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Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact

Howard C. Eglit, *Chicago-Kent College of Law*

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Howard C. Eglit[*]

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* J.D. University of Chicago, Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law. (Financial support for the preparation of this Article was provided by the Marshall Ewell Research Fund at Chicago-Kent College of Law.) My thanks for their comments on this Article go to my colleagues, Richard Gonzalez, Martin H. Malin, Henry H. Perritt, Jr., and Mary Rose Strubbe.

> All in all, our system of legal remedies for breach of contract, heavily influenced by the economic philosophy of free enterprise, has shown a marked solicitude for men who do not keep their promises.[1]

INTRODUCTION: ISSUES, CONCLUSIONS, AND RESOLUTION

The common law doctrine of avoidable consequences,[2] effectuated by what is usually termed (albeit erroneously so)[3] a "duty" on the part of a victim of a tort or of a contract breach to mitigate damages, is a time-worn facet of common law remedies formulations. In accord with the mitigation principle, a defendant who breaches a contract or perpetrates a tort is "entitled to a credit against liability for any consequential damages the plaintiff could have avoided or minimized by reasonable effort and expense, whether or not the plaintiff actually avoided or minimized such damages."[4] Apart from its embrace by common law courts, the mitigation principle[5] has been incorporated—either expressly or by means of judicial interpretation—into the major federal anti-discrimination statutes, *i.e.*, Title VII of the Civil Rights Act of 1964 (Title VII),[6] the Age Discrimination in Employment Act of 1967 (ADEA),[7] and the Americans with Disabilities Act of 1990 (ADA).[8]

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1. E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1216 (1970).

2. The avoidable consequences doctrine has been defined as enunciating the following general rule:

> Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.

CHARLES T. MCCORMICK, LAW OF DAMAGES 127 (1935).

3. Actually, the word "duty" and the phrase "duty to mitigate" are erroneous, albeit very common, misstatements. A failure to mitigate does not expose the failing party to any liability, as would the failure to satisfy a duty. *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 n.1 (1983); RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981) (noting that the notion of a "duty" is misleading because it suggests that a party is liable if he or she fails to act). What the failure to mitigate does do is result in a limitation on the amount of damages the party who failed to mitigate can recover. In this Article, which focuses on the employment context, I prefer to use the term "mitigation principle" as the designation for the doctrine that calls for a reduction of the plaintiff's recovery keyed to what the plaintiff earned, or could have earned, following his or her wrongful discharge or denial of hire.

4. 1 DAN B. DOBBS, LAW OF REMEDIES § 3.9 (2d ed. West 1993).

5. *See supra* note 3 regarding this terminology.

6. 42 U.S.C. §§ 2000e—2000e-17 (1994).

7. 29 U.S.C. §§ 621-634 (1994).

8. 42 U.S.C. §§ 12101-12189 (1994).

Notwithstanding this uniform endorsement of the mitigation principle, its absorption into these statutes in fact seriously undercuts their anti-discrimination aims. This conflict between the mitigation principle and the statutory goals it compromises is the animating force that has generated this Article. My goals here are several: (1) to highlight and assess the mitigation principle's benefits and detriments; (2) to recount the common law genesis and the latter-day infusion into statutory law of the mitigation principle; (3) to propose a modified mitigation principle that appropriately accommodates the anti-discrimination goals of the statutes without doing violence to the principle itself; and (4) to assess the constitutionality of this proposed modification. I reach several conclusions, which I will briefly summarize at this juncture.

First, the mitigation principle that today is universally applied in the American workplace was the common law creation of a nineteenth century judiciary that, in the context of ostensibly determining damages for workers who had been wrongfully fired, condemned worker idleness as economically wasteful and even immoral. Giving short, or no, shrift to the culpability of the employers—who after all were the wrongdoers—these courts insisted that those who had been wrongfully discharged could not remain jobless while they litigated their claims. Accordingly, the courts embraced a principle that was of very considerable benefit to errant employers and of no benefit to innocent grievants.

Second, the common law morality-laden mitigation principle endorsed by nineteenth century courts was embraced in the 1930s and 1940s, without any perceptible examination of its aptness, by both the courts and the National Labor Relations Board (NLRB) in the course of construing the National Labor Relations Act (NLRA),[9] which was enacted into law in 1935 to protect employees from discrimination and deprivation based on their union-organizing activities.[10] The absence of intellectual trenchancy from this legal exercise notwithstanding, there is at least a colorable justification to be ventured that takes the following form: (1) the NLRA's goal is the achieving of workplace peace; (2) this goal requires recognition that both employees and employers have legitimate interests; and (3) as a consequence, neither labor nor

9. 29 U.S.C. §§ 151-169 (1994).

10. Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under § 7, 29 U.S.C. § 157, which sets forth employees' basic rights to organize and to bargain collectively. Pursuant to § 8(a)(3), 29 U.S.C. § 158(a)(3), it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Pursuant to § 10, 29 U.S.C. § 160, the National Labor Relations Board is authorized to prevent and remedy unfair labor practices; § 10(c), 29 U.S.C. § 160(c), authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

management should be too harshly penalized. Within the contours of this rationale, the mitigation principle arguably—albeit dubiously—is justifiable.

Third, the NLRA in some measure served as the model for Congress when Title VII of the Civil Rights Act of 1964 was drafted. But Title VII's mitigation provision is certainly much more problematic vis-a-vis Title VII than is the mitigation principle for the NLRA. Title VII is designed to eradicate discriminatory practices and policies that have no socially redeeming aspects. There is, after all, very little by way of an acceptable argument that can be made that racially or religiously bigoted employers[11] need some leeway for exercising their biases. Any effort, then, to take account of supposedly competing legitimate employer interests simply is off the mark, in the main, for Title VII concerns.[12] Moreover, nineteenth century judicial rulings grounded on the perception of worker idleness as immoral certainly are of very dubious relevance in the twenty-first century, when our contemporary values strenuously condemn what are perceived to be evils of much greater perniciousness—*i.e.*, racism, sexism, religious prejudice, and bias based on skin color or national origin. And yet the Congress that wrote Title VII apparently looked to NLRA judicial and administrative rulings, which in turn apparently thoughtlessly took their cue from nineteenth century mitigation decisions. In sum, both the analytical and precedential underpinnings of Title VII's mitigation provision are deeply flawed.

Fourth, despite the fact that the ADEA does not contain an express mitigation provision (in contrast to Title VII), ADEA courts—which

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11. The statutes also apply to labor organizations, employment agencies, and joint labor-management apprenticeship committees; for the sake of simplicity those entities, *i.e.*, employers, that generate the vast majority of the case law are the ones addressed here.

12. Some room in fact is allowed for some otherwise forbidden characteristics to be taken into account under Title VII, the ADEA, and the ADA. Most notably, small employers do not have to comply with the statutes, *e.g.*, employers with 14 or less employees do not come within the coverage of Title VII, 42 U.S.C. § 2000e(b) (1994), and the ADA, 42 U.S.C. § 12111(5)(A) (1994). Employers with fewer than 19 employees are not covered by the ADEA. 29 U.S.C. § 630(b) (1994). There also are some substantive exceptions to the statutes' prohibitions. For example, Title VII contains a bona fide occupational qualification (BFOQ) defense, allowing the use of gender, national origin, and religion as bases for employer decision making. 42 U.S.C. § 2000e-2(e). (This exception to the Act's prohibitions is inapplicable, by its terms, to decisions by entities covered by the Act insofar as race and color are concerned.) The BFOQ defense is very narrowly construed, even where it does apply. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). Two provisions of Title VII—42 U.S.C. §§ 2000e-1, 2000e-2(e)(2)—authorize the use of religion as a basis for decision making by religious institutions. Those entities availing themselves of these provisions presumably would contend that they are dutifully observing the tenets of their religions, rather than engaging in biased decision making. As to exceptions to the ADEA's prohibition of discrimination, see 1 HOWARD C. EGLIT, AGE DISCRIMINATION §§ 5.01-5.77 (2d ed. 1993).

In sum, the statutes do not ban all employer decision making that is based on employee characteristics that, absent the foregoing caveats and exceptions, would not be deemed appropriate bases for decision making.

commonly look to Title VII judicial rulings for guidance[13]— mechanically have followed the lead afforded by Title VII's statute-driven mitigation decisions. Thereby, proven victims of unlawful age discrimination have been saddled, like their compatriots pursuing discrimination claims under Title VII, with the mitigation principle.[14] And thereby, as

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13. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983). *See generally* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1096-1100 (1993).

14. In an Article published more than 20 years ago the author concluded that the mitigation principle should apply to the ADEA. While he is to be commended (belatedly) for his sincere concerns as well as his acknowledgment that there was no easy or apparent answer, his conclusion missed the mark. The author wrote as follows:

> The question, therefore, is whether the avoidable consequences doctrine *should* be applied when an award of unpaid wages is sought under the ADEA, assuming the purposes of the award to be deterrence and fair competition. The answer depends upon a balancing of the gains and losses which would result from the application of the doctrine. Unfortunately, any attempt to correctly balance these matters runs into considerable difficulty.
>
> Before any balancing can be undertaken, the interests on each side of the scales must be identified and gauged. On one hand, there would be some gain in economic efficiency from invoking the doctrine but it probably would be minimal. Surely, only a small number of persons with ADEA claims would have the financial means to go without employment until their claims are resolved; of these persons, there probably would be only a small percentage who would assume the risk of losing the litigation by remaining idle. On the other hand, it might be doubted that applying the doctrine in ADEA litigation would substantially affect compliance with the statute or would allow violators of the statute to gain a significant competitive advantage. Even if the doctrine is invoked, an employer who has violated the ADEA is still liable for losses which could not reasonably have been avoided, attorneys' fees, costs and, in some cases, liquidated damages.
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> Even when the interests to be balanced are defined, it is difficult to know what weight to assign to each interest. How important is a minimal gain in economic efficiency in an economy that has substantial unemployment and unused industrial capacity? How much weight should be given to the losses to the deterrence effect and fair competition when the losses appear minimal?
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> As difficult as it is to balance these matters with any degree of precision, one might opine that the avoidable consequences doctrine should apply in ADEA litigation. The application of the doctrine would encourage some persons with ADEA claims to seek other employment rather than remain idle, but probably would have little or no effect on the goals of deterrence and fair competition. Thus, it can be concluded that the advantages of applying the doctrine outweight [sic] the disadvantages.

Richard F. Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305, 319-20 (1976).

Professor Richards erred at a critical point. He reasoned that even given the negative result (for the grievant) of application of the mitigation principle, an employer still would be liable for attorneys' fees, losses that were not avoidable, and sometimes even liquidated damages. The exposure to these financial risks, he reasoned, would work to deter violations by employers. But the problem with the mitigation principle is that it in fact no doubt deters many victims of age discrimination from ever pursuing legal recourse. Thus, the notions of recovering fees and other damages simply are irrelevant if victims of discrimination do not sue, and certainly afford no offset to the negative consequence of the mitigation principle. Even for those who might sue, the reduced awards they will recover if they prevail further diminish the statute's deterrent force. Moreover, liquidated damages are based on the back pay award, and so a minimal back pay recovery produces a comparably minuscule award of liquidated damages. *See infra*

well, the moral values of the judiciary of the 1830s and 1840s erroneously have been transported into the ADEA case law of the 1970s, '80s, and '90s.

Fifth, the ADA—enacted into law in 1991—embraces the mitigation principle by virtue of Congress having incorporated into it the enforcement and remedies schemes of Title VII. Here too, then, an enlightened late twentieth century anti-discrimination statutory effort was tied to antiquated nineteenth century common law doctrine. And as was the case with the NLRA, Title VII, and the ADEA, no discernible thought or analysis was directed by the drafters of the ADA to examining whether such unreflective fealty to tradition was warranted.

Sixth, I conclude that there indeed is an alternative to the unadulterated mitigation principle—an alternative which better serves the reformist facets of Title VII, the ADEA, and the ADA, while at the same time doing no violence to the private, compensatory foci of the three statutes or the mitigation principle itself. To these ends, I propose the creation through statutory amendment of a new regimen: prevailing plaintiffs would continue to have deducted from their back pay awards those sums they earned or could have earned from comparable available jobs, but rather than the wrongdoing employers enjoying corresponding reductions of their liabilities, a large percentage (80 percent) of these amounts would be paid by the employers into a statutorily created fund. This fund would be used to pay for the costs and fees, including those incurred for appointed counsel, confronting financially disadvantaged litigants who meet prescribed eligibility criteria. The case for this proposal starts with a delineation of the mitigation principle in practice.

I. MITIGATION IN OPERATION

Some years ago I received a call from a just-discharged advertising account salesman. About forty-five years of age, he wanted to discuss with me the potentials for legal recourse arising out of his having been fired the week before. So did three of his likewise terminated compatriots, each of whom also was in his mid-forties. We met, we discussed their situations, and I counseled them regarding the applicability of the

notes 35-37 and accompanying text. Finally, so far as the availability of attorneys' fees is concerned, few grievants are so financially foolhardy as to sue when the best they can do—assuming their litigation gambles pay off and they actually prevail—is to recover attorneys' fees, which are fine from the lawyers' views but do nothing for the clients.

ADEA,[15] a statute which—as its full title makes obvious—addresses discrimination on the basis of age in the workplace.[16]

All four salesmen recounted the same basic story. They reported that the president of the advertising agency for which they had worked was a rabid hockey fan. Aside from making money, his consuming ambition was to win the annual championship of the ad agency hockey league, which was made up of a large number of teams that competed in a winter-long series of games at ice rinks throughout the Chicago area. To this end, skill on the ice was a key criterion in the agency president's hiring and firing decisions. Indeed, his employment philosophy pretty much could be summarized as being grounded on two premises: (1) good salesman were relatively easy to find and train, and (2) good hockey players were far rarer and thus much more to be valued.

Unfortunately for my visitors, their boss perceived a negative correlation between advancing age and athletic prowess. Indeed, even the four salesmen themselves, while claiming to be very successful in selling advertising,[17] did not deny that their glory days on the ice lay in the past. What was somewhat surprising was the employer's candor: in terminating the four men, the president—while mouthing the usual platitudes about "feeling badly and having great respect and affection for them, but really having no alternative"—actually was brazen enough to acknowledge that it was the salesmen's ebbing skills with stick and puck that were the key factors in his decisions to fire them.[18]

I told the four superannuated athletes that a reasonable argument—*i.e.*, an argument that had a reasonable chance of at least staving off a motion for summary judgment—could be made that the employer had utilized diminishing athletic prowess as a stand-in, or proxy, for age. I explained further (and remember, this was some years ago) that so-called age proxies had generated some case law favorable to plaintiffs.[19] In *Metz v. Transit Mix, Inc.*,[20] for example, the United States Court of

15. We also discussed the Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-101—5/10-103 (West 1993), and possible common law causes of action.

16. *See generally* 1-3 EGLIT, *supra* note 12.

17. As anyone who has practiced law knows, one always needs to cautiously credit a client's version of the facts when the client is first recounting the events that brought her to you.

18. This scenario occurred years before enactment of the ADA. Whether the same terminations would run afoul of this Act, were they to occur today, is doubtful; in any event, the question need not be resolved in this Article. One more point; some of the incidental facts, for example, those regarding the particular sports activity, have been changed so as to maintain confidentiality as to the persons involved.

19. *See, e.g.*, EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). *See generally* 1-2 EGLIT, *supra* note 12, §§ 4.19, 7.53.

20. 828 F.2d 1202 (7th Cir. 1987).

Appeals for the Seventh Circuit had held that cost-saving could not be used as a justification for terminating an employee when high salary correlated with seniority, and seniority in turn correlated with age.[21] In *Metz*, therefore, the plaintiff—a fifty-four-year-old who had long tenure with the employer and accordingly received the second highest salary in the company—was deemed by the court to have been a victim of illegal age discrimination because, in relying upon the salary criterion, the employer in effect had utilized, albeit in an indirect way, age as the basis for the decision to discharge.[22] (Today, such an argument almost certainly would fail, given the Supreme Court's 1993 ruling in *Hazen Paper Co. v. Biggins*,[23] in which the Court pretty much disemboweled the age-proxy case law.[24]) After some further discussion directed to fleshing out the essential factual and doctrinal contours of a winning ADEA case, I turned to the practical realities of the matter. What did my clients want? Moral vindication? Reinstatement? Back pay? Front pay? Their answers: moral vindication, yes; money, yes; reinstatement, no.

Insofar as financial compensation was concerned, it was here that the salesmen's desires collided—to their detriment—with doctrine. It is judicially-constructed black letter law that a discharged grievant who believes himself to be a victim of discrimination under the ADEA has a "duty"[25] to mitigate damages by making a reasonable effort to secure other, comparable employment.[26] Earnings that are received between

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21. *Id.* at 1211.

22. *Id.*

23. 507 U.S. 604 (1993).

24. There are a number of articles addressing the implications of *Hazen Paper*; some view it as foreclosing successful age-proxy arguments, while others view the decision as leaving open some measure of viability for age-proxy claims. *Compare* Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391 (1994) (latter view), *with* Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1 (1995) (former view), *and* Toni J. Querry, Note, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530 (1996) (former view).

25. For convenience's sake, I am going to refer—because so many commentators and courts do, as well—to the plaintiff's "duty." This word is a misnomer, however. *See supra* note 3.

26. There are a number of judicially constructed limits placed on the plaintiff's duty; these limits generally apply both in common law and statutory contexts. For example, it was asserted in an ADEA ruling that the plaintiff "need only make a reasonable and good faith effort, and is not held to the highest standards of diligence." Spulak v. K Mart Corp., 894 F.2d 1150, 1158 (10th Cir. 1990); *accord* Lathem v. Department of Children & Youth Servs., 172 F.3d 786, 794 (11th Cir. 1999) (suit arising under Title VII); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972) (suit arising under the NLRA).

If the plaintiff becomes disabled, he or she cannot be expected to seek other employment. *See* Loubrido v. Hull Dobbs Co., 526 F. Supp. 1055, 1061 (D.P.R. 1981) (ADEA decision). (By like token, in the instance of a post-discharge disability, the disabled plaintiff will not be able to recover back pay for the period he or she was disabled and therefore would not have been able to work for the defendant even had the defendant not wrongfully terminated the plaintiff. *See id.*) However, if the defendant caused the disability, the plaintiff will be relieved of her mitigation requirement. *See Lathem*, 172 F.3d at 794.

The plaintiff need not accept a job offer if the job is not comparable to his or her prior position.

the time of discharge and the date of judgment[27] and that could not have been secured but for the termination[28] will be deducted from the back

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Of course, determining comparability can be an ambiguous matter. Generally, it is correct to state that the plaintiff need not accept a job that constitutes a demotion. *See* Glass v. I.D.S. Fin. Servs., Inc., 778 F. Supp. 1029, 1075 (D. Minn. 1991) (ADEA decision). However, the plaintiff's claim that he or she would feel humiliated in the new position will not suffice to establish that it was not sufficiently comparable to the prior position. *See id.* Lack of comparability does not necessarily flow from the fact that the wages at the new position are less than those at the former one. *See* Logan v. Pena, 61 F.E.P. Cas. (BNA) 564, 567 (D. Kan. 1993) (ADEA decision).

An individual need not relocate if this would require leaving "home for a distant location," EEOC v. Pennsylvania, 772 F. Supp. 217, 222 (M.D. Pa. 1991) (ADEA decision), *aff'd on other grounds sub nom.* Binker v. Pennsylvania, 977 F.2d 738 (3d Cir. 1992), or would require moving to another community—at least if that community is not nearby, *see, e.g.*, Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 119 (4th Cir. 1983) (ADEA decision), Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983) (ADEA decision).

Self-employment can satisfy a plaintiff's mitigation requirement, "as long as the self-employment was a reasonable alternative to finding other comparable employment." Smith v. Great Am. Restaurants, Inc., 969 F.2d 430, 438 (7th Cir. 1992) (ADEA decision); *accord* Teichgraeber v. Memorial Union Corp. of Emporia State Univ., 932 F. Supp. 1263, 1266 (D. Kan. 1996) (ADEA decision). However, if that self-employment effort proves to be unsuccessful, at some point the plaintiff's continuing pursuit of that effort will be deemed to be an unreasonable mitigation effort and the plaintiff will have to seek other employment if he or she is to stave off a successful failure-to-mitigate argument by the defendant. *See Smith*, 969 F.2d at 438; *accord* Wilson v. Ohse Foods, 58 F.E.P. Cas. (BNA) 1640 (D. Kan. 1992) (ADEA decision). Pursuit of education may or may not satisfy the mitigation requirement. *See* Keller v. Connaught, Inc., No. CIV. A. 96-177, 1997 WL 56925 (E.D. Pa. Feb. 10, 1997) (ADEA decision).

The rejection by the plaintiff of an offer made by the defendant of the position that the plaintiff had sought, or from which he or she had been terminated or demoted, will constitute a failure of the plaintiff to mitigate, so long as that offer is for a position comparable to the one sought or lost and so long as it is not conditioned on the plaintiff giving up his or her cause of action arising out of the original alleged wrong. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 235-40 (1982) (Title VII case). This is so even if the offer does not include a further offer of retroactive seniority, *see id.* at 238, and even if it does not include an offer of back pay for the period between the alleged wrong and the subsequent offer to hire, promote, or reinstate, provided the offer is not conditioned on the plaintiff giving up his or her cause of action for such back pay, *see id.* at 233 n.19.

27. There is variation in the courts as to the trigger for terminating the accrual of back pay in statutory discrimination cases. Many courts use the date of trial (typically without specifying whether they mean the date of commencement or the date of termination of the trial). *See, e.g.*, Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1348 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); Wehr v. Burroughs Corp., 619 F.2d 276, 283 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979). Some courts look to the date the jury returns a verdict. *See, e.g.*, Watlington v. University of Puerto Rico, 751 F. Supp. 318, 330 (D.P.R. 1990); Coston v. Plitt Theatres, Inc., 44 F.E.P. Cas. (BNA) 1717 (N.D. Ill. 1986), *aff'd in part & rev'd in part on other grounds*, 831 F.2d 1321 (7th Cir. 1987), *vacated*, 486 U.S. 1020 (1988). Some courts use the date on which damages are settled. *See, e.g.*, Kolb v. Goldring, Inc., 694 F.2d 869, 874 n.4 (1st Cir. 1982); Loubrido v. Hull Dobbs Co., 526 F. Supp. 1055, 1058 (D.P.R. 1981). Some key the back pay award to the date of judgment, *see, e.g.*, Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1528 (11th Cir. 1991), Dunlap-McCuller v. Riese Org., 980 F.2d 153, 159 (2d Cir. 1992), *cert. denied*, 510 U.S. 908 (1993), or to the date judgment is entered, *see, e.g.*, Greene v. Union Mut. Life Ins. Co., 635 F. Supp. 1437, 1438 (D. Me. 1986), Merkel v. Scovill, Inc., 570 F. Supp. 141, 145 (S.D. Ohio 1983). *See generally* 2 EGLIT, *supra* note 12, § 8.09.

28. The courts do not deduct amounts earned from a second job that the plaintiff had, or could have had, even if she retained the job whose loss gave rise to suit. *See, e.g.*, Lilly v. City of Beckley, 797 F.2d 191, 196 (4th Cir. 1986); Rodriguez v. Taylor, 569 F.2d 1231, 1242 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Laugesen v. Anaconda Co., 510 F.2d 307, 317-18 (6th Cir. 1975). For example, if an individual takes an evening job after being fired from a daytime job, the income earned from the evening

pay award. Moreover, even if no successor job was obtained, the amount that *could have been* earned will be deducted, provided there was a comparable job that the plaintiff could have obtained had she exercised reasonable diligence in seeking it out.[29]

Thus, prevailing plaintiffs who are denied, let us say, annual salaries of $50,000 for two years as the result of wrongful discharges from daytime jobs will have deducted from their $100,000 back pay claims the interim earnings received from working at successor day jobs. Likewise, even if they did not secure new jobs, these claimants will be subject to deductions from their back pay claims of $100,000, the amounts representing what could have been earned from available comparable day jobs that could have been obtained had reasonable efforts been expended in seeking new employment.[30]

In order to focus on the mitigation duty, or principle,[31] as it specifically applied to the salesmen, I queried each of them as to his present and/or future work plans. Salesmen Nos. 1 and 2 both told me that within a couple of days of their having been fired word had spread in the advertising agency community of their availability and each had received several job offers. As a result, they already were working for other agencies, where each was receiving the same salary that he had earned with his former employer. In brief, the monetary loss each had suffered was minimal: about a week's worth of pay, at most.

Salesman No. 3 also had received some offers of comparable jobs, but he had turned them down. He regarded his firing as providing the welcome impetus to finally embark on the alternative career he had been considering for some time, and so he was already situated as a real estate agent with a local company. He anticipated that within eighteen months or so his income would be back to where it had been with the

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job will not be deducted from the back pay award attributable to the income lost by virtue of being terminated (unless, perhaps, the plaintiff simply would not have had the stamina to work two jobs and so her ability to handle the evening hours was, after all, tied to her days being free).

29. Even if the plaintiff did not exercise reasonable diligence, if there was no job that could have been found, the plaintiff will not be deemed to have failed to satisfy his or her "duty" to mitigate. *See* 3 DOBBS, *supra* note 4, § 12.21(2), at 481.

30. The burden of proof is on the defendant to prove that the plaintiff failed to adequately seek to mitigate. The exact nature of that burden has generated varying formulations. See Wehr v. Burroughs Corp., 619 F.2d 276, 278 n.3 (3d Cir. 1980) (ADEA defendant must prove that (1) plaintiff failed to exercise reasonable diligence to mitigate, and (2) there was a reasonable likelihood that plaintiff might have found comparable work by exercising reasonable diligence); Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978) (defendant must prove that (1) there were suitable positions available that plaintiff could have discovered and for which she was qualified, and (2) that plaintiff failed to use reasonable care and diligence in seeking such positions) (suit arising under Title VII); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 925 (S.D.N.Y.) (ADEA defendant must prove that plaintiff's course of conduct "was so deficient as to constitute an unreasonable failure to seek employment"), *aff'd*, 559 F.2d 1203 (2d Cir. 1976), *cert. denied*, 434 U.S. 920 (1977).

31. *See supra* note 3 regarding the term "mitigation principle."

ad agency. Salesman No. 4 likewise had rejected several good offers from other ad agencies. For him, too, his unexpected free time had proved to be a blessing in disguise. He long had felt that he was spending too little time with his kids and so he had decided that he was going to take a year off from working, which he figured he could manage with a little bit of scrimping, to stay at home as a "house dad."

In sum, the first two salesmen had satisfied their duty to mitigate so well that there was virtually no back pay to recover. As for the other two, it was problematic as to whether Salesman No. 3[32] would be able to surmount a failure-to-mitigate defense[33] and Salesman No. 4 certainly would not be able to do so. Thus, it followed that even if the four men were to win on the merits of their ADEA claims, Salesmen Nos. 1, 2, and 4 would recover either little (a week's worth at most) or no back pay, and very likely the same would hold true for Salesman No. 3.

With back pay and undesired reinstatement[34] out of the picture, what about other forms of relief?

Under the ADEA a plaintiff who is the victim of a willful violation of the Act can recover statutorily authorized liquidated damages in an amount equal to the back pay award.[35] The matter of willfulness has generated a considerable body of case law,[36] including three Supreme Court rulings.[37] Judicial decisions were beside the point, however, because any attempt to recover such damages here would have been fruitless: since the potential back pay awards effectively were zero, it followed that the liquidated damages awards (*i.e.*, one times zero) would be the same. With regard to damages for pain and suffering[38] and

32. The case law addressed to a discharged employee who undertakes self-employment following termination is mixed. In *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989), the ADEA plaintiff's efforts to mitigate were held to have ended at the point when, after having unsuccessfully sought employment, he began operating a small business. On the other hand, in *Smith v. Great American Restaurants, Inc.*, 969 F.2d 430 (7th Cir. 1992), the court held that an ADEA plaintiff's self-employment can constitute an adequate mitigation effort "as long as the self-employment was a reasonable alternative to finding other comparable employment." *Id.* at 438.

33. As to this being an affirmative defense, see *supra* note 30.

34. It is common for injunctive relief to be granted to a prevailing plaintiff whereby the defendant is ordered to reinstate the wrongfully terminated or demoted grievant or to instate the wrongfully rejected applicant for a job or a promotion. *See, e.g.*, EEOC v. Century Broad. Corp., 957 F.2d 1446, 1463 (7th Cir. 1992); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1448 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 280 (8th Cir. 1983). Here, however, the potential plaintiffs did not want such relief. As for damages in lieu of reinstatement, see *infra* notes 40-42 and accompanying text.

35. 29 U.S.C. § 626(b) (1994) (incorporating 29 U.S.C. § 216(b) (1994)).

36. *See generally* 2 EGLIT, *supra* note 12, §§ 8.30-8.38.

37. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

38. *See, e.g.*, Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984); Hilo v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983); Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982).

punitive damages,[39] a slew of decisions make absolutely clear today—as did the case law when the four salesmen visited with me—that both are unavailable under the ADEA. So much, then, for any claim by the salesmen arising out of alleged psychological distress. As for front pay, which is more formally known as damages in lieu of reinstatement and which constitutes compensation for the prevailing plaintiff's lost future income, the courts—while willing to make such awards—generally have been wary both as to authorizing such awards and as to the amounts awarded, given the speculative nature of such damages.[40] In any event, and more immediately relevant to the four salesmen, the mitigation principle was, and is, applicable in the front pay context.[41] Thus, for the already-discussed reasons explaining the salesmen's ability to recover either little or nothing by way of back pay awards, front pay recoveries also either would be foreclosed entirely, or would be minuscule at best.[42]

Now, one might conclude that all is well that ends well. Here, since each of the four salesmen either suffered no financial loss or chose to accept such loss as might come his way, things ended well: no harm was really done. Were the ADEA solely a vehicle for redress of individual wrongs, this understanding of the situation would be a legitimate one. However, there is more to the ADEA than its just serving as a means of compensating individual victims of wrongful decisions for their private losses. The statute also serves as a potentially powerful device for achieving broader aims, to wit, both the general enhancement of older workers' employment prospects and the general eradication of arbitrary age discrimination from the workplace.[43] Thus,

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39. *See, e.g.*, Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987); Walker v. Pettit Constr. Co., 605 F.2d 128 (4th Cir.), *modified on other grounds sub nom.* Frith v. Eastern Air Lines, Inc., 611 F.2d 950 (4th Cir. 1979); Murphy v. American Motors Sales Corp., 570 F.2d 1226 (5th Cir. 1978).

40. *See* 2 EGLIT, *supra* note 12, §§ 8.27-8.29.

41. *See, e.g.*, Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1562 (11th Cir. 1988); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

42. A few ADEA courts have stated that for a plaintiff to recover front pay, she must first request reinstatement or instatement, with an award of front pay ensuing when it is determined that such relief is infeasible. Thus, the failure to request reinstatement or instatement will be fatal to a front pay claim. *See, e.g.*, Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980). Here, since the plaintiffs did not want reinstatement, this case law would cut against their eligibility for front pay, even apart from the mitigation principle's impact on such an award. Most ADEA courts, however, do not require that reinstatement or instatement be requested as a predicate to the recovery of front pay. *See, e.g.*, Williams v. Valentic Kisco, Inc., 964 F.2d 723, 729-30 (8th Cir. 1992), *cert. denied*, 506 U.S. 1014 (1992); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Blim v. Western Elec. Co., 731 F.2d 1473, 1479 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984).

43. Section 2 of the ADEA sets out Congress's statement of its findings and of the Act's purposes:

> (a) the Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment and especially to retain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has

while in its narrow, compensatory aspect the Act effectuates Congress's political resolve to make whole the specific individual who has been victimized by ageism, the statute's more ambitious public interest function is the securing of bias-free work environments for *all* older individuals—both in the particular setting in which a particular victim of discrimination is, was, or wants to be, employed, as well as throughout the broader work world.

In sum, the private interest focus of the statute—*i.e.*, the redressing of individual harm—was not offended in the scenario involving the four salesmen. Each alleged victim turned out either not to have been harmed by the discrimination he suffered or to have accepted monetary loss as the price for some offsetting benefit. In contrast, however, the ADEA's larger public policy goals of specific and general deterrence through punishment were compromised. The salesmen's employer did not incur the financial pain that would have flowed from a settlement[44] or an adverse verdict. Nor did the ad agency even face, let alone suffer, the reputational injury that a courtroom finding of culpability could

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> become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employment acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621 (1994).

44. In Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, the author wrote as follows regarding settlement statistics:

> As to the settling of legal claims generally, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2-3 (1996). A recent survey of attorneys practicing in the employment discrimination area reveals just how prevalent settlements are. The researcher surveyed 321 members of the National Employment Lawyers Association, as well as 330 members of the Section of Labor and Employment Law of the American Bar Association. Employment law made up 80% of their practices. The defense attorneys estimated that 79% of their cases were settled prior to final adjudication, and the plaintiffs' attorneys gave an estimate of 84% of employment discrimination cases being settled prior to final adjudication. *See* [William J. Howard,] *Arbitrating Claims of Employment Discrimination*, [50 DISP. RESOL. J. 40,] . . . 43-44 [(1995)].
>
> One must take care in interpreting these data. They should not be read as suggesting that 79% or 84% of all claims, no matter how shallow or specious, generate settlements. These figures presumably only refer to those matters that make it past the initial screening that any reputable plaintiff's attorney undertakes. (I state "presumably" because the researcher from whose article these data are extracted did not provide further detail).

Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 595 n.53 (1997)

have generated. What is more, as long as the agency's president was shrewd enough or lucky enough to fire only salesmen who readily could land comparable jobs, future litigation likely would not be in the offing—this because the mitigation principle would discourage any efforts to pursue legal claims that on the one hand offered no prospect of financial gain even if successful, and on the other hand posed the onerous risk of unreimbursed costs and attorney's fees if unsuccessful.[45]

In brief, when a mistreated employee mitigates, or could have mitigated, the harm done, the result is that the discriminator's financial exposure is reduced (sometimes down to zero) and so the specific discriminator, and employers in general, are only subjected to diminished, and sometimes even no, behavior-modifying penalties for their wrongdoing. Thus, the mitigation principle that is applied to plaintiffs pursuing grievances under the ADEA actually undermines the deterrent and reformist goals of the statute. What is more, this paradoxical situation—*i.e.*, the undercutting of the ADEA's pro-employee aims by an employer-protective doctrine that insulates employers from punishment for their wrongdoing, or at least reduces the extent of their financial exposure—is not limited just to the ADEA litigation scenario. The mitigation principle, which has been infused into a facially silent ADEA by the courts, is an express component of the remedies scheme constructed by Title VII of the Civil Rights Act of 1964,[46] a statute that generates many more discrimination claims than does the ADEA.[47]

45. The ADEA authorizes the award of fees and costs to a prevailing plaintiff. 29 U.S.C. § 626(b) (1994) (incorporating § 16(b), 29 U.S.C. § 216(b) (1994), of the Fair Labor Standards Act, 29 U.S.C. §§ 200-219 (1994)). *See generally* Davis v. Combustion Eng'g, 742 F.2d 916 (6th Cir. 1984); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86 (2d Cir. 1983). Absent bad faith on the part of a losing plaintiff, a prevailing defendant will not be able to secure an award of its fees and costs. *See, e.g.*, Hoover v. Armco, Inc., 915 F.2d 355, 357 (8th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986).

46. 42 U.S.C. §§ 2000e—2000e-17 (1994).

47. The Equal Employment Opportunity Commission's (EEOC) Office of Research, Information and Planning periodically issues data setting forth by fiscal year the total number of discrimination charges filed with the agency under the various categories covered by Title VII, the ADEA, and the ADA, 42 U.S.C. §§ 12101-12189 (1994). (No data were provided regarding disability discrimination under the ADA for FY 1991, and the numbers for FY 1992 were very low because the EEOC's statutory authority to enforce the Act only commenced on July 26, 1992.) The following table sets out the data:

Charge Findings—FY 1991 to FY 1999

Category	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999
Total Charges	63,898	72,302	87,942	91,189	87,529	77,990	80,680	75,591	77,444
Race	27,981	29,548	31,695	31,656	29,986	26,287	29,199	28,820	28,819
	43.8%	40.9%	36.0%	34.8%	34.3%	33.8%	36.2%	36.2%	37.3%
Sex	17,672	21,796	23,919	25,860	26,181	23,813	24,728	24,454	23,907
	27.7%	30.1%	27.2%	28.4%	29.9%	30.6%	30.7%	30.7%	30.9%

Section 706(g)(1) of Title VII provides: "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."[48] Moreover, mitigation also is a facet of the remedies scheme devised for the Americans with Disabilities Act,[49] given that this statute expressly incorporates the enforcement and remedies provisions of Title VII.[50] And since the number of charges of discrimination being made under the ADA continues to mount rapidly,[51] the mitigation principle's application to such claims is of inarguably growing significance in this context, as well.[52]

Even though compensatory and punitive damages are available under Title VII and the ADA (but not the ADEA) and such awards are not—as is the case with liquidated damages under the ADEA—linked to the amount of the back pay award, such damages do little to diminish the adverse impact of the mitigation principle on Title VII's and the ADA's public interest aims.[53] This is because the amounts recoverable

National Origin	6,692	7,454	7,454	7,414	7,035	6,687	6,712	6,778	7,108
	10.5%	10.3%	8.5%	8.1%	8.0%	8.6%	8.3%	8.5%	9.2%
Religion	1,192	1,388	1,449	1,546	1,581	1,564	1,709	1,786	1,811
	1.9%	1.9%	1.6%	1.7%	1.8%	2.0%	2.1%	2.2%	2.3%
Retaliation	7,906	10,932	12,644	14,415	15,342	14,412	18,113	19,114	19,694
	12.4%	15.1%	14.4%	15.8%	17.5%	18.5%	22.5%	24.0%	25.4%
Age	17,550	19,573	19,809	19,618	17,416	15,719	15,785	15,191	14,141
	27.5%	27.1%	22.5%	21.5%	19.9%	20.2%	19.6%	19.1%	18.3%
Disability	NA	1,048	15,274	18,859	19,798	18,046	18,108	17,806	17,007
		1.4%	17.4%	20.7%	22.6%	23.1%	22.4%	22.4%	22.0%
Equal Pay Act	1,187	1,294	1,328	1,381	1,275	969	1,134	1,071	1,044
	1.9%	1.8%	1.5%	1.5%	1.5%	1.2%	1.4%	1.3%	1.3%

1 EGLIT, *supra* note 12, § 2.01, at 4 (2d ed. Supp. 2000).

48. 42 U.S.C. § 2000e-5(g)(1).

49. 42 U.S.C. §§ 12101-12189 (1994).

50. *Id.* § 12117.

51. *See supra* note 47 (table).

52. This Article addresses the so-called EEO (equal employment opportunity) federal statutes. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994), also bans discrimination by employers. *See supra* note 10. As is the case regarding Title VII, the ADEA, and the ADA, the mitigation principle also applies in the NLRA context. *See infra* Part III.B.

53. Over the years a number of commentators have noted, typically in cursory manner, the negative consequence of the so-called duty to mitigate. *See, e.g.*, Comment, *Title VII of the Civil Rights Act—A Prayer for Damages*, 5 CAL. W. L. REV. 252, 256 (1969); Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1252-53, 1259 (1971); Comment, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 492 (1968). *Cf.* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 478 (1992) (criticizing mitigation principle in context of remedies under National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994)); James J. Graham, *How Effective is the National Labor Relations Board?*, 48 MINN. L. REV. 1009, 1023 (1964) (pointing out that mitigation diminishes consequences for employers that violate National Labor Relations Act); *see also* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 208-209 (1990).

are limited[54] and also because the proof necessary to satisfy the statutory standard for punitive damages under the two statutes presents a significant hurdle for plaintiffs to surmount.[55]

II. THE BACKDROP: THE STATUTORY PRESCRIPTIONS FOR BACK PAY AND MITIGATION

A. Back Pay

There are two basic elements of relief available to the prevailing plaintiff under Title VII, the ADEA and the ADA: back pay and reinstatement (or, in the case of a wrongful refusal to hire, instatement).

Other commentators have endorsed the mitigation principle. *See, e.g.*, H. Richard Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L.J. 387, 395 (1968); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 466-67 (1965); Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113, 1121 (1981).

One of the most thoughtful critiques of the adequacy of back pay as a remedy for discrimination in violation of Title VII was set forth in an article published shortly prior to enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which, inter alia, added a new 42 U.S.C. § 1977A to authorize limited awards of compensatory and punitive damages. *See* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301 (1990). While noting that mitigation erodes the utility of the back pay award, *see id.* at 1306-07, Professor Kotkin focused on urging that the then as-yet unamended statute be amended to allow for compensatory and punitive damages; she did not address the most obvious solution to the inadequacy of the back pay award, *i.e.*, removal of the mitigation provision.

54. 42 U.S.C. § 1981a(b)(3) (1994) provides, in part, as follows:

> The sum of the amount of compensatory damages . . . and the amount of punitive damages . . . shall not exceed, for each complaining party—
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

55. Punitive damages under Title VII and the ADA can only be recovered where the defendant engaged in intentional discrimination, 42 U.S.C. § 1981a(a)(1), and did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1). In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Court rejected a reading of § 1981a as requiring that a plaintiff seeking punitive damages under Title VII must satisfy the heavy burden of establishing that the employer's conduct was egregious. *Id.* at 535. However, the Court pointed out that § 1981a(b)(1) requires the employer to have acted with malice or with reckless indifference to the plaintiff's federally protected rights, and it asserted that the terms malice and reckless indifference "pertain to the employer's knowledge that it may be acting in violation of federal law, not [merely] its awareness that it is engaging in discrimination." *Id.*

Back pay constitutes the amount that the plaintiff would have received by way of earnings had she not been wrongfully discharged, denied a job, or demoted. Actually, the term is a misnomer, since "pay" includes not just lost wages but also lost fringe benefits: stock options that the plaintiff would have been able to exercise were she working for the defendant;[56] lost sick leave time;[57] employer contributions to employee savings accounts;[58] the premiums the employer pays for health and life insurance coverage for its employees;[59] the value of the use of a company car;[60] and so on.[61]

Title VII ostensibly reposes in the trial court judge some discretion as to awarding back pay to a prevailing plaintiff,[62] but case law establishes that in fact the courts have very little choice in the matter. By judicial mandate back pay has come to be virtually a required remedy under Title VII for proven victims of discrimination who can further prove that they suffered losses of salary and/or benefits.[63] The same holds true for the ADA, given its incorporation of the Title VII enforcement and remedies schemes. The ADEA incorporates portions of the Fair Labor Standards Act (FLSA)[64] and thereby the age statute also prescribes, albeit in convoluted language because of the FLSA's not entirely harmonious fit within the ADEA context, back pay awards.[65]

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56. *See* Courtney v. Safelite Glass Corp., 811 F. Supp. 1466, 1476-77 (D. Kan. 1992).

57. *See* Whitfield v. City of Knoxville, 567 F. Supp. 1344, 1347 (E.D. Tenn. 1983), *aff'd on other grounds*, 756 F.2d 455 (6th Cir. 1985); Coates v. National Cash Register Co., 433 F. Supp. 655, 663 (W.D. Va. 1977).

58. *See, e.g.*, Gaworski v. I.T.T. Commercial Fin. Corp., 17 F.3d 1104 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994); Blim v. Western Elec. Co., 496 F. Supp. 818 (W.D. Okla. 1980), *aff'd in part & rev'd in part on other grounds*, 731 F.2d 1473 (10th Cir.), *cert. denied*, 469 U.S. 874 (1984).

59. *See, e.g.*, Fariss v. Lynchburg Foundry, 769 F.2d 958 (4th Cir. 1985); Worsowicz v. Nashua Corp., 612 F. Supp. 310 (D.N.H. 1985).

60. *See, e.g.*, Brunnemann v. Terra Int'l, Inc., 975 F.2d 175, 179 n.6 (5th Cir. 1992); Loubrido v. Hull Dobbs Co., 526 F. Supp. 1055 (D.P.R. 1981).

61. *See generally* 2 EGLIT, *supra* note 12, §§ 8.13-8.17.

62. 42 U.S.C. § 2000e-5(g)(1) (1994) provides that a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." Back pay is deemed to constitute equitable relief. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-17 (1975).

63. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); *see also* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 186 (1988) ("The right of a successful plaintiff to receive full restitution of back wages is virtually absolute.").

64. 29 U.S.C. §§ 201-219 (1994).

65. Section 7(b), 29 U.S.C. § 626(b) (1994), of the ADEA provides as follows:

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

Here, too, such awards are virtually mandatory once the plaintiff prevails on the merits of her discrimination claim and further proves a salary and/or benefits loss.[66]

The fullest Supreme Court explication of the back pay remedy in the statutory employment discrimination setting was set forth in *Albemarle Paper Co. v. Moody*,[67] a Title VII decision.[68] In affirming the reversal by the United States Court of Appeals for the Fourth Circuit of the trial court's refusal to award back pay to the prevailing plaintiffs,[69] the Court initially acknowledged that the statute makes the award of back pay a matter of discretion. However, it significantly limited that discretion. First, the Court articulated the policies animating Title VII:

> The District Court's decision must . . . be measured against the purposes which inform Title VII. As the Court observed in Griggs v. Duke Power Co., 401 U.S. [424,] at 429-430 [(1971)], . . . the primary objective was a prophylactic one:
>
> > "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[70]

In brief, back pay serves a broad societal goal, *i.e.*, the eradication of discrimination from the workplace. Indeed, in a subsequent Title VII ruling, *Ford Motor Co. v. EEOC*,[71] the Court identified this as the statute's chief purpose: "Title VII's primary goal, of course, *is* to end discrimination . . . . When unlawful discrimination does occur, Title VII's

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for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

66. *See* Gaworski v. I.T.T. Commercial Fin. Corp., 17 F.3d 1104, 1113 n.8 (8th Cir.), *cert. denied*, 513 U.S. 946 (1994); Anastasio v. Schering Corp., 838 F.2d 701, 708 (3d Cir. 1988); Bender v. Salvation Army, 830 F. Supp. 1454, 1456 (M.D. Fla. 1993).

67. 422 U.S. 405 (1975).

68. Title VII precedents are directly relevant vis-a-vis the ADA, given that the latter statute expressly incorporates the enforcement and remedies provisions of Title VII. 42 U.S.C. § 12117 (1994). As for the ADEA, courts construing that statute regularly have looked to Title VII decisions as providing very persuasive analogical guidance for construing the age discrimination statute—particularly its prohibitory provisions. *See* cases cited *infra* note 195.

69. The trial court based its refusal on two grounds: first, a lack of evidence of bad faith noncompliance with Title VII on the part of the defendants, and second, the fact that the defendants would be substantially prejudiced by a back pay award because that award was demanded late in the course of the litigation and contrary to an earlier representation by the plaintiffs. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 413 (1975). The Court of Appeals, in reversing, held that back pay could be denied only in "special circumstances." Albemarle Paper Co. v. Moody, 474 F.2d 134, 142 (4th Cir. 1973), *vacated on other grounds*, 422 U.S. 405 (1975).

70. *Albemarle Paper Co.*, 422 U.S. at 417.

71. 458 U.S. 219 (1982).

secondary, fallback purpose is to compensate the victims for their injuries."[72]

The *Albemarle Paper Co.* Court explained how back pay awards effectuate Title VII's broad prophylactic policy:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[73]

In sum, back pay awards under Title VII serve a deterrent function that is integral to achieving the public interest aim of the statute. Such awards further serve to effectuate the private interest end that also is a focus of the statute, *i.e.*, making the victim of discrimination whole—an end which "is made evident by the legislative history" of Title VII.[74] The same two goals are served by the ADA, which incorporates the Title VII remedies scheme, and by the ADEA as well, as pointed out in *Rodriguez v. Taylor*:[75]

> First, the prospect of economic penalties more certainly deters illegal employment practice than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct.[76]

Given the dual roles of back pay awards, "[i]t follows," so the *Albemarle Paper Co.* Court reasoned, "that . . . backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[77] This is a view that also has been expressly articulated as to the ADEA,[78] and that has been established implicitly as to the ADA, given its incorporation of Title VII's remedies scheme.

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72. *Id.* at 230.

73. *Albermarle Paper Co.*, 422 U.S. at 417-18 (alteration in original) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

74. *Id.* at 419.

75. 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

76. *Id.* at 1237.

77. *Albermarle Paper Co.*, 422 U.S. at 421.

78. *See, e.g.*, Gaworski v. I.T.T. Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994), *cert. denied*, 513 U.S. 946 (1994); Anastasio v. Schering Corp., 838 F.2d 701, 708 (3d Cir. 1988).

B. The Mitigation Principle

1. Title VII

Insofar as mitigation is concerned, Title VII precludes judicial discretion: section 706(g)(1) directs that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable."[79] The language is clear on its face, and so the fact that the legislative history offers no elucidation is irrelevant to the provision's actual application in specific cases. But the silent legislative record, discussed below, is revelatory: it confirms that Congress embraced the mitigation principle without any discernible analysis of its aptness or consequences.

President Kennedy submitted to the Congress the proposed Civil Rights Act of 1963 on June 19, 1963.[80] The Administration bill was introduced by the chairman of the House Committee on the Judiciary, Congressman Celler, as H.R. 7152.[81] The bill's Title VII called for the creation of a commission whose task would be to prevent discrimination in employment by government contractors and subcontractors in federally assisted programs. Thus, while the bill did contain a title addressing discrimination in employment, this proposal was quite different than the ultimately-enacted Title VII, which applies across the private sector.

In the House Judiciary Committee a subcommittee significantly revised H.R. 7152.[82] The initially proposed Title VII was deleted and replaced (still under the designation of H.R. 7152) by the text of H.R. 405,[83] a bill that already had been approved by the House Committee on Education and Labor but had not yet been considered by the House Rules Committee, the gatekeeper that decides which bills proceed forward and what restrictions apply to the bills' consideration by the full House. The revised H.R. 7152 was in a number of respects similar to what we today know as Title VII. It banned discrimination in employment because of race, religion, color, national origin, and ancestry. It

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79. 42 U.S.C. § 2000e-5(g)(1) (1994) (emphasis added).

80. *See* John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, 1964 PUB. PAPERS 483-94.

81. H.R. 7152, 88th Cong. (1963). A companion bill, S. 1731, was introduced in the Senate and referred to the Senate Committee on the Judiciary. S. Res. 1731, 88th Cong. (1963). This bill was never reported out of committee.

82. The subcommittee held 22 days of hearings on "a total of one hundred seventy-two bills, including six . . . that contained comprehensive provisions outlawing discrimination in private employment." Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 434 (1966).

83. H.R. 405, 88th Cong. (1963).

applied to employers with twenty-five or more employees, to labor organizations with twenty-five or more members, and to employment agencies. Enforcement authority was vested in an Equal Employment Opportunity Commission (EEOC) which, unlike today's Commission, was modeled on the National Labor Relations Board. This version of the enforcement scheme envisioned the Commission being made up of an Administrator who would investigate complaints and bring formal charges, and a five-member Board which would hear and determine cases brought by the Administrator and would issue cease-and-desist orders in those instances where a determination was made that unlawful discrimination had occurred. Of more immediate relevance here, H.R. 405—now embedded in H.R. 7152—contained the same mitigation principle that today is set forth in Title VII.[84]

H.R. 7152, now embodying the text of H.R. 405, was revised by the full House Judiciary Committee. In response to objections regarding the proposed EEOC's enforcement authority, a different enforcement scheme was substituted for the subcommittee bill's version. This new structure was derived from still another equal employment opportunity bill, H.R. 10,144,[85] that had been reported out of committee by the House Education and Labor Committee in the previous Congress and that, but for the enforcement provisions, was similar to H.R. 405. The new enforcement scheme that the Judiciary Committee bill adopted envisioned the EEOC as a prosecuting agency that could neither adjudicate cases nor issue cease-and-desist orders, but rather only could seek relief through civil suits in federal court, where trials de novo would then ensue.[86]

H.R. 7152, as revised, was reported out of the Judiciary Committee (with some additional changes, including deletion of "ancestry" from the list of forbidden bases for employment decisions).[87] After extensive debates and some changes (including the addition of "sex" to the list of

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84. Section 9(j) of H.R. 405 provided, *inter alia*:

> If, upon the preponderance of the evidence . . . the Commission shall find that the respondent engaged in any unlawful employment practice, the Commission shall issue and cause to be served on such person and other parties an order requiring such person to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . as will effectuate the policies of the Act: *Provided*, That interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

Equal Employment Opportunity: Hearings Before the General Subcomm. on Labor of the Comm. on Educ. & Labor, 88th Cong. 7-8 (1963).

85. H.R. 10,144, 87th Cong. (1962), *accompanied by* Comm. on Educ. & Labor, Equal Employment Opportunity Act of 1962, H.R. REP. NO. 87-1370 (1962), *reprinted in* EEOC LEGISLATIVE HISTORY, *infra* note 95, at 2012.

86. See Vaas, *supra* note 82, at 435-37, for the explanation of this change.

87. *See id.* at 438-42.

forbidden bases for employment decisions), the bill was passed by the House on February 10, 1964.[88]

The Senate then spent fifty-eight days debating H.R. 7152; this followed seventeen days of debate on procedural issues, including the question of whether the bill even should be considered.[89] During the course of this extensive period a compromise bill was drafted by Senate Minority Leader Dirksen, Senate Majority Leader Mansfield, and Senators Humphrey and Kuchel, along with leaders from the House, Johnson Administration representatives, and other senators. The Mansfield-Dirksen amended bill, in the nature of a substitute for the entire H.R. 7152, was presented to the Senate on May 26, 1964.[90] A substitute for this substitute subsequently was submitted by Senators Dirksen, Mansfield, Humphrey and Kuchel on June 10, 1964.[91] This substitute, which was further amended, was passed on June 19, 1964.[92] It then was agreed to by the House on July 2, 1964.[93] Later that day, the bill was signed into law.[94]

Throughout the convoluted history of Title VII, the mitigation provision that we know today persisted. As was noted earlier, it was in the bill that was adopted by the House Committee on Education and Labor, *i.e.*, H.R. 405,[95] which bill in turn was embraced by the House Judiciary Committee in H.R. 7152,[96] which bill subsequently was supplanted by substitute bills, which again contained the mitigation provision. Throughout the journey from proposal to law, however,

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88. See id. at 443.

89. One author explained as follows:

> After House passage, H.R. 7152, in the normal course, would have been referred to the Senate Judiciary Committee, presided over by Senator Eastland of Mississippi, which had already buried the companion bill, S. 1731. . . . Accordingly, the proponents of the bill sought to have the bill taken up directly, thus bypassing the Judiciary Committee. From March 9 until March 26 the Senate engaged in extended debate on a motion to take up the bill, before voting to proceed to its formal consideration and against referring it to committee, 110 Cong. Rec. 6205, 6244 (3-26-64). Thereafter, debate on the bill itself continued substantially without interruption until June 10, when cloture was imposed by a vote of 71-29, an effective margin of only five votes.

Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 66 n.8 (1964).

90. *See* Vaas, *supra* note 82, at 445.

91. *See id.* at 446.

92. *See id.* at 444-47.

93. *See id.* at 446.

94. *See id.*

95. *See* Comm. on Educ. & Labor, Equal Employment Opportunity Act of 1962, H.R. REP. NO. 87-1370 (1962), *reprinted in* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2167 [hereinafter EEOC LEGISLATIVE HISTORY].

96. *See* Comm. on the Judiciary, H.R. Rep. No. 88-914 (1963), *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 95, at 2012.

there was no explanation offered as to the mitigation provision's rationale. All that the committee report issued by the House Judiciary Committee set forth was a recitation of the provision.[97] As for the compromise bill ultimately enacted into law, there were no committee hearings or reports. And the debates in the House and Senate were devoid of discussion regarding the mitigation principle.

2. The ADA

Because a specific provision of the ADA, *i.e.*, 42 U.S.C. § 12117, incorporates the remedies scheme of Title VII, the same back pay remedy and mitigation requirement are statutorily mandated vis-a-vis awards made under the disability discrimination statute. As was the case regarding Title VII, here, too, there was no discussion either in committee reports or in the House and Senate debates regarding the merits or demerits of the mitigation principle. While the more general issue of relief *was* addressed in the committee reports or elsewhere, all that was perfunctorily written or said—save for one instance—was that the remedies provisions of Title VII were incorporated into the ADA.[98] The only extended discussion regarding remedies arose in the course of debate on an amendment offered by Representative Sensenbrenner to ensure that the Title VII remedies to be incorporated were only those that existed at the time the ADA legislation was being debated, and not any remedies that might be added to Title VII in the future.[99] However, true to form, during the debate on this amendment, which was defeated, nothing was said regarding the mitigation issue.[100]

3. The ADEA

Unlike Title VII, the ADEA is facially silent as to mitigation. The legislative history offers no explanation for this. One can engage in conjecture as to the lack of a mitigation provision in the Act, but no certain answer emerges.

First, it perhaps is relevant to note that the ADEA's prohibitory language tracks that of Title VII—a fact that has been remarked upon

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97. *Id.* at 2029.

98. *See generally* BERNARD D. REAMS, JR., ET AL., DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990—PUBLIC LAW 101-336 (1992).

99. See 136 CONG. REC. H2612-23 (daily ed. May 22, 1990).

100. *See id.*

by a number of courts.[101] Thus, given that in drafting the ADEA the Congress in part took as its model Title VII, one might reasonably have expected that the two statutes' enforcement provisions also would parallel each other. However, when Congress fashioned the age statute, it rejected the National Labor Relations Act[102] enforcement scheme to which Title VII in some measure looks;[103] rather, the legislators relied on the FLSA[104] as their model for ADEA enforcement. The FLSA does not set forth on its face a mitigation requirement, and it is this fact that arguably explains why the ADEA also does not do so. However, this explanation (such as it is) for the ADEA's silence on the matter loses force in light of the fact that the NLRA likewise does not facially contain a mitigation requirement, yet that did not deter the drafters of Title VII from setting forth an express mitigation provision.[105] Accordingly, silence on the FLSA's part does not seem to offer much by way of a convincing rationale for a comparable approach in the ADEA.[106]

A second explanation for the ADEA's silence vis-a-vis the matter of mitigation looks to the fact that there were a few pre-ADEA FLSA cases in which courts had imposed set-offs of interim earnings against grievants' back pay awards,[107] and so one might surmise that Congress perhaps assumed that the same judicial construction would ensue when the ADEA would come to be litigated.[108] However, this explanation for the ADEA's silence on the mitigation issue also is unpersuasive. After all, there was in 1964 a much more significant backdrop of NLRA judicial and administrative rulings supporting mitigation, and yet the existence of these analogical guides did not forestall Congress's expressly placing a mitigation provision in Title VII.

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101. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1978); Lorillard v. Pons, 434 U.S. 575, 584 (1978).

102. 29 U.S.C. §§ 151-169 (1994).

103. *See infra* Section III.

104. *See* H.R. REP. NO. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2218 (the statute's remedial provisions "essentially follow those of the Fair Labor Standards Act"); S. REP. NO. 90-723 (1967), *reprinted in part in* 113 CONG. REC. 31,249 (1967).

105. The case for invoking the interpretive practice of treating like statutes alike, see *infra* note 195, hardly supports reading into the age discrimination statute the mitigation principle that the courts have infused into the NLRA. The NLRA and the ADEA are alike only in terms of their mutual silence on the mitigation issue, and to regard statutory silence as signifying statutory kinship would be to link thousands of statutes that resemble each other only by virtue of what they do not say, rather than what they do say—an absurd interpretive posture.

106. Actually, the silence in the FLSA is itself more explicable. Given that the FLSA addresses issues concerning wage rates and maximum hour limits, rather than terminations per se, the typical FLSA grievant will not have lost her job and thus will not have had the occasion to seek other employment. *See* Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113, 1113 (1981).

107. *See, e.g.*, Mitchell v. Dyess, 180 F. Supp. 852, 854 (S.D. Ala. 1960).

108. *See* Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 579 n.103 (1986).

A third explanation takes the ADEA's silence at face value: Congress omitted a mitigation provision for the simple reason that it did not want the mitigation principle to come into play for ADEA plaintiffs. This rationale gathers strength from the fact that when Congress enacted the ADEA its focus was on middle-aged workers, *i.e.*, those forty-five and older, and these individuals—according to the Labor Department study on which Congress particularly relied—found it enormously difficult to secure new employment.[109] Imposing a required mitigation effort on discharged forty-five- or fifty-year-olds could have been seen as pointless, given that a critical animating force for adoption of the statute was the understanding that these unfortunate men and women indeed could not—because of their ages—secure new employment.[110] On the other hand, if the statute were to prove successful in reducing or even eradicating age discrimination in the workplace, it would follow that fifty-year-olds then indeed would be better able to secure new jobs, and so a mitigation requirement would have been appropriate after all (assuming one subscribed in the first instance to the premise that the common law cases and the subsequent Title VII model were correct in imposing such a requirement). Thus, explaining the ADEA's silence as being a function of the unemployability of older workers loses at least some strength. Again on the other hand, however, perhaps Congress simply did not choose to look too far down the road, or did not think to do so, and so either intentionally or unintentionally did not take account of the possibility that mitigation would be useful if the ADEA proved to be successful.

Whatever the process that led to the absence of the mitigation principle in the ADEA, that omission quickly was negated by the courts. Numerous judicial rulings have prescribed mitigation in ADEA cases.[111] Thus, for example, in deciding *Laugesen v. Anaconda Co.*[112] the United States Court of Appeals for the Sixth Circuit stated that "[a]ny

109. *See* U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT 6 (1965) ("The most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications.") [hereinafter THE OLDER AMERICAN WORKER]. The study also stated that "[t]here . . . [was] persistent and widespread use of age limits in hiring that in a great many cases . . . [could] be attributed only to arbitrary discrimination against older workers on the basis of age." *Id.* at 21.

110. *See* 113 CONG. REC. 34,744-45, 34,751 (1967) (statements of Reps. Perkins, Pucinski, Eilberg and Dwyer).

111. *See, e.g.*, Payne v. Security Sav. & Loan Ass'n, F.A., 924 F.2d 109, 110 (7th Cir. 1991); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1468 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983); Cline v. Roadway Express, Inc., 689 F.2d 481, 488 (4th Cir. 1982); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809 (8th Cir. 1982); EEOC v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980). *See generally* 2 EGLIT, *supra* note 12, §§ 8.18-8.20. This result is in accord with the urgings of at least one commentator. *See, e.g.*, Richards, *supra* note 14, at 318.

112. 510 F.2d 307 (6th Cir. 1975).

remuneration that Laugesen received following his discharge should be set off from the damages . . . to the extent that it actually mitigated his losses."[113] More generally, it has been observed that ADEA courts typically have directly asserted "that the plaintiff must exercise reasonable diligence or make reasonable efforts to secure other employment."[114] Or these courts effectively, albeit not overtly, have "establish[ed] the mitigation requirement indirectly by basing the computation of damages on back or front pay less amounts that could have been earned through reasonable diligence."[115] In any event, the ADEA courts' opinions demonstrate the same lack of analysis that is seen in the legislative history of Title VII. For example, the United States Court of Appeals for the Fourth Circuit, in deciding *Spagnuolo v. Whirlpool Corp.*,[116] simply made an unsupported reference to the plaintiff's "obligation to mitigate damages." In the same vein, a district court in 1971 opined—without citation—that "damages should properly equal the difference between the value of the compensation by way of salary [and benefits] . . . and the value of [the plaintiff's] total benefits and earnings at other jobs from his discharge until the trial date."[117] This assertion then was approvingly quoted without any analysis by the United States Court of Appeals for the Eighth Circuit in *Brennan v. Ace Hardware Corp.*[118] Thereby, the law of that circuit was simplistically established.

4. A Necessary Look Back

Given the foregoing recitation of the statutes' drafting and interpretive histories, one can conclude that the mitigation principle emerged in each Act devoid of any discernible substantive discussion or analysis. One must look beyond legislative history and judicial interpretation, then, to understand how the employer-protective mitigation principle came to be a fixed facet of three statutes whose primary foci are the protection of employees in the workplace.

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113. *Id.* at 317-18.

114. 2 EGLIT, *supra* note 12, § 8.18, at 8-80 (footnote omitted); *see* Payne v. Security Sav. & Loan Ass'n, F.A., 924 F.2d 109, 110 (7th Cir. 1991); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1468 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); Coleman v. City of Omaha, 714 F.2d 704, 808 (8th Cir. 1983).

115. 2 EGLIT, *supra* note 12, § 8.18, at 8-80.

116. 641 F.2d 1109, 1114 (4th Cir. 1981).

117. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 234-35 (N.D. Ga. 1971) (footnotes omitted).

118. 495 F.2d 368, 373 (8th Cir. 1974).

III. THE PROGENITORS OF TITLE VII'S, THE ADEA'S, AND THE ADA'S MITIGATION PRINCIPLE

A. Introduction

In *Ford Motor Co. v. EEOC*[119] the Supreme Court held that the rejections by the plaintiffs of jobs offered to them by the defendant subsequent to their filing a Title VII suit constituted fatal errors on their parts.[120] By spurning these offers, the plaintiffs were deemed to have defaulted on their "statutory duty to minimize damages,"[121] and so the accrual of back pay ceased when the offers were rejected. In justifying its conclusion the Court looked back in time: "[t]his duty [*i.e.*, the "duty" to mitigate], rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment."[122] In support of this statement the *Ford Motor Co.* Court cited two sources—a 1935 treatise on damages and a 1941 decision concerning relief under the National Labor Relations Act:

> McCormick [, LAW OF DAMAGES (1935)] summarizes "the general rule" as follows: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Id.*, at 127.
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> In connection with the remedial provisions of the NLRA, we said: "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-198 (1941).[123]

To the extent, then, that one can extract post hoc rationales for the Title VII mitigation provision, two emerge in *Ford Motor Co.* The Court invoked tradition: the mitigation principle is of ancient vintage. In addition, the Court quoted from *Phelps Dodge Corp. v. NLRB*,[124] where the Court justified endorsement of the principle in the NLRA context as

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119. 458 U.S. 219 (1982).

120. *Id.* at 225-40.

121. *Id.* at 231. Obviously, the use of the misnomer "duty," *see supra* note 3, is not limited just to the lower courts.

122. *Ford Motor Co.*, 458 U.S. at 231.

123. *Id.* at 231 n.15.

124. 313 U.S. 177 (1941).

being required by fairness.[125] As for the citation to Dean McCormick's treatise, the particular statement the Court relied upon was largely an *ipse dixit*: the plaintiff must avoid damages because the plaintiff must avoid damages. Actually, however, Dean McCormick elsewhere in his treatise provided an economic efficiency justification for the principle—a justification discussed in Part IV.A. of this Article.[126]

Examination of *Ford Motor Co.*'s benchmarks, *i.e.*, tradition and fairness, is in order.

1. Not-So-Ancient Roots: The Common Law Genesis of the Mitigation Principle

Hoary tradition was a touchstone for the 1982 *Ford Motor Co.* Court's invocation of the mitigation principle. And certainly judicial (or other) adherence over time to a given proposition or doctrine can constitute convincing confirmation of its enduring value. It is only *foolish* consistency, after all, that is "the hobgoblin of little minds."[127] In fact, however, the cases cited by Dean McCormick, the Court's apparent authority for its perception of the mitigation principle as having ancient roots, fell short in vindicating the principle's supposed ancient vintage—at least in the employment context. Of the twenty decisions cited in that section of Dean McCormick's treatise (which was published in 1935) that was most directly concerned with the mitigation principle as applied to victims of wrongful employment decisions, sixteen were decided in the twentieth century.[128] Of the remaining four, one was handed down in 1898 and two were rendered in 1890.[129] Thus, insofar as the McCormick treatise's authoritativeness is concerned, the mitigation principle's supposed ancient roots (in the eyes of the *Ford Motor Co.* Court) actually were quite shallow: most of the cases were of relatively recent vintage at the time the treatise was published, and even forty-seven years later, when *Ford Motor Co.* was decided, the supporting decisions were still within the reckoning of living memory.

One must look beyond Dean McCormick, then, to test the accuracy of the *Ford Motor Co.* Court's understanding of the mitigation

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125. *Id.* at 198.

126. *See infra* note 232 and accompanying text. The author of the treatise was dean of the University of Texas Law School during the 1940s.

127. Ralph Waldo Emerson, *Self-Reliance*, *in* SELECTIONS FROM RALPH WALDO EMERSON 147, 153 (1957) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

128. *See* MCCORMICK, *supra* note 2, at 629-30 nn.16-25. Dean McCormick cited four earlier cases—*Williams v. Chicago Coal Co.*, 60 Ill. 149 (1871); *Levin v. Standard Fashion Co.*, 11 N.Y.S. 706 (1890); *County of Galveston v. Ducie*, 45 S.W. 798 (Tex. 1898); *Simon v. Allen*, 76 Tex. 398 (1890).

129. *See supra* note 128. The remaining cited case was decided in 1871.

principle as having an ancient ancestry. This enterprise takes one back, initially, to an 1816 British case, *Gandell v. Pontigny*,[130] in which Lord Ellenborough established the doctrine of constructive service.[131] Subsequently embraced by some American courts,[132] this doctrine held that an individual who had been wrongfully discharged could sue on the breached contract as each claim for salary came due—let us say, every two weeks—provided he was available to return to the former employer's service.[133] Accordingly, the grievant would not, indeed could not, suffer the detriment imposed by the mitigation principle, *i.e.*, deduction of the moneys he had earned, or could have earned at a comparable new position (were one obtainable through the exercise of reasonable diligence), from his back pay claim. This was because in order to preserve a viable cause of action he had to remain unemployed so as to be in constant readiness to return to his former employer.[134] Thus, in early ninteenth century England the general avoidable consequences, or mitigation, doctrine did not apply in the employment context.

In the years following *Gandell* the constructive service doctrine was—as noted[135]—endorsed by some, albeit a minority, of American courts; ultimately, however, it disappeared from the legal scene.[136]

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130. 171 Eng. Rep. 119 (1816).

131. *Id.* at 119-20.

132. *See, e.g.*, Fowler & Prout v. Armour, 24 Ala. 194 (1854); Ramey v. Holcombe, 21 Ala. 567 (1852); Isaacs v. Davies, 68 Ga. 169 (1881); Williams v. Luckett, 26 So. 967 (Miss. 1899).

133. *See Gandell*, 117 Eng. Rep. at 119.

134. *See* Casenote, *Damages—Contracts—Wrongful Discharge a Breach of Contract of Service*, 31 YALE L.J. 441, 442 (1922). *Gandell* understandably did not address the treatment of interim earnings in a situation where the discharged employee in fact secured another job because in such a circumstance the plaintiff would not even have a cause of action, since a basic element of the constructive service doctrine, *i.e.*, readiness to work, would not have been satisfied. Nor did the *Gandell* court say anything regarding any deductions from the amount actually sought by the plaintiff. However, it should be noted that the plaintiff's claim in *Gandell* actually was a limited one. His contract called for the payment of 200 pounds for the year, which salary was to be paid in quarterly installments, *i.e.*, 50 pounds per quarter. *See Gandell*, 117 Eng. Rep. at 119. Midway through one quarter he was discharged. The employer paid him 25 pounds, and the plaintiff sought an additional 25 pounds, which represented the amount he claimed was due for the rest of the quarter. Thus, while Gandell did prevail, he did not seek or recover payment for anything but the remainder of the quarter during the course of which he was discharged. There is no way of knowing whether the court might have treated differently the issue of a right of recovery or the issue of mitigation had the plaintiff made a claim for moneys allegedly due for succeeding quarters.

135. *See supra* note 132 and accompanying text.

136. Professor Farnsworth pointed to a "leading American case decided in 1875"—*Howard v. Daly*, 61 N.Y. 362 (1875)—as rejecting the constructive service doctrine and endorsing the mitigation principle. Farnsworth, *supra* note 1, at 1188. In 1935 Dean McCormick pointed out that the constructive service doctrine at that time survived in only a minority of jurisdictions. *See* MCCORMICK, *supra* note 2, at 625-26. Even in England *Gandell* was relatively soon repudiated. *See* Emmens v. Elderton, 94 Rev. Rep. 288 (1853). The basis for the doctrine's demise was explained as follows:

> Perhaps the reason most generally assigned for rejecting the doctrine is that it can not be reconciled with the rule of damages that a person discharged from service must not remain idle, but must seek employment elsewhere. It is a doctrine [, so it is said,] which instills in

That which supplanted the constructive service doctrine in those jurisdictions where the latter analysis had been embraced, or that filled in the doctrinal void which existed in other jurisdictions, was the mitigation principle.[137] A very early reference to this principle was set forth in *Byrd v. Boyd*,[138] an 1827 decision by the South Carolina Supreme Court. Addressing the question of what was due a plaintiff who had been discharged after he had performed for a period of time, but whose performance did not extend all the way to the terminal date of the contract, the court observed in dictum as follows:

> The English cases go very far in establishing that contracts particularly with servants and seamen cannot be apportioned, and that the performance of the service is a condition precedent to the payment of wages, and they result in the rule, that when they are prevented from performing it by the misconduct of the master, they are entitled to the stipulated wages for the whole time, and e converso, they are entitled to nothing if they abandon the service voluntarily. And yet the rule has been so far relaxed as to entitle the master to a deduction of any sum which a seaman may have earned in another vessel in the mean time. This rule is evidently the result of expediency, especially as applied to seamen.[139]

The *Byrd* court did not rule on the applicability of the mitigation principle to the facts before it; rather, it veered off in a different direction. Nor did it suggest whether the mitigation principle that it perceived as being applied by English courts in the instance of seamen applied to other work settings.

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discharged employees the spirit of laziness.

Herbert D. Laube, *The Defaulting Employee*—Britton v. Turner *Re-Viewed*, 83 U. PA. L. REV. 825, 838 (1935) (footnotes omitted).

137. The same is true with regard to the evolution of doctrine in Great Britain. In *Beckham v. Drake*, 9 Eng. Rep. 1213, II H.L.C. 579 (1849), Justice Erle, arguing to the House of Lords in a case involving a bankruptcy issue, observed as follows:

> The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment.

9 Eng. Rep. at 1223, II H.L.C. at 606-07.

138. 15 S.C.L. (4 McCord) 246 (1827).

139. *Id.* at 247 (citations omitted). The court's reference to the notion that an employee who voluntarily quit would not be able to recover anything—even for the work already performed—was reflective of another employer-protective doctrine that was developing virtually contemporaneously with the absorption of the mitigation principle into employment law. *See infra* note 181 and accompanying text.

The law of seamen adverted to in the quotation was earlier addressed in *Ward v. Ames*, 9 Johns. 137, 138 (N.Y. Sup. Ct. 1812): "It is an acknowledged principle in the marine law, that if the master unjustly dismiss a seaman, during a voyage, he is entitled to his full wages for the voyage." *Id.*; *accord* Hoyt v. Wildfire, 3 Johns. 518, 519 (N.Y. Sup. Ct. 1808). Neither opinion, however, at all discussed the matters of a set-off of subsequent wages or mitigation—matters to which the *Byrd* court made reference.

Twelve years later, what appears to be the seminal decision addressing mitigation in the employment context, *Shannon v. Comstock*,[140] was rendered by the New York Supreme Court of Judicature. Comstock, who along with three partners owned a boat that traveled on the Champlain Canal, entered into a contract with the defendants to transport some horses to Albany. While twelve animals were delivered to the boat for transport, they proved to be too restive to keep on board and so, after the passage of about an hour's time, the defendants took them off the boat and abandoned the idea of getting them to Albany in that manner. The plaintiffs sued, claiming that they were ready and able to perform and that the defendants had breached the contract by changing their transportation plans. In response, the defendants sought to prove that the plaintiffs' damages did not exceed five dollars, but their evidence was excluded. The trial court instructed the jury that the plaintiffs were entitled to recover the contract price, and the jury rendered a verdict for twenty-five dollars. The appellate court reversed, however, and in so doing articulated the mitigation principle:[141]

> Here we have a contract to sell labor and services. On the vendee declining them, the vendor sells them to another or converts them to his own use: in other words, he goes about his business in another direction, which fetches him the same or nearly the same, or more, perhaps, than the agreed price, which has failed. This is necessarily so, unless the vendor of the labor choose to lie idle, for the supposed length of time which performance would have demanded. But that he has no right to do.[142]

The *Shannon* court, having condemned worker idleness, next invoked a Maine Supreme Court ruling, *Miller v. Mariner's Church*,[143] that was

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140. 21 Wend. 457 (N.Y. Sup. Ct. 1839).

141. On its facts *Shannon* itself is not entirely on point, since it dealt with plaintiffs who were independent contractors, rather than employees of the defendant. *Id.* at 458. But in dictum the court clearly addressed the employer-employee relationship. *See id.* at 462. Moreover, the decision's regular citation by later courts addressing the claims of discharged employees establishes its role as a seminal American employment decision.

142. *Id.* at 461.

143. 7 Me. 51 (1830). *Miller* arose out of a contract for the sale and delivery of stones by Miller, the warden of a state prison, to the church. *Miller*, 7 Me. at 52. (Presumably, the stones were to be dug and cut by the prison inmates. Presumably, also, the inmates were not to receive any of the proceeds. The actual opinion is silent as to these matters.) As a result of the late delivery of the stones, the church claimed that the contract had been breached and it sought damages arising from what the court termed "loss of labor," loss of rents, and the defective character of the work. *Id.* at 52. As the excerpt from the *Shannon* ruling reveals, *see* note 144 and accompanying text, the *Miller* court obviously spoke in mitigation terms. *Shannon*, 21 Wend. at 461. But the case did not involve an employment relationship; rather, it concerned a contract for the sale of goods. Thus, the rhetoric of the court—which focussed on the general avoidable consequences doctrine, of which mitigation in the employment context is the key manifestation—is not factually on point in terms of tracing the genesis of the mitigation principle in the workplace setting. Even so, *Miller* often was cited in later employment cases involving mitigation.

rendered in a non-employment case but that nonetheless clearly was deemed of great import by the New York court for the normative prescription the Maine court articulated:

> The rule on this subject is well laid down by Mellen, Ch. J., in *Miller v. Mariner's Church*, 3 *Greenl.* 51, 55, 56. "In general, the delinquent party is holden to make good the loss occasioned by the delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions and other expenses of resale, from the purchaser. If the party entitled to the benefit of the contract can protect himself from the loss arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his *social duty*, if he omit to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable."[144]

The *Shannon* court then applied the Maine ruling to the employment scenario:

> The reason and justice of these remarks [by the *Miller* court] are open to continual illustration in the affairs of men. A mason is engaged to work for a month, and tenders himself and offers to perform, but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month. Clearly, his loss is but one day; and it is his duty to seek other employment. Idleness is in itself a breach of *moral obligation*. But if he continue idle for the purpose of charging another, he superadds a fraud, which the law had rather punish than countenance.[145]

The *Shannon* court went on to point out that the defendants were themselves blameless—the plaintiffs' loss "arose from [the defendants'] mere misfortune."[146] Indeed, "all the witnesses concur[red] that the failure [of the contract] was from causes which the defendants could not have anticipated, much less have controlled."[147] Ultimately, the court ruled that since the trial court had excluded the defendants' evidence as to how the plaintiffs might have mitigated their loss by taking on another customer, reversal was in order.

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144. *Shannon*, 21 Wend. at 461-62 (emphasis added).
145. *Id.* at 462 (emphasis added).
146. *Id.*
147. *Id.*

Thus, the *Shannon* court endorsed mitigation as a means of achieving two goods. First, it effectuated the plaintiff's "social duty," *i.e.*, a duty to minimize the breaching party's losses, that concededly was not confined just to discharged workers, but rather—as illustrated by *Mariner's Church*—was a duty that extended generally to all victims of contract breaches. Second, and here was the facet of the judgmental computation that particularly focused on breaches in the employment setting, the injured party had a "moral obligation" to not remain idle. Nothing was said of the wronged parties' mistreatment by the defendants. Indeed, the court depicted the latter as blameless victims of circumstance, and given the particular facts of the case, such a characterization of the defendants perhaps was legitimate. Even so, it is instructive to note that the court engaged in no effort whatsoever to likewise portray the plaintiffs—who, after all, were no more responsible for the restiveness of the horses than were the defendants—as the victims of that same unanticipated circumstance. Rather, the plaintiffs—not the breaching parties—had moral and social duties to satisfy, which duties, if not fulfilled, would justify a reduction in their damage award.

Shannon was invoked the next year (by the same judge who wrote the *Shannon* opinion) in *Heckscher v. McCrea*,[148] a case concerning the amount of damages due an owner of a ship plying the China trade who had failed to secure an alternative cargo in China to fill the ship's hold when the defendants failed to deliver the goods that they had agreed to provide for transport back to New York. The defendants argued that the plaintiff's acquisition of alternative goods would have diminished the loss that the captain claimed he had suffered by virtue of returning from China with an empty cargo hold. In the course of ruling for the defendants, the court set forth dicta relevant to the employer-employee relationship:

> The . . . question is . . . whether . . . the master [of the vessel] did not owe . . . [a] duty to the defendants which he has unwarrantably refused to discharge. By failing to perform, and that promptly, I admit the defendants had already subjected themselves to an action for damages. That they do not deny; but it by no means follows that where a man has hired out the services of his person or his property at a stipulated price, and the employer has failed to perform, the employee may, either by lying still, or omitting to engage otherwise in the general line of his business, as a matter of course subject his employer to a payment of the whole contract price. We lately had

148. 24 Wend. 304 (N.Y. Sup. Ct. 1840).

occasion to consider this rule as applied to canal freight in *Shannon v. Comstock* . . . .[149]

The court proceeded to quote, as had the *Shannon* court, from *Miller v. Mariner's Church*: "'If the party entitled to the benefit of the contract can protect himself from a loss arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so . . . .'"[150] Thus, once again the notion of the plaintiff's social duty was brought into play. And once again an overlay of moral righteousness was added to the analytic mix, for the *Heckscher* court went on, having just quoted from *Miller*, to opine that "[a] doctrine so sound in morals, I never could have suspected to be wanting in any department of the law."[151]

Costigan v. Mohawk and Hudson Railroad Co.,[152] the next key New York ruling, was issued in 1846. It further solidified the mitigation principle. The court also made the point—one to which virtually all courts today subscribe[153]—that the defendant bears the burden of proving that the plaintiff with reasonable diligence could have found comparable employment.[154]

A year later Theodore Sedgwick's very influential *A Treatise on the Measure of Damages*[155] was published. At this point, in 1847, Sedgwick did not at all address the mitigation principle in the context of employer and employee (or master and servant). But just five years later, in the treatise's second edition, Sedgwick now endorsed the principle.[156] He described a then-recent English case, *Smith v. Thompson*,[157] which involved a plaintiff who had been employed as a clerk pursuant to a contract of two years' duration and who been discharged by the defendant, allegedly because he had disobeyed orders and, moreover, had misappropriated the employer's funds. The jury found for the plaintiff and awarded him one year's salary. Sedgwick had no problem with the verdict per se, but he deemed the computation of damages defective because amounts that the clerk had earned or might have earned elsewhere following his discharge were not taken into account:

149. *Id.* at 309.

150. *Id.* at 310 (quoting Miller v. Mariner's Church, 7 Me. 51, 55-56 (1830)). The *Heckscher* court did not entirely accurately quote from the *Miller* decision, for the *Miller* court actually wrote as follows: "If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense, or with reasonable exertions, he fails in his social duty if he omits to do so . . . ." *Miller*, 7 Me. at 55.

151. *Heckscher*, 24 Wend. at 309.

152. 2 Denio 609 (N.Y. Sup. Ct. 1846).

153. *See supra* note 30.

154. *See Costigan*, 2 Denio at 616.

155. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1847).

156. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (2d ed. 1852).

157. 137 Eng. Rep. 424 (1849).

> That there is a rule in cases of this kind seems not to me to be doubtful; and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recover whatever the plaintiff might during the period have reasonably earned.[158]

Other jurisdictions' courts, often citing *Shannon*, *Heckscher*, and/or *Costigan*,[159] embraced the mitigation principle in increasing numbers as the nineteenth century wore on.[160] For example, in 1849 the Arkansas

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158. SEDGWICK, *supra* note 156, at 352.

159. *See, e.g.*, Holloway v. Talbot, 70 Ala. 389, 392 (1881); Benziger v. Miller, 50 Ala. 206 (1874); Van Winkle v. Satterfield, 58 Ark. 617, 25 S.W. 1113 (1894); Rosenberger v. Pacific Coast Ry., 111 Cal. 313, 43 P. 963 (1896); Saxonia Mining & Reduction Co. v. Cook, 70 Colo. 569, 4 P. 111 (1884); Fuller v. Little, 61 Ill. 21 (1871); Hinchcliffe v. Koontz, 121 Ind. 422, 23 N.E. 271 (1890); Heavilon v. Kramer, 31 Ind. 241 (1869); Sutherland v. Wyer, 67 Me. 64 (1877); Cumberland & Pennsylvania R.R. v. Slack, 45 Md. 161 (1876); Owen v. Union Match Co., 48 Mich. 348, 12 N.W. 175 (1882); McMullan v. Dickinson Co., 63 Minn. 405, 65 N.W. 661 (1896); Horn v. Western Land Ass'n, 22 Minn. 233 (1875); Odoneal v. Henry, 70 Miss. 172, 12 So. 154 (1892); Lewis v. Atlas Mut. Life Ins. Co., 61 Mo. 534 (1876); Pond v. Wyman, 15 Mo. 175 (1851); Miller v. Woolman-Todd Boot & Shoe Co., 26 Mo. App. 57 (1887); Squire v. Wright, 1 Mo. App. 172 (1876); Hendrickson v. Anderson, 50 N.C. (5 Jones) 246 (1858); Chamberlin v. Morgan, 68 Pa. 168 (1871); King & Graham v. Steiren, 44 Pa. 99 (1862); Allen v. Maronne, 93 Tenn. 161, 23 S.W. 113 (1893); Congregation of Children of Israel v. Peres, 42 Tenn. (2 Cold) 620 (1866); Jones v. Jones, 32 Tenn. (2 Swan) 605 (1853); Watson v. Gray's Harbor Brick Co., 3 Wash. 283, 28 P. 527 (1891); Kennedy v. South Shore Lumber Co., 102 Wis. 284, 78 N.W. 567 (1899); Winkler v. Racine Wagon & Carriage Co., 99 Wis. 184, 74 N.W. 793, 794 (1898); Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630 (1869). *Accord* Leatherberry v. Odell, Regan & Co., 7 Fed. 641 (W.D. N.C. 1880). *See also* Meade v. Rutledge, 11 Tex. 44 (1853); Sherman v. Champlain Transp. Co., 31 Vt. 162, 179 (1858). *But see* Williams v. Chicago Coal Co., 60 Ill. 149, 156 (1871) (no deduction of post-discharge earnings from plaintiff's award where the post-discharge job was "different in character and more severe in the performance").

In *Farrell v. School Dist. No. 2*, 98 Mich. 43, 56 N.W. 1053 (1893), the court drew a distinction between discharge and denial of hire situations. In the former, the mitigation principle was deemed to apply, but in the latter it was not deemed applicable. *See id.* at 1054. In *Pond v. Wyman*, 15 Mo. 175 (1851), the court disagreed to some extent with *Costigan*. *Id.* at 184. It read *Costigan* as only bringing the mitigation principle into play when the plaintiff received an offer of employment similar to that from which he had been discharged; the *Pond* court held that an offer within the "line of the plaintiff's occupation" would halt the accrual of back pay, and so the offer did not have to be for a similar job. *Id.*

160. H.G. Wood's treatise on employment law is in accord. Rejecting the doctrine of constructive service and embracing the mitigation principle, the treatise author wrote as follows:

> The broad statement made in some of the cases, that the plaintiff is entitled to recover his wages for the entire term, if he has been wrongfully discharged, if he has at all times held himself in readiness to discharge those services when required to do so, is not intended in that sense, and is not in conformity with principle or authority. *Prima facie* this is the rule of recovery, but really it is limited to the *actual loss* which the servant sustains, which is the amount he would have received if he had been permitted to complete his contract, *less what he has earned in the meantime, or what he might have earned by due diligence in seeking employment.* If he finds employment at the same wages, or even higher, he is entitled to recover for the time actually lost, but if he finds employment at less wages the measure of recovery is the difference between the amount earned and what the master was to pay him. The law simply intending to save the servant from actual loss by the master's breach of the contract. It is the duty of a servant discharged without cause to make the best use of his or her time for the balance of the term; and the master may always show, in mitigation of damages, that he

Supreme Court invoked these rulings in the course of subscribing to the mitigation principle in *Walworth v. Pool*,[161] a case involving a plantation overseer whose job disappeared when the land he was to oversee was flooded (through no fault of the plantation owner) and the year's potential crops thereby were destroyed. The court, while not stating that the overseer had a duty to seek other employment,[162] did hold that the salary earned at the job the plaintiff in fact subsequently obtained was to be deducted from his claim against the defendant. In so ruling the court praised the mitigation principle as one of the great inventions of the modern mind:

> [The rule] is manifestly based on principles of obvious equity, and which, perhaps, like many of the rules of the common law courts, has either found its way into these tribunals through the medium of the admiralty and equity courts, which had adopted it from the civil law, or else the exigencies of society, in a more advanced state of civilization and refinement, have developed it from the latent powers and capacity of the common law to subserve the great end of its mission to the Anglo Saxon race. Be this as it may, however, it is so fully recognized by the courts, and so well sustained by reason, justice and authority, that we hesitate not to recognize it as a rule of the common law courts . . . .[163]

In a number of these rulings the courts expressed, sometimes explicitly but sometimes more ambiguously through tone and nuance, the disapprobation of idleness that infused the earlier New York rulings. For example, by 1875 the notion that the willful idleness of a discharged employee was a moral vice was firmly embedded in the jurisprudence of New York State. In contrast to *Shannon*, where there at least was an argument to be made that the breaching parties were themselves blameless victims of circumstance, in *Howard v. Daly*[164] the Court of Appeals excoriated idleness even while acknowledging that it was the wrongdoing of the employer that cast the plaintiff into his jobless status: "Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor . . . ."[165] Rather,

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might have procured employment elsewhere.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 246-47 (2d ed. 1886) (footnotes omitted); *see also* J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 2087 (John R. Berryman ed., 3d ed. 1903).

161. 9 Ark. 394 (1849).

162. By 1894 the Supreme Court of Arkansas was holding that sums that the discharged plaintiff employee could have earned had he obtained other employment were to be deducted, as well, from his claim. *See* Van Winkle v. Satterfield, 58 Ark. 617, 25 S.W. 1113, 1114 (1894).

163. *Walworth*, 9 Ark. at 399.

164. 61 N.Y. 362 (1875).

165. *Id.* at 373-74.

the mitigation principle was a "great and beneficent rule of law, [ensuring] that a person discharged from service must not remain idle, but must accept employment elsewhere if offered."[166] Accordingly, the *Daly* court rejected the earlier-discussed doctrine of constructive service:

> If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law [*i.e.*, the mitigation principle] should call upon him to accept other employment, while another rule required him to remain idle in order that he may recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amounts of labor.[167]

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166. *Id.* at 373.

167. *Id.* at 373-74. Idleness of course long has been condemned in Anglo-American culture, and the laws reifying that culture. Six and one-half centuries ago the Statute of Labourers provided as follows:

> *EDWARD by the grace of God, &c. to the reverend father in Christ,* William, *by the same grace archbishop of* Canterbury, *primate of all* England, *greeting. Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, (2) and some rather willing to beg in idleness, than by labour to get their living; we, considering the grievous incommodities, which of the lack especially of ploughmen and such labourers may hereafter come, have upon deliberation and treaty with the prelates and the nobles, and learned men assisting us, of their mutual counsel, ordained:*
>
> CAP. I.
>
> *Every person able in body under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him, or else committed to the gaol, until he find surety to serve.*
>
> THAT every man and woman of our realm of *England*, of what condition he be, free or bond, able in body, and within the age of threescore years, not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, nor proper land, about whose tillage he may himself occupy, and not serving any other, if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require. And take only the wages, livery, meed, or salary, which were accustomed to be given in the places where he oweth to serve, the xx. year of our reign of *England*, or five or six other common years next before. Provided always, That the lords be preferred before other in their bondmen or their land tenants, so in their service to be retained: so that nevertheless the said lords shall retain no more than be necessary for them. And if any such man or woman, being so required to serve, will not the same do, that proved by two true men before the sheriff or the bailiffs of our sovereign lord the King, or the constables of the town where the same shall happen to be done, he shall anon be taken by them or any of them, and committed to the next gaol, there to remain under strait keeping, till he find surety to serve in the form aforesaid.
>
> CAP. II.
>
> *If a workman or servant depart from service before the time agreed upon, he shall be imprisoned.*
>
> ITEM, If any reaper, mower, or other workman or servant, of what estate or condition that he be, retained in any man's service, do depart from the said service without reasonable cause or licence, before the term agreed, he shall have pain of imprisonment. And that none under the same pain presume to receive or to retain any such in his service.

Statute of Labourers, 23 Edw. III (1349).

Professor Friedman has written of the condemnation of idleness in the American colonies:

In like vein, six years earlier, in 1869, the California Supreme Court in *Utter v. Chapman*[168] had relied upon *Heckscher* and *Shannon* in insisting that the discharged plaintiffs "may not refuse employment from others."[169] And reiterating a familiar theme four years after *Howard v. Daly*, in 1879, the Alabama Supreme Court wrote in *Strauss v. Meertief*:[170] "[W]hoever seeks redress for an injury from the conduct of another, is under a moral and legal duty to use due diligence in preventing loss thereby."[171] Accordingly, the person who is discharged "may not continue unemployed from choice . . . [for] [n]either good morals, nor the law, will countenance him in persisting voluntarily in idleness."[172]

Cavil with the mitigation principle was almost non-existent. Indeed, a lone Minnesota Supreme Court 1864 ruling was singularly notable for the court's refusal to fall unthinkingly into line. The court actually found fault with the proposition that a wrongdoer should have its liability reduced:

> If . . . [a man] is discharged by his employer, without cause, . . . it is held that he cannot (necessarily) recover the balance of . . . wages, but only such damages as he has actually sustained, that is, the difference between the agreed price and such sum as he has, or which it is shown he might have, received for work elsewhere. This seems to be placed on the ground that the employed "has no right to be idle—that it is a breach of moral obligation." However true this may be in fact, and however much interest society may have in the industry of each and all its members, I fail to see on what sound principle a man is to be punished for it in this manner, or why the employer should be relieved from the consequences of a willful breach of contract, because the employed has committed a breach of moral obligation.[173]

Despite the Minnesota court's objection to the mitigation principle, which—as the court pointed out—was based on the premise that worker idleness was immoral, the court's discomfiture was not enough for it to

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> In the early days of colonial life, it was a common rule, both North and South, that every able-bodied man had a duty to work. Idleness was a punishable offense. No person, said the *Laws and Liberties of Massachusetts* (1648) shall "spend his time idlely or unprofittably under pain of such punishment as the Court of Assistants or County Court shall think meet to inflict." This principle was never formally abandoned. But in time, it became a matter of caste and class. The magistrates of early New England had to work hard with their hands, just as servants did. In the 18th century there was a definite leisure class, the families of the merchants and planters and their families. Only the poor were impressed into work gangs; only the poor paid their road taxes in personal sweat.

LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 81 (2d ed. 1985).

168. 38 Cal. 659 (1869).
169. *Id.* at 666.
170. 64 Ala. 299 (1879).
171. *Id.* at 307.
172. *Id.* at 308.
173. Williams v. Anderson, 9 Minn. 39, 43 (1864).

reject the principle: "I think . . . [it] to be too well settled to be now disturbed, and that this is one of those principles in which, perhaps, the rule of *stare decisis* is applicable, if in any it should govern."[174] The court then looked to *Shannon*, *Heckscher*, and *Costigan* in coming to the ultimate conclusion that the mitigation principle had to be upheld.

In sum, the mitigation principle—as applied in the employment context by nineteenth century common law courts—expressed judicial affirmation of a perceived social obligation on the part of all breach victims to minimize their victimizers' losses. But the principle also—and in particular—was reflective of a factor unique to the employment context: the perceived moral odiousness of worker idleness. As for the matter of the moral rectitude (or lack thereof) of breaching employers, the courts typically were silent,[175] although it is true that one can read into the subsidiary case law some implicit acknowledgment of the employer's fault. (More specifically, it is true that the courts agreed that the employer had—and still has, today—the burden of proving that the plaintiff secured, or could have secured, other employment.[176] There also was, and still is, other case law tempering the rigor of the discharged employee's "duty."[177] These ameliorative cases, however, did not alter the ultimate fact that it typically was the innocent, but potentially idle, employee who was the focus of condemnatory judicial language, as *Shannon*, *Heckscher*, *Walworth*, *Utter*, *Howard* and *Strauss* illustrate.)

2. Other Employer-Protective Common Law Developments

The mitigation principle that first was applied by nineteenth century courts to employer-employee disputes was, and continues to be, employer-protective. It was certainly not unique, however, either in terms of its orientation or even its temporal appearance on the legal scene. During the nineteenth and early twentieth centuries, the courts were quite willing to devise doctrinal rejections of employee interests.

Christopher Tomlins has trenchantly explored the changing social, historical, and ideological facets of the employment relationship in the nineteenth century.[178] One key development, Tomlins writes, was the establishment of all employment relationships as contractual in nature,

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174. *Id.*

175. *But see* Pond v. Wyman, 15 Mo. 175, 183 (1851).

176. *See supra* note 30.

177. The courts generally have reached consensus as to a number of positions that are supportive of the victimized plaintiff. For example, it is agreed that a discharged employee need not seek a new job in a distant geographical location. *See supra* note 26.

178. *See* CHRISTOPHER L. TOMLINS, LAW , LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (2d ed. 1997).

notwithstanding that this relationship in fact did not originate as such.[179] This development had particular relevance for the application of the mitigation principle to terminated employees that was emerging in the 1830s and 1840s virtually contemporaneously with the articulation of contract as the basis of the employment relationship. Since the mitigation principle, or the doctrine of avoidable consequences, applies in contract law,[180] characterization of the employee-employer relationship as contractual no doubt facilitated application of the mitigation principle to that relationship.

Another doctrinal development that flowed from defining employment relationships as being contractual in nature was reflected in a body of case law denying to employees who left their jobs prior to the end of the contractual term any right to recover the wages due them for work that had been performed by the time they quit. This development, too, occurred virtually contemporaneously with the emergence of the mitigation principle's application to the employment relationship. Tomlins wrote as follows:

> At first, lower court trials of this issue tended to result in the employee's recovery of wages owed on a plea of *quantum meruit* (what the plaintiff reasonably deserved to have), compensating employers for actual costs where appropriate by deducting expenses accruing from the premature departure in setoff. As in employer suits for damages, then, lower courts allowed compensation for actual loss but did not

179. *See id.* at 268-70 (footnotes omitted):

> Although writers such as Kent and Dane were moving to define the master/servant relationship far more widely than had been the case thirty years before, their descriptions of its doctrinal ambit still tended to be constructed in part through reference to the categories of *persons* considered properly subject to its rules. When Timothy Walker came to address the matter in 1837, however [in Timothy Walker, An Introduction to American Law (Philadelphia 1837)] he succeeded in engineering a major refinement. Whereas in previous treatise writers' hands master/servant had described the sorts of employment relationships in which one of the parties was considered routinely subject to the controlling authority of the other, Walker reinterpreted *all* employment relationships in that light. . . .
>
> . . . .
>
> Ostensibly, the form of this new universal relation of employment was wholly contractual, the design of any particular employment situation the product of the parties' joined wills and interpreted as such. Certainly according to Walker all matters between the employer and the employed were settled as matters of contract . . . . Theophilus Parson spoke to the same point sixteen years after Walker [in Theophilus Parson, The Law of Contracts (Boston 1853)]. . . . Certainly, . . . midcentury courts did have resort to just such formal contractualist discourse in employment cases. . . .
>
> In short [however], Walker and Parsons notwithstanding, the shape of the employment relation did not originate with the law of contracts. It originated in received common law understandings of what was entailed in being a master and a servant, an employer and an employee. Representing employment relations in the voluntarist language of contract thus mystified the existence and exercise of power in the employment relationship.

180. *See infra* notes 228-29 and accompanying text.

> grant the employer the full value of the employee's promise. Almost unanimously during the first half of the century, however, courts of record hearing cases on appeal disallowed lower court recoveries, holding that an employment contract was an entire contract, and therefore that no obligation to pay wages existed until the employee had completed the agreed term.[181]

The consequence of this doctrine of "entire contracts" necessarily was to discourage employees from leaving their jobs—a boon for employers desirous of retaining their workers (particularly those with valued skills or those for whom replacements would be hard to come by). On the other hand, an employer could discharge his employee, knowing that that individual then had a duty to seek to mitigate damages—again, a boon for the employer, particularly in times of full employment when the likelihood was high that the discharged worker would or could secure another job.

Later in the century other judicial responses restrictive of employee rights came to enjoy broad currency at the same time that the mitigation principle was spreading throughout the various states. Starting in the 1880s, for example, hostile equity courts began regularly to enjoin workers' efforts to secure through organized effort improved working conditions.[182] In the latter part of the nineteenth century, the courts also

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181. TOMLINS, *supra* note 178, at 273-74 (footnotes omitted); *see also* Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677.

182. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). Forbath wrote:

> Although estimates are incomplete, there seem to have been relatively few criminal conspiracy trials of trade unionists until the 1870s, and sanctions, in general, were surprisingly mild. In the 1870s and 1880s, however, sanctions grew harsher. This new severity emerged within the context of the city-wide boycott and new, more comprehensive strike ambitions on the part of miners and other unions.
>
> In addition to stoking judicial hostility, these developments promoted a swift change in the characteristic form of legal intervention in labor strife. By 1895, conspiracy prosecutions for strike activities had dwindled to a handful each year, while labor injunctions were multiplying. By a conservative reckoning, at least 4,300 injunctions were issued between 1880 and 1930. These amounted to only a small fraction of the total number of strikes for most of those five decades, although by the 1920s the fraction had increased to 25 percent. The proportion of large secondary actions enjoined, however, was substantial throughout this period. In the 1890s, the decade that saw the greatest number of sympathy strikes in the country's history, courts enjoined at least 15 percent of recorded sympathy strikes. That percentage rose to 25 percent in the next decade, and by the 1920s 46 percent of all sympathy strikes were greeted by anti-strike decrees. Injunctions figured in virtually every railroad strike; in most strikes in which industrial unionism, "amalgamation," or "federation" was at issue; in most major organizing and recognition strikes, boycotts, closed shop or sympathy strikes or anti-union/open-shop lockouts of significant magnitude; and in a small but still significant and growing portion of ordinary mine-run strikes.

Id. at 61-62 (footnotes omitted).

fashioned the employer-protective employment-at-will doctrine, affording employers the freedom under the law to terminate employees for any reason—good, bad, or whimsical.[183] While judicial explanations represented the doctrine as simply confirming the symmetry of the employer-employee relationship, whereby each party to the relationship had the freedom to terminate it, the doctrine of course actually served to expand the economic and workplace power of already-advantaged employers, while doing nothing to enhance the weak position of workers who, given their typically parlous economic circumstances, often were not in positions to exercise their supposed freedom by willy-nilly quitting their jobs.[184] Not surprisingly, the doctrine spread quickly: it was adopted in three states prior to 1870; another five between 1870 and 1879; four more in the next decade; thirteen between 1890 and 1899; and another five between 1900 and 1909.[185]

There are two reasons for briefly noting these foregoing developments. First, they highlight the fact that the infusion of the mitigation principle into the employment setting cannot be dismissed as an aberrant departure from the general flow of the law. Rather, it was consistent with other nineteenth century judicial responses to, and support for, the legal dominance of the employer in the employee-employer relationship. Second, and more importantly, attention to these other developments draws into focus the fact that the courts' and legislatures' continuing endorsement of the mitigation principle stands in notable contrast to these entities' responses in this century to those other manifestation of the nineteenth century judiciary's tilt in the employer's favor. The "entire contract" construction only prevailed until the 1850s.[186] The federal courts' power to enjoin labor organizing activities was very significantly curtailed more than seventy years ago by

183. Several explanations have been offered for the appearance and rapid spread of the employment-at-will doctrine in the late nineteenth century. These rationale typically entail ascribing to the courts political and/or economic motivations as the driving forces generating the rule. Thus, the employment-at-will rule's ascendancy in the nineteenth century has been variously explained as being consistent with, and supportive of, the then-dominant laissez faire economic philosophy, *see, e.g.*, Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 458 (1979), Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 690-92 (1994); as a means by which the capitalist class staved off the possibility of an emerging middle class made up of educated professionals from obtaining economic and workplace power, *see* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 132-34 (1976); or as resulting from two social and political phenomena: a weak trade union movement and a lack of social class distinctions, *see* Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85 (1982).

184. *See* Feinman, *supra* note 183, at 132-34.

185. *See* Morriss, *supra* note 183, at 699; *see also* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Feinman, *supra* note 183.

186. *See* TOMLINS, *supra* note 178, at 278 n.58.

enactment of the Norris-LaGuardia Act[187] in 1932. And common law state courts' adherence to the employment-at-will doctrine has been weakening in the last twenty or so years by virtue of a significant number of decisions erecting exceptions to the doctrine.[188] Meanwhile, however, the mitigation principle continues to hold unmitigated sway.

3. Summary

If the mitigation principle is justifiable in the statutory equal employment opportunity setting, it is not because persuasive justifications for its consistency with the statutes' anti-discrimination aims flow from the common law precedents. Indeed, a review of this case law uncovers an antipathy directed toward workers, who were seen as potential idlers whose indolence—if it were to be tolerated—would constitute a breach of the claimants' obligations to society and an affront to sound moral values. Recognition of these nineteenth century judicial orientations leads to the conclusion that the common law decisions should be recognized as being in spirit, at least, inapposite to twentieth century reformist statutes devised to protect individuals from workplace mistreatment perceived as so pernicious as to evoke the enactment of corrective national legislation, *i.e.*, Title VII, the ADEA, and the ADA.

B. The National Labor Relations Act Analogy

Apart from Dean McCormick's treatise addressing common law decisions, the other identified basis for the *Ford Motor Co.* Court's ready

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187. 29 U.S.C. §§ 101-115 (1994).

188. According to an article published in 1992, 43 jurisdictions by that point in time had recognized in some form a so-called "retaliatory discharge" cause of action as a limit on the employer's freedom to fire at-will employees under some circumstances. *See* Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 394 (1992). For example, numerous courts have held that an employer can be held liable for firing an injured employee who disregards an employer's order to not file a workers' compensation claim. *See, e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979).

A few courts have relied upon the covenant of good faith and fair dealing implicit in every contractual relationship, and so have held that a wrongful discharge violates that covenant and thus constitutes a breach of contract. *See, e.g.*, Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982) (applying California law); Fortune v. N.C.R. Co., 373 Mass. 96, 101, 364 N.E.2d 1251, 1255-56 (1977). *Contra* Conaway v. Control Data Corp., 955 F.2d 358, 361 (5th Cir.), *cert. denied*, 506 U.S. 864 (1992) (applying Texas law); Smitley v. Cigna Corp., 640 F. Supp. 397, 401 (D. Kan. 1986) (applying Kansas law); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 297, 448 N.E.2d 86, 87 (1983). Most courts that have erected exceptions to the employment-at-will doctrine have deemed a wrongful discharge to sound in tort. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law); Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984). *See generally* M.A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544 (1982).

embrace of Title VII's mitigation principle was its decision rendered some forty-plus years earlier in *Phelps Dodge Corp. v. NLRB*.[189] This invocation of a decision construing the NLRA[190] hardly was a unique rhetorical and analytical tack: numerous Title VII courts regularly have cited the NLRA as being the model for Title VII and its enforcement scheme.[191] For example, in *Albemarle Paper Co. v. Moody*[192] the Court observed that "[t]he backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act."[193] Thus, inasmuch as both the National Labor Relations Board (NLRB) and NLRA courts have embraced the mitigation principle, it follows—so the reasoning goes—that the principle is an apt one for the Title VII setting, as well.[194]

Arguments by way of analogy are persuasive only if the analogy itself holds up. Here, it does so weakly, at best.

1. Language Comparisons

When two statutes share identical, or even similar, language, it is common judicial practice to accord the enactments like interpretations.[195] While Title VII does contain an express mitigation

189. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n.15 (1982) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

190. 29 U.S.C. §§ 151-167 (1994).

191. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982); Berger v. Iron Workers Reinforced Rodmen Local 201, 170 F.3d 1111, 1133 n.11 (D.C. Cir. 1999); Musikiwamba v. Essi, Inc., 760 F.2d 740, 748 (7th Cir. 1985); Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 (11th Cir. 1982); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 194-96 (6th Cir. 1978).

192. 422 U.S. 405 (1975).

193. *Id.* at 419.

194. Of course, Title VII in fact contains an express mitigation requirement. But the *Ford Motor Co.* Court's approving rhetoric leads to the conclusion that even absent such a provision the mitigation principle properly would apply—presumably to be infused into the statute through judicial application of the statute's general remedies scheme, just as has occurred in the ADEA context. My point here is to demonstrate that the NLRA analogy is flawed, and thus to the extent that the supposed wisdom of the Title VII statutory provision—as to which the legislative history is silent—is grounded on the NLRA analogy, there is much to criticize.

195. For example, in *Lorillard v. Pons*, 434 U.S. 575 (1978), an ADEA case addressing the availability of jury trials in actions for back pay, the Supreme Court observed that "[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Id.* at 584. The Court continued: "In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Id.* (footnote omitted). The affinity of Title VII and the ADEA also was noted in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-58 (1979), another ADEA ruling. Not surprisingly, then, the Title VII formula for establishing a prima facie violation by a plaintiff claiming to be the victim of intentional, individualized discriminatory treatment—a framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and, most recently, *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000)—has been adopted by virtually every court called upon to address the prima facie claim issue in the ADEA context. Typically, these

provision, the NLRA does not.[196] Thus, the methodology entailing treating like language in like fashion cannot legitimately be pursued as a basis for establishing the appropriateness of the Title VII provision as a standard, and therefore expectable, component of a remedies regime for dealing with bias in the workplace. This admittedly is a minor point; the Title VII drafters, likely noting that the Board and the courts had done what Congress itself had failed to do in the NLRA, *i.e.*, to include in it an express mitigation provision, simply concluded that that omission should not be repeated.[197] Still, there is a relevant conclusion to be drawn: similarity in statutory language is not a factor that can account for the mitigation principle's transposition from the NLRA into Title VII.

2. Legislative History

There is no question that the House-passed version of Title VII, which ultimately was to be supplanted by the Senate's compromise bill,[198] looked in part to the NLRA as its model. Indeed, during Senate consideration of the initial version of the House bill, H.R. 7152,[199] prior to its text being replaced by compromise language, an Interpretative Memorandum was placed in the Congressional Record by Senators Clark and Case, floor managers for the bill,[200] in which a linkage to the

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ADEA courts have invoked the Title VII rulings. For example, in *Hase v. Missouri Division of Employment Security*, 972 F.2d 893 (8th Cir. 1992), the court wrote: "Although *McDonnell Douglas* and *Burdine* dealt specifically with actions under Title VII, the guidelines they established are generally applicable to age discrimination actions as well." *Id.* at 896; *see also* Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

196. The NLRA provides as follows with regard to back pay:

> [The Board is authorized to issue] an order requiring such person [*i.e.*, the person violating the Act] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . .

29 U.S.C. § 160(c) (1994).

197. As is discussed *supra*, the legislative history of Title VII is uninformative as to the mitigation provision. *See supra* notes 80-97 and accompanying text. The ADA incorporates the enforcement mechanisms of Title VII. *See* 42 U.S.C. § 12117 (1994). Thus, the ADA—like Title VII—also is facially different from the NLRA (although more subtly so, since the mitigation principle is absorbed by cross-reference to Title VII, and thus does not appear in the literal text of the ADA.)

198. *See supra* notes 80-97 and accompanying text.

199. H.R. 7152, 87th Cong. (1963).

200. The proponents of the legislation established a disciplined structure to achieve enactment of the bill. Senator Humphrey (D. Minn.), the Democrat majority whip, and Senator Kuchel (R. Cal.), the Republican minority whip, were designated as the bipartisan spokespersons whose jobs were to speak generally in favor of the bill and to explain its provisions. Bipartisan captains were selected to handle each major title of the bill; they were responsible for explaining the titles, defending them, and leading the debates on them. Senator Clark (D. Pa.) and Senator Case (R. N.J.) were the captains for Title VII.

NLRA was drawn in the course of their discussion of the relief available under the title:

> The relief sought in such a suit [*i.e.*, a suit against an alleged discriminator,] would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices.[201]

(Senator Humphrey also noted that the NLRA was the model for Title VII.)[202] It is the foregoing Interpretative Memorandum to which the Court pointed in *Albemarle Paper Co. v. Moody* to buttress its assertion that Title VII's and the NLRA's back pay provisions were linked.

Insofar as the matter of mitigation is concerned, however, the NLRA's own language and legislative history are uninstructive. The matter simply was not discussed either in the various committee reports or in the House and Senate debates.[203] Of course, given the NLRA's lack of specific mitigation language, it is hardly surprising that the legislative history of that Act was silent as to Congressional intent or expectations regarding application of the mitigation principle to awards made to prevailing grievants.

3. NLRA Administrative and Judicial Rulings Embracing the Mitigation Principle

In *Ford Motor Co. v. EEOC*[204] the Court looked to NLRA court rulings and NLRB administrative decisions to support its interpretation of Title VII's mitigation provision. In asserting that the mitigation principle requires a claimant "to use reasonable diligence in finding other suitable employment,"[205] the Court pointed out that the claimant is not required to "go into another line of work, accept a demotion, or take a demeaning position,"[206] and in support of this latter assertion the Court cited one NLRA court ruling and four NLRB decisions.[207] The

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201. 110 CONG. REC. 7214 (1964) (Interpretative Memorandum by Senators Clark and Case).

202. 110 CONG. REC. 6549 (1964).

203. *See* 1-2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT (1949).

204. 458 U.S. 219 (1982).

205. *Id.* at 231.

206. *Id.*

207. *See id.* at 231-32 n.16 (citing NLRB v. Madison Courier, Inc., 472 F.2d 1307 (1972); Wonder Markets, Inc, 236 N.L.R.B. 787 (1978), *enforced*, 598 F.2d 666 (1st Cir. 1979), *supplemented by*, 249 N.L.R.B. 294 (1980); Good Foods Mfg. & Processing Corp., 195 N.L.R.B. 418 (1972), 200 N.L.R.B. 623 (1972), *enforced*, 492 F.2d 1302 (7th Cir. 1974); Harvey Carlton, 143 N.L.R.B. 295 (1963)). In the same footnote the *Ford Motor Co.* Court discussed the length of time that a claimant must spend seeking another job and

Court further explained that a claimant who fails to mitigate "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied," and again it cited as support an NLRA decision.[208]

Given the obviously persuasive force (for the Supreme Court) of the NLRA analogy vis-a-vis the otherwise unexplained Title VII mitigation provision, it is appropriate to examine from whence the NLRA decisional bodies derived their commitment to the mitigation principle. If it turns out that the judicially- and agency-created NLRA mitigation requirement is grounded on unanalytic obeisance to antiquated, morality-infused common law doctrine that had its inception in the 1830s and 1840s, the case for approbation of Congress's demonstrably unanalytic incorporation into Title VII of the NLRA's mitigation principle becomes a very dubious one. As it happens, the *Phelps Dodge* decision, which addressed the NLRA and upon which the *Ford Motor Co.* Court relied in addressing Title VII's mitigation provision, indeed was a weak peg upon which to hang an affirmation, forty-plus years later, of the probity of the mitigation principle in the Title VII context, as well as, for that matter, in the NLRA context itself.[209]

The *Phelps Dodge* Court addressed a modified Board ruling requiring that the grievants, who had been wrongfully denied employment by Phelps Dodge but who had then secured other comparable employment, be hired and that they be made whole for their loss of pay resulting from the denials of hire.[210] The latter aspect of relief entailed payment to them of back pay, less earnings received from other employment during the period in question, *i.e.*, the period running from the wrongful rejections until the grievants were offered jobs by the company pursuant to the NLRB order. The employer challenged the ruling in favor of the rejected job applicants. The United States Court of Appeals for the Second Circuit, while holding for the grievants, relied upon the common law mitigation principle[211] to modify

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here, too, it cited NLRB decisions: *Madison Courier*, 472 F.2d 1307; NLRB v. Southern Silk Mills, Inc., 242 F.2d 697 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

208. *See* NLRB v. Arduini Mfg. Corp., 394 F.2d 420 (1st Cir. 1968).

209. Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940), which preceded *Phelps Dodge*, also involved a deduction from a back pay award, but was really a case dealing with an application of the collateral benefits rule, rather than mitigation.

210. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 181-82 (1941).

211. The Court of Appeals wrote as follows:

> There is no reason to suppose that Congress intended to have those who had unlawfully been deprived of their jobs maintained in idleness beyond the period when they had an opportunity to do work they were fitted to perform. They were bound to use reasonable efforts to find work and to keep employed. It is only to the extent that their earnings were diminished after they made such efforts that they are entitled to be made whole. *The same rule that applies to a discharged employee who sues for a breach of contract is applicable to them.*

the Board order to require that amounts which the workers "'failed without excuse to earn" should be deducted from the awards.[212] The losing company then sought to have the basic ruling in favor of the grievants overturned. For its part, the Board did not dispute application of the basic mitigation principle insofar as the deduction of actual interim earnings was concerned. But the Board did object to being required to take into account moneys that could have been earned; it deemed the determinations of such amounts to be too burdensome and so it, too, sought Supreme Court review. In sum, neither party attacked the mitigation principle per se, and so the Court had no occasion to squarely address its genesis or its wisdom.[213] Even so, there were some oblique observations by the Court that are relevant here.

The Court noted in a footnote that "[i]n accordance with the Board's general practice, deductions were made in the present case for amounts earned during the period of the back pay award."[214] Given that the Court expressed no quarrel with that practice, it is safe to infer that implicit in this observation was approbation of it. Somewhat less obliquely, the Court—in disparaging the Board's protest regarding the administrative burden that allegedly would be occasioned by having to deduct potential earnings—registered approval, albeit again implicitly, of the mitigation principle, and it tersely offered a policy basis for this approbation: "The Board will . . . have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, *while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment.*"[215]

One animating factor for the Court was the matter of fairness: "Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."[216] The Court also focused on public policy (as opposed to private interest) concerns: "By leaving . . . adjustment[s] [of the back pay award] to the administrative process we have in mind not so much the minimization of damages as

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> Accordingly, the amount allowed each such employee should be the difference between his actual earnings plus what he failed without excuse to earn and the amount he would have earned but for the unfair labor practices of the petitioner.

Phelps Dodge Corp. v. NLRB, 113 F.2d 202, 206 (2d Cir. 1940) (emphasis added), *remanded*, 313 U.S. 177 (1941).

212. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

213. The Court did hold that the Board, rather than the lower court, should have determined whether to deduct earnings that could have been secured with reasonable diligence, and so it remanded to the Board to make that determination. *See id.* at 197.

214. *Id.* at 198 n.7.

215. *Id.* at 199-200 (emphasis added).

216. *Id.* at 198.

the healthy policy of promoting production and employment."[217] The Court discounted any conflict between the public policy focus on maximizing production and employment, on the one hand, and the private interest concern for assuring fairness for individual victims of wrongdoing:

> This consideration [*i.e.*, the policy of promoting production and employment] in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment.[218]

Five justices dissented in part. Of these, Justice Murphy, joined by Justices Black and Douglas, contested the deduction from the back pay award of earnings that could have been, but were in fact not, earned in the interim between the wrongful denial of hire and Board-ordered instatement.[219] The other two partial dissenters, Justice Stone and Chief Justice Hughes, focused on specific statutory language in concluding that the Board lacked the authority both to order an employer (1) to hire previously rejected applicants who had obtained other employment—such as those here, and (2) to give to such rejected applicants back pay.[220] A sixth member of the Court, Justice Roberts, did not participate in the decision.

Thus, the ostensible opinion of the Court (and it indeed was so denominated) actually is very problematic insofar as it is read as constituting a majority endorsement of the mitigation principle. Three justices (Murphy, Black, and Douglas) certainly did not embrace that principle in full: they rejected that aspect of the principle that prescribes reductions of awards to reflect not only actual earnings, but also the amounts that plaintiffs could have earned. Justice Stone and Chief Justice Hughes did not even address the mitigation principle. Justice Roberts was not involved in the decision. In sum, then, there actually were only three justices who more or less fully subscribed to the mitigation principle.

In any event, whatever the internal complications of *Phelps Dodge*, the Court certainly invoked no longstanding tradition as the basis for the mitigation principle, notwithstanding the revisionist reading of the case

217. *Id.* at 200.
218. *Id.*
219. *See id.* at 205-07 (Murphy, J., dissenting).
220. *See id.* at 208-12 (Stone, J., dissenting).

forty-one years later in *Ford Motor Co.*, where the Court cited *Phelps Dodge* in a footnote keyed to a sentence in which the later Court spoke of a "duty, rooted in an *ancient* principle of law . . . ."[221] Moreover, *Phelps Dodge* is hardly persuasive in supporting the rectitude of the mitigation principle in the Title VII context, let alone the NLRA context. After all, those few justices who addressed the principle in *Phelps Dodge* undertook little analysis either as to the aptness of the principle or of the common law decisions in which it was first articulated. To the extent that these justices expended any intellectual effort on the matter, they merely asserted that mitigation was an appropriate means to protect the wrongdoing employer, and to advance the general societal goals of enhancing productivity and averting worker idleness. Like their predecessors sitting in the nineteenth century on state courts and fashioning common law doctrine, these justices did not accord any particular attention to whether the employer's own wrongdoing had any relevance for the question of reducing the wrongdoer's exposure to liability.

The NLRB rulings that preceded *Phelps Dodge* offered no more by way of focusing on the mitigation principle's diminution of the NLRA's deterrence value.[222] In these decisions the Board mechanically and unanalytically infused the mitigation principle into the statute. By way of illustration, one sees the Board in *In the Matter of Pusey, Maynes & Breish Co.*[223] simply ordering the employer to make whole the grievants, who were the victims of unlawful discharges, by payment to each of them of back pay "less the amount which each, respectively, may have earned subsequent to the time of discharge and up to the time of the offer of reinstatement."[224]

4. Title VII's Kinship with the National Labor Relations Act

Putting aside differences in language between Title VII and the NLRA, and putting aside, also, the fact that the judicial and Board adoptions of the mitigation principle in the NLRA context were devoid of any particular intellectual trenchancy, there is another arguable reason why the supposed NLRA analogy fails to persuade vis-a-vis Title VII. This is the significant difference posited by some between the

221. Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982) (emphasis added).

222. By way of contrast, several commentators have made note of this adverse consequence of infusing the mitigation principle into the NLRA. *See supra* note 53.

223. 1 N.L.R.B. 482 (1936).

224. *Id.* at 488; *accord* Interlake Iron Corp., 33 N.L.R.B. 613, 654 (1941); Sterling Corset Co., 9 N.L.R.B. 858, 871 (1938); Renown Stove Co., 2 N.L.R.B. 117, 124 (1936); Anwelt Shoe Mfg. Co., 1 N.L.R.B. 939, 949 (1936).

foundational premises of Title VII and the NLRA. The latter statute, it has been suggested, is animated by a legislative desire to promote peace in the workplace. To that end, the statute acknowledges and accords deference both to the perceived legitimate interests of employees and the perceived legitimate interests of employers.[225] That perception of legislative equanimity is debatable.[226] But if one accepts—at least for argument's sake—the view that the NLRA attempts to accommodate legitimate employer interests, the contrast with Title VII becomes very clear. In the context of the NLRA the mitigation principle, which is directed to limiting the financial exposure of employers, is consistent—so the argument would go—with Congress's desire to be supportive of employer concerns. But there is very much less brief for limiting employers' financial exposure in the Title VII, ADEA, and ADA settings, where the employer only is held liable if it engaged in discriminatory activities or made discriminatory decisions that are accorded virtually no social, political, or legal legitimacy.[227]

5. Summary

If the mitigation principle is justifiable in the statutory equal employment opportunity setting, that is not so because the NLRA offers a persuasive analogical model.

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225. *See* Kotkin, *supra* note 53, at 1317-18. Professor Kotkin wrote:

> The primary intent of the NLRA was to preserve industrial peace and to eliminate labor disruption that interfered with commerce. The enforcement mechanisms adopted to achieve this purpose were designed with a view towards simplicity, directness, and prompt resolution of disputes. . . . The concern of the statute was not only to assist employees but also to assist employers.

Id. (footnotes omitted).

226. *See* Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 285-87 (1987). Professor Casebeer wrote: "It has become commonplace among labor law academics to view the National Labor Relations Act, also known as the Wagner Act, as both a watershed change in labor relations law and one of the most radical legislative initiatives in American history." *Id.* at 285-86 (footnotes omitted).

227. *Cf.* Kotkin, *supra* note 53, at 1319-20.

> The differences between Title VII and the [NLRA] labor law structure as they pertain to back pay are apparent. There is no equivalent to what Congress viewed as a legitimate need to protect employers from the disruption caused by union organizing in the discrimination context. Substantively, because Title VII is motivated by a unitary concern for the protection of workers, the concerns regarding balance hold less force.

Id. (footnotes omitted).

IV. A FRESH LOOK: ARGUMENTS FOR AND AGAINST THE MITIGATION PRINCIPLE

The mitigation principle applies both in tort[228] and contract[229] to bar a grievant from recovering damages for losses that she could have avoided. In the employment context, which is contractual in nature,[230] notions of the grievant's moral duty and social obligation to be productive flavored invocations of the mitigation principle in the 1800s.[231] More modern justifications for the mitigation principle have not moved all that far from the moralizing and righteousness of the nineteenth century courts, although the phrasing is somewhat more temperate. Instead of speaking of a social duty to avoid idleness, the mitigation principle's proponents today couch their explications in terms of avoidance of economic waste. And instead of uttering morality-based pronouncements, today the discussants frame support for the mitigation principle in terms of a latter-day secular icon, *i.e.*, the notion of fairness. There also are a couple of other justifications, as well, although these have been less often articulated.

A. Economic Efficiency—Avoiding the Waste of Human Capital

The avoidance-of-economic-waste rationale was explained sixty-five years ago by Dean McCormick:

> Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community.

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228. The RESTATEMENT (SECOND) OF TORTS § 918 (1979) provides as follows:

§ 918. Avoidable Consequences.

(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

229. The RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) provides as follows:

§ 350. Avoidability as a Limitation on Damages

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

230. *See, e.g.*, A.J. Johnson Paving Co. v. Industrial Comm'n, 82 Ill. 2d 342, 412 N.E.2d 477, 480-81 (Ill. 1980). Thus, for example, the RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d, illus. 6 (1981), recognizes that acceptance of an offer of at-will employment may create a contract even though it is of indefinite duration. *See also* Fadeyi v. Planned Parenthood Ass'n, 160 F.3d 1049, 1049-50 (5th Cir. 1998) (at-will employment constitutes a contract for purposes of action under 42 U.S.C. § 1981).

231. *See supra* notes 137-77 and accompanying text.

> Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would require that such activity cease. The machinery by which the law seeks to encourage the avoidance of loss is by denying to the wronged party a recovery for such losses as he could reasonably have avoided, and by allowing him to recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.[232]

Likewise, it has been stated that an injured party will be precluded from recovering tort damages when they are "in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources, both physical or economic."[233]

Closer to home, the economic waste rationale has been proffered in the specific context of the wrongful discharge scenario:

> An employee wrongfully discharged in violation of his contract of employment may choose to remain idle and live off of his anticipated damages award rather than to seek new employment. If there is other demand in the same market for the same product, to induce idleness by an award of damages is to contribute to the misallocation of resources and to promote the dissatisfaction of human wants. The rule requiring reasonable effort of the promisee to mitigate damages by seeking the same or a similar kind of employment in the same general area described in the breached contract serves to prevent the waste.[234]

In sum, the mitigation principle averts the waste of human capital. Producers, *i.e.*, workers, are discouraged from remaining idle and thereby removing from the economy their productive capacities, by virtue of the fact that idleness comes at a stiff price: the reduction of the back pay award.

Less commonly acknowledged is the fact that the mitigation principle also serves as a device to protect wrongdoers from paying full economic fare for their wrongdoing. In the typical race or gender or age discrimination case, the plaintiff establishes his or her prima facie claim by pointing to the fact that someone of a different race or gender,

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232. MCCORMICK, *supra* note 2, at 127 (footnote omitted); *see also* Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 558 (1976).

233. RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1979). In the antitrust setting the same point has been made. *See* Neil Hamilton & Virginia B. Cone, *Mitigation of Antitrust Damages*, 66 ORE. L. REV. 339, 354 (1987); *see also* Amanda Kay Esquibel, *The Rule of Avoidable Consequences in Antitrust Cases: A Law and Economics Approach*, 26 HOFSTRA L. REV. 891, 893-96 (1998).

234. Hartzler, *supra* note 53, at 395.

or someone younger, replaced the grievant, or was hired for the job that the grievant unsuccessfully had sought. Obviously, that replacement is going to receive a salary—let us say, $50,000 annually. If, down the line, the discharged plaintiff (who also had been paid, let us say, $50,000 a year) or the disappointed job applicant (who would have received the same $50,000 annual salary that was paid to the person actually hired) sues and wins his or her case and is awarded back pay, the consequence will be that the employer will pay twice for the same work output—first to the person currently occupying the job in question, and then again to the victorious plaintiff. This obviously is going to put an economic strain on that employer. Moreover, in macro-economic terms, this double-pay scenario is inefficient since it means that the product produced by the person who replaced the plaintiff or who secured the job sought by the plaintiff effectively will cost twice as much as it otherwise would have. The mitigation principle, then, helps to avert these economic burdens on the discriminatory employer, as well as on the economy at large, by reducing the plaintiff's claim by the amount he or she actually earned or could have earned elsewhere. Thus, if the plaintiff obtained another job paying $50,000 annually, or could have secured a job paying comparably to the one he lost or sought and yet he did not do so, his or her claim will be reduced to zero.[235] The results will be that the employer will not pay double, and the economy will not be burdened by a product that costs twice as much as it otherwise would. (Of course, if the claimant seeks, but is unable to secure, a comparable job, he will have satisfied his mitigation "duty" and so the employer will wind up, after all, having to bear the burden of paying an undiminished back pay award. Thus, at best the mitigation principle is an inefficient mechanism for producing economic efficiency.)

B. Economic Efficiency—A Different Perspective

The foregoing economic arguments for mitigation are persuasive. There is, after all, really little, if anything, to say in praise of lost worker productivity. Moreover, the imposition of costs (*i.e.*, double salaries) on employers can both jeopardize their economic health and raise costs for the consumers of the product produced by that employer. The conclusion could be arrived at, then, that the mitigation principle is best

235. Of course, the mitigation principle is not limited just to situations where the amount made in the successor job is the same as that earned at the prior position. Thus, even if the plaintiff secured a job paying less than $50,000, let us say $40,000, that amount would be deducted from the back pay claim and so the employer's liability would be only $10,000, rather than $50,000. The defendant does not receive unbounded credit for the successor job, however: if the plaintiff were to secure a job paying more than she had earned at the defendant's workplace, the defendant is not credited with that surplus.

left untouched. Of course, this economic efficiency argument can be pushed to much larger conclusions: anything that reduces the costs of doing business arguably should be promoted, while anything that increases the costs of doing business should be combatted. Buy into this analysis, and it follows that one gets rid of laws regulating pollution levels, anti-discrimination laws, laws setting limits on hours of work, and so on. Fortunately, proponents of a return to nineteenth century *laissez faire* economic policy have not yet won the day. Even so, there remains the question of how far one goes in regulating the workplace; and for now, at least, the mitigation principle constitutes one of the lines that has been drawn in the legal sand, so to speak. I do not propose to construct an argument that that particular line is misdirected, in economic terms. But I do think that some other economic arguments—cutting in a direction less supportive of the principle—need to be recognized. They may not overpower the economic rationales in favor of the mitigation principle, but they do mitigate their force.

For one, there is the fact that potentially successful suits go unpursued. For the salesmen whose stories were recounted at the beginning of this Article this was of no financial moment, since they either suffered no financial injuries, or the harms they experienced were acceptable to them as trade-offs for other benefits. However, their former co-workers—who perhaps would not so easily be able to secure other jobs or to tolerate periods of unemployment—were left to continue working in an ageist environment. Granted, neither the data nor the methodology exist to enable quantifying in dollar terms the costs imposed on people toiling in environments pervaded by bias based on the very characteristics they themselves possess, but it would not seem amiss to reason that these people are going to experience psychological distress, reduced initiative, diminished performance, bad morale, etc. And it would not seem amiss further to speculate, with a respectable degree of confidence, that these adverse conditions are going to translate into compromised productivity, reflected through lack of creativity, increased absenteeism, and increased health problems. None of these eventualities are without cost for the individual and/or the employer, and thus for society at large.

Then, too, an employer that discriminates by *discharging* protected workers likely also is going to discriminate at the *hiring* stage against older workers, women, the disabled, African-Americans, and the other usual victims of discrimination. Here, too, difficult-to-value psychological injuries are going to be inflicted and, as well, more concrete costs are going to be incurred. Enormous adverse economic consequences, for example, have been alleged to flow from discriminatory practices that

operate vis-a-vis disabled men and women,[236] as well as older workers,[237]

236. A recounting of some of the costs was set forth in the report on the ADA issued by the House Committee on Education and Labor in 1990:

> The [House] Committee [on Education and Labor] . . . heard testimony and reviewed reports concluding that discrimination [on the basis of handicap] results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year. Sandy Parrino, the chairperson of the National Council on Disability, testified that discrimination places people with disabilities in chains that:
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> > . . . bind many of the 36 million people into a bondage of unjust, unwanted dependency on families, charity, and social welfare. Dependency that is a major and totally unnecessary contributor to public deficits and private expenditures. (Testimony before the House Subcommittee on Special Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p.27.)
>
> She added that:
>
> > It is contrary to sound principles of fiscal responsibility to spend billions of federal tax dollars to relegate people with disabilities to positions of dependency upon public support. (Id. at 28.)
>
> President Bush has stated:
>
> > On the cost side, the National Council on the Handicapped states that current (federal) spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues. (Statement by Vice President George Bush on Disabled Americans, March 31, 1988, p. 2.)
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> . . . .
>
> Jay Rochlin, the executive director of the President's Committee on Employment of People with Disabilities, explained why the needs of people with disabilities for employment opportunities and the needs of business for qualified employees make for what he calls a "win-win" situation:
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> > The . . . (Department of Labor's) *Opportunity 2000* concluded that business will be able to satisfy their labor needs only if they successfully confront . . . barriers and empower individuals presently outside the economic mainstream to take advantage of meaningful employment opportunities. ". . . While comprehensive civil rights legislation can provide protections from employment discrimination for persons with disabilities, it will also enhance the private sector's access to an additional resource of human capital—qualified individuals with disabilities." (Testimony before the House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, September 13, 1989, p. 33.)

Comm. on Educ. & Labor, U.S. House of Rep., Americans with Disabilities Act of 1990. H.R. REP. NO. 101-485, at 43-44 (1990), *reprinted in* 1990 U.S.C.C.A.N. 325, 325-26.

237. In the landmark 1965 report that contributed to enactment of the ADEA, the Secretary of Labor offered some rough estimates as to the economic cost of age discrimination in the workplace. *See* THE OLDER AMERICAN WORKER, *supra* note 109. The report is dated. For example, the report refers to the costs attributable to mandatory retirement; since 1986, however, the ADEA has banned age-based mandatory retirement in most work settings. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (removal from the Act of the age 70 cap on coverage). Nonetheless, the report still is instructive regarding the costs that age bias in the workplace generates for the economy:

> It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers of years are lost because of forced, compulsory, or automatic retirement.
>
> The total costs to the Nation's economy of the combination of factors which underlie discrimination on account of age cannot easily be calculated. Even where the loss is tangible it is possible to make only very rough approximations; moreover, it is difficult to

to impede their access to productive employment.

Such losses in productivity occasioned by wrongs that go unchallenged, as well as by the demoralization and frustration of those who are the objects of wrongful discrimination, might be averted by virtue of the deterrence generated by suits by those possessed of the gumption and funds to sue, on the one hand, and of the facts necessary to establish winning cases, on the other. Because of the mitigation principle, however, some valid potential claims no doubt go unarticulated and unpursued because there simply is no financial utility in the victims seeking legal redress.

There are a couple of other factors that also need to be recognized. Most plaintiffs are not going to be able to afford the luxury of joblessness for extended periods, even if they assume that down the road there are going to be judicially-ordained "pots of gold," *i.e.*, back pay awards, coming their way. Moreover, the fact is that most grievants who do pursue legal recourse ultimately lose,[238] and so a plaintiff would have to indulge in blissful ignorance to think that a financially lucrative victory is a very likely outcome. Thus, it is quite unlikely that the current version of the mitigation principle really is needed to prod discharged or rejected men and women into seeking other employment. Their economic circumstances, as well as recognition of their dubious prospects of prevailing, both are going to provide sufficient incentive in most instances for them to seek escape from financially infeasible (and often psychologically insupportable) idleness.

C. Fairness—The Argument for Protecting Wrongdoers

In his explanation of the economic rationale for requiring mitigation Dean McCormick at least acknowledged that those who are called upon to mitigate are persons "against whom wrongs have been committed."[239] The *Phelps Dodge* Court was, and some commentators

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differentiate the effects of discrimination from other influences.

> A substantial portion of the unemployment insurance payments of $1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long-duration unemployment that reflects the difficulty which the older worker faces in attempting to find a new job. The Nation loses, furthermore, potential production in an amount at least two or three times the size of the unemployment insurance payments that might be attributable to discrimination.

THE OLDER AMERICAN WORKER, *supra* note 109, at 18.

238. *See* Eglit, *supra* note 44, at 657-58 (success rate for defendants in ADEA cases is 67.7% and for plaintiffs it is 23.4%, with the remaining 10% of cases being split decisions).

239. MCCORMICK, *supra* note 2, at 127. For the full quotation, see *supra* the text accompanying note 232.

have been, considerably more reluctant to even express that minimal recognition of the mitigator as victim. Rather, they have viewed the avoidable consequences doctrine as the appropriate mechanism for assuring fairness to the defendant, while at the same time they have failed to articulate a semblance of disapproval for the wrongdoer. Thus, the *Phelps Dodge* Court wrote: "Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."[240] A like notion—that costs that could have been averted or mitigated by the injured party should be deemed to be caused by the injured party, and not by the contract breacher or tortfeasor—is explicated in Professor Dobbs' monumental treatise on remedies:

> The fairness basis for the [mitigation] rule can be expressed in terms of causal ideas. We could say that if the injured plaintiff fails to spend $1 when she knows it will reduce damages by $10, she is author of her own loss or that the defendant's tort is not a proximate cause of it.[241]

Even if this version of fairness were without flaw, it fails—in the statutory discrimination context, at least—to take account of two related truths: (1) the discriminatory decision or action that triggers liability under Title VII, the ADEA, or the ADA does harm to the larger societal goal of nondiscrimination that is reified in statutory language, and (2) *that* injury cannot be mitigated by the individual discrimination victim.[242] Thus, the notion that loss could have been averted by the wronged party's securing another job really is inapposite insofar as harm to the general anti-discrimination aims of the three statutes is concerned.

Moreover, the formulation of fairness expressed in *Phelps Dodge* and in Professor Dobbs' treatise is at odds with a basic legal premise that underlies Title VII, the ADEA, and the ADA. The *Phelps Dodge* formulation reflects the bedrock proposition that in contract law fault is

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240. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941).

241. 1 DOBBS, *supra* note 4, § 3.9, at 384. A similar focus on fairness for the wrongdoer, and the back of the hand for the victim, was expressed by a commentator assessing the aptness of the unavoidable consequences doctrine in the antitrust context:

> [A] basic economic rationale supports the rule of avoidable consequences in both contract and tort actions. The rule also seems to be consistent with basic notions of fairness. Indeed, one can see how it would be unfair to hold a defendant liable for harm that a plaintiff could have easily prevented at little or no cost.

Esquibel, *supra* note 233, at 896 (footnotes omitted); *see also* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1754 n.171 (1997).

242. Professor Dobbs acknowledges that "[b]oth fairness and efficiency may require relaxation of the minimizing rules in some cases." 1 DOBBS, *supra* note 4, § 3.9, at 384.

irrelevant. Rather, strict liability is the normal regime,[243] as Professor Farnsworth has written:

> [C]ourts in this country, as in most of the rest of the world, expressly reject the notion that remedies for breach of contract have punishment as a goal, and with rare exceptions, refuse to grant "punitive damages" for breach of contract. In so refusing they confidently claim to be blind to fault, and they purport not to distinguish between aggravated and innocent breach. So Holmes said, "If a contract is broken the measure of damages generally is the same, whatever the cause of the breach." . . . In its essential design, . . . our system of remedies for breach of contract is one of strict liability and not of liability based on fault, and this would be a strange design indeed if it were a system directed at the compulsion of promisors.
>
> Our system, then, is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at *relief* to *promisees* to *redress* breach.[244]

Rejection of the fault principle in the general contract context apparently flows from a concern that introduction of a fault-based system of allocating liability would discourage individuals and entities from entering into contracts, to the detriment of society's goals of economic growth and efficiency.[245]

In contrast, in discrimination law fault—expressed through the notion that the plaintiff must establish that the employer intentionally discriminated—is almost always integral to assigning liability to the contract-breacher, *i.e.*, the employer.[246] There is only one, rarely utilized (albeit much discussed) exception, *i.e.*, discriminatory impact analysis.[247] Thus, in order to prevail, a claimant under Title VII or the

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243. *See* Hillman, *supra* note 232, at 556-57. Professor Hillman wrote as follows:

> To protect expectations, contract remedies are based not on fault, but on strict liability. They focus on making the injured party whole—to "put the promisee in the position in which he would have been had the promise been performed . . . ." This is accomplished by awarding damages to the injured party based upon the "benefit of the bargain."

Id. at 557 (footnotes omitted).

244. Farnsworth, *supra* note 1, at 1146-47 (footnotes omitted).

245. *See* Hillman, *supra* note 232, at 556-57; *see also* Hartzler, *supra* note 53, at 389-90, 392.

246. The focus on fault, while central to statutory employment discrimination law, has not gone without criticism. *See, e.g.*, D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311, 2366-68 (1994); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 95-97, 144-46 (1994). *See generally* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 589-90.

247. The defendant's intent is irrelevant in disparate impact analysis; a defendant can be held liable whether it had bad intent, good intent, or no intent. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *Griggs* is the seminal Title VII case. Impact analysis also applies in the ADA context, inasmuch as ADA case law tracks Title VII. Discriminatory impact analysis has been accepted by some courts in the ADEA context and, more recently, rejected by some others. *Compare* Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997) (affirmative as to impact analysis), *cert. denied*, 523 U.S. 1062 (1998), *and* District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347, 351 (2d

ADEA or the ADA in almost all instances must prove that the defendant intentionally discriminated against her on the basis of her gender or race or color or age or disability. Accordingly, ADEA courts, by way of example, regularly state that the plaintiff's task is to prove that age was a determining (although not necessarily the sole) factor in the employer's decisional process, such that *but for* the plaintiff's age the complained-of decision would not have been made.[248] In brief, the discharge or demotion or whatever must have occurred *because of* the plaintiff's age.[249]

In most breach of contract situations, then, the mitigation principle is applied to ameliorate a contract breacher's burden within the context of a common law system that disclaims taking account of fault. But it is a fault-based regime that holds sway under Title VII, the ADA and the ADEA vis-a-vis adverse decisions affecting the employment relationship, notwithstanding that that relationship is deemed to be a contractual one.[250] And so, while mitigation may contribute to an appropriate distribution of loss where the ascribing of fault, and the imposition of punishment for fault, are tasks the law abjures, it does not follow that mitigation is equally appropriate in the context of statutes that do focus on fault and that only allow for the imposition of liability (save in the rare disparate impact case) where fault, *i.e.*, discriminatory intent, is proven. In these statutory settings, society has no discernible interest in protecting bigoted employers who hire and fire on the basis of charac-

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Cir. 1997) (same), *with* Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (negative as to impact analysis), Maier v. Lucent Techs., Inc., 120 F.3d 730, 735 n.4 (7th Cir. 1997) (same), *and* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.) (same), *cert. denied*, 517 U.S. 1245 (1996).

It was reported a few years ago that less than five percent of Title VII cases involved the impact theory. *See* John J. Donahue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991). There is nothing to suggest any increase since that article was published.

248. *See, e.g.*, Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991); EEOC v. University of Oklahoma, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983); Reeves v. General Foods Corp., 682 F.2d 515, 524 n.12 (5th Cir. 1982). There also are other, less commonly utilized, formulations of the plaintiff's burden. *See generally* 2 EGLIT, *supra* note 12, § 7.02.

249. *See, e.g.*, Huhn v. Koehring Co., 718 F.2d 239, 243 (7th Cir. 1983) (ADEA case). *Cf.* White v. York Int'l Corp., 45 F.3d 357, 360 (10th Cir. 1995) (to prevail under ADA, plaintiff must prove that he or she was subjected to adverse employment decision because of his or her disability); *see also* Barnett v. U.S. Air, Inc., 157 F.3d 744, 748 (9th Cir. 1998) (to establish a prima facie ADA case, plaintiff must show that he or she was subjected to an adverse employment decision because of his or her disability).

250. It is true that the mitigation principle applies to victims of torts, *see supra* note 228 and accompanying text, and fault is a relevant factor in that context. However, inasmuch as the employment relationship is deemed to be a contractual one, *see supra* notes 179 & 230 and accompanying text, it seems appropriate to contrast the differing roles of fault in the contract and equal employment opportunity settings. In any event, even if the tort analogy were not to be so readily dismissed, the RESTATEMENT (SECOND) OF TORTS § 918(2) (1979), quoted *supra* note 228, proposes that the mitigation principle not apply when the tortfeasor engages in intentional wrongdoing, which is what the great majority of entities that are adjudicated violators of Title VII, the ADEA, and the ADA are found to have done.

teristics that Title VII and the ADA and the ADEA tell us are for the most part[251] improper factors to even consider, let alone act upon, in the workplace.

But what of the bedrock proposition in contract law that the plaintiff be made whole, but not more than whole?[252] Suppose a fifty-five-year-old mid-level manager who had been earning $75,000 annually was fired by Acme Corp. because of his age. Suppose, also, that it took three years for his case to go to trial. And suppose, further, that one year into that three-year period the plaintiff secured a comparable job, in the same area, paying $60,000 a year. When our plaintiff finally wins his suit and argues for an award of $225,000 ($75,000 times 3 years), will he not be made more than whole if the $120,000 in salary he received during his forced hiatus from Acme—salary that he would not have been able to earn but for his discharge—is not deducted from the $225,000? Obviously, the answer is yes. Whether that is an unacceptable answer, however, is not as easily determined.

Remember, Title VII and the ADEA and the ADA reflect normative judgments, codified through the democratic process in legislative form, that discrimination on the basis of certain characteristics is wrong. There is no, or at least very little, place in the workplace for bias based on race, gender, age, and/or disability. Thus, the fact that the victim is made more than whole—while offensive because perceived as unfair to breachers within the legal regime that has been erected by common law courts and later by legislative bodies for dealing with standard commercial contracts—is not necessarily likewise unfair in the context of statutory discrimination settings where very significant societal values have been reified in statutory proscriptions.[253]

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251. Each statute does afford some leeway by providing in varying degrees exceptions to its proscriptions or by couching its prohibitions in less than absolute terms. *See supra* note 12.

252. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS § 12.1, at 840 (2d ed. 1990); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14-4, at 591 (3d ed. 1987).

253. The award of punitive damages is authorized for prevailing Title VII and ADA plaintiffs. *See supra* notes 54-55. Liquidated damages in an amount equalling the back award are authorized by the ADEA in instances of willful violations of the Act. *See supra* notes 35-37 and accompanying text. In both instances, the recipients of such damages are made more than whole, since these damages are not awarded as compensation for loss, but rather are computed and awarded for other reasons—primarily punishment and deterrence. Thus, the availability of such damages debunks the notion that "fairness" in the statutory discrimination setting precludes anything more than make-whole relief.

In addition, the collateral source rule allows a Title VII, ADEA, or ADA plaintiff to retain moneys received from an independent third party, without those funds counting against his or her recovery from the defendant. *See, e.g.*, EEOC v. Kentucky State Police Dep't, 80 F.3d 1086, 1100 (6th Cir.) (ADEA case), *cert. denied*, 519 U.S. 903 (1996); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977) (same); Phuong v. National Academy of Sciences, 927 F. Supp. 487, 492 (D.D.C. 1996) (same). In the common law setting, it generally is accepted that the rule only applies in tort actions, although there actually is sparse case law applying the rule in the contract context. *See* Waumbec Mills, Inc. v. Bahnson Serv. Co., 103 N.H. 461, 464, 174 A.2d 839, 842 (1961); Gusikoff v. Republic Storage Co., 241 A.D. 889,

In any event, I am not prepared—nor need I be—to push these arguments too far. For whether or not one were willing to seriously entertain the notion that windfalls for victims of violations of Title VII, the ADEA, and the ADA are preferable to the beneficence accorded the violators by the mitigation principle, eradication of the employer's unwarranted boon can be achieved without extending to the grievant relief in excess of his or her actual harm. This can be done by means of the modified-mitigation proposal discussed in Part V of this Article.

D. Other Justifications for the Mitigation Principle

There are a couple of contentions in addition to those involving economic efficiency and fairness that have been articulated in support of application of the mitigation principle in the context of employment relations.

1. Personnel Decision Making

It has been suggested that the mitigation principle has a positive impact with regard to facilitating salutary decision making regarding personnel changes. Absent the mitigation principle, employers—it has been conjectured—would be discouraged from making needed changes in their work forces. The potential for double expenses—*i.e.*, the award of back pay to the discharged employee, as well as the payment of a salary to her replacement—would deter an employer from firing the less productive current employee and replacing her with a more productive one.[254] There are at least two responses, however, that diminish the force of this speculation.

For one, an employer only need worry about a double payment in instances where it will be, or can be, held liable for the discharge of the first employee. But it can only be held liable if it is found to have violated Title VII, the ADEA, or the ADA; it is only then that the mitigation principle comes into play. Given this fundamental fact, the mitigation principle actually amounts to a device that facilitates illegal decision making, since it is only needed by the employer if the employer does something wrong. Yet a justification for the principle that is based

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272 N.Y.S. 77, 78-79 (1934). Professor Fleming has observed that benefits from collateral sources are a kind of mitigation, and therefore it is odd that the rule calls for no reduction of the plaintiff's award. *See* John G. Fleming, *The Collateral Source Rule of Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966). In fact, the collateral source rule has come in for considerable criticism in recent years, and so it has been limited or abolished in more than half the states. *See* Douglas H. Cook, *Personal Responsibility and the Law of Torts*, 45 AM. U. L. REV. 1245, 1261 n.92 (1996).

254. *See* Hillman, *supra* note 232, at 559 n.27 (1976).

on enhancing the employer's ability to engage in bigoted decision making hardly can serve as a persuasive rationale for the mitigation principle's application to victims of violations of Title VII, the ADEA, or the ADA.

In any event, a justification for the mitigation principle that rests on the aim of relieving the employer from exposure to double payments is further debunked by the fact that in the case of a terminated individual who does make a reasonable effort to secure another comparable job but is unable to obtain one, the employer indeed will wind up in exactly that disfavored position—*i.e.*, paying twice for the same work product. Surely this eventuality is recognized by employers and, because of this, it is doubtful that the mitigation principle actually is perceived by employers as a very significant device that frees them to engage in the unfettered exercise of both appropriately and improperly utilized discretion. Thus, modification of the principle should not have an inhibitory effect on legal, *i.e.*, non-discriminatory, personnel decision making by employers.

There is another perception that further undercuts the argument that the mitigation principle is necessary to facilitate employer freedom to make appropriate personnel decisions. The mitigation principle actually may have a perverse consequence for personnel decision making by employers in that it may actually only facilitate the employer's freedom to discharge the most competent employees, while it inhibits the employer's ability to safely terminate less competent workers. How would this be so?

The competent employee who is discharged is likely going to be able to soon secure new employment. Thus, an employer who chooses to terminate a satisfactorily performing older worker, or to deny a promotion to a productive employee who happens to be of the wrong gender or race, can rely upon the likelihood that even if it is sued and found liable, the exposure to a significant back pay award will be unlikely. That is because this victim of discrimination will readily find, or at least will be able to readily find, an alternative comparable job with an employer who appreciates competence and who does not make twisted decisions motivated by bias. In this situation, then, the mitigation principle works to encourage adverse decisions vis-a-vis competent employees who, by virtue of their very competence, are able to readily mitigate, but who, by virtue of the misplaced values of their employers, are mistreated for discriminatory reasons.

On the other hand, there are more problematic employees for whom the mitigation principle may work, oddly enough, as a shield. These are the employees whose performances are not quite deficient enough to render adverse employer decisions based on the grounds of

incompetence or inadequate performance open-and-shut matters. Should such an employee be fired or demoted, he may—given the inevitable ambiguities and conflicting testimony as to the quality of his work product—be able to prevail before a jury or judge with his claim of unlawful discrimination. And yet, because he is undeniably a second-rater who is not going to be able to go out into the job market with a stellar resumé, he is unlikely to be easily able to secure another comparable job. Thus, he is likely going to recover a significant back pay award because, even if he makes the effort, he will not succeed in mitigating his losses. The consequence is that a reasonably prescient or savvy employer will be dissuaded from terminating, demoting, or otherwise adversely dealing with its mediocre employee. Rather, that employee will be retained and perhaps even promoted, only to continue performing in a lackluster manner. And it will be the mitigation principle that at least in part may account for this perverse result.

2. Manipulative Employees

Another argument has been made that the mitigation principle is a necessary device for deterring Machiavellian employees from engineering their wrongful discharges. More specifically, it has been suggested that if a terminated employee could secure another job and receive the salary for that endeavor without it counting against her back pay award, there would be an incentive for her to provoke a breach, *i.e.*, wrongful discharge, of the contract with the first employer. Thereby, she would wind up in a better financial position than she would have occupied had she not been fired, since she would be able to retain both her pay from her new job, as well as her back pay from the previous employer.[255]

Whatever the likelihood of the foregoing scenario in some circumstances, it would not seem to be one likely to be played out in the statutory discrimination context. For if an employer were to be somehow provoked into getting rid of a troublesome employee (whose disruptive conduct was engaged in as a ploy to secure discharge), the discharge would be based on the employee's provoking actions, rather than on one of the factors forbidden by Title VII, the ADEA, and/or the ADA, *i.e.*, gender, race, age, etc. Thus, the employee presumably would be unable to prove her discrimination case and would not be able to collect back pay after all. (On the other hand, it must be conceded that the threat of a lawsuit—even a spurious one—may have some

255. *See* Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 186 n.32 (1996).

settlement value and so the likelihood of employee-generated discharges cannot entirely be discounted.)

V. RESOLUTION: THE MODIFIED-MITIGATION PRINCIPLE

A. *The Proposal*

If one accepts the conclusion that the mitigation principle undercuts the effectiveness of Title VII, the ADEA, and the ADA, and if one further is committed to enhancing achievement of the equal employment opportunity goals that animate these statutes, it follows that the principle either should be rejected or at least modified. For Title VII and the ADA, either tack—abolition or modification—would require legislative action to remove the explicit mitigation requirement set forth in the former statute and incorporated into the latter. Inasmuch as the ADEA contains no express mitigation language, judicial reconsideration of the principle could achieve its demise or reshaping.

Neither the amending of Title VII and/or the ADA, nor judicial revision of prior judicially-created doctrine, will easily occur. Given the forces presently in control in the Congress, no quick response could reasonably be expected by any sensible observer of the political scene. And given the general resistance of the courts to self-generated innovation, such judicial creativity is not likely to occur more than sporadically. This latter conclusion is buttressed, moreover, by the seeming overall tenor of the courts' less than eager response in recent years to ADEA claims: an examination of both trial court and appellate court dispositions reveals that ADEA plaintiffs prevail less than one-fourth of the time.[256] In any event, fashioning the actual strategies for achieving change, and assessing the likely success of these efforts, are for other arenas than this Article. The best that can be done here is to make the case for change. That has been done. The other task that must be essayed here is to suggest the contours of that change.

What is needed is eradication of the benefit for the employer that is inherent in the principle as it now stands. That end could be achieved by simply abolishing, root and branch, the mitigation principle. Thereby, no moneys that are actually earned, or that could have been earned, by the grievant following his or her wrongful treatment would be applied to reduce the employer's liability. The problem with this solution is that it may accomplish too much—at least in the eyes of

256. *See* Eglit, *supra* note 44, at 645-58. Of course, presumably most strong plaintiffs' cases are settled and thus never are resolved in the courtroom.

some. There is, after all, the bugaboo of idleness. Whether deemed immoral or economically inefficient or both, idleness by able-bodied adults is a state that society generally condemns (except at certain appropriate times, *i.e.*, weekends, vacations, and—for elders—following retirement). And so one must take account of the relatively few (but concededly indeterminable) discrimination plaintiffs who could afford to stay unemployed and who might—absent the existence of the incentive afforded by the mitigation principle in its present form—actually choose to do so. Their indolence is not something that is particularly deserving of the encouragement that abolition of the mitigation principle would constitute.

There would be another adverse consequence, as well, were the mitigation principle to be totally junked in the statutory discrimination contexts: discharged plaintiffs who in fact did secure other employment would wind up with what some would consider windfalls, making them far better off than they would have been had the unlawful discrimination never occurred. They would have in their pockets both their back pay awards and the post-termination earnings that, but for having been discharged, they would not have been able to acquire.

There is a middle way, however, between wholesale abolition, on the one hand, and unmodified retention, whose negative consequence has been amply discussed, on the other. The mitigation principle can be retained to the extent that it holds that post-discharge moneys earned, or that could have been earned from an available comparable job that could have been secured with reasonable diligence, are deducted from the prevailing plaintiff's back pay recovery. But the mitigation principle should be modified so as to prevent the culpable employer from receiving the benefit of that reduction.[257] To that end, the reduction in the plaintiff's back pay award should not be credited to the employer. Instead, the employer should be required to pay that amount—subject in some instances to a twenty percent reduction—to a federal agency, *i.e.*, the Equal Employment Opportunity Commission (EEOC), or a to new entity created by federal statute, *i.e.*, a statutorily created trust fund administered by the EEOC. These moneys collected from employers then would be deployed to further the purposes of Title VII, the ADEA, and the ADA: they would be used to pay the costs of litigation incurred by discrimination claimants who meet suitable statutorily set criteria in order to be eligible for a subsidy.

257. *Cf.* Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1196-97 (1989) (while generally endorsing the mitigation principle, the authors argue for the non-applicability of the principle in whistleblowing cases where the employee is discharged because such discharges are wrongful and, more specifically, because the employer in firing the employee violates a New York statute that purports to protect whistleblowers).

I do not undertake here the task of spelling out in detail what criteria might or should apply to the eligibility determination. Assuming the Congress were willing to pursue this approach, there would be time enough then to address and accord weight to the various factors that could come into play. Obviously, one would have to take into account the extent of a litigant's financial need; the strength of a subsidy applicant's case; the particular litigation needs—discovery, expert witnesses, computer time, etc.—for which funding is sought; the impact of the suit should the plaintiff prevail; and so on. Presumably, the EEOC is up to the task of making such judgments. After all, it already is engaged in similar determinations, given that it must select—pursuant to its existing statutory authority[258]—which claims it will expend its resources on by suing on behalf of aggrieved individuals.

By enacting this split-recovery approach, the Congress would achieve several salutary ends:

—the employee would not be encouraged to remain idle, since he or she would continue to suffer a diminution in the back pay recovery that results from deducting actual or potential post-discrimination earnings;

—the employer would benefit very little (only a twenty percent reduction would be credited to the employer) from its wrongdoing, and so the public interest goals of the statutes no longer would be undermined; and

—the public interest goals of the statutes would be served both by elimination of the current negative force of the unmodified mitigation principle, and by the subsidization of colorably meritorious claims that otherwise might not be pursued because of financial impediments confronting private litigants.

But why allow a possible twenty percent reduction in the employer's liability, if indeed any reduction at all in liability serves as a misplaced reward to employers for wrongdoing? The answer is that this is a necessary bounty, so to speak, that is required as a matter of pragmatism. Where there is an issue as to whether the plaintiff earned other income, the burden of proof is on the employer to prove that the plaintiff failed to mitigate.[259] Unless there is some financial benefit to be obtained by an employer for successfully pursuing such an effort, the employer will have no reason to try to establish the plaintiff's lapse. By

258. The EEOC is authorized to file suit under Title VII against non-governmental entities. 42 U.S.C. § 2000e-5(f)(1) (1994). The United States Attorney General is authorized to sue governmental entities under Title VII. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6 (1994). These provisions are incorporated into the ADA by 42 U.S.C. § 12117 (1994). Section 626 of the ADEA, 29 U.S.C. § 626 (1994), incorporates sections 216 and 217, 29 U.S.C. §§ 216, 217 (1994), of the Fair Labor Standards Act, 29 U.S.C. §§ 200-19 (1994), and thereby the EEOC is authorized to maintain age discrimination suits.

259. *See supra* note 30.

according to the employer a twenty percent reduction in its liability, a financial incentive is provided for it to attempt to prove the failure-to-mitigate defense. Of course, if there is no argument as to interim income—*i.e.*, the plaintiff acknowledges that she secured a new job at an undisputed pay rate—there would be no basis for rewarding the defendant for raising an issue that did not need to be broached.

B. The Punitive Damages Split-Recovery Analogue

While there does not appear to be any direct precedent for the foregoing modified-mitigation proposal, there is an analogue that is somewhat instructive. Several states have adopted statutory limitations on the recovery by plaintiffs of punitive damages, whereby a portion of the recovery is paid into a state fund.[260] For example, an Oregon statute provides that after the attorney has been paid her agreed-upon share of a punitive damages award, only one-half of the remainder is to be paid to the plaintiff, while the other half is to be paid into a Criminal Injuries Compensation Account.[261] Other states have enacted variations on this theme.[262] The impetus for these statutes has been the desire to avert

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260. *See generally* Sharon G. Burrows, Comment, *Apportioning a Piece of Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437 (1992); James D. Ghiardi, *Punitive Damages: State Extraction Practice is Subject to Eighth Amendment Limitations*, 26 TORT & INS. L.J. 119 (1990); Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104 (1994).

261. OR. REV. STAT., Ch. 18, § 18.540 (Butterworth 1988), provides as follows:

> The punitive damages portion of an award shall be distributed as follows:
>
> (1) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.
>
> (2) One-half of the remainder shall be paid to the prevailing party.
>
> (3) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

262. The Georgia statute, GA. CODE ANN. § 51-12-5.1(e)(1) (Supp. 1999), provides as follows:

> (e) (1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.
>
> (2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of Treasury and Fiscal Services within 60 days of receipt from the

judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

The Illinois statute, 735 ILL. COMP. STAT. 5/2-1207 (West 2000), provides as follows:

The trial court may also in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services. The amount of the award paid from the punitive damages to the plaintiff's attorney shall be reasonable and without regard to any contingent fee contract, except that such amount shall not exceed the amount authorized by the contingent fee contract. In apportioning punitive damages as provided in this Section, the court shall consider, among other factors it deems relevant, whether any special duty was owed by the defendant to the plaintiff.

The Iowa statute, IOWA CODE ANN. § 668A.1 (West 1998), provides as follows:

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

. . . .

b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. . . . .

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assisted programs.

The Missouri statute, MO. ANN. STAT. § 537.675 (West 1999) provides as follows:

1. There is created the "Tort Victims' Compensation Fund." . . . .

2. Fifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed rendered in favor of the state of Missouri. The circuit clerks shall notify the attorney general of any final judgment awarding punitive damages rendered in their circuits. With respect to such fifty percent, the attorney general shall collect upon such judgment, and may execute or make settlements with respect thereto as he deems appropriate for deposit into the fund.

3. The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding under this section.

4. No disbursement shall be made from the tort victims' compensation fund until procedures for disbursement are established by further action of the general assembly.

The Utah statute, UTAH CODE ANN. § 78-18-1 (1996), provides as follows: "(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund."

Some statutes have either expired or have been repealed. The Kansas statute, KAN. STAT. ANN. § 3402(e) (1994), applied only to actions that accrued between July 1, 1985, and June 30, 1988. The statute, which expired on July 1, 1989, provided as follows:

(e) If exemplary or punitive damages are awarded pursuant to this section, 50% of such damages recovered and collected shall be paid to the party awarded them and 50% shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the health care stabilization fund established pursuant to K.S.A. 40-3403 and amendments thereto.

COLO. REV. STAT. § 13-21-102(4) (1987) (repealed), was held unconstitutional in *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 272 (Colo. 1991). *See infra* notes 278-85 and accompanying text. The provision, which subsequently was repealed, read as follows:

windfalls for plaintiffs, while at the same time preserving the punitive damages remedy as a useful mechanism for achieving both punishment and deterrence.

The case law is both limited and divided. Two courts have held a split-recovery punitive damages statutory scheme unconstitutional under various provisions of the United States Constitution;[263] several other courts have rejected legal challenges.[264]

1. The Negative Split-Recovery Statute Decisions

One of the two decisions holding a split-recovery statute unconstitutional was rendered by a federal district court in *McBride v. General Motors Corp.*[265] The court addressed a Georgia statute which provides that in the instance of product liability claims (and only in such instance), seventy-five percent of a punitive damages award is to be paid to the state.[266] The court concluded that this provision violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment[267] (as well as comparable state constitutional provisions). The equal protection issue flowed from the fact that the statute differentiates between product liability plaintiffs and other claimants, given that the former can retain only twenty-five percent of their punitive damages awards, whereas the latter plaintiffs recover the full one hundred percent. Applying the standard equal protection minimum rationality test,[268] the court held that this differential in treatment was not rationally related to a legitimate state interest.[269]

> One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

The Florida statute, FLA. STAT. ANN. § 768.73(2)(b) (repealed), also no longer is in force.

263. *See* McBride v. General Motors Corp., 737 F. Supp. 1563, 1578 (M.D. Ga. 1990); Kirk v. Denver Publ'g Co., 818 P.2d 262, 272 (Colo. 1991).

264. *See* Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992); State v. Moseley, 236 Ga. 680, 436 S.E.2d 632 (1993), *cert. denied*, 511 U.S. 1107 (1994); Mack Trucks, Inc., v. Conkel, 263 Ga. 539, 436 S.E.2d 632 (1993); Shepherd Components v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 612 (Iowa 1991); Fust v. Attorney Gen., 947 S.W.2d 424, 431 (Mo. 1997).

265. 737 F. Supp. 1563 (M.D. Ga. 1990).

266. For the full text of the statute see *supra* note 262.

267. U.S. CONST. amend. XIV, cl. 1.

268. *See infra* note 303 and accompanying text.

269. *See McBride*, 737 F. Supp. at 1576-77. There is no equal protection problem insofar as the modified-mitigation proposal is concerned, inasmuch as all Title VII defendants come within its sway, rather than some being held accountable under it and some not. The same holds true vis-a-vis ADEA and ADA defendants.

The court further held that the Excessive Fines Clause of the Eighth Amendment,[270] which the court obviously deemed to have been incorporated through the Fourteenth Amendment and made applicable to the states (although it did not so state or hold),[271] was violated by the statute.[272] The court also held that the Double Jeopardy Clause of the Fifth Amendment[273] (which indubitably has been incorporated through the Fourteenth Amendment so as to be applicable to the states)[274] was violated.[275] However, with regard to both of these holdings the court offered virtually no analysis; rather, it simply announced that the two clauses applied and that both had been transgressed:

> The [Georgia] Act, through the product liability punitive damage subsection, converted the pre- . . . Act punitive damages statute of Georgia into a statute having [a] constitutional infirmity . . . because the State of Georgia would have a right to receive a share of the damages awarded and the excessive fines clause of both the state and federal constitutions would be implicated. Thus, the Act, if the subsection allowing the State of Georgia to occupy the status of a judgment creditor entitled to 75% of any award of product liability punitive damages is allowed to stand, converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States.[276]

The other decision striking down a split-recovery statute was rendered by the Colorado Supreme Court in *Kirk v. Denver Publishing Co.*[277] The statute, which subsequently was repealed, provided that one-third of a punitive damages award was to be paid into the state general fund.[278] The court concluded that the statute violated the Takings

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270. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

271. In fact, the Supreme Court has yet to hold that the Excessive Fines Clause indeed is applicable to the states. The majority in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the key Excessive Fines Clause ruling, declined to decide the question. *Id.* at 276 n.22. As to the relation of the Clause to punitive damages generally, see Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987).

272. *See McBride*, 737 F. Supp. at 1579.

273. U.S. CONST. amend. V.

274. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969).

275. *See McBride*, 737 F. Supp. at 1579.

276. *Id.* at 1578.

277. 818 P.2d 262 (Colo. 1991).

278. For the full text of the statute see *supra* note 262.

Clause of the United States Constitution[279] and the comparable state constitutional provision.[280] The *Kirk* court looked to the statute's phraseology, which called for a judgment first being entered, the award then being collected by the plaintiff, and then one-third of the award being remitted to the state by the plaintiff.[281] The judgment, the court opined, constituted a property interest that belonged to the prevailing plaintiff.[282] The court next articulated the applicable rule for determining whether the plaintiff's obligation to remit to the state one-third of the judgment, without any compensation being paid by the state to the plaintiff, constituted a permissible taking under the Fifth and Fourteenth Amendments:

> [I]n order to withstand a constitutional challenge to a governmental appropriation of a significant part of a money judgment under the Taking Clause of the United States Constitution, the governmental appropriation must bear a reasonable relationship to the governmental services provided to civil litigants in making use of the judicial process for the purpose of resolving the civil claim resulting in the judgment.[283]

The court concluded that the statute did not satisfy this "reasonable relationship" standard; the extraction of one-third of the award did not qualify as a valid penalty or forfeiture because it was imposed not on the defendant wrongdoer but on the innocent plaintiff: "It goes without saying that placing the burden of payment on the judgment creditor who suffered the wrong bears no reasonable relationship to any arguable goal of punishing the wrongdoer or deterring others [, which are the goals of punitive damages,] from engaging in similar conduct."[284] (The court further concluded that the state's capture of one-third of an award could not qualify as an *ad valorem*

279. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. This provision has been incorporated through the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, cl. 1, so as to be applicable to the states. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

280. The plaintiff raised a variety of other constitutional claims—including denials of procedural and substantive due process, and of equal protection—which the court did not address. *See Kirk*, 818 P.2d at 265 n.3.

281. *Kirk*, 818 P.2d at 266-67.

282. "[T]he term 'property'... includes the judgment itself, which creates an independent legal right to full satisfaction from the 'goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained.'" *Kirk*, 818 P.2d at 267 (quoting COLO. REV. STAT. § 13-52-102(1) (1987)).

283. *Id.* at 270.

284. *Id.*

property tax or as a valid excise tax. Nor could it be justified as a valid user fee imposed for the privilege of using the civil justice system.[285])

2. The Decisions Upholding Split-Recovery Statutes

All but one of the decisions upholding punitive damages split-recovery statutes concerned the claims of plaintiffs protesting the reduction of the amounts they otherwise would have recovered as punitive damages. The exception is *Burke v. Deere & Co.*,[286] in which the court addressed the Iowa statute.[287] Here, it was the defendant that raised a constitutional claim, based on the Excessive Fines Clause.[288] The defendant argued that by virtue of seventy-five percent of the punitive damages award being paid into a state civil reparations trust fund, it was subjected to an excessive fine. In rejecting that somewhat obscure argument, the court drew a distinction based on the identity of the recipient of those funds: "A clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts."[289] The identity of the latter payee rendered the scheme constitutionally acceptable. On appeal, the Court of Appeals reversed, but did not address the issue of the split-recovery statute's constitutionality.[290]

The Iowa Supreme Court rejected the plaintiff's argument in *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*[291] that the Iowa split-recovery statute that also was addressed in *Burke* effectuated a taking of property in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses (as well as the comparable state constitutional provisions).[292] The court reasoned that punitive damages are "not intended to be compensatory and . . . a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it."[293] Consequently, a prevailing plaintiff has no vested right to punitive damages prior to the entry of a judgment, and so a judgment entered by the trial court directing payment of a portion of an award to a state entity in accordance with the state split-recovery statute would not constitute a taking of property.

285. *See id.* at 272.
286. 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd*, 6 F.3d 497 (8th Cir. 1993).
287. For the full text of the statute see *supra* note 262.
288. *See Burke*, 780 F. Supp. at 1234-35.
289. *Id.* at 1242.
290. *See* Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993).
291. 473 N.W.2d 612 (Iowa 1991).
292. *Id.* at 619.
293. *Id.*

In *Gordon v. State*[294] the Florida Supreme Court addressed a taking argument (albeit without identifying whether this claim was being made under the United States Constitution or under a state constitutional provision).[295] Approvingly quoting from the district court decision that it affirmed, the court reasoned that the prevailing plaintiff had no property right to the recovery per se of punitive damages, since the authority for such damages was based entirely upon public policy considerations.[296] Thus, at least prior to the entry of judgment a plaintiff had no protectable property interest in such damages, and so it followed that there was no valid taking argument to be made.[297] The *Gordon* court further ruled, again without specifying whether it was engaging in an analysis of the federal or the state constitution, that there was no substantive due process violation inasmuch as the statute (which since has been repealed)[298] constituted a rational exercise of state power:

> The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.[299]

In *Fust v. Attorney General of Missouri*[300] the state supreme court addressed a profusion of claims arising under various provisions of the Missouri constitution.[301] With regard to the plaintiffs' due process claim (which was not identified as arising either under the Fourteenth Amendment's Due Process Clause, a state constitution due process provision, or both), the court looked to federal case law, citing a United States Supreme Court decision as follows: "'A person has no property

294. 608 So. 2d 800 (Fla. 1992), *cert. denied*, 507 U.S. 1005 (1993).

295. *Id.* at 801.

296. *See id.* (citing Gordon v. State, 585 So. 2d 1033, 1035-36 (Fla. Dist. Ct. App. 1991), *aff'd*, 608 So.2d 800 (Fla. 1992), *cert. denied*, 507 U.S. 1005 (1993)).

297. *See id.* at 801-02.

298. *See supra* note 262.

299. *Gordon*, 608 So. 2d at 802. The court also rejected in very abbreviated fashion a number of other constitutionally-based claims, *i.e.*, that the statute violated the right to trial by jury, that it constituted a tax on judgments, that it denied equal protection, and that it constituted a special law. *See id.*

300. 947 S.W.2d 424 (Mo. 1997).

301. These claims were as follows: a bill enacted by the state legislature must address only one subject; the subject matter of a bill must be set forth in the bill's title; the distribution of the moneys received violated the ban on the grant of public moneys or property to private persons; the deposit of the moneys in a special fund violated the requirement that moneys received by the state be paid into the state treasury; the distribution from the fund of the moneys received by the state fund violated the ban on state moneys being distributed other than by legislatively enacted appropriations; the diversion of part of an award violated the separation of powers by depriving the courts of the power to enforce the judgments they rendered; the diversion of moneys to a state fund violated the "certain remedy" provision of the Missouri constitution; the statute denied the plaintiffs their natural right to enjoyment of the gains of their own industry; the statute constituted a "special law." *Id.* at 427-31.

interest, no vested interest, in any rule of the common law . . . . The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law.'"[302] With regard to the equal protection claim that there was an unconstitutional disparity in treatment as between people who secured awards in the Missouri state courts and those who either settled their claims or litigated them in federal court, the state supreme court again looked to federal law for guidance (again without identifying the source of the equal protection claim):

> Social and economic legislation like sec. 537.675.2 "that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. " "Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Appellants have not carried this heavy burden here.[303]

The plaintiffs' constitutional challenges also were unsuccessful in *Mack Trucks, Inc. v. Conkle*,[304] which involved the same Georgia split-recovery statute earlier held unconstitutional by the federal district court that decided the *McBride* case. Ignoring *McBride*, the court rejected the claim that this statute effectuated a taking in violation of the Fourteenth Amendment, reasoning that "[a] plaintiff has no vested property right in the amount of punitive damages which can be awarded in any case, and the legislature may lawfully regulate the amount of punitive damages which can be awarded."[305] The court further concluded that the differential in treatment as between products liability plaintiffs and other plaintiffs was rationally related to legitimate state purposes.[306]

3. The Lessons Drawn From the Punitive Damages Cases

While the case law generated by the split-recovery statutes involving punitive damages awards suggests some issues to be considered

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302. *Id.* at 431 (quoting Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978)).

303. *Id.* at 432 (citations omitted).

304. 436 S.E.2d 635 (Ga. 1993).

305. *Id.* at 639. The court likewise deemed lacking the plaintiffs' Fourteenth Amendment equal protection argument, which was based on the fact that prevailing plaintiffs who recovered punitive damages in products liability cases were treated differently than were plaintiffs in other cases, as to which the diversion of a portion of the award into the state treasury did not apply. *See id.*

306. In *State v. Moseley*, 263 Ga. 679, 436 S.E.2d 632 (1993), *cert. denied*, 511 U.S. 1107 (1994), the same court again upheld the constitutionality of the Georgia statute. In addition to rejecting the taking argument, as had the *Mack Trucks* court, the court further rejected the claim that the statute constituted a violation of the jury trial guarantee set forth in the state constitution.

vis-a-vis the modified-mitigation proposal, the decisions do not in their own right have any crucial bearing here. For one, of course, the statutes at issue in these cases concerned punitive damages; the modified-mitigation proposal does not. Moreover, the case law upholding such statutes, as well as the *Kirk* decision which struck down such a statute, addressed claimants who suffered diminutions of their recoveries by virtue of the state taking portions of their punitive damages awards. The modified-mitigation proposal, however, leaves the plaintiff untouched. She is neither better off nor worse off than she otherwise would have been. Rather, under the modified-mitigation scheme it is the defendant from whom the moneys in question are being extracted.

While it was the defendant who contested the split-recovery statute in *McBride*, the court's equal protection concern has no bearing here, since there is no differential in treatment as between one group of Title VII, ADEA, and/or ADA defendants and another group of defendants under one or more of the statutes. As for the *McBride* court's treatment of the defendant's due process claim, the court held for the party challenging the statute (*i.e.*, the defendant in the underlying suit) on grounds irrelevant to the discussion here.[307] And as for the excessive fines and double jeopardy issues raised by the defendant and addressed in *McBride*, the court's analyses simply were deficient (or non-existent).[308]

C. The Excessive Fines Clause

Even though in *McBride* the one court to address a defendant's excessive fines argument responded with an unelucidating discussion, the Excessive Fines Clause itself merits discussion. The conclusion emerges that the Clause's prohibition is not an impediment to adoption of the mitigation reform proposal put forth here. This conclusion is arrived at through addressing a number of subsidiary questions.

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307. The court reasoned that if the split-recovery scheme was, as the State contended, a revenue-raising device, it would be irrational for the State to not take the entire punitive damages award, rather than just 75%. Thus, the scheme actually was, in the court's view, not a revenue-raising measure, but rather was an "arbitrary and unreasonable provision [that was] business-oriented, designed to restrict injured plaintiffs of an incentive to bring actions to punish, penalize, or deter egregious business practices." McBride v. General Motors Corp., 737 F. Supp.1563, 1578 (M.D. Ga. 1990).

308. Even if the Excessive Fines Clause were applicable at the state level, at most it only proscribes *excessive* fines. Yet there was no explanation on the *McBride* court's part as to why the so-called fine was excessive. Moreover, the focus of the court's condemnatory language was not the award's amount, but the fact that the state was a payee. *See McBride*, 793 F. Supp. at 1563. There simply is nothing on the face of the Clause, however, that suggests that the identity of the recipient of funds is at all relevant to the substantive determination of whether a violation has occurred. Finally, the court's pronouncement regarding double jeopardy was unexplained.

1. The Modified-Mitigation Proposal as Calling for Punishment of Discriminators

The seminal Supreme Court decision addressing the Eighth Amendment's Excessive Fines Clause is *Browning-Ferris Industries v. Kelco Disposal, Inc.*[309] While acknowledging that there was language in previous rulings intimating that the Eighth Amendment only applies to criminal prosecutions and punishments, the Court—confronted with the claim that a punitive damages award rendered in a civil case constituted a violation of the Excessive Fines Clause—declined to resolve the question. "Whatever the outer confines of the Clause's reach may be," it wrote, "we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[310] Thus, the Court at least left open the possibility that the Clause could apply in a situation where a governmental body receives some portion of the award. The Court arguably went on to narrow the scope of the Clause's potential application in civil cases, however, when it asserted later in the opinion that "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines *directly imposed by*, and payable to, the government."[311] In the same arguably restrictive vein the Court further observed that "the text of the Amendment points to an intent to deal only with the prosecutorial powers of government."[312]

Subsequently, in *Austin v. United States*[313] the Court refined its analysis. *Austin* involved a civil forfeiture proceeding instituted by the federal government to secure personal property belonging to an individual who previously had been convicted of a state criminal drug offense. The Court rejected the argument—based on *Browning-Ferris*—that the Excessive Fines Clause does not apply in the civil context save in instances where the government either prosecutes the action or has a right to receive a share of the damages. The purpose of the Eighth Amendment, the Court asserted, is to limit the government's power to punish, and so the key issue is whether the forfeiture is a punishment, and not whether it is civil or criminal in nature. Quoting from *United States v. Halper*,[314] the *Austin* Court stated: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather

309. 492 U.S. 257 (1989).
310. *Id.* at 263-64.
311. *Id.* at 268 (emphasis added).
312. *Id.* at 275.
313. 509 U.S. 602 (1993).
314. 490 U.S. 435 (1989).

can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[315]

There is no point in disputing the obvious here: the modified-mitigation proposal—whether applied in suits by non-governmental entities or by the federal government, itself[316]—entails punishment, since its animating force is enhancement of the deterrent values of Title VII, the ADEA, and the ADA, with this enhanced deterrence being achieved through retribution, *i.e.*, the extraction from wrongdoers of more money than they hitherto have had to pay. Moreover, the proposal calls for the losing defendant making a payment of money to the federal government. Thus, as a general proposition, it is correct to conclude that the Excessive Fines Clause ostensibly is applicable to the amounts that defendants (or at least some of them[317]) would have to pay in those instances where prevailing plaintiffs secure other paying jobs or with reasonable diligence could have obtained other comparable, compensatory employment.[318]

2. Applicability of the Clause to Defendants That Are Not Persons

Notwithstanding the fact that the Excessive Fines Clause is, in the abstract, applicable in assessing the constitutionality of the modified-mitigation proposal, there is good reason to question as a practical matter the likely availability of an excessive fines argument in the statutory employment discrimination context. This is because the typical Title VII, ADEA, or ADA defendant—whether an employer, a union, an employment agency, or a joint labor-management apprenticeship committee—will not be a person. Most defendants in cases arising under these statutes are corporations; sometimes the defendant is a governmental body; on occasion the defendant is a partnership.[319]

315. *Austin*, 509 U.S. at 610 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

316. There remains a question as to whether the Excessive Fines Clause applies to the states. *See supra* note 271. In any event, most state constitutions contain comparable clauses. *See, e.g.*, COLO. CONST. art. II, § 20; KY. CONST. § 17. While the case law concerning such clauses is not addressed here, the author assumes that the analysis put forth in this Article would be apposite vis-a-vis at least some, and perhaps most or all, of the state provisions.

317. *See infra* notes 319-22 and accompanying text.

318. The *Browning-Ferris* Court declined to decide whether the Double Jeopardy Clause comes into play in a *qui tam* action, "in which a private party brings suit in the name of the United States and shares in any award of damages." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.21 (1989). Here, of course, a private plaintiff is neither suing in the name of the United States, asserting a right of the United States, nor sharing in an award as to which the United States is the primary recipient.

319. A survey of the 94 federal court of appeals ADEA decisions published in 1996 disclosed as to the entities that were the defendants the following: 60 were corporations; 13 were governmental entities; eight were educational institutions; five were non-governmental health care providers; five were financial institutions, of which four were banks; one was a trade association; and one was an accounting firm. *See*

Almost invariably, suits against individuals are not allowed to proceed: the great majority of courts dismiss claims against individual defendants (typically supervisory personnel), even if they work for corporate or governmental entities.[320]

In *Browning-Ferris* the Court specifically declined to decide whether the Eighth Amendment protects corporations that, as defendants, claim to have been subjected to excessive fines.[321] Presumably, although it did not directly so state, it also thereby was avoiding answering the more general question of whether the Clause affords protection to other comparable grievants, *i.e.*, partnerships and government bodies, as well. Thus, there is reason to at least ponder whether an excessive fines claim

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Eglit, *supra* note 44, at 621. With regard to the 222 nonappealed district court rulings published in that year, the breakdown was as follows:

Corporations	76
Governmental agencies or corporations	38
Manufacturers	20
Institutions of higher education (including 7 private and one public university, 1 medical college, and 1 additional institution)	11
Health care providers (including 5 hospitals)	11
Insurance companies	9
Banks	4
Advertising agencies	3
Private utility companies	3
Hotels	2
Airlines	2
Brokerage houses	2
Credit unions	2
Not-for-profit scientific organizations	2
Beer brewers	2
Debt collection agencies	2
Construction company	1
Energy company	1
Clothing retailer	1
Credit card company	1
Jewelry company	1
TV station	1
Securities dealer	1
Labor organization	1
Security service	1
Public school	1
Private school	1
Charitable not-for-profit organization	1

Id. at 622.

320. *See, e.g.*, Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996) (ADEA suit); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995) (Title VII suit); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 52 n.2 (7th Cir. 1995) (ADEA suit); Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (Title VII suit); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (ADEA suit).

321. *Browning-Ferris*, 492 U.S. at 276 n.22.

could even be established, as a matter of law, by the typical losing defendant in a Title VII, ADEA, or ADA suit.[322]

3. Applicability of the Clause Only to Fines

The Excessive Fines Clause only affords protection vis-a-vis fines and, more than that, only fines that are excessive. Two relevant questions emerge. First, does holding a discriminatory employer liable for the amount which, under the existing formulation of the mitigation principle it would not have to pay, constitute the imposition of a fine? If that question is answered in the affirmative, the inquiry then must focus on whether the fine imposed is excessive.

Looking to the origins of the Clause and the purposes animating the Framers, the *Browning-Ferris* Court pointed out that "at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[323] The Court further emphasized that "[p]etitioners have come forward with no evidence, or argument, which convinces us that the word 'fine,' as used in the late 18th century, would have encompassed private civil damages of any kind."[324] Thus, the Court concluded—as already discussed—that the "Excessive Fines Clause . . . [only limits] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."[325] However, as discussed earlier, in *Austin* the Court rejected a distinction between civil and criminal proceedings and focused on the presence of punishment as being the trigger for the applicability of the Clause.[326] Here, the occasional increased financial exposure of defendants effectuated by the modified-mitigation proposal does constitute punishment. It follows that the proposal creates, in substance albeit not in name, a fine.

This is particularly so if one adheres to the traditional notion that the damages which follow a victim's failure to mitigate are damages caused not by the wrongdoer but by the victim herself.[327] The modified-mitigation proposal, from this perspective, forces a defendant that is found to have violated Title VII, the ADEA, or the ADA to pay for harm caused by someone else, *i.e.*, the victim of its wrongdoing. This

322. *But see* Burke v. Deere & Co., 780 F. Supp. 1225, 1241-42 (S.D. Iowa 1991) (addressing Excessive Fines Clause argument made by defendant, a corporation, without questioning whether defendant could maintain such an argument).

323. *Browning-Ferris*, 492 U.S. at 265.

324. *Id.* at 265 n.7.

325. *Id.* at 267.

326. Austin v. United States, 509 U.S. 602, 609-10 (1993).

327. *See supra* note 241 and accompanying text.

payment constitutes, not compensation to make the victim whole, but something over and above that, *i.e.*, punishment. In other words, a fine.

4. Applicability of the Clause Only to Fines That are Excessive

It is only excessive fines that the Eighth Amendment precludes. There is no formula, however, for determining excessiveness within the contours of the Excessive Fines Clause, which has generated very little by way of case law. No standards emerged in *Browning-Ferris* and later, in *Austin*, the Court specifically declined to fashion a test for excessiveness.[328]

a. A Reasonableness Test

The treatment by the courts of punitive damages has some tangential relevance to the treatment of the moneys paid by an employer pursuant to the modified-mitigation proposal, inasmuch as both entail damages imposed for retributive and deterrent purposes. In addressing a due process-based challenge to the amount of a punitive damages award, the Supreme Court in *BMW of North America, Inc. v. Gore*[329] endorsed a reasonableness test. It explained that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[330] In assessing whether an award is arbitrary or, conversely, reasonable, the "most important indicium," the Court asserted, "of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[331] In brief, "some wrongs are more blameworthy than others."[332] A second key factor, although a less significant one than the first, is the "ratio [of the award] to the actual harm inflicted on the plaintiff:"[333] the greater the disparity between the award and the actual harm, the more likely it is that the award will be deemed unreasonable. Finally, the reasonableness inquiry is informed by comparing the punitive damages award to the civil or criminal penalties that could be imposed for comparable misconduct.[334]

328. *Austin*, 509 U.S. at 622.

329. 517 U.S. 559 (1996).

330. *Id.* at 568 (quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 456 (1993)).

331. *Id.* at 575.

332. *Id.*

333. *Id.* at 580.

334. *See id.* at 583.

Reasonableness tests typically are not rigorous; they encourage the upholding of the policy or practice being challenged.[335] Moreover, reasonableness tests leave much room for subjective assessments: that which may seem reasonable to me may appear unreasonable to you. Thus, the *BMW* decision is not a hallmark of judicial incisiveness. Moreover, the *BMW* Court was assessing a due process claim, rather than a claim arising under the Excessive Fines Clause. And what is more, it was speaking to a challenge to a punitive damages award, not a mitigation matter. Still, after taking all these differentiating factors into account, there is a commonality between punitive damages and the amounts losing defendants would have to pay under the modified-mitigation proposal: both involve punishment, and both entail the payment of amounts that exceed the discriminatee's actual losses. Thus, the reasonableness test devised for dealing with punitive damages awards deserves attention here.

If one were to apply the due process-generated reasonableness test to Excessive Fines Clause claims, one readily could come to the conclusion that the modified-mitigation proposal passes constitutional muster. On the other hand, candor requires the admission that one also legitimately could conclude that the reasonableness factors work against upholding the proposal.

(1) Reprehensibility

Discriminatory acts and decisions in violation of Title VII, the ADEA, and/or the ADA indeed are reprehensible: they flout non-discrimination norms that have been deemed to be important enough to enact into national law.[336] Thus, one prong—indeed, the most important, according to the *BMW* Court[337]—of the punitive damages reasonableness formulation is satisfied. (Admittedly, this is a very subjective conclusion; for those who deem the anti-discrimination laws either unnecessary or flawed, violations of these statutes presumably would not evoke condemnation. For the naysayers, nothing I might suggest as to reforming one component of these statutory schemes would be persuasive. So be it—arguing first principles is not my concern, here.)

335. Thus, for example, in the equal protection context, the mere rationality test that is used to measure the constitutionality of most classifications challenged as violations of equal protection is readily satisfied; a plaintiff who must prove a law or policy to be unreasonable, and therefore violative of equal protection, almost invariably will lose. *See* Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 872 (1981).

336. For that matter, every state also has enacted a law or laws banning workplace discrimination on the basis of the same (and even more) factors as are set forth in the federal statutes.

337. *See supra* note 332 and accompanying text.

(2) Ratio

The ratio issue is more complicated. Pursuant to the traditional mitigation principle, if an individual who has been fired finds another job paying the same as, or more than, her previous one, she has suffered no harm—at least once the new job begins or could have begun. In that situation, the defendant eludes total, or at least partial, liability for back pay. Under the modified-mitigation proposal, a different scenario plays out: the defendant still must pay the mitigated amount to the EEOC or to a statutorily created trust (less the twenty percent bounty allowed the defendant as an incentive for its proving that the plaintiff failed to mitigate).

While the Court has declined to articulate a specific formula,[338] it did suggest in another punitive damages ruling, *Pacific Mutual Life Insurance Co. v. Haslip*,[339] that a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line."[340] And the *BMW* Court observed that "[w]hen the ratio is a breathtaking 500 to 1, . . . the award must surely 'raise a suspicious judicial eyebrow.'"[341] On the other hand, in *BMW* the Court conceded that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages."[342] Or "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[343]

In the most extreme case under the modified-mitigation proposal, the defendant employer could be subjected to a financial obligation entailing a ratio of X dollars to 0 dollars, where X equals the amount of the award and 0 dollars is the harm suffered by the plaintiff. For example, if a plaintiff had been earning $100,000 a year at the job from which she was fired, and she quickly secures another job paying $100,000, she suffers no financial harm. Yet, if the defendant's liability is established, let us say a year down the road, in a suit that the plaintiff pursues notwithstanding no hope of financial gain but because she desires reinstatement, the discriminatory employer will have to pay to

338. In *BMW* the Court noted that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula." *BMW*, 517 U.S. at 582.

339. 499 U.S. 1 (1991).

340. *Id.* at 23.

341. *BMW*, 517 U.S. at 583.

342. *Id.* at 582.

343. *Id.*

the EEOC or the trust $100,000 (less twenty percent). The ratio of the award to the harm is $80,000 to $0.

Of course, the foregoing scenario presents the most extreme situation. Suppose, to take a different set of numbers, a plaintiff manages only to partially mitigate—let us say our plaintiff who was earning $100,000 annually with the defendant is unable to quickly find another job and so her replacement income for the year in which she was discharged only winds up being $50,000. In that instance, she suffers $50,000 in harm for the year:[344] the difference between what she would have been paid by the defendant had she not been wrongly terminated and what she earned at a successor job. Here, the employer is required to pay to the plaintiff $50,000 in back pay and to pay $50,000 more to the EEOC or the trust. Given these numbers, the ratio of the amount paid to the government pursuant to the modified-mitigation proposal ($50,000) and the injury to the plaintiff ($50,000) is 1 to 1. This ratio certainly satisfies any application of the reasonableness test.

Returning to the first scenario, involving a stark $80,000 to $0 ratio, there is another perspective that alleviates this seeming extreme ratio. The animating force underlying the modified-mitigation proposal is the understanding that an employer, employment agency, labor organization, or joint labor-management apprenticeship committee that discriminates in violation of Title VII, the ADEA, or the ADA perpetrates a wrong whose scope extends beyond the individual person against whom the discrimination is most immediately directed. That discriminatory action or decision also inflicts damage on the public weal: it is an affront to the shared public policy goals of these statutes, to wit, the eradication of certain invidious biases from the workplace. Even though there is no way to quantify in dollars the harm done to the public good by any given instance of wrongful discrimination, surely the injury is a serious one. Thus, the ratio of the amount paid to the EEOC and the injury inflicted is not really $80,000 to $0, but something quite more moderate, even if not identifiable in specific dollar terms.

344. In figuring mitigation amounts, some courts make their computations on an annualized basis. *See, e.g.*, Stephens v. C.I.T. Group Equip. Fin., Inc., 955 F.2d 1023, 1029 (5th Cir. 1992) (ADEA case); Leftwich v. Harris Stowe State College, 702 F.2d 686, 693 (8th Cir. 1983) (same). More commonly, the entire amount of earnings received during the post-discharge period is aggregated and then deducted from the back pay claim. *See generally* 2 EGLIT, *supra* note 12, § 8.22. *Cf.* Sinclair v. Insurance Co. of N. Am., 609 F. Supp. 397, 401-02 (E.D. Pa. 1984) (disagreeing with *Leftwich* in context of determining ADEA plaintiff's entitlement to severance pay), *aff'd without opinion*, 782 F.2d 1029 (3d Cir. 1986).

(3) Comparison to Other Penalties

There are presently no civil or criminal penalties comparable to that imposed by the modified-mitigation principle. That is because the modified-mitigation principle calls for a new remedial mechanism, and not because other jurisdictions have adopted variations of this proposal that call for lesser payments to be made by the wrongdoing defendant. Thus, the third *BMW* factor arguably does not come into play either to debunk or support the modified-mitigation proposal.

On the other hand, one could argue that there indeed is a comparator: the proposal calls for imposing upon a losing defendant a financial obligation that constitutes punishment, and punitive damages also constitute a remedy grounded on the goal of punishment, rather than compensation. Title VII and the ADA permit the award of punitive damages to limited degrees: there are caps, geared to the size of the defendant, on the amounts of such damages that may be awarded.[345] Punitive damages technically are not available to prevailing plaintiffs under the ADEA, but in instances of willful discrimination the age discrimination statute does authorize the award of liquidated damages,[346] and these have been likened by the Supreme Court to punitive damages.[347] The amount of recoverable liquidated damages is set by statute as being equal to the amount of the back pay award.[348] At least as long as the amount of a modified-mitigation payment would parallel the amount that is recoverable as punitive damages under Title VII or the ADA, or liquidated damages under the ADEA, the third prong of the *BMW* reasonableness test would be satisfied.

In some instances, however, the modified-mitigation payment could considerably exceed the caps set by Title VII and the ADA. Moreover, such payments would be required in circumstances that no doubt often would not rise to the level of wrongdoing—intentional discrimination engaged in with malice or reckless disregard—that is required by the two statutes for the award of punitive damages.[349] In many instances, also, the modified-mitigation payment would arise out of factual scenarios not entailing the kind of willfulness that triggers liability for liquidated damages under the ADEA.[350] Several possibilities

345. *See supra* note 54.

346. *See* 29 U.S.C. § 626(b) (1994) (incorporating 29 U.S.C. § 216(b) (1994)).

347. *See, e.g.*, TWA, Inc. v. Thurston, 469 U.S. 111, 126 n.19 (1985).

348. *See* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b)).

349. *See supra* note 55.

350. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Court affirmed its continuing adherence to the standard it had earlier set in *TWA, Inc. v. Thurston*, 469 U.S. 111 (1985): "'[A] violation of the Act [would be] willful if the employer knew or showed reckless diregard for the matter of whether its conduct was prohibited by the ADEA.'" *Hazen Paper Co.*, 507 U.S. at 614 (quoting *Thurston*, 469 U.S. at 126).

flow from these circumstances. First, one could conclude that *all* modified-mitigation payments are unreasonable because *some* payments will exceed statutorily set Title VII and ADA punitive damages awards or typical liquidated damages awards under the ADEA. Or second, one could conclude that modified-mitigation payments would be permissible, but only to the extent that they are consistent with the amounts awardable under the statutes. Third, one could conclude that the differences between punitive damages and modified-mitigation payments are sufficient to warrant discounting the disparities in awards that may arise.

Most important in choosing among these alternatives (although this certainly is a debatable judgment) is the fact that punitive damages are paid to an individual and thus she receives what some might term a windfall. In contrast, modified-mitigation payments would be paid to the government, which in turn would use the funds to support other worthwhile litigation.[351] Thus, while no sure answer emerges, in this author's view the third of these options is the appropriate one to elect.

b. A Proportionality Test

Some have suggested[352] that the proportionality framework that the Court at one time employed in the context of the Eighth Amendment's Cruel and Unusual Punishments Clause provides the key for assessing claims made under the Eighth Amendment's Excessive Fines Clause.[353] Justice O'Connor, joined by Justice Stevens, concurred in part and dissented in part in *Browning-Ferris* and in so doing set forth a proposed proportionality scheme for measuring the constitutionality of punitive damages awards:

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351. In *Burke v. Deere & Co.*, 780 F. Supp. 125 (S.D. Iowa 1991), the court addressed the Iowa split-recovery statute, the full text of which appears in note 232 *supra*. The defendant argued that by virtue of 75% of the punitive damages award being paid into a state civil reparations trust fund, it was subjected to an excessive fine. In rejecting that somewhat obscure argument, the court drew the same distinction that is put forth in the text: "A clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts." *Id.* at 1242. Accordingly, the court denied the defendant's motion for judgment notwithstanding the verdict.

352. *See, e.g.*, Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 THOMAS M. COOLEY L. REV. 667 (1988); Klaben, *supra* note 260, at 147-51.

353. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court set forth factors to consider when determining proportionality under the Eighth Amendment. Subsequently, the Court turned its back on proportionality analysis in the context of considering claims under the Cruel and Unusual Punishments Clause. *See* Harmelin v. Michigan, 501 U.S. 957 (1991). However, in so doing the Court did not necessarily spurn such analysis for other aspects of the Eighth Amendment. *See* Alexander v. United States, 509 U.S. 544, 558 (1993). (Indeed, in *Solem* the Court pointed out that the English Bill of Rights, from which the Eighth Amendment's excessive fines prohibition stems, embodied a proportionality principle. *Solem*, 463 U.S. at 285.)

> First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.[354]

These three factors must be addressed here.

(1) The Harshness Factor

The law as it now stands assures that if a given plaintiff seeks to secure other employment but is unable to do so, and if, further, the defendant is unable to prove that the plaintiff indeed could have obtained a comparable job with reasonable diligence, the defendant will be liable for one hundred percent of the back pay award sought. Thus, an employer today knows the outer theoretical boundary (although not the actual amount) of its potential financial exposure under federal law (insofar as the back pay component of damages is concerned) when it terminates an employee or rejects an applicant. The modified-mitigation proposal does not alter this outer limit, *i.e.*, a full back pay award in situations where the plaintiff makes a reasonable, but unsuccessful, effort to mitigate. Thus far, it has never been suggested that holding an employer accountable for legitimately unmitigated back pay constitutes a fine, let alone an excessive one. And so it would be a considerable stretch to define that amount as an excessive fine just because the defendant pays the money in question to the EEOC or a trust, rather than to an individual victim.

(2) The Gravity of the Defendant's Conduct

As in the context of the earlier discussion of the reasonableness standard for assessing the constitutionality of the modified-mitigation principle, so too here, it must be recognized that discrimination in

354. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

violation of Title VII, the ADEA, and/or the ADA constitutes an affront to profoundly important social and political norms that have been enshrined in statutory proscriptions. Moreover, it also is very important to take into account the matter of intent. Despite the extensive academic and professional attention that has been focused on disparate impact analysis,[355] the great majority of cases litigated under Title VII, the ADEA, and the ADA entail the discriminatory intent model fashioned by the Supreme Court in four cases:[356] *McDonnell Douglas Corp. v. Green*,[357] *Texas Department of Community Affairs v. Burdine*,[358] *St. Mary's Honor Center v. Hicks*,[359] and *Reeves v. Sanderson Plumbing Products, Inc.*[360] Pursuant to this model, liability only can be established if the plaintiff proves that the defendant acted with discriminatory intent.[361] This standard does not require the forbidden factor to be the only one taken into account by the defendant, but it does require that that factor be a determinative one.[362] In sum, then, liability under Title VII, the ADEA, and the ADA typically is fault-based, save in the comparatively rare disparate impact situation, in which the employer's intent is irrelevant.[363] (Inasmuch as contract law is non-fault based,[364] the statutory employment discrimination scenario—which involves a relationship that is

355. *See, e.g.*, Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception*, 66 B.U. L. REV. 155 (1986); Michael Evans Gold, *Grigg's Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985); Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 570 (1983).

356. *See supra* notes 248-49 and accompanying text. In mixed motives cases, which are relatively rare, the defendant's intent also is at issue, but a different litigation scenario applies for Title VII and ADA cases as a result of the dictates of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), whose holdings were in part modified by 42 U.S.C. § 2000e-2(m) (1994). A different scenario applies vis-a-vis the ADEA, as to which *Price Waterhouse* applies in unmodified form. *See* Eglit, *supra* note 44, at 1150-53. Likewise, in direct evidence cases, the defendant's intent is at issue, but a different proof paradigm also applies. *See* 2 EGLIT, *supra* note 12, §§ 7.43-7.46. *See supra* note 247 as to discriminatory impact cases.

357. 411 U.S. 792 (1973).

358. 450 U.S. 248 (1981).

359. 509 U.S. 502 (1993).

360. 120 S. Ct. 2097 (2000).

361. *See, e.g.*, EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992) (ADEA case); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982) (same). However, it is particularly true in the ADA case law that has been proliferating that the court never gets to the intent issue; rather, the questions that commonly are addressed are whether the plaintiff was able to perform or whether the employer failed to make a reasonable accommodation. In such instances, the *McDonnell Douglas/Burdine/Hicks/Reeves* paradigm does not come into play. *See, e.g.*, Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 n.93 (10th Cir. 1997); Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1283-84 (7th Cir. 1996); Cruz v. McAllister Bros., 52 F. Supp. 2d 269, 278-79 (D.P.R. 1999).

362. *See, e.g.*, Miller v. Cigna Corp., 47 F.3d 586, 598 (3d Cir. 1995) (ADEA case); Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 n.3 (10th Cir. 1993) (same).

363. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) (Title VII case); Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993).

364. *See supra* notes 243-45 and accompanying text.

deemed to be contractual in nature[365]—actually is somewhat anomalous. Because of the critical intent factor, a termination in violation of the strictures of Title VII, the ADEA, or the ADA, is more akin to a tort than it is to a breach of contract.[366])

In terms of legal posture, then, the wrongdoer who invokes the Excessive Fines Clause comes before the court in a different position than does a traditional contract breacher. The latter may have acted intentionally or negligently, but it also may have acted merely mistakenly or unwittingly when it breached the contract at issue. In any event, whatever the motivation, that motivation is legally irrelevant under traditional contract law. In Title VII, ADEA, and ADA cases, however, the defendant that is being held accountable for the payment of damages is an adjudicated wrongdoer who has been determined (save in the rare disparate impact case) to have intentionally discriminated.

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365. *See supra* notes 179 & 230 and accompanying text.

366. This perception assumes particular relevance because the Restatement of Torts, while generally subscribing to the mitigation principle, sets forth a limited exception applicable in the instance of some intentional torts: if a tortfeasor intended a particular harm or was recklessly disregardful of it, the avoidable consequences rule does not apply "unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." RESTATEMENT (SECOND) OF TORTS § 918(2) (1979). In other words, some intentional tortfeasors do not receive the benefit of having their liability reduced by the amount of money earned, or that could have been earned, by their victims. Thus, one finds analogical support in the Restatement of Torts for denying to defendants that intentionally violate Title VII, the ADEA, or the ADA the benefit of having their liability reduced by an amount equal to the income earned, or that could have been earned, by the prevailing plaintiff.

The sticking point regarding the persuasiveness, such as it is, of this analogy lies in the Restatement's caveat: the mitigation principle will apply, after all, if the plaintiff "intentionally or heedlessly failed to protect his own interests." *Id.* This language does not do violence to the modified-mitigation proposal so far as plaintiffs who actually obtained post-termination jobs are concerned. They did not fail to protect their own interests, and so there would be no reason, were the Restatement of Torts itself to apply, to accord to the defendant employer the benefit of reduced liability resulting from application of the mitigation principle. But what of the plaintiff who failed to seek other employment, or having sought it, then failed to accept an offer of a comparable job? Would her inaction, or resistance, be deemed to rise to the level of intentional or heedless failure to protect her interests, the result being that the mitigation principle indeed would apply, were the Restatement of Torts applicable? Probably so. An example offered in a comment to the Restatement suggests why this is so:

> A intentionally strikes B, causing a light wound on B's hand. B unreasonably delays in taking antiseptic measures and the wound becomes infected, as a result of which B is unable to use his hand for six weeks. B sues A, claiming damages, including loss of six weeks' earnings. A files an answer stating that B was neglectful in not having the wound attended to. The answer is not a defense to B's action, but B is entitled to damages only for the pain, loss of earnings and other elements of damages that B would have suffered if he had used reasonable care.

RESTATEMENT (SECOND) OF TORTS § 918 cmt. a, illus. 1 (1979).

(In the modern common law setting, most of the case law that has been carving out exceptions to the employment-at-will doctrine has sounded in tort, rather than contract. *See supra* note 188 and accompanying text.)

(3) Other Jurisdictions

Justice O'Connor, in propounding a proportionality test for measuring punitive damages awards, prescribed looking for comparison purposes to other jurisdictions. Here, it is undeniable that what is proposed entails a departure from the practice that all jurisdictions currently pursue. Even so, it hardly seems sensible to read Justice O'Connor's admonition so literally as to preclude legislative innovation, since such a reading would lock into immutable form existing practices and laws.

5. Conclusion

The reasonableness test used in the punitive damages setting and the proportionality test advocated by Justice O'Connor are quite similar. They both home in on the ultimate question of whether the financial obligation imposed upon the wrongdoer is commensurate with the gravity of the wrongdoing. Under either test, the modified-mitigation proposal passes muster: it does not violate the Excessive Fines Clause.

D. The Taking Issue

Insofar as the taking issue is concerned, whatever the merits of the Colorado Supreme Court's analysis regarding a punitive damages split-recovery statute in the earlier-discussed *Kirk v. Denver Publishing Co.*,[367] that decision is not relevant to the proposed payment by a wrongdoing defendant of the mitigated amount to the federal government, be it the EEOC or a statutorily-created trust. The person from whom the money was taken in *Kirk* was the innocent plaintiff; under the modified-mitigation proposal put forth in this Article, it is the adjudicated wrongdoer who is forced to disgorge money. Still, *Kirk* aside, the fact that the defendant is being required to pay money arguably leaves the taking issue at least colorably significant if one adheres to the traditional view that, as to the plaintiff who fails to mitigate, the losses incurred by this failure properly are attributable to his own wrongdoing and not to the defendant's.[368] It follows that if the plaintiff does mitigate, he really is minimizing the losses that otherwise would be attributable to him. Thus, to make the employer pay the mitigated amounts to the EEOC

367. 818 P.2d 262 (Colo. 1991); *see supra* notes 278-85 and accompanying text.

368. *See, e.g.*, 1 DOBBS, *supra* note 4, at 384: "We could say that if the injured plaintiff fails to spend $1 [for treatment of her injury] when she knows it will reduce damages by $10, she is author of her own loss or that the defendant's tort is not a proximate cause of it." 1 *Id.*; *see also* Kelly, *supra* note 255, at 263-64.

or a fund is to take from the employer assets that belong to it, rather than moneys which, if not so taken, in any event would go to the injured plaintiff and thus would be the plaintiff's property.

There is no taking here, however. By virtue of being required to pay to a governmental entity the money that it otherwise would have been able to retain, the wrongdoing discriminator is simply subjected to a modification of the financial boon to which it otherwise has no constitutional claim, but that rather is the consequence of statutory or judge-created largesse. Granted, the extraction of the mitigated amount from the defendant constitutes what presumably the employer, resultantly poorer than it otherwise would be, would view as a penalty. Nonetheless, it is a penalty that is only imposed after an adjudication of wrongdoing and thus it is no more a taking, for purposes of the Takings Clause, than is any civil or criminal financial punishment imposed after a trial and a determination by a judge or a jury of culpability.

Connolly v. Pension Benefit Guaranty Corp.[369] is instructive. In 1980 Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),[370] which required an employer withdrawing from a multi-employer pension plan to pay to the plan the employer's proportionate share of the plan's unfunded vested benefits. The plaintiffs were trustees of a union pension plan that received contributions from several thousand employers. By the terms of the trust agreement, an employer's sole obligation to the trust was to pay the contributions required by the collective bargaining agreements negotiated by the union and the employers, even if these contributions were insufficient to pay the benefits provided for by the plan. In the trial court the plaintiff trustees argued that the MPPAA violated the Takings Clause by virtue of the fact that (1) the statute overrode the employers' insulation from any liability which exceeded that provided for by the terms of the collective-bargaining agreements, and (2) this contractual insulation constituted property. Before the Supreme Court, the plaintiffs, who lost below, no longer asserted that their contract-guaranteed limitation of liability was property; rather, they argued that the imposition of liability by the MPPAA for withdrawing from a plan violated the Takings Clause in that it required employers to transfer their assets for the private use of pension trusts and that such transfers were required without any offsetting compensation.

The Supreme Court ruled against the plaintiffs. In so doing, the Court pointed out that Congress may by statute modify contractual rights without effectuating an illegal taking:

369. 475 U.S. 211 (1986).

370. Pub. L. No. 96-364, 94 Stat. 1208 (codified at 5 U.S.C. § 8521 and in scattered sections of 26 U.S.C. and 29 U.S.C.).

> If the regulatory statute is otherwise within the powers of Congress, . . . its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking . . . . This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation. But here, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose.[371]

Under the modified-mitigation proposal, there is not even a contractual right upon which an employer can rely as a basis for limiting its liability. Rather, there is no more than inapt common law tradition insofar as mitigation under the ADEA is concerned. True, there currently is a specific statutory mitigation provision in Title VII, and this is applicable, as well, to the ADA. But this is merely a statutory beneficence accorded to defendants, and just as Congress at one time bestowed it upon them by virtue of its writing a mitigation requirement into Title VII and by virtue of the incorporation of that provision into the ADA, Congress later may change its mind and withdraw that benefit. Moreover, as in the *Connolly* case, the increased obligation imposed upon the employer under the modified-mitigation principle would not be taken by the United States for its own use but rather would be used to benefit individuals, *i.e.*, grievants invoking Title VII, the ADEA, and/or the ADA as the bases for their claims that they are victims of unlawful discrimination.

There also are more generalized bases for rejecting any Takings Clause argument here. In *Connolly* the Court, after acknowledging that there is no set formula for identifying a forbidden taking, pointed to three factors that are particularly significant in the *ad hoc* process of determining whether a taking has occurred: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[372] In applying these factors to the facts before it, the *Connolly* Court articulated rationale that are on point vis-a-vis the modified-mitigation principle, as well.

With regard to the first factor that the Court identified, *i.e.*, economic impact, the Court acknowledged, but did not deem damning, the fact that "there is no doubt that the Act completely deprives an

371. *Connolly*, 475 U.S. at 224 (citations omitted).

372. *Id.* at 225 (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

employer of whatever amount of money it is obligated to pay to fulfill its statutory liability."[373] The same holds true for the losing defendant under the modified-mitigation principle. While there were some exceptions to the MPPAA that mitigated its severity, and there is only one caveat applicable to the modified-mitigation principle (*i.e.*, the possible twenty percent bounty afforded a defendant as an incentive for it to seek to prove that the plaintiff failed to mitigate), the bottom line, to quote the Court, is that "the mere fact the employer must pay money to comply with the Act is but a necessary consequence of the . . . regulatory scheme."[374]

With regard to the second factor, *i.e.*, interference with investment-backed expectations, the Court pointed out that pension plans were the objects of legislative concern long before the passage in 1974 of the Employee Retirement Income Security Act (ERISA),[375] which was in turn amended by the MPPAA. In the Court's view, "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."[376] Accordingly, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[377] A change in the mitigation principle would only occur, at least insofar as Title VII and the ADA would be concerned, through statutory amendment, and the laborious process of achieving passage of such amendments would afford notice to employers. Concededly, judicial modification of the principle in the ADEA context would not give the same notice, and if that were to be a fatal flaw the legislative route to modification could be pursued with regard to that statute as well. In any event, just as was the case in *Connolly*, there is no reason for employers, labor organizations, joint labor-management apprenticeship committees, and advertising agencies—all of which are subject to the strictures of the three statutes—to object if the legislative scheme were to be buttressed, as the author of this Article advocates, by amendments to achieve the salutary end of eradicating workplace bias. (Indeed, that is exactly what occurred when in 1991 Title VII and the ADA were amended to allow for the recovery of compensatory and punitive damages.)[378] Thus, just as the *Connelly* Court held there was no taking

373. *Id.*

374. *Id.* at 226.

375. 29 U.S.C. §§ 1001-1461 (1994).

376. *Connolly*, 475 U.S. at 227.

377. *Id.* (quoting FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958)).

378. The Civil Rights Act of 1991, Pub. L. No. 101-166, § 102, 105 Stat. 1071, 1072-74, created 42 U.S.C. § 1981a, pursuant to which a Title VII plaintiff in an intentional discrimination suit may recover limited punitive damages. *See supra* notes 54-55. The remedies available under Title VII are incorporated

without compensation resulting from enactment of the MPPAA, so too would there be no taking were the modified-mitigation principle to be adopted.

With regard to the third factor identified by the *Connolly* Court as relevant to the determination of whether a taking in violation of the Fifth Amendment has occurred, the Court articulated a general theme directly apposite to, and supportive of, the modified-mitigation principle:

> [W]ith respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligation incurred during its association with the plan. *This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.*[379]

E. The Double Jeopardy Question

In *McBride v. General Motors Corp.*[380] a federal district court struck down the Georgia split-recovery statute applicable to punitive damages awards.[381] In so doing, the court concluded, *inter alia*, that the statute was defective on double jeopardy grounds.[382] Unfortunately, the court provided no explanation as to why it thought there was a double jeopardy problem involved in the application of the statute. Perhaps the court perceived a double jeopardy difficulty flowing from the underlying perception (one that is commonly articulated,[383] albeit not by the *McBride* court, itself) that the losses that follow a victim's failure to mitigate are deemed to result from the victim's inaction, and not the initial wrongdoer's. Thus, so the reasoning would go, to hold an adjudicated wrongdoer financially responsible for these losses, as well as those that the victim could not mitigate, would be to impose two punishments—one for loss caused by the defendant, itself, and one for loss caused by the plaintiff.

This analysis does not suffice to trigger a persuasive double jeapardy claim by the defendant. It is permissible, for example, in

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into the ADA by 42 U.S.C. § 12117 (1994).

379. *Connolly*, 475 U.S. at 225 (emphasis added).

380. 737 F. Supp. 1563 (M.D. Ga. 1990).

381. *See supra* notes 265-276 and accompanying text.

382. *See McBride*, 737 F. Supp. at 1579.

383. *See, e.g.*, 1 DOBBS, *supra* note 4, § 3.9, at 384; *see also* Kelly, *supra* note 255, at 263-64.

federal criminal cases for the court to impose upon a convicted defendant not only a jail term but also responsibility for paying the costs of the trial.[384] There is no double jeopardy problem in that scenario. Moreover, it is permissible for a wrongdoer to be both prosecuted for a criminal violation and held liable civilly for the same act; again there is no double jeopardy problem.[385] Closer to home, so to speak, is the availability under the ADEA of both a back pay award and a liquidated damages award to a plaintiff who is the object of a willful violation of the statute.[386] There never has been a persuasive suggestion that the recovery of both forms of relief runs afoul of any constitutional proscription.

Granted, the foregoing practical examples are just that—examples; they are not in and of themselves dispositive legal analyses. Thus, it is perhaps not surprising that one commentator has expended considerable effort in exploring the double jeopardy issue that he perceived as arising in the context of punitive damages split-recovery statutes.[387] Even so, whatever the relevance of the Double Jeopardy Clause[388] might be in the punitive damages context, that Clause is not an impediment—save in one minor respect, perhaps—to adoption of the unadorned modified-mitigation proposal. It is helpful in regard to this conclusion to separate the claims litigated under Title VII, the ADA, and the ADEA into two categories—those in which the plaintiff is a private individual and those in which the EEOC is the plaintiff.

1. Private Party Plaintiffs

In the group of cases in which the plaintiff is a private party—a group that comprises the great majority of the causes of action pursued under these statutes, the prevailing plaintiff typically will recover back pay from the defendant (provided the defendant does not prove that the plaintiff secured, or could have secured, other earnings that negate the claimed financial harm). Under the modified-mitigation proposal a defendant would be required to pay to the EEOC or a statutorily-created trust an amount equal to the mitigated back pay, *i.e.*, the plaintiff's post-discrimination actual or potential earnings that are deducted from her back pay award. This latter payment constitutes a penalty; its aim is to punish and deter. But despite the penal

384. *See* 28 U.S.C. § 1918(b) (1994).

385. *See, e.g.*, Hudson v. United States, 522 U.S. 93 (1997).

386. *See supra* notes 35-37 and accompanying text.

387. *See* Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 862-68 (1993).

388. U.S. CONST. amend. V.

characterization of the second payment, the Double Jeopardy Clause is inapplicable to this scenario because the first imposition of liability arises out of a suit by a private plaintiff. The accuracy of this conclusion is confirmed by *United States v. Halper*,[389] a case involving the federal government first successfully prosecuting the manager of a health care provider for a criminal offense, *i.e.*, submitting false Medicare claims, and then civilly suing the manager to recover a statutory civil penalty.[390] The *Halper* Court asserted in dictum that "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties."[391] The Court also addressed the constitutionality of the government pursuing both civil and criminal causes of action against the same individual and ruled that no double jeopardy problem exists in that scenario.[392] The Court wrote as follows:

> Nothing in today's ruling . . . prevent[s] the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature.[393]

While *Halper's* mode of analysis was subsequently debunked in *Hudson v. United States*[394] by virtue of the *Halper* Court's failure to require an initial determination as to whether the successive punishment was criminal in nature and its further failure to evaluate the statute at issue on its face to make that determination, the *Hudson* Court did not retreat from the proposition that the Double Jeopardy Clause does not preclude a criminal penalty followed by a civil one, or vice-versa. It thus follows, as already asserted, that no constitutional problem arises out of a situation entailing a private party's civil cause of action that results in two elements of relief—one that is paid to the prevailing private party by the losing defendant and another that is paid by the defendant to a governmental entity.

With regard to a situation where a private party is suing in the name of the United States and shares in an award of damages, the *Halper* Court left open the question of whether the Double Jeopardy Clause would be implicated.[395] But in any event, the private Title VII

389. 490 U.S. 435 (1989).
390. *Id.* at 437-38.
391. *Id.* at 451 (footnote omitted).
392. *See id.* at 450.
393. *Id.*
394. 522 U.S. 93 (1997).
395. The Court wrote as follows:

> We express no opinion as to whether a *qui tam* action . . . is properly characterized as

or ADEA or ADA claimant sues on his or her own behalf, not the government's. Moreover, the federal government would not share in the private plaintiff's award under the modified-mitigation proposal.

So much, then, for the first category of cases, *i.e.*, those involving private plaintiffs.

2. Cases in Which the Government is the Plaintiff

What of cases in which the EEOC is the plaintiff and is seeking relief on behalf of individuals, as it is authorized to do?[396] Again, *Halper* establishes that there is no double jeopardy problem. The same logic that applies in the instance of a private party securing two elements of relief applies to a governmental plaintiff's securing the same: as long as the total punishment does not exceed that authorized by Congress (assuming the modified-mitigation proposal were to be enacted into law), the Double Jeopardy Clause is neither implicated nor offended.[397]

There is another variable here, however. What if, in a given suit, a plaintiff recovers punitive damages under Title VII or the ADA, or liquidated damages—which are punitive in nature—under the ADEA? Pursuant to the modified-mitigation proposal, amounts representing what plaintiffs earned or could have earned are paid by defendants to the EEOC or a trust, and these payments are imposed for punitive purposes. The double jeopardy argument perhaps becomes a stronger one in this scenario, since two punishments are being imposed. If the plaintiff in the civil proceeding is a private party, *Halper* confirms that the Double Jeopardy Clause is not offended. However, if the plaintiff in the suit is the EEOC, this conclusion arguably becomes more problematic. *Hudson* resolves the problem, however. Multiple civil punishments do not run afoul of the Double Jeopardy Clause—only multiple criminal punishments do so: "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense."[398]

> a suit between private parties for the purposes of this rule. In contrast to the plaintiff in a private-attorney-general action, the private party in a *qui tam* action brings suit in the name of the United States and shares with the Government any proceeds of the action. 31 U.S.C. § 3730. In . . . [an earlier ruling] the Court assumed but did not decide that a *qui tam* action could give rise to double jeopardy. Since this assumption was not essential to the judgment in . . . [that case], we consider the issue unresolved.

Halper, 490 U.S. at 451 n.11.

396. *See supra* note 258 and accompanying text.

397. *See supra* note 393 and accompanying text.

398. Hudson v. United States, 522 U.S. 93, 99 (1997) (emphasis added).

CONCLUSION

The proposition that post-discharge moneys that a wrongfully discharged individual earns, or that she or he could have earned with reasonable effort, should be credited to the wrongdoer was developed by common law courts in the first half of the nineteenth century. This mitigation notion, which spread throughout the states in succeeding years, at least in part constituted an expression of judicial hostility to workers—a hostility flavored by a dose of sanctimonious judicial excoriations of worker idleness as morally and/or socially reprehensible.

As political and societal perceptions of undue employer power and undeserved worker weakness developed in the twentieth century, Congress stepped in to rectify some of the perceived imbalance. In enacting the National Labor Relations Act—a major New Deal legislative corrective for this skewed state of affairs—the Congress said nothing regarding the mitigation principle. Even so, the courts and the National Labor Relations Board infused it into the statute. But they did so without any apparent thoughtfulness or inquiry as to the fit of a nineteenth century employer-biased doctrine within the interstices of a twentieth century effort aimed at revising the legal system's tilt against employees.

This absence of intellectual trenchancy was compounded when Title VII of the Civil Rights Act of 1964 was drafted. Now, the Congress wrote language explicitly embracing the mitigation principle. This likely flowed from the NLRA example, for the Congress clearly perceived itself as modeling Title VII's remedial scheme on the NLRA model. In any event, whatever the animating force, it is clear that Congress accorded no perceptible attention to the relevance, utility, or suitability of the principle within a statute that expresses a profound political and social commitment to eradicating improper biases from the workplace.

The subsequent enactment of the ADA simply exacerbated the problem by applying the mitigation principle to a new subset of discriminatees and discriminators. As for the ADEA, Congress for unexplained reasons did not include a mitigation provision in that statute, but Congress's silence posed no impediment for the courts, which with alacrity infused into the statute the mitigation principle.

The problem in all this—apart from the dispiriting absence of legislative and judicial acuity that the embrace of the mitigation principle reveals—is that this principle undercuts the reformist aims of Title VII, the ADEA, and the ADA. It gives financial succor to undeserving employers, and in so doing actually minimizes the impact of these statutes as forces for reform of the workplace. It is past time,

then, to discard, or at least to modify, a nineteenth century doctrine that has been inaptly and ineptly incorporated into twentieth century laws.

The solution is to modify the mitigation principle so as to impose upon a discriminatory employer, employment agency, labor organization, or joint labor-management apprenticeship committee—the entities that fall under the sway of the three statutes' prohibitory language—a deserved financial penalty. The amounts that the plaintiff earns, or could have earned, still should be deducted from his or her back pay award. But those amounts should not in turn reduce the wrongdoer's financial exposure. Instead, the discriminator should be required to pay those mitigated amounts to the EEOC or a statutorily-created trust. These funds then should be used to subsidize litigation by financially needy litigants presenting colorable claims of violations of Title VII, the ADA, and/or the ADEA.