pay between men and women when performing substantially equivalent jobs (29 U.S.C. §206(d)(1));
- c. the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621, *et seq.*, as amended, prohibiting discrimination against individuals who are 40 years of age or older (29 U.S.C. §626, *et seq.*);
- d. 42 U.S.C. §1981, prohibiting discrimination on the basis of race and national origin, which had its genesis in the Civil Rights Act of 1866;
- e. 42 U.S.C. §1983, prohibiting discrimination on the basis of race, gender, and national origin by public employers, which derives from the Civil Rights Act of 1871; and
- f. the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.*, prohibiting discrimination against qualified individuals with disabilities.

Historically, Title VII plaintiffs were entitled to seek restitution in the form of backpay, front pay, lost benefits, and reasonable attorneys' fees. Title VII also authorized courts to enjoin unlawful employment practices and to order such affirmative action as might be appropriate.

CRA '91 represented the most sweeping revision to the nation's employment discrimination statutes since the enactment of Title VII nearly 30 years before. CRA '91 expanded the remedies available for intentional discrimination and provided the right to a jury trial. Employees who prove intentional discrimination may be awarded compensatory and even punitive damages against the defendant. CRA '91 also expanded the ability of plaintiffs to recover reasonable attorneys' fees. However, as described more fully in §9.62 below, compensatory and punitive damages are capped by CRA '91.

II. [9.2] GENERAL COMMENTS

The primary purpose of awarding damages under the federal statutes prohibiting employment discrimination is to make the victim "whole." *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721, 102 S.Ct. 3057, 3064 – 3065 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362, 2373 (1975); *EEOC v. Iona of Hungary, Inc.*, 108 F.3d 1569,

1580 (7th Cir. 1997). Generally a court will look to provide “[c]omplete relief for a victim of discrimination.” *Ilova of Hungary, supra*. Therefore, a court “must ‘do its best to recreate the conditions and relationships that would have existed if the unlawful discrimination had not occurred.’” *Id.*, quoting *United States v. City of Chicago*, 853 F.2d 572, 575 (7th Cir. 1988).

III. [9.3] PRELIMINARY AND INTERMEDIARY RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Years may elapse between the time that an alleged discriminatory termination or other act occurs and the time final adjudication is reached. An employee may wish to seek preliminary relief in order to mitigate against the harshness of such a delay or to avoid the injury altogether. A temporary restraining order or preliminary injunction could maintain the status quo and deter further discriminatory or retaliatory conduct pending the duration of the proceedings. Such relief, however, is available more in theory than in reality. The Seventh Circuit has noted that although preliminary injunctions are available in employment cases, it has never granted one. *Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155 (7th Cir. 1998) (affirming denial of preliminary injunction returning plaintiff to work). See §§9.4 – 9.14 below.

A. Preliminary Relief Under Title VII

1. [9.4] Who May Seek Preliminary Relief

Title VII provides that when an unlawful employment practice occurs, persons wishing to invoke their rights must first file a claim with the EEOC and, in Illinois, with the Illinois Department of Human Rights (IDHR). *See Zugay v. Progressive Care, S.C.*, 180 F.3d 901 (7th Cir. 1999) (plaintiff not required to complete state administrative process before starting federal Title VII proceedings; after filing charge with IDHR and allowing agency 60 days to act, plaintiff is free to file suit in federal court after receiving right-to-sue letter from EEOC).

Section 706(f)(2) of Title VII further establishes that when a charge is filed and the EEOC concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of Title VII, the EEOC may bring an action for appropriate temporary or preliminary relief pending final disposition of the charge. 42 U.S.C. §2000e-5(f)(2). See the comparable provisions under §7A-104 of the Illinois Human Rights Act (IHRA), 775 ILCS 5/1-101, *et seq.*, providing that the IDHR may petition the appropriate court for temporary relief. In *EEOC v. CNA Insurance Cos.*, 96 F.3d 1039, 1043 (7th Cir. 1996), the Seventh Circuit held that the EEOC’s right to seek preliminary injunctive relief during its processing of a charge extends until it either brings suit or issues a right-to-sue letter, even if its conciliation efforts have concluded.

The courts are divided on the question of whether a request for preliminary relief can be made by an individual plaintiff under Title VII before the completion of EEOC administrative action or the EEOC’s issuance of a right-to-sue letter. The Fifth Circuit has taken the position that an individual can initiate an action for preliminary relief in federal court before the administrative

procedures have been exhausted. See *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69, *reh'g denied*, 480 F.2d 924 (5th Cir. 1973), *cert. denied*, 94 S.Ct. 2650 (1974); *Parks v. Dunlop*, 517 F.2d 785 (5th Cir. 1975). In the Sixth Circuit, however, a right-to-sue letter or the completion of administrative action is a prerequisite to an individual plaintiff's suit for preliminary relief. See *Jerome v. Viviano Food Co.*, 7 F.E.P.Cas. (BNA) 143 (E.D.Mich. 1973), *aff'd*, 489 F.2d 965 (6th Cir. 1974). The First Circuit has taken a middle ground, holding that the plaintiff would have to show irreparable injury "sufficient in kind and degree to justify the disruption of the prescribed administrative process." *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983). See generally Judith Ashton, *The Availability of Preliminary Injunctive Relief to Private Plaintiffs Pending Equal Employment Opportunity Commission Action Under Title VII of the Civil Rights Act of 1964*, 8 Loy.U.Chi.L.J. 51 (1976).

In *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (1981), the Second Circuit held that a federal district court has jurisdiction to entertain a charging party's motion for a preliminary injunction to maintain the status quo pending a resolution of the charge even though the charging party has not yet obtained the right-to-sue letter from the EEOC. The majority in *Sheehan* relied on the federal court's inherent power as a court of equity to grant temporary relief in proper circumstances as well as its view that the overall purpose of the 1972 amendments was to expand, not to contract, the avenues of enforcement under Title VII. *Accord Scelsa v. City University of New York*, 806 F.Supp. 1126 (S.D.N.Y. 1992); *Pollis v. New School for Social Research*, 829 F.Supp. 584 (S.D.N.Y. 1993); *Irizarry v. New York City Housing Authority*, 575 F.Supp. 571 (S.D.N.Y. 1983); *Aguilar v. Baine Service Systems, Inc.*, 538 F.Supp. 581 (S.D.N.Y. 1982).

The Seventh Circuit appears to favor the line of cases holding that a plaintiff may not seek preliminary relief before obtaining a right-to-sue letter. In *Berg v. LaCrosse Cooler Co.*, 13 F.E.P.Cas. (BNA) 783, 784 (W.D.Wis. 1976), *appeal dismissed*, 548 F.2d 211 (7th Cir. 1977), the district court held that a plaintiff in an employment discrimination action was not entitled to seek a preliminary injunction forcing her employer to reinstate her to her former job when she had not exhausted the requisite administrative channels or obtained a right-to-sue letter from the EEOC:

The statute [Title VII] provides that the Commission may seek such interlocutory relief from a federal district court under certain circumstances, §2000e-5(f)(2), but it makes no similar provision for an initiative by the aggrieved party. I have concluded that it would involve too radical judicial surgery to infer from the Congressional language such a remedy for the plaintiff. *Id.*

When *Berg* reached the Court of Appeals for the Seventh Circuit, the court declined to address the issue of whether a district court has jurisdiction to grant private preliminary relief in a Title VII suit before administrative procedures have been exhausted because the underlying action had become moot. The court did note that it had previously ruled that to secure jurisdiction in a Title VII action, a plaintiff must follow the administrative procedures prescribed by Title VII, among them "the filing of a charge and receipt of a right-to-sue notice from the EEOC." 548 F.2d at 212. Similarly, in *Fields v. Village of Skokie*, 502 F.Supp. 456 (N.D.Ill. 1980), the district court held that Title VII's jurisdictional requirement that a plaintiff receive a right-to-sue notice before instituting any action in federal court applied to a complaint seeking only preliminary injunctive relief.

2. [9.5] Standard for Granting Preliminary Relief in Discrimination Actions

In the Seventh Circuit, to prevail on a motion for preliminary injunction in a discrimination case, the moving party must meet the same tests applied in other injunction cases. The moving party must establish (a) some likelihood of prevailing on the merits and (b) that in the absence of the injunction he or she will suffer irreparable harm for which there is no adequate remedy at law. After these hurdles are cleared, the court balances the harms to the parties and the public interest. *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995). Other courts may articulate this test differently, but most courts, in one way or another, assess these factors before granting a preliminary injunction. The Seventh Circuit has stated that in assessing and weighing the competing considerations, the court may rely on a subjective evaluation of the import of the various factors and on personal intuitive sense about the nature of the case. *See id.*; *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir. 1991); *Black Fire Fighters Association of Dallas v. City of Dallas, Texas*, 905 F.2d 63 (5th Cir. 1990); *Bertoncini v. City of Providence*, 767 F.Supp. 1194, 1197 – 1199 (D.R.I. 1991) (injunction denied). *See also Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155 (7th Cir. 1998), for a discussion of the standards for granting preliminary injunctions in Title VII cases.

a. [9.6] Substantial Likelihood That Plaintiff Will Prevail on the Merits

In order to show a substantial likelihood that the plaintiff will prevail on the merits, the plaintiff must demonstrate a prima facie case of violation of Title VII or other applicable statute. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); *United States v. City of Chicago*, 14 F.E.P.Cas. (BNA) 882 (N.D.Ill. 1976); *Ekanem v. Health & Hospital Corporation of Marion County*, 589 F.2d 316 (7th Cir. 1978). The Seventh Circuit in *Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155, 1158 (7th Cir. 1998), denied an injunction in a case in which the plaintiff had been discharged following improper use of her position to obtain information about her lawsuit, holding that her likelihood of success on the merits was not high. *See also DeNovellis v. Shalala*, 135 F.3d 58, 65 (1st Cir. 1998) (plaintiff had little likelihood of success on merits of Age Discrimination in Employment Act and retaliation claims). In *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), the plaintiff alleged that the employer violated the Americans with Disabilities Act in denying him a spot in its residency program. He sought a preliminary injunction ordering the hospital to admit him to the respondent's pediatric residency program. The district court denied the injunction, finding that the plaintiff did not meet the threshold burden of establishing that he was disabled, and the Seventh Circuit affirmed. Similarly, in *Scelsa v. City University of New York*, 806 F.Supp. 1126 (S.D.N.Y. 1992), the claimant, a director of an institute, sought to enjoin his employer from terminating his employment. The court declined to enjoin the employer, concluding that the claimant had not adduced sufficiently compelling evidence of intentional discrimination. *See also Hicks v. Dothan City Board of Education*, 814 F.Supp. 1044 (M.D.Ala. 1993).

b. [9.7] Lack of Adequate Remedy at Law

Before a court will grant a preliminary injunction, it must be satisfied that the expected harm to the plaintiff could not be compensated adequately by a monetary award. When the plaintiff's only damages are the monetary loss calculated on the basis of the pay differential between the job

he or she sought and the one he or she holds, a court is not likely to grant preliminary relief. *See, e.g., Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155 (7th Cir. 1998); *Hicks v. Dothan City Board of Education*, 814 F.Supp. 1044 (M.D.Ala. 1993) (preliminary injunction denied because transfer would be adequate remedy). *See also Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 300 (8th Cir. 1996) (holding that damages would provide adequate remedy if employee placed on unpaid administrative leave ultimately prevailed on merits and noting that this was not “genuinely extraordinary situation” warranting preliminary injunction).

c. [9.8] Irreparable Injury

Although analytically close to the availability of an adequate remedy at law, to obtain a preliminary injunction the plaintiff also must be able to demonstrate that irreparable injury will result if he or she is not protected by an injunction. Establishing irreparable harm is the critical and often the decisive factor in injunction cases. Irreparable harm is not easy to prove in Illinois or in many other jurisdictions. *See Cox v. City of Chicago*, 868 F.2d 217, 223 (7th Cir. 1989) (delay in promotion does not constitute irreparable harm); *Ekanem v. Health & Hospital Corporation of Marion County*, 589 F.2d 316 (7th Cir. 1978); *Washington v. Walker*, 529 F.2d 1062 (7th Cir. 1976); *Theodore v. Elmhurst College*, 421 F.Supp. 355 (N.D.Ill. 1976); *Adams v. City of Chicago*, 135 F.3d 1150 (7th Cir. 1998). In *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), in affirming the district court’s denial of a preliminary injunction that would have required a hospital to admit the plaintiff into its residency program, the Seventh Circuit noted that the plaintiff’s inability to handpick the desired residency program was not irreparable harm. *See also Maye v. City of Kannapolis, North Carolina Board of Education*, 872 F.Supp. 246 (M.D.N.C. 1994).

Courts are more likely to find irreparable injury when money cannot remedy the discrimination. Typically, injunctions are more likely to be granted when the passage of time effectively moots the issue or when damages cannot be reliably calculated. For example, in *Pottgen v. Missouri State High School Activities Ass’n*, 857 F.Supp. 654 (E.D.Mo.), *rev’d on other grounds, remanded*, 40 F.3d 926 (8th Cir. 1994), an overage student with learning disabilities sought the right to play on the school team in his senior year. The court granted a preliminary injunction, noting that the senior year could not be repeated and that the student could lose scholarships if he did not play. *See also Thomas v. Davidson Academy*, 846 F.Supp. 611 (M.D.Tenn. 1994) (preliminary injunction awarded to student expelled from class for panic attacks).

Similarly, in *Concerned Parents To Save Dreher Park Center v. City of West Palm Beach*, 846 F.Supp. 986 (S.D.Fla. 1994), the plaintiff organization sought to enjoin the city from eliminating a recreational program for disabled persons. The court granted the injunction, noting that eliminating the program would be irreparable injury because other similar programs were not offered elsewhere. In *Legault v. aRusso*, 842 F.Supp. 1479 (D.N.H. 1994), the court granted the claimant a preliminary injunction requiring the department to hire her because she would otherwise lose valuable experience in the interim. A finding of irreparable injury may be more likely in Americans with Disabilities Act cases when a plaintiff’s health hangs in the balance. *See, e.g., Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 961 (8th Cir. 1995) (finding

irreparable harm would result if employer and its insurer refused to cover plaintiff's cancer treatment); *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 170 (1st Cir. 1998) (finding irreparable injury would result if ADA plaintiff were not returned to work because returning to his job was essential to recovery from mental breakdown).

An Eastern District of New York case stated that to obtain a preliminary injunction a discharged employee must show that he or she

(1) has very little chance of securing further employment; (2) has no personal or family resources at [his or] her disposal; (3) lacks private unemployment insurance; (4) is unable to obtain a privately financed loan; (5) is ineligible for any type of public support or relief . . . and (6) [is affected by] any other compelling circumstances which weigh heavily in favor of granting interim equitable relief. In essence the plaintiff must quite literally find [himself or] herself being forced into the streets or facing the spectre of bankruptcy before a court can enter a finding of irreparable harm. [Citation omitted.] *Williams v. State University of New York*, 635 F.Supp. 1243, 1248 (E.D.N.Y. 1986).

In *Leen v. Carr*, 945 F.Supp. 1151, 1157 (N.D.Ill. 1996), the court held that irreparable harm occurs only when monetary damages cannot adequately compensate the plaintiff for the injury or when the injury cannot be measured by pecuniary standards. The court denied an injunction enjoining a fire department from hiring its paramedic class. In *DeNovellis v. Shalala*, 135 F.3d 58, 64 (1st Cir. 1998), the court found that a plaintiff's alleged emotional distress and loss of status were insufficient to enjoin transfer. *But see Bonds v. Heyman*, 950 F.Supp. 1202, 1215 (D.D.C. 1997), in which the court found that a Title VII plaintiff had demonstrated that her layoff would have a chilling effect on other employees and that she would suffer irreparable harm if she were laid off, due to the facts that she could never find comparable work and that, because of Title VII's damages cap, she could never fully recover the value of her injuries.

It should be noted that in *Nelson v. Baldrige*, 578 F.Supp. 320 (W.D.Mo. 1984), *Farkas v. New York State Department of Health*, 554 F.Supp. 24 (N.D.N.Y. 1982), *aff'd without op.*, 767 F.2d 907 (2d Cir.), *cert. denied*, 106 S.Ct. 596 (1985), and *Gibson v. U.S. Immigration & Naturalization Service*, 541 F.Supp. 131 (S.D.N.Y. 1982), the courts found that plaintiffs have a higher burden in demonstrating irreparable injury when the court is being asked to issue an injunction against the government. *See also Jordan v. Evans*, 355 F.Supp.2d 72, 77 (D.D.C. 2004).

Most courts require that the EEOC similarly demonstrate irreparable harm before they will enter an order for preliminary relief against the employer. *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981). In *Anchor Hocking*, the EEOC argued that it was entitled to a preliminary injunction reinstating the charging party on the basis that the reinstatement was necessary to an effective investigation of the pending charges. If the charging party were not reinstated, other black employees would be reluctant to cooperate in the investigation. The *Anchor Hocking* court specifically rejected the EEOC's notion that a statutory violation is irreparable injury per se. *See also EEOC v. Bay Shipbuilding Corp.*, 27 F.E.P.Cas. (BNA) 1372 (E.D.Wis.), *aff'd*, 668 F.2d 304 (7th Cir. 1981). *But see EEOC v. Pacific Southwest Airlines*, 587

F.Supp. 686 (N.D.Cal. 1984), in which the court held that the EEOC need not show irreparable injury or an imbalance of hardships to obtain preliminary injunctive relief. In *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743, 745 (1st Cir. 1996), the court rejected the EEOC's argument that it should not be required to satisfy the traditional test for preliminary injunctive relief under Title VII. The court held that the EEOC was able to demonstrate sufficient risk of irreparable harm to warrant an injunction voiding provisions in settlement agreements barring employees from assisting the EEOC.

d. [9.9] Comparison of Relative Hardships Imposed on Parties

In considering granting preliminary relief, courts have considered the potential impact on and/or harm to other parties and the public interest in general. In the Seventh Circuit this assessment comes into play only after the moving party meets the threshold burden of establishing some likelihood of success on the merits and irreparable harm. *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995); *Cox v. City of Chicago*, 868 F.2d 217 (7th Cir. 1989). The Ninth Circuit has stressed the public interest served by the EEOC in eliminating discrimination. *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753 – 754 (9th Cir. 1991). The *Recruit U.S.A.* court affirmed the district court's grant of an injunction, in spite of the EEOC's unclean hands, based on the strength of the public interest served. Thus, if granting preliminary relief would likely impose undue hardship on the defendant or another party, the court may decline to issue such relief. For example, in *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1979), after reviewing the relative hardship on both parties, the court found that the harm to the defendant in requiring that a military position be held open outweighed any harm the plaintiff would have suffered had no injunction been issued. Note, however, that *Anderson* arose in the public employment area. In *Adams v. City of Chicago*, 135 F.3d 1150, 1155 (7th Cir. 1998), the court upheld the denial of an injunction that would have delayed promotions due to an imbalance of harms. In *Hetreed v. Allstate Insurance Co.*, 135 F.3d 1155, 1158 (7th Cir. 1998), the court contrasted "false negatives" in employment discrimination injunctions (which can be made up in damages) with "false positives," which "can create substantial and irreversible costs." The court noted that it has never had an employment discrimination case in which it found interlocutory relief to be appropriate.

3. [9.10] Special Considerations Underlying Applications for Temporary Restraining Orders

The general principles courts consider when deciding whether to grant or deny a motion for a temporary restraining order are similar to those considered for preliminary injunctions. A plaintiff must first establish a high probability of success on the merits and then show that immediate and irreparable harm will ensue if the temporary restraining order is denied.

The courts appear to be much more reluctant to grant temporary restraining orders than preliminary injunctions. See *United States v. Baltimore County*, 19 F.E.P.Cas. (BNA) 403 (D.Md. 1978). *But cf. United States v. State of New Jersey*, 23 F.E.P.Cas. (BNA) 1716 (D.N.J. 1980). One commentator has noted that the nature of a temporary restraining order as an ex parte proceeding makes it less attractive to judges. See Susan R. Agid, FAIR EMPLOYMENT LITIGATION:

PROVING AND DEFENDING A TITLE VII CASE (2d ed. 1979). In *Coalition for Economic Equity v. Wilson*, 72 F.E.P.Cas. (BNA) 579 (N.D.Cal. 1996), the court granted a temporary restraining order forbidding state entities from implementing new anti-affirmative action legislation based on the balance of harms involved.

B. [9.11] Preliminary Relief Under the Equal Pay Act

The Equal Pay Act, 29 U.S.C. §206(d), amended the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201, *et seq.*, and is enforced pursuant to the provisions of that statute, although responsibility for the investigation and prosecution of those claims has been transferred to the EEOC. See §9.13 below. The FLSA permits individual actions by employees to recover monetary damages when violations of the Equal Pay Act have occurred. Private employees, however, are not permitted to maintain actions for equitable relief. The sole authority to obtain injunctive or other equitable relief rests with the EEOC. See 29 U.S.C. §217; Richard F. Richards, *Preliminary Relief in Employment Discrimination Cases*, 66 Ky.L.J. 39 (1977). Thus, injunctive relief for violations of the Equal Pay Act is available only in suits by the government.

It is not clear whether the EEOC has the authority to obtain a preliminary as opposed to a permanent injunction in Equal Pay Act actions. One of the few cases that has addressed the question of the availability of preliminary injunctions in such actions brought by the EEOC is *EEOC v. Lawson Milk Co.*, 23 F.E.P.Cas. (BNA) 531 (N.D. Ohio 1980). In *Lawson*, the EEOC sought to enjoin the Lawson Milk Company from shipping bread and pastry in interstate commerce after an EEOC investigation revealed that female wrapper operators were being paid less than their male counterparts in the same department. Although the *Lawson* court found that the EEOC had demonstrated that it was likely to succeed on the merits, the court rejected the motion for a preliminary injunction because no showing of urgency or irreparable injury was made. The *Lawson* court noted that “[i]f there has been a violation of the equal pay for equal work provisions of the FLSA, the only remedy necessary to make the employees whole is strictly monetary, *i.e.*, back pay.” 23 F.E.P.Cas. (BNA) at 532. The *Lawson* court also added that “Title VII specifically authorizes preliminary relief. The FLSA does not.” *Id.*

C. [9.12] Preliminary Relief Under the ADEA

The Age Discrimination in Employment Act expressly provides that an aggrieved employee may bring an action for whatever “legal or equitable relief as will effectuate the purposes of this Act.” 29 U.S.C. §626(c)(1). Before doing so, however, the individual must pursue any available state administrative remedies. 29 U.S.C. §633(b). An individual employee also is required to give the EEOC at least 60 days’ notice of an intent to file such an action. 29 U.S.C. §626(d).

The standard for granting a preliminary injunction or temporary restraining order in ADEA actions is the same test that must be satisfied in Title VII actions. *EEOC v. Lockheed Corp.*, 54 F.E.P.Cas. (BNA) 1632 (C.D.Cal. 1991) (EEOC entitled to preliminary injunction barring employer from removing older pilot from flight status at age 60 when bona fide occupational qualification (BFOQ) was questionable and balance of hardships was in favor of pilot); *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980). In *Janesville*, the Seventh Circuit held that the district court erroneously granted the EEOC’s motion for a preliminary injunction requiring the

city, which had mandatorily retired its 55-year-old police chief, to reinstate him pending a decision on his claim that the city's policy of mandatory retirement at age 55 for protective service employees violated the ADEA. The court found that the city's reliance on the state legislature's judgment in enacting the specific retirement program was not unjustified and that the city might succeed in its argument that being younger than 55 is a BFOQ for the generic class of protective service employees.

In age discrimination cases, courts have awarded preliminary relief when the employee's entire future economic stability would be jeopardized by the employer's action. Thus, in *Morrow v. Inmont Corp.*, 30 F.E.P.Cas. (BNA) 1019 (W.D.N.C. 1982), the court issued a preliminary injunction reinstating a saleswoman who was fired after filing charges of sex and age discrimination. The court justified its action on the basis that she would suffer irreparable loss of commissions and business contacts while waiting for her charges to be litigated. The plaintiff had been unable to find other work. The court observed that she "is being punished daily for pursuing her rights, and there is substantial likelihood that she cannot be made whole . . . if she is not provided interim relief." 30 F.E.P.Cas. (BNA) at 1026. See *Monroe v. United Airlines, Inc.*, 34 F.E.P.Cas. (BNA) 1610 (N.D.Ill. 1983).

In at least one case, a court's award of preliminary relief was aimed at halting an employer's alleged discriminatory practice. In *EEOC v. Chrysler Corp.*, 546 F.Supp. 54 (E.D.Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984), the court enjoined Chrysler from continuing to retire employees early on an involuntary basis, finding that the preliminary injunction was the logical means to maintain the status quo. The court did not, however, find a showing of sufficient irreparable injury by the class of those already involuntarily retired that would have necessitated a preliminary award of backpay. One district court held that a presumption of irreparable injury arises upon a showing of age discrimination in violation of the ADEA, so the plaintiff was not required to show a specific irreparable injury in order to obtain injunctive relief. See *Duke v. Uniroyal, Inc.*, 777 F.Supp. 428 (E.D.N.C. 1991). *DeNovellis v. Shalala*, 135 F.3d 58 (1st Cir. 1998), provides a discussion of the standards for granting a preliminary injunction in an ADEA case.

D. [9.13] EEOC Enforcement of the ADEA and the Equal Pay Act

In 1978, pursuant to Reorganization Plan No. 1, administrative enforcement of the Equal Pay Act and the Age Discrimination in Employment Act was transferred from the United States Department of Labor to the EEOC. When neither the House of Representatives nor the Senate vetoed this transfer, it became law, and the EEOC assumed jurisdiction over Equal Pay Act and ADEA charges, pursuant to the one-house legislative veto provision in the plan. The validity of this transfer, however, was called into question by the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983), which declared the one-house legislative veto unconstitutional. The federal courts were split as to the impact of *Chadha* on EEOC enforcement of the Equal Pay Act and the ADEA. In *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), the Second Circuit relied on *Chadha* and found the EEOC's powers to be invalid, but in *Muller Optical Co. v. EEOC*, 574 F.Supp. 946 (W.D.Tenn. 1983), *aff'd*, 743 F.2d 380 (6th Cir. 1984), the Sixth Circuit upheld the transfer of powers to the

EEOC. Congress resolved the split by expressly ratifying the executive branch reorganization with Pub.L. No. 98-532, 98 Stat. 2705 (Oct. 19, 1984). Subsequent decisions affirmed the authority of the EEOC to enforce the Equal Pay Act and the ADEA. *Equal Employment Opportunity Commission v. Westinghouse Electric Corp.*, 765 F.2d 389 (3d Cir. 1985).

E. [9.14] Preliminary Relief Under 42 U.S.C. §1981 and/or 42 U.S.C. §1983

When an employment discrimination suit is filed under 42 U.S.C. §1981 and/or 42 U.S.C. §1983, an employee is free to seek preliminary relief without filing with the EEOC or waiting for its determination. See generally Richard F. Richards, *Preliminary Relief in Employment Discrimination Cases*, 66 Ky.L.J. 39 (1977). The standard for obtaining a preliminary injunction or temporary restraining order in §§1981 and 1983 suits is similar to the test that must be satisfied in Title VII actions. See *Crockett v. Green*, 534 F.2d 715 (7th Cir. 1976); *Washington v. Walker*, 529 F.2d 1062 (7th Cir. 1976). However, a greater showing of irreparable injury often appears to be necessary in §§1981 and 1983 actions for preliminary injunctions against public employers. The courts frequently hold that the hardships in public employment override the necessity of granting aggrieved employees interim relief. In *Washington*, black applicants for state police positions brought an action under §§1981 and 1983 requesting a preliminary injunction that would forbid the state police to go forward with their allegedly discriminatory employee selection process and training program. The Seventh Circuit ordered that the preliminary injunction should not be granted, stating that the plaintiffs had failed to establish a balance of hardships in their favor. The court said: “Surely the public interest would be adversely affected by such a preliminary injunction since fewer State Troopers would be available.” 529 F.2d at 1066. See also *Rizzo v. Goode*, 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. 598 (1976) (strong showing of irreparable injury required in §1983 action for preliminary injunction against police); *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission of City of New York*, 490 F.2d 400 (2d Cir. 1973). *But cf. Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

IV. FINAL RELIEF: BACKPAY, FRONT PAY, PERMANENT INJUNCTIONS AND OTHER AFFIRMATIVE RELIEF, ATTORNEYS’ FEES, COSTS, OTHER COMPENSATORY DAMAGES, PUNITIVE DAMAGES, LIQUIDATED DAMAGES, AND INTEREST

A. Availability of Backpay

1. [9.15] In General

Generally, once discrimination has been shown, entitlement to backpay is presumed. “[A] plaintiff or a complaining class who is successful [on the merits] should ordinarily be awarded back pay unless special circumstances would render such an award unjust.” *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362, 2369 (1975), quoting *Moody v. Albermarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973). Such special circumstances could include bankruptcy of the employer or an award that would place the plaintiff in a better position.

In *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995), the Seventh Circuit, quoting *Albemarle, supra*, 95 S.Ct. at 2373, held that an award of backpay may be denied only “for reasons which ‘if applied generally, would not frustrate the central statutory purposes of eradicating discrimination.’” In *O & G*, an intentional and disparate impact case, the court stated that there are circumstances that might justify a court altering an award of backpay if the award bankrupted an employer and rendered it judgment proof. *See also EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1579 (7th Cir. 1997) (vacating backpay award to plaintiff when evidence showed she was planning to quit to run her own business).

a. [9.16] *Who Is Entitled to Backpay*

Any aggrieved party who is successful on the merits and who can demonstrate an economic loss generally is entitled to backpay. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1579 (7th Cir. 1997). However, the Supreme Court has held that undocumented aliens are not entitled to awards of backpay because such awards run contrary to national policy. *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 152 L.Ed.2d 271, 122 S.Ct. 1275 (2002).

The issue of the appropriateness of backpay awards in “pattern and practice” suits has been raised in several circuits. The majority view holds that backpay relief is appropriate. *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995); *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006).

As the Fifth Circuit court held:

[T]his form of relief [backpay] may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks, not to punish the respondent but to compensate the victim of discrimination. *United States v. Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1973) (cited with approval in *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F.2d 871, 876 (6th Cir. 1974)).

b. [9.17] *After-Acquired Evidence of Employee Wrongdoing*

Occasionally during litigation employers will discover evidence of a plaintiff’s misconduct. This misconduct may limit damages if the employer can show that the misconduct would have resulted in termination had the employer learned of it during employment. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1047 (7th Cir. 1999), citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L.Ed.2d 852, 115 S.Ct. 879, 886 (1995). The employer must establish by a preponderance of the evidence that its actual employment practices, not just the standards or policies articulated in its manual, would have resulted in termination. *See O’Day v. McDonnell Douglas Helicopter Corp.*, 79 F.3d 756, 759 (9th Cir. 1996).

In *Sheehan, supra*, the Seventh Circuit applied the reasoning of *McKennon, supra*, in affirming the lower court’s decision. A jury found that the defendant discriminated against the

plaintiff on the basis of her pregnancy. In discovery, the employer learned that the plaintiff had left many jobs off her resume and had failed to inform the employer that she had been fired from one of those jobs. The employer claimed that the plaintiff would have been fired when the employer became aware of the falsification. The lower court rejected this argument, finding that there was no falsification and that there was no evidence that the employer had ever fired an employee for falsification of a resume. Relying on *McKennon*, the Seventh Circuit stated that the employer must show by a preponderance of the evidence that the after-acquired evidence would have led to the employee's termination in order to successfully state the defense. *See also Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1168 (employer failed to prove it would have refused to hire plaintiff for misrepresentation on application in failure-to-hire case), *amended*, 97 F.3d 833 (6th Cir. 1996); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 935 (5th Cir. 1996) (employer failed to prove it would have terminated plaintiff solely for failing to disclose conviction), *cert. denied*, 117 S.Ct. 767 (1997).

c. [9.18] Computation of Backpay

Generally, backpay accrues from the date the discrimination occurred until the date that the discrimination has been remedied. *See, e.g., Parsen v. Kaiser Aluminum & Chemical Corp.*, 727 F.2d 473 (5th Cir.), *cert. denied*, 104 S.Ct. 3516 (1984). Title VII specifically provides that “[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [EEOC].” 42 U.S.C. §2000e-5(g)(1). For continuous violations, however, backpay can be awarded for the period before the filing of the EEOC charge when the employer's bias continues into the filing period. *Estate of Pitre v. Western Electric Co.*, 63 F.E.P.Cas. (BNA) 607 (D.Kan. 1993). *See also Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 401 (1st Cir. 1990) (determining plaintiff failed to prove continuing violation and ordering relief to be adjusted accordingly). Generally, the date of judgment terminates the accrual of backpay. *See Emmel v. Coca-Cola Bottling Company of Chicago*, 904 F.Supp. 723 (N.D.Ill. 1995), *aff'd*, 95 F.3d 627 (7th Cir. 1996); *Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). Decisions that have used a date other than the date of judgment include *Inda v. United Air Lines, Inc.*, 405 F.Supp. 426 (N.D.Cal. 1975) (date of reinstatement), *aff'd in part, vacated in part*, 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 98 S.Ct. 1877 (1978); *Doe v. Osteopathic Hospital of Wichita, Inc.*, 333 F.Supp. 1357 (D.Kan. 1971) (date of trial); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (1974) (noting that generally date would be date of district court's decision but may be date discriminatory practice ends), *appeal after remand*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1020 (1979).

Some factors can cut off the accrual of backpay. In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721, 102 S.Ct. 3057 (1982), the Supreme Court held that an employer's unconditional offer of reinstatement to individuals claiming discrimination effectively cut off any further accrual of backpay liability even if the offer did not include retroactive seniority. *See also Thomas v. Resort Health Related Facility*, 539 F.Supp. 630 (E.D.N.Y. 1982). The employer, in its offer of employment, must offer the employee a job substantially equivalent to the one he or she was seeking or backpay may not be cut off. *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276 (8th Cir. 1983). Moreover, a change in circumstances that precludes acceptance of an employer's job offer, such as disability, death, or imprisonment, also ends the accrual of backpay. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985).

Similarly, in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L.Ed.2d 852, 115 S.Ct. 879 (1995), the Supreme Court recognized that the employer's discovery of employee wrongdoing can terminate the accrual of backpay. In *Harper v. Godfrey Co.*, 45 F.3d 143, 149 (7th Cir. 1995), the plaintiffs had been laid off prior to being terminated for misconduct. Although the court found the layoffs were discriminatory, it limited the award of backpay to the time preceding the termination and disallowed reinstatement.

At least one court has held that the sale of a plant does not terminate accrual of backpay. *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989). In *Gaddy*, the court held that the accrual of backpay for an employee who was terminated because of her sex was not terminated by the sale of the plant where she was formerly employed. 884 F.2d at 319. The court noted that “[a]lthough the sale of a plant often results in the restructuring and the effective elimination of former positions,” the evidence in *Gaddy* revealed that the remaining two employees in the plaintiff's department were retained in their same positions after the sale of the plant. *Id.* Therefore, the plaintiff had shown by a preponderance of the evidence that she would have retained her position. Accordingly, the sale of the plant did not end the employer's liability for backpay. *See also Dybala v. Landau & Heyman, Inc.*, No. 94 C 7719, 1998 U.S. Dist. LEXIS 1719 (N.D.Ill. Feb. 10, 1998) (refusing to reduce backpay award when employer sold its business but majority of employees were retained by purchasing company).

In *EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524 (11th Cir. 1990), the court limited the backpay to the period of the average tenure of employees.

(1) [9.19] What is included in backpay

Backpay consists of all monetary benefits that would have been earned by the aggrieved party had there been no discrimination. That amount generally includes all wages, salary, and fringe benefits to which the employee would have been entitled. The courts have noted that the purpose of a backpay award is to make the plaintiff whole for the injuries suffered as a result of an employer's wrongdoing. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721, 102 S.Ct. 3057, 3064 – 3065 (1982); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1580 (7th Cir. 1997). Accordingly, “[b]ackpay awards may properly include all forms of compensation: bonuses, vacation pay, pensions and health insurance benefits in addition to regular wages.” *Marcing v. Fluor Daniel, Inc.*, 826 F.Supp. 1128, 1142 (N.D.Ill. 1993), *rev'd on other grounds*, 36 F.3d 1099 (7th Cir. 1994). *See also Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726 (10th Cir. 1984) (award may reflect fluctuations with working time, overtime rates, changes with rates of pay, transfers, promotions, and other perquisites of employment worker would have enjoyed but for discrimination); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.) (interest, overtime, shift differentials, vacation pay, sick pay, and other benefits court deems necessary), *cert. denied*, 107 S.Ct. 274 (1986).

Other fringe benefits or compensation that may be included in a backpay award include the value of stock options, pension and retirement benefits, and insurance. A Safeway Stores division manager whose termination in violation of the Age Discrimination in Employment Act forced him to exercise his stock options earlier than he otherwise would have done was held entitled to recover \$4.4 million in damages. *Greene v. Safeway Stores, Inc.*, 210 F.3d 1237 (10th Cir. 2000).

The judge held that the difference in the value of the stock options at the time he was forced to exercise them and at the time the plaintiff otherwise would have exercised them (as based on his expert's testimony) was "contingent compensation" that he would have received but for his illegal termination. 210 F.3d at 1243 – 1244. He also recovered \$1.7 million for the loss of retirement benefits because he was fired a little over two years before his interest in a supplemental executive pension would have vested. *See Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931 (1st Cir. 1995) (awarding plaintiff for value of stock options plaintiff would have received if he had not suffered discrimination); *Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354 (1st Cir. 1989); *Adams v. City of Chicago*, 135 F.3d 1150 (7th Cir. 1998) (including pension and retirement); *EEOC v. Emerson Electric Co.*, 39 F.E.P.Cas. (BNA) 1569 (E.D.Mo. 1986) (including insurance benefits). Courts may require evidence of the value of the benefits or the cost of their replacement before including some of these benefits in the backpay award. *See Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996). The proceeds of a life insurance policy were not included in a backpay award because the employer, who was not the insurer, would have been responsible only for premiums had the employee still been employed. *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985).

(2) [9.20] What is deducted from backpay

In computing the amount of the backpay award, Title VII specifically requires that "[i]nterim earnings or amounts earnable with reasonable diligence" be deducted. 42 U.S.C. §2000e-5(g)(1).

(a) [9.21] Interim earnings

After determining what should be included in a backpay award, deductions are made for wages the claimant actually earned from alternative employment since the discriminatory act. *Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). Thus, in *Nord*, the court remanded the case to the lower court for a deduction of the plaintiff's interim earnings from her backpay award. 758 F.2d at 1471. *See also Behlar v. Smith*, 719 F.2d 950 (8th Cir. 1983) (when employee had history of "moonlighting," earnings from what normally would have been second job not deducted), *cert. denied*, 104 S.Ct. 2169 (1984); *Chesser v. State of Illinois*, 895 F.2d 330 (7th Cir. 1990) (moonlighting earnings offset against backpay award because employee would have been unable to hold moonlighting job simultaneously with job he lost because of discrimination); *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975) (earnings from second job deducted to extent that amounts exceeded amounts normally earned at second job); *Whatley v. Skaggs Cos.*, 508 F.Supp. 302 (D.Colo. 1981) (moonlighting earnings offset against backpay award because employee would have been unable to hold moonlighting job simultaneously with job he lost because of discrimination), *aff'd in part, remanded in part*, 707 F.2d 1129 (10th Cir.), *cert. denied*, 104 S.Ct. 349 (1983).

An employee who obtains employment following a discharge but is then terminated for misconduct may not receive backpay from the initial employer for the period after the second discharge according to a Fourth Circuit decision. *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985). The court found that the discharge from subsequent employment was equivalent to a voluntary termination since the individual chose to violate employer rules. Thus, the employee forfeited the right to backpay for the period of time after the justified discharge.

Subsequent decisions have attempted to refine the concepts expressed in *Brady, supra*, with respect to the plaintiff's entitlement to backpay damage after termination for cause by a second employer. The First Circuit has held that the employee's right to seek backpay "is not permanently terminated when an employee is fired for misconduct or voluntarily quits interim employment." *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 382 (1st Cir. 2004). In *Johnson*, the court counseled that the entitlement to backpay should be decided on a case-by-case approach, based on the relevant facts. 364 F.3d at 383.

(b) [9.22] Requirement of mitigation

The aggrieved party has a duty to mitigate damages by using reasonable and diligent efforts to secure other employment. 42 U.S.C. §2000e-5(g); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721, 102 S.Ct. 3057, 3066 (1982); *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037 (7th Cir. 1994); *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892 (3d Cir. 1993); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992); *Hunter v. Allis-Chalmers Corporation, Engine Division*, 797 F.2d 1417, 1427 (7th Cir. 1986); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 905 (8th Cir. 2006); *Doe v. Oberweis Dairy*, 456 F.3d 704, 714 (7th Cir. 2006). Mitigation is a fact question that turns on the reasonableness and diligence of the plaintiff's efforts and the similarity of the new employment. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998). That duty requires that an unemployed claimant check employment advertisements, register with employment agencies, and pursue reasonable leads in the search for employment. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975). An aggrieved party is required to make only reasonable exertions. He or she is not held to the highest standard of diligence and need not be successful in finding other employment in order to establish reasonable diligence. *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979), *on remand*, 25 F.E.P.Cas. (BNA) 142 (W.D.Okla. 1980). When a plaintiff's mitigation efforts are frustrated by an employer's improper actions, the plaintiff's entitlement to backpay will not be cut off. *See Ford v. Rigidply Rafters, Inc.*, 984 F.Supp. 386, 390 (D.Md. 1997) (plaintiff's failure to continue job search was not unreasonable failure to mitigate when defendant had warned prospective employers about plaintiff's lawsuits).

In *Ford Motor Co., supra*, the Supreme Court held that an employment discrimination plaintiff's duty to mitigate damages includes a requirement that the employee accept a "substantially equivalent" job offered by the defendant. If the plaintiff fails to accept such a job, the accrual of backpay liability by the defendant employer is tolled. 102 S.Ct. at 3066. The Supreme Court, however, also recognized that the plaintiff's obligation is not absolute. "The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised." 102 S.Ct. at 3066 n.18. A plaintiff's refusal of an unconditional offer of reinstatement is not unreasonable and will not cut off backpay liability if the plaintiff was constructively discharged. *Mungin v. Katten Muchin & Zavis*, 941 F.Supp. 153, 155 (D.D.C. 1996), *rev'd on other grounds, remanded*, 116 F.3d 1549 (D.C.Cir. 1997). However, a plaintiff who refuses a comparable position with another company has failed to

mitigate damages, and any backpay award cuts off on the date of such refusal. *Kao v. Sara Lee Corp.*, 73 F.E.P.Cas. (BNA) 1054, 1058 (N.D.Ill.), *aff'd*, 129 F.3d 119 (7th Cir. 1997). When an employee took a part-time job for substantially less money and failed to look for other work, the court reduced the employee's backpay award for failure to mitigate. *Meyer v. United Air Lines, Inc.*, 950 F.Supp. 874 (N.D.Ill. 1997). A plaintiff must take reasonable efforts to minimize the cost to him or her. *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999).

Some courts have held that in a failure-to-promote case the duty to mitigate can include remaining on the job after being denied the promotion. *See Jurgens v. EEOC*, 903 F.2d 386 (5th Cir. 1990). However, in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 758 F.Supp. 303 (E.D.Pa. 1991), *rev'd on other grounds*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S.Ct. 88 (1993), the district court awarded backpay in a failure-to-promote case even though the plaintiff quit. The plaintiff had been a female associate at a law firm who was unlawfully denied promotion to partner. Several months after the denial, she quit. The court held it was reasonable for her to seek other employment in mitigation of damages because she had been denied the single most significant promotion achievable at a private law firm, it was unlikely that she would ever become a partner, and she left the firm in an attempt to replenish and continue her career.

Although plaintiffs are obligated to mitigate their damages, the defendant has the burden of asserting and proving that the plaintiff failed to mitigate damages because it is an affirmative defense. *Hutchison, supra*. *See also EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1580 – 1581 (7th Cir. 1997); *Broadnax v. City of New Haven*, 415 F.3d 265 (2d Cir. 2005). To prove that the plaintiff failed to mitigate damages, a defendant must show that “(1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence.” *Hutchison, supra*, 42 F.3d at 1044. *See also Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999); *Delight Wholesale, supra*; *United States EEOC v. Gurnee Inn Corp.*, 914 F.2d 815 (7th Cir. 1990); *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir.), *cert. denied*, 111 S.Ct. 525 (1990); *Wheeler, supra*, 794 F.2d at 1234. In *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47 (2d Cir. 1998), the court adopted a rule applied in several other circuits that relieves employers of the obligation to prove the availability of comparable employment when the plaintiff made no reasonable efforts to find new work.

Comparable employment is that which affords “virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status” as the previous position. *Hutchison, supra*, 42 F.3d at 1044. The plaintiff is not necessarily obligated to accept lesser employment or relocate to a new community. *Ford Motor Co., supra*. Similarly, an employee is not obligated to anticipate the employer's actions and begin mitigating damages even before being constructively discharged. *Neal v. Honeywell Inc.*, 191 F.3d 827, 831 (7th Cir. 1999).

In *Hutchison, supra*, the court held that the jury reasonably could have found that the plaintiff failed to mitigate damages when the defendant presented an expert who testified that the plaintiff's failure to use temporary or full-time employment agency services did not show reasonable diligence in attempting to mitigate damages. The court also held that a reasonable juror could conclude that the plaintiff could have found comparable employment despite her contention that she could not obtain the same salary when she had been paid far above the market

rate in her previous job in order to buy her tolerance for the defendant's sexual harassment. In *Sheehan, supra*, the court held that a jury reasonably could have found that the plaintiff failed to mitigate when the plaintiff found no other employment in the three years between her termination and trial, the plaintiff was an undisputedly qualified employee with a previously long and unbroken work record, and there was evidence that comparable jobs were available.

The duty to mitigate includes the obligation to make reasonable and good-faith efforts to maintain the new employment. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 936 (5th Cir. 1996) (plaintiff breached duty to mitigate by engaging in actions to cause termination), *cert. denied*, 117 S.Ct. 767 (1997); *Dreger v. Mid-America Club*, No. 95 C 4490, 1998 U.S. Dist. LEXIS 2536 (N.D.Ill. Mar. 5, 1998) (same, excluding from backpay award amount plaintiff would have earned if not fired for own misconduct). *See also Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1168 (plaintiff fired from subsequent job for accident did not fail to mitigate damages because conduct was not willful or egregious), *amended*, 97 F.3d 833 (6th Cir. 1996).

Plaintiffs who fail to mitigate damages may have summary judgment entered against them on damages claims related to backpay. *See Meyer, supra*. *But see Booker v. Taylor Milk Co.*, 64 F.3d 860, 867 (3d Cir. 1995) (failure to mitigate did not cut off all backpay when plaintiff could not have earned comparable salary even if he had looked for new employment).

(c) [9.23] Unemployment compensation

The circuits are split as to whether unemployment benefits should be deducted from backpay awards in discrimination cases. *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir.) (comparing positions of circuits), *cert. denied*, 115 S.Ct. 355 (1994). A majority of the circuits have held that unemployment benefits should not be deducted from backpay awards because of the collateral source rule. *Id.* *See also EEOC v. Kentucky State Police Department*, 80 F.3d 1086 (6th Cir. 1996) (declining to offset unemployment compensation).

In *Gaworski, supra*, the Eighth Circuit adopted the majority position, stating that the purpose of backpay awards in discrimination cases is to make the victim whole from injuries resulting from discrimination and to deter future discrimination. 17 F.3d at 1113. Reducing backpay awards in discrimination cases by unemployment benefits paid by a state agency makes it less costly for an employer to wrongfully terminate an employee and therefore frustrates the purpose of backpay awards. *Id.* Thus, the collateral source rule, which prohibits offsetting employer liability for damages in tort actions by collateral sources, such as insurance and workers' compensation, applies to unemployment benefits paid by a state agency. *Id.* *See Daniel v. Loveridge*, 32 F.3d 1472 (10th Cir. 1994); *Carter v. Bruce Oakley, Inc.*, 849 F.Supp. 677 (E.D.Ark. 1993); *Williams v. Secretary of Navy*, 853 F.Supp. 66 (E.D.N.Y. 1994). The Seventh Circuit has held that it is within the discretion of the district judge to deduct unemployment benefits from backpay. *See Hunter v. Allis-Chalmers Corporation, Engine Division*, 797 F.2d 1417 (7th Cir. 1986) (unemployment benefits not deducted from combined Title VII-42 U.S.C. §1981 award); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir.) (employer but not union entitled to set off unemployment compensation benefits), *cert. denied*, 102 S.Ct. 587 (1981). *See also Dailey v. Societe Generale*, 108 F.3d 451, 560 (2d Cir. 1997)

(clarifying Second Circuit's position that decision of whether to offset unemployment compensation from backpay award rests in court's discretion). A similar analysis applies to the deduction of social security benefits from backpay awards. *See Dominguez v. Tom James Co.*, 113 F.3d 1188, 1191 (11th Cir. 1997) (recognizing differences in circuits and holding that social security benefits may not be deducted from Age Discrimination in Employment Act awards).

(d) [9.24] Other deductions

When employees are required to deduct certain fixed expenses from their wages, the argument can be made that they should not recover those expenses in a backpay award. In the Fifth Circuit, the court deducted normal expenses from the base backpay figure to arrive at a net backpay figure that more accurately reflected lost wages. *Sabala v. Western Gillette, Inc.*, 371 F.Supp. 385 (S.D.Tex. 1974), *aff'd in part, rev'd in part on other grounds*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds sub nom. Teamsters Freight, Tank Line & Automobile Industry Employees, Local No. 988 v. Sabala*, 97 S.Ct. 2670 (1977). At least one court deducted disability benefits paid to the employee by the employer and any state disability benefits paid to the employee after the employer did not let the employee return to work. *Ackerman v. Western Electric Co.*, 643 F.Supp. 836 (N.D.Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988). *See also Austen v. State of Hawaii*, 759 F.Supp. 612 (D.Haw. 1991) (holding employer may offset temporary and permanent disability payments when disability payments are not fringe benefits but payments by employer as part of employee's salary), *aff'd*, 967 F.2d 583 (9th Cir. 1992). *But see Kohnke v. Delta Airlines, Inc.*, No. 93 C 7096, 5 Am. Disabilities Cas. (BNA) 334 (N.D.Ill. 1995) (refusing to offset workers' compensation and disability insurance payments made to plaintiff by defendant against plaintiff's backpay award, holding they were collateral source payments paid by statutory mandate), *different results reached on reconsideration on other grounds*, 932 F.Supp. 1110 (N.D.Ill. 1996); *EEOC v. Service News Co.*, 898 F.2d 958 (4th Cir. 1990) (backpay entitlement not offset by child care or transportation expenses). In discussing the collateral source rule, the court in *Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554, 558 (7th Cir. 1999), noted that "[i]n an employment case, if the employer is the source of the funds at issue, then the payments can be deducted from the award."

Some courts have deducted from the base backpay figure time when an aggrieved party was otherwise unavailable for work because of illness, pregnancy, or attendance at an educational institution. In *Best v. Shell Oil Co.*, 4 F.Supp.2d 770, 772 (N.D.Ill. 1998), the court held that the plaintiff could not recover backpay for the time period during which he represented in another legal proceeding that he was incapable of working. *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (pregnancy); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975). *See also Gaddy v. Abex Corp.*, 884 F.2d 312, 319 – 320 (7th Cir. 1989) (holding that plaintiff was not entitled to backpay for periods of slowdown during which overtime hours were not available or for periods during which plant was closed for lack of work). *Cf. Comacho v. Colorado Electronic Technical College, Inc.*, 590 F.2d 887 (10th Cir. 1979). It is arguable that individuals in military service, confined to institutions, or otherwise unavailable should be similarly treated.

A Social Security Administration finding that a plaintiff was disabled may serve to cut off a backpay award. *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 31 (2d Cir. 1997). *See also Best, supra*, 4 F.Supp.2d at 772 – 773 (holding that plaintiff could not recover backpay for period during which plaintiff represented in another legal proceeding that he could not work).

In addition, at least two courts have awarded, as part of damages, an amount designed to offset the adverse tax consequences of receiving a lump-sum backpay award in one year. *Sears v. Atchison, Topeka & Santa Fe Ry.*, 30 F.E.P.Cas. (BNA) 1084 (D.Kan. 1982), *aff'd*, 749 F.2d 1451 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 2322 (1985); *Blim v. Western Electric Co.*, 496 F.Supp. 818 (W.D.Okla. 1980), *aff'd in part, rev'd in part, remanded*, 731 F.2d 1473 (10th Cir.), *cert. denied*, 105 S.Ct. 233 (1984). *But see Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281 (8th Cir. 1993) (denying award of pay for income taxes because plaintiff failed to present evidence regarding amount of enhancement or convenient way to calculate).

(e) [9.25] Laches

Courts have acknowledged that a backpay award may be lowered due to a plaintiff's unreasonable lack of diligence in pursuing a Title VII claim. *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999) (upholding district court's application of laches to cut off plaintiff's backpay award); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281 (8th Cir. 1993) (acknowledging that defense of laches may require reduction of backpay award but declining to do so although four-and-one-half year period elapsed between plaintiff's filing charges at EEOC and receiving her right-to-sue letter, reasoning that plaintiff pursued her claim during four-and-one-half year period by calling EEOC at least 20 times to check on status of her charges); *EEOC v. Vucitech*, 842 F.2d 936 (7th Cir. 1988) (stating defendant may assert defense of laches when failure to pursue claim, by plaintiff or EEOC, has impaired defendant's ability to defend suit or causes other harm). "The doctrine of laches is an affirmative defense that may apply in a Title VII lawsuit if the plaintiff's delay in filing is unreasonable and unexcused, and the defendant shows resulting prejudice." *Hukkanen, supra*, 3 F.3d at 286. For a discussion of the laches doctrine in an employment discrimination case, see *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, 990 F.Supp. 1059, 1090 (C.D.Ill. 1998) (holding that defendant failed to prove two elements of laches defense — inexcusable delay and prejudice).

In *Cook, supra*, as part of a consent decree, the plaintiff had been notified in 1983 that there were no vacancies for the position she had requested, but the City told her that she would be notified of openings. In the next five years there were openings of which the City never informed the plaintiff and the plaintiff never inquired about the vacancies. The district court concluded that at some point between 1983, the date of her initial request, and 1994, the year she filed suit, the plaintiff should have again inquired about the vacancies. The Seventh Circuit upheld the district court's holding.

In *Vucitech, supra*, a sex discrimination suit brought by the EEOC, the court held that when there was no evidence of the death of witnesses or other developments caused by the EEOC's delay in prosecuting a claim that had made the claim harder to defend against, the doctrine of laches did not apply. The court in dicta also stated that the harm caused by a delay in prosecuting a claim that would make the doctrine of laches applicable included harm such as the reasonable expenditure of "large sums of money on employee benefits that unexpectedly — unpredictably — turned out to be illegal, resulting in a staggering unanticipated further liability." 842 F.2d at 943. *Cf. Cannon v. University of Health Sciences/Chicago Medical School*, 710 F.2d 351, 361 (7th Cir.

1983) (stating that impairment of defendant's ability to defend is only kind of harm relevant to defense of laches asserted against EEOC). However, a nine-year delay by the EEOC in acting on a pregnancy-related discrimination charge led to dismissal under the doctrine of laches when the court held that at least part of the delay was inexcusable and that it caused undue prejudice to the defendant. *EEOC v. Indiana Bell Telephone Co.*, 641 F.Supp. 115 (S.D.Ind. 1986).

d. [9.26] Taxation of Backpay Awards

In *Commissioner v. Schleier*, 515 U.S. 323, 132 L.Ed.2d 294, 115 S.Ct. 2159 (1995), the United States Supreme Court held that a recovery under the Age Discrimination in Employment Act consisting of backpay and liquidated damages was not excludible from the employee-taxpayer's gross income. In order for a recovery to be excludible from gross income under §104(a)(2) of the Internal Revenue Code, two requirements must be met:

1. the underlying cause of action giving rise to the recovery must be "based upon tort or tort type rights" and
2. the damages must have been received "on account of personal injuries or sickness." 115 S.Ct. at 2164 – 2167.

Writing for the majority, Justice Stevens stated that "[w]hether one treats respondent's attaining the age of 60 or his being laid off on account of his age as the proximate cause of respondent's loss of income, neither the birthday nor the discharge can fairly be described as a 'personal injury' or 'sickness.'" 115 S.Ct. at 2164. Although Justice Stevens acknowledged that the respondent's unlawful termination may have caused "some psychological or 'personal' injury comparable to the intangible pain and suffering caused by an automobile accident," none of employee's award was attributable to that injury. *Id.*

Furthermore, the Court held that an award under the ADEA was not excludible under Code §104(a)(2) because the cause of action was not based on tort or tort-type rights as required by regulations interpreting Code §104(a)(2). The Court noted it had stated in *United States v. Burke*, 504 U.S. 229, 119 L.Ed.2d 34, 112 S.Ct. 1867 (1992), that it recognized that one characteristic of traditional tort liability was the availability of a range of damages to compensate the plaintiff for injuries caused by the violation of legal rights. Like the pre-Civil Rights Act of 1991 version of Title VII, the ADEA, which provides only backpay and liquidated damages, provides no compensation for traditional harms associated with personal injury. Under the ADEA, liquidated damages are designed to punish the defendant and not to compensate the victim of discrimination. 115 S.Ct. at 2165 – 2167. Thus, the respondent's award of damages under the ADEA failed to satisfy the requirements under Code §104(a)(2) and was includible in the respondent's gross income.

e. [9.27] Comparative Analysis

It is sometimes difficult to compute what the aggrieved party would have earned if not unlawfully discharged, denied a promotion, etc. The usual procedure is to find a similarly situated employee with average job progress and calculate the amount of backpay based on a comparison

of that individual's earnings to the plaintiff's. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), *appeal after remand*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1020 (1979). In complicated cases with perhaps several discriminatees, the court may even use a flowchart to make the determination. By charting other employees' progress, raises, and promotions, the court could estimate figures that, in its opinion, would represent lost wages. *See United States v. United States Steel Corp.*, 520 F.2d 1043 (1975), *reh'g denied*, 525 F.2d 1214 (5th Cir.), *cert. denied*, 97 S.Ct. 61 (1976).

2. [9.28] Backpay Under the Equal Pay Act

Backpay is available as a remedy under the Equal Pay Act. 29 U.S.C. §206(d)(3). *See generally Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994). A two-year statute of limitations governs recovery of backpay except when the violation is determined to be "willful." For willful violations, the Equal Pay Act provides a three-year statute of limitations. A violation is willful only if the employer knew its actions were illegal or showed reckless disregard for whether its conduct was prohibited. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 100 L.Ed.2d 115, 108 S.Ct. 1677 (1988); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985); *EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 363 – 364 (8th Cir. 1994) (stating that although district court did not make express finding of good faith, circuit court believed lower court's findings that there was no knowing or reckless disregard for matter of whether employer's misconduct was illegal were sufficient to support court's conclusion that there was no willful violation). Although *Thurston, supra*, was an Age Discrimination in Employment Act case, the Supreme Court decision in *McLaughlin, supra*, expressly applies *Thurston* to the Fair Labor Standards Act for statute of limitations purposes. *See Peters v. City of Shreveport*, 818 F.2d 1148 (5th Cir. 1987) (*Thurston* standard applicable to statute of limitations under Equal Pay Act), *cert. dismissed*, 108 S.Ct. 1101 (1988). Courts have generally held that backpay cannot be recovered under the Equal Pay Act for salary differentials occurring prior to the limitations period. *Pollis v. New School for Social Research*, 132 F.3d 115, 118 (2d Cir. 1997) (discussing other circuits' decisions).

Overlapping relief under the Equal Pay Act and Title VII usually is not permitted. An aggrieved party is not precluded from proceeding under both statutes but will be required to set off one recovery against the other. *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 956 (1st Cir. 1995); *Lowe v. Southmark Corp.*, 998 F.2d 335, 337 (5th Cir. 1993).

Courts have permitted recovery under the Equal Pay Act against employers and against employers and unions but not against unions alone. In *Tuma v. American Can Co.*, 367 F.Supp. 1178 (D.N.J. 1973), the court held that a union could not be held liable on its own for an Equal Pay Act violation.

3. [9.29] Backpay Under 42 U.S.C. §1981

Backpay is recoverable under 42 U.S.C. §1981 by a successful litigant who demonstrates actual pecuniary loss. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). The courts have used the same rules under §1981 to measure backpay as are used under Title VII. *See Reaves v. Westinghouse Electric Corp.*, 430 F.Supp. 623 (E.D.Wis.

1977); *Howard v. Lockheed-Georgia Co.*, 372 F.Supp. 854 (N.D.Ga. 1974). Parties proceeding under §1981, however, are not restricted to the two-year period under Title VII; they are governed by the appropriate state statute of limitations. *Johnson, supra*. In *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 935 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 767 (1997), the court explained that even though §1981, unlike Title VII, does not expressly mention the duty to mitigate, the mitigation duty is equally applicable. In *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir.), *cert. denied*, 117 S.Ct. 584 (1996), the court denied backpay to the prevailing §1981 plaintiff because she earned more in the position she held after she was demoted.

4. [9.30] Backpay Under the ADA

The remedies available to aggrieved individuals under Title I of the Americans with Disabilities Act are generally identical to those available under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. See §9.15 above. The Seventh Circuit discussed the collateral source rule in an ADA case and determined that it is within the district court's discretion to set off or not set off social security disability payments. The court cautioned that the only social security benefits that can be set off against the backpay award are those that a plaintiff received during the portion of the backpay period during which the plaintiff was capable of working. *Flowers v. Komatsu Mining Systems, Inc.*, 165 F.3d 554 (7th Cir. 1999). *See also Kohnke v. Delta Airlines, Inc.*, No. 93 C 7096, 5 Am. Disabilities Cas. (BNA) 334 (N.D.Ill. 1995), *different results reached on reconsideration on other grounds*, 932 F.Supp. 1110 (N.D.Ill. 1996), for a discussion of the collateral source rule as it applies to backpay awards in ADA cases.

B. [9.31] Front Pay Under Title VII, the ADA, and the ADEA

Front pay is a monetary award available when reinstatement is inappropriate or not possible. *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.*, 399 F.3d 52, 67 (1st Cir. 2005). It covers the time period from the entry of judgment until the time a plaintiff can be expected to attain his or her rightful place. *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998); *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006). Because the purpose of a front-pay award is to compensate for the effects of past discrimination, a large backpay award is irrelevant. *United States EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1464 (7th Cir. 1992). *But see Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990) (failure to award front pay because district court impliedly found that other relief was sufficient did not constitute abuse of discretion).

An award of front pay is designed to monetize the value of the lost opportunity to be reinstated at the defendant's place of employment. *See Williams, supra*, 137 F.3d at 952. It is the difference between what the plaintiff would have earned in the future had he or she been reinstated at the time of judgment and what he or she would earn in next best employment. *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995). Front pay does not continue indefinitely. It cuts off at the time at which the plaintiff, with reasonable diligence, should find employment comparable (or superior) to the old position. *Williams, supra*, 137 F.3d at 954.

In *Williams*, the court distinguished between front pay, which approximates the earnings the plaintiff would have had if reinstated, and a compensatory damages award for lost future earnings, which compensates the plaintiff for a lifetime of diminished earnings due to reputational harm. 137 F.3d at 952 – 953. The court held that awards of front pay and lost future earnings are not duplicative. *Id.* But see *Hudson v. Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997) (holding that front pay is award for compensatory damages for future pecuniary losses), *overruled in part by Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 150 L.Ed.2d 62, 121 S.Ct. 1946 (2001). In deciding *Pollard*, the U.S. Supreme Court resolved the split between the circuit courts as to whether front pay should be included as an element of compensatory damages and therefore be subject to the statutory limit. The Court found that “front pay is not an element of compensatory damages within the meaning of §1981a, and, therefore, we hold that the statutory cap of §1981a(b)(3) is inapplicable to front pay.” 121 S.Ct. at 1949.

The Seventh Circuit has also found that front pay is available under the ADEA. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991). See 29 U.S.C. §626(b). In *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990), the court noted that front pay may be less appropriate when liquidated damages are awarded, but only if a front-pay award would be highly speculative due to the lengthy period for which damages are sought and the lack of certainty that the plaintiff would have remained employed during such a lengthy period. See also *Century Broadcasting, supra*, 957 F.2d at 1464.

Courts also have justified front-pay awards by finding that the plaintiff was a displaced worker and that the plaintiff would suffer future effects of discrimination. *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931 (1st Cir. 1995); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281 (8th Cir. 1993). For example, in *Scarfo*, a sex discrimination suit brought under Title VII and the Equal Pay Act, after correcting for recovery for the same time period in both Scarfo’s front pay and backpay awards, the court awarded Scarfo over \$500,000. The court held that the district court’s finding that Scarfo was a displaced worker and would be unable to find professional employment in the future was not clearly erroneous when there was evidence that she had only a ten-percent chance of returning to full employment at an equivalent salary. 54 F.3d 954 – 955. In *Hukkanen*, a sexual harassment case, the employer argued that a front-pay award for the plaintiff was improper because there was no evidence the plaintiff would suffer any future effects of the discrimination. 3 F.3d at 285 – 286. The court rejected this argument and held that evidence that the plaintiff then held a lower-paying job and had applied, but was not hired, for higher-paying jobs was evidence of the immediate effects of the employer’s wrongful conduct. Additionally, the court held that the lower court did not abuse its discretion by finding that a front-pay award for a period of ten years was “reasonable and necessary to afford [the plaintiff] an opportunity to obtain employment having pay and responsibilities equal to the pay and responsibilities she had at [the employer].” 3 F.3d at 286.

In *Spears v. Board of Education of Pike County, Kentucky*, 843 F.2d 882 (6th Cir. 1988), the court granted front pay to a female teacher who had been promoted to the position of principal at the time of the award after she had been improperly passed over for several higher-paying positions as principal. The court reasoned that a plaintiff is entitled to front pay until placed in a position comparable to the one that would have been occupied in the absence of discrimination.

Front-pay awards also occur under circumstances in which a court orders reinstatement and there may be delays in effecting the order. Courts may grant an additional monetary award to compensate the aggrieved party for the estimated earnings lost between the date of the court's decision and the date of reinstatement. *See EEOC v. Ford Motor Co.*, 645 F.2d 183 (4th Cir. 1981), *rev'd in part on other grounds*, 102 S.Ct. 3057 (1982); *Chisholm v. United States Postal Service*, 516 F.Supp. 810 (W.D.N.C. 1980), *aff'd in part, vacated in part on other grounds*, 665 F.2d 482 (4th Cir. 1981). The First Circuit has stressed that front pay and reinstatement are not mutually exclusive as long as there is no duplication. *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 14 (1st Cir. 1997) (front pay would cover time between judgment and plaintiff's fitness for duty, and then reinstatement would be appropriate).

1. [9.32] Calculation of Front Pay Under Title VII and the ADEA

Courts consider numerous factors when calculating an award of front pay, including “whether the plaintiff has a reasonable prospect of obtaining comparable employment, whether the time period for the award is relatively short, whether the plaintiff intended to work or was physically capable of working and whether liquidated damages have been awarded.” *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994) (Age Discrimination in Employment Act). *See also EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166 (10th Cir.), *cert. denied*, 106 S.Ct. 312 (1985); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984). The mere fact that damages may be difficult to compute should not insulate an employer who has engaged in age discrimination from providing full relief. *Prudential Federal Savings, supra*, 763 F.2d at 1173. *See Wildman, supra* (holding that future damages are often speculative and should be awarded only after trial court has considered circumstances of case and availability of liquidated damages). However, a plaintiff should put in all evidence necessary for the court to make a front-pay calculation, including the amount of the proposed award, the length of time the plaintiff expected to work for the defendant, and the applicable discount rate. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1270 (1993).

If a plaintiff is able or should be able, with reasonable effort, to obtain comparable employment, an award of front pay is not necessary to make the plaintiff whole. Similarly, if a plaintiff unreasonably refuses an offer of reinstatement or otherwise fails to mitigate damages, an award of front pay is precluded. *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 1983 (1987), *overruled on other grounds by Coston v. Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988). However, an employer seeking to avoid an award of front pay bears the burden of demonstrating that the plaintiff failed to mitigate. *Broadnax v. City of New Haven*, 415 F.3d 365 (2d Cir. 2005). A plaintiff's refusal of an offer of reinstatement may not be unreasonable (and hence front pay will not be cut off) if the defendant's offer is “belated” and “halfhearted.” *Eichler v. Riddell, Inc.*, 961 F.Supp. 211, 212 (N.D.Ill. 1997). In *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1232 (7th Cir. 1995), the court did not grant reinstatement and did not grant front pay because the plaintiff had made a tactical judgment and had not requested front pay.

As with backpay awards, an employer who contests a front-pay award on the grounds that a plaintiff has not met the duty to mitigate bears the burden of proving that the plaintiff has failed to mitigate damages. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983) (ADEA); *Green v. USX Corp.*, 843 F.2d 1511, 1532 (3d Cir. 1988), *vacated on other grounds*, 109 S.Ct. 3151 (1989).

Courts have cut off front-pay awards when evidence showed that the plaintiff would not have remained employed with the defendant. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1182 (2d Cir. 1996) (limiting plaintiff to seven weeks front-pay since office was scheduled to close). But the fact that a plaintiff's former position was eliminated will not necessarily cut off front pay. *See Curtis v. Electronics & Space Corp.*, 113 F.3d 1498, 1504 (8th Cir. 1997).

No clear bright-line rule has been enunciated to determine how many years the award should cover. In *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281, 286 (8th Cir. 1993), the court held that the lower court did not abuse its discretion by finding that a front-pay award for a period of 10 years was "reasonable and necessary to afford [the plaintiff] an opportunity to obtain employment having pay and responsibilities equal to the pay and responsibilities she had at [the employer]." Some courts have upheld extremely long front-pay award periods. In *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 126 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 2453 (1997), the court upheld a front-pay award for a period in excess of 20 years because the plaintiff had no prospect of finding comparable employment. *See also Pierce v. Atchison, Topeka & Santa Fe Ry.*, 65 F.3d 562, 574 – 575 (7th Cir. 1995) (affirming 10-year front-pay award in ADEA case because plaintiff was unable to find anything other than minimum wage work and he would have worked at defendant until retirement).

2. [9.33] Who Determines Front Pay Under Title VII and the ADEA

The circuit courts remain split as to whether the judge or the jury determines the amount of an award for front pay under Title VII and the Age Discrimination in Employment Act. The Third, Sixth, and Ninth Circuits have ruled that once the court determines front pay is appropriate, the amount is set by the jury. *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 796 (1986); *Wells v. New Cherokee Corp.*, 58 F.3d 233 (6th Cir. 1995); *Roush v. KFC National Management Co.*, 10 F.3d 392 (6th Cir. 1993) (ADEA); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 785 (1988). In contrast, the First, Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that the judge, not the jury, determines whether front pay should be awarded and the amount of the award. *Lussier v. Runyon*, 50 F.3d 1103 (1st Cir. 1995) (finding that decision to award or withhold front pay is within equitable discretion of trial court); *Dominic v. Consolidated Edison Company of New York*, 822 F.2d 1249 (2d Cir. 1987) (reasoning that Congress intended to limit jury to deciding factual issues); *Duke v. Uniroyal Inc.*, 928 F.2d 1413 (4th Cir.) (stating that claimant's entitlement to front pay and amount of front pay are matters for consideration by court sitting in equity because nature and extent of injury to claimant whose capacity to work has not been destroyed is not within realm of fact-finding but requires consideration of variety of circumstances to determine future prospects of claimant), *cert. denied*, 112 S.Ct. 429 (1991); *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998); *Newhouse v. McCormick & Co.*,

110 F.3d 635, 643 (8th Cir. 1997) (holding that determinations are equitable matters for court); *Denison v. Swaco Geologist Co.*, 941 F.2d 1416 (10th Cir. 1991); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541 (11th Cir. 1988) (holding that front pay is equitable remedy that lies within discretion of trial court). However, the Second Circuit has held that amount of front pay may be determined by the jury if the employer fails to object. *Broadnax v. City of New Haven*, 415 F.3d 265 (2d Cir. 2005). The Fifth Circuit has held both ways. *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989) (holding that amount of front pay should be determined by jury); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n.19 (5th Cir. 1998) (deeming front pay to be equitable remedy under Title VII, as amended in 1991, and holding that jury therefore lacks authority to determine these issues).

The Seventh Circuit held that the judge also decides the amount of a front-pay award under the ADEA. *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994); *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991). In *Fortino*, the court expressly rejected any suggestion in *Coston v. Plitt Theaters, Inc.*, 831 F.2d 1321 (7th Cir. 1987), *vacated*, 108 S.Ct. 1990 (1988), that a plaintiff has a right to a jury trial on the issue of the amount of a front-pay award under the ADEA. 950 F.2d at 398. *See also Hadley v. VAM P T S*, 44 F.3d 372, 376 (5th Cir. 1995). *But see Campbell v. Rust Engineering Co.*, 927 F.2d 603 (6th Cir. 1991) (text available in LEXIS) (unpublished per Sixth Circuit Rule 24) (stating trial judge has discretion to determine whether court or jury determines amount of front pay).

There was a split among the courts concerning whether front pay is subject to the damages cap imposed by the Civil Rights Act of 1991. Contrary to most circuits, the Sixth Circuit held that front pay is a legal remedy and accordingly falls within the cap. *Hudson v. Reno*, 130 F.3d 1193, 1202 – 1204 (6th Cir. 1997). As noted in §9.31 above, the U.S. Supreme Court overruled *Hudson* in *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 150 L.Ed.2d 62, 121 S.Ct. 1946 (2001). The Court found that “front pay is not an element of compensatory damages within the meaning of §1981a, and, therefore, we hold that the statutory cap of §1981a(b)(3) is inapplicable to front pay.” 121 S.Ct. at 1949.

Several courts have held that front pay is available under the ADEA when reinstatement would not be appropriate. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916 (6th Cir. 1984) (award of front pay governed by sound discretion of trial court and may not be appropriate in all cases); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) (court awarded \$242,000 for four-year period from trial until plaintiff would reach age 70). *See also Koyen v. Consolidated Edison Company of New York*, 560 F.Supp. 1161 (S.D.N.Y. 1983), in which the court discounted the front-pay award to present value. *See Blim v. Western Electric Co.*, 731 F.2d 1473 (10th Cir.) (plaintiff’s preference for monetary damage award did not justify front pay when re-promotion was appropriate remedy), *cert. denied*, 105 S.Ct. 233 (1984); *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988) (no front pay for employee who would have been terminated when office closed as reinstatement would not be possible); *Stamey v. Southern Bell Telephone & Telegraph Co.*, 658 F.Supp. 1152 (N.D.Ga. 1987) (refusal of employer’s unconditional offer of reinstatement to comanagement position based on employee’s desire for management position precluded front pay), *aff’d in part*,

rev'd in part, 859 F.2d 855 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 3178 (1989); *Kolb v. Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982). *See also Powers v. Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990) (consideration of liquidated damages in decision not to award front pay is appropriate); *Hybert v. Hearst Corp.*, 900 F.2d 1050 (7th Cir. 1990).

C. [9.34] Permanent Injunctions and Other Affirmative Relief

Courts have the power to grant permanent injunctions and/or to order other affirmative relief in employment discrimination cases.

When a court finds that an employer or a union violated Title VII, it has the authority to enjoin the unlawful conduct and order such affirmative relief as is appropriate. Title VII also provides:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee . . . if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. 42 U.S.C. §2000e-5(g)(2)(A).

The Seventh Circuit has joined the Third Circuit and the First Circuit in holding that the provision of the Civil Rights Act of 1991 allowing injunctive relief and attorneys' fees in mixed-motive cases does not extend to retaliation cases. *McNutt v. Board of Trustees of University of Illinois*, 141 F.3d 706 (7th Cir. 1998).

1. [9.35] Injunctions Prohibiting Discriminatory Employment Practices

Courts will enjoin employment practices that are found to be unlawful under Title VII as long as the court finds the violation was intentional. 42 U.S.C. §2000e-5(g) (individual actions); 42 U.S.C. §2000e-6(a) (pattern and practice suits). "Intentional" means that the act was done knowingly and was not the result of an accident. *See generally Annot.*, 38 A.L.R.Fed. 27 (1978). *See also Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (requiring "subjective good faith and objective reasonableness" in Fair Labor Standards Act case); *Local 246 Utility Workers Union of America v. Southern California Edison Co.*, 83 F.3d 292, 298 (9th Cir. 1996) ("good faith" under FLSA includes both objective and subjective components).

Courts commonly grant injunctions when they find the defendant has not voluntarily ceased engaging in discriminatory actions or has not adequately acknowledged wrongdoing. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1579 (7th Cir. 1997) (granting permanent injunction when primary decision makers offered no evidence to suggest they would cease discriminating); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1231 (10th Cir. 1997) (employer's defiant hostility to amending Americans with Disabilities Act violative policy indicated danger of recurrence, requiring injunction); *United States v. Board of Trustees of Illinois State University*, 944 F.Supp. 714, 723 (C.D.Ill. 1996). Injunctive relief may be appropriate even if there is no evidence of a similar pattern or practice. *Ilona of Hungary, supra*.

Once discrimination has been shown, district judges have broad discretion to issue injunctions addressing the proven conduct. *Id.* Courts are under an affirmative duty to render decrees that will effect as nearly as possible a complete remedy and will eliminate the effects of discriminatory practices. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975). A remedial measure that makes a sexual harassment victim worse off than she was (*i.e.*, a transfer that reduces her wages, benefits, amenities, or chances for promotion) is ineffective. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990). The trial court has discretion to order injunctive relief if it finds that an injunction is necessary to make the victims of discrimination whole or that discrimination could persist without an injunction. *United States EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817 (7th Cir. 1990); *EEOC v. Clayton Residential Home, Inc.*, 874 F.Supp. 212 (N.D.Ill. 1995). Appellate courts occasionally find injunctive relief ordered by a district court to be overly broad in scope. *See United States v. Criminal Sheriff, Parish of Orleans*, 19 F.3d 238 (5th Cir. 1994) (injunction ordering program of equal hiring and promotion of women throughout prison system too broad when discriminatory practices occurred only in assignments for male inmate residential floors); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989) (portion of injunction that prohibited sex discrimination against all faculty members too broad when suit was not class action), *cert. denied*, 110 S.Ct. 3217 (1990).

An injunction was denied in *Sanchez v. Philip Morris Inc.*, 774 F.Supp. 626 (W.D.Okla. 1991). In *Sanchez*, the plaintiff alleged discrimination on the basis of sex and national origin in a failure-to-hire case, and the court found that the monetary award was sufficient to induce correction of the unlawful employment practices. Courts have also denied injunctions on the basis that the discriminatory conduct has ceased. *See Clayton Residential Home, supra*; *Spencer v. General Electric Co.*, 706 F.Supp. 1234 (E.D.Va. 1989), *aff'd*, 894 F.2d 651 (4th Cir. 1990). However, in *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230 (7th Cir. 1994), the court found that the plaintiff's request for a permanent injunction was not mooted by the fact that she and the harasser were currently employed in different work areas because that situation could change. *See also Jones v. Rivers*, 732 F.Supp. 176, 178 (D.D.C. 1990).

2. [9.36] Instatement and Reinstatement

Ordinarily, an aggrieved party is to be placed in the position he or she would have occupied had there been no unlawful discrimination. Exceptions to this principle are situations in which the defendant's operations would be severely disrupted by such an award. Courts may award reinstatement to achieve the purposes of Title VII "even where incumbents are bumped from their jobs because those incumbents would not have been hired if the discrimination had not occurred." *Bruno v. City of Crown Point, Indiana*, 950 F.2d 355, 360 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 2998 (1992). The D.C. Circuit held that Title VII authorizes the bumping of innocent incumbents because "we see no indication in the statute nor in logic to lead us to conclude that ordinarily the innocent beneficiary has a superior equitable claim to the job vis-à-vis the victim of discrimination." *Lander v. Lujan*, 888 F.2d 153, 157 (D.C.Cir. 1989). *See also Hany v. General Electric Co.*, 53 F.E.P.Cas. (BNA) 133, 137 (C.D.Ill. 1990) (bumping and displacement may be allowed in certain circumstances), *rev'd sub nom. King v. General Electric Co.*, 960 F.2d 617 (7th Cir. 1992). However, in denying the plaintiff's displacement of an incumbent employee, the

court in *Hicks v. Dothan City Board of Education*, 814 F.Supp. 1044, 1050 (M.D.Ala. 1993), quoting *Walters v. City of Atlanta*, 803 F.2d 1135, 1149 (11th Cir. 1986), stated that displacement should be “used sparingly and only when a careful balancing of the equities indicates that absent ‘bumping,’ plaintiff’s relief will be unjustly inadequate.”

Reinstatement is not required when it would violate the principles of equity. In *Carlson v. American Meter Co.*, 896 F.Supp. 952 (D.Neb. 1995), the court of appeals upheld the district court’s refusal to order reinstatement. The court held that the plaintiff’s acts of misconduct, which included removing confidential company documents, precluded an order of reinstatement. See also *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L.Ed.2d 852, 115 S.Ct. 879, 886 (1995) (reinstatement would be “both inequitable and pointless” when employer then would have rightfully terminated employee for wrongdoing); *Mardell v. Harleysville Life Insurance Co.*, 31 F.3d 1221 (3d Cir. 1994), *vacated, remanded*, 115 S.Ct. 1397, *reaff’d in relevant part*, 65 F.3d 1072 (3d Cir. 1995).

In *Doll v. Brown*, 75 F.3d 1200, 1205 (7th Cir. 1996), the court held that the appropriate remedy in a denial-of-promotion case was to instate the plaintiff into the disputed position immediately or order front pay, not just to consider the plaintiff for the next vacancy. *But see Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (proper injunctive remedy for multiple claimants each denied promotion to same position would be to restore their chance of being selected; whether to remove incumbent would be in court’s discretion), *cert. denied*, 117 S.Ct. 949 (1997). In *Hetzel v. County of Prince William*, 89 F.3d 169, 173 (4th Cir.), *cert. denied*, 117 S.Ct. 584 (1996), the court upheld a denial of reinstatement into a higher position on the grounds that the plaintiff did not have the temperament for the position even though the defendant’s failure to promote had been retaliatory.

Courts have also denied reinstatement as a remedy when hostile relations exist between the parties. See *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 169 (2d Cir. 1998); *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998); *United Paperworkers International Union, Local 274 v. Champion International Corp.*, 81 F.3d 798, 805 (8th Cir. 1996); *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006). In *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 899 (3d Cir. 1993), the court found that the district court did not abuse its discretion in denying reinstatement. The trial court found that the “demonstrated irreparable conflict” between the parties made reinstatement impracticable. *Id.* See also *Hutchison v. Amateur Electronic Supply*, 42 F.3d 1037 (7th Cir. 1994); *McKnight v. General Motors Corp.*, 973 F.2d 1366 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1270 (1993). Particularly when the employer must rely on employees’ integrity and good judgment, hostility between the parties will justify denial of reinstatement. See *Tennes v. Commonwealth of Massachusetts, Department of Revenue*, 745 F.Supp. 1352, 1360 (N.D.Ill. 1990), *aff’d*, 944 F.2d 372 (7th Cir. 1991). See also *Fortino v. Quasar Co.*, 751 F.Supp. 1306, 1318 (N.D.Ill. 1990), *rev’d on other grounds*, 950 F.2d 389 (7th Cir. 1991).

An offer of unconditional reinstatement that is unreasonably refused will preclude an award of both front pay and backpay. *Smith v. World Insurance Co.*, 38 F.3d 1456 (8th Cir. 1994); *Hurley v. Racetrac Petroleum, Inc.*, 146 Fed.Appx. 365, 368 (11th Cir. 2005). In *Smith*, the

Eighth Circuit held that a reasonable refusal of reinstatement (fear of probable continued harassment) constituted a “special circumstance” that would not stop accrual of backpay damages. At least one court found that a plaintiff rejecting reinstatement could claim backpay but not front pay. *Mitchell v. Tenney*, 54 F.E.P.Cas. (BNA) 731, 732 (N.D.Ill. 1990).

Reinstatement is also not appropriate when the person discriminated against is presently unqualified to assume the position. In *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598 (7th Cir. 1979), *cert. denied*, 102 S.Ct. 612 (1981), a reinstatement order was vacated on the basis that the aggrieved party was no longer qualified to assume a position as corporate attorney because she had not practiced law for several years. Balancing “the various equities between the parties” and applying the standard that “the result must be consistent with the purposes of Title VII and the ‘fundamental concepts of fairness,’” the court in *Kamberos* denied injunctive relief. 603 F.2d at 603, quoting *Williams v. General Foods Corp.*, 492 F.2d 399, 407 (7th Cir. 1974). In the case of a discriminatory layoff, reinstatement is warranted unless a comparable position is not available. *Ray v. Iuka Special Municipal Separate School District*, 51 F.3d 1246 (5th Cir. 1995). In *Ray*, the court found that no comparable position existed for a school principal when two schools consolidated and the number of students increased by more than half. The burden is on the defendant to show a lack of an available position at any of its locations.

If an employee was wrongly denied a promotion and is then discharged, the court may order retroactive promotion instead of mere reinstatement to the prior position. *See Ingram v. Missouri Pacific R.R.*, 897 F.2d 1450, 1456 – 1457 (8th Cir. 1990); *Isabel v. City of Memphis*, 404 F.3d 404, 414 (6th Cir. 2005). Similarly, granting of partnership status is the proper remedy for discriminatory denial of partnership. *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 – 979 (D.C.Cir. 1990) (accounting firm ordered to grant partnership to accountant who was denied partnership because of sex discrimination).

In the context of academic promotions, at least a few courts have ordered promotion of a tenured associate professor to full professor as a Title VII remedy. *See Bennun v. Rutgers, State University*, 737 F.Supp. 1393 (D.N.J. 1990), *aff’d in part, rev’d in part on other grounds*, 941 F.2d 154 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 956 (1992); *Jew v. University of Iowa*, 749 F.Supp. 946, 963 (S.D. Iowa 1990). At least one court has held that a university may be required to confer tenure on a victim of discrimination. In *Brown v. Trustees of Boston University*, 891 F.2d 337, 359 – 361 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990), the First Circuit held that granting tenure would make the plaintiff whole and that no issues of collegiality or ability made the granting of tenure inappropriate. “[O]nce a university has been found to have impermissibly discriminated in making a tenure decision, as here, the University’s prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII.” 891 F.2d at 359.

For a good general discussion of when reinstatement in Age Discrimination in Employment Act actions is inappropriate, *see Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir.), *cert. denied*, 112 S.Ct. 429 (1991).

3. [9.37] Other Affirmative Relief: Quotas and Preferential Relief

One of the most controversial remedies available under Title VII is the imposition of a requirement that employers or unions adopt specified quotas for hiring or advancing minorities. It has been argued that Title VII prohibits the imposition of quotas as follows:

Nothing contained in [Title VII] shall be interpreted to require any employer, employment agency, [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. 42 U.S.C. §2000e-2(j).

The Supreme Court has held that courts can use quotas as remedies for past discrimination. *Local 28 of Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421, 92 L.Ed.2d 344, 106 S.Ct. 3019 (1986) (upholding requirement that union's membership be 29.23 percent minority). The Court held that 42 U.S.C. §2000e-5(g) does not restrict the use of quotas only to actual victims of past discrimination. However, the Court cautioned that such relief is not always appropriate. It was proper in *Local 28* because of the union's "egregious and pervasive violations" and because the quota was not used "simply to achieve and maintain racial balance, but rather as a benchmark" to measure compliance. 106 S.Ct. at 3057, 3059 (O'Connor, J., concurring in part, dissenting in part). Citing *Local 28*, the Third Circuit upheld an affirmative recruitment plan imposed by the trial court to remedy a long history of "residents only" hiring. *Newark Branch, NAACP v. Town of Harrison, New Jersey*, 940 F.2d 792, 807 (3d Cir. 1991). The *Newark Branch* court stressed that the relief decree was limited in time and served as a benchmark to measure compliance rather than an arbitrary quota.

The Sixth Circuit distinguished permissible quotas to remedy past discrimination from quotas to remedy labor pool disparities, which are impermissible. *Middleton v. City of Flint, Michigan*, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 1552 (1997). *See also United States v. State of New Jersey*, 75 F.E.P.Cas. (BNA) 1602, 1613 (D.N.J. 1995) (consent decree upheld because rights of others were disrupted only to minimum extent necessary); *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547, 1563 (3d Cir. 1996) (finding application of non-remedial affirmative action policy that resulted in layoff of white teacher violated Title VII), *cert. dismissed*, 118 S.Ct. 595 (1997).

In *Daines v. City of Mankato*, 754 F.Supp. 681, 704 – 705 (D.Minn. 1990), the court declined to order the defendant city to exercise preferential hiring of women and other affirmative measures, noting that the defendant already operated under a "thorough and aggressive" affirmative action policy.

The Supreme Court has ruled that laying off senior nonminority employees in order to retain later-hired minorities violates the Equal Protection Clause. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842, 1851 – 1852 (1986). The Court held that the reasons behind the plan in *Wygant* — to rectify societal discrimination and provide students with role models — were not sufficient to justify the layoff plan. 106 S.Ct. at 1847 – 1849. The Court nevertheless agreed that a formal finding that the employer had discriminated in the past was not necessary to uphold an otherwise valid affirmative action plan. 106 S.Ct. at 1863 – 1864.

The Supreme Court has also upheld relief fashioned in a consent decree that benefited individuals who were not the actual victims of discrimination. *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 92 L.Ed.2d 405, 106 S.Ct. 3063 (1986). Whatever parameters 42 U.S.C. §2000e-5(g) places on a court's posttrial relief, the Court held, they do not apply to a consent decree, which is exactly the sort of voluntary agreement that Title VII encourages.

The Supreme Court decisions in *Regents of University of California v. Bakke*, 438 U.S. 265, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978), and *United Steelworkers of America v. Weber*, 443 U.S. 193, 61 L.Ed.2d 480, 99 S.Ct. 2721 (1979), should have little, if any, impact on the power of courts to impose quota relief. The Supreme Court decisions in those cases may be distinguished on the basis that the quotas were not part of a court remedy for a prior finding of discrimination. See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989) (discussing constitutional challenges to minority set-asides in construction plan adopted by city).

In *Vaughns v. Board of Education of Prince George's County*, 742 F.Supp. 1275, 1291 (D.Md. 1990), *aff'd in part, rev'd in part*, 977 F.2d 574 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 973 (1993), the court held that a board of education possesses greater latitude to act pursuant to its affirmative obligation to desegregate than does a court when imposing a remedy for default. However, the board was ordered to adjust its faculty assignment plan to reflect black membership in the local teacher population. See also *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship & Training Committee*, 94 F.3d 1366 (9th Cir. 1996) (ordering defendant union to implement affirmative action plan), *cert. denied*, 117 S.Ct. 1470 (1997).

4. [9.38] Affirmative Relief Other than Quotas and Preferential Relief

In addition to ordering injunctions prohibiting employers from engaging in specified conduct, courts may impose injunctive orders compelling employers to undertake miscellaneous remedial actions. For instance, in *Morris v. American National Can Corp.*, 730 F.Supp. 1489 (E.D.Mo. 1989), *aff'd in part, rev'd in part on other grounds*, 941 F.2d 710 (8th Cir. 1991), the court ordered an employer who tolerated sexual harassment to develop staff training programs and to develop sexual harassment grievance procedures. In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D.Fla. 1991), the court imposed an onerous sexual harassment policy on an employer found liable for sexual harassment. In *Dutton v. Johnson County Board of County Commissioners*, 859 F.Supp. 498 (D.Kan. 1994), the court imposed specific accommodations to be offered by the employer found liable for violating the Americans with Disabilities Act. It is

reasonable to assume that courts may become more active in fashioning “reasonable accommodations” in remedying violations of the ADA. *See also Daniels v. Pipefitters’ Association, Local Union 597*, 53 F.E.P.Cas. (BNA) 1669, 1673 (N.D.Ill. 1990) (court ordered special master to formulate and implement union referral system), *aff’d*, 945 F.2d 906 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992); *Thomas v. Washington County School Board*, 915 F.2d 922, 926 (4th Cir. 1990) (court ordered school board to advertise vacancies publicly and to fill them by specified procedures); *Garland v. USAir, Inc.*, 56 F.E.P.Cas. (BNA) 377, 378 (W.D.Pa. 1991) (court ordered defendant to advertise openings in media aimed at black audiences). *See also Knox v. State of Indiana*, 93 F.3d 1327, 1337 (7th Cir. 1996) (defendant ordered to post anti-retaliation policy).

5. [9.39] Injunctive Relief in Equal Pay Act Actions

Injunctive relief is not available to private parties in an Equal Pay Act action. It is available only in suits by the EEOC. 29 U.S.C. §206(d)(3). Injunctions have issued against both employers and unions enjoining future violations. *See Hodgson v. Food Fair Stores, Inc.*, 329 F.Supp. 102 (M.D.Pa. 1971); *Brennan v. City Stores, Inc.*, 479 F.2d 235, *reh’g denied*, 481 F.2d 1403 (5th Cir. 1973). “Good faith” has not been held a defense to the granting of an injunction. Injunctions have been denied in cases in which the court found that the employer voluntarily implemented its own plan designed to rectify the violation and its effects and there was no evidence that future violations were likely to occur. *See Usery v. Sears, Roebuck & Co.*, 421 F.Supp. 411 (N.D. Iowa 1976). *See also United States Department of Labor v. Shenandoah Baptist Church*, 707 F.Supp. 1450, 1464 (W.D.Va. 1989) (injunction against future violation of Equal Pay Act denied because employer had already been in compliance for several years), *aff’d sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert. denied*, 111 S.Ct. 131 (1990); *U.S. EEOC v. Illinois Department of Rehabilitation Services*, 51 F.E.P.Cas. (BNA) 1741 (C.D.Ill. 1989) (injunction against violation of Equal Pay Act was inappropriate when employee who made salary determinations was no longer with agency and new violations did not seem likely).

6. [9.40] Injunctive Relief in ADEA Actions

Courts may issue injunctions in Age Discrimination in Employment Act actions. Before requesting an injunction, the EEOC must attempt voluntary conciliation. 29 U.S.C. §216(b). Whether an injunction issues is left to the discretion of the trial court. Injunctions will not be granted during the 60-day conciliation period. A plaintiff who wishes to preserve his or her rights to future unliquidated damages should request injunctive relief. *See Monroe v. Penn-Dixie Cement Corp.*, 335 F.Supp. 231 (N.D.Ga. 1971). In *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), *cert. denied*, 118 S.Ct. 47 (1997), the court upheld an injunction prohibiting an employer from enforcing a mandatory retirement policy. In *United States EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 74 F.E.P.Cas. (BNA) 847, 853 (11th Cir. 1997), the court held that the charging party’s decision not to seek reinstatement did not prevent the EEOC from obtaining injunctive relief. The court held that equitable relief would be appropriate due to the company’s failure to admit wrongdoing.

7. [9.41] Injunctive Relief in 42 U.S.C. §1981 and/or 42 U.S.C. §1983 Actions

Courts have jurisdiction to grant injunctions in appropriate cases under 42 U.S.C. §1981 and/or 42 U.S.C. §1983. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). Injunctions will not always be granted in cases of §1981 violation. In *Jackson v. McCleod*, 748 F.Supp. 831, 836 (S.D.Ala. 1990), the court refused to order the defendant to hire the plaintiff even though it found a §1981 violation because it found that the close working relationship would not be in the best interest of either litigant. Courts also have authority to order the imposition of preferential hiring procedures to eliminate the vestiges of past discrimination. See *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 92 S.Ct. 2045 (1972). Reinstatement is available as a remedy under both §§1981 and 1983. An employee will not be reinstated to a position where there is no vacancy. See §9.36 above. Courts also have the authority to order unions to reinstate members. See *Daniels v. Pipefitters' Association, Local Union 597*, 53 F.E.P.Cas. (BNA) 1669, 1675 – 1676 (N.D.Ill. 1990), *aff'd*, 945 F.2d 906 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1514 (1992).

D. Attorneys' Fees

1. [9.42] Attorneys' Fees in Title VII Actions

Title VII authorizes the court in its discretion to award “reasonable” attorneys’ fees to a “prevailing party” as costs. 42 U.S.C. §2000e-5(k).

The Supreme Court has held that a “prevailing party” is one who has success on any significant issue in a case that achieves “some of the benefit” sought by a plaintiff sufficient to cross “the threshold to a fee award of some kind.” *Texas State Teachers Ass’n v. Garland Independent School District*, 489 U.S. 782, 103 L.Ed.2d 866, 109 S.Ct. 1486, 1493 (1989), quoting *Nadeau v. Helgemore*, 581 F.2d 275, 278 (1st Cir. 1978). The “touchstone . . . inquiry” in determining whether the threshold has been crossed is whether in the course of the litigation there occurred a “material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.” 109 S.Ct. at 1494. *Farrar v. Hobby*, 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566, 573 (1992). Thus, a party who litigates to judgment and ultimately loses on all claims is not a “prevailing party” for purposes of attorneys’ fees. *Balark v. City of Chicago*, 81 F.3d 658, 664 – 665 (7th Cir. 1996).

Litigants who appear pro se are not entitled to recover attorneys’ fees even if they are attorneys. In reaching this decision, the Supreme Court has reasoned that the overriding purpose of the statute is to obtain independent counsel for victims of civil rights violations to ensure the effective prosecution of meritorious claims. This purpose is best served by a rule that creates the incentive to retain counsel in every case rather than a disincentive to employ counsel whenever a plaintiff feels competent to litigate on his or her own behalf. *Kay v. Ehrler*, 499 U.S. 432, 113 L.Ed.2d 486, 111 S.Ct. 1435 (1991).

The Civil Rights Act of 1991 also substantially expanded the ability of plaintiffs to recover attorneys’ fees. 42 U.S.C. §2000e-2 provides that in “mixed motive” cases plaintiffs can recover attorneys’ fees even if no other damages are awardable. Section 2000e-2 provides that if the

plaintiff establishes that race, gender, etc., was “a motivating” factor in the employment decision, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of considerations of race, gender, etc. If the employer meets this burden, the plaintiff will not be entitled to damages but is still entitled to an award of attorneys’ fees. *But see Akrabawi v. Carnes Co.*, 152 F.3d 688 (7th Cir. 1998) (district court did not err in denying fees to both parties in mixed-motive Title VII case). Attorneys’ fees for a successful appeal may also be recovered under a similar analysis if the party seeking fees substantially prevails on appeal, but fees will not be awarded to a plaintiff who prevails in the district court and then “appeals, seeking a greater victory — and fails utterly in his appeal.” *Evans v. City of Evanston*, 941 F.2d 473, 476 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3028 (1992).

a. [9.43] “Reasonable” Fees

What is a “reasonable” fee is not precisely defined. In *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 96 S.Ct. 2214 (1976), the Seventh Circuit listed the following factors as guides in determining the reasonableness of a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Accord Skelton v. General Motors Corp., 661 F.Supp. 1368, 1376 (N.D.Ill. 1987), *aff’d in part, rev’d in part*, 860 F.2d 250 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 53 (1989). *But see Hudson v. Reno*, 130 F.3d 1193, 1208 (6th Cir. 1997), *overruled in part by Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 150 L.Ed.2d 62, 121 S.Ct. 1946 (2001), in which the court affirmed the district court’s decision to limit the fee award to the rate customarily charged by local attorneys, rather than the rates normally charged by the plaintiff’s nonlocal attorneys, despite their “special expertise” in Title VII cases. The court explained that the district courts enjoy broad discretion to determine what constitutes a “reasonable rate.” *Id. See also Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268, 278 (6th Cir. 1983),

quoting *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 2999 (1980), in which the court explained that the district court's decision concerning a fee award should be affirmed as long as the fees awarded are "adequate to attract competent counsel, but . . . do not produce windfalls to attorneys." *But see Adcock-Ladd v. Secretary of Treasury*, 227 F.3d 343 (6th Cir. 2000). The *Adcock-Ladd* court approved a District of Columbia market rate instead of a Tennessee local rate when the plaintiff specifically retained the District of Columbia lawyer to depose a key witness residing in the District. 227 F.3d at 347. The court noted that the defendant had refused to produce that witness in the Tennessee forum, where he could have been deposed by lead counsel at the local rate. *Id.*

Although relevant as evidence of a reasonable fee, private fee arrangements between a plaintiff and counsel do not automatically serve as a ceiling on the amount of attorneys' fees that the prevailing party may recover. *See Blanchard v. Bergeron*, 489 U.S. 87, 103 L.Ed.2d 67, 109 S.Ct. 939 (1989); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982) (contingency fee contract does not serve as "automatic ceiling on the amount of a statutory award"). In *Venegas v. Mitchell*, 495 U.S. 82, 109 L.Ed.2d 74, 110 S.Ct. 1679 (1990), the Supreme Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, does not invalidate a contingent fee contract that requires the prevailing plaintiff to pay an attorney more than the statutory award of reasonable counsel fees that would be collected from the losing opponent.

The Seventh Circuit has held that it is erroneous to deny all fees when the court finds the amount requested to be unreasonable. The court should decrease the fees to a reasonable amount, looking at what claims arise out of a common factual core or from related legal theories. *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986).

b. [9.44] Calculation of Attorneys' Fees Award

Normally, attorneys' fees are calculated as follows: The court approves an hourly rate for each attorney based on the experience and ability of the attorney and the fees customarily charged in the area or by that attorney and then multiplies the number of hours reported by the attorney against the hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983); *Harman v. Lyphomed, Inc.*, 945 F.2d 969 (7th Cir. 1991); *Sassaman v. Heart City Toyota*, 879 F.Supp. 901 (N.D.Ind. 1994). Sometimes two rates are established, one for in-court work and one for out-of-court work. When that occurs, the attorney's time must be divided into in-court time and out-of-court time.

The D.C. Court of Appeals has established detailed guidelines regarding the minimum documentation that should be presented to a court on a fee application. *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C.Cir. 1982). *Accord Hirschey v. Federal Energy Regulation Commission*, 760 F.2d 305 (D.C.Cir. 1985). The court directed attorneys to submit with their fee applications detailed supporting documentary evidence with respect to their hourly rate, the amount of time spent on the case, and any facts supporting a lodestar or multiplier award. Attorneys who anticipate making a fee application in the D.C. Circuit or elsewhere will be well advised to maintain contemporaneous, complete, and standardized time records that accurately reflect the work performance by each attorney. The Seventh Circuit has not prescribed any such guidelines, preferring to rely on the parties to

develop accurate and full evidentiary records in fee proceedings. *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982). Similarly, counsel opposing a request for fees and costs have a “responsibility to state objections with particularity and clarity.” *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1048 (7th Cir. 1994), quoting *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 664 (7th Cir. 1985).

The amount of attorneys’ fees in civil rights cases is not limited by the amount of damages recovered by the plaintiff. *City of Riverside v. Rivera*, 477 U.S. 561, 91 L.Ed.2d 466, 106 S.Ct. 2686 (1986). The *Riverside* Court stated that there is no rule of proportionality that limits fees to some percentage of the damages won. 106 S.Ct. at 2690 – 2691. The Court noted that success of a civil rights suit is measured not only by the money recovered but also by the benefit the public gains by the suit. Similarly, in *Eddleman v. Switchcraft, Inc.*, 927 F.2d 316 (7th Cir. 1991), the Seventh Circuit recognized that although the amount of damages a plaintiff recovers is relevant to an award of attorneys’ fees, the size of the award does not dictate that the attorneys’ fees allowed be proportional to the damage award. See also *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 194 (7th Cir. 1994); *Wallace v. Mulholland*, 957 F.2d 333, 339 (7th Cir. 1992); *EEOC v. Accurate Mechanical Contractors, Inc.*, 863 F.Supp. 828 (E.D.Wis. 1994) (court concluded that relatively small damage award received by plaintiff did not provide valid basis for reduction in her attorneys’ fees). *Accord Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1040 (3d Cir. 1996) (holding that district court may not reduce fees in 42 U.S.C. §1983 employment discrimination action to maintain proportionality between award and fees, although amount of award remains relevant evidence of plaintiff’s degree of success).

An attorneys’ fees award may be reduced in some situations. Dilatory tactics by counsel, for example, could justify reduction of the award. *Connolly v. National School Bus Service, Inc.*, 177 F.3d 593 (7th Cir. 1999). Similarly, “limited success” could be the basis for reducing an award. *Id.*; *Shea v. Galaxie Lumber & Construction Co.*, 152 F.3d 729, 736 (7th Cir. 1998). In *Connolly*, the Seventh Circuit looked at the following factors to determine the degree of success: (1) the difference between the judgment recovered and the recovery sought; (2) the significance of the legal issues on which the plaintiff prevailed; and (3) the public purpose served by the litigation.

Courts have also looked at the numbers of attorneys involved and whether their involvement led to a duplication of effort. As the Seventh Circuit explained in *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1160 (7th Cir. 1989), “duplicative and excessive time, not reasonably billed to one’s own client, cannot be billed to an adversary through a fee-shifting statute.” In fact, the court suggested that while it would not lay down a flat rule of one lawyer per case, the tendency of law firms to overstaff cases should cause trial courts to scrutinize fee petitions carefully for duplicative time. *Id.* But see *Barth v. Bayou Candy Co.*, 379 F.Supp. 1201 (E.D.La. 1974) (duplication not unreasonable). Not only may a court reduce the number of hours to be included if it feels that there was an unnecessary duplication of effort, but it also may reduce the number of hours to be included when it finds that the attorneys performed tasks that could be handled by clerical staff. *Sassaman, supra*. See also *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 985 (4th Cir. 1997) (affirming district court decision to eliminate from fee award hours spent by attorney on “secretarial tasks”). In *Connolly, supra*, the Seventh Circuit found no error in the district court’s reduction of fees for duplicative time, excessive rates, dilatory tactics, and limited success,

stating: “The standard is whether the fees are reasonable in relation to the difficulty, stakes, and outcome of the case.” 117 F.3d at 597, quoting *Bankston v. State of Illinois*, 60 F.3d 1249, 1256 (7th Cir. 1995). However, it held that the district court erred in reducing the attorney’s fee for his refusal to mediate with the judge’s law clerk.

A multiplier may be added at the court’s option to cover such considerations as the complexity and the novelty of the legal issues presented or the significance of the results obtained. In *Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir.), *cert. denied*, 114 S.Ct. 548 (1993), the court recognized the appropriateness of enhancing the award of attorneys’ fees because of the complete victory on all issues, the size of the monetary award obtained, and the future protection against discrimination obtained through injunctive relief. In *Taylor v. Jones*, 495 F.Supp. 1285, 1297 (E.D.Ark. 1980), *aff’d in part, rev’d in part*, 653 F.2d 1193 (8th Cir. 1981), the court added a 20-percent multiplier, stating that “[t]he results obtained, both for the named plaintiff and for the general citizenry, go beyond the normal. A substantial public benefit to the State . . . should accrue from the relief decreed in this case.”

However, in *Communications Workers of America v. Illinois Bell Telephone Co.*, 553 F.Supp. 144 (N.D.Ill. 1982), the court declined to award a multiplier because the legal issues were not complex, the case was litigated over several years, and the attorney was not precluded from accepting other employment. In *Lewis v. J.P. Stevens & Co.*, 40 F.E.P.Cas. (BNA) 1032 (D.S.C. 1986), the court reviewed the fee award and ruled that a court should not adjust the lodestar amount depending on how many of the claims the attorney won. The amount should be increased, however, for a high risk of losing, for opportunity costs incurred in pursuing the case exclusively for many weeks, and for the defendant’s long delay in payment.

In *King v. Palmer*, 950 F.2d 771 (D.C.Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 3054 (1992), the D.C. Circuit halted the practice of awarding fee enhancements to prevailing parties in Title VII litigation. In a seven-four decision, the majority reasoned that because there is no “practical middle ground” between awarding enhancements routinely and not awarding them at all, contingency enhancements would be unavailable in the D.C. Circuit. 950 F.2d at 784.

Courts also may refuse to enhance a plaintiff’s recovery of attorneys’ fees to reflect that the plaintiff’s attorney was retained on a contingency basis. *City of Burlington v. Dague*, 505 U.S. 557, 120 L.Ed.2d 449, 112 S.Ct. 2638 (1992); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281 (8th Cir. 1993).

c. [9.45] Right To Recover Attorneys’ Fees Award

In *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 54 L.Ed.2d 648, 98 S.Ct. 694, 697 – 699 (1978), the Court held that attorneys’ fees are to be awarded to prevailing plaintiffs absent very unusual or “special circumstances.” It rejected the argument that prevailing defendants should recover attorneys’ fees on the same basis as prevailing plaintiffs. The Court held that a prevailing defendant may recover attorneys’ fees upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation even though the action was not brought in subjective bad faith. As the Seventh Circuit has explained, “[I]t is the responsibility of counsel to know the law and to know whether a claim is clearly foreclosed by precedent.” *Hamilton v.*

Daley, 777 F.2d 1207, 1212 (7th Cir. 1985). Additionally, the Seventh Circuit has held that a district court cannot deem a claim frivolous for purposes of deciding a motion to dismiss but not frivolous for the purpose of deciding a motion for attorneys' fees — backpedaling from a frivolous finding on a motion to dismiss to avoid imposing fees is impermissible. *Adkins v. Briggs & Stratton Corp.*, 159 F.3d 306 (7th Cir. 1998).

Following *Christianburg*, *supra*, the Seventh Circuit imposed attorneys' fees on the plaintiffs to cover defense costs after the plaintiffs continued to pursue their claims despite a decision in a related case that rendered their claim frivolous. *Hamer v. County of Lake*, 819 F.2d 1362 (1987). In *Cote v. James River Corp.*, 761 F.2d 60 (1st Cir. 1985), the court imposed attorneys' fees on the plaintiff when she continued her Title VII suit even after she learned that her claim was time-barred. Another court held that when the plaintiff does not make a prima facie case, the employer is not necessarily entitled to attorneys' fees, especially when the court did not grant the employer summary judgment and the case went to trial. *Berry v. E.I. DuPont de Nemours & Co.*, 635 F.Supp. 262 (D.Del. 1986). In addition, the plaintiff's voluntary dismissal of a case does not necessarily indicate that the suit was groundless or frivolous, justifying an award of attorneys' fees to the employer. *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246 (7th Cir. 1985).

The Supreme Court held that it is appropriate under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, for a judge to approve a settlement in a civil rights case conditioned on a waiver of attorneys' fees. *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed. 2d 747, 106 S.Ct. 1531 (1986). The Court held that the district court did not abuse its discretion in upholding the agreement that gave the plaintiffs greater relief than they could have gotten at trial in exchange for the waiver. *See also Marek v. Chesny*, 473 U.S. 1, 87 L.Ed.2d 1, 105 S.Ct. 3012 (1985), in which the Supreme Court held that a complainant who refused a settlement offer and subsequently recovered a settlement of less than the settlement offer was not entitled to recover attorneys' fees.

In deciding whether to award attorneys' fees to a prevailing defendant, courts consider the good faith of the plaintiff in bringing the action, the ability of the prevailing defendant to pay its own fees, and the ability of the plaintiff to pay part of those fees. In *Ekanem v. Health & Hospital Corporation of Marion County*, 33 F.E.P.Cas. (BNA) 1338 (S.D.Ind. 1981), *cert. denied*, 105 S.Ct. 93 (1984), the court awarded partial attorneys' fees of \$8,000 when an employer incurred attorneys' fees in excess of \$100,000 in defending a frivolous lawsuit. Costs of \$2,147 had been assessed against the plaintiff, who also was obligated to pay \$10,000 for the trial transcript. In assessing fees at \$8,000, the court considered the other assessments as well as the plaintiff's ability to pay. But in *Arnold v. Burger King Corp.*, 719 F.2d 63 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 108 (1984), the court awarded full fees to the employers, finding that the plaintiff had the ability to pay and that he knowingly brought a frivolous claim. *See also Harris v. Group Health Ass'n*, 662 F.2d 869 (D.C.Cir. 1981) (appellate court ordered unsuccessful plaintiff to pay costs and attorneys' fees incurred by other party on appeal); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981) (court assessed \$5,000 in attorneys' fees against unsuccessful plaintiff); *Brown v. Fairleigh Dickinson University*, 560 F.Supp. 391 (D.N.J. 1983); *Davidson v. Allis-Chalmers Corp.*, 567 F.Supp. 1532 (W.D.Mo. 1983); *Fisher v. Fashion Institute of Technology*, 26 F.E.P.Cas. (BNA) 1514 (S.D.N.Y. 1980) (\$3,600 assessed against plaintiff to be paid at rate of \$100 per month for period of three years). In some cases, courts have assessed attorneys' fees

against plaintiffs based on a certain percentage of the plaintiff's annual income or salary. *See Kee v. NEC Technologies, Inc.*, 949 F.Supp. 662, 664 (N.D.Ill. 1997) (awarding prevailing defendant, in addition to costs, attorneys' fees in amount equal to 20 percent of plaintiff's annual salary). In *Monroe v. Children's Home Association of Illinois*, 128 F.3d 591, 594 (7th Cir. 1997), the court granted the employer's motion for attorneys' fees for the appeal on the ground that the appeal was frivolous, finding that the plaintiff's appeal was "foredoomed" because the plaintiff had failed to adduce any evidence of age discrimination in response to the employer's motion for summary judgment. Although the court awarded fees under Federal Rule of Civil Procedure 38 in accordance with the employer's motion, the court noted that such fees were also available directly under the Age Discrimination in Employment Act.

In *Greenspan v. Automobile Club of Michigan*, 536 F.Supp. 411 (E.D.Mich. 1982), the court held that an organization that paid part of the costs of financing a Title VII action was entitled to an award of attorneys' fees for the amount paid for paralegal services and other expenses. However, the financing organization was not necessarily entitled to be awarded the fair market value of those services.

A party that prevails against the EEOC may also be entitled to attorneys' fees. In *EEOC v. Shoney's Inc.*, 542 F.Supp. 332, 335 (N.D.Ala. 1982), the court assessed attorneys' fees against the EEOC when its actions "so blatantly demonstrate[d] bad faith." *See also EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994) (like private plaintiffs, EEOC may be liable for attorneys' fees under ADEA), *cert. denied*, 115 S.Ct. 1270 (1995).

Although attorneys' fees are normally assessed against the parties, they can be assessed against losing counsel. *Morris v. Adams-Millis Corp.*, 758 F.2d 1352 (10th Cir. 1985). Courts will also assess fees against a complainant's attorney for prosecuting a vexatious case. In *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir. 1991), the Third Circuit found that under the facts of the case the plaintiff's attorney could be held responsible for the defendant's attorneys' fees. The court remanded the case to the district court with instructions to order the plaintiff, his counsel, or both to pay the attorneys' fees assessed.

d. [9.46] Recoverability of Time Spent in Administrative Proceedings

An award of attorneys' fees under Title VII may include any time spent pursuing administrative remedies. *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978); *Smallwood v. National Can Co.*, 583 F.2d 419 (9th Cir. 1978); *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 96 S.Ct. 2215 (1976). The informal "pre-complaint" process required of federal employees before filing a formal complaint is not, however, a proceeding for which attorneys' fees are recoverable. *Mertz v. Marsh*, 786 F.2d 1578 (11th Cir.), *cert. denied*, 107 S.Ct. 649 (1986).

Fee awards also may include time spent pursuing state administrative proceedings under the referral provisions of Title VII. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L.Ed.2d 723, 100 S.Ct. 2024 (1980). In *Lampher v. Zagel*, 755 F.2d 99, 103 (7th Cir. 1985), the Seventh Circuit explained that not to compensate counsel "would encourage bypassing state procedures by

inhibiting counsel from appearing in state proceedings.” Time spent in pursuing the attorneys’ fees award itself may be recovered as well as time spent preparing a settlement agreement. *See New York Gaslight Club, supra.*

In *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2428 (1983), the Seventh Circuit reversed the district court and held that a plaintiff may be awarded attorneys’ fees for time spent in an Office of Federal Contract Compliance Programs (OFCCP) proceeding. The court noted that the plaintiffs’ efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in their Title VII action were sufficiently related to the Title VII action and were designed to move the Title VII case to ultimate disposition. *Accord Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), in which the court awarded attorneys’ fees for administrative proceedings under 42 U.S.C. §1988.

However, a plaintiff may not be able to recover attorneys’ fees for time spent in an optional state administrative proceeding. *See Webb v. Board of Education of Dyer County, Tennessee*, 471 U.S. 234, 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985) (involving action brought under 42 U.S.C. §1983). *But see Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 92 L.Ed.2d 439, 106 S.Ct. 3088, 3096 (1986) (explaining that *Webb*, 105 S.Ct. at 1928, permits recovery of fees in optional proceedings when the proceeding is “‘useful and of a type ordinarily necessary’ to secure the final result obtained from the litigation”); *ECOS, Inc. v. Brinegar*, 671 F.Supp. 381 (M.D.N.C. 1987) (attorneys’ fees awarded for administrative proceeding that was not required under Title VII).

Similarly, a plaintiff who succeeds in an arbitration proceeding is also entitled to an award of attorneys’ fees. *See DeGaetano v. Smith Barney, Inc.*, 983 F.Supp. 459, 463 – 464 (S.D.N.Y. 1997) (modifying arbitration award for “manifest disregard” of applicability of Title VII’s fee-shifting provision to employee’s sexual harassment claim that was based on Title VII and concluding that arbitration agreement provision requiring each side to pay its own fees and costs was void as against public policy when applied to successful discrimination claim).

A plaintiff who prevails before a state or local administrative body may even be permitted to file a separate claim in federal court for the sole purpose of obtaining attorneys’ fees for a successful administrative proceeding. *See Jones v. American State Bank*, 857 F.2d 494, 497 – 498 (8th Cir. 1988) (concluding that Supreme Court’s analysis in *New York Gaslight Club, supra*, should permit plaintiff to file separate federal court claim for attorneys’ fees). *Compare Cassas v. Lenox Hill Hospital*, 75 F.E.P.Cas. (BNA) 672, 673 (S.D.N.Y. 1997) (permitting plaintiff to append Title VII claim to already pending Age Discrimination in Employment Act claim in order to pursue application for attorneys’ fees based on successful national origin claim before New York City Commission on Human Rights), *with Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 914 (2d Cir. 1997) (concluding that ADEA did not provide basis for awarding attorneys’ fees based on jury award under New York State Human Rights Law when ADEA claim had been dismissed and city law did not provide for attorneys’ fees), *Paz v. Long Island R.R.*, 128 F.3d 121, 122 (2d Cir. 1997) (*per curiam*) (affirming dismissal of claim filed under §706(k) of Title VII, 42 U.S.C. §2000e-5(k), to recover attorneys’ fees incurred in successful prosecution of state law discrimination claims when state law claims had not alleged violation of Title VII), *and Chris v. Tenet*, 221 F.3d 648, 649 – 650, 654 – 655 (4th Cir. 2000) (criticizing *Jones* and affirming

dismissal of claim filed under Title VII to recover attorneys' fees incurred in equal employment opportunity proceeding when proceeding settled and settlement agreement provided for payment of fees but did not specify amount). *See also* *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) (reasoning that rule that allowed suit solely for attorneys' fees and costs would encourage resolution of lawsuits by judicial means as opposed to administrative proceedings).

e. [9.47] Interest on Attorneys' Fees Award

A plaintiff who is awarded fees under Title VII may also be entitled in some jurisdictions to postjudgment interest on the attorneys' fees award. *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985); *Sassaman v. Heart City Toyota*, 879 F.Supp. 901 (N.D.Ind. 1994); *Wells v. Hutchinson*, 499 F.Supp. 174 (E.D.Tex. 1980). *See also* *Miller v. Artistic Cleaners*, 153 F.3d 781 (7th Cir. 1998) (prevailing plaintiffs in federal court automatically entitled to postjudgment interest). *See also* *Carter v. Sedgwick County, Kansas*, 36 F.3d 952, 955 (10th Cir. 1994) ("attorneys fees are to be included as part of a money judgment upon which post-judgment interest is awarded pursuant to [28 U.S.C.] section 1961").

f. [9.48] "Prevailing Party" for Purposes of Attorneys' Fees Award

Because recovery of attorneys' fees in Title VII actions is limited to a prevailing party, there has been substantial litigation regarding the definition of "prevailing party." The Supreme Court has found that the extent of the prevailing party's success is the most important factor in determining the amount of fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988. In *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983), the Supreme Court distinguished between the types of claims for which attorneys' fees may be granted. When a prevailing party has unsuccessful claims that are unrelated to the successful claims, the prevailing party may not receive fees for the time spent on those unsuccessful and unrelated claims. But when the prevailing party has not won every claim asserted but has prevailed on substantially all of the related claims, the party is entitled to receive fees for the time spent on all related claims. Thus, an award will not be reduced by the time spent on related but unsuccessful claims. A plaintiff who won only on a harassment claim and received \$1, not \$100,000, was deemed the prevailing party. *Jones v. City of Roswell*, 40 F.E.P.Cas. (BNA) 705 (N.D.Ga. 1986). The *Jones* court stated that the issue was a significant one, the proof was difficult, the judge and jury did find a wrong, and the ruling imposed conditions from then on. Similarly, a plaintiff who prevailed on all of her claims but who received only nominal damages for one of her claims was deemed a prevailing party. *Hall v. Western Production Co.*, 988 F.2d 1050 (10th Cir. 1993). *See also* *Hashimoto v. Dalton*, 118 F.3d 671, 678 (9th Cir. 1997) (affirming district court's order awarding attorneys' fees against Navy for plaintiff's counsel's success in obtaining declaratory and injunctive relief from EEOC on retaliation claim even though plaintiff failed to obtain relief on her other claims before district court); *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir. 1984), *cert. denied*, 106 S.Ct. 791 (1986), in which the court disallowed the plaintiff's request for attorneys' fees on the basis that she prevailed on less than half of her claims and received only a nominal award of damages. *See* *Lawrence v. Bowsher*, 931 F.2d 1579 (D.C.Cir. 1991) (court may not deny attorneys' fees to prevailing party just because that party's litigating position does not comport with court's vision of position that

would, in broad sense, protect civil rights); *Sassaman v. Heart City Toyota*, 879 F.Supp. 901 (N.D.Ind. 1994) (plaintiff who obtained substantial relief on related claims should not have attorneys' fees reduced simply because she did not prevail on all of her claims).

However, fees may still be denied in cases in which the plaintiff receives no more than nominal damages on any claim. In *Farrar v. Hobby*, 506 U.S. 103, 121 L.Ed.2d 494, 113 S.Ct. 566, 575 (1992), a case brought under 42 U.S.C. §1983, the Supreme Court held that although the plaintiffs were prevailing parties for purposes of a fee award under the Civil Rights Attorney's Fees Awards Act, fees were properly denied because of the lack of success reflected by the nominal damage award. Several decisions have applied *Farrar* to deny requests for fees in Title VII cases. See *Pino v. Locascio*, 101 F.3d 235, 238 – 239 (2d Cir. 1996) (reversing fee award under *Farrar* when Title VII plaintiff sought \$21 million in damages but received only \$1); *Cartwright v. Stamper*, 7 F.3d 106, 109 – 110 (7th Cir. 1993) (citing *Farrar* and reversing award of fees in §1983 action in which plaintiff was prevailing party but recovered only de minimis damages); *Nissim v. McNeil Consumer Products Co.*, 957 F.Supp. 604, 607 (E.D.Pa. 1997) (denying fees when jury found for plaintiff on one of two claims but awarded no damages).

In *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 338 – 341 (1st Cir. 1997), the court discussed the different factors that a district court might consider in making a fee award. The court observed that the “chasmal gulf” between the award the plaintiff received and the amount requested in the complaint was a relevant element of the analysis but held that the district court had abused its discretion by awarding only ten percent of requested fees when the plaintiff had prevailed on all of her substantive claims and received more than a nominal amount of damages on each. 124 F.3d at 338. The Third Circuit, by contrast, affirmed a district court's decision to discount fees by fifty percent for partial lack of success when the plaintiff prevailed on his retaliation claim but not his race discrimination claim. *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1044 (3d Cir. 1996). The Seventh Circuit has followed a three-part test, focusing on the amount of the damage award compared to the amount requested, the significance of the legal issues, and the public purpose served by the litigation. *Connolly v. National School Bus Service, Inc.*, 177 F.3d 593 (7th Cir. 1999). In practice, the court seems to focus primarily on the first element. See *Cole v. Wodziak*, 169 F.3d 486, 488 (7th Cir. 1999) (affirming significant reduction in fees when plaintiffs were awarded less than ten percent of their demand). Cf. *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997) (fact that only \$500 was awarded on small amount claimed did not preclude award of attorneys' fees).

In *Sullivan v. Commonwealth of Pennsylvania Department of Labor & Industry, Bureau of Vocational Rehabilitation*, 663 F.2d 443 (3d Cir. 1981), cert. denied, 102 S.Ct. 1716 (1982), the court declared that an individual who successfully prosecuted her discrimination claims before a state agency and who ultimately obtained relief as a result of an arbitration proceeding instituted on her behalf by her union was a prevailing party and thus entitled to her attorneys' fees under Title VII. A plaintiff can receive attorneys' fees even if the causal link between the civil rights suit and the relief obtained is not as direct as when the case is completely adjudicated in the district court itself or is formally settled with the defendants in the context of the civil rights proceeding. However, the Fifth Circuit denied a claim for interim attorneys' fees when a preliminary injunction reinstating the plaintiff was later vacated. *Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center*, 777 F.2d 329 (5th Cir. 1985), cert. denied, 106

S.Ct. 2252 (1986). *See also* *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169 (6th Cir. 1990) (class counsel probably not compensated for time spent on individual claims of class members who did not obtain backpay even if class is viewed as prevailing party, since unsuccessful claims constituted separate claims for relief once action reached damages phase); *Koster v. Perales*, 903 F.2d 131, 134 – 135 (2d Cir. 1990) (plaintiffs are eligible for fee award as prevailing party when settlement agreement grants plaintiffs all of relief contemplated at outset of litigation); *Lyte v. Sara Lee Corp.*, 950 F.2d 101 (2d Cir. 1991) (acceptance of Fed.R.Civ.P. 68 offer of judgment did not preclude plaintiff from being prevailing party when he received monetary relief, which was only relief requested in his complaint, and when amount he received was not de minimis in light of his potential damages).

The Supreme Court has held that while a successful interlocutory ruling does not grant prevailing party status, a settlement would entitle a prevailing party to attorneys' fees. *Hewitt v. Helms*, 482 U.S. 755, 96 L.Ed.2d 654, 107 S.Ct. 2672 (1987). *See also* *Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983), in which fees were awarded when complainants prevailed on preliminary injunctions. A plaintiff who has settled a case "is considered a prevailing party if she has achieved some success on the merits and can point to a resolution that has changed the legal relationship between herself and defendant." *Connolly v. National School Bus Service, Inc.*, 177 F.3d 593, 595 (7th Cir. 1999). The "two-part test for determining whether a plaintiff who settles is a prevailing party [is] '1) whether the lawsuit was causally linked to the relief obtained, and 2) whether the defendant acted gratuitously, that is, the lawsuit was frivolous, unreasonable or groundless.'" *Id.*, quoting *Fisher v. Kelly*, 105 F.3d 350, 353 (7th Cir. 1997).

The Supreme Court appeared to have established a bright-line approach in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 149 L.Ed.2d 855, 121 S.Ct. 1835 (2001). Writing for the five-four majority, Chief Justice Rehnquist stated that a private settlement alone cannot confer prevailing party status. 121 S.Ct. at 1840 n.7. Referring to Supreme Court opinions following *Maher v. Gagne*, 448 U.S. 122, 65 L.Ed.2d 653, 100 S.Ct. 2570 (1980), Chief Justice Rehnquist stated that although the Court previously "characterized the *Maher* opinion as also allowing for an award of attorney's fees for private settlements . . . *Maher* only 'held that fees *may* be assessed . . . after a case has been settled by the entry of a consent decree.' . . . Private settlements do not entail the judicial approval and oversight involved in consent decrees." [Emphasis in original.] [Citations omitted.] 100 S.Ct. at 1840 n.7, quoting *Evans v. Jeff D.*, 475 U.S. 717, 89 L.Ed.2d 747, 106 S.Ct. 1531, 1533 (1986). Although *Buckhannon* was an Americans with Disabilities Act and Fair Housing Amendments Act case, the Court's rationale applies equally to any case in which "prevailing party" status for an award of fees is at issue.

However, the circuit courts of appeal wasted no time in chipping away at the *Buckhannon* ruling. *See Roberson v. Giuliani*, 346 F.3d 75, 82 – 84 (2d Cir. 2003) (district court's retention of jurisdiction to enforce settlement sufficient judicial sanction to confer prevailing party status, even when district court had not reviewed or approved settlement); *Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360, 1366 (Fed.Cir. 2003) (when case was dismissed but was, by consent motion, remanded for reconsideration, plaintiffs were prevailing parties; consent remand was sufficient judicial sanction); *American Disability Ass'n v.*

Chmielarz, 289 F.3d 1315, 1319 (11th Cir. 2002) (district court's approval of settlement terms coupled with retention of jurisdiction sufficient to confer prevailing party status); *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (private settlement agreement alone sufficient to confer prevailing party status; distinguishing *Buckhannon* as dicta); *Oil, Chemical & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452, 458 – 459 (D.C.Cir. 2002) (implying that stipulation and dismissal order may meaningfully alter parties' relationship and therefore confer prevailing party status); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (denying prevailing party status but stating that *Buckhannon* should not be interpreted so restrictively that only judgment or consent decree could confer prevailing party status, but judicial recognition of merits of claim is still required); *Truesdell v. Philadelphia Housing Authority*, 290 F.3d 159, 165 (3d Cir. 2002) (settlement agreement stipulated to at preliminary injunction hearing and therefore contained in court order conferred prevailing party status). However, the court in *Shapiro v. Paradise Valley Unified School District No. 69*, 374 F.3d 857 (9th Cir. 2004), held that to be a prevailing party, a plaintiff must be judicially sanctioned, essentially overruling the holding in *Barrios*. This abrogation was recognized in *M.C. v. Seattle School District No. 1*, No. C04-1459P, 2005 WL 1111207 (W.D.Wash. May 9, 2005). The Sixth Circuit joined the majority of circuits by holding that a formal consent decree is not necessary to confer prevailing party status as long as the court retains jurisdiction over potential future enforcement problems. *Doe v. Hogan*, 421 F.Supp.2d 1051 (S.D. Ohio 2006). *But see Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (*Buckhannon* "makes it clear that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree").

Courts have held that a court determination on the merits is not required for a plaintiff to be found to be the prevailing party. In *Tomazzoli v. Sheedy*, 804 F.2d 93 (7th Cir. 1986), the court recognized that the plaintiff who had settled her 42 U.S.C. §1983 case with the defendant was a prevailing party entitled to attorneys' fees, citing *Lovell v. City of Kankakee*, 783 F.2d 95 (7th Cir. 1986) (settlement of case before formal adjudication on merits not bar to recovery of attorneys' fees). *See also Hewitt, supra; Liverman-Melton v. British Aerospace, Inc.*, 628 F.Supp. 102 (D.D.C. 1986). *But cf. Brown v. Boorstin*, 471 F.Supp. 56 (D.D.C. 1978), in which the plaintiff was denied attorneys' fees when the proceedings and the settlement did not reflect discrimination by the defendant. In *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980), the court stated:

Nuisance settlements, of course, should not give rise to a "prevailing" plaintiff. . . . But if a settlement provides some benefit to plaintiffs or some vindication of their rights, then the congressional intent to encourage private enforcement of civil rights . . . will be furthered by the awarding of fees. This is true even when both sides lose something and gain something, resulting in a "draw," as long as plaintiffs have received substantial benefits. . . . Therefore, the court must determine whether the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way. . . .

In addition, plaintiffs' conduct, as a practical matter, must have played a significant role in achieving the objective. [Citations omitted.]

Accord Commonwealth Oil Refining Co. v. EEOC, 720 F.2d 1383 (5th Cir. 1983) (case remanded for determination of whether employer “prevailed” in settlement and, if so, whether EEOC acted in bad faith).

Thus, in the absence of the plaintiffs’ ability to establish the connection between their claims and the defendants’ voluntary compliance with the relief they sought, the plaintiffs are not entitled to attorneys’ fees. *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271 (9th Cir. 1982). In *Besig*, a constitutional challenge to access to a private club was challenged. Although the club modified some of its admission and usage rules, the court found that the ultimate plaintiffs in *Besig* were not catalysts for the practical outcome and were not entitled to attorneys’ fees. In *St. Louis Fire Fighters Association International Association of Fire Fighters Local 73 v. City of St. Louis, Missouri*, 96 F.3d 323, 331 – 332 (8th Cir. 1996), by contrast, the court reversed the district court’s denial of fees when the plaintiffs’ claims had been dismissed as moot after the city agreed to eliminate challenged testing procedures, finding that the plaintiffs’ suit had been the “catalyst” that prompted voluntary compliance.

Distinguished from the prevailing party’s attorneys’ fees situation are mixed motive cases in which discrimination was a motivating factor in a challenged employment decision but the same decision would have been reached even in the absence of discrimination. An amendment to Title VII made by §107(b) of the Civil Rights Act of 1991 specifically authorizes an award of attorneys’ fees in mixed motive situations. 42 U.S.C. §2000e-5(g)(2)(B). Thus, in *Sheppard v. Riverview Nursing Centre, Inc.*, 870 F.Supp. 1369 (D.Md. 1994), the court awarded the plaintiff \$40,000 in attorneys’ fees under 42 U.S.C. §2000e-5(g)(2)(B) despite the fact that the plaintiff’s damage claim was rejected on the ground that her layoff, motivated in part by her pregnancy, would have occurred anyway. The district court’s decision in *Sheppard*, however, was subsequently vacated by the court of appeals, which remanded on the ground that the district court should consider, in assessing the fee request, the plaintiff’s rejection of a settlement offer that was more favorable than the award ultimately obtained. *Sheppard v. Riverview Nursing Centre, Inc.*, 88 F.3d 1332, 1337 (4th Cir.), *cert. denied*, 117 S.Ct. 483 (1996). On remand, the fee award was reduced to a nominal amount. *Sheppard v. Riverview Nursing Centre, Inc.*, 948 F.Supp. 502, 503 (D.Md. 1996). The courts have explained that an award of attorneys’ fees in such “mixed motive” cases is permitted, but not required, under the statute. Accordingly, in *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1444 (11th Cir. 1997), the court held that the district court had not abused its discretion in refusing to award fees to the plaintiff when the defendant proved that the plaintiff would have been fired, even had his race not been considered, for engaging in an extramarital affair with a subordinate. Additionally, the concerns identified by the Supreme Court in *Farrar, supra*, may be applied to the decision of whether to award fees in mixed motive cases under 42 U.S.C. §2000e-5(g)(2)(B). *See Sheppard, supra*, 88 F.3d at 1335 – 1336 (vacating fee award on ground that district court erroneously believed that fees were mandatory under section and remanding for reconsideration under *Farrar*).

In the 1980s and 1990s, the “catalyst” test was widely accepted in circuits addressing the issue. *See Horner v. Kentucky High School Athletic Ass’n*, 206 F.3d 685, 697 – 698 (6th Cir.), *cert. denied*, 121 S.Ct. 69 (2000); *Krocka v. City of Chicago*, 203 F.3d 507, 517 (7th Cir. 2000); *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1486 (10th Cir. 1995); *Paris v. U.S. Department of*

Housing & Urban Development, 988 F.2d 236, 238 (1st Cir. 1993); *Little Rock School District v. Pulaski County Special School District, #1*, 17 F.3d 260, 262 (8th Cir. 1994); *Koster, supra*; *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 716 F.2d 915, 919 (D.C.Cir. 1983); *Bartholomew v. Watson*, 665 F.2d 910, 914 (9th Cir. 1982); *Sullivan, supra*, 663 F.2d at 447 – 451; *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981). The Fourth Circuit was the exception. See *S-1 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir.), *cert. denied*, 115 S.Ct. 205 (1994). The Supreme Court shocked many by rejecting the catalyst test in *Buckhannon, supra*. Again, although the case involved only ADA and Fair Housing Amendments Act claims, it is clear that the Court would reach the same result under Title VII and other prevailing party statutory schemes. See 121 S.Ct. at 1840 – 1843.

g. [9.49] *Discovery and Hearing*

Courts will permit some discovery against the party claiming fees when the request is relevant and when precautions are taken against improper disclosures. *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C.Cir. 1982). In addition, an evidentiary hearing may be required in those cases in which the documentary evidence would not be sufficient for the court to render a decision. *Id.* An award of attorneys' fees and costs may also be granted in connection with certain interlocutory motions, such as motions to compel discovery. See *Kern v. University of Notre Dame Du Lac*, 75 F.E.P.Cas. (BNA) 815, 823 (N.D.Ind. 1997) (awarding plaintiff reasonable fees and costs under Fed.R.Civ.P. 37 in connection with motion to compel compliance with discovery requests).

In a postjudgment hearing or proceeding on fees, the prevailing party will have to present evidence to demonstrate the fees incurred. See *Miller v. Woodharbor Molding & Millworks, Inc.*, 174 F.3d 948, 949 – 950 (8th Cir. 1999) (time records that “failed to consistently identify the subject matter of the work performed” or “to specify the substance or content of” tasks at issue could not support award of fees). *But see Kline v. Western City of Kansas City, Missouri, Fire Department*, 245 F.3d 707, 709 (8th Cir. 2001) (time records reconstructed after fact are adequate provided they are sufficient to document “reasonable estimate” of time spent).

h. [9.50] *Taxability of Attorneys' Fees Award*

The Small Business Job Protection Act of 1996, Pub.L. No. 104-188, 110 Stat. 1755, relevant portions of which are codified as amendments to 26 U.S.C. §104(a)(2), purported to set forth a bright-line approach to the taxability of damage recoveries, including attorneys' fees awards. Section 104(a)(2) provides that gross income will not include the amount of any damages, other than punitive damages, received through judgment or settlement “on account of personal physical injuries or physical sickness.” An addendum to §104(a) further provides that emotional distress will not be treated as a physical injury or physical sickness (except to the extent of damages not in excess of the amount paid for medical care attributable to emotional distress). One circuit has held §104(a)(2) unconstitutional to the extent it permits taxation of damage awards for mental distress and loss of reputation. *Murphy v. Internal Revenue Service*, 460 F.3d 79 (D.C.Cir. 2006).

The taxability question arises when, as in the majority of employment cases, there are arguably no “physical injuries or physical sickness.” The circuit courts of appeal have not agreed

on this topic. The Fifth, Sixth, and Eleventh Circuits, for example, hold that contingency fees in such cases are excludable from gross income, in large part based on the theory that state laws in the relevant states extend to attorneys an ownership right in settlement awards to the extent of their fees. *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959) (applying theory that claim, rather than income, was assigned from client to attorney); *Estate of Clarks v. United States*, 202 F.3d 854 (6th Cir. 2000) (plaintiff neither earned nor received “income” at issue); *Davis v. Commissioner*, 210 F.3d 1346 (11th Cir. 2000).

On the other hand, the First, Third, Fourth, Seventh, Ninth, and Federal Circuits require parties to include in their gross income legal fees recovered but provide that the fees can be declared as a miscellaneous itemized deduction. *See, e.g., Alexander v. Internal Revenue Service*, 72 F.3d 938 (1st Cir. 1995); *O'Brien v. Commissioner*, 319 F.2d 532 (3d Cir. 1963); *Young v. Commissioner*, 240 F.3d 369 (4th Cir. 2001); *Kenseth v. Commissioner*, 259 F.3d 881 (7th Cir. 2001); *Fredrickson v. Commissioner*, 166 F.3d 342 (9th Cir. 1998) (text available in LEXIS); *Baylin v. United States*, 43 F.3d 1451 (Fed.Cir. 1995). Unfortunately for recovering parties, the miscellaneous itemized deduction approach presents problems of its own. To proceed under this theory, the deduction item must exceed two percent of the individual's adjusted gross income, and that portion of the deduction that does not exceed two percent of adjusted gross income is taxable. Worse, if comparison of the “what if” tax on gross income before itemized deductions exceeds the “what if” tax on adjusted gross income with deductions, the alternate minimum tax rule is triggered. That rule effectively requires the individual to pay tax on the entire amount of the fee recovery deduction. *See, e.g., Benci-Woodward v. Commissioner*, 219 F.3d 941, 944 (9th Cir. 2000); *First Chicago Corp. v. Commissioner*, 842 F.2d 180, 181 (7th Cir. 1988).

In other words, in those jurisdictions, the recovering party often must pay tax on the fees award even though the attorney receives the money and is also taxed on it. In the event of a small damage recovery accompanied by a significant attorneys' fees recovery, the recovering party could owe more in taxes than the party received in recovery. *See, e.g., Spina v. Forest Preserve District of Cook County*, 207 F.Supp.2d 764, 777 (N.D.Ill. 2002). Courts are becoming creative in attempts to work around this problem. *O'Neill v. Sears, Roebuck & Co.*, 108 F.Supp.2d 443 (E.D.Pa. 2000) (court increased award to plaintiff in order to offset tax consequences); *International Association of Machinists & Aerospace Workers, District No. 160*, 114 Wn.App. 80.

2. [9.51] Attorneys' Fees in Equal Pay Act Actions

Reasonable attorneys' fees may be granted to a prevailing plaintiff in an Equal Pay Act action. 29 C.F.R. pt. 1620; *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543 (7th Cir. 1991) (plaintiff entitled to recovery of attorneys' fees based on success of Equal Pay Act claim). It is not clear whether attorneys' fees are similarly available to a prevailing defendant. One court facing this issue ruled that attorneys' fees were not available to a defendant if no statute other than the Equal Pay Act was cited. *See Horner v. Mary Institute*, 613 F.2d 706 (8th Cir. 1980).

3. [9.52] Attorneys' Fees in ADEA Actions

Reasonable attorneys' fees may be granted to a prevailing plaintiff who obtains a judgment in an Age Discrimination in Employment Act action under the Fair Labor Standards Act. 29 U.S.C.

§216(b). *See Jardien v. Winston Network, Inc.*, 888 F.2d 1151 (7th Cir. 1989), in which the court concluded that the prevailing plaintiff was entitled to attorneys' fees. *See also EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995), in which the court recognized that although the ADEA does not provide for recovery for prevailing defendants, prevailing defendants can recover attorneys' fees under the common-law rule if the plaintiff brought the suit in bad faith. The Eleventh Circuit has also held that a prevailing defendant may recover attorneys' fees based on a finding that the plaintiff litigated the claim in bad faith. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1438 (11th Cir. 1998). *But see EEOC v. Clay Printing Co.*, 13 F.3d 813, 817 – 818 (4th Cir. 1994), in which the court found that the ADEA's silence on the recovery of attorneys' fees by prevailing defendants did not mean that the bad-faith standard should be applied. In *Gregor v. Derwinski*, 911 F.Supp. 643, 656 (W.D.N.Y. 1996), citing *Palmer v. General Services Administration*, 787 F.2d 300 (8th Cir. 1986), however, the court held that Congress' failure to provide for attorneys' fees when it amended the ADEA to include federal employees made such fees unavailable to successful federal employee plaintiffs. The Tenth Circuit has held that an employee was entitled to a \$102,000 award for attorneys' fees even though he rejected a \$150,000 offer of judgment on his ADEA claim. *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757 (10th Cir. 1999).

Although §216(b) provides for responsibility for fees to shift to the defendant when there is "any judgment" for the plaintiff, a court may nevertheless require that a plaintiff obtaining a judgment meet the "prevailing party" requirements as under Title VII. *See Salvatori v. Westinghouse Electric Corp.*, 190 F.3d 1244, 1245 (11th Cir. 1999) (denying fees to plaintiff who won judgment but not monetary relief), *cert. denied*, 120 S.Ct. 1172 (2000).

The standards for calculating the amount to be awarded as "reasonable" are similar to the tests discussed in §§9.42 – 9.50 above. Courts have deducted from these awards the cost of pursuing a pendent state claim. *Wehr v. Burroughs Corp.*, 477 F.Supp. 1012 (E.D.Pa. 1979), *modified*, 619 F.2d 276 (3d Cir. 1980). Deductions also have been made when the court has determined that the number of hours spent on a particular motion was excessive. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (court agreed with trial court that attorneys' fees should be cut due to overlap of work by EEOC and plaintiff employee's private attorney); *Jardien, supra* (court remanded case for redetermination of attorneys' fees after concluding that duplicative and excessive time was not adequately omitted from fee petition); *D'Angelo v. Department of Navy*, 593 F.Supp. 1307 (E.D.Pa. 1984) (court held that attorneys' fees are not recoverable for hours spent in administrative proceedings because proceedings do not play central role in enforcement of ADEA). *See also McKenzie v. Kennickell*, 645 F.Supp. 437 (D.D.C. 1986); *Real v. Continental Group, Inc.*, 653 F.Supp. 736 (N.D.Cal. 1987) (no award for time spent on fee application). According to the Ninth Circuit, the ADEA does not provide for the recovery of attorneys' fees from a non-employer who has not discriminated against the individual. *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984).

4. [9.53] Attorneys' Fees in ADA Actions

The Americans with Disabilities Act also provides for the recovery of reasonable attorneys' fees by a prevailing party under the same standards that apply to attorneys' fees awards under Title VII. 42 U.S.C. §12205; *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1288

(7th Cir. 1995). In *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 – 1233 (10th Cir. 1997), the court held that the district court had abused its discretion when it denied attorneys’ fees to the plaintiff who prevailed on her claim that her employer’s drug disclosure policy violated the ADA. The court rejected the defendant’s arguments that fees were properly denied because the issue was a “novel” one under the ADA and because there was no evidence that the employer intended to violate the statute; the court observed, however, that the district court might properly consider whether the plaintiff’s decision to bypass administrative remedies caused unnecessary delay or expense. 124 F.3d at 1233. *See also Shrader v. OMC Aluminum Boat Group, Inc.*, 128 F.3d 1218, 1221 (8th Cir. 1997) (concluding that plaintiff’s withdrawn “actual” disability and reasonable accommodation claims were sufficiently related to her successful “perceived” disability claim to justify full fee award).

5. [9.54] Attorneys’ Fees in 42 U.S.C. §1981 Actions

The Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. §1988, permits the court to grant attorneys’ fees to a prevailing party in a 42 U.S.C. §1981 action. If the prevailing party is the United States government, an award may not be made.

The standards for awarding attorneys’ fees in §1981 actions are the same as those in Title VII actions discussed in §§9.42 – 9.50 above. The Supreme Court has held that attorneys’ fees are to be calculated according to the prevailing market rates in the relevant community regardless of whether the prevailing party is represented by private or nonprofit counsel. *Blum v. Stenson*, 465 U.S. 886, 79 L.Ed.2d 891, 104 S.Ct. 1541 (1984).

6. [9.55] Expert Witnesses’ Fees

Section 113 of the Civil Rights Act of 1991 amended the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. §1988, to provide that experts’ fees may be included as part of the attorneys’ fees awarded under 42 U.S.C. §1981. CRA ’91 also amended Title VII to include experts’ fees in the section providing for attorneys’ fees.

E. [9.56] Costs

“Costs” are those disbursements that are necessary for the prosecution or defense of a claim, including, *e.g.*, filing fees, transcript costs, and witness fees. Such costs are discussed in §§9.57 – 9.60 below.

1. [9.57] Costs in Title VII Actions

Fed.R.Civ.P. 54(d), which controls the awarding of costs in Title VII actions as well as in other federal litigation, provides that unless the court directs otherwise, costs are allowable to the prevailing party. 28 U.S.C. §1920 identifies various expenses that may be taxed as costs. A district court’s award of costs is reviewed only for abuse of discretion, but the Seventh Circuit has held that in exercising its discretion, the district court must provide some explanation for the costs awarded. *Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445, 454 (7th Cir. 1998).

The award of costs to a prevailing defendant is not subject to the same limitations as an award of fees. Thus, an award of costs will be made against a plaintiff who loses even if the claim was reasonable and had foundation, while an attorneys' fees award would obtain against a losing plaintiff only if the claim was frivolous, unreasonable, or groundless. *Cosgrove v. Sears, Roebuck, & Co.*, 191 F.3d 98, 101 – 102 (2d Cir. 1999); *Cherry v. Champion International Corp.*, 186 F.3d 442, 447 (4th Cir. 1999) (reversing district court's denial of costs award to prevailing defendant and noting that even losing in forma pauperis plaintiffs must pay costs).

2. [9.58] Costs in Equal Pay Act Actions

Costs are recoverable in Equal Pay Act actions on the same basis as attorneys' fees. See §9.51 above.

3. [9.59] Costs in ADEA Actions

Costs are recoverable in Age Discrimination in Employment Act actions. What is recoverable as costs, however, appears to be somewhat limited. *See, e.g., Wehr v. Burroughs Corp.*, 477 F.Supp. 1012 (E.D.Pa. 1979) (computer-aided legal research is reasonable cost of litigation), *modified*, 619 F.2d 276 (3d Cir. 1980); *Ginsberg v. Burlington Industries, Inc.*, 500 F.Supp. 696 (S.D.N.Y. 1980).

4. [9.60] Costs in 42 U.S.C. §1981 Actions

Costs may be awarded in 42 U.S.C. §1981 actions if attorneys' fees are denied. A defendant who prevails on the merits and does not recover attorneys' fees still may recover costs.

F. [9.61] Consequential and Compensatory Damages

“Consequential and compensatory damages” refers to monetary awards that are meant to compensate a plaintiff for non-pecuniary losses, such as emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Other non-pecuniary losses could include injury to professional standing, to character and reputation, and to credit standing. *EEOC Enforcement Guidance: Compensatory and Punitive Damages Under Section 102 of the Civil Rights Act of 1991* (July 7, 1992) (available online at www.eeoc.gov/policy/docs/damages.html). Emotional harm can be manifested through, for example, sleeplessness, anxiety, depression, weight loss/gain, headaches, etc. To recover compensatory damages, a plaintiff must plead and prove emotional harm. The plaintiff must establish the nature and severity of the harm and that the harm is the proximate result of the discrimination. *See Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998) (to show loss of future earning ability, plaintiff must show range of economic opportunities has been narrowed as result of discrimination). See also further discussion in §§9.62 – 9.65 below.

1. [9.62] Consequential and Compensatory Damages in Title VII and ADA Actions

With the passage of the Civil Rights Act of 1991, victims of intentional discrimination under Title VII and the American with Disabilities Act may recover compensatory and punitive

damages. Compensatory damages do not include backpay, interest on backpay, or “any other type of relief authorized” by the Civil Rights Act of 1964. 42 U.S.C. §1981a(b)(2). Compensatory damages are damages awarded to compensate the plaintiff for non-pecuniary losses for emotional distress, psychological harm, or physical harm. The damages entitlement is not unlimited, however. The statute caps the combined value of compensatory and punitive damages recoverable on a sliding scale based on the size of the employer. An individual complainant can recover up to \$50,000 in compensatory and punitive damages from employers of 100 or fewer employees; \$100,000 from employers with more than 100 and fewer than 201 employees; \$200,000 from employers with more than 200 and fewer than 501 employees; and \$300,000 from employers with more than 500 employees. 42 U.S.C. §1981a(b)(3). In *West v. Gibson*, 527 U.S. 212, 144 L.Ed.2d 196, 119 S.Ct. 1906 (1999), the U.S. Supreme Court held that the EEOC has legal authority to require federal agencies to pay compensatory damages when they discriminate in violation of Title VII.

Since the effective date of CRA '91, juries have begun awarding compensatory damages to prevailing plaintiffs. *See, e.g., Hathaway v. Illinois Department of Transportation*, No. 95-2045, 1998 U.S. Dist. LEXIS 8272 (C.D.Ill. Jan. 16, 1998); *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997). Because these awards are made by juries, the basis for the award is not always easily determinable. In *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995), the jury's award of \$50,000 in compensatory damages was upheld by the Seventh Circuit Court of Appeals. The jury found the company had violated the ADA by firing its executive director when he developed brain cancer: “Wessel’s work was a very large part of his life. . . . [T]he emotional burden on a person dying of cancer, perceiving himself as unable to adequately provide for his family, is considerably greater than that suffered by the ordinary victim of a wrongful discharge.” 55 F.3d at 1285 – 1286. The Seventh Circuit looked at the following factors to determine whether the \$50,000 compensatory damages award was excessive: (a) whether the award was “monstrously excessive,” (b) whether there was a rational connection between the award and the evidence; and (c) whether the award was roughly comparable to other awards. 55 F.3d at 1285. These three factors have been consistently relied on by federal courts within the Seventh Circuit. *Worth v. Tyler*, 276 F.3d 249, 268 (7th Cir. 2001).

In *Pfister v. Bryan Memorial Hospital*, 874 F.Supp. 993 (D.Neb. 1995), the jury awarded \$39,375 for mental anguish to a woman who claimed she was fired 18 months after complaining to management that a male coworker had made offensive remarks to her. The Seventh Circuit rejected the employer’s argument that compensatory damages for lost future earnings cannot be awarded if front pay is also awarded. In *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998), the Seventh Circuit concluded that compensatory damages for lost future earnings compensated the plaintiff for future earning capacity that she may have lost due to damage to her professional reputation and standing and that this award did not impermissibly overlap with the award of one year’s front pay in lieu of reinstatement. *See also* §9.31 above.

2. [9.63] Consequential and Compensatory Damages in Equal Pay Act Actions

Compensatory damages do not appear to be available under the Equal Pay Act. *Hybki v. Alexander & Alexander, Inc.*, 536 F.Supp. 483 (W.D.Mo. 1982). One case to address this issue directly is *Carter v. Marshall*, 457 F.Supp. 38 (D.D.C. 1978). In *Carter*, the court held that

employees are not entitled to recover compensatory damages under the Equal Pay Act. The *Carter* court noted that the Fair Labor Standards Act at 29 U.S.C. §216(b) provides that an employer who violates the FLSA is liable to employees in “the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” 457 F.Supp. at 40. 29 U.S.C. §217 also provides for injunctive relief. “Because the statute specifically outlines the type of relief available and also provides for liquidated damages,” the *Carter* court reasoned, “it appears that Congress intended the relief provided to be exclusive.” 457 F.Supp. at 40 – 41. See generally Richard F. Richards, *Monetary Awards in Equal Pay Act Litigation*, 29 Ark.L.Rev. 328 (1975). See also *Altman v. Stevens Fashion Fabrics, Division of Singer Co.*, 441 F.Supp. 1318 (N.D.Cal. 1977).

In *Elliott v. Employers Reinsurance Corp.*, 534 F.Supp. 690 (D.Kan. 1982), the court in an Equal Pay Act suit refused to exercise pendent jurisdiction over a state law claim for tortious outrage when the possibility of punitive damages under the state claim threatened to overshadow the compensatory claims under the Equal Pay Act claim. To prove a prima facie claim of tortious outrage, the plaintiff would have to prove more than the existence of a pay differential and similar work. Pendent jurisdiction was held inappropriate as a means of seeking greater remedies than those available under federal law. *Cf. Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir.), cert. denied, 103 S.Ct. 131 (1982); *Hovey v. Lutheran Medical Center*, 516 F.Supp. 554 (E.D.N.Y. 1981).

3. [9.64] Consequential and Compensatory Damages in ADEA Actions

The remedies available to a successful plaintiff in an action under the Age Discrimination in Employment Act are outlined at 29 U.S.C. §626(b):

Amounts owing to a person as a result of a violation of [the Fair Labor Standards Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of [the FLSA (29 U.S.C. §§216, 217)]: *Provided, That liquidated damages shall be payable only in cases of willful violations of [the FLSA]. In any action brought to enforce [the FLSA] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the FLSA], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.* [Emphasis in original.]

Most federal courts, including nine courts of appeal, have held that compensatory damages are unavailable under the ADEA. See, e.g., *Rokosik v. City of Chicago, Department of Police*, No. 99 C 3587, 1999 U.S. Dist. LEXIS 16440 (N.D.Ill. Oct. 12, 1999); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir. 1984); *Hill v. Spiegel of Ohio, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir.), cert. denied, 103 S.Ct. 453 (1982); *Slatin v. Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), cert. denied, 98 S.Ct. 749 (1978); *Dean v. American Security Insurance Co.*, 559 F.2d 1036, reh'g

denied, 564 F.2d 97 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 1243 (1978); *Knerr v. Norge Co.*, 476 F.Supp. 1352 (S.D.Ill. 1979); *Stevenson v. J.C. Penney Co.*, 464 F.Supp. 945 (N.D.Ill. 1979). *But see Jaeger v. American Cyanamid Co.*, 442 F.Supp. 1270 (E.D.Wis. 1978). *See Buchholz v. Symons Manufacturing Co.*, 445 F.Supp. 706 (E.D.Wis. 1978); *Coates v. National Cash Register Co.*, 433 F.Supp. 655 (W.D.Va. 1977); *Bertrand v. Orkin Exterminating Co.*, 432 F.Supp. 952 (N.D.Ill. 1977); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325 (6th Cir. 1994). See generally Sue C. Erwin, *Employment Discrimination — Damages — Awarding Compensatory Damages for Pain and Suffering in Age Discrimination Cases: A Proper Reading of the Statute?* 29 S.C.L.Rev. 705 (1978); G. Terrell Davis, *Compensatory and Punitive Damages in Age Discrimination in Employment*, 32 U.Fla.L.Rev. 701 (1980).

4. [9.65] Consequential and Compensatory Damages in 42 U.S.C. §1981 Actions

Compensatory damages generally are available in 42 U.S.C. §1981 actions. See generally Richard F. Richards, *Compensatory and Punitive Damages in Employment Discrimination Cases*, 27 Ark.L.Rev. 603 (1973). This conclusion is supported by the Supreme Court decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). *Johnson* primarily dealt with a question concerning the statute of limitations in §1981 actions. However, the Court, in dictum, stated that “[a]n individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory . . . damages.” 95 S.Ct. at 1720.

The decisions following *Johnson* have consistently awarded compensatory damages in §1981 actions. *See Plummer v. Chicago Journeyman Plumbers’ Local Union No. 130*, 452 F.Supp. 1127, 1140 (N.D.Ill. 1978) (damages for “emotional harm,” “degradation” available under §1981); *McCray v. Standard Oil Company (Indiana)*, 18 F.E.P.Cas. (BNA) 758 (N.D.Ill. 1977) (relying on *Johnson, supra*, court held that award of compensatory damages is appropriate in mixed Title VII and §1981 action). In *Brule v. Southworth*, 611 F.2d 406 (1st Cir. 1979), the court affirmed an award of \$1,000 to plaintiff employees who had suffered emotional and mental distress, including nervousness, sleeplessness, and irritability. The court noted, however, that the “amount of damages may have approached the limits of the court’s authority.” 611 F.2d at 411.

G. Punitive Damages

1. [9.66] Limitations

Victims of employment discrimination under Title VII and the American with Disabilities Act can recover punitive damages. 42 U.S.C. §1981a. Punitive damages are separate and in addition to other relief. They are intended to punish the defendant for its illegal behavior and to deter other illegal behavior. The amount of punitive damages that can be awarded is capped together with the compensatory damages. The applicable cap varies according to the number of individuals employed by the defendant employer. See §9.62 above. The cap applies to the aggregate award for all Title VII claims raised by a single complaining party and not to each claim separately. *Hall v. Stormont Trice Corp.*, 976 F.Supp. 383, 386 (E.D.Va. 1997). The Civil Rights Act of 1991 does not indicate how the total award should be conformed to the cap. In *Jonasson v. Lutheran Child & Family Services*, 115 F.3d 436, 441 (7th Cir. 1997), the Seventh

Circuit affirmed the district court's decision to reduce the amount of compensatory damages awarded, rather than the amount of punitive damages awarded, in order to "preserve the jury's determination that the judgment of the court ought to reflect the award of both punitive and compensatory damages."

Although CRA '91 limits the amount of compensatory and punitive damages that may be awarded under Title VII, the caps do not apply to concurrent race discrimination claims under 42 U.S.C. §1981 or §1983. Section 1981a(a)(1) provides that compensatory and punitive damages are available under Title VII "provided that the complaining party cannot recover under [42 U.S.C. §1981]." 42 U.S.C. §1981a(a)(1). The courts have stated that this "cannot recover" provision indicates that §1981a does not affect the relief available under §1981, but simply prohibits double recovery. *See Johnson v. Metropolitan Sewer District*, 926 F.Supp. 874, 876 (E.D.Mo. 1996) (§1981a not intended to limit scope of §1981); *Dunning v. General Electric Co.*, 892 F.Supp. 1424, 1431 (M.D.Ala. 1995) (plaintiff who could have, but did not, raise race discrimination claim under §1981 not precluded from obtaining damages under §1981a); *Bradshaw v. University of Maine System*, 870 F.Supp. 406, 408 (D.Me. 1994) (same). Senator Edward M. Kennedy (D. Mass.) has periodically proposed equalizing the remedies available for race, sex, and national origin claims by eliminating the damage caps under Title VII.

Punitive damages may be awarded even if no other damages are awarded. *See Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (concluding that "punitive damages are not inconsistent with the lack of compensatory damages" and affirming \$15,000 punitive damage award in sexual harassment case in which plaintiff quit after several months to accept better-paying job); *Paciorek v. Michigan Consolidated Gas Co.*, 179 F.R.D. 216 (E.D.Mich. 1998) (ADA claim). *But see Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (vacating §1981 punitive damage award when no compensatory damages awarded).

2. [9.67] Standard for Awarding

Under the Civil Rights Act of 1991, punitive damages are available only when an employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §1981a(b)(1). Punitive damages are monetary awards, separate and apart from any compensatory relief, that are awarded as a method of punishing a defendant for aggravated misconduct. The theory is that punitive damages will act as a deterrent to future misconduct.

In *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 144 L.Ed.2d 494, 119 S.Ct. 2118 (1999), the Supreme Court held that a plaintiff need not make a showing of egregious employer actions to collect punitive damages in a Title VII action. A showing of malice or reckless indifference as to the employer's knowledge that it acted "in the face of a perceived risk that its actions will violate federal law" is sufficient 119 S.Ct. at 2125. "Malice" and "reckless indifference" do not refer to the employer's awareness that it is engaging in discrimination. Employers are not vicariously liable for discriminatory decisions of managers that are contrary to the employer's good-faith efforts to comply with Title VII.

A number of federal cases have followed and interpreted *Kolstad*. See, e.g., *Bruso v. United Airlines, Inc.*, 239 F.3d 848 (7th Cir. 2001); *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001); *David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003); *Fine v. Ryan International Airlines*, 305 F.3d 746 (7th Cir. 2002).

The Seventh Circuit has discussed and explained the “three-part framework for determining whether an award of punitive damages is proper under the statutory standard.” *Bruso, supra*, 239 F.3d at 857. First, the plaintiff must establish that the employer acted with the requisite state of mind. However, as described in *Bruso*, the employer need not be aware that it is engaging in discrimination. Instead, it need only act in the face of a perceived risk that its actions will violate federal law. A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the antidiscrimination laws and the employer’s policies for implementing those laws. 239 F.3d at 857 – 858. Second, the plaintiff “must demonstrate that the employees who discriminated against him are managerial agents acting within the scope of their employment.” 239 F.3d at 858. If the plaintiff meets the foregoing evidentiary burdens, then “the employer may avoid liability for punitive damages if it can show that it engaged in good faith efforts to implement an antidiscrimination policy.” *Id.*

Many of the Seventh Circuit decisions in which the award of punitive damages has been affirmed relate to retaliatory conduct committed by the employer. For example, in *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 480 – 481 (7th Cir. 2003), the plaintiff’s employer discharged him soon after he complained to the EEOC that he had been denied a promotion based on race discrimination. The plaintiff in *Fine, supra*, was terminated by her employer soon after she submitted a letter to management alleging that she and her fellow female pilots suffered from both sex discrimination and sexual harassment. 305 F.3d at 755.

Typically, a court will not set aside a punitive damages award unless it is certain the award exceeds what is necessary to punish and deter. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1009 – 1010 (7th Cir. 1998) (\$15,000 not excessive in relation to harm sexual harassment can inflict). In *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995), an employer violated the Americans with Disabilities Act when it fired its executive director when he developed brain cancer. The jury awarded \$50,000 in compensatory damages, \$250,000 in punitive damages against the employer, and \$250,000 in punitive damages against the president individually. The district court reduced the punitive damages award to a total of \$150,000 to be shared equally between the employer and the president, citing the statutory limit, because it believed \$250,000 per defendant was excessive. On appeal, the Seventh Circuit held the punitive damages award of \$150,000 against the company was not excessive, noting that AIC was not a small company but rather had more than 300 employees and yearly revenues of several million dollars. The court reversed the punitive damages award against the individual, holding that individuals cannot be held liable under the statute.

Among the factors courts assess when evaluating award of punitive damages are the degree of reprehensibility of a defendant’s behavior, the ratio of the punitive damages to the compensatory damages, and a comparison of the punitive damages award with the penalties for comparable misconduct. *Jonasson v. Lutheran Child & Family Services*, 115 F.3d 436, 441 (7th

Cir. 1997); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L.Ed.2d 809, 116 S.Ct. 1589, 1598 (1996); *Shea v. Galaxie Lumber & Construction Co.*, 152 F.3d 729, 736 (7th Cir. 1998). See also *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996).

3. [9.68] Punitive Damages in ADEA Actions

The courts are divided on whether punitive damages are recoverable under the Age Discrimination in Employment Act. The majority of courts considering the issue hold that punitive damages are not available under the ADEA. *Glass v. IDS Financial Services, Inc.*, 778 F.Supp. 1029 (D.Minn. 1991) (listing circuits that have held that punitives are not available under ADEA); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 688 (7th Cir.), *cert. denied*, 103 S.Ct. 453 (1982); *Boise v. Boufford*, 121 Fed.Appx. 890, 892 (2d Cir. 2005). In *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir.) (decided before the Civil Rights Act of 1991), *cert. denied*, 110 S.Ct. 3241 (1990), the Seventh Circuit held that “[n]either Title VII nor the ADEA authorizes awards of compensatory or punitive damages, as opposed to ‘equitable’ relief such as reinstatement and back pay.” See *Rokosik v. City of Chicago, Department of Police*, No. 99 C 3587, 1999 U.S. Dist. LEXIS 16440 (N.D.Ill. Oct. 12, 1999); *Whiteman v. Kroger Co.*, 548 F.Supp. 563 (C.D.Ill. 1982); *Stevenson v. J.C. Penney Co.*, 464 F.Supp. 945 (N.D.Ill. 1979); *Brin v. Bigsby & Kruthers*, 19 F.E.P.Cas. (BNA) 415 (N.D.Ill. 1979), *aff’d without op.*, 622 F.2d 590 (7th Cir. 1980). Some courts have adopted a contrary position. See *Wise v. Olan Mills Incorporated of Texas*, 485 F.Supp. 542 (D.Colo. 1980); *Karijolic v. Illinois Bell Telephone Co.*, 19 F.E.P.Cas. (BNA) 447 (N.D.Ill. 1977), *aff’d without op.*, 601 F.2d 596 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 733 (1980); *Kennedy v. Mountain States Telephone & Telegraph Co.*, 449 F.Supp. 1008 (D.Colo. 1978).

The court in *Espinueva*, *supra*, did not articulate why it held that the ADEA did not authorize punitive damages. In *Stevenson*, *supra*, however, the court based its decision to reject the plaintiff’s claim for punitive damages on the legislative history of the 1978 amendments to the ADEA. Although the remedial provision essentially remained unchanged, the *Stevenson* court found that the legislative history revealed that Congress did not intend to allow punitive (and compensatory) damages in ADEA actions. The Congressional Report accompanying the amendments expressly stated that “[t]he ADEA as amended by this act does not provide remedies of a punitive nature.” 464 F.Supp. at 948, quoting H.R.Rep. No. 950, 95th Cong., 2d Sess. (1978). Even if the ADEA precludes punitive damages, a plaintiff is not necessarily precluded from seeking punitive damages under state law. *Rawson v. Sears Roebuck & Co.*, 585 F.Supp. 1393 (D.Colo. 1984), *rev’d in part, vacated in part*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 699 (1988).

It should be noted that at least two of the cases that held that punitive damages were available under the ADEA were decided before the 1978 amendments. See *Karijolic*, *supra*; *Kennedy*, *supra*. The *Karijolic* and *Kennedy* courts focused on the language of 29 U.S.C. §626(b), which empowered the court to grant “such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter.” The *Karijolic* and *Kennedy* courts reasoned that by referring to “legal relief,” Congress intended to incorporate all of the remedies traditionally available at common law. 449 F.Supp. at 110. It is not certain whether the *Karijolic* and *Kennedy* courts

would take the same positions today. *But see, e.g., Wise, supra* (exemplary and compensatory damages available under ADEA). See generally G. Terrell Davis, *Compensatory and Punitive Damages in Age Discrimination in Employment*, 32 U.Fla.L.Rev. 701 (1980).

4. [9.69] Punitive Damages in Equal Pay Act Actions

Punitive damages, like compensatory damages, do not appear to be permissible under any of the provisions of the Equal Pay Act. See *Hybki v. Alexander & Alexander, Inc.*, 536 F.Supp. 483 (W.D.Mo. 1982). In *Carter v. Marshall*, 457 F.Supp. 38 (D.D.C. 1978), the court dismissed claims by federal employees for punitive damages under the Equal Pay Act based on two factors. First, punitive damages are not expressly provided for as remedies in 29 U.S.C. §216 or §217 (as applicable to the Equal Pay Act). Second, the established rule is that absent express consent by Congress, punitive damages are not recoverable against the United States. See *Kumbalek v. I. Bahcall Industries, Inc.*, 6 F.E.P.Cas. (BNA) 1269 (E.D.Wis. 1974). Commentators have suggested that there are some very strong policy reasons for awarding punitive damages in §216 Equal Pay Act actions. The fact that “[p]unitive damages are intended to punish reprehensible conduct, provide compensation for injuries not otherwise redressed, deter others from similar conduct, and encourage suit where the defendant’s conduct is particularly offensive to society . . . arguably may justify making punitive damages available” in these actions. Charles A. Sullivan et al., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §10.15(d)(2), p. 675 (1980).

5. [9.70] Punitive Damages in 42 U.S.C. §1981 and/or 42 U.S.C. §1983 Actions

Punitive damages may be awarded in 42 U.S.C. §§1981 and/or 42 U.S.C. §1983 actions, provided that the conduct in question warrants them. See *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985); *Busche v. Burkee*, 649 F.2d 509 (7th Cir.) (§1983), *cert. denied*, 102 S.Ct. 396 (1981); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987) (§1981); *Claiborne v. Illinois Central R.R.*, 583 F.2d 143 (§1981), *reh’g denied*, 588 F.2d 828 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 2869 (1979); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.) (§1981), *cert. denied*, 98 S.Ct. 266 (1977); *Medrano v. MCDR, Inc.*, 366 F.Supp.2d 625, 635 (W.D. Tenn. 2005); *Chellen v. John Pickle Co.*, 446 F.Supp.2d 1247, 1288 (N.D.Okla. 2006). See generally *Annot.*, 14 A.L.R.Fed. 608 (1973); Note, *Employment Discrimination Litigation: The Availability of Damages*, 44 U.Mo.-Kansas City L.Rev. 497 (1976).

This conclusion is supported by the Supreme Court’s language in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 44 L.Ed.2d 295, 95 S.Ct. 1716 (1975). The Court stated, in dictum, that “[a]n individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.” 95 S.Ct. at 1720.

Although it is well settled that punitive damages may be recoverable in §1981 or §1983 actions, it is less certain what circumstances will warrant such relief. The Fifth Circuit decision in

Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970), is often cited for its articulation of the standard for awarding punitive damages:

The general rule as to punitive damages, repeatedly found in the reported cases, is that they may be imposed if a defendant has acted wilfully and in gross disregard for the rights of the complaining party. . . . Since such damages are punitive and are assessed as an example and warning to others . . . they are not a favorite in law and are to be allowed only with caution and within narrow limits. . . .

The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of the fact. [Citations omitted.]

Although a number of circuits have formulated their own standards governing the awarding of punitive damages in civil rights actions, the Seventh Circuit has cited with approval the test enumerated by the Fifth Circuit in *Lee*. See *Busche, supra*.

In *Busche*, the Seventh Circuit upheld the district court's award of \$2,000 in punitive damages, finding that the award was not clearly erroneous and that the award was appropriately within the discretion of the trier of fact. The court further noted:

We believe the district court's award of punitive damages was not clearly erroneous. The record establishes that Burkee ordered Busche's discharge even though he had been repeatedly advised that he was without legal authority to do so. Both Chief of Police Bosman and Inspector of Police Trotta had informed Burkee that Busche could be terminated only after he received a hearing before the Police and Fire Commission. This intentional and considered disregard of Busche's legal rights demonstrates that Burkee acted with the "malicious intent" necessary to support the district court's award of punitive damages. [Citations omitted.] 649 F.2d at 520.

See also *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972) (district court can award punitive damages in §1983 action when, in its discretion, it finds award is justified by defendant's "bad faith"), *cert. denied*, 93 S.Ct. 1419 (1973); *Hulbert v. Wilhelm*, 120 F.3d 648, 657 (7th Cir. 1997) (punitive damages may be awarded when defendant showed "callous disregard" for plaintiff's rights).

H. [9.71] Liquidated Damages

"Liquidated damages" refers to a sum of money in addition to actual damages awarded to provide full restitution to an injured party when the actual dollar value of harm is not ascertainable. They are available under the Equal Pay Act (see §§9.72 – 9.76 below) and the Age Discrimination in Employment Act (see §9.77 below). In *Shea v. Galaxie Lumber & Construction*

Co., 152 F.3d 729 (7th Cir. 1998), the Seventh Circuit held that 29 U.S.C. §216(b) makes liquidated damages mandatory unless the court finds that the employer acted in good faith and reasonably believed its conduct was consistent with the law. The employer bears the burden of proving good faith and reasonableness.

1. [9.72] Liquidated Damages in Equal Pay Act Actions

Liquidated damages may be awarded for up to the amount of the backpay award for violations of the Equal Pay Act. An employer in violation of the Equal Pay Act is liable for liquidated damages unless the employer demonstrates that the act or omission was in good faith and that it had reasonable grounds for believing the act or omission was not violative of the Equal Pay Act. 29 U.S.C. §260; *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 357 (4th Cir. 1994). *See also Hatton v. Hunt*, 780 F.Supp. 1157 (W.D.Tenn. 1991) (stating award of liquidated damages is mandatory if no evidence employer acted in good faith); *Fortino v. Quasar Co.*, 751 F.Supp. 1306 (N.D.Ill. 1990) (front pay may not be considered in determining amount of liquidated damages because front pay is prospective remedy), *rev'd on other grounds*, 950 F.2d 389 (7th Cir. 1991); *Wauhop v. Allied Humble Bank, N.A.*, 57 F.E.P.Cas. (BNA) 790 (S.D.Tex. 1988) (mandatory). When an employer “shows to the satisfaction of the court” that the violation was “in good faith and that he had reasonable grounds for believing that his act or omission was not a violation,” then the court may, “in its sound discretion,” award a lesser amount or no liquidated damages. 29 U.S.C. §260, as added by the Portal-to-Portal Act of 1947 (PPA), ch. 52, 61 Stat. 84. *See Brinkley-Obu, supra*, 36 F.3d at 357; *Lowe v. Southmark Corp.*, 998 F.2d 335 (5th Cir. 1993); *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543 (7th Cir. 1991); *Tidwell v. Fort Howard Corp.*, 756 F.Supp. 1487 (E.D.Okla. 1991), *aff'd in part, rev'd in part*, 989 F.2d 406 (10th Cir. 1993). *See also Glenn v. General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir.) (stating employer has burden of persuading court that failure to obey Equal Pay Act was “in good faith” and predicated on “reasonable grounds”), *cert. denied*, 109 S.Ct. 378 (1988). This requirement comes from the Fair Labor Standards Act (29 U.S.C. §§216, 217) and the PPA (29 U.S.C. §260) (remedy provisions), which were incorporated into the Equal Pay Act. Under the FLSA, the district court’s decision of whether to award liquidated damages is reviewed only for abuse of discretion. *Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997).

In *Brinkley-Obu, supra*, a female employee sued her employer under Title VII and the Equal Pay Act, alleging that she was paid less than her male counterparts because of her sex. The jury found that the employer violated both Title VII and the Equal Pay Act but that the violation was not willful. 36 F.3d at 357. The appellate court affirmed the jury’s finding based on evidence that although the employer did not pay her a salary comparable to her male counterparts, it did react to the employee’s complaints about her salary. Additionally, the court found that the district judge did not abuse his discretion by using the same evidence to find that the employer acted in good faith.

a. [9.73] “Good Faith”

The courts are divided over the issue of whether “good faith” under the liquidated damages provision of the Equal Pay Act, 29 U.S.C. §260, is an objective or subjective standard. The Department of Labor and a minority of courts take the position that good faith is an objective

standard. See 29 C.F.R. §790.22(c); *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923 (11th Cir. 1987); *Richard v. Marriott Corp.*, 549 F.2d 303 (4th Cir.), *cert. denied*, 97 S.Ct. 2988 (1977); *King v. Board of Education, City of Chicago*, 435 F.2d 295 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 1380 (1971). See generally Victor S. Netterville, *Good Faith Defenses Under the Portal-to-Portal Act of 1947*, 17 Geo.Wash.L.Rev. 322 (1949).

A substantial number of courts have held that good faith may be measured by a subjective inquiry into the defendant's state of mind. In *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 464 (D.C.Cir. 1976), *cert. denied*, 98 S.Ct. 1281 (1978), the court, quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 74 S.Ct. 120 (1953), stated that "[t]he good faith of which the [Equal Pay] Act speaks is 'an honest intention to ascertain what the . . . Act requires and to act in accordance with it.' That necessitates a subjective inquiry." An employer does not necessarily meet the test of good faith by claiming that its wages were set by negotiation with a union. "That an employer and others in the industry have broken the law for a long time without complaints from employees is plainly not the reasonable ground to which the statute speaks." *Thompson v. Sawyer*, 678 F.2d 257, 282 (D.C.Cir. 1982), *rev'd in part sub nom. Thompson v. Kennickell*, 836 F.2d 616 (D.C.Cir. 1988), quoting *Laffey, supra*, 567 F.2d at 465. See also *Addison, supra*; *Beebe v. United States*, 640 F.2d 1283 (Ct.Cl. 1981). See generally *Annot.*, 26 A.L.R.Fed. 607 (1976).

b. [9.74] Reasonable Grounds

In addition to showing good faith, the employer must demonstrate "reasonable grounds" for believing that an act or omission was in compliance with the Equal Pay Act to avoid liquidated damages. Courts facing this issue appear to agree that the requirement involves an objective rather than a subjective inquiry. See *Beebe v. United States*, 640 F.2d 1283, 1293 (Ct.Cl. 1981), in which the court, quoting *Kam Koon Wan v. E.E. Black, Ltd.*, 188 F.2d 558, 562 (9th Cir. 1951), addressed the question of whether the defendant in relying on past practice acted as a "reasonably prudent man would have acted under the same circumstances." See *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C.Cir. 1976), *cert. denied*, 98 S.Ct. 1281 (1978).

c. [9.75] Examples

Since the test for whether an employer had reasonable grounds for believing that its act or omission was in compliance with the Fair Labor Standards Act applied to cases alleging Equal Pay Act violations is the same test generally applied to cases arising under the FLSA, one may look to the general body of FLSA law for guidance.

Courts have found that some employers had reasonable grounds for believing that their act or omission was in compliance with the FLSA. See, e.g., *Bauler v. Pressed Steel Car Co.*, 81 F.Supp. 172 (N.D.Ill. 1948) (inspectors from Wage and Hour Division had informed employer that he was not violating FLSA), *aff'd*, 182 F.2d 357 (7th Cir. 1950); *Beebe v. United States*, 640 F.2d 1283 (Ct.Cl. 1981) (law was highly ambiguous and complex); *Retail Store Employees Union, Local 400 v. Drug Fair-Community Drug Co.*, 307 F.Supp. 473 (D.D.C. 1969) (labor officials were fully aware of employers' questionable practices). In *Mayhew v. Wells*, 125 F.3d

216, 221 (4th Cir. 1997), the court concluded that the defendant sheriff had reasonable grounds for believing that a deputy was not owed overtime pay for time spent caring for and training a dog when the deputy independently owned and trained two dogs, only one of which was used for police work.

Cases holding that such reasonable grounds were not present include *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C.Cir. 1976), *cert. denied*, 98 S.Ct. 1281 (1978), and *King v. Board of Education, City of Chicago*, 435 F.2d 295 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 1380 (1971). In *Laffey*, the employer's claim that it had reasonable grounds for violating the FLSA because its conduct involved a longstanding practice in its industry was soundly rejected. In *King*, the Seventh Circuit found that the board of education did not have reasonable grounds for excluding certain employees from the coverage of the FLSA after an administrative bulletin stated that they were within the purview of the Act. *See also Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 71 – 72 (2d Cir. 1997) (rejecting employer's argument that conformity to industry practice and absence of employee complaints demonstrated good faith).

d. [9.76] Discretionary Considerations

The courts have discretion to award any amount of liquidated damages they consider to be appropriate even if good faith and reasonable grounds are deemed to be present. But commentators have noted that “the reflex to deny liquidated damages” is “[s]o automatic” when these two elements are found “that there is very little [legal] discussion” of the considerations that should enter into the decision. Charles A. Sullivan et al., *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* §10.15(c)(5), p. 672 (1980).

2. [9.77] Liquidated Damages in ADEA Actions

The Age Discrimination in Employment Act provides that an employee may be awarded “liquidated damages,” in addition to backpay and benefits, when the employer's violation of the Act was “willful.” 29 U.S.C. §626(b). Section 626(b) expressly incorporated the “powers and procedures” of the Fair Labor Standards Act. As originally enacted, §16(b) of the FLSA, 29 U.S.C. §216(b), mandated awards of liquidated damages that were equal to the amount of wages due. Congress mitigated the harshness of this requirement in 1947 by providing in the Portal-to-Portal Act that the court has discretion to disallow all or part of the liquidated damages if it finds that the employer acted “in good faith” or had “reasonable grounds for believing that his act or omission was not a violation” of the FLSA. 29 U.S.C. §260.

The measure of liquidated damages is equal to the amount already due the employee as a result of the employer's violation of the ADEA. According to the Supreme Court, liquidated damages under the ADEA are punitive in nature. Rather than compensating the victim, they are designed to deter willful violations. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985).

In *Thurston*, the Supreme Court held that to recover double damages, a plaintiff must show that the employer “knew or showed reckless disregard for the matter of whether its conduct was

prohibited by the ADEA.” 105 S.Ct. at 624, quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983). TWA, the *Thurston* Court found, acted reasonably and in good faith in evaluating whether its plan of allowing medically disabled pilots to bump into flight engineering positions violated the ADEA. Pilots who were disqualified from flying by reason of being over age 60 were not, under TWA’s plan, permitted to bump flight engineer positions. See also *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 100 L.Ed.2d 115, 108 S.Ct. 1677 (1988); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632 (9th Cir. 1993) (no award of liquidated damages when employer acted in good faith); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471 (5th Cir. 1992) (liquidated damages awarded if willful violation occurs), *cert. denied*, 113 S.Ct. 1253 (1993); *Beshears v. Asbill*, 930 F.2d 1348 (8th Cir. 1991) (awarding liquidated damages when officials responsible for employment decisions were familiar with ADEA and made comments manifesting aged-based animus); *Tennes v. Commonwealth of Massachusetts, Department of Revenue*, 944 F.2d 372, 381 (7th Cir. 1991) (employer’s willful conduct entitled plaintiff to liquidated damages). The Supreme Court affirmed the definition of “willful” in *Thurston*, stating that “Congress intended for liquidated damages [under the ADEA] to be punitive in nature.” *Commissioner v. Schleier*, 515 U.S. 323, 132 L.Ed.2d 294, 115 S.Ct. 2159, 2165 (1995), quoting *Thurston*, 105 S.Ct. at 624.

The Eleventh Circuit held that the *Thurston* standard “does not require proof of an intentional violation of the Act; action which violates the law, whether or not undertaken with specific intent, may be found sufficient for liquidated damages if it is shown that the employer acted against one in the protected age group recklessly and without any concern at all about the existence of the law.” *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1513 – 1514 (11th Cir. 1986). See *Glover v. McDonnell Douglas Corp.*, 12 F.3d 845 (8th Cir.) (recklessness is precondition to award of liquidated damages), *cert. denied*, 114 S.Ct. 1647 (1994).

The Third Circuit held that a plaintiff must present evidence of the employer’s intent in order to show willfulness under *Thurston*, *supra*. *Smith v. Consolidated Mutual Water Co.*, 787 F.2d 1441 (10th Cir. 1986). See *Tidwell v. Fort Howard Corp.*, 989 F.2d 406 (10th Cir. 1993). A district court’s jury instructions on the issue of willfulness for ADEA double damages were declared faulty under *Thurston* because they did not instruct the jury to consider the defendant’s knowledge that its conduct violated the ADEA. *Weems v. INA Corp.*, No. 84-2349 (unpublished), *aff’d in part, rev’d in part, remanded*, 636 F.Supp. 887 (W.D.N.C. 1986). Cf. *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 562 (8th Cir. 1993) (holding jury instruction that stated that ADEA violation is willful if done “voluntarily and deliberately” was proper).

Many courts have held that an award of liquidated damages is mandatory upon a jury’s finding of willfulness. See *Mitroff v. Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986); *Spanier v. Morrison’s Management Services, Inc.*, 822 F.2d 975 (11th Cir. 1987). The Seventh Circuit, however, has held that an award is not mandatory under such circumstances. *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 3500 (1985).

I. [9.78] Interest

A court may allow two types of interest on backpay awards — prejudgment interest and postjudgment interest. Prejudgment interest is designed to compensate the aggrieved employee

for the loss of money during the period preceding final judgment. *See Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 274 (7th Cir. 1993). Postjudgment interest is intended to compensate the aggrieved employee for the loss of money between the date of judgment and the date of payment. Section 114 of the Civil Rights Act of 1991 changed the law on interest for tardy payment of awards by the federal government for actions arising after the effective date of CRA '91, making the same interest available as in cases involving private parties. 42 U.S.C. §2000e-16(d).

1. [9.79] Prejudgment Interest in Title VII Actions

Prejudgment interest is “presumptively available” on backpay awards in Title VII cases. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1270 (1993); *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1046 – 1048 (7th Cir. 1994); *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 897 (3d Cir. 1993); *Zicherman v. Korean Air Lines Co.*, 814 F.Supp. 605 (S.D.N.Y. 1993); *EEOC v. Molle Chevrolet, Inc.*, 61 F.E.P.Cas. (BNA) 172 (W.D.Mo. 1992); *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992). Although interest in backpay awards is not specifically enumerated as a form of relief in 42 U.S.C. §1981a, a substantial number of courts have awarded both postjudgment and prejudgment interest for the benefit of private, as opposed to public, employees in Title VII actions. *But see Emmel v. Coca-Cola Bottling Company of Chicago*, 904 F.Supp. 723 (N.D.Ill. 1995) (prejudgment interest disfavored in Seventh Circuit when punitive damages have been awarded), *aff’d*, 95 F.3d 627 (7th Cir. 1996).

2. [9.80] Prejudgment Interest in Equal Pay Act Actions

As noted in §9.72 above, the Equal Pay Act incorporates the remedies of §§16 and 17 of the Fair Labor Standards Act, 29 U.S.C. §§216 and 217. Three types of actions can be brought under those sections for violations of the Equal Pay Act. They include (a) an action by an employee for unpaid wages and liquidated damages pursuant to 29 U.S.C. §216(b); (b) an action by the EEOC on behalf of an employee for unpaid wages and liquidated damages pursuant to 29 U.S.C. §216(c); and (c) an action by the EEOC for equitable relief pursuant to 29 U.S.C. §217.

a. [9.81] Prejudgment Interest in 29 U.S.C. §216 Actions

Brooklyn Savings Bank v. O’Neil, 324 U.S. 697, 89 L.Ed. 1296, 65 S.Ct. 895 (1945), is the leading decision concerning the recovery of prejudgment interest in 29 U.S.C. §216 actions. The *Brooklyn* court held that an employee recovering mandatory liquidated damages under the statute could not receive interest on these payments. Justice Reed stated:

[Section] 16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the [Equal Pay] Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. 65 S.Ct. at 906.

The courts are divided over the question of whether *Brooklyn* is valid today. *Brooklyn* was issued before the enactment of §11 of the Portal-to-Portal Act, codified at 29 U.S.C. §260. Some courts question the rule enunciated in *Brooklyn* because the awarding of liquidated damages is no longer mandatory after the enactment of that section.

In cases decided after the enactment of the PPA, when an employee recovered full liquidated damages, the courts consistently have held that prejudgment interest cannot be recovered. See *Gandy v. Sullivan County, Tennessee*, 819 F.Supp. 726 (E.D.Tenn. 1993), *aff'd*, 24 F.3d 861 (6th Cir. 1994); *EEOC v. City of Detroit Health Department*, 920 F.2d 355 (6th Cir. 1990); *Pearce v. Wichita County, City of Wichita Falls, Texas, Hospital Board*, 590 F.2d 128 (5th Cir. 1979); *Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir. 1982); *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464 (5th Cir. 1979); *Caserta v. Home Lines Agency, Inc.*, 172 F.Supp. 409 (S.D.N.Y.), *aff'd on other grounds*, 273 F.2d 943 (2d Cir. 1959). In *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 229 (7th Cir. 1972), the court stated:

Regardless of the change in the basis for awarding liquidated damages, as evidenced by [§11 of the PPA], we think that *Brooklyn* is still controlling where, as here, the maximum amount of liquidated damages are awarded.

When the court uses its discretion to award less than the maximum amount of liquidated damages, it is unclear whether *Brooklyn* is controlling. A number of cases decided after the enactment of the PPA have held that prejudgment interest cannot be recovered even when employees are awarded less than the maximum amount of liquidated damages. See *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88 (2d Cir.), *cert. denied*, 74 S.Ct. 120 (1953); *Landaas v. Canister Co.*, 188 F.2d 768 (3d Cir. 1951); *Ahearn v. Holmes Electric Protective Co.*, 110 F.Supp. 822 (S.D.N.Y. 1953). A number of courts have taken a contrary position. See *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971); *Holtville Alfalfa Mills, Inc. v. Wyatt*, 230 F.2d 398 (9th Cir. 1955); *Davis v. Jobs for Progress, Inc.*, 427 F.Supp. 479 (D.Ariz. 1976); *Asselta v. 149 Madison Ave. Corp.*, 95 F.Supp. 856 (S.D.N.Y. 1951).

Several arguments support the contention that prejudgment interest should be recoverable when a court exercises its discretion to award less than the maximum amount of liquidated damages. In *Asselta*, the court stated that “interest on an award in which no liquidated damages were granted, such as in the present case, would not be barred by the holding in *Brooklyn Savings Bank v. O’Neil*.” 95 F.Supp. at 858. The *Asselta* court reasoned that “[a]n analysis of the opinion in the *O’Neil* case indicates that the Court regarded the provision for liquidated damages as a substitute for interest, which, the court said ‘is customarily allowed as compensation for delay in payment.’” *Id.*, quoting *Brooklyn, supra*, 65 S.Ct. at 906.

McClanahan, supra, also found that “[t]here are compelling reasons why pre-judgment interest should be recoverable where, in its discretion, the district court has awarded less than the maximum amount of liquidated damages.” 440 F.2d at 325. The *McClanahan* court observed that an employer would be “unjustly enriched by his own violation at his employee’s expense” if permitted unconditionally to use his employee’s money. 440 F.2d at 326. The court therefore concluded that a court that uses its discretion to deny liquidated damages “must award interest on back pay from the date the claims accrued.” *Id.* If the court uses its discretion to award liquidated damages, “the award must at least equal the amount of interest that would have been due.” *Id.*

Although the *Asselta-McClanahan* line of cases is well reasoned, strong arguments support the position that prejudgment interest should not be awarded when no liquidated damages have been recovered. According to commentators:

The view that interest cannot be recovered in section 16 actions, even where liquidated damages for loss of use have been denied, seems correct. While there would be no double recovery in such a case, the purpose of the post-PPA discretionary liquidated damages award is the same as the pre-PPA mandatory award — to compensate employees for their incidental losses, including the loss of use. The PPA merely made the award discretionary in certain circumstances. This change in the operation of the award does not suggest that interest is now available as a distinct element of recovery when liquidated damages have been denied for the loss of use. Indeed, such a conclusion would seem clearly inconsistent with the apparent congressional purpose in making the liquidated damages award discretionary in some circumstances. Charles A. Sullivan et al., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §10.15(e)(2), p. 679 (1980).

See also *Addison, supra*; *Landaas, supra*.

b. [9.82] Prejudgment Interest in 29 U.S.C. §217 Actions

The question of whether to award prejudgment interest in cases brought by the EEOC (or by the Secretary of Labor before 1979) has been held to be discretionary. See *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658 (4th Cir. 1969); *Hodgson v. Robert Hall Clothes, Inc.*, 326 F.Supp. 1264 (D.Del. 1971), *aff'd in part, rev'd in part*, 473 F.2d 589 (3d Cir.), *cert. denied*, 94 S.Ct. 50 (1973). Most courts award such interest in successful 29 U.S.C. §217 actions. See *Usery v. Associated Drugs, Inc.*, 538 F.2d 1191 (5th Cir. 1976); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971); *Marshall v. Board of Education of Baltimore County*, 470 F.Supp. 517 (D.Md. 1979), *aff'd without op.*, 618 F.2d 101 (4th Cir. 1980); *Usery v. Godwin Hardware, Inc.*, 426 F.Supp. 1243 (W.D.Mich. 1976).

Such awards are made for a number of reasons. “The award by an equity court of prejudgment interest not only prevents unjust enrichment of the employer flowing from the latter’s unlawful withholding but also makes the employees whole and thus effectuates the statutory purpose.” *Marshall, supra*, 470 F.Supp. at 519. In *Wheaton Glass, supra*, the court reasoned:

If the employee recovers liquidated damages in his suit under §16(b) such liquidated damages include compensation for the withholding of money. . . . But where the Secretary [now the EEOC] sues under §17, and thus cuts off the individual employee’s right to sue under §16(b) there is no reason why the order of the equity court should not include compensation, by way of interest, for the money wrongfully withheld. [Citation omitted.] 446 F.2d at 535.

Courts will consider the absence or presence of the employer's good faith when attempting to determine whether to award prejudgment interest in 29 U.S.C. §217 actions. An employer's good faith may be sufficient reason for denying prejudgment interest. *See Clifton D. Mayhew, Inc., supra; Wheaton Glass, supra*. A growing number of cases have taken a contrary position. *See Brennan v. City Stores, Inc.*, 479 F.2d 235, *reh'g denied*, 481 F.2d 1403 (5th Cir. 1973); *Maxey's Yamaha, supra*. In *Maxey's Yamaha*, the court stated that "[g]ood faith . . . is no justification for penalizing the employee by denying prejudgment interest." 513 F.2d at 183.

3. Prejudgment Interest in ADEA Actions

a. [9.83] Prejudgment Interest in 29 U.S.C. §216 Actions

Before the Supreme Court decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985), few cases addressed the question of whether prejudgment interest could be awarded in 29 U.S.C. §216 Age Discrimination in Employment Act actions. Most of the district courts that considered the issue held that recovery of prejudgment interest is precluded when the plaintiff has been awarded liquidated damages. *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841 (W.D.Okla. 1976); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 102 S.Ct. 316 (1981), *on remand*, 548 F.Supp. 104 (W.D.N.C. 1982), *aff'd in part, rev'd in part*, 717 F.2d 114 (4th Cir. 1983); *Blim v. Western Electric Co.*, 731 F.2d 1473 (10th Cir.), *cert. denied*, 105 S.Ct. 233 (1984); *Rose v. National Cash Register Corp.*, 703 F.2d 225 (6th Cir.), *cert. denied*, 104 S.Ct. 352 (1983); *Kolb v. Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982). *See also O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543 (11th Cir. 1984), in which the appeals court reversed the trial court's award of prejudgment interest in view of the award of liquidated damages.

After the Supreme Court decision in *Thurston, supra*, an increasing number of courts have ruled that an award of liquidated damages does not preclude an award of prejudgment interest. *See Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 (11th Cir. 1987), in which the Eleventh Circuit reversed the position taken in *O'Donnell, supra*. The court stated: "In light of the *Thurston* decision, the portion of *O'Donnell* that bars recovery of both liquidated damages and prejudgment interest under the ADEA is no longer the law." 810 F.2d at 1102. *Accord Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550 (11th Cir. 1988). *See Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278 (2d Cir. 1987); *Fariss v. Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985); *Gelof v. Papineau*, 648 F.Supp. 912 (D.Del. 1986), *aff'd in part, vacated in part, remanded in part for further findings*, 829 F.2d 452 (3d Cir. 1987); *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988).

In *Powers v. Grinnell Corp.*, 915 F.2d 34 (1st Cir. 1990), despite the Supreme Court decision in *Thurston, supra*, the First Circuit held that prejudgment interest may not be awarded if liquidated damages are awarded under the ADEA. *See Andersen v. Phillips Petroleum, Co.*, 722 F.Supp. 668 (D.Kan. 1989). *See also Chang v. University of Rhode Island*, 606 F.Supp. 1161 (D.R.I. 1985) (holding that if liquidated damages are awarded, then no prejudgment interest is awarded). The Seventh Circuit has also held that prejudgment interest should not be awarded if liquidated damages are also awarded. *Fortino v. Quasar Co.*, 950 F.2d 389, 397 – 398 (7th Cir. 1991).

b. [9.84] Prejudgment Interest in 29 U.S.C. §217 Actions

It is not settled whether prejudgment interest is available in 29 U.S.C. §217 Age Discrimination in Employment Act actions. According to commentators, ADEA actions brought by the EEOC pursuant to 29 U.S.C. §217 are identical to Equal Pay Act actions brought by the EEOC pursuant to this statute. Thus, the cases holding that prejudgment interest may be awarded in 29 U.S.C. §217 Equal Pay Act actions will probably be followed when this issue arises in an ADEA action. See generally Charles A. Sullivan et al., FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §11.10(c) (1980).

4. [9.85] Postjudgment Interest

Postjudgment interest must be awarded to a plaintiff on any money judgment in a court case. 28 U.S.C. §1961(a); *Miller v. Artistic Cleaners*, 153 F.3d 781, 785 (7th Cir. 1998) (“a prevailing plaintiff in federal court is automatically entitled to postjudgment interest”).

5. [9.86] Calculation of Interest

There are a number of different methods for computing prejudgment interest. These include (a) the date from which the claim accrued until judgment (*Rogers v. Fansteel, Inc.*, 533 F.Supp. 100 (E.D.Mich. 1981); *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971)); (b) the median date of employment (*Wirtz v. Atlas Metal Spraying Co.*, 49 Lab.Cas. (CCH) ¶31,551 (E.D.Pa. 1963)); (c) the date of underpayment (*Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1971)); (d) the date of the end of the job involving underpayment (*Mitchell v. Carter*, 37 Lab.Cas. (CCH) ¶65,505 (D.C.Z. 1959)); and (e) the date from which the employer was advised of the violation (*Hodgson v. Fairmont Supply Co.*, 9 F.E.P.Cas. (BNA) 754 (N.D.W.Va. 1972)). See generally *Annot.*, 17 A.L.R.Fed. 343 (1973). When there is no statutory rate, prejudgment interest can be the prime rate of interest or the rate that the defendant pays for unsecured loans. Postjudgment interest is calculated from the date of judgment entry at the rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of judgment. It is computed daily and should be compounded annually. 28 U.S.C. §§1961(a), 1961(b).

A few courts have added an “inflation factor” onto backpay awards. See *Lewis v. Philip Morris, Inc.*, 17 F.E.P.Cas. (BNA) 618, 621 (E.D.Va. 1976), *vacated sub nom. Lewis v. Tobacco Workers’ International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 871 (1979). The purpose of such awards is to account for the effect of inflation on backpay and to ensure that backpay when paid is paid in dollars of the same value.

Most courts, however, have declined to include a separate inflation factor in backpay awards. *But see Gelof v. Papineau*, 648 F.Supp. 912 (D.Del. 1986) (grant of additional damages to account for tax consequences of lump-sum award), *aff’d in part, vacated in part, remanded for further findings*, 829 F.2d 452 (3d Cir. 1987). The majority of courts have held that inflation is to be considered, if at all, as an element of interest rather than as a separate element of damage. *Carter v. Shop Rite Foods, Inc.*, 503 F.Supp. 680, 687 – 689 (N.D.Tex. 1980); *EEOC v. Pacific Press Publishing Ass’n*, 535 F.2d 1182 (9th Cir. 1976). District courts in Illinois and Indiana have

followed this latter approach. *Liberles v. Daniel*, 26 F.E.P.Cas. (BNA) 547, 550 (N.D.Ill. 1981), *aff'd in part, rev'd in part sub nom. Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983); *Patterson v. Youngstown Sheet & Tube Co.*, 475 F.Supp. 344, 355 (N.D.Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S.Ct. 674 (1981). Under that approach, these courts have adjusted the interest rate upwards to reflect the effects of inflation.

V. [9.87] TITLE VII: RIGHT TO TRIAL DE NOVO IN FEDERAL COURT

The Supreme Court has ruled that when a charging party pursues state administrative remedies first and receives an adverse state court judgment, the party will be precluded from relitigating the same issues in federal court. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982). *Accord Takahashi v. Board of Trustees of Livingston Union School District*, 783 F.2d 848 (9th Cir.), *cert. denied*, 106 S.Ct. 2916 (1986). The Seventh Circuit in *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982), held that the principles underlying *Kremer* would not only bar relitigation of issues actually decided in prior proceedings but also preclude the litigation of any issues that could have been raised in such proceedings. *See also Davis v. United States Steel Supply, Division of United States Steel Corp.*, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1256 (1983).

The key element, according to most courts, is whether the administrative determination has been appealed to a state court. Thus, in *Gonsalves v. Alpine Country Club*, 563 F.Supp. 1283 (D.R.I. 1983), *aff'd*, 727 F.2d 27 (1st Cir. 1984), the court found that res judicata precluded a de novo proceeding in federal court when either the employer or the employee appealed the administrative finding to a state court. In *Moore v. Bonner*, 695 F.2d 799 (4th Cir. 1982), the court limited the principle of res judicata to a state court decision. In *University of Tennessee v. Elliott*, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986), the Supreme Court held that a Title VII claim that is ruled on by a state administrative law judge and not appealed to a state court can be heard by a federal court. A ruling on a 42 U.S.C. §1983 claim in the same suit, however, may be as preclusive as is a state court decision if the administrative proceeding was sufficiently judicial. *Id. Accord Delaine v. Western Temporary Services (USA), Inc.*, 32 F.E.P.Cas. (BNA) 593 (D.N.J. 1983).

Illinois lawyers should take note that the Northern District reached a different conclusion in finding that a final decision of the Illinois Human Rights Commission (IHRC) barred federal litigation of the employee's discrimination claim. *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 590 F.Supp. 1146 (N.D.Ill. 1984), *aff'd*, 768 F.2d 842 (7th Cir. 1985). The court found that the adjudicatory process of the IHRC gave the plaintiff the right to be heard and an opportunity to cross-examine the employer's witnesses. Thus, a subsequent federal action was barred by res judicata. *Buckhalter* was affirmed by the Seventh Circuit; however, the decision was subsequently vacated and remanded for reconsideration in light of the Supreme Court's decision in *Elliott, supra. Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 478 U.S. 1017, 92 L. Ed. 2d 735, 106 S. Ct. 3328 (1986). On remand, the Seventh Circuit held that the plaintiff's Title VII claim was not precluded by the administrative proceeding's factual determination but that the §1983 claim was precluded. *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892 (7th Cir. 1987); *Cooper v. City of North Olmstead*, 576 F.Supp. 592 (N.D. Ohio 1983), *aff'd in part, rev'd in part, vacated in part*, 795 F.2d 1265 (6th Cir. 1986).

In *Patzer v. Board of Regents of University of Wisconsin System*, 763 F.2d 851 (7th Cir. 1985), the Seventh Circuit held that when a state agency is not authorized to award backpay, the decision of the agency and subsequent appeal to state court do not bar a Title VII action in federal court. The court rejected the employer's reliance on *Kremer, supra*.

VI. [9.88] PERSONAL LIABILITY

Typically, a victim of employment discrimination sues the employer. Increasingly, individual managers also are being sued. The courts have resolved the issue of supervisor liability differently. Currently, the law varies from circuit to circuit and, in some cases in which the appellate court has yet to rule, within circuits.

Title VII provides that an "employer" shall not discriminate. 42 U.S.C. §2000e-2(a). Title VII defines "employer" as

a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. [Emphasis added.] 42 U.S.C. §2000e(b).

Some courts interpret "and any agent" to mean that individual supervisors can also be held liable. Other courts interpret "and any agent" as language designed to ensure that corporations will be held liable for the acts of their agents.

In *Ball v. Renner*, 54 F.3d 664, 666 – 667 (10th Cir. 1995), the court summarized and categorized a number of decisions as follows:

1. Some Courts of Appeals have lined up on one side or the other — compare the decisions in the Fourth Circuit (*Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989)) and Sixth Circuit (*Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986)), holding individuals liable, with those in the Ninth Circuit (*Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)), holding that individual defendants cannot be liable under Title VII.

2. Some Courts of Appeals appear to have sent somewhat mixed or evolving signals — in the Fifth Circuit, contrast *Hamilton v. Rodgers*, 791 F.2d 439, 442 – 43 (5th Cir. 1986) (holding supervisors in charge of staffing and assignments liable) with the later decisions in *Harvey v. Blake*, 913 F.2d 226, 227 – 28 (5th Cir. 1990) (holding that a municipal supervisor could be sued in official capacity only) and *Grant v. Lone Star Co.*, 21 F.3d 649, 651 – 52 (5th Cir. 1994) (extending that principle to the branch manager of a private employer); and in the Eleventh Circuit, contrast *Cross v. Alabama*, No. 92-7005, 1994 U.S.App. LEXIS 23673, at *36 (11th Cir. Aug. 30), petition for rehearing en banc pending (imposing individual liability) with *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam)

(holding a superior officer not individually liable); and see also *Quillen v. American Tobacco Co.*, 874 F.Supp. 1285, 1296 (M.D.Ala.1995) (suggesting that *Cross* “made a sharp departure from past precedent”).

3. Where Courts of Appeals have not ruled directly, district courts have reflected intracircuit splits — in the Second Circuit, see *Donato v. Rockefeller Fin. Servs.*, 93 Civ. 4663 (LLS), 1994 U.S. Dist. LEXIS 17709, at *5 – *11 (S.D.N.Y. Dec. 12) (stating that weight of authority in Circuit favors individual liability) and *Whitaker v. Port Auth. of New York & New Jersey*, 88 CIV 4395 (SS), 1993 U.S. Dist. LEXIS 14477, at *18 n.11 (S.D.N.Y. Oct. 14) (describing the district court split); and in the Seventh Circuit, see *Jendus v. Cancer Treatment Centers of America, Inc.*, 868 F.Supp. 1006, 1008 – 09 (N.D.Ill. 1994) (canvassing district court cases).

The Seventh Circuit has held that “individuals who do not otherwise meet the statutory definition of ‘employer’ cannot be liable under the ADA.” *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995). Because “employer” is defined in a materially identical manner under Title VII, supervisors in the Seventh Circuit are likely not to be liable under Title VII either. See *Lynam v. Foot First Podiatry Centers, P.C.*, 886 F.Supp. 1443 (N.D.Ill. 1995).

The issue of personal liability under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act continues to evoke widely divergent responses by the district and appellate courts. In recent years, the majority of courts that have considered the issue have concluded that individuals may not be held personally liable under Title VII. Although the issue remains technically open in a few circuits, most have ruled against individual liability. The Second, Third, Seventh, Eighth, Eleventh, and District of Columbia Circuits have joined the Fourth, Sixth, and Ninth Circuits in this position. See *Spencer v. Ripley County State Bank*, 123 F.3d 690, 691 (8th Cir. 1997); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 – 1317 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C.Cir.), *cert. denied*, 116 S.Ct. 569 (1995); *Cross v. State of Alabama, State Department of Mental Health & Mental Retardation*, 49 F.3d 1490 (11th Cir. 1995).

