No. 00-763

IN THE
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,
v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND AARP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD M. WYNER
(Counsel of Record)
MATTHEW M. HOFFMAN
MICHELE LEE SVONKIN
REBECCA E. RAPP
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2000

February 22, 2001

Counsel for *Amici Curiae*

(Additional Counsel Listed on Inside Cover)

ADDITIONAL COUNSEL

CHARLES T. LESTER, JR.
JOHN PAYTON
Co-Chairs
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA FORD HARDING
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

STEVEN R. SHAPIRO
LENORA M. LAPIDUSSARA L. MANDELBAUM
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2611

MARCIA D. GREENBERGER
JUDITH C. APPELBAUM
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, DC 20036
(202) 588-5180

JUDITH L. LICHTMAN
DONNA R. LENHOFF
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Ave., N.W.
Suite 710
Washington, DC 20009
(202) 986-2600
MARTHA F. DAVIS
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635

KAREN K. NARASAKI
VINCENT A. ENG
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Ave., N.W.
Suite 1200Washington, DC 20036(202) 296-2300

MARK D. ROTH
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W.Washington, DC 20001(202) 737-8700

LAURIE A. MCCANNAARP FOUNDATION LITIGATIONMELVIN RADOWITZAARP601 E Street, N.W.Washington, DC 20049(202) 434-2060

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

IN THE
Supreme Court of the United States

No. 00-763

SHARON B. POLLARD, *Petitioner*,

v.

E.I. DUPONT DE NEMOURS COMPANY, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL WOMEN'S LAW CENTER, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND AARP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICI CURIAE*[1]

[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. For the past three decades, the ACLU's Women's Rights Project has been at the forefront of the battle to secure equal rights for women in the workplace. Because Title VII is one of the nation's most important antidiscrimination statutes, its proper interpretation and effective enforcement is a matter of great concern to the ACLU and its members throughout the country.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to

---

than the *amici* and their counsel, made any monetary contribution to its preparation or submission.

secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, and NWLC played a leading role in urging the enactment of the Civil Rights Act of 1991, and in particular its inclusion of compensatory and punitive damages as remedies for victims of sexual harassment and other forms of sex discrimination.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW Legal Defense has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and

Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a longstanding interest in employment discrimination based on race and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The American Federation of Government Employees ("AFGE") is a labor organization affiliated with the AFL-CIO which represents approximately 600,000 employees of the United States federal government and the government of the District of Columbia. On behalf of its members, AFGE presents grievances and complaints, including administrative and judicial Equal Employment Opportunity (EEO) complaints, and carries on legislative activity to improve the welfare of the employees it represents.

AARP is a nonprofit membership organization of more then 34 million people age 50 or older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. More than forty percent of AARP's members remain active in the work force and, thus, are protected by the federal employment discrimination laws, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The proper interpretation and application of these statutes are of paramount importance to the millions of workers who rely on them to remedy invidious bias in the work place.

Many of the *amici* were closely involved with the enactment of the Civil Rights Act of 1991, and in particular with the

provision of compensatory damages as a remedy for intentional discrimination under Title VII of the Civil Rights Act of 1964 and under other civil rights laws. These *amici* provided information to Congress through testimony on behalf of the organizations, through contacts with members of Congress and their staffs, and through the identification of victims and other persons for Committee staff to consider as potential witnesses in hearings.[2]

SUMMARY OF ARGUMENT

This case presents the question of whether so-called "front pay" awards — a form of prospective relief awarded by courts in employment discrimination cases under Title VII of the Civil Rights Act of 1964 — are an element of "compensatory damages" subject to the dollar caps set forth in 42 U.S.C. § 1981a.[3] Both prior to and following the enactment of the Civil Rights Act of 1991 (the "1991 Act"), courts recognized front pay as a form of equitable relief that was available under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), in cases where an order of immediate reinstatement (or similar immediate injunctive relief) would impose unnecessary hardships on the plaintiff or on innocent third parties. The issue before this Court is whether, by adding a limited right to recover compensatory and punitive damages to Title VII in 1991, Congress meant to disrupt the settled view of front pay as an equitable remedy available under § 706(g).

---

[2] *See, e.g.*, Report of the Senate Committee on Labor and Human Resources, S. REP. NO. 101-315 at 8-9 (1990) (listing witnesses); Report of the House Committee on Education and Labor, H.R. REP. NO. 102-40, pt. 1 at 17-18 (1991) (listing witnesses); 136 CONG. REC. 18,054 (1990) (statement of Sen. Kennedy); 137 CONG. REC. 28,898 (1991) (statement of Sen. Warner regarding AFGE).

[3] Rev. Stat. § 1977A, as added by § 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991).

In this brief, *amici* demonstrate that the 1991 Act did not alter the nature of front pay as an equitable remedy and that front pay therefore is not subject to the § 1981a damages caps. In Part I below, we show that front pay is an essential element in the arsenal of equitable remedies available under Title VII. Prior to 1991, courts found that, in certain circumstances, equitable considerations weigh against the granting of immediate reinstatement to a plaintiff who might otherwise be entitled to such relief. For example, in some cases, an order directing immediate reinstatement, hiring or promotion of a plaintiff might displace or "bump" other employees who had not engaged in any wrongdoing. In other cases, a hostile work environment makes reinstatement problematic. In such cases, courts developed the front pay remedy to provide the plaintiff full prospective relief while avoiding unnecessary harm to innocent third parties or the plaintiff herself. These considerations were not affected by the 1991 Act, and courts therefore have continued to treat front pay as an essential tool in their set of equitable remedies.

In Part II below, we show that Congress did not intend to subject this equitable front pay remedy to the damages caps in § 1981a. The purpose of the 1991 Act was to *expand* the remedies available under Title VII, not to limit remedies that federal courts had already recognized. While the language of the statute is plain on its face, the legislative history of § 1981a removes any shadow of a doubt regarding Congressional intent. Indeed, the bipartisan sponsors of the Act expressly stated that they did not intend to make front pay an element of compensatory damages. Moreover, the concern that led Congress to cap front pay awards—the prospect of a runaway jury verdict—did not apply to front pay. Congress understood that, under Title VII, such awards were made by courts, not juries, were available only in certain circumstances, and were subject to appellate review for abuse of discretion.

Finally, in Part III below, we show that classifying front pay as an element of "compensatory damages" would undermine the enforcement of Title VII. In particular, such a ruling would sharply limit the ability of courts to craft appropriate equitable relief and would deter voluntary compliance with the statute by curtailing an employer's incentive to remedy discrimination promptly.

ARGUMENT

Front Pay Is an Integral Part of the Equitable Remedial Scheme Under § 706(g) of the Civil Rights Act.

Since 1972, § 706(g) of the Civil Rights Act of 1964 has authorized courts to remedy employment discrimination by ordering "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." 42 U.S.C. § 2000e-5(g)(1). Although federal courts have long recognized front pay as a form of "other equitable relief" available under that section, this Court has never directly addressed the issue of whether, and under what circumstances, § 706(g) authorizes an award of front pay.[4] Accordingly, we begin by demonstrating that (1) courts developed front pay long before 1991 to provide a substitute form of prospective relief in situations where an order of immediate reinstatement (or similar relief) would not have been as equitable, and (2) following passage of the 1991 Act, courts have continued to award front pay in appropriate cases

[4] *See Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777 n.38 (1975) (declining to reach front pay issue under Title VII); *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) (holding that neither reinstatement nor front pay is appropriate in age discrimination action where employee would have been terminated on lawful grounds in any event).

under § 706(g) as an equitable substitute for immediate reinstatement.

A. Courts Developed Front Pay To Provide a Prospective Remedy in Cases Where Equitable Considerations Weigh Against Immediate Reinstatement.

The primary goal of Title VII is, and always has been, the eradication of discrimination within the workplace, preferably by encouraging "cooperation and voluntary compliance" with the law. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Where such efforts fail, Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), by restoring them "so far as possible . . . to a position where they would have been were it not for the unlawful discrimination," *id.* at 421 (citations and internal quotation marks omitted). The remedial provisions of Title VII are designed to effectuate these "twin statutory objectives." *Id.*

In the ordinary Title VII case, a plaintiff who proves that an employer engaged in an unlawful employment practice that results in the loss of a job or position is presumptively entitled to obtain both back pay and reinstatement (or analogous injunctive relief like promotion or hiring). *Albemarle*, 422 U.S. at 421. But courts are not limited to the equitable remedies expressly mentioned in the statute. Rather, "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976).

Courts originally developed the front pay remedy to provide prospective relief to plaintiffs in situations where an immediate order of reinstatement or promotion would have

imposed undue hardships on innocent third parties. In *Patterson* v. *Am. Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), one of the earliest front pay cases, an employer and its labor unions had adopted discriminatory procedures for the promotion of African-American and female employees. To remedy the problem, the district court proposed to implement a company-wide seniority program, which would have permitted senior African-American and female employees to "bump" junior employees from the jobs they already held. The Fourth Circuit rejected this remedy, reasoning that it would penalize innocent employees, who might themselves have been victims of discrimination. *See id.* at 268. As an alternative, the court decided to extend the back pay remedy beyond the date of judgment. The court explained that:

"Some employees who have been victims of discrimination will be unable to move immediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated 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. . . . Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit." *Id.* at 269.

The *Patterson* court recognized that this solution would not provide the plaintiffs with the same satisfaction as immediate promotion. But it held that this benefit must be "[w]eighed against . . . the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. . . . [F]ull

monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management." *Id.* at 269-70.

Following *Patterson*, numerous courts recognized front pay as an appropriate substitute remedy where immediate reinstatement or promotion would have had an adverse impact on innocent third parties. *See, e.g.*, *King* v. *Staley*, 849 F.2d 1143, 1145 (8th Cir. 1988) (awarding successful claimant front pay rather than a promotion to a position that had been filled by another employee because doing so "would have injured an innocent incumbent"); *Walsdorf* v. *Bd. of Comm'rs*, 857 F.2d 1047, 1054 (5th Cir. 1988) (awarding front pay rather than promotion to "avoid tampering with the rights of other employees who did not participate in the discriminatory activity"). In these situations, courts awarded front pay to compensate the plaintiff for the period "between the date of judgment and the date the plaintiff attains the position he or she would have occupied but for the discrimination." *Shore* v. *Fed. Express Corp.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *see also Edwards* v. *Occidental Chem. Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990) (affirming award of front pay from date of judgment to date plaintiff received promotion).

Courts also found that front pay was a necessary part of their equitable powers in other situations, such as harassment cases where the animosity between the parties became so great that reinstatement was no longer feasible. For example, in *Goss* v. *Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir. 1984), the plaintiff was constructively discharged after a lengthy pattern of abuse and hostility from her supervisors. The trial court concluded that it would not be "sensible to order plaintiff reinstated to a job in which harmonious working relationships are so important after the acrimony this case has engendered," and accordingly ordered front pay in lieu of reinstatement. *Id.* at 890; *see also Fitzgerald* v.

Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (affirming award of front pay where defendant engaged in "psychological warfare" against the plaintiff). In these situations, courts ordered front pay for the period of time deemed necessary to permit the plaintiff to find comparable employment elsewhere. *E.g.*, *Goss*, 747 F.2d at 890 (affirming award of four months front pay where court found plaintiff was likely to earn comparable wages to old job within short period of time); *Fitzgerald*, 624 F.2d at 956-57 (affirming award front pay award for period of time necessary for plaintiff to "reach[] a place where she could recover equivalent pay and could exercise equivalent responsibility").

This line of authority was bolstered by this Court's decision in *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), which held that claims of "hostile environment" sex discrimination are actionable under Title VII. *Id*. at 73. Courts held that where harassment was sufficiently extreme, it would not be reasonable to expect the victim to return to the workplace where the harassment occurred, and that front pay was therefore warranted as a substitute form of prospective relief. For example, in *Hansel* v. *Public Service Co. of Colorado*, 778 F. Supp. 1126 (D. Colo. 1991), the plaintiff worked in a power plant.[5] Over an eight year period, she was subjected to severe harassment that repeatedly placed her in physical jeopardy. For example, on one occasion, a male co-worker hit her over the head with a crescent wrench with such force that her helmet was dented. *Id.* at 1128. On another occasion, two co-workers offered her a ride, and then sexually assaulted her in their car. *Id.* at 1129. The windshield on the plaintiff's car was broken twice in the employee parking lot. *Id.* And on one occasion, a male co-worker held a hangman's noose in front of the

[5] Although *Hansel* was issued shortly after the passage of the 1991 Act, it was decided under pre-1991 law. 778 F. Supp. at 1136-37.

plaintiff and suggested that she kill herself. *Id.* Two psychologists testified that as a result of these and numerous other incidents, the plaintiff suffered from post traumatic stress disorder. The court found that under these circumstances, reinstatement was an "impossible option" for the plaintiff, noting that "not only would returning to [the plant] jeopardize her mental health, but many of the men who were her worst harassers are now in supervisor positions." *Id.* at 1135. Accordingly, the court held that plaintiff was entitled to front pay in lieu of reinstatement to "make her whole" until she was able to find alternative employment.[6]

In sum, courts developed the front pay remedy because, in seeking to do equity as directed by § 706(g), they found it appropriate in certain types of cases to provide the plaintiff with prospective monetary relief rather than immediate injunctive relief. In some cases, as in *Patterson*, courts sought to balance the plaintiffs' interests against those of innocent employees, while in other cases, as in *Hansel*, courts sought to protect the plaintiff herself from further physical or psychological harm. Prior to the adoption of the Civil Rights Act of 1991, every federal court of appeals to

---

[6] *See also Daniels* v. *Essex Group, Inc.*, 740 F. Supp. 553, 555-58, 562 (N.D. Ind. 1990) (awarding front pay where African American employee subjected to threats and severe workplace harassment on account of race), *aff'd*, 937 F.2d 1264 (7th Cir. 1991); *Sowers* v. *Kemira*, 701 F. Supp. 809, 815-20, 827 (S.D. Ga. 1988) (awarding front pay to sexual harassment plaintiff where her psychiatrist advised her not to return to workplace); *Pease* v. *Alford Photo Indus.*, 667 F. Supp. 1188, 1191-93, 1203 (W.D. Tenn. 1987) (awarding front pay to sexual harassment plaintiff); *Arnold* v. *City of Seminole*, 614 F. Supp. 853, 873 (E.D. Okla. 1985) (awarding front pay to sexual harassment plaintiff).

consider the question had concluded that front pay was available under § 706(g) in appropriate cases.[7]

B. Since 1991, Courts Have Continued To Treat Front Pay as an Essential Part of Their Equitable Remedial Powers Under § 706(g).

The 1991 Act did not make any substantive change in § 706(g),[8] and courts have therefore continued to treat front pay as an available remedy under that section. *See, e.g.*, *EEOC* v. *W&O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000) ("[F]ront pay retains its equitable nature . . . after passage of the Civil Rights Act of 1991."); *Barbour* v. *Merrill*, 48 F.3d 1270, 1279 (D.C. Cir. 1995) (when "preferred remedy" of

---

[7] In addition to the cases cited in the text, see *Johnson* v. *Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 382-83 (5th Cir. 1988); *Pecker* v. *Heckler*, 801 F.2d 709, 713 & n.8 (4th Cir. 1986); *Thorne* v. *City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Thompson* v. *Sawyer*, 678 F.2d 257, 292-93 (D.C. Cir. 1982); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932 (10th Cir. 1979); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977); *EEOC* v. *Enter. Ass'n Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976). For additional cases, see Appendix A to Petitioner's Brief.

Courts have also awarded front pay under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Front pay under the ADEA remains an especially important remedy for older workers who often face longer and more difficult job searches than younger workers. The remedial provisions of the ADEA, however, are quite different from those of § 706(g). *See* discussion *infra* note 16.

[8] The 1991 Act redesignated the existing § 706(g) as paragraphs (1) and (2)(A), and added a new paragraph (2)(B). Pub. L. No. § 102-166, § 107(b),105 Stat. 1075 (1991).

hiring or reinstatement is unavailable, front pay is appropriate). Courts have found front pay relief to be an essential part of their equitable relief powers that is separate and distinct from the compensatory damages remedy under § 1981a, and have awarded front pay in a wide variety of situations where the balance of the equities weighs against immediate reinstatement or other injunctive relief. *See, e.g.*, *Williams* v. *Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998) (affirming front pay award where reinstatement was unavailable because subsequent merger eliminated division where employee had worked); *Selgas* v. *Am. Airlines, Inc.*, 104 F.3d 9, 14 & n.7 (1st Cir. 1997) (affirming front pay award where plaintiff was unable to return to work for approximately 18 months).

For example, as the hostile work environment case law has developed in the years since *Meritor*, courts have continued to find front pay an especially appropriate remedy where the harassment has already caused the plaintiff significant psychological injuries. *See, e.g.*, *Gotthardt* v. *Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999) (affirming award of front pay where court found pattern of harassment that caused plaintiff to suffer post traumatic stress disorder); *Baty* v. *Willamette Indus., Inc.*, 172 F.3d 1232, 1240 (10th Cir. 1999) (affirming front pay award where plaintiff suffered post traumatic stress disorder as a result of harassment); *Hukkanen* v. *Int'l Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993) (affirming front pay award where supervisor touched plaintiff in offensive manner and threatened to rape her at gunpoint).

In keeping with the equitable nature of the front pay remedy, courts emphasize that they have broad discretion to tailor the award to the "individualized circumstances of the plaintiff and the employer." *Davoll* v. *Webb*, 194 F.3d 1116, 1144

(10th Cir. 1999).[9] The front pay case law reflects the individualized, flexible nature traditionally associated with equity. *See, e.g, Florida* v. *Long*, 487 U.S. 223, 237 (1988) ("Our power to order appropriate relief under Title VII is equitable in nature and flexible . . ."). For example, courts have held that they have broad discretion to determine the proper mix of remedies that will fully compensate a plaintiff. *E.g.*, *Selgas*, 104 F.3d at 13; *see also Albemarle*, 422 U.S. at 415-16 ("The [Title VII] scheme implicitly recognizes that there may be cases calling for one remedy but not another."). Thus, a court may award both front pay and reinstatement in a proper case, so long as the awards are not duplicative and cover distinct periods of time. *Selgas*, *104 F.3d* at *13* (affirming hybrid award of reinstatement and front pay); *see also Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995) ("A front pay award—like any other single strand in a tapestry of relief—must be assessed as a part of the entire remedial fabric that the trial court has fashioned in a particular case."). In short, following the 1991 Act, courts have continued to treat front pay as an indispensable arrow in their quiver of equitable remedies under § 706(g).

II. Congress Did Not Intend To Subject Front Pay Awards to the Caps for Compensatory and Punitive Damages When It Adopted the Civil Rights Act of 1991.

---

[9] In *Davoll*, the court noted that relevant factors may include "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value." *Id.*; *see also Barbour* v. *Merrill*, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (discussing factors relevant to determination of front pay award).

The plain language of 42 U.S.C. § 1981a demonstrates that front pay awards are not subject to the dollar caps on compensatory and punitive damages that Congress added to the statute in 1991. As we have just shown, front pay is a form of equitable relief that is available under § 706(g). As such, it is excluded from the definition of "compensatory damages" in § 1981a(b)(2).[10] Front pay therefore is not subject to the caps in § 1981a(b)(3), which by their terms apply only to "compensatory damages" and "punitive damages." Apart from the Sixth Circuit, every court of appeals that has considered the issue has reached this conclusion. *See EEOC* v. *W&O, Inc.*, 213 F.3d 600, 618-19 & n.10 (11th Cir. 2000); *Gotthardt* v. *Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1153-55 (9th Cir. 1999); *Martini* v. *Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999), *cert. dismissed*, 528 U.S. 1147 (2000); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 555-56 (10th Cir.), *cert. denied*, 528 U.S. 813 (1999); *Kramer* v. *Logan County Sch. Dist.*, 157 F.3d 620 (8th Cir. 1998).

As we now demonstrate, however, the plain language of the statute is reinforced by an overwhelming volume of evidence demonstrating that Congress did not intend to subject front pay to the damages caps.

C. The Purpose of § 1981a Was to Expand the Remedies Available to Title VII Plaintiffs, Not To Limit Remedies That Courts Had Already Recognized.

Congress enacted § 1981a to address a historical quirk in the nation's civil rights laws. Prior to 1991, Title VII protected employees from workplace discrimination on the basis of

[10] Section 1981a(b)(2) provides that: "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)]."

race, sex, religion or national origin, but permitted plaintiffs to obtain only equitable relief. *See generally Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252-53 (1994). Employees who alleged intentional race discrimination, however, had the additional option of bringing a claim under 42 U.S.C. § 1981, which — in addition to equitable relief — permits a plaintiff to recover compensatory and punitive damages. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975). Thus a victim of intentional racial discrimination could recover damages for out-of-pocket losses and other monetary harms, as well as impairment of reputation, personal humiliation, mental anguish and similar injuries. *See generally Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (discussing compensatory damages under 42 U.S.C. § 1983). Plaintiffs alleging intentional discrimination on the basis of sex or religion, however, could not recover such damages. Section 1981a partially rectified this anomaly by extending a limited right to compensatory and punitive damages to Title VII plaintiffs in such cases. *See Landgraf*, 511 U.S. at 253-55.

As this Court has previously recognized, the intent of the new section was solely to *expand* the remedies available to Title VII plaintiffs. *See Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies . . ."); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 308 (1994) (noting that the Act expanded the scope of relevant civil rights statutes); *Landgraf*, 511 U.S. at 253. The legislative history confirms this conclusion. Like the rest of the 1991 Act, § 1981a was the product of extensive negotiations between Congress and President Bush. In 1990, both houses of Congress approved a predecessor version of the Act designed to partially rectify this anomaly. As originally reported by the Senate Committee on Labor and Human Resources, the 1990 Act would have given Title VII plaintiffs an unlimited right to recover compensatory and punitive damages. S. REP.

NO. 101-315, at 4 (1990).[11] The Senate Committee report explained that the existing Title VII remedies were inadequate, especially in harassment cases where a plaintiff might suffer significant psychological and medical injuries in addition to loss of wages:

"Victims of sexual or religious harassment and other intentional discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems. And victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. Limiting relief to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination; and thus victims of intentional discrimination are discouraged from seeking to vindicate their civil rights." *Id.* at 30.

Opponents of the legislation sharply criticized this proposal, arguing that the prospect of unlimited damages would deter settlement and lead to significant increases in the volume of Title VII litigation that would place unreasonable burdens on em ployers. *See* S. REP. NO. 101-315, at 95-98 (minority views of Sens. Hatch, Thurmond and Coats); H.R. REP. NO. 101-644, pt. 1, at 131-39 (1990) (minority views); H.R. REP. NO. 101-644, pt. 2, at 66-69 (minority views of Rep. Sensenbrenner et al.) (1990).

As ultimately passed, the 1990 Act attempted to respond to these concerns by limiting punitive damages to the greater of $150,000 or the sum of compensatory damages and equitable

[11] Similar versions of the bill were favorably reported by the House Committee on Education and Labor, H.R. REP. NO. 101-644, pt. 1, at 5-6 (1990), and the House Committee on the Judiciary, H.R. REP. NO. 101-644, pt. 2, at 5-6 (1990).

monetary relief awarded. H.R. CONF. REP. NO. 101-755, at 5-6, 16 (1990). President Bush vetoed the Act, however, 136 CONG. REC. 33,377 (1990), and a motion to override the veto in the Senate failed by a single vote, *id.* at 33,406.

To avert a second veto, a bipartisan group headed by Senators Danforth and Kennedy worked with President Bush to develop compromise legislation. The compromise proposal passed both chambers of Congress by substantial margins, and President Bush signed the 1991 Act into law on November 25, 1991. Like the 1990 Act, the 1991 Act was designed to grant a compensatory and punitive damages remedy to victims of intentional discrimination who could not recover under § 1981. A Section-By-Section Analysis submitted in the House by Representative Edwards explained that:

"The creation of a damages remedy for intentional discrimination is necessary to conform remedies for intentional gender, disability, and certain forms of religious discrimination to those currently available to victims of intentional race, national origin and other forms of religious discrimination as well as to provide a more effective damages remedy in the public sector. . . . [I]t is simply untenable to continue any longer the disparity in the civil rights laws which permits the recovery of compensatory and punitive damages in cases of intentional race discrimination but to deny these same remedies to victims of other forms of discrimination." 137 CONG. REC. 30,661 (1991).

Unlike the 1990 Act, however, the 1991 Act imposed a sliding cap on compensatory and punitive damages in Title VII actions. The damages cap was a key element of the compromise. Lawmakers who had previously opposed the 1990 Act made it clear that they had never had any objection to the basic principle of making compensatory damages available under Title VII, provided that appropriate limits were in place to prevent runaway jury verdicts. Senator

Hatch, for example, supported the compromise bill, remarking that:

"[F]or the first time, damages will be available under [T]itle VII and for the first time you will have a right to collect damages for sexual harassment, something that is long overdue in the law, something for which I have argued from the beginning of this whole debate — something that President Bush had been willing to do in his own bill." 137 CONG. REC. 28,851 (1991).

Congress explicitly recognized that the new remedy it was creating applied to non-wage damages and thus was separate from the wage-related back pay and front pay remedies that were already available under Title VII. An Interpretive Memorandum submitted by Senator Danforth, *see* 137 CONG. REC. 29,045-47 (1991), which reflected the consensus views of both Senator Kennedy and the Republican sponsors of the bill,[12] explained that:

"It is the intention of the sponsors of this legislation to make the perpetrators of intentional discrimination liable for the *non-wage economic consequences* of that discrimination up to the full extent of the stated limitations." *Id.* at 29,046 (emphasis added).

Nothing in the legislative history suggests that by adding a limited right to recover non-wage damages in intentional discrimination cases, Congress sought to limit front pay or

[12] The Court attached little weight to this Memorandum in *Landgraf*, *see* 511 U.S. at 262 n.15, because the Democratic and Republican sponsors disagreed as to the question of retroactivity at issue in that case. With respect to the issue in this case, however, the Memorandum reflects a consensus view of Senators from both parties.

any other existing Title VII remedies. To the contrary, Senator Danforth's Memorandum expressly stated that:

"[T]he following limitations . . . are placed on the damages available to each individual complaining party for each cause of action brought under section 1981A:

"Such damages cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII . . . ." *Id*.[13]

Similar language appears in Representative Edwards's Section-By-Section Analysis from the House:

"The new damages provision does not limit either the amount of damages available in section 1981 actions or the circumstances under which a person may bring suit under that section . . . .

"Damages awarded under section 1977A cannot include remedies already available under Title VII including backpay, the interest thereon, front pay, or any other relief authorized under Title VII . . . ." 137 CONG. REC. 30,661 (1991).

These bipartisan statements confirm that Congress did not intend to disturb the existing scheme of equitable remedies, including front pay, when it enacted § 1981a.

---

[13] *See also* 137 CONG. REC. 28,637 (1991) (remarks of Sen. Kennedy) ("Compensatory damages do not include backpay, interest on backpay, or any other type or relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay.").

D. The Factors That Led Congress To Cap Compensatory and Punitive Damages Awards Are Not Applicable to Front Pay Awards.

It is not surprising that the sponsors of the 1991 Act did not attempt to subject front pay to the kinds of caps that they created for compensatory and punitive damages in § 1981a. As shown above, the legislative history indicates that the damages caps were adopted to respond to concerns that a new unlimited right to compensatory and punitive damages would deter settlements and result in runaway jury verdicts. Critics of the 1990 Act, for example, repeatedly cited a study by the RAND Corporation, which found compensatory and punitive damages awards in wrongful discharge cases in California ranging from $7,000 to $8,000,000, with an average recovery of $307,628. *E.g.*, S. REP. NO. 101-315, at 97-98 (1990). As Senator Wirth remarked during the debates on the compromise proposal, "President Bush has made it clear – no caps, no bill." 137 CONG. REC. 29,022 (1991).[14]

---

[14] In his remarks upon signing the 1991 Act, President Bush confirmed that he viewed damages caps as a necessary safeguard against jury awards:

> "[An] important source of the controversy that delayed enactment of this legislation was a proposal to authorize jury trials and punitive damages in cases arising under Title VII. [The 1991 Act] adopts a compromise under which 'caps' have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the Nation's tort system." Statement of President George Bush Upon Signing S. 1745, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769.

But while Congress was evidently concerned about the prospect of excessive compensatory and punitive damages awards, it did not have a similar concern about front pay awards. The reason is simple: Congress was familiar with the existing case law under Title VII and knew that as the front pay remedy had been applied, there was little potential for runaway awards. *See, e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

First, Congress was aware that courts had treated front pay under Title VII as an equitable remedy awarded by courts rather than juries. Prior to 1991, federal courts were virtually unanimous that no jury trial right existed under Title VII because the statute provided only equitable remedies.[15] District courts thus awarded back pay and front pay without a jury. Congress reasonably expected this practice to continue following the 1991 Act. See 137 CONG. REC. 29,046 (1991) ("The courts shall continue to exercise their discretion in the handling of . . . hybrid actions as they have in handling the many hybrid actions brought under Title VII/ section 1981 in the past."). Since front pay was not perceived as a jury issue,

---

[15] *See, e.g.*, *Wade* v. *Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Johnson* v. *Ga. Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds sub nom. Local 223, Util. Workers Union* v. *EEOC*, 431 U.S. 951 (1977); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978); *Slack* v. *Havens*, 522 F.2d 1091 (9th Cir. 1975). *See also Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981) (stating in dicta that "there is no right to trial by jury in cases arising under Title VII").

there was no concern over the prospect of runaway front pay verdicts.[16]

[16] In this regard, it is important to distinguish Title VII cases from cases arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The remedial provisions of the ADEA are quite different from Title VII; they expressly authorize legal as well as equitable relief, and expressly grant a right to "trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter." 29 U.S.C. § 626(c). Thus back pay awards under the ADEA are for the jury to decide. *See Lorillard* v. *Pons*, 434 U.S. 575, 580-84 (1978).

The Circuits are split regarding the award of front pay under the ADEA. The Third, Fifth, Sixth, and Ninth Circuits have held that the decision to award front pay under the ADEA is a matter within the discretion of the trial court, but that the amount of front pay is for the jury to decide. *See Fite* v. *First Ten.n. Prod. Credit Ass'n*, 861 F.2d 884, 892-93 (6th Cir. 1988); *Cassino* v. *Reinhold Chem., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987); *Maxfield* v. *Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985); *Hansard* v. *Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989). The First, Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, by contrast, have held that both the propriety and the amount of front pay are solely the province of the court. *See Denison* v. *Swaco Geolograph Co.*, 941 F.2d 1416, 1426 (10th Cir. 1991); *Fortino* v. *Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991); *Duke* v. *Uniroyal, Inc.*, 928 F.2d 1413, 1421-24 (4th Cir. 1991); *Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 616 (1st Cir. 1985); *Dominic* v. *Consol. Edison of N.Y., Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987); *Ramsey* v. *Chrysler First, Inc*., 861 F.2d 1541, 1545 (11th Cir. 1988); *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997). This issue does not arise in the Title VII context, however, because Title VII does not provide the ADEA's broad statutory right to a jury trial.

Second, Congress knew that the legal rules courts had developed for front pay made excessive awards unlikely. Courts had made it clear that front pay was only appropriate where equitable considerations weighed against immediate reinstatement. *See, e.g.*, *Thorne* v. *City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980). Courts had held that front pay, like back pay, was subject to the employee's duty to mitigate by making reasonable and diligent efforts to find comparable employment elsewhere. *See Castle* v. *Sangamo Weston, Inc.*, 837 F.2d 1550, 1562 (11th Cir. 1988); *Whittlesey* v. *Union Carbide Corp.*, 742 F.2d 724, 728 (2d *Cir*. 1984). And courts had held that front pay awards had to be reasonably limited in duration. *See Carter* v. *Sedgwick County*, 929 F.2d 1501,1505 (10th Cir. 1991); *Shore* v. *Fed. Express Corp.*, 777 F.2d 1155, 1160 (6th Cir. 1985).

Finally, Congress knew that federal appellate courts had reviewed front pay awards for abuse of discretion, and thus such awards would not be accorded the same deference traditionally accorded to jury verdicts. *E.g.*, *Wulf* v. *City of Wichita*, 883 F.2d 842, 873 (10th Cir. 1989); *Burns* v. *Tex. City Refining, Inc.*, 890 F.2d 747, 753 (5th Cir.1989); *Graefenhain* v. *Pabst Brewing Co.*, 870 F.2d 1198, 1201 (7th Cir. 1989); *cf.* 137 CONG. REC. 30,662 (1991) ("The sponsors recognize the limited role of the judiciary in reviewing jury awards and intend that only this well-established supervisory role be applied to the review of jury awards under [§ 1981a]"). For all of these reasons, the factors that led Congress to cap compensatory and punitive damages were not applicable to the issue of front pay.

II. Subjecting Front Pay to the Damages Caps Would Severely Undermine the Enforcement of Title VII.

We now turn to the consequences that would result if this Court were to conclude that front pay is an element of

"compensatory damages" subject to the caps in § 1981a. By limiting the remedies available under Title VII, rather than expanding them as Congress intended (see discussion *supra* Part II.A), such a decision would frustrate the objectives of the statute and undermine its enforcement.

E. Making Front Pay Part of "Compensatory Damages" Would Undermine the Ability of Courts To Craft Appropriate Equitable Relief in Title VII Cases.

Construing front pay as an element of "compensatory damages" would sharply impair the ability of courts to fashion appropriate equitable relief under § 706(g) in two respects. First, because either party can demand a jury trial as to compensatory damages, the courts would lose control over this element of their equitable powers in every case where the plaintiff seeks front pay.[17] Second, in cases, such as this, where the plaintiff has already incurred damages equal to or in excess of the statutory cap, such a construction would leave immediate injunctive relief as the only available prospective remedy.

As to the former point, given that front pay exists as an alternative to immediate reinstatement, it obviously would be both disruptive and confusing to allot one of these alternatives (front pay) to a jury and the other (reinstatement) to the court. Such a course would compromise the court's flexibility to fashion the most appropriate form of equitable relief. For example, where a judge deem reinstatement to be problematic and award front pay instead, a jury might deny front pay or award only a nominal sum. *See Dominic* v. *Consol. Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (discussing problems that would be created if jury were allowed to decide amount of front pay). In those

[17] *See* 42 U.S.C. § 1981a(c) ("If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury.").

situations, courts would have little choice but to order immediate reinstatement, since the alternative would be to provide no prospective relief for the victims of discrimination.

As to the latter point, the court's discretion would be even more severely limited in situations where the plaintiff's compensatory damages (for emotional distress, medical expenses, etc.) exceed the cap, leaving no room for a front pay award. In such cases, front pay would effectively be eliminated as a remedy, and courts would have no alternative but to order immediate reinstatement. Ironically, this problem would likely be most severe in the cases involving small businesses that Congress sought to protect when it adopted the damages caps in § 1981a. Because Congress was concerned about the potential impact of large jury awards on small businesses, § 1981a imposes a sliding scale of damages caps, ranging from $50,000 for the smallest companies (15 to 100 employees) to $300,000 for the largest companies (more than 500 employees). 42 U.S.C. § 1981a(b)(3). Thus if front pay were subject to the caps, it would be most stringently limited for the employees of small businesses. Yet reinstatement is likely to be more difficult for small employers than for large ones, simply because there are fewer jobs available in smaller companies. Thus in all likelihood, if front pay were subjected to the caps, the most significant disruptions would occur in small businesses. Congress surely did not contemplate this result when it enacted § 1981a.

F. Subjecting Front Pay to the Damages Caps Would Undermine Voluntary Compliance With Title VII.

In *Albemarle*, this Court held that the backpay remedy serves the important function of promoting voluntary compliance with Title VII by giving employers an "incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or

catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . . .” 422 U.S. at 417-18 (alteration in original). The Court elaborated on this rationale in *Ford Motor Company*, explaining that back pay “encourage[s] Title VII defendants promptly to make curative, unconditional job offers to Title VII claimaints, thereby. . . ending discrimination far more quickly than could litigation proceeding at its often ponderous pace.” *Ford Motor Co.*, 458 U.S. at 228.

Much the same analysis applies to front pay awards, which effectively extend the back pay remedy award beyond the date of judgment. *See, e.g.*, *Patterson*, 535 F.2d at 269 (“[B]ack pay must be allowed an employee from the time he is unlawfully denied a promotion . . . until he actually receives it.”); *see also* 2 Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 1815 (3d ed. 1996) (describing front pay as a “continuation of back pay . . . award beyond the date of judgment”). If employers did not face additional front pay liability once a court has already found a violation of the statute, they would have no incentive to try to remedy the problem. *See EEOC* v. *Enter. Ass’n Steamfitters Local 638*, 542 F.2d 579, 590-91 (2d Cir. 1976) (“It is the date of actual remedying of discrimination, rather than the date of the district court’s order, which should govern. . . . [T]o hold otherwise is to encourage the union to delay the remedial process rather than to encourage the rapid achievement of the discrimination victims’ rightful place.”). Thus, for reasons similar to those identified in *Albemarle* and *Ford*, artificially capping front pay would tend to discourage compliance with Title VII.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

RICHARD M. WYNER
(Counsel of Record)
MATTHEW M. HOFFMAN
MICHELE LEE SVONKIN
REBECCA E. RAPP[18]
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2000

CHARLES T. LESTER, JR.
JOHN PAYTON
Co-Chairs
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA FORD HARDING
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

STEVEN R. SHAPIRO
LENORA M. LAPIDUSSARA L.
MANDELBAUM
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2611

MARCIA D. GREENBERGER
JUDITH C. APPELBAUM
NATIONAL WOMEN'S LAW
CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, DC 20036
(202) 588-5180

JUDITH L. LICHTMAN
DONNA R. LENHOFF
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Ave., N.W.
Suite 710
Washington, DC 20009
(202) 986-2600
MARTHA F. DAVIS

[18] Member of the Illinois Bar; not a member of the District of Columbia Bar.

NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635

KAREN K. NARASAKI
VINCENT A. ENG
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Ave., N.W.
Suite 1200Washington, DC 20036(202) 296-2300

MARK D. ROTH
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street,
N.W.Washington, DC 20001(202) 737-8700

LAURIE A. MCCANNAARP FOUNDATION LITIGATIONMELVIN RADOWITZAARP601 E Street, N.W.Washington, DC 20049(202) 434-2060

February 22, 2001