

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 7 (2000-2001)

Issue 1 *William & Mary Journal of Women and the Law: Symposium: (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law*

Article 7

---

October 2000

## Front Pay and Sexual Harrassment Cases: What It Is, Why It Is Important and How to Make it Better

Valerie Harris

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#)

---

### Repository Citation

Valerie Harris, *Front Pay and Sexual Harrassment Cases: What It Is, Why It Is Important and How to Make it Better*, 7 Wm. & Mary J. Women & L. 217 (2000), <https://scholarship.law.wm.edu/wmjowl/vol7/iss1/7>

Copyright c 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

## FRONT PAY AND SEXUAL HARASSMENT CASES: WHAT IT IS, WHY IT IS IMPORTANT AND HOW TO MAKE IT BETTER

The purposes of Title VII of the Civil Rights Act of 1964<sup>1</sup> are to deter employers from discriminating on the basis of sex or race and to make the victims of that discrimination whole again through both equitable and legal remedies.<sup>2</sup> Sexual harassment and discrimination have created roadblocks for working women, affecting their employment opportunities, advancement and job performance.<sup>3</sup> In an effort to address this serious problem of discrimination in the workplace, Congress included Title VII in the Civil Rights Act.<sup>4</sup> Congress amended the statute in 1991, adding section 1981a, which specifically deals with the types and amounts of damages possible in Title VII actions.<sup>5</sup> Section 1981a provides caps on compensatory and punitive damages based on the number of employees in a company.<sup>6</sup>

Although at first glance this provision seems both precise and helpful in computing damages, some confusion has surfaced over whether front pay should be included in the damage caps provided for in section 1981a.<sup>7</sup> This confusion stems from the inclusion of the phrase "future pecuniary losses" within the language of the statutory cap on damages.<sup>8</sup> By phrasing the statute in this manner, Congress presented courts with an ambiguity in classifying front pay as an equitable or legal remedy.<sup>9</sup> Another confusion and controversy in the award of front pay damages stems from the speculative nature of front pay, which can result in wildly varying awards.<sup>10</sup>

Despite the continuing confusion courts face in awarding front pay, it has proven a valuable remedy in many cases,

---

1. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

2. See *infra* notes 25-29 and accompanying text.

3. See LYNNE EISAGUIRRE, *SEXUAL HARASSMENT: A REFERENCE HANDBOOK* 153 (2d ed. 1997) (listing effects of sexual harassment on job performance, including less job satisfaction, reduced organizational commitment and less favorable views of company communications).

4. See *infra* notes 19-20 and accompanying text.

5. 42 U.S.C. § 1981a (1994).

6. *Id.*

7. See *infra* notes 99-117 and accompanying text.

8. See *infra* notes 99-117 and accompanying text.

9. See *infra* notes 99-117 and accompanying text.

10. See *infra* notes 99-117 and accompanying text.

particularly those involving sexual harassment, in which reinstatement may not be the best option for the plaintiff.<sup>11</sup>

To illustrate the importance of front pay in sex discrimination cases, this Note will first discuss Title VII and the policies behind it. Next, it will address sex discrimination cases, focusing on sexual harassment. Part III of this Note reviews the types of damages available under Title VII and the changes made by the 1991 Amendments. Part IV of this Note will focus on front pay as a remedy in Title VII cases. This section will begin by providing a general definition of front pay and will then discuss its application and the benefits and problems of awarding front pay in sexual harassment claims. Finally, this Note will explain the ways in which front pay can be made less speculative and easier to apply, alleviating courts' hostility to awarding it.

### THE CIVIL RIGHTS ACT OF 1964

#### *The Pertinent Text and Amendments of the Civil Rights Act*

The Civil Rights Act of 1964<sup>12</sup> was passed during a time of turmoil and change in the United States when citizens, the media and legislatures questioned the social structure of our society and examined the problems inherent in a segregated and discriminatory society.<sup>13</sup> The Act is a broad and sweeping piece of legislation that addresses all types of discrimination, including voting rights,<sup>14</sup> equal access to public accommodations,<sup>15</sup> and discrimination in employment opportunities.<sup>16</sup> Title VII,<sup>17</sup> which addresses discrimination in the workplace, is an integral part of the Civil Rights Act, and provides remedies for those affected by these discriminatory practices.<sup>18</sup>

---

11. See *infra* notes 55-56 and accompanying text.

12. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

13. Robert Charles Johnson, Comment, *Partnership and Title VII Remedies: Price Waterhouse Cracks the Glass Ceiling*, 1991 WIS. L. REV. 787, 788 (explaining that the Civil Rights Act was implemented in response to societal problems attributed to discrimination).

14. 42 U.S.C. § 1971 (1994).

15. *Id.* § 2000a.

16. Johnson, *supra* note 13, at 789 n.7.

17. 42 U.S.C. § 2000e-17 (1994).

18. Johnson, *supra* note 13, at 789 n.7.

Title VII made employment discrimination based on race, color, sex, religion or national origin illegal.<sup>19</sup> Originally, equitable relief, including back pay and reinstatement, was the remedy available to victims who proved their cases.<sup>20</sup> In 1972, Congress amended the Civil Rights Act to expand the equitable relief available to successful plaintiffs, giving courts more discretion to choose among the available remedies.<sup>21</sup> The 1991 amendments to the Act increased the available remedies under Title VII to include both compensatory and punitive damages.<sup>22</sup> The amount of damages that can be recovered is limited or capped, however, based on the number of employees within the company.<sup>23</sup> These caps set forth in the 1991 Amendments do not apply to any equitable relief awarded in a discrimination case.<sup>24</sup>

19. 42 U.S.C. § 2000e-2(a)(1) (1994).

20. *Id.* § 2000e-5(g)(1). Title VII states in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

*Id.*; see also Johnson, *supra* note 13, at 789 (describing the relief initially available under the Civil Rights Act of 1964).

21. See 42 U.S.C. § 2000e-5(g) (1994) (adding the phrase "or any other equitable relief as the court deems appropriate"); see also 118 CONG. REC. 7166, 7168 (1972) (discussing the legislative purpose of the expansion).

22. 42 U.S.C. § 1981a(b) (1994). In pertinent part:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

....

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].

*Id.* Before this amendment was passed, only equitable remedies could be awarded to victims of discrimination. See *Dombeck v. Milwaukee Valve Co.*, 823 F. Supp. 1475, 1481-82 (W.D. Wis. 1993) (holding that cases involving an alleged act of discrimination occurring before the effective date of the 1991 amendments to the Civil Rights Act of 1964, although filed after the effective date, were not eligible for punitive or compensatory damages).

23. 42 U.S.C. § 1981a(b)(3) (1994), setting forth the following limitations:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

*The Legislative Purpose and Intent of the Act*

The Civil Rights Act is both a remedial and prophylactic piece of legislation.<sup>25</sup> The equitable damages available under the Civil Rights Act, along with the 1991 inclusion of legal damages, reflect Congress' commitment to change.<sup>26</sup> In cases brought under Title VII, an attempt is made to compensate the victims of discrimination by restoring them to the position they would have been in absent discriminatory practices by their employers.<sup>27</sup>

Courts have interpreted this legislative intent by fashioning relief based on both the societal goals of prohibiting and

(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.

*Id.* Temporary workers and part-time employees are included in the number of employees considered in this calculation. *See Walters v. Metro. Educ. Enter.*, 519 U.S. 202, 206 (1997).

24. 42 U.S.C. § 1981a(b)(4) (1994) ("Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.").

25. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (stating that complete remedies under Title VII provide an important incentive and deterrent for employers to do away with discriminatory practices); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (holding that Title VII serves a prophylactic purpose by removing discriminatory barriers and achieving equal employment opportunities); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir. 1985) (noting that complete remedies serve as a deterrent for future violations).

26. *See* 118 CONG. REC. 7166, 7168 (1972), stating:

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under . . . [section 706(g)] . . . is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effect of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

*Id.*

27. *See id.*

eliminating discrimination and the individual or private goal of making the aggrieved employee whole again through damage awards.<sup>28</sup> While both types of goals are essential to the Civil Rights Act and must be considered by courts, under Title VII, the emphasis must be on making the individual whole.<sup>29</sup>

### *Enforcement Mechanisms of Title VII*

The Civil Rights Act of 1964 created the five-member Equal Employment Opportunity Commission (EEOC or Commission) to adjudicate cases arising under Title VII.<sup>30</sup> The power of the EEOC was limited, however, because if it could not resolve the dispute, the case did not automatically proceed to the courts for resolution.<sup>31</sup> Plaintiffs under the original 1964 Act could bring private suits against employers in a federal district court if the EEOC's efforts at informal disputes resolution failed; however, the EEOC would no longer be involved.<sup>32</sup>

---

28. See *id.* ("The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant."); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 n.28 & 788 n.5 (1976) (awarding retroactive seniority to a group of non-employee African-American applicants who sought work, but were denied positions prior to 1972, stating that, without seniority, the relief would fall short of the make-whole relief mandate of Title VII; both the majority and the dissent held that the eradication and prevention of employment discrimination are the primary goals of Title VII); *Moody*, 422 U.S. at 421 (holding that the application of back pay provision is consonant with the dual statutory objectives of achieving equal employment opportunity and make-whole relief); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (stating that the express purpose of Title VII is to assure equal opportunities in employment and the elimination of discriminatory practices); *Griggs*, 401 U.S. at 429-30 (asserting that the objective of Title VII is to achieve equality of employment opportunities and remove barriers that have operated to favor one group of employees over another). See generally J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479 (1989) (discussing the tension that sometimes arises between the goals of preventing discrimination and providing remedy to the victim).

29. See *EEOC v. Gen. Lines, Inc.*, 865 F.2d 1555, 1558 (10th Cir. 1989) (holding that if courts do not make the individual whole through the remedial provisions of the statute, they must articulate their reasons for not doing so); see also Susan K. Grebeldinger, *The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*, 1996 U. ILL. L. REV. 319, 326 (discussing the dual purposes of the Civil Rights Act and the preference for relief that makes plaintiffs whole).

30. See Equal Employment Opportunity Act of 1972 § 705(a), 42 U.S.C. § 2000e-4(a) (1994).

31. See *Johnson*, *supra* note 13, at 789 (discussing procedures for processing claims under the original EEOC). The commission could refer suits to the Attorney General, who could file actions in district court based on pattern or practice or submit amicus briefs if the individual brought suit. See 42 U.S.C. §§ 2000e-5(b), 2000e-6(a) (1994).

32. See 42 U.S.C. § 2000e-4(a).

Congress realized that the EEOC lacked enforcement powers and proposed many amendments to its grant of power to the Commission,<sup>33</sup> however, the amendments to the Act were not passed until 1972.<sup>34</sup> The Equal Employment Opportunity Act of 1972 granted the EEOC the power to sue offending employers directly in district court.<sup>35</sup> If the EEOC chooses not to pursue the matter, either by not bringing suit or by dismissing the action outright, individuals can still initiate a private suit.<sup>36</sup>

### SEXUAL DISCRIMINATION AND HARASSMENT UNDER TITLE VII: A UNIQUE CLAIM

The Civil Rights Act precludes discrimination based on sex.<sup>37</sup> The more sensitive and confusing issue has been defining sexual harassment as a form of sex discrimination prohibited by Title VII, a concept the courts did not recognize until 1976.<sup>38</sup>

In 1980, the EEOC formally affirmed sexual harassment as a claim under Title VII and established guidelines for analyzing those claims.<sup>39</sup> The EEOC reaffirmed these interim guidelines after it had the chance to analyze public comments.<sup>40</sup> The EEOC

33. See Johnson, *supra* note 13, at 789-90 (discussing the lack of enforcement powers in the original EEOC configuration, proposed alternatives and the current formation).

34. See generally 42 U.S.C. § 2000e-5(f) (1994) (granting additional enforcement capabilities to EEOC).

35. See *id.* § 2000e-5 (providing the EEOC with the power to sue violators in court).

36. See *id.*

37. 42 U.S.C. § 2000e-2(a)(1) (1994) (stating that employers are prohibited from discriminating based on "race, color, religion, sex, or national origin"). Courts have struggled with the fact that there is limited legislative history on the issue of discrimination based on sex. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) ("[W]e are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"); *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991) (noting that there is "[v]irtually no legislative history provid[ing] guidance to courts interpreting the prohibition of sex discrimination"). The 1972 amendments to Title VII provided some clarification of congressional intent to eliminate sexual discrimination through Title VII. See Johnson, *supra* note 13, at 790-91.

38. See *Williams v. Saxbe*, 413 F. Supp. 654, 651-61 (D.D.C. 1976), *rev'd sub. nom. on other grounds Williams v. Bell*, 587 F.2d 1240, 1244 n.33 (D.C. Cir. 1978); (becoming the first case to hold that sexual harassment constituted sexual discrimination and therefore falls under Title VII); see also *Vinson*, 477 U.S. at 67 (holding that there can be a claim under Title VII for sexual discrimination based on a discriminatory work environment, even without detrimental effects to a tangible job benefit); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that sexual discrimination occurs when, but for his/her sex, an employee would not have faced the discriminatory treatment).

39. See Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 25,024 (Aug. 1, 1980) (codified as 29 C.F.R. pt. 1604) (2000).

40. See Final Amendment to Guidelines of Discrimination Because of Sex, 45 Fed. Reg. 74,676 (Nov. 10, 1980) (codified as 29 C.F.R. pt. 1604) (2000).

guidelines set forth the following conduct as violative of Title VII:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>41</sup>

EEOC decisions and guidelines are not binding on courts.<sup>42</sup> Thus, while these guidelines helped to clarify the issue, it was not until the Supreme Court decided *Meritor Savings Bank, FSB v. Vinson*<sup>43</sup> that sexual harassment gained total acceptance in the lower courts as a form of sex discrimination.<sup>44</sup>

Courts have recognized two types of sexual harassment as sexual discrimination: quid pro quo<sup>45</sup> and hostile work environment claims.<sup>46</sup> With either type of sexual harassment

---

41. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2000).

42. See Elizabeth Papacek, Comment, *Sexual Harassment and the Struggle for Equal Treatment Under Title VII: Front Pay as an Appropriate Remedy*, 24 WM. MITCHELL L. REV. 743, 752 (1998).

43. 477 U.S. 57 (1986).

44. See Papacek, *supra* note 42, at 753-55 (discussing courts' growing acceptance of sexual harassment claims).

45. By definition, quid pro quo sexual harassment entails the demand of a sexual favor by a superior coupled with a threat of adverse effects on advancement or employment. *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). The Eleventh Circuit set forth the elements of quid pro quo sexual harassment in *Henson* as follows:

(1) membership in a protected class; (2) subjection to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the employee's reaction to the harassment affected a tangible term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

*Id.*

46. The factors to be considered when evaluating a hostile work environment claim were set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* This is not a test per se, but rather a totality of the circumstances framework whereby no single factor is controlling. See *id.*; see also *Vinson*, 477 U.S. at 57 (recognizing a claim for a hostile work environment); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (stating that the determination of whether a work environment is hostile must be made from the plaintiff's perspective).



claim, the plaintiff must show elements of both unwelcomeness and motive.<sup>47</sup> These requirements are unique to sex discrimination cases and do not apply to other Title VII actions.<sup>48</sup>

Aside from the unique and stringent legal requirements of sexual harassment claims, victims of sexual harassment may also experience serious psychological effects. Sexual harassment has been shown to harm the victim's entire employment experience, affecting one's attitude toward the company, performance and opportunities.<sup>49</sup> Victims of sexual harassment also suffer detrimental psychological effects.<sup>50</sup> Some noted effects of sexual harassment include: "anxiety attacks, headaches, sleep disturbance, disordered eating, gastrointestinal disorders, nausea, weight loss or gain, and crying spells."<sup>51</sup> In 1987, the American Psychiatric Association cited sexual harassment as a "severe stressor."<sup>52</sup> Further, a correlation has been noted between post-traumatic stress disorder and the effects of sexual harassment.<sup>53</sup> Memories of sexual harassment can be so traumatic to the victim that she may repress them.<sup>54</sup>

Such serious psychological consequences for victims of sexual harassment indicate that the remedy of reinstatement is

47. See Papacek, *supra* note 42, at 756 (explaining the elements of sexual harassment claims and the differences between these and other Title VII claims).

48. See *id.*

49. See EISAGUIRRE, *supra* note 3, at 153 (citing common responses to a survey concerning the effects of sexual harassment: "1. Less job satisfaction 2. Lower rating of their immediate supervisor 3. Less favorable view of company communication 4. Diminished confidence in the senior management team 5. Reduced organizational commitment and 6. Increased likelihood of leaving the company").

50. See *id.* at 150-54 (describing the psychological, as well as employment effects, of sexual harassment on victims).

51. *Id.* at 152-53; see also JANA HOWARD CAREY, SEXUAL HARASSMENT IN THE WORKPLACE: DESIGNING AND IMPLEMENTING A SUCCESSFUL POLICY, CONDUCTING THE INVESTIGATION, PROTECTING THE RIGHTS OF THE PARTIES 49 (1992) (citing a 1982 study which found the following effects of sexual harassment: "self blame, depression, anger, disgust, sadness, and generalized anxiety"). In fact, some psychologists compare the effects of sexual harassment to those of rape. To prevail in her claim, of course, the victim must show only differential treatment on the basis of sex. See *id.* at 50.

52. EISAGUIRRE, *supra* note 3, at 152 (citation omitted).

53. See *id.* at 154 (citing a 1994 study that found women suffering from post-traumatic stress syndrome and depression "were more likely to have been sexually harassed than those who had never experienced these problems") (citation omitted). In a separate survey of public utility employees, "those women who had experienced harassment were more likely to report symptoms associated with [post traumatic stress syndrome] than were women who had not been harassed." *Id.* (citation omitted).

54. See *id.* at 154 (explaining the repression of traumatic experiences such as sexual harassment).

not a viable option for many plaintiffs.<sup>55</sup> Reinstatement is generally found to be inappropriate when the hostility of the workplace would make a continued employment relationship unworkable and unproductive.<sup>56</sup> Although it is not always conclusive proof that reinstatement is not an option,<sup>57</sup> evidence of the hostility at the workplace provides strong support for the proposition.<sup>58</sup> In cases such as these, front pay becomes essential in the make-whole policy of Title VII.<sup>59</sup>

### *Damages Available Under Title VII*

The 1991 Amendments to the Civil Rights Act broadened the range of remedies available under Title VII when a plaintiff proves her case of discrimination. Historically, only equitable remedies were available to plaintiffs.<sup>60</sup> Compensatory and punitive damages were made available, in addition to the traditional remedies, with the adoption of the 1991 amendments.<sup>61</sup> To better understand the impact these additional remedies had on Title VII claims, a brief description of each available type of damages is useful.

Equitable remedies generally attempt to make a plaintiff whole, thus serving justice by providing a complete remedy.<sup>62</sup> Equitable remedies under Title VII traditionally provided relief

---

55. See *McKnight v. Gen. Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992) (observing that reinstatement is typically the preferred, rather than mandatory, remedy); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (upholding front pay in lieu of reinstatement where defendant had engaged in "psychological warfare" against plaintiff). See also *Grebeldinger*, *supra* note 29, at 319 (discussing the judicial preference, not statutory mandate, for reinstatement instead of front pay as a remedy for Title VII cases).

56. See *Papacek*, *supra* note 42, at 775-76 (explaining the situations in which reinstatement is not typically awarded).

57. See *id.* at 776-77 (stating that proof of hostile work environment does not always result in excluding reinstatement as a remedy).

58. See *id.* (discussing the proof of hostile environment in sexual harassment claims and its effect on remedies).

59. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984) (stressing trial court discretion in the use of front pay to make a plaintiff whole in cases where the hostile work environment is proven).

60. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1994) (providing for equitable relief).

61. See *id.* § 1981a (providing the additional remedies of compensatory and punitive damages).

62. See Eileen Kuklis, Comment, *The Future of Front Pay Under the Civil Rights Act of 1991: Will It Be Subject to the Damage Caps?*, 60 ALB. L. REV. 465, 474 (1996) (discussing the goals of equitable remedies).

in the form of back pay and reinstatement.<sup>63</sup> The Supreme Court set forth the following test in *Ross v. Bernhard*<sup>64</sup> for determining whether equitable relief is available: (1) how the cause of action was handled prior to the merger of courts of law and courts of equity, (2) the nature of the remedy sought, and (3) whether the issues raised by the cause of action are within the abilities of the jury to comprehend.<sup>65</sup> In later cases, however, the Supreme Court has focused on the second prong of this test—the nature of the remedy sought—and whether a legal remedy would be adequate to compensate the plaintiff to determine the type of relief to award.<sup>66</sup>

With equitable remedies, Congress established another means of redress in employment discrimination cases.<sup>67</sup> Although legal damages are available under Title VII, they do not adequately compensate society with respect to the public interest in equality of employment opportunities.<sup>68</sup>

Back pay is one of the equitable remedies available under Title VII.<sup>69</sup> Back pay compensates plaintiffs for the wages they would have received but for the employer's unlawful, discriminatory actions, less any income earned from the time of the discharge through the time the court renders its verdict.<sup>70</sup>

Reinstatement is another possible remedy under Title VII.<sup>71</sup> It places the employee back into her previous employment position or a comparable one.<sup>72</sup> Currently, courts favor reinstatement over other forms of relief in discrimination cases due to its predictable nature and the ease with which the courts

63. See Papacek, *supra* note 42, at 774 (discussing the early application of remedies to Title VII).

64. 396 U.S. 531 (1970).

65. *Id.* at 538 n.10.

66. *Curtis v. Loether*, 415 U.S. 189, 195-98 (1974) (holding that the nature of the remedy sought in a Title VII action was legal in nature); see also *Younger v. Harris*, 401 U.S. 37, 43-53 (1971) (noting a "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the serving party has an adequate remedy at law").

67. See *Johnson*, *supra* note 13, at 797 (discussing the remedies available in employment discrimination cases).

68. See *id.* at 800 (discussing the societal harm of discrimination in employment and the failure of legal damages to redress that harm).

69. Title VII of the Civil Rights Act of 1974, 42 U.S.C. § 2000e-5(g) (1994) (listing back pay as a remedy).

70. See *Kuklis*, *supra* note 62, at 467 n.13 (explaining the nature and computation of back pay).

71. 42 U.S.C. § 2000e-5(g) (listing reinstatement as a remedy in Title VII cases).

72. *Kuklis*, *supra* note 62, at 467 n.14 (explaining the nature and use of reinstatement).

can implement it.<sup>73</sup> As stated previously, Congress included the phrase "any other equitable relief deemed necessary,"<sup>74</sup> thus granting the courts more discretionary power and creating more confusion as to what remedies were available.<sup>75</sup> Historically, front pay has been awarded under this clause.<sup>76</sup>

Although equitable forms of relief have always been available under Title VII, the 1991 amendments to the Act authorized additional legal damages, specifically compensatory and limited punitive damages, to prevailing plaintiffs.<sup>77</sup> Compensatory damages are generally defined as "damages in satisfaction of, or in recompense for, loss or injury sustained."<sup>78</sup> The Act lists the following types of injuries to be considered in the award of compensatory damages in discrimination cases: "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."<sup>79</sup> The ultimate purpose of compensatory damages is "to make the party whole, to the extent that it is possible to measure his injury in terms of money."<sup>80</sup>

In addition to compensatory damages, limited punitive damages were also made available through the 1991 amendments.<sup>81</sup> To enhance compensatory damages, courts can award punitive damages when the plaintiff proves that the defendant's acts were "wanton, reckless, malicious, or oppressive [in] character."<sup>82</sup> The purpose of punitive damages is not to make the plaintiff whole, but rather to punish the defendant and deter him/her and others from repeating the illegal behavior.<sup>83</sup> A plaintiff who is awarded compensatory damages does not

---

73. See *McIntosh v. Irving Trust Co.*, 873 F. Supp. 872, 878 (S.D.N.Y. 1995) ("Reinstatement is often appropriate as the means to make plaintiff whole for the unlawful discrimination that the plaintiff has suffered and to place the plaintiff in the same position that the plaintiff would have been in absent the discriminatory conduct.").

74. 42 U.S.C. § 1981a(c) (1994).

75. See *infra* notes 99-115 and accompanying text.

76. See Anne-Marie Carstens, Note, *The Front Pay Niche: Reinstatement's Alter Ego Is Equitable Relief for Sex Discrimination Victims*, 88 GEO. L.J. 299, 315 (2000) (describing the use of front pay as an historically equitable remedy).

77. 42 U.S.C. § 1981a(b)(3) (1994).

78. 22 AM. JUR. 2D *Damages* § 23 (1988).

79. 42 U.S.C. § 1981a(b)(3). The inclusion of the phrase "future pecuniary losses" has caused confusion in some courts as to whether front pay is included in the damage caps. See *infra* notes 99-115 and accompanying text.

80. 22 AM. JUR. 2D *Damages* § 26 (1988).

81. See 42 U.S.C. § 1981a (1994) (including punitive damages as a remedy for Title VII plaintiffs).

82. 22 AM. JUR. 2D *Damages* § 731 (1988).

83. See *id.* § 733.

necessarily receive both compensatory and punitive damages, as punitive damages require a higher state of mind, one of "malice or reckless indifference."<sup>84</sup>

Through compensatory and punitive damages, or legal damages, Congress has established another means of redress in Title VII employment discrimination cases.<sup>85</sup> Although legal damages are now available under Title VII, they do not adequately compensate society with respect to the public interest in equality of employment opportunities.<sup>86</sup> Such societal interests are better represented through equitable remedies, such as back pay, reinstatement, and front pay.<sup>87</sup>

### FRONT PAY

#### *Definition*

In Title VII cases, front pay is an award of monetary damages and is intended to compensate the victim of discrimination for "future economic losses likely to be suffered between the date of judgment and the time the victim reaches his or her rightful place."<sup>88</sup> The purpose of front pay is to

84. 42 U.S.C. § 1981a(b)(1) (1994); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999). In *Kolstad* the court held that in a Title VII case:

That conduct committed with the specified mental state may be characterized as egregious, however, is not to say that employers must engage in conduct with some independent, "egregious" quality before being subject to a punitive award.

To be sure, egregious or outrageous acts may serve as evidence supporting an inference of the requisite "evil motive."

*Id.* *Kolstad* also states that the malice or reckless indifference required by the 1991 amendments does not necessarily indicate intentional discrimination or particularly egregious discriminatory acts, but also includes malice or reckless indifference to plaintiff's federally protected rights. It is based solely on the employer's state of mind, the intentional or knowing violation of federal law. *Id.* at 536.

85. See Papacek, *supra* note 42, at 762-63 (discussing the addition of compensatory and punitive damages in employment discrimination cases).

86. See *id.* at 800 (discussing the societal harm of discrimination in employment and the failure of legal damages to redress that harm).

87. *Id.*

88. *Id.* at 768; see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764-66 (1976) (holding that front pay is designed to put the victim of discrimination in the position that he/she would have been in but for the unlawful conduct); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 n.8 (7th Cir. 1994) (defining front pay as "a lump sum . . . representing the discounted present value of the difference between the earnings [an employee] would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis, inferior employment" (alteration in original) (citation omitted)); *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991) (defining front pay as a monetary value of lost employment opportunities). But see *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982) (noting that damages

supplement back pay and alleviate the "continuing future effects of discrimination. . . ." <sup>89</sup> In order to further the make-whole policy, front pay is calculated using an estimated amount of what the plaintiff would have earned if reinstated and an award for lost future earnings. <sup>90</sup> The particular factors courts use to determine whether front pay is an appropriate remedy in lieu of reinstatement include: (1) whether the plaintiff has been made whole by back pay, (2) whether front pay would be unduly speculative given the plaintiff's prospects for continued employment, (3) whether reinstatement is appropriate or feasible, (4) whether liquidated damages have been awarded; and (5) whether the former employer's financial condition is adverse. <sup>91</sup>

In consideration of such criteria, *Patterson v. American Tobacco Co.* <sup>92</sup> explicitly endorsed front pay. The Fourth Circuit emphasized the make-whole policy of Title VII and supplemented back pay with a front pay award. <sup>93</sup> The supplemental damages "estimated [the] present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position." <sup>94</sup> Other courts have been hesitant to use front pay as a remedy, however, preferring to use the more traditional remedies of back pay and reinstatement. <sup>95</sup>

An often cited and troubling disadvantage of front pay is its speculative nature. The award of front pay can last until

---

are settled on date of judgment and plaintiff cannot recover front pay even though the injury to economic status continues).

89. William J. Martinez & Kathleen M. Flynn, *Damage Caps Under the Civil Rights Act of 1991*, COLO. LAW. 65, 66 n.29 (Mar. 27, 1998) (citing *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995)).

90. See JULIE O'DONNELL ALLEN ET. AL, ILL. INST. FOR CONTINUING LEGAL EDUC., FEDERAL REMEDIES IN EMPLOYMENT DISCRIMINATION. ACTIONS § 9.32 (2000), EDP IL-CLE 9-1 (explaining the role of front pay as a make-whole remedy).

91. See 45C AM. JUR. 2D *Job Discrimination* § 2974 (1993).

92. 535 F.2d 257 (4th Cir. 1976).

93. *Id.* at 269.

94. *Id.*

95. See Papacek, *supra* note 42, at 772-75 (discussing the preference of courts toward back pay and reinstatement instead of front pay); see, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (stating that if reinstatement provides appropriate relief, front pay should not be awarded); *Contardo v. Merrill Lynch*, 753 F. Supp. 406, 411 (D. Mass. 1990) (holding that front pay should not be awarded because calculation of the award would be "unduly speculative"). But see 45C AM. JUR. 2D *Job Discrimination*. § 2973 (1993) (stating that front pay should be awarded when remedies such as reinstatement, hiring or promotion are not available).

retirement age or only a few months.<sup>96</sup> Judges are wary of these wildly varying amounts and the uncertainties inherent within the calculation of front pay. It is within courts' discretion to decide what factors are used to determine if, how much, and for how long front pay should be awarded.<sup>97</sup> Further complicating this matter is the current debate over the nature of front pay as an equitable or legal remedy. Some argue that front pay is a legal remedy, included within compensatory damages as defined by the 1991 Amendments to the Act.<sup>98</sup> Thus, judges are presented with unresolved issues when dealing with front pay: Is it equitable or legal in nature? Can it only be awarded in lieu of reinstatement? What factors should or can one use in reaching a determination on the amount?

*The Nature of Front Pay: Equitable or Legal?*

Overwhelming authority seems to indicate that front pay should be considered an equitable remedy.<sup>99</sup> Although front pay is a monetary award, it should be considered an equitable relief because it restores a victim of sexual harassment to her rightful position. Legislative history, though limited, supports this characterization.<sup>100</sup> The EEOC has also taken the position that front pay is not a form of compensatory damages, and thus, is

---

96. See *Padilla v. Metro-N. Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996) (awarding over twenty years' worth of front pay); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189-90 (2d Cir. 1992) (affirming an award of speculative damages for seventeen years); see also *Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 841, 844 (D. Me. 1996) (awarding compensatory and punitive damages, but denying front pay because the court found plaintiff's testimony about limited prospects for similar employment speculative and not supported by any expert testimony); *Eldred v. Consol. Freightways Corp.*, 907 F. Supp. 26, 28 (D. Mass. 1995) (finding the speculative inquiry precluded award of front pay); *Buckley v. Reynolds Metals, Co.*, 690 F. Supp. 211, 216 (S.D.N.Y. 1988). The court in *Buckley* held:

Front pay awards have been considered unduly speculative in situations where the discharged employee is at the lower end of the protected class, that is, forty years old, and where an award may encompass ten years or more "during which the employee, had he not been unlawfully discharged but continued in his employment, 'might or might not get raises, reductions, fired or incapacitated.'"

*Id.* (citations omitted).

97. See *infra* notes 118-29 and accompanying text.

98. See *infra* notes 106-08 and accompanying text.

99. See *Brown v. Youth Serv. Int'l of Balt., Inc.*, 904 F. Supp. 469, 471 (D. Md. 1995) (holding that front pay, along with back pay, is separate from compensatory damages); *Bartlett v. United States*, 835 F. Supp. 1246, 1253-65 (E.D. Wash. 1993) (calculating front pay separately from compensatory damages).

100. See *Kuklis, supra* note 62, at 484 (stating that congressional silence is an indication that front pay should not be included in the damage caps, but rather, the damage caps were an attempt at tort reform).

not capped under section 1981a.<sup>101</sup> This argument is particularly convincing when front pay is awarded in lieu of reinstatement, a traditional equitable remedy.<sup>102</sup>

Despite apparent support in the legislative history for the proposition that front pay is equitable and not compensatory in nature, Congress' inclusion of the words "future pecuniary losses" within the compensatory damages provision of section 1981a blurred the line between equitable and legal remedies with regard to front pay. This lack of precision created confusion among the courts.<sup>103</sup> The confusion has resulted, in large part, because front pay is a future monetary damage, which seems to indicate it should be included within the compensatory damage cap as a legal remedy.<sup>104</sup> However, not all monetary damages are considered legal damages.<sup>105</sup> In *Hudson v. Reno*,<sup>106</sup> the Sixth Circuit examined the definition of "future pecuniary losses,"<sup>107</sup> concluding that front pay fit the plain meaning of the words, and that the purpose of front pay indicated it should be included under the damage caps in section 1981a.<sup>108</sup>

Aside from the language "future pecuniary losses" found in the 1991 Amendments, front pay should be found to share other characteristics of legal remedies prior to subjecting it to damage caps. Other characteristics of legal remedies include "their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use."<sup>109</sup> As the widely varying awards and the plethora of formulas used to calculate front pay show, its

---

101. See EEOC Policy Guidelines, Dec. No. 915.002, 1992 WL 189089 (July 14, 1992) (stating that front pay is an equitable remedy); see also *Carpenter v. Glickman Agency* No. 92-0615, 1995 WL 434072 (July 17, 1995) (holding explicitly that front pay is an equitable remedy).

102. See Carstens, *supra* note 76, at 306 (discussing the use of front pay in lieu of reinstatement).

103. *Id.* at 301 (stating that there has been confusion in the courts over the legal or equitable nature of front pay due to the use of the term "future pecuniary losses" in the compensatory damage amendment to the Civil Rights Act).

104. See Kuklis, *supra* note 62, at 475 (explaining the reasoning behind classifying front pay as a legal damage); see also *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (recognizing that monetary relief such as "actual and punitive damages" is traditionally regarded as a "form of relief offered in the courts of law").

105. See *Curtis*, 415 U.S. at 196 ("We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief.").

106. 130 F.3d 1193 (6th Cir. 1997).

107. *Id.* at 1203. The court used the Webster's Dictionary definition of the words as follows: "1. Future: existing or occurring at a later time; 2. Pecuniary: consisting of or measured in money; 3. Losses: an amount that is lost." *Id.*

108. See *id.* at 1203-04 (holding that, given the plain meaning of the words of the Act, front pay is included as a compensatory damage and, therefore, capped).

109. Kuklis, *supra* note 62, at 475 n.64.



application is anything but uniform.<sup>110</sup> Front pay is also very flexible and adaptable to individual circumstances.<sup>111</sup> Even with the added feature of uniformity, its use as an alternative to reinstatement and its adaptability to individual circumstances indicate that it should not be considered a legal remedy but rather an equitable remedy.

In response to such arguments that front pay should be classified as a legal remedy, a comparison of front pay to back pay, the equitable nature of which is virtually unquestioned,<sup>112</sup> is helpful. Back pay and front pay are similar in nature and purpose, both attempting to fulfill Title VII's make-whole objective. In fact, it has been argued that front pay is "merely a continuation of back pay . . . ."<sup>113</sup> Many courts have taken this view of front pay and reject classifying it as a legal remedy.<sup>114</sup>

Front pay's adaptability to the individual circumstances in each case and the discretion in its application, in addition to the factors discussed above, support the argument that it should be classified as an equitable remedy.<sup>115</sup> If front pay is classified as a compensatory damage, it is a form of legal remedy and is thus subject to the damage caps of section 1981a.<sup>116</sup> Without uncapped front pay damages, the deterrent and make-whole policy objectives of Title VII could be in jeopardy, particularly in hostile work environment cases where reinstatement may not be a viable remedy.<sup>117</sup>

### *Computation and Duration*

Front pay is generally calculated as "the difference (after proper discounting of present value) between what a plaintiff would have earned in the future had he or she been reinstated at the time of trial and what the plaintiff would have earned in the

---

110. See *supra* note 96 and accompanying text.

111. See *supra* note 96 and accompanying text; *infra* notes 118-29 and accompanying text.

112. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-22 (1975) (holding that back pay is an equitable remedy); *Curtis v. Loether*, 415 U.S. 189, 196-97 (holding that back pay, although a form of monetary restitution, is equitable under the 1964 Act).

113. *Papacek*, *supra* note 42, at 773.

114. See *Carstens*, *supra* note 76, at 311 ("[A]ll but two of the federal circuits have stated unequivocally that front pay is an equitable remedy for employment discrimination.").

115. See *id.* at 327 (concluding that the history, legislative intent and nature of front pay indicate that it is an equitable remedy).

116. See *supra* note 23 and accompanying text.

117. See *supra* notes 57-58 and accompanying text.

future in his or her next best employment.”<sup>118</sup> Factors considered in computing front pay focus on “the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, [and] the employee’s work and life expectancy.”<sup>119</sup>

In *McKnight v. General Motors Corp.*,<sup>120</sup> the Second Circuit attempted to provide guidelines for awarding front pay by holding that the plaintiff must provide the necessary data to calculate a reasonably certain front pay award. Relevant factors include the length of time the plaintiff expected to work for the defendant, the applicable discount rate and the amount of the award.<sup>121</sup> While these specific factors have not been widely adopted, courts have adopted variations of them when determining front pay awards.<sup>122</sup>

In 1996, the court in *Suggs v. Servicemaster Educational Food Management*<sup>123</sup> attempted to provide greater guidance in the computation of front pay:

Generally, in awarding front pay, the following factors are relevant: (1) the employee’s future in the position from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; (5) the discount tables to determine the present value of future

---

118. *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995).

119. *Koyen v. Consol. Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).

120. 973 F.2d 1366, 1372 (2d Cir. 1992).

121. *See id.*

122. *E.g.*, *Barbour v. Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (considering the following factors in determining the amount to be awarded as front pay: the plaintiff’s age; the plaintiff’s intention to continue employment with the employer; the length of time persons in similar positions have stayed with the employer; how long the replacement employee stayed in the position; the plaintiff’s efforts at mitigating damages and the employer’s proof of how long the plaintiff would have remained employed); *Roush v. KFC Nat’l Mgmt. Co.*, 10 F.3d 392, 399 (6th Cir. 1993) (holding that the award of front pay should “be guided by consideration of certain factors, including[:] an employee’s duty to mitigate; the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee’s work and life expectancy, the [use of] discount tables to determine the present value of future damages and other factors that are pertinent or prospective damage awards.”) (citation omitted); *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 871 (5th Cir. 1991) (considering the following factors in determining the amount of front pay to be awarded: “length of prior employment, the permanency of the position held, the nature of work, the age, [and] physical condition of the employee and possible consolidation of jobs”).

123. 72 F.3d 1228 (6th Cir. 1996).

damages; and (6) "other factors that are pertinent in prospective damage awards."<sup>124</sup>

Although this formulation includes the factors considered relevant in *McKnight*,<sup>125</sup> it also expands the inquiry into the employee's future with the employer, as well as her future generally as an employee.

The *Suggs* formulation for calculating front pay specifically incorporates one of the inherent controls of front pay, the employee's duty to mitigate his/her damages.<sup>126</sup> Plaintiffs filing under Title VII have a duty to mitigate damages by reasonable diligence.<sup>127</sup> The temporary nature of front pay also controls the period of pay awarded.<sup>128</sup> Despite the trend towards a greater use of front pay, the adoption of various criteria by which to judge it, and the inherent controls in front pay awards, many courts remain uncertain about the use of front pay because of its speculative nature.<sup>129</sup>

### *Making Front Pay a Better Remedy*

The importance of front pay as a remedy in Title VII cases, particularly sexual harassment cases, is readily identifiable. When reinstatement is not a tenable option, front pay is the only way to ensure that the deterrent and make-whole policies of Title VII are fulfilled.<sup>130</sup> Considering the potential, physical, psychological and emotional effects of sexual harassment on its victim,<sup>131</sup> front pay may be the plaintiff's only option to be adequately restored to her rightful position.

Courts' general hostility to awarding front pay seems to be based primarily on its uncertainty and speculative nature.<sup>132</sup> Front pay may be considered speculative in nature because the award must be determined by individual circumstances on a case by case basis. However, the benefits of front pay, and the

124. *Id.* at 1234 (citations omitted).

125. 973 F.2d 1366 (2d Cir. 1992).

126. *See Suggs*, 72 F.3d at 1228.

127. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1427-28 (requiring plaintiff to use reasonable diligence in searching for alternative employment); Papacek, *supra* note 42, at 743 (discussing the duty of employees to mitigate damages as an inherent control on front pay awards).

128. *See Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) ("Front pay is intended to be temporary in nature.").

129. *See supra* notes 118-28 and accompanying text.

130. *See supra* notes 71-76 and accompanying text.

131. *See supra* notes 49-59 and accompanying text.

132. *See supra* notes 88-98 and accompanying text.

seemingly growing number of sexual harassment and hostile work environment cases, demand a more frequent application.

One way to increase the use of front pay is to alleviate judges' fear of its speculative nature and widely varying awards.<sup>133</sup> For this reason, adopting a formula that takes into account the characteristics of individual plaintiffs and defendants would bring more certainty in front pay awards without losing the flexibility that makes it such an attractive remedy. Further, such a formula would not be overly difficult for judges or juries to apply, and would simplify the process.<sup>134</sup>

A formula for front pay should take into account the history of the defendant, include the average length of employment for employees not exceeding a certain number of years, and exclude temporary workers. This information should be provided by the employer, as it has easier access to the necessary information. Establishing the average length of employment at a place of business will allow the fact finder to determine the amount of time that would reasonably be left in the employee's career with that particular employer but for the illegal behavior.

The second factor to be considered would be the employee's history with the employer. Performance evaluations and rates of promotion should be considered here. A comparison to the performance reviews of the average employee would assist the fact finder in evaluating the plaintiff's employment history. Again, the company should provide this data due to its ready access to the information.

Finally, the fact finder would need to consider the employee's job search while the action is pending. Since front pay is designed to be temporary in nature,<sup>135</sup> the employee has a duty to mitigate the damages incurred by the employer.<sup>136</sup> Testimony by the employee should satisfy this requirement. If the employee claims that a comparable job cannot be found, she should provide an expert to attest to the current job market.

While all of these factors have been used by courts before in some form and combination,<sup>137</sup> this allocation of burdens and a mandate that all courts follow the steps would make front pay an easier remedy to apply. Such a formula allows front pay to

---

133. See *supra* notes 88-98 and accompanying text.

134. See *Koyen v. Consol. Edison Co.*, 560 F. Supp. 1161, 1167-69 (S.D.N.Y. 1983) (holding that prospective losses can easily be decided by juries or the court based upon the individual facts of the case).

135. See *supra* note 128 and accompanying text.

136. See *supra* note 127 and accompanying text.

137. See *supra* notes 121-22 and accompanying text.

retain its flexibility, making it adaptable to the particular circumstances of each case. To be sure, codifying the steps in the analysis of front pay may cause more speculation as to its inherently equitable nature,<sup>138</sup> and in turn create more ambiguity in the calculation of damages, as codification tends to suggest that front pay is a legal remedy subject to a damage cap. Nevertheless, its adaptation to individual circumstances and the judicial discretion involved in the decision to award front pay in lieu of reinstatement ensures that front pay will retain its equitable nature.<sup>139</sup> Also, front pay's history in the courts, prior to the amendments, as an equitable remedy<sup>140</sup> and its similarities to back pay<sup>141</sup> make a compelling case for a continued equitable classification.

### CONCLUSION

Given the purposes of the Civil Rights Act, front pay is an important remedy for victims of discrimination, particularly in hostile work environment cases. Front pay allows victims of sexual harassment and sex discrimination to be made whole without returning to an uncomfortable situation with a former employer. Requiring employers to provide the bulk of the information required to determine the amount of a front pay award in these types of cases takes an unnecessary burden off of plaintiffs, and fully compensating those who prove their cases satisfies the objectives of Title VII.

By combining front pay with back pay, and taking advantage of the legal remedies available under Title VII, this formula would also satisfy the make-whole objective of Title VII when reinstatement is not desirable. While most, if not all, of these factors are considered in the current, although varying, formulations used to analyze and award claims for front pay, codifying these three steps and requiring fact finders to carefully examine all of them would lessen the uncertainty presently found in front pay awards. This approach would also avoid the large variations in the amounts awarded, thus making judges more comfortable with the process.

---

138. See *supra* notes 99-117 and accompanying text.

139. See *id.*

140. See Carstens, *supra* note 76, at 315 (discussing front pay's status as a remedy before the 1991 amendments: an equitable remedy analogous to back pay, and later by its own right).

141. See *supra* notes 113-14 and accompanying text.

Given the potentially serious consequences of sexual harassment,<sup>142</sup> a forward-looking remedy that makes a plaintiff whole without mandating a return to the hostile work environment is essential. The Supreme Court should clarify what factors ought to be considered in evaluating and awarding claims for front pay. The adoption of a uniform set of factors, with the burdens for plaintiffs and defendants clearly outlined, would make such claims easier for courts to manage.

Making front pay more certain, and hence more acceptable to judges, will allow for more frequent use thereof, as front pay is an essential part of the damages consideration in Title VII cases, particularly in hostile environment sexual harassment cases. Application of front pay in these types of situations fully satisfies both the deterrent and make-whole objectives of Title VII.

VALERIE HARRIS

---

142. See *supra* notes 49-59 and accompanying text.