Back Pay Awards: A Remedy under Executive Order 11246

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INTRODUCTION

Section 202 of Executive Order 11246 mandates that government contractors "take affirmative action to ensure" nondiscriminatory hiring and treatment of their employees.1 If a contractor practices such discrimination, a federal agency which is charged with enforcement responsibility may impose various sanctions.2 Unfortunately, the sanctions which have been employed to end section 202 violations have proven inadequate: they do not constitute a satisfactory remedy because they fail to restore to the employee benefits which are lost because of the contractor's actions. Complete restoration can occur only if back pay is awarded to the aggrieved employee. When added to other sanctions, back pay makes the employee whole and renders the discrimination nugatory.

Currently, federal agencies charged with enforcement responsibility refuse to require back pay because such awards are not specifically provided for in either Executive Order 11246 or the regula-

* Much of the material which appears in this article was gathered by the author while he was serving as Attorney-Adviser in the Office of the General Counsel, Civil Rights Division, United States Department of Health, Education, and Welfare.
1. Exec. Order No. 11246 § 202(1), 3 C.F.R. 419 (Supp. 1972), provides as follows:
Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
"During the performance of this contract, the contractor agrees as follows:
"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
2. See id. § 202(6), 3 C.F.R. at 419-20 which provides for various sanctions in the event of noncompliance.
tions issued pursuant thereto. This article contends that back pay awards are an appropriate remedy which may be imposed by enforcement agencies. The contention is supported by: an analysis of the provisions and objectives of the Executive Order; a discussion of the power of an agency to require back pay; a consideration of the purpose and nature of back pay as affecting its legality; and a review of the willingness of federal courts to imply remedies where they are needed to effectuate the purposes of a statute.

I. EXECUTIVE ORDER 11246

Issued in 1965 by President Johnson, Executive Order 11246 has as its purpose the attainment of equal employment opportunity in the employment practices of employers who are parties to contracts with federal agencies. The Executive Order provides in section 202 that contracts and subcontracts of federal contractors must contain an equal employment opportunity clause, which clause contractually obligates such contractors not to discriminate in their employment practices on grounds of race, color, national origin, religion, or sex and requires them to take "affirmative action" to ensure all applicants and employees are treated without regard to those same grounds. Affirmative action is defined as including, but not being limited to: "employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation, and selection for training, including apprenticeship." Further, "in the event of the Contractor's noncompliance . . . [he] may be declared ineligible for further Government contracts . . . and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation or order of the Secretary of Labor . . . ." From these provisions, back pay as a remedy for breach of the equal opportunity clause apparently is within the authority of the Secretary of Labor.

To determine whether a federal contractor is in compliance with the requirements of the Executive Order during the term of a contract or subcontract, a federal agency makes compliance reviews to learn

3. Id. § 202(1), 3 C.F.R. 419.
4. Id.
5. Id. § 202(6), 3 C.F.R. 419-20 (emphasis added).
if the contractor is discriminating against applicants or employees and, where necessary, to determine the extent of affirmative action taken by the contractor to seek employees of those groups against which it has discriminated in the past. Once discriminatory practices or a lack of affirmative action has been identified, the compliance agency attempts to negotiate with the contractor to obtain commitments which will put it into compliance. As this article will establish, one of the commitments which the agency legally can and should require as an element of this voluntary compliance process is the remedy of back pay.

II. THE POWER TO REQUIRE BACK PAY

A. Imposing Sanctions not Provided for—The Administrative Procedure Act

An important point with respect to back pay awards under the Executive Order concerns whether the Administrative Procedure Act (APA), precludes an administrative requirement of back pay without statutory authorization. “Sanction” is defined in section 2(f) as including: “(5) assessment of damages, reimbursement, restitution, compensation, costs, charges or fees . . . .” Such sanctions may be imposed by a whole or a part of an agency. Further, the APA requires the following: “A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.” If we concede that back pay would probably be included under section 2(f) and thus be a “sanction” to be imposed only where authorized by law, the question becomes whether the fact that back pay is not specifically provided for in the Executive Order means it cannot be required of a noncomplying contractor as a part of his compliance with the equal opportunity provisions of his contract.

The legislative history of the APA shows a change in the limitation of the imposition of sanctions under section 9(a) in the original draft: those “as specified and authorized by statute;” was changed to

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8. Id.
10. This seems reasonable since “reimbursement, restitution, [and] compensation” are elements of back pay and are within the contemplation of section 2(f).
those “as specified and authorized by law.” (Emphasis added.) This modification from “statute” to “law” was intended to permit agencies to impose sanctions that were authorized by treaties, court decisions, commonly recognized administrative practices or other law, as well as by statutes.\textsuperscript{12} Case law had recognized that the authority for agency action may be either specific or general, with the latter including both common practices and court decisions.\textsuperscript{13} This was recognized by both the Senate and House Reports issued pursuant to the passage of the APA. The House Committee on the Judiciary noted that the range of sanctions available to administrative agencies is limited to those for which general or specific authorization has been given,\textsuperscript{14} and further emphasized that the bill sets forth “the general limitations on administrative powers” in section 9.\textsuperscript{15} The Senate Committee stated that “agencies may not undertake anything which statutes or other appropriate sources of authority... do not authorize them to do.” It added that where sources are general, “no authority beyond the generality granted may be exercised.”\textsuperscript{16} It is clear then that statutes were not intended to be the only source of authority for agency activity and that where an agency imposes sanctions under authority which might be called “general,” it is up to the courts to determine whether the agency has exceeded its authority.

In considering this question, the Supreme Court looks to the statute pursuant to which the agency is acting and decides whether the sanctions imposed, although not specifically provided by the statute, will effectuate its general purpose as intended by the legislators who passed the law. If so, the agency will be found to have acted within its authority.\textsuperscript{17}

In considering the limits of “general” authority, former Attorney General Clark pointed out that while many powers of an agency are

\textsuperscript{12} T. Clark, Attorney General’s Manual on the APA 88 (1947). This concept of agencies deriving authority for their sanctions from sources other than statutes began with an early Supreme Court case, United States v. MacDaniel, 32 U.S. (7 Pet.) 1, 13-14 (1833). MacDaniel was a suit by the federal government to recover wages and commissions from an employee of the Navy who had been improperly appointed by a former Secretary of the Navy. The Court held that, notwithstanding the error, MacDaniel did not have to forfeit his wages and commissions because he provided services in his position for fifteen years and his status had been sanctioned by all the subsequent Secretaries since his appointment.

\textsuperscript{13} See, e.g., Alaska Steamship Co. v. United States, 290 U.S. 256 (1933).


\textsuperscript{15} Id. at 17.


\textsuperscript{17} Federal Trade Comm. v. Western Meat Co., 272 U.S. 554 (1926).
clearly set forth in the Act creating it, other powers "may be readily inferred from the framework of the Act creating the agency or may be logically necessary for the conduct of the powers granted to the agency."\textsuperscript{18} Whether powers of an agency are expressed or implied, they may be exercised.

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. \textit{But in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of the remedies to effectuate these policies in an infinite variety of specific situations.} Congress met these difficulties by leaving the adaptation of means to end the empiric process of administration. ... [T]he relation of remedy to policy is peculiarly a matter of administrative competence ... \textsuperscript{19}

B. \textit{The Concepts of Sanction and Remedy Under the Executive Order}

Section 209 of the Executive Order sets forth certain specific sanctions and penalties which a contracting agency may invoke against a contractor who is not in compliance.\textsuperscript{20} Back pay is not one of the enumerated sanctions. It is most important at this point to consider the relationship between the term "sanction" as used under the Executive Order, and its definition under the APA as discussed earlier. Section 209 refers to five specific items, none of which involves corrective action for individual discriminatees. These sanctions and penalties appear designed to uphold the public interest in enforcement of the equal opportunity clause (section 202) by action against contractors such as denial of federal contracts or by institution of judicial proceedings. They often operate as a forfeiture of the violator's property or some right to which he is usually entitled, and come within the APA section 2(f)(3) definition of sanction as a "penalty." They are not designed to make the discriminatee whole or to rectify in any way past discrimination.

However, the term "sanction" as defined by section 2(f)(5) of the APA ("assessment of damages, reimbursement, restitution, compensa-

\textsuperscript{18} T. Clark, \textit{supra} note 12, at 89.
\textsuperscript{19} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) (emphasis added).
tion, costs, charges, or fees") also includes what are normally termed remedies, for those discriminated against. Thus a back pay award remedy, which under the Executive Order would be corrective action designed to make the discriminatee whole and to rectify past discrimination, would be a sanction by the APA definition. According to subpart B, clause (6) of section 202 of the Executive Order, the noncompliance of a contractor may be met with "such . . . sanctions . . . and remedies . . . as provided in Executive Order No. 11246 . . . or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law." (Emphasis added.) Consequently, "sanctions" specified in the APA may be utilized under the Executive Order's authorization.21

C. Back Pay and the Contractual Obligation

When a federal agency enters into a contract, it does so with the intent of obtaining an enforceable right to performance of the terms of the agreement—including the equal opportunity clause of Executive Order 11246. As with any other contractor, the United States Government is entitled to pursue "any appropriate remedies for breach of the obligations agreed to by its contractors, and needs no specific authorization for judicial enforcement of its rights."22

As a matter of law, an agency may require complete equality in employment practices. Since paying individuals unequal salaries for the same work, based on race, sex, color, religion and national origin constitutes discrimination, performance on the part of the employer would necessarily seem to require back pay awards. That is, the organization with whom the agency has a contract has a contractual obligation not to discriminate and where it has been found to be in violation of that obligation, it can only fulfill the contract by doing what it should have done initially—paying equal wages for equal work.

Under ordinary rules of contract law, the failure of a contractor to comply with the nondiscrimination clause is a breach of contract for which the United States is entitled to an appropriate remedy by way of damages, rescission or injunction against a contractor. The fact,

21. It might be argued that this section is addressed to remedies against the contractor rather than affirmative action to "make whole" individual discriminatees. If this construction were accepted, the provisions might be inapplicable to our situation. However, I do not accept this construction, and am of the opinion that in any case, back pay can be required as a remedy. This contention will be supported in subsequent parts of this article.

however, that back pay is nowhere mentioned in the contract clause, or the regulation issued pursuant to the Executive Order, presents a question of contract interpretation and construction which bears consideration.

As noted in Corbin, section 561,

A contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made . . . 23

In cases where the major incident of discrimination against an individual is payment of lower wages than his or her counterpart, back pay should be considered an implied requirement “indispensable to effectuate the intention of the parties” which arises from the contract language and surrounding circumstances. (This would be so even if section 202 (6) of the Executive Order, which does not specifically provide for back pay awards, is viewed as the authority for a contracting agency to seek remedies by a contractor for discrimination clauses of its contracts. The purpose of this provision, expressly agreed to by the contractor in signing the contract, is to provide a remedy under the Executive Order in unequal wage cases found to be based on illegal discrimination.) Back pay is the only effective remedy to eliminate the salary inequities and to make the discriminatees whole. In addition Corbin notes in section 550 that it is a rule that public contracts and other contracts by which the public interest is affected shall be “construed in the manner most favorable to the public.” Surely, in contracts containing the equal employment opportunity clause, to remedy discrimination is in the public interest.

III. The Purposes and Nature of a Back Pay Remedy

Section 202 (1) of the Executive Order requires a contractor to agree that during the performance of his contract with the Government, he “will take affirmative action . . .” and “such action shall include . . . rates of pay or other forms of compensation.” As the government contractor’s affirmative action obligation clearly requires him to take whatever remedial action necessary with regard to pay rates in the absence of discrimination, surely affirmative action in this regard

23. 3 A. Corbin, Contracts § 561 n.1 (2d ed. 1960).
is required where it is proven that a contractor has discriminated in the past. A victim of discrimination is not made whole until he receives earnings lost as a result of his employer's discriminatory practices. He remains in a position beneath that of his co-workers and continues to feel the impact of his minority status. In effect then, there is a continuation of the discrimination against him, and a continuing violation of the equal opportunity clause, until he receives an award of back pay. "Only thus can there be a restoration of the situation, as nearly as possible to that which would have obtained but for the illegal discrimination." And only in this way can a contractor cure his defective performance under the clause.

The concept of "affirmative action," as used in the Executive Order, when viewed in the light of its usage in the National Labor Relations Act, section 10 (c), and Title VII of the Civil Rights Act of 1964, section 706 (g), seems to include back pay as a remedy. Section 10 (c) of the NLRA specifically requires individuals found to have been engaged in unfair labor practices "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter," while section 706 (g) allows a court to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ." The Supreme Court has specifically indicated that the mention of back pay in the NLRA is illustrative of the requirement of affirmative action to remedy past discrimination.

29. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). An employer argued that Congress had intended to exclude the remedy of discriminatory termination of employment from coverage under the National Labor Relations Act by the phrase "including reinstatement of employees with or without back pay, as will effectuate the policies of the Act," and the court stated:

Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . . Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board "to take such
The rationale for a back pay remedy has been extensively considered in the legislative history and cases involving section 10 (c) of the NLRA. In hearings held pursuant to the passage of section 10 (c) in the House of Representatives, the Committee on Labor noted:

The most frequent form of affirmative action required in cases of this type [referring to unfair labor practices] is specifically provided for, i.e., the reinstatement of employees with or without back pay, as the circumstances dictate. No private rights of action is contemplated. Essentially the unfair labor practices listed are matters of public concern . . .; the proceeding is in the name of the Board upon the Board's formal complaint.30

Back pay orders were seen to have the primary function of acting as a remedy for conditions created by unfair labor practices with the incidental consequences of providing compensation for the employee and punishment for the employer, the latter serving the deterrent function of discouraging employers from engaging in unfair labor practices by requiring them to make good losses which their violations of the law have caused.

The Supreme Court considered the question of remedies other than back pay ordered by the Labor Board in Virginia Electric & Power Co. v. NLRB.31 The Board had ordered the employer to reinstate with back pay two employees found to have been discriminatorily discharged and, in addition, to reimburse all its employees in the amount of dues and other deductions made from wages on behalf of a union the Board had ordered disestablished. The company appealed. In discussing the Board's discretion, the Court stated that the particular means by which the effects of unfair labor practices are to be expunged are matters "for the Board not the courts to determine."32 Thus, it noted, the Board's exercise of discretion resulting in a decision to demand reimbursement of "checked-off dues" will stand "unless it can be shown that the order is a patent attempt to achieve ends other than

affirmative action as will effectuate the policies of this Act," simpliciter, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application.

Id. at 187-89. The Executive Order clearly provides such jurisdiction.
32. Id. at 539, quoting from I.A. of M. v. NLRB, 311 U.S. 72, 82 (1940).
those which can fairly be said to effectuate the policies of the Act." The Court found that the ordered remedy appeared "manifestly reasonable" and promoted the policies of the Act in "substantially the same manner as would a back pay award." The reimbursement order was not a redress for a private wrong. Like back pay, the remedy restored to employees what had been wrongfully taken from them due to the company's contravention of the Act.

In the section of the opinion most significant for the purposes of this article, the Court offered that both monetary awards (back pay and reimbursement), though they resemble compensation for private injury, are "remedies created by statute—one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights." Thus, it concluded, it would be erroneous to characterize the reimbursement order as penal and wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order.

The only discussion of the rationale for back pay awards pursuant to title VII was in Bowe v. Colgate Palmolive Co., a class suit by female employees who allegedly were laid off because of sex discrimination by their employer. The defendant had restricted female employees to jobs not requiring the lifting of more than thirty-five pounds. The Seventh Circuit, in awarding back pay to the plaintiffs, held that

> [t]he clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it. To permit only injunctive relief in the class action would frustrate the implementation of the strong Congressional purpose expressed in the Civil Rights Act of 1964.

Under both section 10 (c) of the National Labor Relations Act and, section 706 (g) of the Civil Rights Act of 1964, back pay awards have a public purpose in serving to effectuate the policies of the Acts and do not amount to a private remedy. These awards are elements of affirmative action which serve to make the employee suffering discrimination "whole" by attempting to restore the situation which would have

33. Id. at 540.
34. Id. at 543.
35. 416 F.2d 711 (7th Cir. 1969).
36. Id. at 720.
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existed but for the discrimination. Under the Executive Order, back pay awards would similarly have a public purpose and not amount to private relief. Just as the elimination of unfair labor practices is a public concern, so is discrimination by an employer, and back pay in each situation, while incidentally providing compensation for the employee, serves primarily as a deterrent against an employer acting similarly in the future. It would also aid in the enforcement of the Executive Order as it does the National Labor Relations Act due to the high cost to a violator of awarding back pay. And just as with the Board, the agency administering the Executive Order in a particular situation would most probably act as the agent of the discriminatee and thus as a claimant for the back pay award while the injured employee would play no active role whatsoever in the proceedings.

The major difference, of course, between section 10 (c) and the Executive Order is that in the former, back pay is one of the stated remedies while it is not provided for in any way in the latter. Yet the Supreme Court in Virginia Electric & Power Co. v. NLRB, seems to be stating that where a remedy is implied by an administrative agency pursuant to a statute and serves to effectuate the policies of the statute in a reasonable way, it will not be struck down by the courts. It is submitted that this is the role that back pay would play under the Executive Order.

Neither the Railway Labor Act nor the Fair Labor Standards Act has specific provisions for back pay awards as remedies. Nevertheless, several courts have ruled that such a remedy would be appropriate under circumstances where it is established that employees have wrongfully suffered at the hands of employers and the back pay remedy is found necessary to effectuate the purpose of the act involved. Mitchell v. Robert De Mario Jewelry, Inc., involving the Federal Fair Labor Standards Act, is illustrative.

There the Supreme Court considered whether a district court is empowered to order reinstatement for wages lost because of unlawful discharge or other discrimination and ruled that jurisdiction to award back pay, for violations by an employer of section 15(a)(3) of the Fair Labor Standards Act exists in suits by the Secretary of Labor.

under section 17 of the Act. Section 15(a)(3) makes it unlawful for an employer covered by the Act to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . .

Section 17 gives the district court its jurisdiction to hear Fair Labor Standards Act cases as follows:

for cause shown, to restrain violations of section 15: provided, that no court shall have jurisdiction in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

The specific issue before the Court, then, was whether, in an action under section 17 of the Act by the Secretary of Labor to enjoin violations of section 15(a)(3), a district court is empowered to order reimbursement for wages lost because of unlawful discharge or other discrimination involving an employee.

The Court discussed the central aim of the Act as being to attain certain minimum labor standards, which the Court viewed as best achieved by relying on information and complaints received from employees seeking to vindicate their rights under the Act. Provisions against discriminatory discharges were included to help produce effective enforcement where reliance is on such complaints (referring to sections 15(a)(3) and 17). Back pay awards were seen as a means of encouraging employees with legitimate grievances to make their complaint without fear of discharge and total loss of wages for the period necessary to seek and obtain reinstatement.42 Thus, back pay was found to be compensatory, and invoking of back pay jurisdiction by a court in a section 17 action by the Secretary of Labor was not punitive (as argued by the respondents), but rather proper as a public remedy for violation of section 15(a)(3).

It is clear from an analysis of the foregoing cases that back pay as an equitable remedy will be fashioned by a court to: maintain and reconstruct the status quo, provide retroactive compensation, protect employee's benefits against lapse of time, aid in enforcement of the

41. Id. § 217.
42. 361 U.S. at 290, 292.
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particular statute involved, and provide money damages as incident to reinstatement or to judicial order of future action. The federal courts have exhibited a willingness to order back pay as a remedy to protect damaged employees in situations where such awards were not specifically provided for by statute or regulation.\footnote{See Chambers v. United States, No. 141-70 (U.S. Ct. Cl., Oct. 15, 1971) and Allison v. United States, No. 507-69 (U.S. Ct. Cl., Oct. 15, 1971), as additional cases tending to demonstrate the willingness of federal courts to find back pay within the Executive Order.} The decisions speak of the necessity for back pay as a means of effectuating the purpose of the statute pursuant to which the agency is acting. It is clear from these decisions that the courts involved placed no limitations on the imposition of the back pay remedy. There is nothing to indicate that the Railway Labor Board or the Labor Department would be precluded from requiring such a remedy to achieve a purpose consistent with that of the Railway Labor Act or the Fair Labor Standards Act. And most importantly, the courts did not reserve the power to impose the remedy to themselves.

IV. IMPLICATION OF REMEDIES

In many different areas of the law, the federal courts have shown a willingness to imply a damages remedy, even though such a remedy was not specifically provided by the statute involved in the case. A consideration of decisions involving the implication of remedies is important in order to determine in what situations the courts find it appropriate to do so.\footnote{See Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 290 (1963).} This will provide a further basis for predicting the judicial response to agency imposition of back pay pursuant to the Executive Order.

In the area of civil rights, courts have, until recently, been reluctant to imply a damages remedy.\footnote{See Bell v. Hood, 327 U.S. 678 (1946).}

But in \textit{Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics},\footnote{409 F.2d 718 (1969).} an action for damages based on violation of the fourth amendment by a federal agent acting under color of law, the Second Circuit ruled that a remedy could be implied for constitutional as well as statutory violations.\footnote{Id. at 721.} However, it noted that although damages as well as equitable remedies have been implied to enforce the

\textit{Commonwealth of Pennsylvania v. Focht.}
right to compensation for condemnation under the fifth amendment, the damages remedy is not implicit in the fourth amendment since there are other ways to preserve the validity of the amendment. The court specifically referred to the existence of a remedy at common law in a tort action for trespass or invasion of privacy in a state court, reasoning that the fact that the amendment is designed to protect a common law right does not inevitably lead to the conclusion that there is a federal remedy. Thus, it concluded that a damages remedy is less “essential” to guarantee the enforcement of a constitutional right, than remedies restraining threatened or continuing violations or denying the government the benefit of a violation.

On appeal, the Supreme Court determined that violation of the fourth amendment by a federal agent acting under color of law does create a cause of action for damages based on unconstitutional conduct. Relying on language in Bell v. Hood, the Court found that although there was, in fact, no provision for money damages, it is “well settled that where legal rights are invaded and a federal statute provides a general right to sue for such invasion, the federal courts may use any available remedy to make good the wrong done.” Justice Harlan’s concurrence suggested that a traditional judicial remedy such as damages is appropriate to the vindication of personal interests protected by the amendment. He also found that in suits for damages based on a violation of federal statutes lacking the express authority for a damages remedy, the Supreme Court has authorized such relief where “damages are necessary to effectuate the congressional policy underpinning substantive provisions of the statute.”

In the securities area, the Supreme Court found in J. I. Case Co. v. Borak that the power granted by section 27 of the Securities Exchange Act of 1934 to enforce any duty or liability under the Act, implies the power to make the right of recovery effective. The Court emphatically pointed out that “the answers [to questions concerning

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49. 409 F.2d at 724-26.
50. Id. at 724.
52. 327 U.S. 678 (1946).
55. Id. at 402, citing J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
58. 377 U.S. at 433-34.
the extent and nature of legal consequences] are to be derived from the statute and the federal policy which it has adopted."

Another securities related case, Colonial Realty Corp. v. Bache & Co.,60 involved a suit by plaintiff to recover losses suffered as a result of a sale of securities from its margin account maintained with defendant. The suit was based, in addition, on tort and contractual theories, on a claim of a private right to damages under the Securities Act due to Bache's conduct having violated a New York Stock Exchange rule, and the "just and equitable principles of trade" provisions of section 6 (b) of the Act. With respect to implication of remedies, Judge Friendly noted:

Implication of a private right of action may be suggested by explicit statutory condemnation of certain conduct and a general grant of jurisdiction to enforce liabilities created by the statute . . . or from such considerations as the protection intended by the legislature and the ineffectiveness of existing remedies, administrative and judicial, fully to achieve that end.61

Absant contrary legislation, where implication of a damages remedy is deemed necessary to effect the protective purposes of a statute, it is clear that, based on the grant of general jurisdiction to the federal courts, an inherent power to adjust remedies will be found.62 That is, the federal judiciary is free to fashion federal rules for decision where they are necessary, such as where they are demonstrated to be of importance in connection with a specific national interest and concern.63 As the majority in Anderson v. Abbott64 stated:

If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we were helpless to fashion the instruments for appropriate relief.65

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60. 358 F.2d 178 (2d Cir. 1966).
61. Id. at 181 (emphasis added).
64. 321 U.S. 349 (1944).
65. Id. at 366-67.
From the cases considered, it seems clear that the power to imply remedies is, by inference, found to exist in the federal agency as well as in the federal courts where such implication is necessary to carry out the purposes of the statute pursuant to which the agency is acting. Where a damages remedy is the only effective means of combating statutorily proscribed conduct, a court which would imply the remedy would not strike down agency imposition of similar relief.

Because of the need for a back pay requirement to encourage voluntary compliance, to erase discrimination against protected individuals, and to effect the clear and important public policy involved, I believe that the courts would uphold agency imposition of such a requirement under the Executive Order.

**CONCLUSION**

Back pay can legally be required by a contracting agency as an element of affirmative action agreed to by a federal contractor based on his acceptance of the provisions of section 202 (1) of the Executive Order. The APA definition of sanction encompasses back pay remedy, and the Executive Order allows for agency imposition of sanctions which are otherwise provided by law. In addition, the contractual obligation of the employer demands that he refrain from discriminating against employees based on race, color, national origin, religion or sex. Based on fundamental principles of contract law, specific performance may be demanded. Full performance would require that the effects of the breach be nullified and this can be done only by an award of back pay. The general authority of an agency to fashion remedies to effectuate the purpose for which it was formed offers an alternative theory for the granting of a back pay award. Substantial evidence indicates that where the federal courts find it necessary to grant either back pay or a damages remedy in order to effectuate the purpose of a statute, they will do so without hesitation—irrespective of whether such reme-

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66. See, e.g., *In re Karnack*, United States Department of Health, Education and Welfare Hearing No. CR-827 (Sept. 15, 1971), where the hearing examiner granted back pay to teachers not reemployed in violation of section 601 of the Civil Rights Act of 1964 and section 10 of Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964. The respondent district had dismissed the teachers when it adopted a desegregation plan. The hearing examiner ruled that “it is only fair to require the Respondent District to offer reemployment to [names of teachers] with back pay . . .” as a condition for reinstating its eligibility to participate in the Federal programs. No other basis for the award was given.
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dies are specifically provided by statute. In view of this, a court ruling on the question of back pay awards as remedial relief pursuant to Executive Order 11246 would uphold a requirement by a federal agency of back pay and this decision would establish back pay as a remedy which is "otherwise provided by law" as required by section 202 (6) of the Executive Order.

The need for a back pay remedy under Executive Order 11246 is clear. The Equal Opportunity Act of 1972 does not provide such relief for (1) charges of discrimination made prior to March, 1972, (2) charges made by a class alleging acts of discrimination against it as a whole, or (3) elementary and secondary school teachers and principals. In addition, the 1972 enactment may take years to implement effectively, and requires a lawsuit to provide monetary relief in the form of back pay. Judicial relief pursuant to section 1981 of title 42 of the U.S.C. concerning private employment discrimination is available only in six judicial circuits. Suits under section 1983 require defendant action under color of state law, and generally involve only public contractors. The Equal Pay Act deals solely with sex discrimination and involves only the issue of unequal pay for equal work. In addition, private suits are expensive and usually involve long time periods before a decision is rendered.

Thus, since many employees of federal contractors have no effective remedy for employment discrimination and others who can bring private suits find it a hardship to do so, Executive Order 11246 becomes the only source of relief. Because employees who suffer discrimination currently have no remedy under the Executive Order, it is my belief, based on legal and policy grounds, that back pay awards should be required of federal contractors pursuant to the Executive Order.

68. Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971).