THE ROLE OF WORKPLACE HOSTILITY IN DETERMINING PROSPECTIVE REMEDIES FOR EMPLOYMENT DISCRIMINATION: A CALL FOR GREATER JUDICIAL DISCRETION IN AWARDING FRONT PAY

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Individuals who are subjected to intentional employment discrimination may attempt to seek relief under Title VII of the Civil Rights Act of 1964 or under the Age Discrimination in Employment Act. Unfortunately, for those individuals who prevail on their claims of discrimination, many courts view reinstatement to the employer as the preferred prospective remedy; the courts award the alternate prospective remedy of front pay only upon finding that the individual and the employer are too hostile to reestablish a working relationship. This “workplace hostility” exception to the reinstatement preference has been narrowly construed.

In this article, Professor Susan K. Grebeldinger argues that the courts should abandon their historically strong preference for reinstatement and instead should redefine the scope of workplace hostility in order to make more liberal use of front pay as a prospective remedy. Contrary to the views held by many courts, Professor Grebeldinger believes that an expanded definition of workplace hostility not only would further the purposes of Title VII and the ADEA, but also would avoid the many difficulties faced by reinstated individuals. Professor Grebeldinger concludes by suggesting that courts should take a more progressive stance in

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This is the first of two articles concerning prospective remedies for victims of employment discrimination. The second, currently in progress and coauthored with Professor Stephen L. Hayford of the Babcock Graduate School of Management, is an empirical research project addressing the efficacy of reinstatement and front pay. The project is funded in part by the Fund for Labor Relations Studies.
remedying employment discrimination by giving equal consideration to front pay and reinstatement on a case-by-case basis.

I. Introduction

Courts have almost uniformly held that reinstatement, rather than front pay, is the preferred prospective remedy for individuals who prevail on their claims of intentional discriminatory discharge from employment under either Title VII of the Civil Rights Act of 1964 (Title VII) or the Age Discrimination in Employment Act (ADEA). This strong reinstatement preference, however, is inappropriate as currently formulated—as a judicial creation not mandated by the language of the statutes or by the legislative history. Moreover, reinstatement does not always serve the interests of the victims of discrimination, the employers, or society.

The reinstatement preference is subject only to a few exceptions, most notably that of workplace hostility. The workplace hostility exception applies when a court concludes that the discharged individual and the former employer cannot reestablish an amicable working relationship. In such a case, the individual may receive a front pay award, essentially lost future earnings, in lieu of reinstatement.

Although the workplace hostility exception is growing in usage, the hostility of the parties should no longer remain a mere exception to the reinstatement preference. An enhanced role for workplace hostility in determining prospective remedies is justified by the goals of Title VII and the ADEA, which, contrary to the analogies drawn by many courts, are not identical to the goals of federal labor law. An enhanced role for workplace hostility is further justified in light of the difficulties often created by reinstatement orders and the benefits offered by front pay awards in lieu of reinstatement.

1. See infra notes 54-85 and accompanying text.
2. This article concerns only intentional discrimination against individuals, not classwide discrimination, which undoubtedly raises other remedial issues. See, e.g., Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).
5. See infra notes 63-72 and accompanying text.
6. See infra notes 104-55 and accompanying text.
7. See infra notes 88-89 and accompanying text.
8. See infra notes 59-60, 89-90 and accompanying text.
11. See infra notes 104-55 and accompanying text.
12. See infra notes 196-201, 215-16 and accompanying text.
This article begins in part II by examining Congress’s goals in enacting Title VII and the ADEA, and the ample discretion accorded to courts sitting in equity to determine the appropriate remedies for discriminatory discharges. In part III, the article assesses the development of the reinstatement preference and discusses the advantages and disadvantages of a reinstatement order. Part IV analyzes the use of front pay in discriminatory discharge cases, concluding that front pay is an eminently workable and advantageous alternative to reinstatement in certain situations.

Finally, in part V, the article considers the workplace hostility exception to the reinstatement preference and recommends an expanded definition of “hostility.” It further recommends that courts no longer view reinstatement as the preferred remedy, with front pay allowed only by virtue of the workplace hostility exception. Rather, courts should exercise their discretion to take hostility into account in choosing between the equally valid prospective remedies of reinstatement and front pay.

II. THE REMEDIAL GOALS OF TITLE VII AND THE ADEA

A. The Language and Legislative History of Title VII

Congress enacted Title VII to protect individuals from employment discrimination on the basis of race, color, religion, sex, and national origin. Section 706(g) of Title VII provides that once a court finds that discrimination has occurred, the court may enjoin the employer “from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or

14. Section 703(a)(1)-(2) of Title VII provides:
(a) It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
15. Until 1990, courts and commentators assumed that the federal courts had exclusive subject-matter jurisdiction of Title VII actions. See id. § 2000e-5(f)(3) (“Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.”). In 1990, the Supreme Court unanimously held that, because Title VII does not expressly limit subject-matter jurisdiction to federal courts, state courts have concurrent jurisdiction. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990).
without back pay . . . or any other equitable relief as the court deems appropriate.”

In drafting Title VII, Congress did not devote significant attention to remedial issues. Instead, it modeled section 706(g) after section 10(c) of the National Labor Relations Act (NLRA). The NLRA, enacted in 1935 and extensively amended in 1947, allows nonsupervisory employees to form unions and to bargain collectively with their employer. The NLRA also prohibits employers from discriminatorily discharging employees because of their union activities. Instead of allowing employees a private right of action against their employer under the NLRA, Congress created the National Labor Relations Board (NLRB) to enforce the law through administrative and judicial processes.

In enacting Title VII, however, Congress allowed individuals to bring an action against employers following exhaustion of administrative remedies before the newly created Equal Employment Opportunity Commission (EEOC). Thus, whereas the NLRA is enforced through suits brought by the NLRB, Title VII is overwhelmingly enforced through suits brought by aggrieved individuals.


18. 110 Cong. Rec. 7214 (1964) (interpretative memorandum by Sens. Clark and Case); 110 Cong. Rec. 6549 (1964) (statement of Sen. Humphrey). Section 10(c) of the NLRA provides, “[W]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.” 29 U.S.C. § 160(c) (1994).


21. Section 7 of the NLRA grants employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities.” Id. § 157.

22. Section 8(a)(3) of the NLRA provides that it is an unfair labor practice for an employer to engage in “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Id. § 158(a)(3).


For the period September 30, 1993, to September 30, 1994, there were 15,965 employment discrimination cases filed in the federal courts; only 439 of them were brought by the EEOC or
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The U.S. Supreme Court has concluded that both Title VII and the NLRA have at least one similar purpose—making individuals whole for the losses they suffered as a result of a discriminatory discharge. For example, both statutes provide for the remedy of reinstatement, essentially the specific performance of a personal services contract. Both statutes allow ample discretion in choosing among remedies; they both use the discretionary word "may" rather than such mandatory words as "must" or "shall."

Congress expanded the courts' remedial discretion under Title VII when, in 1972, it added to section 706(g) the phrase "or any other equitable relief as the court deems appropriate." The 1972 Conference Report explains that the amendment was "intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." The Report identifies two components of such a make-whole remedy: eliminating the discriminatory employment practice and, "so far as possible," restoring the individual to "a" (not "the") position where the individual would have been but for the unlawful practice.

In sum, although Congress initially modeled section 706(g) of Title VII after section 10(c) of the NLRA, the remedial provisions of the two statutes are different. The Supreme Court has noted that section 706(g) contains "broader discretionary powers" than section 10(c).
This difference in remedial language is heightened by the difference in enforcement mechanisms. Title VII, with its provision for private rights of action, emphasizes the vindication of individual interests to a greater degree than does the NLRA, with its administrative enforcement scheme. Thus, Title VII remedies should be determined more by the interests of the aggrieved individuals than by the public interest.

B. The Language and Legislative History of the ADEA

The ADEA, enacted in 1967, prohibits employers from discriminating against individuals on the basis of age, save for certain narrowly tailored exceptions. Congress modeled the ADEA's substantive provisions after Title VII but based much of the ADEA's enforcement and remedial provisions upon the Fair Labor Standards Act (FLSA), which was passed in 1938 to regulate minimum wages, overtime, and child labor. Nonetheless, the remedial language of the ADEA, contained in section 7(b), is broader than that in the FLSA.

Section 7(b) of the ADEA provides that courts "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter, including without limitation judgments compelling employment, reinstatement, or promotion." The phrases "such legal or equitable relief as may be appropriate to

private, 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."  
Id. at 769 n.29 (citations omitted).


35. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), expressly incorporates the remedial provisions of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1994)). It provides, in relevant part, "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U.S.C. § 626(b); see also Lorillard v. Pons, 434 U.S. 575, 582 (1978) (The "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."); 113 Cong. Rec. 31,248, 31,254 (1967) (remarks of Sen. Javits) ("The enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporated by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act.").


37. State and federal courts have concurrent subject-matter jurisdiction of ADEA suits. 29 U.S.C. § 626(c)(1).

38. Id. § 626(b).
effectuate the purposes of this chapter” and “without limitation” are quite analogous to the language of section 706(g) in Title VII.39

Like Title VII, the ADEA provides individuals with a private right of action following exhaustion of the EEOC’s administrative remedies.40 Again, the remedial emphasis should be on the individual seeking relief, rather than on the public interest.

C. The Similar Remedial Purposes of Title VII and the ADEA

Although the remedial provisions of Title VII and the ADEA are not identical, courts often apply the case law of one statute to a suit brought under the other because both statutes “vest trial courts with a similar broad discretion in awarding such legal or equitable relief as the courts deem appropriate.”41 The EEOC, the administrative agency charged with enforcing Title VII and the ADEA,42 applies the same Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination to cases arising under either statute.43 The EEOC notes “the wide range of remedial measures available” and states that the remedy must “be tailored, where possible, to cure the specific situation.”44

One primary remedial purpose of Title VII and the ADEA is to make the individual victim of discrimination whole. In Albemarle Paper Co. v. Moody,45 the Supreme Court, quoting from the legislative history of the 1972 amendments to Title VII, stated that “Congress’ purpose in vesting a variety of ‘discretionary’ powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the ‘fashion[ing] of the most complete relief possible.’”46 Numerous lower federal courts47 and

40. 29 U.S.C. § 626(b).
41. McKnight v. General Motors Corp., 973 F.2d 1366, 1369 n.1 (7th Cir. 1992) [hereinafter McKnight II], cert. denied, 507 U.S. 915 (1993).
44. Id. The courts’ broad discretion in fashioning remedial relief under Title VII and the ADEA is not unfettered, however. The Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), held that courts must fashion relief so as to effectuate the purposes of the statutes and minimize any inconsistencies that might frustrate those purposes. Id. at 417 (“Important national goals would be frustrated by a regime of discretion that ‘produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.’”) (quoting Morgan v. States Marine Lines, 398 U.S. 375, 405 (1970)).
45. 422 U.S. 405 (1975).
46. Id. at 421 (quoting from Section-by-Section Analysis accompanying Conference Committee Report on the 1972 amendments). The Supreme Court recently reaffirmed this view in McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995), stating that one objective
the EEOC as well, have echoed this sentiment for complete relief. Accordingly, most courts award a discriminatorily discharged individual retrospective relief, in the form of back pay and lost benefits, and prospective relief, in the form of reinstatement or front pay.

Yet another purpose of Title VII and the ADEA is to deter employers from violating the law. The Albemarle Court observed that in the absence of complete remedies for aggrieved individuals, employers “would have little incentive to shun practices of dubious legality.” The deterrence purpose contains elements of punishment for the employer and of assurance to other workers that Title VII and the ADEA do in fact work.

In light of the statutes’ dual purposes of making the individual whole and of deterring future discrimination in the workplace, courts are to award the victim of discrimination a full range of prospective and retrospective remedies. Nonetheless, the courts’ primary focus must be on the individual; if the courts do not make that individual whole, they must articulate, carefully and in detail, their reasons for failing to do so.

47. See, e.g., Lussier v. Runyon, 50 F.3d 1103, 1112 n.10 (1st Cir.) (“After all, the basic function of a front pay award is to make victims of discrimination whole.”), cert. denied, 116 S. Ct. 69 (1995); Sinai v. New England Tel. & Tel. Co., 3 F.3d 471, 476 (1st Cir. 1993) (“The purpose of damages under Title VII is to make the plaintiff whole.”), cert. denied, 115 S. Ct. 597 (1994); Sandlin v. Corporate Interiors, Inc., 972 F.2d 1212, 1215 (10th Cir. 1992) (“The purpose of the equitable remedies under the ADEA is to make a plaintiff whole—to put the plaintiff, as nearly as possible, into the position he or she would have been in absent the discriminatory conduct”); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir.) (“In fashioning remedies under the ADEA, we must remember that the purpose of Congress was to make the plaintiff whole.”), cert. denied, 493 U.S. 842 (1989); Hutchison v. Amateur Elec. Supply, Inc., 840 F. Supp. 612, 621 (E.D. Wis. 1993) (“A finding that an employer violated Title VII at the liability stage of the proceedings triggers a rebuttable presumption that the plaintiff is entitled to full relief.”), aff’d in part and rev’d in part, 42 F.3d 1037 (7th Cir. 1994).

48. The EEOC’s Policy Statement on Remedies and Relief stresses “prompt, comprehensive, and complete relief for all individuals. . . .” 29 C.F.R. pt. 1613, app. A.

49. See infra notes 54-62, 206-14 and accompanying text.

50. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975); see also McKennon, 115 S. Ct. at 884 (“Deterrence is one object of these statutes.”); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting the prophylactic objective of Title VII “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”); EEOC Policy Statement on Remedies and Relief, 29 C.F.R. pt. 1613, app. A (“The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.”).

51. Kotkin, supra note 17, at 1376 (noting that perhaps the courts’ discretion is “broadened because compensatory and punitive elements, not just defendant’s wrongful gain, are part of the calculus”).


53. In EEOC v. General Lines, Inc., 865 F.2d 1555 (10th Cir. 1989), the U.S. Court of Appeals for the Tenth Circuit stated:

It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons. The courts of appeals must maintain a consistent and principled appli-
III. THE REINSTATEMENT PREFERENCE AND THE DIFFICULTIES IT CREATES

A. The Reinstatement Preference and the Workplace Hostility Exception

In determining the prospective relief to which an individual victim of discrimination is entitled under Title VII and the ADEA, courts uniformly begin by stating their preference for reinstatement over front pay.\(^54\) No Supreme Court authority mandates this preference; often the courts give no reasoning beyond citation to other circuit cases or Albemarle's make-whole philosophy. A reinstatement order returns the individual to one of three positions\(^55\) with the former employer: the position held immediately before the discriminatory discharge,\(^56\) a comparable position,\(^57\) or an advanced position via promotion.\(^58\)

Front pay, currently the less favored prospective remedy, is a monetary amount intended to compensate the individual for lost opportunities with the former employer.\(^59\) This remedy is most commonly defined as the discounted present value of the difference between the individual’s predischarge earnings and the earnings the


\(55\) Conway v. Hercules Inc., 831 F. Supp. 354, 358 n.7 (D. Del. 1993) (“The term ‘position’ includes the duties of an employee as well as his title.”).

\(56\) See, e.g., Carter v. Sedgwick County, Kan., 929 F.2d 1501, 1505 (10th Cir. 1991) (applying Title VII, reinstatement could be to the “former job”); Duke v. Uniroyal, Inc., 777 F. Supp. 428, 435 (E.D.N.C. 1991) (applying ADEA, reinstatement to the position from which plaintiff was terminated).

\(57\) See, e.g., Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1529 (11th Cir. 1991) (applying Title VII, reinstatement depends on the existence of “substantially equivalent positions”); Carter, 929 F.2d at 1505 (applying Title VII, reinstatement could be to “a position with a commensurate rating”); Hybert v. Hearst Corp., 900 F.2d 1050, 1055 (7th Cir. 1990) (applying ADEA, reinstatement must be to a comparable or equivalent position).

\(58\) Hopkins v. Price Waterhouse, 920 F.2d 967, 979 (D.C. Cir. 1990) (plaintiff senior manager was promoted to partner status); Pecker v. Heckler, 801 F.2d 709, 712 (4th Cir. 1986) (plaintiff at a grade of GS-9 was promoted to a grade of GS-11); Saunders v. Clayton, 629 F.2d 596, 597 (9th Cir. 1980) (same), cert. denied, 450 U.S. 980 (1981).

\(59\) Fortino v. Quasar Co., 950 F.2d 389, 398 (7th Cir. 1991) ("[Front pay] refers to a situation in which for one reason or another it isn’t feasible to order the successful plaintiff reinstated in the defendant’s employ. An award of front pay is designed to monetize the value of that lost opportunity.").
individual might obtain in future employment. Although the Supreme Court has not expressly approved of the use of front pay under Title VII or the ADEA, virtually every federal appellate court has done so.

The preference for reinstatement instead of front pay is a judicially created doctrine, the rationale for which bears critical reexamination. Courts advance several reasons for the preference, including their interpretations of the language and legislative history of Title VII and the ADEA. None of these reasons, however, adequately supports such rigid adherence to the preference.

First, the courts cite the language of the remedial provisions of Title VII and the ADEA in support of the reinstatement preference. The statutes specifically list reinstatement as a remedial option, whereas front pay must be implied from the phrases "other equitable relief" and "such . . . relief as may be appropriate." The statutes do

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60. See, e.g., Wilson v. S & L Acquisition Co., 940 F.2d 1429, 1433 n.6 (11th Cir. 1991) (defining front pay as "the difference between what the employee was earning at the time the cause of action arose and the earnings at the time of trial"); McKnight v. General Motors Corp., 908 F.2d 104, 116 (7th Cir. 1990) [hereinafter McKnight] (defining front pay as a "lump sum . . . representing the discounted present value of the difference between the earnings [the 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"), cert. denied, 499 U.S. 919 (1991); Hybert, 909 F.2d at 1055 (defining front pay as the "present value of the future income that the ADEA plaintiff would have earned if he/she would have remained in the defendant's employ for the rest of his/her working life"); Hanks v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir.) (defining front pay as "future lost earnings"), cert. denied, 493 U.S. 842 (1989); White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977) (defining front pay as 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 the employee can assume his new position").

61. In United States v. Burke, 504 U.S. 229, 239 n.9 (1992), where the issue before the Court was the taxability of back pay awards, the Court noted, "[s]ome courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings." Years earlier the Court in Franks v. Bowman Transp. Co., 424 U.S. 747, 777 n.38 (1976), stated that in some cases front pay might be awarded in lieu of back pay. In his concurrence, Chief Justice Burger opined that front pay "would serve the dual purpose of deterring wrongdoing by the employer or union . . . as well as protecting the rights of innocent employees." Id. at 781.

62. See, e.g., Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1528 (11th Cir. 1991); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985); see also Brian S. Felton, Note, Jury Computation of Front Pay Under the Age Discrimination in Employment Act, 76 MINN. L. REV. 985, 985 (1992) ("Within the last decade, all federal circuit courts addressing the issue have held that [the ADEA] permits awards for future income that the employee would have earned were it not for the employer's discrimination."). But see Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 678 (7th Cir. 1993) ("The very question of whether a district court may order front pay as part of the equitable relief permitted by Title VII remains an open question in this circuit."). One district court has stated that front pay is "clearly awardable under the compensated damages provision of the 1991 Act" amending Title VII. Hutchison v. Amateur Elec. Supply, Inc., 840 F. Supp. 612, 621 n.7 (E.D. Wis. 1993), aff'd in part and rev'd in part, 42 F.3d 1037 (7th Cir. 1994).

not, however, mandate that reinstatement deserves any special preference. Moreover, the Supreme Court has clearly rejected the argument that remedies not specifically mentioned in the statutes are “less available.”

Given the absence of any preferential language in the statutes and the courts’ use of the above residual relief phrases, some courts recognize that they have the authority to order remedies based on the particular facts in each case, with less attention paid to the reinstatement preference. Indeed, one Tenth Circuit judge earlier concluded, in an ADEA case, that “[t]he Act does not create any such priorities and the matter is best left to the trial courts with the usual standard of review.”

Second, the courts cite the legislative history and policy statements of the statutes in support of the reinstatement preference. Such reliance is similarly misplaced.

In applying the reinstatement preference to Title VII, the courts note that Congress modeled section 706(g) of Title VII after section 10(c) of the NLRA; they therefore wholly import the NLRA preference for reinstatement into Title VII. But courts have more discretion to choose among remedies under Title VII than they do under the NLRA. Also, the missions of the NLRA and Title VII differ signifi-

1561 (10th Cir. 1989) ("Reinstatement is one of the express affirmative actions authorized under [Title VII] and certainly ‘front pay’ would qualify as ‘other equitable relief’ the court may grant if deemed appropriate."); Kotkin, supra note 17, at 1376 ("‘Front pay’ relief is not referred to in the statutory language or in Title VII's legislative history. . . . [F]ront pay is not statutorily authorized other than to the extent it falls within ‘other equitable relief.’").

64. Franks, 424 U.S. at 764 n.21 ("It is true that backpay is the only remedy specifically mentioned in § 706(g). But to draw from this fact . . . any implicit statement by Congress that seniority relief is a prohibited, or at least less available, form of remedy is not warranted.").

65. See, e.g., McKnight II, 973 F.2d 1366, 1370 (7th Cir. 1992) ("The decision regarding reinstatement is within the discretion of the district court, and several factors may persuade the district judge after careful consideration in a particular case that the preferred remedy of reinstatement is not possible or is inappropriate."); cert. denied, 507 U.S. 915 (1993).

66. Blim v. Western Elec. Co., 731 F.2d 1473, 1481 (10th Cir.) (Seth, C.J., concurring and dissenting), cert. denied, 469 U.S. 874 (1984). A similar result can be found in the antidiscrimination statutes of Great Britain, which provide that the tribunal shall make such of the following as it considers just and equitable—(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates; (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or by a sheriff court . . . ; (c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

Race Relations Act, 1976, ch. 74, § 56; Sex Discrimination Act, 1975, ch. 65, § 65. These statutes have been read as allowing the tribunal to decide among three prospective remedies: reinstatement to the former position, reengagement to a similar position, or compensation. Michael Mankes, Comment, Combating Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach, 16 COMP. LAB. L.J. 67, 92 (1994).

67. See supra note 18 and accompanying text.

68. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) ("Reinstatement is the conventional correction for discriminatory discharges.").

69. See supra note 32.
cantly. NLRA remedies may in fact make the discharged individual whole, but they are more often viewed as necessary to assist workers in self-organization; if an employer discharged a worker because of his union activities, the worker should be reinstated to help with the organizing effort.\(^70\) Moreover, workers protected by the NLRA are nonsupervisory employees who have an organization—the union—to protect them.

In applying the reinstatement preference to the ADEA, the courts look to one of the three goals listed in the statute's preamble—"to promote employment of older persons based on their ability rather than age"\(^71\)—and to a statement in the legislative history that "older individuals who desire to work will not be denied employment opportunities solely on the basis of age."\(^72\) Neither of these statements indicates any preference that the discriminatorily discharged individual return to the former employer; they simply express the desire that older individuals remain in the work force.

Third, the courts might refer to the EEOC's Policy Statement on Remedies and Relief.\(^73\) One of the policy's five components of complete relief is "[a] requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person."\(^74\) Although such EEOC pronouncements are entitled to some degree of judicial deference,\(^75\) this policy statement, if taken to the extreme, robs the courts of the very remedial discretion given by Congress.

Fourth, and most important, the courts assume that reinstatement better fulfills the statutes' dual purposes of making individual victims whole and of deterring future discrimination.\(^76\) Some believe that re-

\(^70\) Phelps Dodge Corp., 313 U.S. at 193.
\(^71\) 29 U.S.C. § 621(b).
\(^74\) 29 C.F.R. pt. 1613, app. A.
\(^75\) In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 844. However, because EEOC guidelines and policy statements are not true regulations promulgated by an agency with congressional rulemaking authority, they merit less deference. See also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (EEOC guideline "is no doubt entitled to great deference, but that deference must have limits" such as where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question") (citations omitted); see also Robert A. Anthony, Interpretative Rules, Policy Statements, Guidelines, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1321-27 (1992).
\(^76\) See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (Title VII restores individuals to "a position where they would have been were it not for the unlawful discrimination") (quoting 118 Cong. Rec. 7168 (1972) (statement of Sen. Williams)); Brunnemann v. Terra
instatement will actually "negat[e] the effects of the unlawful termination."
77 others assert that without reinstatement the employer would accomplish its goal of discharging the individual. 78 A few courts explain that reinstatement is necessary to the individual's sense of self-worth and accomplishment, 79 even if the reinstatement creates interpersonal difficulties in the renewed working relationship between the individual and his former employer. 80 Still others prefer reinstatement because they believe that an award of front pay is too speculative. 81 Finally, commentators have suggested that unless individual

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77. Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991) ("The purpose of ADEA remedies is to make the victim of age discrimination whole. The most obvious way to make a plaintiff whole is to award back pay denied by termination and then reinstate the plaintiff, thereby negating the effect of the unlawful termination.").

78. See, e.g., Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991) ("[I]f reinstatement were denied, then the defendant[s] would have accomplished their purpose."); McKnight I, 908 F.2d 104, 116 (7th Cir. 1990) ("Mere hostility by the employer or its supervisory employees is of course no ground for denying reinstatement. . . . That would arm the employer to defeat the court's remedial order.") (citations omitted), cert. denied, 499 U.S. 919 (1991); Jackson v. City of Albuquerque, 890 F.2d 225, 235 (10th Cir. 1989) ("[I]f [plaintiff] is denied reinstatement, [defendants] will have accomplished their purpose."); Gallo v. John Powell Chevrolet, Inc., 779 F. Supp. 804, 815 (M.D. Pa. 1991) ("Allowing the probability of hostility to negate reinstatement would give in to the attitudes which brought about the discrimination in the first place, an intolerable result.").

79. Hopkins, 920 F.2d at 977 n.9 (monetary relief "may nonetheless fall short of fully compensating [plaintiff] for the opportunity she was denied").

80. Cf. Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982) (applying 42 U.S.C. § 1983, analogous to Title VII, and stating, "When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored."); see also Alvarez & Lipsky, supra note 76, at 210 ("Every day that a victim of discrimination is not placed in the job, that individual is losing self-esteem and valuable experience which is necessary to future career advancement.").

81. See, e.g., Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir. 1991) ("In circumstances, however, where employment is terminated without destroying the capacity to work, the nature and extent of injury is nearly indeterminable. The broad array of potential circumstances of a terminated employee's future income makes any attempt at finding damages a speculative venture.")., cert. denied, 502 U.S. 963 (1991).
victims of discrimination are reinstated, employment opportunities will
never increase in society.\textsuperscript{82} Certainly, an appropriate
reinstatement order can fulfill the statutes’ goals, but the courts also must take
into consideration the difficulties created by reinstatement and the
benefits offered by the alternate remedy of front pay.

Because reinstatement is the rule, and front pay the exception,
courts may award reinstatement even if the individual has not re-
quested it as a remedy.\textsuperscript{83} Neither the individual’s nor the employer’s
professed desire for one remedy over the other is dispositive.\textsuperscript{84} “It is
not enough that reinstatement might have ‘disturbing consequences,’
that it might revive old antagonisms, or that it could ‘breed difficult
working conditions’ [because r]elief is not restricted to that which will
be pleasing and free of irritation.”\textsuperscript{85}

The courts do concede that in some exceptional circumstances,
reinstatement would not be feasible.\textsuperscript{86} The EEOC also has acknowl-

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  \item \textsuperscript{82} Alvarez & Lipsky, supra note 76, at 210 (“Until individuals are actually offered the jobs
they earned based on their merit, no opportunities have, in fact, been extended. The absence of
members of the excluded group from the employer’s work force . . . may also serve to discourage
other members of that group from seeking similar opportunities.”).
  \item \textsuperscript{83} Roush v. KFC Nat’l Management Co., 10 F.3d 392, 398 n.8 (6th Cir. 1993) (“We have
never held that a plaintiff must request reinstatement as a prerequisite to recovering front pay,
and we decline to do so in this case.”), \textit{cert. denied}, 115 S. Ct. 56 (1994); Williams v. Valenteck
Kisco, Inc., 964 F.2d 723, 730 (8th Cir.) (“[W]e have never said that the failure to request rein-
statement is an absolute bar to the district court’s consideration of awarding front pay in lieu of
reinstatement. The district court is to use its discretion in deciding whether to grant equitable
(10th Cir. 1989) (“[T]he trial court may restore the plaintiff to the position he would have held
but for the discrimination, even though such relief was not sought in the pleadings.”); \textit{see also}
Fed. R. Civ. P. 54(c) (allowing relief, in all cases except for default, even if the party has not
demanded such relief in the pleadings).
  \item \textsuperscript{84} \textit{See}, e.g., Grantham v. Trickey, 21 F.3d 289, 296 n.5 (8th Cir. 1994) (if reinstatement not
feasible, court may grant front pay as alternative); Price v. Marshall Erdman & Assocs., 966 F.2d
320, 325 (7th Cir. 1992) (remanding for computation of front pay, although plaintiff sought rein-
statement); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1396 (6th Cir. 1990) (“The basis
upon which reinstatements, or an appointment in this case, may be denied must be more compel-
ing than the personal preferences and distrusts which accompanied the initial discriminatory
sas Gazette, 897 F.2d 945, 954 (8th Cir. 1990) (affirming award of reinstatement, which plaintiff
had sought and employer had resisted); Stanfield v. Answering Serv., Inc., 867 F.2d 1290, 1295
(plaintiff sought front pay, but was awarded reinstatement); Keenan v. City of Philadelphia, 55
for future lost wages rather than reinstatement. That defendants happen now to prefer the rem-
edy of reinstatement, over damages for lost pay, is not decisive . . . . The operative question is
whether, in this court’s view, reinstatement is feasible and warranted.”), \textit{aff’d in part and vacated
in part}, 983 F.2d 459 (3d Cir. 1999).
  \item Some courts do take into account that the parties are in agreement as to the appropriate
(“Plaintiff and defendant are uniquely in agreement that plaintiff’s reinstatement as a Union
Electric employee is not appropriate.”).
  \item \textsuperscript{85} \textit{Farber}, 917 F.2d at 1396.
  \item \textsuperscript{86} \textit{See}, e.g., Acrey v. American Sheep Indus. Ass’n, 981 F.2d 1569, 1576 (10th Cir. 1992)
(“We have held that reinstatement is the preferred remedy in ADEA cases, but that a plaintiff is
entitled to front pay when reinstatement is not feasible.”); Walther v. Lone Star Gas Co., 952
F.2d 119, 127 (5th Cir. 1992) (“Reinstatement is the remedy of choice . . . unless the plaintiff
shows that reinstatement is not feasible.”).
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edged that reinstatement might not always be possible. 87 The most widely used exception 88 is that of workplace hostility, where reinstatement would engender an unacceptable degree of animosity between the individual and the employer. 89 In such a situation, the individual typically receives some amount of front pay. 90 Although a trial court’s decision between reinstatement and front pay can be reversed only upon an abuse of discretion, 91 that discretion is unnecessarily restricted by the reinstatement preference.

Such a strong preference for reinstatement and such a cabinet view of workplace hostility run counter to traditional equitable principles. Equity “eschews mechanical rules” and “depends on flexibility”, 92 equitable discretion is of paramount importance in remedies. 93

87. EEOC Policy Statement on Remedies and Relief, 29 C.F.R. pt. 1613, app. A (“If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.”).

88. The other exception to the reinstatement preference is where the employer has gone out of business or has so substantially reorganized that there are no positions available for the individual; in such a situation the individual receives neither reinstatement nor front pay. See, e.g., Sandlin v. Corporate Interiors, Inc., 972 F.2d 1211, 1215 (10th Cir. 1992) (“[R]einstatement is not possible and front pay is inappropriate if a defendant company has ceased doing business.”); Burns v. Texas City Ref., Inc., 890 F.2d 747, 753 (5th Cir. 1989) (reversing award of front pay because the employer sold its assets and “all employees except a small transition team were terminated”). But see Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989) (reinstatement allowed where the employer sold its plant, but the individual’s former co-workers continued in employment with the purchaser).

89. Williams v. Valente Kisco, Inc., 964 F.2d 723, 730 (8th Cir.) (“We have recognized that reinstatement is sometimes not an appropriate remedy, as when there is ‘evidence of extreme animosity between plaintiffs and defendant employers.’”) (quoting Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983), cert. denied, 506 U.S. 1014 (1992); Tennes v. Massachusetts Dep’t of Revenue, 944 F.2d 372, 381 (7th Cir. 1991) (reinstatement was inappropriate due to workplace hostility); Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991) (“This circuit has frequently held that reinstatement is the preferred remedy for discrimination in employment matters in all but special instances of unusual workplace hostility or other aggravating circumstances which may make reinstatement impossible.”).


91. See, e.g., James v. Sears, Roebuck & Co., 21 F.3d 989, 997 (10th Cir. 1994); Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 286 (8th Cir. 1993); Acrey v. American Sheep Indus. Ass'n, 981 F.2d 1569, 1576 (10th Cir. 1993); Estate of Janice D. Pitre v. Western Elec. Co., 975 F.2d 700, 704 (10th Cir. 1992), cert. denied, 114 S. Ct. 459 (1993); Brunnemann v. Terra Int'l, Inc., 975 F.2d 175, 177 (5th Cir. 1992); Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990); Standfield v. Answering Serv., Inc., 867 F.2d 1290, 1295 (11th Cir. 1989).

“A district court abuses its discretion when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales.” Lussier v. Runyon, 50 F.3d 1103, 1111 n.9 (1st Cir.) (quoting Holmberg v. Armbricht, 327 U.S. 392, 396 (1946), cert. denied, 116 S. Ct. 69 (1995).


Certainly, a trial court's discretion must not be so great as to produce "different results for breaches of duty in situations that cannot be differentiated in policy."94 But it cannot be disputed that a trial court "will often have the keener appreciation of those facts and circumstances peculiar to particular cases."95

A recent example of a trial court restricted by the reinstatement preference is Curtis v. Robern, Inc.96 There, the plaintiff proved that he had been terminated in violation of the ADEA, largely at the behest of a twenty-six-year-old general manager.97 The trial court disbelieved much of the manager's testimony,98 finding that he engaged in "heavy-handed conduct." The court further found that the manager exhibited "insensitivity to good employee relations, . . . as well as to the truth."99

The plaintiff in Curtis sought front pay as a prospective remedy "because he believe[d] that . . . [the employer] would be hostile to him if reinstatement were ordered."100 The trial court, however, applied the staunch preference for reinstatement, stating:

Nothing adduced before us at trial leads us to conclude that reinstatement is not "feasible" here. The only basis cited against the feasibility of reinstatement was [plaintiff's] concern about "hostility." Obviously, there will inevitably be some measure of bad feelings after every employment discrimination case is concluded, and thus the evidence of such feelings cannot preclude reinstatement, the "preferred remedy" in these cases.101

The court believed that the employer's president would prevent any retaliation,102 even though the manager remained in his same position and had control over the plant at which the plaintiff would work.103 Perhaps if reinstatement were not the rule, and hostility not such a narrow exception, the plaintiff in Curtis would not have been forced to return to a work environment he had reason to fear.

B. The Difficulties Created by Reinstatement

Ordering an individual to return to work for the very employer that discharged him creates at least four significant problems.

First, because Title VII and ADEA litigation is relatively protracted, the individual may have been separated from the employer

97. Id. at 454.
98. Id. at 455-56.
99. Id.
100. Id. at 457.
101. Id. at 457-58.
102. Id. at 458.
103. Id.
for a number of years and may no longer be interested in returning.\textsuperscript{104} Although no data exist on the acceptance rates of reinstatement orders under Title VII and the ADEA, studies of reinstatement offers pursuant to the NLRA reveal that an individual is much more likely to accept an informal offer of reinstatement shortly after the discharge than he is to accept a reinstatement order made years later, after administrative or judicial resolution.\textsuperscript{105} With the passage of time, the individual may have moved away or found another job.\textsuperscript{106} Additionally, the individual may no longer be qualified to assume a position with the employer.\textsuperscript{107} Thus, even a trial court that initially opts for reinstatement might be forced to reconsider its choice following a lengthy appeal.\textsuperscript{108}

Second, because the individual has been separated from the employer for several years, reinstatement might require the displacement, or “bumping,” of an innocent incumbent employee.\textsuperscript{109} Although courts “do not lightly order bumping,”\textsuperscript{110} they will do so upon a balancing of the equities and a belief that the discharged indi-

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\textsuperscript{104} In the U.S. district courts, the median time from filing to trial in a civil suit in 1994 was 18 months, with 62.2% of the cases over three years old. \textit{Administrative Office of the U.S. Courts, Federal Court Management Statistics} 167 (1994) [hereinafter \textit{Federal Court Management Statistics}]. Of the 236,391 civil suits filed in 1994, 32,622 were civil rights actions; only prisoner petitions and tort suits were more numerous. \textit{Id.}; see also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982) (“Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.”); Suggs v. Servicemaster Educ. Food Management, 72 F.3d 1228, 1234 (6th Cir. 1996) (remanding to district court to determine if reinstatement is feasible two years after trial); Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 961 (5th Cir. 1993) (where plaintiff was discharged in 1989 and went to trial in 1992, “[o]n remand, the district court can reconsider its reinstatement order in light of the passage of time. ... [I]t can determine that reinstatement is no longer feasible and award front pay.”).

\textsuperscript{105} NLRB figures show that if employers offer reinstatement soon after the discharge, as part of an informal settlement, 73% of the individuals accepted. If reinstatement is ordered pursuant to administrative or judicial proceedings, the acceptance rate drops to 56% and 57%, respectively. Martha S. West, \textit{The Case Against Reinstatement in Wrongful Discharge}, 1988 U. ILL. L. REV. 1, 30 & n.144 (summarizing NLRB annual reports).


\textsuperscript{107} See, e.g., Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598, 603 (7th Cir. 1979) (“A hiring order is not appropriate unless the person discriminated against is presently qualified to assume the position sought.”), \textit{cert. denied}, 454 U.S. 1060 (1981).

\textsuperscript{108} See \textit{supra} note 104.

\textsuperscript{109} Brunnenmann v. Terra Int'l, Inc., 975 F.2d 175, 180 (5th Cir. 1992) (employer appealed reinstatement order “because that position was already held by another employee”).

\textsuperscript{110} Elizabeth Newsom, \textit{The Price of Eradicating Discrimination: Should a Title VII Plaintiff Displace an Incumbent Employee?}, 59 GEO. WASH. L. REV. 1395, 1406 (1991); see, e.g., Roush v. KFC Nat'l Management Co., 10 F.3d 392, 398 (6th Cir. 1993) (reinstatement “is not appropriate in every case, such as ... where reinstatement would require displacement of a nonculpable employee”), \textit{cert. denied}, 115 S. Ct. 56 (1994); Delaware v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) (affirming district court's denial of reinstatement because “reinstatement would disrupt the employment of others”); Gallo v. John Powell Chevrolet, Inc., 779 F. Supp. 804, 815 (M.D. Pa. 1991) (“Reinstatement should be denied if plaintiff’s return to the workplace ... would displace an innocent third party now holding the job plaintiff would be given.”), \textit{aff'd}, 981 F.2d 1246 tbl. (3d Cir. 1992).
individual has a superior claim to the position. They find implicit authorization in the Supreme Court's decision in *Franks v. Bowman Transportation Co.*, which upheld an award of retroactive seniority despite the possibility that it might ultimately result in the bumping of incumbent employees. The award in *Franks*, however, did not result in the immediate loss of any incumbent's job.

The courts also find support for bumping under section 10(c) of the NLRA, upon which section 706(g) of Title VII was based. They fail to note that, as a practical matter, bumping is undoubtedly more acceptable under the NLRA. The vast majority of collective bargaining agreements contain seniority provisions for purposes such as bumping; workers are thus on notice as to potential displacement. Additionally, under the NLRA, workers hired to replace strikers are aware that the strikers who return have some rights in their jobs. The courts often assume that an employer faced with a reinstatement order will rarely bump an incumbent. They envision the employer retaining both the discharged individual and the innocent incumbent; the employer, having been found liable for discriminatory discharge, simply bears the added cost of another worker. The courts assume that true displacement of an innocent incumbent would be limited to "unique, typically higher-level, jobs that have no reasonable substitutes." In this era of frequent corporate downsizing, however, an employer may be less willing to retain the incumbent


113. *Id. at 776*.

114. *Lander*, 888 F.2d at 156 (finding "a legislative intent to include bumping in the district court's remedial arsenal").


116. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); see also *Lander*, 888 F.2d at 159 (Ginsburg, J., concurring).

117. See, e.g., *Bingman v. Natkin & Co.*, 937 F.2d 553 (10th Cir. 1991), where the court stated:

The trial court also considered that defendant was well established in the construction industry, with a large number of employees, and was then involved in projects requiring the need for employees in the pipe shop. The evidence during trial also established that defendant had been flexible in employee relations in the past, retaining employees when work was slow by reducing their hours or shifting their jobs about, and that the union contracts contained no provisions which would inhibit defendant from returning plaintiff to his former job.

118. Alvarez & Lipsky, supra note 76, at 212 n.42.


while complying with a reinstatement order. The bumping would undoubtedly generate ill-will against the reinstated individual.\textsuperscript{121}

Third, regardless of whether the individual's reinstatement results in the bumping of another worker, the individual who accepts reinstatement is likely to encounter, or at least perceive, some employer or coworker retaliation upon his return. An employer may "attempt[ ] to paint a rosy picture of the warm relationship between its employees and plaintiff and the open arms with which it awaits plaintiff's return,"\textsuperscript{122} simply because reinstatement might be less costly than front pay.\textsuperscript{123}

Although some employers may genuinely believe that reinstatement is feasible, "[n]ot every employer in these circumstances undergoes a moral reawakening."\textsuperscript{124} An employer may make a calculated financial decision to argue for the cheaper remedy of reinstatement, just as it often makes a calculated financial decision to toll the individual's back pay with an unconditional offer of reinstatement prior to trial.\textsuperscript{125} And, as in the postjudgment reinstatement cases, courts assessing the propriety of a pretrial unconditional offer of reinstatement necessarily must consider the possibility of workplace hostility.\textsuperscript{126} Indeed, one commentator describes the pretrial unconditional offer of reinstatement as "nothing more than rubbing salt into [the individual's] wounds",\textsuperscript{127} certainly, the same sentiment could apply to reinstatement after the individual prevails at trial. In fact, postjudgment reinstatement may actually be more problematic because of the pas-

\textsuperscript{121} Miano v. AC&R Advertising, Inc., 875 F. Supp. 204, 227 (S.D.N.Y. 1995) (if plaintiffs were to be reinstated, the men who had replaced them in those positions would have to be "bumped"... Contrary to defendant's assertions, these are not merely the subjective fears of plaintiffs, ... they are what a reasonable person in plaintiffs' respective positions would conclude.").


\textsuperscript{123} Keenan v. City of Philadelphia, 55 Fair Empl. Prac. Cas. (BNA) 932, 942 (E.D. Pa. 1991), aff'd in part and vacated in part, 983 F.2d 459 (3d Cir. 1992) ("The City's professed desire begrudgingly to restore the status quo ante, thereby abridging its considerable monetary damages, comes too late and rings hollow."). Individuals might have ulterior motives as well, though probably less likely. See, e.g., McKnight I, 908 F.2d 104, 116 (7th Cir. 1990) (Plaintiff apparently left a "high-paying job" and sought reinstatement "in order to induce [the employer] to buy him out.")., cert. denied, 499 U.S. 919 (1991).

\textsuperscript{124} Lewis v. Federal Prison Indus., 953 F.2d 1277, 1280 n.1 (11th Cir. 1992).

\textsuperscript{125} Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982). Ford Motor Co. was a Title VII case and involved back pay, but its ruling has been applied to ADEA cases and to cases involving front pay. Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2d Cir. 1987); Holmes v. Marriott Corp., 831 F. Supp. 691, 709 (S.D. Iowa 1993).

\textsuperscript{126} Smith v. World Ins. Co., 38 F.3d 1456, 1464 (8th Cir. 1994) (plaintiff reasonably refused employer's unconditional offer of reinstatement because "there was nothing in the offer to prevent [the employer] from 'turning the screws or doing whatever' to him if he returned"); Naylor v. Georgia-Pacific Corp., 875 F. Supp. 564, 582 (N.D. Iowa 1995) (one factor in assessing the employer's unconditional offer of reinstatement is plaintiff's "reasonable concern of continued harassment").

\textsuperscript{127} Anne C. Levy, Righting the "Unrightable Wrong": A Renewed Call for Adequate Remedies Under Title VII, 34 St. Louis U. L.J. 567, 589 (1990); see also Ford Motor Co., 458 U.S. at 249 (referring to proposed unconditional reinstatement as a "cheap offer") (Blackmun, J., dissenting).
sage of time, during which the parties become increasingly entrenched in their respective positions.128

The courts and the employers may downplay the difficulty of the individual’s return, stressing instead the psychic or societal benefit of reinstatement.129 They also may erroneously believe that the individual, who worked under stressful circumstances prior to discharge, can survive similar postreinstatement pressure.130 This belief might be warranted when the individual is reinstated to a large employer, with multiple facilities and chains of command,131 but not so with a small, single-site employer.132

Fourth, the individual may have been a marginal performer prior to discharge and would be a similarly weak worker after reinstatement. Even though the individual proved that the employer unlawfully discriminated against him133 and that he is entitled to relief,134 reinstatement might not be the preferred prospective remedy in this

128. Keenan v. City of Philadelphia, 55 Fair Empl. Prac. Cas. (BNA) 932, 942 (E.D. Pa. 1991) (“Had the parties so agreed earlier in the course of this conflict, I think perhaps reinstatement would have worked. But now, I regretfully conclude, the spring has been poisoned.”), aff’d in part and vacated in part, 983 F.2d 459 (3d Cir. 1992).

129. Jackson v. City of Albuquerque, 890 F.2d 225, 235 (10th Cir. 1989) (“While some might wonder why plaintiff would want to return to a hostile working environment, we recognize ... that sometimes money alone cannot make a person whole. Actual or expected ill-feeling cannot justify denial of reinstatement here.”); Miano v. AC&R Advertising, Inc., 875 F. Supp. 204, 225 (S.D.N.Y. 1995) (“Throughout these proceedings, defendant scornfully dismissed plaintiffs’ expressed concern that tension, suspicion and outright antagonism would greet them upon their return to AC&R, as a result not only of the prior and ongoing litigation but pre-existing hostility as well.”).

130. Gallo v. John Powell Chevrolet, Inc., 779 F. Supp. 804, 811, 815 (M.D. Pa. 1991) (“Although [plaintiff’s] return will undoubtedly engender some hostility and resentment, she worked under such pressures before, and was able not only to cope, but to perform her job quite well.”), aff’d, 981 F.2d 1246 tbl. (3d Cir. 1992).


132. Hutchinson v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1046 (7th Cir. 1994) (“[F]riction between the parties is a legitimate concern, particularly where the employer is a relatively small operation and the district court is faced with the potentially difficult and expensive task of monitoring the parties’ future employment relationship.”).

133. Typically, the individual proves a case of circumstantial discrimination. He establishes a prima facie case by proving his protected status, his minimal qualifications for the position, the adverse employment action, and the employer’s search to fill the position. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer meets this burden, the individual then must prove that the employer’s reason is a pretext for intentional discrimination. See St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993) (employers are liable under Title VII only “if proven to have taken adverse employment action by reason of [plaintiff’s protected status]”).

The individual might be able to prove a case of direct discrimination where he “demonstrates that [his protected status] was a motivating factor” for the adverse employment action. 42 U.S.C. § 2000e-2(m) (1988 & Supp. V 1993). If the employer proves that it would have taken the same adverse action in the absence of the impermissible motivating factor, the individual cannot be reinstated. Id. § 2000e-5(g)(2)(B). If the employer cannot carry its burden of proof, the individual might be entitled to reinstatement.

134. See EEOC v. G-K-G, Inc., 39 F.3d 740, 747 (7th Cir. 1994) (“Even a worker who does not meet his employer’s legitimate expectations is entitled to a remedy ... if, despite his inadequacies, he would not have been fired had it not been for his [protected status].”).
situation. Reinstatement under such circumstances could create "costs in reduced productivity caused by locking parties into an unsatisfactory employment relation, which is the industrial equivalent of a failed marriage in a regime of no divorce."  

Fifth, in order to effectively monitor the postreinstatement relationship, courts would need to retain continuing jurisdiction over the workplace, an option they cannot and should not exercise with any degree of frequency. A mere injunction against the employer may be insufficient, and courts are justifiably wary of any ongoing intrusions into an employer's business. As the Seventh Circuit recently observed, "[c]ourts do not want to involve themselves in the industrial equivalent of matrimonial squabbling. They do not want to be involved in the continuous supervision of a personal relationship that


136. Wolkinson & Nichol, supra note 9, at 178-79. Even if a court does not expressly state that it is retaining jurisdiction over the case, "power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity, 797 F. Supp. 1174, 1179 (S.D.N.Y. 1992) (quoting United States v. Swift & Co., 286 U.S. 106, 114 (1932)), aff'd, 13 F.3d 33 (2d Cir. 1993), cert. denied, 115 S. Ct. 58 (1994); see also Suggs v. Servicemaster Educ. Food Management, 72 F.3d 1228, 1235 (6th Cir. 1996) ("the district court may retain jurisdiction to enforce the judgment it enters").

137. Compare Goss v. Exxon Office Sys., 747 F.2d 885, 890 (3d Cir. 1984) (affirming trial court, which stated, "[n]or could I possibly draft an injunctive order that would effectively make the existing ill feelings disappear") with Gallo v. John Powell Chevrolet, Inc., 779 F. Supp. 804, 815 (M.D. Pa. 1991) ("The fact that she is returning subject to court order, which will include a proviso against any further harassment of her and a requirement that she be treated in the same manner as the salesmen, will do much to ameliorate these pressures."). aff'd, 981 F.2d 1246 tbl. (3d Cir. 1992).
may last for many years." Continuing jurisdiction can be costly and would add to the workload of the already busy courts.

The problematic nature of reinstatement would lead one to believe that such a forced relationship might be of short duration. Although no empirical data exist on the tenure of individuals reinstated under Title VII or the ADEA, some information can be gleaned from empirical studies of agency and court reinstatement orders pursuant to the NLRA.

A 1971-1972 study of NLRA reinstatement orders in the Fort Worth, Texas Region of the NLRB revealed that nearly sixty percent of the 217 individuals offered reinstatement declined the offer, almost exclusively due to fear of employer retaliation. Of those seventy-two who accepted and received reinstatement, only three remained

138. McKnight I, 908 F.2d 104, 115 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1991); see also Price v. Marshall Erdman & Assoc., 966 F.2d 320, 325-26 (7th Cir. 1992) ("If [plaintiff] is reinstated, every time he has a squabble with Halverson, he will be tempted to run to the district court for further equitable relief ancillary to the reinstatement order or even for a finding of contempt of the order."); Keenan v. City of Philadelphia, 55 Fair Empl. Prac. Cas. (BNA) 932, 942 (E.D. Pa. 1991) ("[R]einstatement may be impracticable in some cases, because of the difficulty of monitoring an ongoing relationship."); aff'd in part and vacated in part, 983 F.2d 459 (3d Cir. 1992); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 927 (S.D.N.Y. 1976) ("To order reinstatement on the facts of this case would merely be to sow the seeds of future litigation, and would unduly burden the defendant."); aff'd, 559 F.2d 1203 tbl. (2d Cir.), cert. denied, 434 U.S. 920 (1977); cf. Note, Making Plaintiffs Whole: The Need for Front Pay Under the ADEA and Other Antidiscrimination Statutes, 49 LAW & CONTEMP. PROBS. 238, 247 (1986) (criticizing the courts' use of continuing jurisdiction to make periodic back pay awards because of the effect of protracted litigation on the parties...). The emotional cost of continuously having to face each other could exceed the economic gain from being able to measure the plaintiff's damages more precisely, particularly if the animosity between the parties is great.

Perhaps because of such concerns, one of the few courts to assert continuing jurisdiction did so only for the individual's probationary period. Locke v. Kansas City Power & Light Co., 660 F.2d 359 (8th Cir. 1981).

139. Avitia, 49 F.3d at 1231 ("The costs include not only the time and money of litigants and judges devoted to administering a continuing remedy as opposed to the one-time remedy of a lump-sum award of damages..."); Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1046 (7th Cir. 1994) (reinstatement would lead to the potentially difficult and expensive task of monitoring the parties' future employment relationship); McKnight I, 908 F.2d at 115 ("It is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment..."); EEOC v. Clayton Residential Home, Inc., 874 F. Supp. 212, 216 (N.D. Ill. 1995) ("A permanent injunction may require the continuing supervision of the court, which is costly.")

140. Avitia, 49 F.3d at 1231 ("Moreover, widespread use of continuing jurisdiction would increase the workload of the already overburdened courts."); FEDERAL COURT MANAGEMENT STATISTICS 167 (in 1994, 236,391 civil cases and 30,667 criminal cases were filed in the U.S. district courts and the average size of the federal judges' civil docket reached 364 cases); J. Michael McWilliams, Dwindling Judicial Resources, ABA J., July 1993, at 8 ("Because of inadequate resources, judges are facing unmanageable caseloads.").

141. West, supra note 105, at 28 n.130.

142. Elvis C. Stephens & Warren Chaney, A Study of the Reinstatement Remedy Under the National Labor Relations Act, 25 LAB. L.J. 31 (1974). Two hundred seventeen individuals were offered reinstatement. One hundred twenty-nine of them, or 59%, declined the offer. Id. at 33. Of the 129 individuals refusing reinstatement, 114 listed "fear of company backlash" as their reason. Id. at 34.
with their employers eight years later—a failure rate of 95.8%.\textsuperscript{143} Those who accepted reinstatement and left soon thereafter listed "unfair company treatment" as the most significant reason for their departure.\textsuperscript{144}

A 1970 study of NLRA reinstatement orders in the New England Region of the NLRB reached similar conclusions.\textsuperscript{145} Half of the individuals offered reinstatement declined the offer, again listing fear of retaliation as a major reason.\textsuperscript{146}

The limited efficacy of the reinstatement remedy under the NLRA has been well documented.\textsuperscript{147} Given that the NLRA typically offers more protection to a reinstated individual than do Title VII and the ADEA, a strict preference for reinstatement under those antidiscrimination statutes is particularly unfounded.

In enacting the NLRA, Congress sought to assist employees in unionizing the work force and in bargaining on equal terms with their employer.\textsuperscript{148} It viewed reinstatement as benefitting not only the discharged individual but also his coworkers in the unionizing effort.\textsuperscript{149} Congress anticipated that the union, perhaps already elected, or at least still organizing at the work site, could protect the individual upon reinstatement. The employer would know that if it were to retaliate against the reinstated individual, the union would file an unfair labor practice charge against it.\textsuperscript{150} If the union and the employer were parties to a collective bargaining agreement, the union could file a grievance and pursue it to arbitration.\textsuperscript{151} The employer would focus its displeasure on the union, not on the individual. Consequently, the employer would be less likely to engage in any retaliatory conduct.

In contrast, the individual reinstated pursuant to Title VII or the ADEA has no such group support. The individual's only recourse is

\begin{itemize}
\item \textsuperscript{144} Stephens & Chaney, supra note 142, at 35.
\item \textsuperscript{145} Les Aspin, \textit{Legal Remedies Under the NLRA: Remedies Under 8(a)(3)}, 23 INDUS. REL. RES. ASS'N PROC. 264 (1970).
\item \textsuperscript{146} Of 194 individuals who were illegally discharged, 171 were offered reinstatement. Eighty-six of them, or 50.2\%, refused reinstatement. Of those refusing reinstatement, 45\% listed fear of retaliation as a main reason. \textit{Id.} at 264-67.
\item \textsuperscript{147} Summers, supra note 90, at 477-78 ("The other and more pervasive reason for refusing reinstatement is fear of employer retaliation. The employee's perception is that returning to the old job will not work out and the employer will find or manufacture some nondiscriminatory reason for dismissal or will make life on the job intolerable.").
\item \textsuperscript{148} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 182-83 (1941); see also West, supra note 105, at 25-26 ("Congress regarded reinstatement as a remedy for a group of employees and their union, protecting employees who sought to organize the group and demand the right to bargain collectively with the employer.").
\item \textsuperscript{149} Phelps Dodge, 313 U.S. at 193.
\item \textsuperscript{150} The union could file an unfair labor charge with the NLRB pursuant to § 8(a)(3) of the NLRA. See supra note 22.
\item \textsuperscript{151} According to a 1992 survey, 99\% of collective bargaining agreements have grievance and arbitration provisions. \textit{Cooper & Nolan}, supra note 115, at 15 n.1 (citing \textit{BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS} 37 (13th ed. 1992)).
\end{itemize}
to ask the trial court to use its inherent powers for continuing jurisdiction\textsuperscript{152} or to file another action, alleging retaliation for exercising his statutory rights.\textsuperscript{153} Having already filed a suit for discriminatory discharge and waited years for a resolution that leads him to perceive retaliation, the individual may be reluctant to pursue further litigation;\textsuperscript{154} he may simply look for a new job. This is hardly the make-whole remedy envisioned by Congress.

One commentator has even suggested that "[r]einstatement should remain largely confined to its original unionized context where it is more effective in protecting employees who are members of a collectively represented group."\textsuperscript{155} Because Title VII and the ADEA specifically list reinstatement as a possible prospective remedy, courts cannot disregard it entirely. They should exercise more discretion, however, to award front pay in lieu of reinstatement when there is evidence of workplace hostility.

IV. The Merits of Front Pay in Lieu of Reinstatement

In light of the difficulties inherent in reinstatement, front pay should be considered an equally workable prospective remedy for discriminatorily discharged individuals. Courts should no longer have to assume that "[w]hile an employer-employee relationship may not be fully restored to its pre-violation condition by reinstatement, the chances of a proper restoration are greater than by guessing, with an award of front pay, whether and for how long a plaintiff will work in the future."\textsuperscript{156} Front pay need not be inordinately speculative;\textsuperscript{157} rather, it is "intelligent guesswork,"\textsuperscript{158} taking into account the individual's and the employer's particular circumstances. It can fully com-

\textsuperscript{152} See supra notes 136-40 and accompanying text.

\textsuperscript{153} Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) (1988), prohibits employers from retaliating against an individual who "has opposed any practice made an unlawful practice by [the statute], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the statute]." The ADEA, 29 U.S.C. § 623(d) (1994), contains similar language.

\textsuperscript{154} Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989) ("[H]aving once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining of the first retaliation.").

\textsuperscript{155} West, supra note 105, at 65.


\textsuperscript{157} Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995) (reversing district court's denial of front pay under 42 U.S.C. § 1981, analogous to Title VII's proscription on racial discrimination, and stating that "a district court should not refuse to award front pay merely because some speculation about future earnings is necessary, or because parties have introduced conflicting evidence"), cert. granted in part, 116 S. Ct. 805 (1996), and cert. dismissed, 64 U.S.L.W. 3593 (U.S. Mar. 5, 1996).

\textsuperscript{158} Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991) ("The courts must employ intelligent guesswork to arrive at the best answer."); Sellers v. Delgado College, 781 F.2d 503, 505 (5th Cir. 1986) (front pay "can only be calculated through intelligent guesswork").
pensate the individual and can deter the employer from further violations of the antidiscrimination statutes.

The trial court, sitting in equity, initially decides between the prospective remedies of reinstatement and front pay in each case.\(^{159}\) If the court opts for front pay, however, there is a split among the circuits as to whether the court or the jury should determine the actual amount of the front pay award.\(^{160}\)

Juries are fully capable of determining the appropriate amount of front pay, for they routinely make similar calculations of future economic losses in personal injury litigation.\(^ {161}\) There may be some difference between a personal injury case, "where the earning capacity of a plaintiff is destroyed or damaged,"\(^{162}\) and a discriminatory discharge case, "where employment is terminated without destroying the capacity to work,"\(^ {163}\) but not enough to exclude juries from making front pay calculations. In fact, the argument can even be made that juries, composed predominantly of employees, are more attuned to the relevant front pay factors than are trial courts.\(^ {164}\) Juries have long computed back pay awards under the ADEA,\(^ {165}\) and, with the 1991 amendments to Title VII, they now calculate compensatory and punitive damages as well.\(^ {166}\)

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160. See Felton, supra note 62, at 985 n.4 (providing a circuit-by-circuit list of cases).

161. Barbour, 48 F.3d at 1280 ("Indeed, in other contexts, such as when valuing lost earning capacity in a personal injury case, courts (or juries) routinely engage in some speculation, based on the factual record the parties have established."); McKnight II, 973 F.2d 1366, 1370 (7th Cir. 1992) ("Damages for impaired future earning capacity are generally awarded in tort suits when a plaintiff's physical injuries diminish his earning power."); cert. denied, 507 U.S. 915 (1993); Price v. Marshall Erdman & Assocs., Inc., 966 F.2d 320, 326 (7th Cir. 1992) ("He was right that the front pay award was 'speculative,' but that is true whenever lost future earnings have to be estimated, as they are routinely in personal-injury cases."); Maxfield, 766 F.2d at 796 ("[A]n award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases."); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983) ("Courts and juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases.").

162. Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir.) ("Future wages are often determined with reasonable certainty and awarded as legal damages in circumstances where the earning capacity of a plaintiff is destroyed or damaged. In circumstances, however, where employment is terminated without destroying the capacity to work, the nature and extent of injury is nearly indeterminable."). cert. denied, 502 U.S. 963 (1991).

163. Id.

164. Jonathan Wallas, Race Discrimination: Who Should Decide?, TRIAL, July 1987, at 44, 47 ("Jurors are often employees and can, perhaps better than most judges, measure the damages to other employees from unlawful actions. . . . Jurors may also understand better than [federal] judges appointed for life the anguish caused by loss of a job.").


166. Title VII did not provide for jury trials until Congress amended the statute in 1991; jury trials are now allowed only in intentional discrimination actions where the individual seeks compensatory or punitive damages. 42 U.S.C. § 1981A (Supp. V 1993).
Courts can adequately instruct juries in the proper calculation of
front pay awards. By using special verdict forms or special interroga-
tories, courts can likely ensure that the juries have followed the
instructions.

Nonetheless, if there is any concern that juries will engage in too
much speculation, or will favor the individual over the employer, trial
courts can set the amount of front pay, subject to review for abuse of
discretion. An enhanced role for the remedy of front pay, whether
calculated by juries or by courts, is more desirable than staunch adher-
ence to the reinstatement preference.

The calculation of front pay awards “must be guided by consider-
ation of certain factors.” There must be sufficient evidence in the
record, although the evidence may properly be viewed in the light
most favorable to the individual because of her reduced access to in-
formation. Moreover, the quantum of evidence required should be
commensurate with the amount of front pay in dispute. As the Sev-
enth Circuit reasoned, in a case where the individual requested a mere
$18,000 in front pay, “[i]t is inevitable and proper that on average the
threshold for proving damages will be lower in the small case than in
the large. Otherwise the damages recovered in the small case would
often be eaten up by the costs of proof, making the net recovery negli-

167. Jackson v. City of Cookeville, 31 F.3d 1354, 1356-57 (6th Cir. 1994) (district court in-
structed jury on definition and calculation of front pay); Roush v. KFC Nat'l Management Co.,
10 F.3d 392, 399 (6th Cir. 1993) (“[T]he jury must be instructed on what factors to consider in
determining the amount of front pay, assuming that the court finds such an award is in order.”),
cert. denied, 115 S. Ct. 56 (1994).

168. Roush, 10 F.3d at 397 n.6 (“Had the court intended to submit the issue of front pay to
the jury, it would have been preferable to do so by special interrogatory . . . .”); Doyme v. Union
Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992) (jury answered “interrogatory finding that Doyme
was entitled to front pay”); see also Fed. R. Civ. P. 49 (allowing special verdicts and interroga-
tories).

169. See, e.g., Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 286 (8th
Cir. 1993) (“The calculation of front pay, which is necessarily uncertain, is a matter of equitable
relief within the district court's sound discretion.”) (quoting MacDissi v. Valmont Indus., Inc.,
856 F.2d 1054, 1060 (8th Cir. 1988)).

170. Roush, 10 F.3d at 399.

171. McKnight II, 973 F.2d 1366, 1372 (7th Cir. 1992) (“[W]hen a party fails to provide the
district court with the essential data necessary to calculate a reasonably certain front pay award,
the court may deny the front pay request.”), cert. denied, 507 U.S. 915 (1993); Renve v. Wayne
Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991) (district court erred in not awarding front
pay because there was “substantial evidentiary support” for calculating the award); Conway v.
Hercules, Inc., 831 F. Supp. 354, 357-58 (D. Del. 1993) (“Clearly, plaintiff has the burden of
proving his case by a preponderance of the evidence, including his damages.”).

172. Partington v. Broxhill Furniture Indus., 999 F.2d 269, 273 (7th Cir. 1993) (affirming
district court's awards of front pay and back pay in part because the employer, in response to
plaintiff's requests, "put in no evidence at all, even though it had better access to the details of
its own profit-sharing and bonus arrangements" than did plaintiff); Conway, 831 F. Supp. at 358
(“The risks associated with any remaining speculation in awarding front pay are upon the em-
ployer, because those risks 'must be borne by the wrongdoer, not the victim.'”) (quoting Barcek v.
Urban Redevelopment Auth., 882 F.2d 739, 746 (3d Cir. 1989)).
gible.” Furthermore, to the extent that calculations could be reasonably made in several ways, the primary focus must be on making the discriminatorily discharged individual whole.

First, the court or the jury must establish a cutoff date for the front pay award, which begins to run at the date of judgment. This necessitates a determination of how much longer the individual would have worked for the employer had she not been discriminatorily discharged. Several cutoff dates are possible, depending upon the individual’s circumstances.

The front pay cutoff date might be the rest of the individual’s work life, ending with her actual or expected retirement date. Such a scenario is especially likely for an older individual who is nearing retirement by the date of judgment, for she would not benefit much from reinstatement. Additionally, because it is quite likely that this individual would have spent the rest of her working life with the employer, the front pay calculations can be made with relative

173. Partington, 999 F.2d at 273; cf. McKnight II, 973 F.2d at 1372 (“The longer a proposed front pay period, the more speculative the damages become.”).
174. Lussier v. Runyon, 50 F.3d 1103, 1112 n.10 (1st Cir.) (“We add that, as between the two primary statutory purposes, the goal of compensation and not deterrence is likely the more important in regard to front pay.”), cert. denied, 116 S. Ct. 69 (1995).
175. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 955 (1st Cir. 1995) (“‘front pay’ usually refers to an award for future salary payments starting on the date of judgment”); Carter v. Sedgwick County, 36 F.3d 952, 957 (10th Cir. 1994) (district court must “set an ending date for front pay”).
176. McKnight II, 973 F.2d at 1372 (plaintiff must show “the length of time [he] expects to work for the defendant”); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1188 (2d Cir.) (plaintiff’s expert economist testified how long plaintiff would have continued working for employer), cert. denied, 506 U.S. 826 (1992); Wilson v. S & L Acquisition Co., 940 F.2d 1429, 1433 n.9 (11th Cir. 1991) (calculation of front pay must “take into consideration the stability of [plaintiff’s] salary if she had stayed with S & L until her retirement”).
178. Jackson v. City of Cookeville, 31 F.3d 1354, 1360 (6th Cir. 1994) (jury reached front pay award “by multiplying [plaintiff’s] 1992 salary by eleven, which is the expected number of years that Jackson would work”); Price v. Marshall Erdman & Assocs., 966 F.2d 320, 326 (7th Cir. 1992) (“The jury’s award of $750,000 could be interpreted as a determination that Price would have retired before he reached 65.”); Fortino v. Quasar Co., 751 F. Supp. 1306, 1319 (N.D. Ill. 1990) (“[T]he evidence at trial demonstrated that these plaintiffs were virtually model, career employees. It does not take any leap of faith to conclude that but for the defendant’s discrimination, these men would have enjoyed continued employment until retirement.”), rev’d on other grounds, 950 F.2d 389 (7th Cir. 1991).
179. Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 871 (5th Cir. 1991) (district court should consider the nature of the work and the age and physical condition of the employee); Eivins v. Adventist Health Sys., 660 F. Supp. 1255, 1264 (D. Kan. 1987) (“The plaintiff is 57 years old and nearing the usual age of retirement. Because the time period for which front pay is being awarded is relatively short, reinstatement may be inappropriate.”).
uncertainty.\textsuperscript{180} For younger individuals, the cutoff date probably would be sooner, given the nationwide decline in job stability.\textsuperscript{181}

The front pay cutoff date might also be determined by the employer having reduced its work force or having gone out of business prior to the date of judgment, in which case the individual would have lost her job for nondiscriminatory reasons.\textsuperscript{182} The cutoff date might also be shortened or even eliminated by the individual’s spotty work history with that employer or with prior employers.\textsuperscript{183}

Second, after a cutoff date has been established, the court or the jury must calculate the individual’s projected income stream with the employer over the front pay period. The court or jury must take into account any salary increases the individual would have received from the employer.\textsuperscript{184}

\begin{flushright}180. Lewis v. Federal Prison Indus., 953 F.2d 1277, 1281 (11th Cir. 1992) (plaintiff “was only four years away from the date of his mandatory retirement,” so court could assume plaintiff “would have remained at [the employer] until the time of that retirement”); Duke v. Uniroyal, Inc., 928 F.2d 1413, 1423 (4th Cir.) (“Also, when the period for reinstatement was expected to be a relatively short one, such as if the plaintiff was close to retirement, the strong preference in favor of reinstatement has been found to be neutralized by the increased certainty of the potential loss of pay, permitting consideration of a front pay award.”), cert. denied, 502 U.S. 963 (1991); Blum v. Witco Chem. Corp., 829 F.2d 367, 375 (3d Cir. 1987) (court assumed “that plaintiff would have remained with the employer until normal retirement age [since plaintiffs were all within eight years of . . . retirement”); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986) (“Front pay may be indicated especially when the plaintiff has no reasonable prospect of obtaining comparable employment or when the time period for which front pay is to be awarded is relatively short.”), cert. denied, 481 U.S. 1041 (1987).
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\begin{flushright}182. Gusman v. Unisys Corp., 986 F.2d 1146, 1147 (7th Cir. 1993) (awarding one and one-half years front pay because plaintiff’s “skills and seniority would have given him that much breathing space” considering reductions in force); Reneau, 945 F.2d at 871 (district court “should consider the permanency of the position held” and “possible consolidation of jobs”); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1208 (7th Cir. 1989) (“In making a front pay determination, the district court must make numerous predictions determining . . . the employer’s financial stability, the prospect that the plaintiff’s position may be eliminated and general economic conditions, such as the inflation and unemployment rates.”).
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\begin{flushright}183. Reneau, 945 F.2d at 871 (district court “should consider the length of prior employment”); Tennes v. Massachusetts Dep’t of Revenue, 944 F.2d 372, 381 (7th Cir. 1991) (finding front pay “too speculative” because plaintiff “did have a weak employment history in general and with the employer in particular”); Hybert v. Hearst Corp., 900 F.2d 1050, 1056-57 (7th Cir. 1990) (in calculating front pay, district court should consider “the evidence regarding complaints from advertisers, tension with management, and other performance-related problems”); EEOC v. Delight Wholesale Co., 765 F. Supp. 583, 591 (W.D. Mo. 1991) (denying front pay due to plaintiff’s “unstable employment history, and the likelihood that she would have remained a long-term employee . . . had the discrimination not taken place”), aff’d, 973 F.2d 664 (8th Cir. 1992).
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\begin{flushright}184. Jackson v. City of Cookeville, 31 F.3d 1354, 1360-61 (6th Cir. 1994) (“[I]t can reasonably be expected that the plaintiff’s future earnings would have increased at approximately the pace of interest rates or of inflation especially since the jury was shown that he was approved for a raise between 1991 and 1992.”); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1188 (2d Cir.) (including annual salary increases of 8.3%), cert. denied, 506 U.S. 826 (1992); Graefenhain, 870 F.2d at 1208 (“In making a front pay determination, the district court must make numerous
It also has been suggested that the front pay calculation should factor in the risk or volatility of the individual's occupation, such as in the field of sales.\textsuperscript{185} However, given the make-whole nature of front pay, the better approach is to weigh any risks according to the individual's personal work history rather than according to the nature of her occupation. For example, individuals who had successfully served an employer as disc jockeys for over a decade were entitled to front pay "even if it is true, as a general rule, that 'job security for disc jockeys is quite tenuous.'"\textsuperscript{186}

Third, the court or the jury must subtract from the individual's income stream all amounts that she earned or should have earned in mitigating her damages.\textsuperscript{187} Front pay should not allow an individual to "sit idly by and be compensated for doing nothing."\textsuperscript{188} The individual must make diligent and reasonable efforts\textsuperscript{189} to secure alternate employment,\textsuperscript{190} and there must be a reasonable likelihood of her find-

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\textsuperscript{185} Price v. Marshall Erdman & Assoc., 966 F.2d 320, 327 (7th Cir. 1992) ("A computation of damages that ignores the difference in risk between earnings in a volatile occupation and a judicial award of a lump sum equal to the present value of those earnings is unsound."); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 890 (3d Cir. 1984) (affirming award of only four months front pay because of risks and volatility in sales positions).

\textsuperscript{186} EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1463 (7th Cir. 1992).

\textsuperscript{187} Title VII provides, "Interim earnings or amounts earnable with reasonable diligence . . . shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g) (1988 & Supp. V 1993). This language has been applied to assessing front pay awards as well. The ADEA does not have such express language, but courts have required mitigation similar to Title VII. See, e.g., Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1005 (3d Cir. 1988).

Numerous cases require mitigation of front pay. See, e.g., Tyler, 958 F.2d at 1189 (front pay calculations must consider "possible future earnings from other employment" and allow "for the possibility that Tyler would become employed again"); Renneau, 945 F.2d at 870 ("Front pay may be denied or reduced when the employee fails to mitigate damages by seeking other employment."); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1470 (5th Cir.) ("[A] plaintiff's failure to mitigate his damages will usually reduce or perhaps eliminate his entitlement to front pay."), cert. denied, 493 U.S. 842 (1989); McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986) ("Of course the duty to mitigate damages may limit the amount of front pay available."), cert. denied, 481 U.S. 1041 (1987).


\textsuperscript{189} Acrey v. American Sheep Indus. Ass'n, 981 F.2d 1569, 1576 (10th Cir. 1992) (plaintiff must "exercise due diligence in mitigating any losses"); Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989) (employer must prove that "plaintiff failed to exercise reasonable diligence to mitigate his damages"); Cassino, 817 F.2d at 1347 (reduce front pay awards "by the amount plaintiff could earn using reasonable mitigation efforts").

\textsuperscript{190} One example of reasonable efforts is Doyne v. Union Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992) ("After being terminated by Union Electric, Doyne contacted friends, business contacts, and associates about another job. He began a job search through answering newspaper and periodical ads. He sent out 150-200 job application letters. . . . There was testimony that he made diligent efforts to find work after his termination.").

There is some dispute as to whether the individual must look only for work similar to that which he had with the employer, or whether at some point he must broaden his search. For a discussion of this issue, see Peter Janovsky, Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act, 53 Fordham L. Rev. 579, 611-14 (1984).
ing work. Thus, the employer can significantly reduce, or even eliminate, the availability of front pay by proving that the individual failed to mitigate her damages. The mitigation doctrine further ensures that front pay "is not too speculative."

Fourth, after subtracting all wages that were or should have been earned in mitigation of damages, the court or the jury must discount the remaining amount to present value. The court or jury also may need to discount the amount further by the probability that the individual will not live to the end of the front pay period.

As is evident by the above process, either a court or a jury can calculate front pay with sufficient precision. Front pay awards can have "a rational basis" and can be "adequately grounded in available facts." A front pay award should be reviewed on appeal as a whole, without reargument of every supporting assumption.

Front pay awards are not necessarily exorbitant, nor are they necessarily for long periods of time. Recent cases reveal that front pay

191. Gaddy, 884 F.2d at 318 (employer must prove that "there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence"). Moreover, the fungibility of the individual's skills must be taken into account. See, e.g., Gusman v. Unysis Corp., 986 F.2d 1146, 1147-48 (7th Cir. 1993) (plaintiff's "human capital was not portable; he could repair [the employer's] computers, not IBM's or Apple's," but he "could learn to work on other devices more quickly than a novice").

192. Jackson v. City of Cookeville, 31 F.3d 1354, 1359 (6th Cir. 1994) ("[T]hough a plaintiff has a duty to mitigate damages, a wrongdoer carries the burden of establishing that damages were lessened or might have been lessened by the plaintiff."); Acrey, 981 F.2d at 1576 ("The employer, however, carries the burden of showing plaintiff failed to exercise due diligence in mitigating any losses."); Gaddy, 884 F.2d at 318 (employer bears "burden of going forward to show that the plaintiff failed to mitigate her damages" and "[t]o demonstrate the affirmative of a plaintiff's failure to mitigate damages").


195. Roush, 10 F.3d at 399 (front pay factors include "employee's work and life expectancy") (quoting Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983)); Price, 966 F.2d at 326-27 ("A minor point is that the expert failed to discount (multiply) each year's projected earnings loss by the probability that Price would have lived long enough to obtain those earnings. The probability was not a hundred percent, and the estimate of lost earnings should have been scaled down accordingly.").


197. Id. at 1208 ("Once the court has aggregated its evaluation of these factors into a single front pay award, a party may not seek to amend the award because the district court's subsidiary findings or predictions turn out to have been mistaken." The court also stated that it "may consider intervening events only if no front pay award has been made, or a front pay award has been vacated for independently sufficient reasons."); see also Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 954 (1st Cir. 1995) (standard of review might be abuse of discretion, or basing the award on clearly erroneous findings of fact).
ROLE OF WORKPLACE HOSTILITY

awards range from a few months to over a decade.\textsuperscript{198} Similarly, the dollar amounts of front pay awards range widely.\textsuperscript{199} Nonetheless, the time periods and monetary amounts are certainly sufficient to make the individual whole and to deter the employer from future wrongdoing.\textsuperscript{200}

Front pay has yet another advantage over reinstatement. Because front pay is usually awarded in a lump sum, there is no ongoing judicial administration of the case.\textsuperscript{201}

The only possible disadvantage of front pay, aside from the unproven assumption that reinstatement better serves societal goals, is that it likely requires the parties to use an expert financial witness at trial.\textsuperscript{202} Some individuals, however, have obtained front pay awards

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\textsuperscript{198} Indeed, the aggrieved individual or the EEOC may have put forward a very modest request. \textit{See}, e.g., EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1463-64 (7th Cir. 1992) (request of two years); EEOC v. Delight Wholesale Co., 765 F. Supp. 583, 591 (W.D. Mo. 1991) (request of one year), \textit{aff'd}, 973 F.2d 664 (8th Cir. 1992).

Examples of the typical time periods of front pay awards include: \textit{Jackson}, 31 F.3d at 1361 (11 years); Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 286 (8th Cir. 1993) (10 years); Gusman v. Unysis Corp., 986 F.2d 1146, 1147 (7th Cir. 1993) (one and one-half years); Lewis v. Federal Prison Indus., 953 F.2d 1277, 1281 (11th Cir. 1992) (four years); Doyle v. Union Elec. Co., 953 F.2d 447, 451 (8th Cir. 1992) (five years); Deloaach, 897 F.2d at 822 (five years); Hybert v. Hearst Corp., 900 F.2d 1050, 1056 (7th Cir. 1990) (fewer than five years); \textit{Groenfhein}, 870 F.2d at 1213 (five months); Acrey v. American Sheep Indus. Ass'n, 772 F. Supp. 1173, 1178 (D. Colo. 1991) (four years), \textit{aff'd in part and rev'd in part}, 981 F.2d 1569 (10th Cir. 1992); Fortino v. Quasar Co., 751 F. Supp. 1306, 1313 (N.D. Ill. 1990) (awards ranged from 7.8 years to 11.9 years), \textit{rev'd on other grounds}, 950 F.2d 389 (1991).


\textsuperscript{199} \textit{Jackson}, 31 F.3d at 1361 ($282,392); Ford v. Community Cash Stores, 14 F.3d 594 (4th Cir. 1994) ($17,000); Kientz v. McDonnell Douglas Corp., 990 F.2d 1051, 1054 (8th Cir. 1993) ($75,000); Gusman, 986 F.2d at 1147 ($75,000); \textit{Tyler}, 958 F.2d at 1188 ($667,000); Doyle, 953 F.2d at 451 ($273,993); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1419 (10th Cir. 1991) ($248,160.94); Bruno v. W.B. Saunders Co., 882 F.2d 760, 771-72 (3d Cir. 1989) ($350,000), \textit{cert. denied}, 493 U.S. 1062 (1990); Acrey, 772 F. Supp. at 1178 ($147,000).

\textsuperscript{200} Estate of Janice D. Pitré v. Western Elec. Co., 975 F.2d 700, 704 (10th Cir. 1992) (district court's front pay award "clearly implements both the deterrent and the 'make whole' purposes of Title VII and accordingly is a proper exercise of discretion"), \textit{cert. denied}, 114 S. Ct. 459 (1993); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985) (courts must evaluate front pay "under the standards applied to all Title VII relief: whether the award will aid in ending illegal discrimination and rectifying the harm it causes"); cf. Lussier v. Runyon, 50 F.3d 1103, 1112 (1st Cir.) ("Deterrence is a function of degree, and nothing ... commands that it be maximized at all costs. ... Even short of maximization, the statutory purpose can be fully satisfied so long as deterrence is meaningfully achieved.")), \textit{cert. denied}, 116 S. Ct. 69 (1995).

\textsuperscript{201} \textit{See supra} notes 136-40 and accompanying text; cf. Sowers v. Kemira, Inc., 701 F. Supp. 809, 827 (S.D. Ga. 1988) ("[A] lump sum is preferable to a monthly payment, which would require continual monitoring of plaintiff's interim earnings and efforts to mitigate damages.").

\textsuperscript{202} Price v. Marshall Erdman & Assocs., 966 F.2d 320, 326 (7th Cir. 1992) (reviewing calculations of plaintiff's expert witness); \textit{Tyler}, 958 F.2d at 1189 (affirming front pay award because "the jury's deliberations were well-cabined by the expert testimony of expected income, possible future earnings from other employment, and expected worklife").
without any expert testimony, relying solely on their earnings history. In any event, the parties may already have retained experts to calculate other damages available under Title VII or the ADEA. Additionally, the individual as a prevailing party can recover her expert witness costs under the 1991 amendments to Title VII.

Finally, it must be remembered that front pay is only one part of an extensive group of retrospective and prospective remedies under Title VII and the ADEA. These remedies work together to make the individual whole and to deter the employer from future wrongdoing. Back pay from the individual’s date of discharge until the date of judgment is a presumed retrospective remedy for violations of either statute, and is completely independent of front pay.

The individual also may recover additional damages, serving both a compensatory and deterrent purpose. With the 1991 amendments to Title VII the individual can receive compensatory and punitive damages for intentional discrimination, capped according to the size of the employer. Under the ADEA she can recover liquidated damages in an amount equal to the back pay award if the employer willfully

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203. See, e.g., Conway v. Hercules, Inc., 831 F. Supp. 354, 358 n.6 (D. Del. 1993) ("An expert is not always necessary to prove damages without 'unreasonable speculation.' In Maxfield, for example, the plaintiff based his request for front pay solely on his prior earnings history.").

204. See infra notes 207-10 and accompanying text.


206. Lussier v. Runyon, 50 F.3d 1103, 1112 (1st Cir.) ("viewing a front pay award in isolation for the purpose of measuring its contribution toward the goals of an antidiscrimination statute is risky business. . . . [I]t must be assessed as a part of the entire remedial fabric the trial court has fashioned in a particular case.",) cert. denied, 116 S. Ct. 69 (1995).

207. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1988 & Supp. V 1993), and § 7(b) of the ADEA, 29 U.S.C. § 626(b) (1994), provide for back pay. All courts agree that, barring special circumstances, the victim of employment discrimination is entitled to back pay. See, e.g., Lussier, 50 F.3d at 1110 n.7; Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985); Nord v. United States Steel Corp., 758 F.2d 1462, 1472 (11th Cir. 1985); Prichard v. Ledford, 767 F. Supp. 1425, 1429 (E.D. Tenn. 1990) ("As a remedy for a Title VII violation, Prichard is presumptively entitled to back pay until the date judgment is entered.")., aff'd per curiam, 927 F.2d 605 tbl. (6th Cir. 1991), available in 1991 WL 24711 (text of opinion).

208. EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1464 (7th Cir. 1992) ("Because the purpose of front pay is to compensate successful plaintiffs for 'the post-judgment effects of past discrimination'. . . ., the jury's award for the pre-judgment effects of past discrimination is irrelevant to determining the propriety of awarding front pay."); Estate of Janice D. Pitre v. Western Elec. Co., 843 F.2d 1262, 1279 (10th Cir. 1988) ("Front pay is thus a supplement to back pay, not a substitute for it, particularly where as here the front pay is granted to only a limited number of employees."). But see Weaver v. Casa Gallardo, 922 F.2d 1515 (11th Cir. 1991). In Weaver, the court of appeals stated:

Back pay and front pay are not independent and severable items of damages. They are each part of the remedy the court is charged with fashioning, a remedy that, as a whole, achieves the remedial purposes of the Act. A monetary award of front pay is calculated to terminate on the date a victim of discrimination attains an opportunity to move to his "rightful place." Front pay, therefore, is appropriate only when the other damages awarded will not fully compensate the plaintiff for his injury.

Id. at 1529.

209. See supra note 166.
violated the statute.\textsuperscript{210} Like back pay, these remedies are analytically distinct from front pay. They should affect the front pay calculation only in unusual cases,\textsuperscript{211} for example, where the liquidated damages award or the front pay award is quite large.\textsuperscript{212}

Additionally, the individual is entitled to reasonable attorneys fees and to costs under both Title VII\textsuperscript{213} and the ADEA.\textsuperscript{214} All these remedies work together to serve the interests articulated in \textit{Albemarle}.

The wider availability of front pay awards, in addition to the other remedies discussed above, may have the added benefit of helping aggrieved individuals obtain counsel. Simply put, attorneys have a greater incentive for monetary recovery in a front pay case.\textsuperscript{215} The potential for a front pay award also may assist aggrieved individuals and their counsel in the settlement process.\textsuperscript{216}

Undoubtedly, front pay in lieu of reinstatement can be calculated with sufficient precision to make the individual whole and to deter the employer from future wrongdoing. With an adequate front pay award, the individual has some financial freedom, so that she can obtain further education or continue to search for alternate employment. The employer has the stigma of an adverse judgment, and it also has suffered a tangible, perhaps quite significant, economic loss.

Front pay also can fulfill our societal goals of eradicating discrimination nationwide. Most courts and commentators presume that reinstatement better serves that goal,\textsuperscript{217} but the presumption is correct

\textsuperscript{210} Section 7(b) of the ADEA, 29 U.S.C. \textsection 626(b), provides for liquidated damages and incorporates the FLSA definition of liquidated damages as "an additional equal amount" of back pay, \textit{id}. \textsection 216(b). Front pay is not part of liquidated damages and therefore can never be doubled. Graefenhain \textit{v. Pabst Brewing Co.}, 870 F.2d 1198, 1210 (7th Cir. 1989).

\textsuperscript{211} Price \textit{v. Marshall Erdman & Assoc's.}, 966 F.2d 320, 326 (7th Cir. 1992) ("So while previous cases . . . suggest that the presence or absence of a liquidated damages award is material in determining entitlement to front pay, we think it should play a very small role in that determination.").

\textsuperscript{212} \textit{See}, \textit{e.g.}, \textit{Tennes v. Massachusetts Dept of Revenue}, 745 F. Supp. 1352 (N.D. Ill. 1990), \textit{aff'd}, 944 F.2d 372, 381 (7th Cir. 1991) (no front pay where combined back pay and liquidated damages was nearly $250,000 and "considering the relatively short time [plaintiff] was employed").


\textsuperscript{214} The ADEA incorporates the FLSA's attorneys fees provision. 29 U.S.C. \textsection 216(b).

\textsuperscript{215} Summers, \textit{supra} note 90, at 490. With front pay and liquidated damages, the monetary rewards are often very substantial, so contingent fee arrangements make obtaining a lawyer and litigating the case more likely. Even so, the majority of the cases are brought by professional and managerial employees, suggesting that even liquidated damages and front pay do not provide an adequate remedy for an average worker to find a lawyer to vindicate her rights.

\textit{Id}.


\textsuperscript{217} \textit{See}, \textit{e.g.}, Robert C. Johnson, Comment, \textit{Partnership and Title VII Remedies: Price Waterhouse Cracks the Glass Ceiling}, 1991 Wis. L. Rev. 787, 801 (1991) ("Specific performance awards in high-level jobs may grant individuals pioneer status that will reshape conventional thinking about the value and role of women and minorities in top jobs.").
only if the individual remains and progresses with the employer. Given the bleak NLRA statistics about the tenure of reinstated workers, it appears that a front pay award could be at least as likely to advance our societal goals as would a reinstatement order.

V. TOWARD AN ENHANCED RELIANCE ON WORKPLACE HOSTILITY IN DETERMINING THE APPROPRIATE PROSPECTIVE REMEDY

Because neither the statutory language nor the legislative history of Title VII or the ADEA commands the reinstatement preference, and because front pay can be an equally valid prospective remedy, trial courts should not be cabined by the reinstatement preference. They should use their traditional equitable powers to assess the facts of each case, including the likelihood and degree of workplace hostility if reinstatement is ordered. To do so, they must create a new definition of workplace hostility, for the most widely used formulation is far too restrictive. Only by eliminating the reinstatement preference and by redefining workplace hostility can the courts truly determine which prospective remedy makes the victim whole and deters the employer from further discrimination.

A. A Broader Definition of Workplace Hostility

The courts must broaden their definition of workplace hostility to comport with the realities of employment. The current definitions of hostility all derive from the erroneous premise that reinstatement is the strongly preferred prospective remedy. Courts therefore only award front pay in lieu of reinstatement where there is “extreme” or

218. See supra notes 17-21, 63-72 and accompanying text.
219. See supra notes 196-201, 215-16 and accompanying text.
220. See, e.g., Lewis v. Federal Prison Indus., 953 F.2d 1277, 1281 (11th Cir. 1992) (“Although we have listed several factors that may prompt our resort to [front pay], we emphasize that in many cases the remedy of reinstatement will continue to suffice despite the presence of any one of these factors.”).
221. Because neither prospective remedy would be presumed, the individual should be able to seek one or the other until the time of the jury trial, Roush v. KFC National Management Co., 10 F.3d 392, 398-99 (6th Cir. 1993) (if jury is to decide amount of front pay, court must decide between reinstatement and front pay before submission of case to jury, so jury can be instructed), cert. denied, 115 S. Ct. 56 (1994), or, in the case of a bench trial, until the court takes evidence on that issue, Downes v. Volkswagen of America, Inc., 41 F.3d 1132, 1141 (7th Cir. 1994) (if court determines amount of front pay, if any, it can be done in posttrial motions). See also Williams v. Valenteck Kisco, Inc., 964 F.2d 723, 730 (8th Cir.) (“[W]e have never said that the failure to request reinstatement is an absolute bar to the district court’s consideration of awarding front pay in lieu of reinstatement. The district court is to use its discretion in deciding whether to grant equitable relief.”), cert. denied, 506 U.S. 1014 (1992).
222. In fact, it is somewhat unclear whether the party seeking reinstatement must show the absence of hostility, or whether the party opposing reinstatement must prove the existence of hostility. Note, supra note 138, at 250.
“exceptional” hostility. Indeed, the most widely used definition is "such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." This formulation is internally inconsistent, with the words "extreme" and "impossible" standing in sharp contrast to the word "practical."

Other common formulations of workplace hostility are similarly flawed. One such formulation requires that hostility make reinstatement "futile." Another requires that "there is no reason to believe the parties would enjoy a productive and amiable working relationship." Yet another demands that "there is little or no hope that a working relationship would be possible." One even goes so far as to demand that the hostilities "manifest themselves in the public function of the employer."

With these definitions, it is not surprising that the court in Curtis ordered the plaintiff reinstated, even though the plaintiff feared hostility and even though the manager responsible for his discharge remained at the work site. A similar result was reached in Truskoski v. ESPN, Inc., where the court reinstated the plaintiff despite the court's misgivings about the behavior of both parties. It stated:

It is true that this litigation has generated publicity, some of which has been negatively reflective of defendant and plaintiff has not been exactly close-mouthed nor wanting in exaggeration on the subject. While events since April 1987 will require some modifications of attitudes of ESPN's personnel and of plaintiff, her sense of responsibility is presumed to suffice to insure her performance of her duties consistent with the obligations to her employer.

Several alternative definitions of workplace hostility would better serve the courts, victims of discrimination, and employers alike. For example, the requirement of "extreme" hostility could be lessened to


226. Tennes v. Massachusetts Dep't of Revenue, 944 F.2d 372, 381 (7th Cir. 1991).


229. See supra notes 96-103 and accompanying text.


231. Id. at 1016.
“substantial hostility.”232 One Tenth Circuit case goes even further: “The standard for denying reinstatement is not ‘extreme hostility,’ but the need for a ‘warm relationship.’”233 It focused on “the hostility between the parties and the friction likely to impede a good working relationship.”234 Some trial courts are adopting similar, more flexible definitions.235 These broader definitions more accurately test the fairness of reinstatement,236 consistent with traditional equitable principles.

B. Assessing the Evidence of Hostility

Once the courts have redefined hostility, they must then find sufficient evidence in the record to determine the existence and magnitude of hostility.237 The parties cannot rely on the arguments of counsel,238 nor can they rely on sheer speculation about fears or animosity.239

The courts, sitting in equity, must decide between front pay and reinstatement “only upon the facts presently obtaining and not based upon historical circumstances which may no longer be present.”240

234. Id. at 1564.
236. Sanchez v. Philip Morris, Inc., 774 F. Supp. 626, 630 (W.D. Okla. 1991) (“In such a situation where, because of hostilities which have developed because of the litigation it would be unfair to either the Plaintiff or the Defendant to order employment, courts have frequently awarded front pay in lieu of an award of employment.”), rev’d on liability grounds, 992 F.2d 244 (10th Cir. 1993).
237. Brunemann v. Terra Int’l, 975 F.2d 175, 180 (5th Cir. 1992) (“The district court was in a much better position to determine whether or not reinstatement was feasible based on the testimony and evidence at trial.”); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) (“In this case the record does not indicate why the district court considered reinstatement infeasible . . . . Unless supported by specific instances of discord, we do not find this sufficient.”); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1397 (6th Cir. 1990) (“The [district] court has failed to provide the ‘carefully articulate[d] . . . rationale’ . . . , and the reasons given are unsupported by such meager material evidence as the record contains, despite Appellant’s two requests for an evidentiary hearing on appointment.”), cert. denied, 498 U.S. 1082, and cert. denied, 501 U.S. 1230 (1991); Marshall v. TRW, Inc., 900 F.2d 1517, 1523 (10th Cir. 1990) (“There is nothing in the record to support any finding of hostility.”).
238. Marshall, 900 F.2d at 1523 (“As far as we can tell, there was no testimony bearing on this issue, although there was closing argument to the jury on the matter.”).
239. Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991) (plaintiff “had misgivings about how he would be received if he returned to work, . . . but all of the evidence established that plaintiff had good relations with his supervisors and fellow workers at the pipe shop and had in fact returned for visits after he was terminated.”).
240. Farber, 917 F.2d at 1396.
Essentially, the courts must predict the future based on the present. They should hold an "evidentiary hearing as to the present circumstances of the parties . . . where the passage of time since trial has been substantial."242

In assessing the significance of the evidence regarding hostility, the courts must examine several factors, including who is hostile to whom and why; the hostility arising from the litigation itself; and a variety of traditional factors long recognized in the case law.

1. **Who Is Hostile to Whom and Why**

   The types and degrees of hostility undoubtedly will vary widely from case to case. The trial courts should have ample discretion to assess the particular facts of each case. Nonetheless, this article examines some of the more common situations in which the courts must consider the significance of the hostility.

   The clearest situation in which hostility compels a court to award front pay in lieu of reinstatement is where the disharmony is mutual, such that each party manifests dislike or distrust of the other.243 The employer’s dislike might be manifested by management, rank-and-file employees, or both.244

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242. *Farber*, 917 F.2d at 1396.

243. Grantham v. Trickey, 21 F.3d 289, 296 (8th Cir. 1994) ("extreme animosity between plaintiffs and defendant employers," where plaintiff wrote “it is clear to me that I will not be able to work” with the supervisor whom he blamed for his discharge); Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 899 (3d Cir. 1993) ("animosity between the parties," given "SEPTA’s complaints about Robinson and Robinson’s own testimony referring to SEPTA as South African dogs"); Price v. Marshall Erdman & Assoc., 966 F.2d 320, 322 (7th Cir. 1992) ("mutual dislike and defendants' continued opinion that plaintiff is incompetent"); Tennes v. Massachusetts Dep't of Revenue, 944 F.2d 372, 381 (7th Cir. 1991) ("where the relationship between the parties is hostile"); Hybart v. Hearst Corp., 900 F.2d 1050, 1055 (7th Cir. 1990) ("the substantial hostility between Hybart and Hearst management"); Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) ("where there is discord and antagonism between the parties"); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1208 (7th Cir. 1989) ("due for example to hostility between employer and employee"); EEOC v. General Lines, Inc., 865 F.2d 1555, 1563 (10th Cir. 1989) ("hostility between the parties will preclude a productive working relationship"); McNeil v. Economics Labs., Inc., 800 F.2d 111, 118 (7th Cir. 1986) ("the employer-employee relationship may be pervaded by hostility"), cert. denied, 481 U.S. 1041 (1987); Goldstein v. Manhattan Indus., 758 F.2d 1435, 1449 (11th Cir. 1985) ("discord and antagonism between the parties"); Doyle v. Union Elec. Co., 755 F. Supp. 866, 870 (E.D. Mo. 1991) ("Plaintiff and defendant are uniquely in agreement that plaintiff’s reinstatement as a Union Electric employee is not appropriate. Defendant contested at trial that plaintiff was an unsuitable employee."); Keenan, 55 Fair Empl. Prac. Cas. at 942 ("the likelihood of continuing disharmony between the parties").

244. See, e.g., Ford v. Community Cash Stores, 14 F.3d 594 tbl. (4th Cir. 1994) (front pay rather than reinstatement in part because of "the likelihood of animosity between Ford and some fellow-employees who testified against her."); available in 1994 WL 14843; Lewis v. Federal Prison Indus., 953 F.2d 1277, 1280-81 (11th Cir. 1992) (plaintiff had "antagonistic relation-
As the Seventh Circuit noted in *Price v. Marshall Erdman & Associates*, however, courts often engage in sloppy reasoning such that one cannot clearly discern who is hostile towards whom. The *Price* court criticized the trial court for implying “that it makes no difference whether the employee dislikes the idea of working [for] the employer, or the employer dislikes the idea of having the employee work for him.” It is imperative that trial courts make specific findings as to which party evinces the hostility.

A somewhat more difficult situation is where neither party professes to harbor hostility toward the other—the classic case where reinstatement should be ordered—but the individual nonetheless fears hostility and retaliation upon return. Sometimes the courts credit the individual’s inchoate fears, especially if there is medical or psychological evidence to show that the individual is emotionally incapable of returning to the work site and such incapacity was caused by the employer’s conduct. Other times, however, the courts reject the individual’s fears, even if the individual presents medical testimony. Without the reinstatement preference, perhaps courts would take more account of the basis of the individual’s fears.

Yet a more complicated situation is where the employer is openly hostile to the individual. Of course, a court’s “discrimination remedy cannot turn on the employer’s preferences,” but the court must engage in “a more discriminating analysis” of precisely why the employer is hostile.

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245. 966 F.2d 320 (7th Cir. 1992).
246. *Id.* at 325.
247. *Id.* at 325.
248. *See, e.g.*, *Lewis*, 953 F.2d at 1280 (doctor “testified that Lewis’ depression would recur if he returned to FCI, even if no additional discrimination occurred there”); *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir. 1989) (“plaintiff here submitted an affidavit from a psychologist . . . stating that reinstatement was not appropriate at that time and would be detrimental to plaintiff’s health. . . . [W]e conclude that the district court did not abuse its discretion in denying plaintiff’s request for reinstatement.”); *Ortiz v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 852 F.2d 383, 386 (9th Cir. 1988) (“there is evidence that [plaintiff] could not work at all or, as one said, should never work at any branch of the [employer] again”).
249. *Martin v. City of Youngstown*, 961 F.2d 1578 tbl. (6th Cir. 1992) (per curiam) (plaintiff “claims that reinstatement is inappropriate in this case based on her doctor’s assessment that [she] should not return to work at the plant. . . . The district court explicitly found contrary to the doctor’s testimony in holding that reinstatement was appropriate.”), *available in 1992 WL 91977, cert. denied, 506 U.S. 1034 (1992).*
One reason for the employer's hostility might be that the employer still evidences discriminatory behavior or opinions. At first blush this seems to be the strongest case for a court to order reinstatement and retain continuing jurisdiction, for "[t]o decline to order reinstatement in such a case would reward the employer for the very attitudes that precipitated his violation of the law, by giving him a choice of remedies." However, reinstatement is equally likely to be a pyrrhic victory if the individual languishes in a "dead-end job," and the trial court cannot effectively monitor the employment relationship. Under those circumstances the court should use its discretion to decide whether a front pay award might in fact have a greater make-whole and deterrent effect than would a reinstatement order.

Another basis for the employer's hostility toward the individual is the employer's nondiscriminatory and sincerely held belief that the individual is somehow unqualified, or too minimally qualified, to reclaim his position years later. Where a jury specifically finds that the individual was performing adequately at the time of the discharge, the court is bound by that finding in determining the prospective remedy. But in bench trials, and even in some jury trials, it is possible for a court or jury to find discrimination without believing that the individual remains completely qualified for his position.

252. See, e.g., Spulak v. K Mart Corp., 894 F.2d 1150, 1157-58 (10th Cir. 1990) ("Spulak's fear of retaliation is likewise supported by K Mart's past treatment of him wherein the District Manager told him that if he withdrew his resignation and remained with K Mart, the District Manager would find some other way to fire him.").

253. Alvarez & Lipsky, supra note 76, at 223 n.86 ("Reinstatement should only be withheld where an employer can show that the deterioration in the relationship is unrelated to the employer's discrimination, or that other unusual circumstances are present such that denying relief will not undermine the purposes of the statute.").

254. Price, 966 F.2d at 325; see also Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991) ("[I]f reinstatement were denied, then the defendants would have accomplished their purpose."); McKnight I, 908 F.2d 104, 116 (7th Cir. 1990) ("Mere hostility by the employer or its supervisory employees is of course no ground for denying reinstatement. That would arm the employer to defeat the court's remedial order.") (citations omitted), cert. denied, 499 U.S. 919 (1991); Jackson v. City of Albuquerque, 890 F.2d 225, 235 (10th Cir. 1989) ("Our review of the evidence reveals that certain parties, including the named defendants within the city administration, were determined to run plaintiff Carl Jackson off the job. If he is denied reinstatement, they will have accomplished their purpose.").

255. Price, 966 F.2d at 325 ("A finding that the defendants did not really believe Price incompetent seems implicit in the jury's verdict in his favor, . . . If this finding can fairly be deemed entailed by the verdict, it would be binding on the district judge when he came to decide whether to order Price reinstated."); see also Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 355 (7th Cir. 1987) ("in deciding whether to grant equitable relief under Title VII, the district court would have been prohibited from reconsidering any issues necessarily and actually decided by the jury").

256. Tennes v. Massachusetts Dep't of Revenue, 745 F. Supp. 1352, 1360 (N.D. Ill. 1990), aff'd, 944 F.2d 372 (7th Cir. 1991).
The employer might doubt the individual’s capabilities, or it might fear morale problems with other workers. The individual may even have admitted some shortcomings, or there may be other uncontradicted evidence of his poor performance and interpersonal skills. “In such a case a refusal to order reinstatement would be within the trial judge’s equitable discretion.” The court might well differentiate between a pattern of poor performance and one mistake, favoring reinstatement in the latter.

Another vexing situation is where the individual, not the employer, manifests most or all of the hostility. Some commentators believe that the individual’s hostility should be irrelevant, with the focus remaining on the employer’s attitude. However, an individual who manifests open disdain or contempt for the employer certainly should not be reinstated. Although the employer forced to reinstate a disgruntled individual escapes the burden of a front pay award, that em-

257. See, e.g., Acrey v. American Sheep Indus. Ass’n, 981 F.2d 1569, 1576 (10th Cir. 1992) (“The record contains examples of sharply conflicting evidence about specific incidents reflecting on plaintiff’s job performance and treatment. . . . The district court’s decision that a productive and amicable working relationship between the parties was not feasible is supported by the record and hence not an abuse of discretion.”); see also Price, 966 F.2d at 325 (“So a belief by defendants that Price is incompetent could be a proper reason for denying reinstatement.”).

258. See, e.g., Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) (“The district court specifically found that reinstatement was not a realistic alternative. The court reached this determination after noting that Delchamps had decided to terminate Deloach rather than demote him due to the morale problems that would ensue.”).

259. Tennes, 745 F. Supp. at 1360 (“Moreover, Tennes admitted at trial that he did not consistently follow his employer’s operating procedures. Under these circumstances, reinstatement is inappropriate.”).

260. Id. (“The current deputy commissioner of the Department of Revenue testified that he believed Tennes was dishonest with his supervisors and was a marginal performer. His doubts about Tennes’ ability and honesty appeared sincere to the court.”). A court might even differentiate between internal and external performance. See, e.g., Jackson v. City of Albuquerque, 890 F.2d 225, 232 (10th Cir. 1989) (“There was no evidence that plaintiff had any particular problems in dealing with the public.”).

261. Robinson v. Southeastern Pa. Transp. Auth., 64 Fair Empl. Prac. Cas. (BNA) 246, 249 (E.D. Pa. 1991) (finding that the employer had violated Title VII but that the individual “has a stubborn and easily excitable disposition which significantly contributed to the demise of his working relationship with [his] supervisor”), aff’d in part and rev’d in part, 982 F.2d 892 (3d Cir. 1993).

262. Price v. Marshall Erdman & Assoc’s., 966 F.2d 320, 325 (7th Cir. 1992); see also McKnight II, 973 F.2d 1366, 1370 (7th Cir. 1992) (“[G]enuine employer dissatisfaction with an employee’s job performance is another factor for a court to consider in its determination whether reinstatement is appropriate.”), cert. denied, 507 U.S. 915 (1993).

263. See, e.g., EEOC v. General Lines Inc., 865 F.2d 1555, 1563 (10th Cir. 1989) (plaintiffs’ work performance deteriorated over time in a variety of ways).


265. Note, supra note 138, at 249 (“In general, the employer’s attitude towards the plaintiff should determine whether the plaintiff can be rehired, not the plaintiff’s attitude towards the employer.”).

266. Mcintosh v. Jones Truck Lines, Inc., 767 F.2d 433, 437 (8th Cir. 1985) (Arnold, J., concurring and dissenting) (plaintiff should be reinstated “unless the animosity occasioned by his unjustified resentment against the defendant’s sick-leave policy, without regard to the [em-
ployer pays another price, measured in quality, efficiency, and morale at the work site.\footnote{See supra notes 109-35 and accompanying text.} Moreover, if that individual were to receive front pay in lieu of reinstatement, even though he evinced hostility toward the employer, "the employer, due to the plaintiff’s attitude, would be paying both the plaintiff (through front pay) and the worker doing the work the employer is willing to let the plaintiff do."\footnote{Note, supra note 138, at 249.} Accordingly, a trial court typically should allow front pay but severely reduce it due to the individual’s failure to mitigate damages.\footnote{See supra notes 187-93 and accompanying text.}

The above situations amply demonstrate the desirability of according the trial courts the widest possible discretion in deciding between the prospective remedies of front pay and reinstatement.

2. \textit{Hostility Arising from the Litigation}

The trial courts, when selecting the appropriate prospective remedy, should consider the hostility engendered during the litigation process itself. Unfortunately, many courts minimize or ignore the hostility created as the case proceeds to trial.\footnote{Shaw v. Mast Advertising & Publishing, Inc., 937 F.2d 617 tbl. (10th Cir. 1991), available in 1991 WL 128223, at *6 ("Reinstatement by its very nature is always awkward to a greater or lesser extent after the parties have spent months or years opposing each other in litigation. Nevertheless, reinstatement is the preferred remedy.")}. They will only consider the relevancy of hostility arising during litigation if it goes "beyond the normal hostility between parties to litigation";\footnote{Grantham v. Trickey, 21 F.3d 289, 296 (8th Cir. 1994); EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1462 (7th Cir. 1992); Brooks v. Woodline Motorfreight, Inc., 852 F.2d 1061, 1065 (8th Cir. 1988); Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1331 (7th Cir. 1987), cert. denied, 485 U.S. 1007, and vacated on other grounds, 486 U.S. 1020 (1988); Whittlesy v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984); see also Alvarez & Lipsky, supra note 76, at 223 n.86 ("Applying the principles of the Remedies Policy and Albersmarle, an employer should not be able to avoid reinstatement by showing the ordinary animosity that can be expected to develop in any lawsuit.").} they fear that "if ‘hostility common to litigation’ would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff."\footnote{Century Broadcasting, 957 F.2d at 1462; see also EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926 (S.D.N.Y. 1976) ("Some antagonism is the natural result of the filing and litigation of discrimination and retaliation charges and to deny reinstatement merely because of the existence of hostility might be contrary to the remedial goals of Title VII.") aff'd, 559 F.2d 1203 tbl., cert. denied, 434 U.S. 920 (1977).}

This approach is flawed for two reasons. First, it is inconsistent with the premise that a prospective remedy "should be founded only upon the facts presently obtaining and not based upon historical circumstances which may no longer be present when the proposed rein-
statement occurs."\textsuperscript{273} Obviously, the most current source of tension between the parties is that arising from the litigation, not from the discriminatory discharge years earlier. Moreover, the parties typically have become increasingly entrenched in their positions as they participate in discovery and present the case for trial. It is disingenuous to believe that "the discord and conflict engendered by the trial would not carry over into the work environment" upon reinstatement.\textsuperscript{274} 

Second, the definition for excessive litigation hostility is too strict, especially because it is often viewed in isolation from other hostility factors. The courts should always consider the effect of hostility arising from the litigation, perhaps not alone, but certainly in combination with the hostilities discussed in the previous section. The Tenth Circuit applied such a test in affirming an award of front pay in lieu of reinstatement, where the antagonism between the parties had "only increased as a result of this litigation."\textsuperscript{275} As always, the trial courts are in the best position to assess the severity of the ill-will engendered from the litigation.\textsuperscript{276}

3. \textit{Traditional Factors Affecting Hostility}

In addition to determining who is hostile to whom, why that party is hostile, and the negative effect of the litigation itself, the courts should continue to take into account certain traditional factors. For example, the courts should certainly note the size of the employer, for hostility within a small work force may be insurmountable.\textsuperscript{277}

The courts also should consider the position to which the individual would be reinstated. It is one thing to order the reinstatement of low-level employees performing routine tasks, "[b]ut to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired . . . is a formula for continu-


\textsuperscript{275} Spulak v. K Mart Corp., 894 F.2d 1150, 1157 (10th Cir. 1990).

\textsuperscript{276} For example, the Fifth Circuit in Walther v. Lone Star Gas Co., 952 F.2d 119 (5th Cir. 1992), should not have disregarded the district court’s finding that the litigation was “protracted and necessarily vexing.” \textit{Id.} at 127.

\textsuperscript{277} \textit{Compare} Hutchison v. Amateur Elec. Supply, Inc., 840 F. Supp. 612 (E.D. Wis. 1993), \textit{aff’d in part and rev’d in part}, 42 F.3d 1037, 1046 (7th Cir. 1994) (affirming denial of reinstatement where employer was “a small, closely held organization” with much “interaction required among employees”) \textit{and} Sanchez v. Phillip Morris, Inc., 774 F. Supp. 626, 629 (W.D. Okla. 1991) (front pay instead of reinstatement because “an order of reinstatement would require the Plaintiff to work within a small, close-knit group of employees and that a large number of . . . [his] co-workers are well aware of the litigation and were among the witnesses that testified for the Defendants in the liability stage of this case.”), \textit{rev’d on liability grounds}, 992 F.2d 244 (10th Cir. 1993) \textit{with} Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1210 (D.D.C.) (plaintiff reinstated as a partner with an employer that had 900 partners and 90 U.S. offices), \textit{aff’d}, 920 F.2d 967 (D.C. Cir. 1990).
ous judicial intervention in the employment relation." The fact that Title VII and ADEA plaintiffs might well hold professional or managerial jobs stands in sharp contrast to the exclusively rank-and-file workers protected by the NLRA's staunch reinstatement preference.

Yet another traditional hostility factor is whether the individual would be reinstated under the same supervisors or managers. Perhaps the courts could order the individual reinstated under another supervisory chain of command, assuming that the employer's internal organization permitted such an arrangement. If not, the courts should have discretion to consider front pay in lieu of reinstatement.

As evidenced by the foregoing discussion, workplace hostility is a complex, multifaceted concept, worthy of more than a passing reference in determining the appropriate prospective remedy.

278. Price v. Marshall Erdman & Assocs., 966 F.2d 320, 325 (7th Cir. 1992); see also Tennes v. Massachusetts Dep't of Revenue, 944 F.2d 372, 381 (7th Cir. 1991) (no reinstatement to position of tax auditor); Spulak, 894 F.2d at 1157 (no reinstatement "based on Spulak's assertion that he would have problems returning to his managerial position"); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 890 (3d Cir. 1984) (sales representative job requires "harmonious working relationships"); Doyle v. Union Elec. Co., 755 F. Supp. 866, 870 (E.D. Mo. 1991) ("Such a shotgun marriage is particularly inappropriate, because plaintiff at the end of his employment with defendant, held a position of substantial responsibility, the Superintendent of Nuclear Services (Site) at the Union Electric Calloway Nuclear Power Plant."); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976) ("job from which plaintiff was discharged required a close working relationship between plaintiff and top executives of defendant. . . . The situation here is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive.") aff'd, 559 F.2d 1203 tbl., cert. denied, 434 U.S. 920 (1977).

Courts must go beyond the individual's job title and assess his actual duties. See, e.g., Morgan v. Arkansas Gazette, 897 F.2d 945, 953-54 (8th Cir. 1990) (plaintiff was a circulation branch manager, who might have given erroneous information to the audit bureau, yet the court found the position not to be "high level, unique or unusually sensitive"); Jackson v. City of Albuquerque, 890 F.2d 235, 235 (10th Cir. 1988) ("There is no evidence that plaintiff's position as an Assistant Superintendent . . . would require any special or sensitive type of personal confidence or a personal loyalty and mutual trust between plaintiff and his superiors."); Hopkins, 737 F. Supp. at 1210 (even though plaintiff would be promoted to management consulting partner, she would not really control firm business and would "probably be subject to accountant supervision").

279. Michael Schuster & Christopher S. Miller, An Empirical Assessment of the Age Discrimination in Employment Act, 38 INDUS. & LAB. REL. REV. 64, 68 (1984) (57.4% of ADEA cases are brought by professional or managerial employees).

280. See supra notes 20-21 and accompanying text.

281. See, e.g., Price, 966 F.2d at 325 ("[R]einstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation . . . ."); Miano v. AC&R Advertising, Inc., 875 F. Supp. 204, 226 (S.D.N.Y. 1995) ("Significantly, plaintiffs would be directly subject to a Chief Operating Officer whose previous antagonistic dealings with plaintiffs have been fully described."); cf. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 678 (7th Cir. 1993) ("In fact, the record establishes that Mann, whose racial comments had been the impetus for Rodgers' constructive discharge, long since had left the Milwaukee office"); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1397 (6th Cir. 1990) ("Not only had Superintendent Young resigned, but so had his successor, Chewney, by the time of the ruling.").

VI. Conclusion

Employment discrimination cases under Title VII and the ADEA have been litigated for approximately thirty years. The courts have never critically reconsidered their staunch preference for reinstatement as a prospective remedy, a remedy that is not mandated by the language or legislative history of Title VII or the ADEA. Rather than reconsider or abandon the reinstatement preference, some courts have strained mightily to find facts supporting front pay in lieu of reinstatement. It would certainly be easier, and more intellectually honest, to reformulate the rules for prospective remedies themselves.

Reinstatement can be a powerful remedial tool, but so too can an award of front pay. Depending upon the facts and circumstances of a particular case, either type of prospective remedy might make the discriminatorily discharged individual whole, deter the employer from future discrimination, and serve societal civil rights goals.

Accordingly, courts should abandon the reinstatement preference and determine the appropriate prospective remedy case-by-case. And, in doing so, they must pay greater attention to the hostility exhibited by one or both parties. Essentially, the courts should forego their tradition of preferring reinstatement and adopt the older and more powerful tradition of using their full equitable discretion in assessing remedies.