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Rogers v. Exxon Research & Engineering Co.: Validity of Pain and Suffering Damages Award Under the Age Discrimination in Employment Act of 1967

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ROGERS V. EXXON RESEARCH & ENGINEERING CO.: VALIDITY OF PAIN AND SUFFERING DAMAGES AWARD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Dr. Dillworth T. Rogers, a chemical engineer and researcher, brought an action against his former employer, Exxon Research and Engineering Company,[1] for unjustifiably forcing him into early retirement in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[2] The defendant had compelled Dr. Rogers, an employee of nearly thirty years, to retire at age 60. Exxon's justification was Rogers' alleged mental instability. The trial was bifurcated, and the first issue before the jury was whether Exxon had retired Dr. Rogers because it wanted to displace an older employee in order to grant additional benefits to younger employees,[3] or whether Dr. Rogers was retired for a genuine medical disability.[4] The jury unanimously found for plaintiffs. Since counsel had stipulated that Dr. Rogers' out-of-pocket compensatory damages were $30,000,[5] the only remaining issue for the jury was an assessment of damages for the pain and suffering inflicted on Dr. Rogers by Exxon's discriminatory action.[6] The jury returned a verdict in the amount of $750,000.[7] Plaintiffs then moved that the court award attorneys' fees pursuant to Title 29 U.S.C. §§ 626(b) and 216(b), and that the court double the total damages award of $780,000 pursuant to Title 29 U.S.C. § 626(b), which provides

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1. Rogers v. Exxon Research & Engineering Co., 404 F. Supp. 324 (D.N.J. 1975), *appeal argued,* Nos. 76-1114, 76-1115 (3d Cir. Nov. 9, 1976). Dr. Rogers lived approximately three and a half years after his involuntary retirement. 404 F. Supp. at 326. On June 11, 1973, his wife and daughter were named co-executrices of his estate and were substituted as plaintiffs. *Id.* at 326. On June 14, 1974, the caption of the case was changed to reflect the change in the defendant's name from Esso to Exxon. *Id.* at 326.

2. 29 U.S.C. §§ 621-634 (1975).

3. Brief for Appellee at 3, Rogers v. Exxon Research & Engineering Co., Nos. 76-1114, 76-1115 (3d Cir., appeal argued Nov. 9, 1976).

4. 404 F. Supp. at 326.

5. These out-of-pocket damages are hereinafter referred to as the lost wages or back pay award. They are based on the statutory language of 29 U.S.C. § 626(b) (1975). *See* text accompanying notes 32 & 36 *infra.*

6. After the jury returned its verdict on liability, the trial court permitted the plaintiffs to show damages for pain and suffering. 404 F. Supp. at 327.

7. The jury verdicts are reported in 2 EMPL. PRAC. GUIDE (CCH) (New Developments) ¶ 5,311 (D.N.J. Feb. 4, 1975).

for an additional award of liquidated damages, equal to the back pay award, in cases of willful violation of the ADEA.[8]

Exxon moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. After extensive briefing and argument on the motions, the court (1) granted the liquidated damages motion with regard to the $30,000 back pay award, but refused to double the $750,000 award for pain and suffering; (2) denied the motion for judgment n.o.v.; and (3) denied the motion for a new trial, on the condition that plaintiffs consent to a $550,000 remittitur.[9] Plaintiffs agreed to the remittitur and the court then awarded attorneys' fees of $65,000, fixed by consent of counsel.[10] Dr. Rogers' estate received judgment for $260,000 plus interest and $65,000 for attorneys' fees, for a total award of $325,000.

The crucial holding that damages for pain and suffering can be recovered under the ADEA raises questions concerning the nature and purpose of pain and suffering damages, compensatory damages, and the statutory provision for liquidated damages. The purpose of this Note is to suggest that the statutory remedies of the ADEA provide complete compensation for plaintiffs such as Dr. Rogers, although they may not be adequate in cases of non-willful age discrimination. The analysis will begin with a discussion of the various theories upon which damages for pain and suffering are awarded. Next, the statutory provisions of the ADEA and its congressional history will be analyzed. Finally, the court's rationale will be examined in the context of the civil rights statutes and cases upon which the *Rogers* court relied to support its holding that damages for pain and suffering are recoverable under the ADEA.

I. DAMAGES

There are three categories of circumstances under which damages for pain and suffering are awarded. The oldest and, until recently,

8. *See* text accompanying notes 38-52 *infra*.

9. The court found the jury award of $750,000 excessive, although not the product of corruption, prejudice or misconception of law. The court viewed the award as a manifestation of the jury's outrage at the offensiveness of Exxon's illegal conduct. The $550,000 remittitur was influenced by plaintiffs' counsel's request that he be permitted to suggest to the jury that $200,000 would be appropriate compensation for Dr. Rogers' pain and suffering. While this request was denied, the court later ruled that the figure represented the maximum verdict the jury could have awarded. 404 F. Supp. at 338. The court gave no indication of what the liquidated award was expected to cover. *Id.* at 335.

10. The court also charged costs to the defendant and, by consent of counsel, awarded interest on the plaintiffs' judgment as of May 27, 1975. *Id.*

most common requires physical impact, so that damages for pain and suffering are awarded only upon a showing that mental injury occurred as a result of actual bodily contact.[11] Damages for pain and suffering are also awarded in the absence of physical injury or economic loss when the mental distress is occasioned by certain dignitary torts, such as libel, slander, false imprisonment, malicious prosecution, and invasion of privacy.[12] Finally, under the relatively new tort of intentional infliction of emotional distress, the defendant is liable for reasonably foreseeable emotional distress and resulting bodily harm caused by his words or actions.[13] The two major obstacles to a successful action under this last theory are the difficulty of proving the injury and the related difficulty of measuring the damages incurred.[14]

The historical assumption has been that damages for pain and suffering are compensatory.[15] Daniel B. Dobbs, whose treatise on remedies is the first major work on this subject since 1935, analyzes the nature of such damages in terms of why juries award them. Based on his findings that the amounts awarded for pain and suffering are far greater than any monies needed for painkillers or diversionary entertainment, and that the pain and suffering is seldom inflicted intentionally, he states that these awards are neither strictly compensatory nor wholly punitive. Dobbs concludes that the main function of awards for pain and suffering is to provide prevailing plaintiffs with funds with which to pay their attorneys. He points out that most pain and suffering awards occur in negligence cases in which the plaintiff's lawyer has been engaged on a contingent fee basis. If recovery in such actions were limited to only direct monetary costs, payment of the attorney's percentage would leave the victim without full recovery of his actual losses. Since the jury has a relatively free hand in determining the amount awarded for pain and suffering, it can set its verdict high

11. W. PROSSER, THE LAW OF TORTS § 54 (4th ed. 1971).

12. D. DOBBS, THE LAW OF REMEDIES §§ 3.2, 7.2, 7.3 (1973) [hereinafter cited as DOBBS]; W. PROSSER, *supra* note 11, §§ 12, 54, 113 and cases cited therein.

13. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); W. PROSSER, *supra* note 11, §§ 12, 54 (4th ed. 1971). Prosser noted that the impact requirement for pain and suffering awards has been overruled in recent years in New York and Pennsylvania, both previously staunch supporters of the physical impact theory. *Id.* at 330-33.

14. W. PROSSER, *supra* note 11, § 12 at 50 (4th ed. 1971).

15. DOBBS §§ 3.1, 8.1; *cf.* O'CONNELL & SIMON, PAYMENT FOR PAIN AND SUFFERING: WHO WANTS WHAT, WHEN & WHY? 3-8 (1972). These discuss various noncompensatory aspects of damages for pain and suffering. *See also* text accompanying note 16 *infra*.

enough to cover both a substantial attorney's fee and the plaintiff's direct pecuniary losses.[16] It should be acknowledged that pain and suffering damages viewed in this way are still compensatory because attorneys' fees are but another actual monetary loss incurred by an injured party as a result of defendant's conduct.

Strictly punitive damages, unlike compensatory damages, are assessed primarily on the basis of the unreasonableness of the defendant's conduct, without substantial regard to the actual injury sustained by the plaintiff.[17] The purpose of such awards is to punish the defendant for his wrongdoing and to deter similar conduct in the future.[18] Punitive awards thus encourage private enforcement of public policy. When damages for pain and suffering were infrequently awarded, punitive damages also served to compensate plaintiffs for their indirect losses, including attorneys' fees.[19]

As Dobbs notes, pain and suffering damages often contain a punitive element. The economic value of suffering is very difficult to measure, and a jury can easily add to its damages verdict an amount really intended to punish the defendant. The greater the amount awarded for pain and suffering, the more the award appears to punish the defendant rather than compensate the victim. Pain and suffering awards, as in *Rogers,* are often very high. Insofar as awards for pain and suffering can approximate the value of intangible yet real losses, they are compensatory because they serve to restore an injured party to his former position. However, there is a point at which these awards can take on punitive characteristics, although it is impossible specifically to define where this point occurs. In view of the jury's free hand in this area, damages for pain and suffering may in fact be awarded to com-

16. DOBBS § 3.1 (1973). For a more traditional view of damages for pain and suffering, see C. MCCORMICK, THE LAW OF DAMAGES §§ 88, 97 (1935); T. SEDGWICK, 1, 2 THE MEASURE OF DAMAGES §§ 43, 171, 462 (9th ed. rev. 1920); J. SUTHERLAND, 1, 4 THE LAW OF DAMAGES §§ 95, 96, 1214, 1242 (4th ed. 1916); H. WILLIS, THE LAW OF DAMAGES §§ 21, 22 (1912).

17. Since most insurance agreements do not cover punitive liability, the courts, when such awards are made, do take notice of the defendant's financial status. *See* DOBBS § 3.9 (1973).

18. There are two good arguments against the imposition of punitive damages. First, they are criminal sanctions by nature, but the defendant is not afforded the rights coincident to a criminal trial. Also, if he is subsequently charged with a criminal offense, he is subject to double jeopardy. *See* DOBBS § 3.9 (1973); authorities cited note 19 *infra.*

19. Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis,* 60 CALIF. L. REV. 191, 203-18 (1972); Note, *Implying Punitive Damages in Employment Discrimination Cases,* 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 325, 335-37 (1974).

pensate for real but intangible injuries, to defray the injured party's legal costs, and to punish the defendant.[20] This conclusion conflicts with the *Rogers* court's implicit assumption that damages for pain and suffering cover only an injured party's mental or emotional non-pecuniary losses. Under the broader view adopted here, separate recovery for pain and suffering may not be appropriate under the ADEA.

II. The Age Discrimination in Employment Act of 1967

The declared congressional purpose of the ADEA[21] is to promote employment of older persons on the basis of their ability, to prohibit arbitrary age discrimination, and to help employers and employees deal with problems stemming from the impact of age on employment.[22] The Act prohibits age discrimination in hiring and discharging, and in compensation or other terms, conditions or privileges of employment.[23] It covers employers of twenty or more persons, employment agencies, and labor organizations,[24] but protects workers only between the ages of 40 and 65.[25] The Act does not cover any bona fide seniority system or employee benefit plan,[26] and it permits establishment of age as a bona fide occupational qualification (B.F.O.Q.) for certain occupations.[27]

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20. This is particularly true in cases where the total award exceeds the defendant's insurance coverage.

21. 29 U.S.C. §§ 621-634 (1975). For a detailed and critical analysis of the ADEA's provisions, see Comment, *Age Discrimination In Employment: Available Federal Relief,* 11 Colum. J.L. & Soc. Prob. 281 (1975). The procedural requirements of the Act are examined in Comment, *Procedural Aspects of the Age Discrimination in Employment Act of 1967,* 36 U. Pitt. L. Rev. 914 (1975). *See also* Agatstein, *The Age Discrimination In Employment Act of 1967: A Critique,* 19 N.Y.L.F. 309 (1973); Halgren, *Age Discrimination in Employment Act,* 43 L.A.B. Bull. 361 (1968); Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments,* 13 Duq. L. Rev. 227 (1974).

22. 29 U.S.C. § 621(b) (1975). The Act provides for education and research programs to effectuate its purpose. 29 U.S.C. § 622(a) (1975).

23. *Id.* § 623(a).

24. *Id.* § 623(a)-(c). *See also id.* § 630(b)-(e) (definitions of employers, employment agencies and labor organizations that fall within the provisions of the Act).

25. *Id.* § 631. *See also* Note, *Age Discrimination in Employment: The Problem of the Worker Over 65,* 5 Rutgers-Camden L.J. 484 (1974); Note, *Constitutionality of Mandatory Retirement: Significance of Summary Affirmation of Weisbrod v. Lynn (Memo 95 S. Ct. 1319),* 9 Clearinghouse Rev. 311-15 (S. 1975). Both notes emphasize the lack of protection under the ADEA for those past the age of 65 who remain able to work and desirous of employment.

26. 29 U.S.C. § 623(f)(2) (1975).

27. *Id.* § 623(f)(1). *See* Hodgson v. Tamiami Trail Tours, 4 Empl. Prac. Dec. (CCH) ¶ 6047 (S.D. Fla. Mar. 31, 1972), which held that defendant's age require-

Civil suit under the ADEA may be brought by either the Secretary of Labor or the person aggrieved if the Secretary's efforts at conciliation, conference, and persuasion have proved fruitless.[28] If the Secretary commences an action to enforce an employee's statutory rights, the aggrieved party loses his right to bring his own civil action.[29]

The ADEA provides[30] that violations of its provisions are to be treated as violations of the Fair Labor Standards Act (FLSA)[31] and incorporates the FLSA's remedial provisions with only slight modifications. Through the incorporation of the FLSA, the injured person is entitled to (1) payment of lost wages or back pay;[32] (2) an additional amount, equal to back pay, as liquidated damages for willful violations;[33] and (3) allowance of reasonable attorneys' fees and court costs.[34] The ADEA also requires employment, reinstatement, or promotion, as appropriate.[35] These remedies are available whether the action is brought privately or by the Secretary.

In applying these remedies, the courts are in agreement that "back pay" means the difference between the value of compensation to which the individual would have been entitled had he been hired or retained, and the value of the benefits he has actually received from subsequent employment or insurance or retirement plans.[36] In ADEA cases, at-

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ments were a B.F.O.Q. because the safe operation of bus tours requires maximum reflex ability, which was shown to decrease after age 40. *Accord,* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974). *But see* Aaron v. Davis, 12 Fair Empl. Prac. Cases 1506 (E.D. Ark. May 28, 1976) (age not a B.F.O.Q. for firefighters).

28. 29 U.S.C. § 626(d) (1975) requires that within 180 days of the defendant's allegedly unlawful action the aggrieved person give the Secretary notice of his intention to institute a court claim. The Secretary then has 60 days in which to negotiate a settlement to eliminate any alleged unlawful practice; no individual action may be commenced during this period.

29. *Id.* § 626(c).

30. *Id.* § 626(b).

31. *Id.* §§ 201-219 (1976 Supp.).

32. The Act's exact language is "unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. § 626(b) (1975). *See* text accompanying note 36 *infra.*

33. 29 U.S.C. § 626(b) Proviso (1975).

34. *Id.* § 216(b). Note that under section 217 injunctive relief is also available.

35. *Id.* § 626(b) Proviso, enforceable through *id.* § 217.

36. Back pay is a broad, make-whole concept which includes in the definition of salary such specific benefits as increased pension rights, profit-sharing, and insurance coverage. A back pay award is intended to restore the victim of age discrimination to the same economic status s/he would have had were it not for the defendant's discriminatory action. Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971), discussed these principles but held that the plaintiff's discriminatory discharge occurred prior to the effective date of the Act. This case was relied on in Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973), in which the court awarded

torneys' fees are awarded on the basis of their explicit provision in the FLSA.[37]

The courts have agreed that liquidated damages are not within the province of the jury but are governed solely by the court's determination of whether the violation was willful.[38] At first impression, these damages clearly appear to be punitive, since the Act specifically states that they can only be awarded for willful violations.[39] The limited legislative history does not clarify the nature and purpose of liquidated damages under the ADEA.[40]

A reading of the ADEA's legislative history[41] reveals that Congress' primary concern was to discourage generally the practice of age discrimination rather than to ensure that every aggrieved party receives full compensation for each injury he has suffered. In both houses, the discussion primarily concerned the Act's provisions for educating employers about the value of older workers; the enforcement provisions of the statute were not emphasized.[42]

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back pay and required reinstatement. *See also* Brennan v. Ace Hardware Co., 495 F.2d 368 (8th Cir. 1974), which upheld the principle of back pay awards in an action by the Secretary, but denied relief because the employees had successfully secured new jobs and the Secretary had failed to try adequately to negotiate a settlement.

37. *See* cases cited note 36 *supra,* each of which upheld the principle of awarding attorneys' fees. In *Schulz,* $5,000 was awarded as reasonable attorneys' fees based on the incorporation principle set out in Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231 (N.D. Ga. 1971). It may be noted that in Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970), the court stated, without any explanation or reference to the FLSA, that the ADEA makes no provision for the imposition of attorneys' fees. 320 F. Supp. at 1181. This was dicta, however, because the court found no violation of the Act.

38. *See* Chilton v. National Cash Register Co., 370 F. Supp. 660 (D. Ohio 1974); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

39. 29 U.S.C. § 626(b) (1975). *See* Aaron v. Davis, 12 Fair Empl. Prac. Cases 1506 (E.D. Ark. May 28, 1976), which awarded reinstatement and back pay but denied "punitive" damages—that is, a liquidated award—because bad faith was not shown.

40. The most enlightening piece of legislative history is Senator Javits' comment concerning a committee amendment which eliminated the criminal penalty provided for in the original bill and substituted a double damages provision for willful violations. 113 CONG. REC. 31,254 (1967). Yet when viewed in the context of the Senator's full speech, with its emphasis on this bill's similarity to the FLSA, the question of whether liquidated damages are punitive or compensatory under the ADEA cannot be answered definitively.

41. 113 CONG. REC. 31,252-57 and 34,740-52 (1967).

42. See, for example, the remarks of Senator Yarborough, Floor Manager of the Bill (S. 830), 113 CONG. REC. 31,253 (1967), and Senator Javits' remarks at 31,524, as well as the opening statement by Representative Perkins, *id.* at 34,740 (1967). Representative Eilbery emphasized the personal costs to victims of age discrimination and added:

[T]his piece of legislation will help to focus attention upon a very serious

The courts in ADEA cases have followed the Supreme Court's holding that under the FLSA liquidated damages are not punitive, but rather constitute compensation for damages too obscure and difficult to prove other than by doubling actual damages.[43] However, this holding was handed down prior to the passage of the Portal-To-Portal Act of 1947,[44] which amended the FLSA to allow courts to award liquidated damages on a discretionary rather than mandatory basis, depending on evidence of the employer's good faith.[45] Under the original language of the FLSA, the courts held that once a violation was shown, the plaintiff was automatically entitled to a liquidated award regardless of the defendant's good faith.[46] It followed that such awards were compensatory rather than punitive, since the employer's intent was irrelevant. The passage of the Portal-To-Portal Act of 1947[47] makes it at

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> problem. At the same time, the bill contains very real and effective tools with which to launch new educational and persuasive programs designed to eradicate discriminatory practices in employment. And, where these tools fail, the bill provides machinery to enable governments and agencies to prevent practices which cannot be otherwise overturned.

Id. at 34,745. Representative Daniels noted "that the bill takes into full consideration the problem and interests of employers . . . . It [H.R. 13054] emphasizes education and services and is not unduly coercive in intent or in fact." *Id.* at 34,746. Representative Olsen stated, "The major thrust of this legislation is designed to expand and promote educational and information programs." *Id.* at 34,746. Representative Dent emphasized that the essential purpose of the statute, promoting the employment of older workers on the basis of their ability, would be done through an educational program directed at employers. *Id.* at 34,747.

The legislative history also includes considerable discussion of the suffering caused by age discrimination. *Id.* at 31,254, 34,742. The eloquent comments of Senator Young were addressed to the issue of mandatory retirement, *id.* at 31,256, and he noted, "though less dramatic—therefore less newsworthy—it [age discrimination] is as insidious, as damaging, and as deplorable as racial or religious discrimination." *Id.* at 31,257. It may be noted that the *Rogers* court stressed this aspect of the legislative history to the exclusion of all else. 404 F. Supp. at 330 n.3.

While Congress was cognizant of the human suffering engendered by age discrimination, the Act's history supports the view that the speeches on the consequences of age discrimination were made to persuade the full body of the necessity of prohibiting this form of employment discrimination rather than to imply that age discrimination causes more severe personal suffering than any other form of employment bias. *See* Brief for Nat'l. Ass'n. of Mfrs. as Amicus Curiae at 8, Rogers v. Exxon Research & Engineering Co., Nos. 76-1114, 76-1115 (3d Cir., appeal argued Nov. 9, 1976).

43. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945), *rehearing denied,* 325 U.S. 893 (1945), *followed in* Rogers v. Exxon, 404 F. Supp. at 335.

44. 29 U.S.C. §§ 251-262 (1975).

45. *Id.* § 260.

46. Seneca Coal & Coke Co. v. Lofton, 136 F.2d 359 (10th Cir.), *cert. denied,* 320 U.S. 722 (1943); Rigopoulos v. Kervan, 140 F.2d 506 (2d Cir. 1943); Barrineau v. Carolina Milling Co., 52 F. Supp. 197 (E.D.S.C. 1942).

47. 29 U.S.C. §§ 251-262 (1975).

least arguable that liquidated awards are punitive.[48] Nonetheless, the courts adhere to the view that these awards are compensatory.[49]

In contract law, where the term originated, "liquidated damages" means a "formula for fixing damages in the event of a breach . . . [and] is extremely helpful when damages from breach may involve many intangible, remote or hard to prove elements, but where such damages are nevertheless very real."[50] Liquidated damages clauses are enforceable unless their terms are found unrealistically disproportionate to foreseeable losses and therefore penal in nature.[51] Contractual liquidated damages provisions can only be compensatory.

The ADEA can be viewed as a statutory employment contract which requires that employers covered by the Act not discriminate against present or potential employees on the basis of age. In the event the employer breaches his contractual duty, he will be liable at least for the employee's actual losses.[52] If he breaches in knowing defiance of the ADEA's terms, the injured employee may also recover for his intangible losses pursuant to the congressional liquidated formula that is part of the statutory contract.

Such a view minimizes, but does not eliminate, the punitive element of ADEA liquidated damages, since it is the employer's conduct, rather than his good or bad faith, that causes the individual's losses—tangible and intangible. Thus a liquidated award is both compensatory and punitive, compensating for mental injuries which are difficult to prove, while punishing the employer for willful discriminatory acts. So described, liquidated damages awards, in light of the ADEA's allowance for reasonable attorneys' fees, are identical in nature to the awards for pain and suffering discussed above.

General principles of damages, together with the provisions and history of the Act, suggest the conclusion that awards for pain and suffering are not warranted under the ADEA. Especially in cases of

48. Congress implied in its findings that mandatory liquidated awards are in fact punitive. 29 U.S.C. § 251(a) (1975).

49. For example, in Snelling v. O.K. Service Garage, Inc., 311 F. Supp. 842 (E.D. Ky. 1970), the court held that liquidated damages should be granted only where an oppressive employer is aware of the law, but refuses to comply with it. Although the court refused to make such an award, it maintained that liquidated damages are compensatory in purpose.

50. DOBBS § 12.5, at 821 (1973). *See also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 232 (1970).

51. DOBBS § 12.5 (1973); J. CALAMARI & J. PERILLO, *supra* note 50, § 232 (1970).

52. Actual economic losses include attorneys' fees as well as all back pay benefits.

willful violations, the damage remedies provided by the ADEA—back pay, liquidated damages, and attorneys' fees—not only are sufficient to effectuate the Act's purposes, but also eliminate entirely any rationale for awarding damages for pain and suffering. An analysis of the rationale on which the *Rogers* court based its holding leads to a similar conclusion.

III. The Court's Analysis in Rogers

The *Rogers* holding that damages for pain and suffering are recoverable under the ADEA is based largely on cases under the federal civil rights statutes,[53] but the court does not detail the provisions and remedies of these statutes. The court begins its opinion by relying on dicta in *Curtis v. Loether*,[54] a housing discrimination case, to assert that the ADEA creates a statutory tort for which common law tort remedies are available. Housing discrimination cases, however, present very different equities than do cases of discrimination in employment. Actual damages in the former situation are minimal. Consequently, damages for pain and suffering are necessary to effectuate the law.[55] The *Rogers* court next relies on *Bell v. Hood*[56] for the principle that "[w]here federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."[57] Yet at issue in *Bell* were the fourth and fifth amendment rights to be free from unlawful arrests and unreasonable searches and seizures. Again, the plaintiff's economic loss was minimal. Moreover, *Bell* actu-

53. *E.g.*, Civil Rights Act of 1870 § 16, 42 U.S.C. § 1981 (1970); Civil Rights Act of 1866 §§ 1, 3, 42 U.S.C. §§ 1982, 1988 (1970); Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970); Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. IV 1974); Civil Rights Act of 1968, tit. VIII, 42 U.S.C. §§ 3601-3619 (1970 & Supp. IV 1974).

54. 415 U.S. 189 (1974). The issue in *Loether* was whether defendants had a right to a trial by jury in a housing discrimination case.

55. *See, e.g.*, Allen v. Gifford, 368 F. Supp. 317 (E.D. Va. 1973). Plaintiffs recovered, *inter alia*, $3,500 compensatory damages from the defendant real estate developer. The only injuries the court held proved were anxiety, embarrassment, and humiliation. Claims for various pecuniary losses were found either speculative or unproven. 368 F. Supp. at 321. In McNeil v. P-N & S Inc., 372 F. Supp. 658 (N.D. Ga. 1973), claims for rent paid or equity lost were rejected as speculative under prevailing authorities. However, plaintiffs recovered, *inter alia*, $2,500 general and compensatory damages for humiliation and embarrassment. 372 F. Supp. at 661.

56. 327 U.S. 678 (1946).

57. *Id.* at 684.

ally held only that the federal courts have jurisdiction over a damages claim predicated on the fourth and fifth amendments.[58]

Title VII of the Civil Rights Act of 1964[59] is the civil rights enactment most analogous to the ADEA because it deals with employment discrimination based on race, sex, religion, or national origin. Although the *Rogers* court's reference to Title VII suggests that it provides for awards of damages for pain and suffering, Title VII plaintiffs are in fact awarded only reinstatement, with or without back pay,[60] and reasonable attorneys' fees.[61] The court heavily relies on the recent Supreme Court holding in *Albemarle Paper Co. v. Moody*[62] for the proposition that Title VII is intended to be a "make-whole" compensatory statute, but fails to mention that *Albemarle* involved a back pay award—not damages for pain and suffering.[63] The remedies available under the ADEA—back pay, liquidated damages, and attorneys' fees—are never mentioned in the *Rogers* court's discussion of damages for pain and suffering; it never considers whether the statutory remedies might provide full relief.

Throughout its opinion, the court relies on out-of-context dicta,[64] scholarly articles *advocating* either punitive or compensatory damages in discrimination cases,[65] an incomplete survey of the ADEA's legis-

58. *Id.* at 685.

59. 42 U.S.C. § 2000e (1974).

60. *Id.* § 2000e-5(g) (1974).

61. *Id.* § 2000e-5(k) (1974).

62. 422 U.S. 405 (1975).

63. Pain and suffering and punitive damages have almost always been denied in title VII cases. *See, e.g.*, EEOC v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Jiron v. Sperry Rand Corp., 10 Fair Empl. Prac. Cases 730 (D. Utah 1975); Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973). The sole exception to these cases is Humphrey v. S.W. Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 992 (5th Cir. 1974). The trial court awarded plaintiff $1,200 for what it termed "psychic injuries"; on appeal, the Fifth Circuit held that the plaintiff failed to show that he was denied a job promotion as a result of racial discrimination. The case was eventually dismissed for failure to state a cause of action. Thus, the weight of authority supports the principle that damages for pain and suffering are not available under title VII.

64. For example, Surrise v. Conwed Corp., 510 F.2d 1088 (8th Cir. 1975), is cited to establish that the ADEA's remedial purpose should be liberally effectuated in fashioning appropriate relief. Yet, this case affirmed the trial court's judgment for the employer on the finding that the plaintiff was dismissed because of poor work performance, not age.

65. *E.g.*, Duda, *Damages for Mental Suffering In Discrimination Cases*, 15 CLEV.-MAR. L. REV. 1 (1966); Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259-69 (1971).

lative history,[66] and a wide range of discrimination cases in areas other than employment.[67] The court further justifies its holding by lengthy discussions of the effects of age discrimination and the suffering of Dr. Rogers. These arguments may be relevant to congressional consideration of amendment of the ADEA to provide for additional pain and suffering recovery, but they are inapposite under the present act.

Perhaps the best argument for the court's conclusion is one which the court does not emphasize. The ADEA's enforcement section provides that:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal* or *equitable* relief as may be appropriate to effectuate the purposes of this chapter, *including without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[68]

But this language cannot be read in a vacuum. When this provision is viewed in the light of its legislative history, other employment cases, and its own specified remedies, the language cannot support a recovery for pain and suffering.

Moreover, to allow recovery for pain and suffering frustrates the congressional goal of ending age discrimination through conciliation and education, since the possibility of a large award will encourage private action rather than settlement. And, since the Secretary is under no obligation to seek damages for pain and suffering, employees whose private actions are superseded by the Secretary might be denied full recovery.[69]

CONCLUSION

The court in *Rogers* has introduced a new remedy for age discrimination by relying on a superficial analysis of only remote author-

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66. *See* note 42 *supra.*

67. For example, the court relied on 42 U.S.C. § 1983 cases, including Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd,* 446 F.2d 904 (5th Cir. 1971); Antelope v. George, 211 F. Supp. 657 (N.D. Idaho 1962); Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo. 1967), and on the housing cases cited in note 55 *supra.* Several state cases involving housing discrimination were also referred to by the *Rogers* court. *See* 404 F. Supp. at 332.

68. 26 U.S.C. § 626(b) (1975) (emphasis added).

69. Brief for Nat'l Ass'n of Mfrs. as Amicus Curiae at 11, Rogers v. Exxon Research & Engineering Co., Nos. 76-1114, 76-1115 (3d Cir., appeal argued Nov. 9, 1976).

ity. It has not considered the purposes and functions of either the ADEA's statutory remedies or damages for pain and suffering. The court has effectively legislated a new remedy for violations of the ADEA, rather than applying the statute's existing remedial provisions. Because *Rogers* is currently on appeal to the third circuit, its final impact is unclear.

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ADDENDUM

On January 20, 1977, Judge Weis filed the carefully reasoned opinion of the Third Circuit in *Rogers v. Exxon*,[70] holding that damages for pain and suffering may not be awarded under the ADEA.[71] Judge Weis supported the holding with the following arguments: (1) the only monetary relief expressly sanctioned by the Act is back pay and liquidated damages; (2) the liquidated damages provision, which penalizes a defendant who has not acted in good faith, functions in much the same way as an award for pain and suffering, which usually varies proportionately with the defendant's turpitude; (3) legal damage awards rarely include compensation for mental distress, and thus the ADEA's provision for "legal relief" does not by itself support an award for pain and suffering under the Act; (4) the legistive history of the ADEA gives no indication that Congress thought the remedies specifically named might be inadequate to eliminate age discrimination; (5) settlement of claims administratively, which Congress clearly wished to encourage, would be jeopardized by the introduction of an element of damages difficult to compute with accuracy; and (6) the prospect of a large jury award for pain and suffering would not encourage claimants to accept settlement before an administrative agency.

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70. Rogers v. Exxon Research & Eng'r Co., —— F.2d ——, 14 Fair Empl. Prac. Cas. 519 (3d Cir. Jan. 20, 1977).

71. In addition, the Third Circuit remanded the case for further proceedings on Exxon's claim that the plan under which Dr. Rogers was retired was exempt, under section 623(f), from ADEA coverage. The Third Circuit thus has limited the coverage of the Act itself, as well as the remedies it provides. Plaintiffs' brief on appeal gave only scant attention to this issue. Defendants' brief was not made available to commentators.

Under another Third Circuit case filed the same day, it seems likely that Exxon will be able to prevail on this claim. *See* Zinger v. Blanchette, —— F.2d ——, 14 Fair Empl. Prac. Cas. 497 (3d Cir. Jan. 20, 1977). If so, the plaintiffs will not be able to obtain damages for the years after Dr. Rogers turned sixty.

The plaintiffs may try to obtain Supreme Court review. The trial court's holding in *Rogers* already has been relied on by district courts in the Seventh and Tenth Circuits to allow claims for pain and suffering.[72] If review is not granted now and a conflict among the circuits develops, eventual Supreme Court review of the question is probable.

C.G.N.

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72. *See* Bertrand v. Orkin Exterminating Co., —— F. Supp. ——, 13 Fair Empl. Prac. Cas. 1447, 1454 (N.D. Ill. Aug. 26, 1976); Combes v. Griffin Television, Inc., —— F. Supp. ——, 13 Fair Empl. Prac. Cas. 1455, 1460 (W.D. Okla. Oct. 8, 1976). *Contra,* Sant v. Mack Trucks, Inc., —— F. Supp. ——, 13 Fair Empl. Prac. Cas. 854 (N.D. Cal. Sept. 24, 1976), where the district court granted a motion to strike the plaintiff's claim for damages for pain and suffering. The court stated that the *Rogers* court's analogy to Title VII was misplaced, since the language of the ADEA plainly limits dollar recovery to lost wages.