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The Age Discrimination in Employment Act[1] (ADEA) prohibits arbitrary age discrimination by employment agencies, labor organizations, and employers[2] against individuals between the ages of forty and seventy.[3] While Congress patterned the ADEA's substantive provisions after the prohibitions against racial discrimination of Title VII of the Civil Rights Act of 1964,[4] the statute's remedial provisions "essentially follow those of the Fair Labor Standards Act"[5] (FLSA). The FLSA, which establishes minimum wage rates and maximum hour requirements,[6] affords supplemental pay to employees for hours actually worked. But the ADEA provides damages to replace the compensation that the victim of a discriminatory termination or refusal to hire would have earned.[7] In most FLSA cases, the plaintiff remains employed and has had no opportunity for outside gains to offset the damages caused by her employer's violation. In ADEA cases, however, a plantiff may have mitigated a discriminatory act's impact with income from substitute employment, unemployment compensation, retirement benefits, welfare payments, and other sources. Consequently, in ADEA cases, unlike most FLSA cases,[8] courts must decide whether to subtract certain types of

1. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1976, Supp. II 1978 & Supp. III 1979)).

2. "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 29 U.S.C. § 630(b) (1976).

3. 29 U.S.C. §§ 623, 631 (1976), *as amended by* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189.

As originally enacted in 1967, the ADEA protected workers between the ages of forty and sixty-five. In 1978, Congress extended the upper age limit of the Act to age seventy.

4. 42 U.S.C. § 2000e (1976). "[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII." Lorillard v. Pons, 434 U.S. 575, 584 (1978). *Compare* 42 U.S.C. § 2000e-2(a)(1) (unlawful for employers "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex or national origin"), *with* 29 U.S.C. § 623(a)(1) (1976) (unlawful for employers "to fail or refuse to hire or to discharge any individual . . . because of such individual's age").

5. H.R. REP. No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218; S. REP. No. 723, 90th Cong. 1st Sess. (1967), *reprinted in part in* 113 CONG. REC. 31,249 (1967). The FLSA is codified at 29 U.S.C. §§ 201-219 (1976) (amended 1977).

6. 29 U.S.C. §§ 206, 207 (1976 & Supp. III 1979).

7. The ADEA also prohibits discriminatory promotion practices, 29 U.S.C. § 623(a)(2) (1976) (amended 1978), but cases involving such practices do not raise the issue addressed by this Note.

8. *But see* Marshall v. Great Lakes Recreation Co., 2 LAB. L. REP. (CCH) (90 Lab. Cas.) ¶ 33,959 (E.D. Mich. Jan. 8, 1981); Wirtz v. Southern Seating Inc., 59 Lab. Cas. 43,653 (M.D.

payments received by the plaintiff after the discriminatory act from back pay awards.

Courts that have addressed this "set-off" question have reached inconsistent results. Although they agree that the ADEA's damage provisions seek to make plaintiffs whole,[9] they differ as to which set-offs the make-whole standard requires. Many courts have reduced monetary awards by wages earned at another job,[10] or by other income that the plaintiff would not have received absent the discrimination.[11] Others have refused to order such set-offs.[12] Still others

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Fla. 1968); Mitchell v. Dyess, 180 F. Supp. 852 (S.D. Ala. 1960). These cases arose under § 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3) (1976), which prohibits retaliatory discharge of employees who attempt to enforce the FLSA.

9. *See, e.g.*, EEOC v. Sandia Corp., 23 Empl. Prac. Dec. 17,121, 17,142 (10th Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

10. Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974) (dicta); Moysey v. Andrus, 22 Empl. Prac. Dec. 15,325-3 (D.D.C. 1980); EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Prac. Dec. 14,693 (W.D. Tenn. 1980); Scofield v. Bolts & Bolts Retail Stores, Inc., 20 Empl. Prac. Dec. 12,299 (S.D.N.Y. 1979) (dicta); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 712 (E.D. Wis. 1978) (dicta); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Hodgson v. Ideal Corrugated Box Co., 8 Empl. Prac. Dec. 6366 (N.D. W. Va. 1974); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974); Monroe v. Penn-Dixie Corp., 335 F. Supp. 231, 234-35 (N.D. Ga. 1971) (dicta).

11. EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Prac. Dec. 14,693 (W.D. Tenn. 1980) (unemployment compensation); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978) (unemployment compensation); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977) (unemployment compensation); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974) (unemployment compensation); Hodgson v. Ideal Corrugated Box Co., 8 Empl. Prac. Dec. 6366 (N.D. W. Va. 1974) (unemployment compensation); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973) (unemployment compensation).

12. EEOC v. Sandia Corp., 23 Empl. Prac. Dec. 17,121, 17,140-42 (10th Cir. 1980) (unemployment compensation); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977) (unemployment compensation); Scofield v. Bolts & Bolts Retail Stores, Inc., 20 Empl. Prac. Dec. 12,299, at 12,302 (S.D.N.Y. 1979) (unemployment compensation); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730 n.20 (E.D.N.Y. 1978) (unemployment compensation), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979). *EEOC v. Sandia Corp.* looked to the source of the benefit to decide whether to reduce the back pay award. The court set off severance pay provided by the defendant employer but not unemployment compensation because it was derived from a "collateral" source. 23 Empl. Prac. Dec. at 17,141-42. Both EEOC v. Sandia Corp., 23 Empl. Prac. Dec. at 17,140-42, and Marshall v. Goodyear Tire & Rubber Co., 554 F.2d at 736, held set-offs discretionary with the court.

All courts to consider the issue have set off actual earnings, but some courts that did not decide the matter have suggested that they might not. Courts are also split over whether amounts earnable ought to be set off from ADEA damages. *Compare* EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Prac. Dec. 14,693 (W.D. Tenn. 1980); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978) (allowing set-off of amounts earnable), *with* Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Combes v. Griffin Television, Inc., 421 F. Supp. 841 (W.D. Okla. 1976); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974) (disallowing set-off of amounts earnable). Courts should set off amounts the plaintiff could have earned if Congress intended to adopt the general mitigation principle that requires reasonable efforts to find substitute employment. *See, e.g.*, 11 S. WILLISTON, CONTRACTS § 1359 (1968). Congress, however, was mindful of the obstacles faced by older job-seekers. *See, e.g.*, 113 CONG. REC. 34,744-45,

have set off only some of the benefits received by the plaintiff.[13] The uncertainty arising from these inconsistent results frustrates efforts to settle ADEA disputes through conciliation and mediation, the preferred methods of enforcing the Act.[14]

This Note proposes a theory to govern set-offs against ADEA damage awards that best effectuates congressional intent. It suggests that courts should set off those types of benefits received after a violation that, had they been lost because of a violation, would have been included in the damage award. Part I identifies the proper measure of damages under the ADEA as the net loss of "job-related benefits," doubled in cases of willful violation. It explains first that job-related benefits should be broadly defined to include unemployment compensation and social security benefits as well as wages, and second that the congressional desire to make victims of age discrimination "whole" is best served by awarding the *net* loss of these job-related benefits rather than the full loss of back pay — that is, by allowing some set-offs. Part II discusses which set-offs are appropriate, concluding that set-offs should include all employment-related gains received by the plaintiff, but not income generated independently of an employment relation.

I

The ADEA provides that its prohibitions against age discrimination shall be enforced in accordance with certain of "the powers, remedies, and procedures"[15] of the FLSA. Violators of the FLSA "are liable to . . . employees affected in the amount of their unpaid

34,751 (1967) (remarks of Reps. Perkins, Pucinski, Eilberg and Dwyer). The issues raised by a mitigation requirement under these circumstances are beyond the scope of this Note.

13. *See, e.g.*, Wise v. Olan Mills Inc., 495 F. Supp. 257 (D. Colo. 1980) (setting off private pension benefits, but not social security payments).

14. *See* text at note 39 *infra*.

15. 29 U.S.C. § 626(b) (1976). The section provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section [remedial provisions of the FSLA]. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. 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. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."[16] For the purpose of applying the FLSA's remedial provisions, "[a]mounts owing to a person as a result of a violation" of the ADEA are "deemed to be unpaid minimum wages or unpaid overtime compensation,"[17] and liquidated damages are recoverable only for willful violations.[18] But the ADEA does not indicate what "amounts" are "owing," and the courts have had to develop the measure of damages on their own. The Supreme Court has construed the ADEA to authorize actions for "lost wages,"[19] and the Conference Report on the 1978 ADEA amendments defined "amounts owing" to include "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits."[20]

Congress's inclusion of "job-related benefits" in the base monetary remedy appears designed to compensate discriminatees for all the pecuniary benefits that would have received from an employment relation. The ADEA thus protects a package of benefits that includes much more than an employee's salary. Although the value of certain entitlements might be difficult to estimate,[21] courts have included in damage assessments pensions, insurance plans, and other fringe benefits that a worker would have received absent the discrimination.[22] The same logic suggests that the ADEA's protection

16. 29 U.S.C. § 216(b) (Supp. III 1979).

17. 29 U.S.C. § 626(b) (1976). The significance of the equation of ADEA "amounts owing" with FLSA "unpaid minimum wages" and "unpaid overtime compensation" is that damages under the ADEA thus become mandatory rather than discretionary with the court. *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978). Further, under both Acts, either the Government or an aggrieved individual may bring an enforcement action. 29 U.S.C. §§ 216(c), 217, 626(b), 626(c) (1976).

> Following the model of the FLSA, the ADEA establishes two primary enforcement mechanisms. Under the FLSA provisions incorporated in § 7(b) of the ADEA, 29 U.S.C. § 626(b), the Secretary of Labor may bring suit on behalf of an aggrieved individual for injunctive and monetary relief. 29 U.S.C. §§ 216(c), 217 (1970 ed. and Supp. V). The incorporated FLSA provisions together with § 7(c) of the ADEA, 29 U.S.C. § 626(c), in addition, authorize private civil actions for "such legal or equitable relief as will effectuate the purposes of" the ADEA.

Lorillard v. Pons, 434 U.S. 575, 579 (1978).

Authority to enforce the ADEA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission pursuant to Reorg. Plan. No. 1 of 1978, 3 C.F.R. 404 (1980), *reprinted in* 5 U.S.C. app., at 289 (Supp. II 1978).

18. 29 U.S.C. § 626(b) (1976).

19. Lorillard v. Pons, 434 U.S. 575, 582 (1978).

20. H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535.

21. *See* Hodgson v. Ideal Corrugated Box Co., 8 Empl. Prac. Dec. 6366, 6374 (N.D. W. Va. 1974) (denying recovery of pension and bonus as too speculative).

22. Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) ("Pension benefits are part of an individual's compensation and, like an award of back pay, should be awarded under 29 U.S.C. § 626(b)."); EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Proc. Dec. 14,693, 14,694

should extend to unemployment compensation and social security benefits lost because of discrimination. Although payment is deferred, an employee, in effect, earns both unemployment compensation and social security benefits while she is working.[23] Discrimination could threaten these benefits in a variety of ways. For example, because an individual must work a certain number of quarters to attain fully-insured social security status, a discriminatory discharge or refusal to hire could jeopardize her eligibility or permanently reduce her benefit levels.[24] Similarly, the timing of a discriminatory discharge may affect a worker's eligibility for unemployment compensation. Since Congress used sweeping language to define the ADEA's package of protected benefits, it is reasonable to infer an intent not only to guarantee older workers current income, but also to allow them to earn their eligibility for programs designed to protect against layoffs and secure retirement income.[25]

The protection afforded by the ADEA, though broad, is not unlimited. Congress did not seek to compensate for personal injuries,[26] and thus did not authorize the recovery of general consequential damages other than through the ADEA's liquidated damages provision.[27] The requirement that losses be "job-related" limits recovery to those pecuniary benefits connected to the employment relation, and courts generally have refused to compensate plaintiffs for nonpecuniary losses such as pain and suffering.[28]

(W.D. Tenn. 1980) (allowing recovery of fringes withheld); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 730 (E.D.N.Y. 1978) (allowing recovery of pension benefits), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wis. 1978) (allowing recovery of pension benefits); Combes v. Griffin Television, Inc., 421 F. Supp. 841, 843-44 (W.D. Okla. 1976) (awarding back pay, cost of living increases, "talent fees," value of company-paid health and life insurance benefits, and profit-sharing benefits); Bishop v. Jelleff Assocs., 398 F. Supp. 579, 596 (D.D.C. 1974) (awarding relief including "back pay, reinstatement and restoration of employee benefits").

23. *See* NLRB v. Marshall Field & Co., 129 F.2d 169, 173 (7th Cir.) (Evans, J., dissenting), *affd. per curiam*, 318 U.S. 253 (1942).

24. *See* [1981] 1 UNEMPL. INS. REP. (CCH) ¶¶ 12,101, 12,109.

25. *See* Blim v. Western Elec. Co., 496 F. Supp. 818, 822 (W.D. Okla. 1980); Mistretta v. Sandia Corp., 18 Empl. Prac. Dec. 5527, 5530-38 (D. N.M. 1978).

26. *See, e.g.*, Sant v. Mack Trucks, Inc., 424 F. Supp. 621, 622 (N.D. Cal. 1976).

27. *See, e.g.*, Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

28. *See* EEOC v. Sandia Corp., 23 Empl. Prac. Dec. 17,121, 17,142 (10th Cir. 1980) ("Back pay awards seek to make whole discharged employees for their lost wages and not for extra expenses"). Cases denying damages for pain and suffering include Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979); Vasquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Ins. Co., 559 F.2d 1036 (5th Cir. 1977); Rogers v. Exxon Research & Engr. Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Crispen v. Southern Cross Indus., 15 Fair Empl. Prac. Cas. 405 (N.D. Ga. 1977); Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976). Schlicke v. Allen-Bradley Co., 448 F. Supp. 252 (E.D. Wis. 1978), denied damages for injury to reputation.

While Congress indicated that it designed the ADEA to compensate for only a limited class of injuries, it failed to clarify whether the "loss" recoverable by victims of discrimination is the net loss of "job-related benefits" or the full amount of back pay. Because the ADEA does not explicitly provide for set-offs, plaintiffs can argue that Congress did not intend to limit awards to net loss. However, "the absence of express set-off language in the ADEA enforcement provisions does not compel the inference that Congress intended to preclude set-offs."[29] Awareness of the common-law tradition of set-offs[30] and court-ordered set-offs under the FLSA[31] might have led Congress to conclude that an explicit set-off provision was unnecessary. The more reasonable conclusion is that Congress simply did not consider the problem.[32] The lack of congressional guidance requires that courts resolve the question by looking to the ADEA's purposes. Remedial provisions generally should further the purposes of anti-discrimination statutes,[33] and the ADEA specifically directs that courts "grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the Act.[34]

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[35] Damage awards under the ADEA serve two major functions:

> First, the prospect of economic penalties more certainly deters illegal employment practice than does exposure to injunctive relief or prospective equitable remedies such as reinstatement. Second, economic exactions recompense individuals for injuries inflicted by employers' discriminatory conduct.[36]

Although either a full back pay award or one limited to the net loss

29. Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

30. *See* C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 160 (1935).

31. *See, e.g.*, note 8 *supra*.

32. Because most FLSA cases do not involve set-off questions, *see* text at notes 7-9 *supra*, Congress could have overlooked the need for set-off provisions when incorporating the FLSA's remedial provisions in the ADEA.

33. *See* Rodriguez v. Taylor, 569 F.2d 1231, 1237 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

34. 29 U.S.C. § 626(b) (1976). Section 626(c) similarly provides: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ." 29 U.S.C. § 626(c) (1976).

35. 29 U.S.C. § 621(b) (1976).

36. Rodriguez v. Taylor, 569 F.2d 1231, 1237 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

of "job-related benefits" would have deterrent and compensatory effects, the Act's approach to age discrimination suggests that the net-loss measure of damages is more appropriate. Admittedly, the greater awards that result when courts deny set-offs would increase deterrence. But Congress did not intend to induce compliance through fear of heavy financial penalties. Rather, Congress believed that the ADEA's purposes would be served primarily through conciliation and friendly persuasion. At least one representative emphasized that age discrimination, unlike race discrimination, is not based on pervasive societal prejudice, but rather on misperceptions of the older worker's ability to function on the job.[37] To eliminate these misperceptions, the ADEA established "a continuing program of education and information."[38] Further, conciliation and mediation are the preferred methods of enforcing the Act.[39] According to Senator Javits, one of the bill's sponsors, Congress designed the ADEA's enforcement scheme "to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business, and with complete fairness to the workers."[40] In addition, the 1978 Conference Report indicates that Congress did not sanction punitive damages;[41] instead it authorized damage awards that would compensate for job-related losses.[42] Courts will effectuate this make-whole relief objective only if they calculate back

37. Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These [racial] discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job-seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

113 CONG. REC. 34,742 (1967) (remarks of Rep. Burke).

38. 29 U.S.C. § 622(a) (1976).

39. *See* H.R. REP. NO. 805, 90th Cong., 1st Sess. 5, 10, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2220, 2223; S. REP. NO. 723, 90th Cong., 1st Sess., 1, 5, 10 (1967), *reprinted in* 113 CONG. REC. 31,249, 31,250, 31,252 (1967); Statement by the President After Signing Bill Prohibiting Improper Age Discrimination in Employment, 3 WEEKLY COMP. OF PRES. DOC. 1736 (Dec. 16, 1967).

The ADEA requires the Secretary of Labor to attempt conciliation between the parties in all cases. 29 U.S.C. § 626(b) (1976). An individual who wishes to file a private action can do so only after the Secretary has had sixty days to attempt conciliation. 29 U.S.C. § 626(d) (1976). *See* note 15 *supra*.

40. 113 CONG. REC. 31,254 (1967) (remarks of Senator Javits).

41. H.R. REP. NO. 950, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535.

42. *See* Rodriguez v. Taylor, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974); Boddorff v. Publicker Indus., Inc., 488 F. Supp. 1107, 1113 (E.D. Pa. 1980); DeFries v. Haarhues, 488 F. Supp. 1037, 1043 (C.D. Ill. 1980); EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Prac. Dec. 14,693, 14,694 (W.D. Tenn. 1980); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977).

pay awards on a net loss basis.[43]

Two other considerations suggest that the measure of deterrence added by denying set-offs is unnecessary and insignificant. First, because the ADEA mandates liquidated damages for willful violations,[44] a net loss measure of damages is not inconsistent with its deterrent purpose.[45] Although Congress did not envision liquidated damages as a punitive remedy,[46] it apparently believed that such damages would effectively deter willful violations.[47] Presumably the Act can deter only willful violators, and these will suffer double

43. Under title VII, which addresses injuries similar to those treated by the ADEA, "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g) (1976). This set-off provision covers only two items, actual earnings and amounts earnable. Courts are split on whether other set-offs are allowable. For title VII decisions that have ordered set-off of unemployment compensation, see, e.g., Marshall v. Communications Workers of America, 21 Empl. Prac. Dec. 12,719, 12,721 (D.D.C. 1979); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967). *Contra*, Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095 (D. Md. 1977); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971).

The Supreme Court has acknowledged the "significant differences" between the remedial provisions of the ADEA and title VII and expressly rejected the use of title VII analogies for the ADEA. Lorillard v. Pons, 434 U.S. 575, 583-84 (1978). In *Lorillard*, the defendant argued that because title VII does not authorize jury trials, the ADEA should be similarly interpreted. Without deciding whether the defendant's reading of title VII was accurate, the Court ruled that the analogy was inappropriate. 434 U.S. at 583-85. Although the two statutes have similar aims and substantive prohibitions, the legislative history of the ADEA illustrates congressional intent to treat age discrimination and title VII discrimination claims differently. *See* 113 CONG. REC. 31,254-55 (1967) (remarks of Senator Javits); *id.* at 34,742 (remarks of Representatives Burke and Matsunaga). Congress deliberately incorporated the FLSA's remedial provisions in the ADEA, after rejecting other statutory schemes as models. *See id.* at 31,254 (remarks of Senator Javits). Senator Javits stated during the floor debates that the enforcement procedures of the ADEA and title VII were meant to operate separately. *Id.* at 31,255. Therefore, courts should not rely unthinkingly on title VII precedent to resolve the issue of set-offs under the ADEA. Not all courts have recognized this distinction. *See* EEOC v. Sandia Corp., 23 Empl. Prac. Dec. 17,121 (10th Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Wise v. Olan Mills Inc., 495 F. Supp. 257 (D. Colo. 1980); Scofield v. Bolts & Bolts Retail Stores, Inc., 20 Empl. Prac. Dec. 12,299 (S.D.N.Y. 1979); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977).

44. *See* note 15 *supra*.

45. For example, Congress intended that the title VII back pay remedy provide "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices," Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)), yet it did not find set-offs inconsistent with that deterrent purpose. *See* note 43 *supra*.

46. *See* note 41 *supra*.

47. *See* Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1039-40 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). Senator Javits observed that "the criminal penalty in cases of willful violations has been eliminated and a double liability substituted. This will furnish an effective deterrent to willful violations." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 25 (1967) (statement of Senator Javits).

damages. Second, the uncertainty surrounding set-offs reduces their negative effect on deterrence. The amount of allowable set-offs will generally depend upon the victim's actions after the discriminatory act and will, therefore, be unknown prior to trial. The deterrence theory assumes that individuals weigh the anticipated costs and benefits of their conduct before they act, but potential ADEA defendants who rationally calculate their contingent liability before discriminating will be unable to rely with certainty on the possibility of set-offs. For these reasons, a net loss damages standard should not, therefore, undermine the ADEA's deterrent purpose.

The "make-whole" standard of relief that is compatible with effective deterrence is the only standard that effectuates the ADEA's compensatory purpose.[48] Under a make-whole standard, courts attempt to restore the plaintiff to the economic position she would have occupied absent the discrimination.[49] The ADEA, which protects only certain pecuniary "job-related benefits" and not a person's overall economic well-being,[50] requires courts to apply a modified "make-whole" standard. To avoid overcompensation, courts must set off from the gross amount of back pay certain benefits, such as earnings from another job, that the worker received following the discriminatory act. Age discrimination victims are made whole by awards that compensate for their net loss — the difference between the total "job-related benefits" lost and those received after the discrimination. To the extent that an individual has received employment-related income between the time of a discriminatory discharge or refusal to hire and the trial,[51] she has mitigated the injury that Congress designed the Act to redress. Neither fairness nor the ADEA's legislative history requires awards in excess of the plaintiff's net loss, and such awards unnecessarily burden employers unless deterrence is a primary goal.

II

Once a court has selected the proper measure of damages under the ADEA and decided that some set-offs are appropriate, it must choose which of a variety of benefits received by the victim after the discrimination should be subtracted from the back pay award. This

48. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-22 (1975).

49. *See, e.g.*, Rodriguez v. Taylor, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

50. *See* text at notes 26-28 *supra*.

51. For a general discussion of the period of back pay liability, see Richards, *Monetary Awards for Age Discrimination in Employment*, 30 ARK. L. REV. 305, 324-26 (1976).

Note suggests that, to determine a plaintiff's net loss, courts should set off from back pay awards those types of benefits that they would have included in damages.

The employment relation produces a wide variety of economic benefits, only some of which an employee receives at any one time. When employment is interrupted or terminated, a worker no longer collects her salary, but may be entitled to other "job-related benefits," such as a pension or severance pay. If age discrimination reduces or eliminates these benefits, courts should include the loss in the ADEA's measure of damages.[52] To the extent that such benefits replace a discriminatee's salary, her loss of employment-related income is reduced. Thus, the definition of earnings used to identify appropriate set-offs should be coextensive with the expansive definition of earnings used when calculating damages. Courts that apply this expansive definition of "job-related benefits" to compute both damages and set-offs would achieve consistent results.

To effectuate the Act's compensatory purpose, courts should, as a general rule, set off from back pay awards not only wages from alternative employment, private pension benefits, and severance pay, but also unemployment compensation and social security payments.[53] Unemployment and social security benefits are loosely analogous to deferred compensation for services.[54] The worker's employment entitles her to those benefits because only former workers are eligible to participate.[55] Thus, courts should not distinguish unemployment and social security benefits from wages. Awarding a plaintiff gross back pay when unemployment insurance and social security payments have substantially mitigated that loss would make her more than whole. Such an award would leave her in a better position than she would have achieved had she not been discriminated against, and is, therefore, inconsistent with the ADEA's compensatory purpose.

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52. *See* text at notes 21-25 *supra*.

53. The defendant bears the burden of proof on the amount of income received by the victim. *See* Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

54. *See* text at note 23 *supra*.

55. *See, e.g.*, N.Y. LAB. LAW § 596 (McKinney 1976) (unemployment compensation); 42 U.S.C. §§ 402(a), 414(a) (1976) (social security). "All states require that an individual must have earned a specified amount of wages or have worked for a certain period of time, or both, to qualify for [unemployment] benefits. These requirements insure that only workers who are genuinely attached to the labor force will become eligible for benefits." [1977] 1B UNEMPL. INS. REP. (CCH) ¶ 1901, at 4386. "In general, social security benefits payable to workers, their dependents, or their survivors are based on the earnings record of the worker. . . . [W]hether the worker is 'insured' . . . depends on whether the worker has enough earnings credited to his or her account." [1981] 1 UNEMPL. INS. REP. (CCH) ¶ 12,001, at 1013.

When applying the "job-related benefit" standard to calculate set-offs, courts must exercise care to set off only those payments that represent true gains. In certain situations, a plaintiff may receive "job-related benefits" that do not improve her economic position or reduce her job-related losses. First, set-offs of gains that a plaintiff would have received regardless of the discrimination leave her less than whole. For example, when the worker could have held a second job in addition to the one from which she was fired, set-off of interim earnings is inappropriate because she could have received the earnings from both had she not been discharged.[56] Second, some payments are simply advances. Many states demand reimbursement from workers who obtain back pay awards covering periods in which they received unemployment compensation.[57] Courts allowing set-offs of amounts that the plaintiff is not entitled to retain fail to compensate victims fully and, therefore, do not effectuate the ADEA's purpose.

Third, certain retirement benefits may represent no gain to the discrimination victim. The social security system, for example, permanently reduces payments to persons who retire between ages sixty-two and sixty-five.[58] An early retiree's benefits are reduced by

56. *See, e.g.*, Laugesen v. Anaconda Co., 510 F.2d 307, 317-18 (6th Cir. 1975); DeFries v. Haarhues, 488 F. Supp. 1037, 1043-44 (C.D. Ill. 1980).

57. *See, e.g.*, COLO. REV. STAT. § 8-73-110(2); MD. CODE ANN. art. 95A, § 17(d) (1979); MICH. COMP. LAWS ANN. § 421.48 (1978); Marshall v. Great Lakes Recreation Co., 2 LAB. L. REP. (CCH) 90 Lab. Cas. ¶ 33,959 (E.D. Mich. 1981) (applying § 421.48 to NLRA plaintiff); Wise v. Olan Mills Inc., 495 F. Supp. 257, 259 n.3 (D. Colo. 1980) (applying § 8-73-110(2) to ADEA plaintiffs); EEOC v. Pacific Press Publishing Co., 482 F. Supp. 1291, 1318-19 (N.D. Cal. 1979) (applying California law to title VII plaintiff); Katsianos v. ESA, 5 UNEMPL. INS. REP. (CCH) ¶ 8410 (Md. Ct. Special App. 1979) (applying § 17(d) to NLRA plaintiff). Some courts have applied principles of unjust enrichment or restitution and allowed states to recover from employers unemployment compensation paid to employees whose back pay awards were reduced by the amount of such compensation. *See, e.g.*, State v. Rucker, 211 Md. 153, 126 A.2d 846 (1956); State v. Continental Baking Co., 72 Wash. 2d 138, 431 P.2d 993 (1967). These decisions rest on state public policy and do not affect this Note's argument.

Even in states without payback provisions, unemployment compensation benefits received may not represent gains. The hypothetical case of a plaintiff who was discriminatorily discharged and received unemployment compensation illustrates this point. Six months later the plant in which she formerly worked was shut down and all the employees permanently laid off. In her suit to recover back pay for the six months she should have been allowed to work, the court should not set off her unemployment benefits. "All state unemployment insurance laws contain provisions limiting the period over which unemployment benefits can be paid to a given claimant. Although the manner in which this is done varies from state to state, the most common maximum duration of benefits — exclusive of additional, extended-duration benefits — is 26 weeks." [1981] 1B UNEMPL. INS. REP. (CCH) ¶ 1935. If she had not been discriminatorily discharged, the plaintiff would have exhausted her benefits after the plant closing. For this reason, she would have received the same amount of unemployment benefits regardless of the firing, and the benefits received covering the six-month period before the plant closing do not constitute a net gain.

58. 42 U.S.C. §§ 402(a), 402(q) (1976).

an actuarily calculated[59] fractional amount[60] designed to equalize the gross amount of payments received by early-retiring workers and workers retiring at age sixty-five. An employee who retires early will receive more payments than if she had retired at the normal age. However, the amount of each payment is reduced so that these additional payments do not represent a net gain. The social security system has already set off whatever additional benefits the plaintiff would have received by retiring early. Allowing the employer to set off early retirement benefits would create a double reduction and the award would thus fail to compensate fully.[61] For this reason, courts should not set off social security payments that workers receive before age sixty-five or similarly-reduced private pension benefits.[62] These problems suggest a need to refine further the "job-related benefits" standard. To avoid over-compensation of discrimination victims, courts should set off from back pay awards only those "job-related benefits" that actually improve plaintiffs' economic positions.

59. *See* H.R. REP. No. 231, 92d Cong., 1st Sess. 46, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5032.

60. Social security payments are reduced by five-ninths of one percent for each month prior to age sixty-five. Under this system, a worker who retires at age sixty-two receives 80% of the monthly amount she would have received had she waited until age sixty-five to retire. 42 U.S.C. § 402(q) (1976).

The social security system also permanently increases benefits for those who delay retirement past sixty-five by one-twelfth or one-fourth of one percent for each month that retirement is delayed. 42 U.S.C. § 402(w) (1976 & Supp. II 1978). *See* [1980] 1 UNEMPL. INS. REP. (CCH) ¶ 12,229. However, because the late-retirement credit is not actuarily calculated, *see* Letter from Boyd S. Mast, actuary with William M. Mercer, Inc. (March 1, 1981) (on file with the *Michigan Law Review*), an individual who delays retirement past age sixty-five will receive a lower gross amount of benefits than if she had retired at sixty-five. Thus, social security benefits received by individuals over age sixty-five do constitute an actual benefit that should be set off against the back pay award despite loss of the late retirement credit.

61. The hypothetical case of a sixty-two year old woman whose salary and fringe benefits total $120 per year illustrates this point. If she had continued working until age sixty-five, she would be entitled to social security benefits (ignoring cost-of-living increases) of $100 per year. Because she was discriminatorily discharged and could find no other employment, her yearly benefit level is reduced to $80. *See* note 60 *supra*. In the three years before she turned sixty-five she would have earned $360 in wages and benefits; instead she received $240 in social security payments. Although set-off of that $240 would seemingly put her in the same position she would have attained at age sixty-five, it will actually reduce her total level of "job-related benefits." Had she retired at age sixty-five, she would have received $500 in social security payments before age seventy; instead she receives only $400 in that five-year period and will receive reduced amounts for the rest of her life. This difference is justified only because she received the $240 before age sixty-five. Setting off those early retirement benefits will, therefore, leave her less well off than she would have been absent the discrimination and frustrate the ADEA's compensatory objective.

62. Actuaries and economists may dispute the proposition that the actuarily calculated reductions under social security or private pension plans are accurate and the corollary that early retirement results in no additional benefit to the plaintiff. The cost of such expert testimony on the relative value of retirement benefits would be prohibitive, however, except in cases involving substantial numbers of employees. Without the aid of experts, the court may have no choice but to assume that Congress accurately calculated the reduction to insure that an early retiree's total benefits will be no more valuable than if she had retired at age sixty-five.

Some set-offs would be disallowed even under this refined standard. Because back-pay awards do not compensate for nonemployment-related losses other than through liquidated damages,[63] gains that are not job-related, such as public assistance payments, are inappropriate set-off items. Even the ADEA's liquidated damages provision does not attempt to assess actual damages. Congress instead directed that willful violators pay liquidated damages in an amount equal to the back pay award.[64] Congress's message is that the ADEA does not redress every injury caused by a discriminatory act. To the extent that a discriminatee has additional leisure time after being discharged, she may be better off. To the extent that she suffers psychic distress from unemployment, she is worse off. Yet the ADEA takes neither of these into account. Rather, "[t]he Act draws its parameters of protected interests around the pecuniary employment relationship between the employer and the employee,"[65] and does not inquire into the plaintiff's overall economic and personal well-being. For this reason, courts that set off gains that are not derived from an employment relation will not fully compensate for job-related losses.

One example demonstrates how set-offs of nonemployment-related benefits will lead to undercompensation. The ADEA does not authorize recovery of consequential damages for pain, suffering, or medical expenses.[66] If a victim has received private insurance benefits that compensate for such damages, her overall economic well-being is improved. However, because the insurance compensates for losses that were not included in the damage calculation, a court that refuses to set it off against a back pay award does not create a windfall for the plaintiff. Only if the court refuses to set off such amounts will the plaintiff receive all the "job-related benefits" to which she is entitled. Thus public assistance payments,[67] private gratuities, payments from individually acquired insurance policies, and similar benefits should not be set off because they do not accrue through employment. The only court to consider this issue refused to set off

63. *See* Rogers v. Exxon Research & Engr. Co., 550 F.2d 834, 841 (3d Cir. 1977) ("The Act provides for determination of the amount of damages by an objective test — the amount of lost earnings"), *cert. denied*, 434 U.S. 1022 (1978).

64. 29 U.S.C. § 216(b) (1976) (incorporated into the ADEA by 29 U.S.C. § 626(b) (1976)).

65. Sant v. Mack Trucks, Inc., 424 F. Supp. 621, 622 (N.D. Cal. 1976).

66. *See* note 28 *supra*.

67. This category of payments encompasses receipts from such programs as Aid to Families with Dependent Children, *see, e.g.*, N.Y. Soc. Serv. Law § 343 (McKinney 1976), and Food Stamps, authorized by 7 U.S.C. § 2011 (1976).

unearned benefits.[68]

Although refusing to set off unearned benefits is consistent with judicial statements that ADEA damages should make whole the plaintiff's earnings, refusing to set off earned benefits is not. However, many courts have failed to set off earned benefits such as unemployment compensation and social security payments, arguing that these amounts are "collateral benefits,"[69] and are awarded in furtherance of a "separate social policy."[70] Although the common-law collateral source doctrine may justify these decisions,[71] they find no support either in logic or in the ADEA's policies. First, at least some of these courts suggested that they would set off wages from other employment,[72] although such interim earnings are no less "collateral." The common law is itself inconsistent on this point since it calls for deduction of actual earnings when computing damages for breach of an employment contract.[73] If courts set off earnings, they cannot distinguish "job-related benefits" on the ground that they come from a source other than the defendant employer. More importantly, courts that apply the collateral source rule fail to effectuate the ADEA's policies. The ADEA's compensatory goal is not

68. *See* EEOC v. Goodyear Tire & Rubber Co., 22 Empl. Prac. Dec. 14,693 (W.D. Tenn. 1980). The court set off actual earnings and unemployment compensation but not public assistance payments. 22 Empl. Prac. Dec. at 14,694. The court noted that public assistance payments were not sufficiently analogous to actual earnings to require set-off. 22 Empl. Prac. Dec. at 14, 694. Welfare benefits are not "analogous" to actual earnings because the right to receive public assistance is not earned through employment.

69. Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977); Wise v. Olan Mills Inc., 495 F. Supp. 257, 259-60 (D. Colo. 1980); Scofield v. Bolts & Bolts Retail Stores, Inc., 20 Empl. Prac. Dec. 12,299 (S.D.N.Y. 1979); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730-31 (E.D.N.Y. 1978), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979).

70. EEOC v. Sandia Corp., 23 Empl. Prac. Dec. 17,121, 17,140 (10th Cir. 1980).

71. The weight of common-law authority is that collateral amounts are not deducted from a damage award, even where payment has been received from a fund supported in part by contributions of the defendant. F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 154 nn.5-6 (Supp. 1968). In a number of states, where the collateral source is derived wholly from the employer's contributions, set-offs for payments from the fund will be required. *See* EEOC v. Enterprise Assoc. Steamfitters Local No. 638, 542 F.2d 579, 591 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977). Since social security benefits are funded by both employer and employee contributions, *see* [1979] 1 UNEMPL. INS. REP. (CCH) ¶ 10,200, the common law supports denial of a set-off. And although unemployment compensation is funded solely by taxes on employers, *see* 1B UNEMPL. INS. REP. (CCH) ¶ 1001, the defendant is not the only employer that pays the tax, and benefits to its discharged employees are not limited to the amounts it paid. *See* NLRB v. Marshall Field & Co., 129 F.2d 169, 173 (7th Cir.), *affd. per curiam*, 318 U.S. 253 (1942). Courts following the common law would, therefore, refuse to set off unemployment compensation as well.

72. Wise v. Olan Mills Inc., 495 F. Supp. 257, 259-60 (D. Colo. 1980); Scofield v. Bolts & Bolts Retail Stores, Inc., 20 Empl. Prac. Dec. 12,299 (S.D.N.Y. 1979); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 730-31 (E.D.N.Y. 1978), *affd. in part, revd. in part and remanded*, 608 F.2d 1369 (2d Cir. 1979).

73. *See* C. MCCORMICK, *supra* note 30, at § 160.

furthered by awarding a sum of money greater than the amount that will make the plaintiff whole from a fund to which the defendant has contributed.[74]

The fact that unemployment compensation and social security payments are based on "separate social policies"[75] does not require a different result. In fact, it is irrelevant. These payments constitute "job-related benefits," receipt of which mitigates the only losses that the ADEA seeks to redress.[76] To effectuate the ADEA's compensatory purpose, courts should not inquire into possible windfalls to employers. Allocation of the burden of compensation between the state or federal government and the defendant employer is not affected by a back pay award. Denial of a set-off for unemployment compensation or social security payments does not return the sums received by the plaintiff to the state or federal treasury, but only insures double compensation. Because governments can easily alter the allocation of the compensation burden,[77] courts should ask only what is necessary to make the plaintiff whole and forsake inquiries into what the defendant deserves to pay.[78]

Despite the shortcomings of the collateral source doctrine, many courts continue to deny set-offs of unemployment compensation and social security benefits. Both the Fifth and Tenth Circuits have mistakenly relied on *NLRB v. Gullett Gin Co.*,[79] which correctly held that set-offs are discretionary with the court, to reach this result.[80] Reliance on *Gullett Gin* is misplaced because the Supreme Court was construing the National Labor Relations Act[81] (NLRA), which Congress considered and rejected as a model for the ADEA.[82] *Gullett*

74. *Cf.* EEOC v. Enterprise Assoc. Steamfitters Local No. 638, 542 F.2d 579, 592 (2d Cir. 1976) (title VII case), *cert. denied*, 430 U.S. 911 (1977); Marshall v. Communication Workers of America, 21 Empl. Prac. Dec. 12,719, at 12,721 (D.D.C. 1979) (title VII case). As the *Steamfitters* court concluded:

> We see no compelling reason for providing the injured party with double recovery for his lost employment; no compelling reason of deterrence or retribution against the responsible party in this case; and we are not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole.

542 F.2d at 592.

75. *See* text at note 70 *supra*.

76. *See* text at notes 20-28 *supra*.

77. *See* note 57 *supra* and accompanying text.

78. *See generally* Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 748-49 (1964).

79. 340 U.S. 361 (1951).

80. *See* EEOC v. Sandia Corp., 23 Emp. Prac. Dec. 17,121 (10th Cir. 1980); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

81. 29 U.S.C. § 151 (1976).

82. H.R. REP. NO. 805, *supra* note 39, at 5, [1967] U.S. CODE CONG. & AD. NEWS at 2220; S. REP. NO. 723, *supra* note 39, 113 CONG. REC. at 31,250; 113 CONG. REC. 34,745 (1967)

Gin merely held that the NLRB did not exceed its authority in failing to deduct unemployment benefits from a back pay award; the Court did not imply that a decision in favor of deducting unemployment benefits would have been an abuse of discretion.[83] Moreover, the Court held that "[s]ince no consideration has been given . . . to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."[84] Because ADEA damages compensate for the loss of "job-related benefits" such as unemployment compensation, this aspect of *Gullett Gin*'s reasoning is inapposite.[85]

The discretion sanctioned by *Gullett Gin* must be "guided by sound legal principles."[86] The ADEA authorizes courts to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]."[87] Although stated in broad terms, the limitation should be observed. In determining the proper scope of discretion, a court must give great weight to the objective sought to be accomplished by the statute.[88] A district court must be reversed when it fails to exercise discretion with an eye to the purposes of an act.[89] Courts should decide whether or not to set off unemployment compensation and other income from back pay awards in accordance with congressional intent. The measure of damages identified by this Note as most consistent with the ADEA's purposes requires courts to set off all "job-related benefits" that represent a true gain to the plaintiff and deny set-offs of other income.

(remarks of Rep. Reid) ("Rather than utilizing enforcement procedures patterned after the National Labor Relations Act, [the ADEA] adopted the recommendation of our bill to follow essentially the well-tested compliance mechanisms of the Fair Labor Standards Act. This approach emphasizes conciliation, conference, and persuasion before permitting the Secretary of Labor to move directly to the U.S. district courts in a civil action".). *See* Lorillard v. Pons, 434 U.S. 575, 578 (1978).

83. *See* Marshall v. Communications Workers of Am., 21 Empl. Prac. Dec. 12,719, 12,720-21 (D.D.C. 1979).

84. NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (emphasis in original).

85. *Gullett Gin* does, however, support this Note's argument that public assistance payments should not be set off.

86. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (quoting United States v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (C.C. Va. 1807) (Marshall, C.J.)).

87. 29 U.S.C. § 626(b) (1976).

88. *See* Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); Head v. Timken Roller Bearing Co., 486 F.2d 870, 877 (6th Cir. 1973).

89. *See* Shultz v. Parke, 413 F.2d 1364, 1368 (5th Cir. 1969); Wirtz v. B.B. Saxon Co., 365 F.2d 457, 462-63 (5th Cir. 1966).

CONCLUSION

During the ADEA's first ten years, 15,000 victims of age discrimination were owed more than $51 million in damages,[90] yet Congress has not clearly instructed courts how to calculate monetary relief. Consistent with the ADEA's conciliatory approach to age discrimination, this Note has proposed a refined make-whole theory that compensates victims fully to the extent contemplated by Congress while creating the least burden on business. Courts should compensate ADEA plaintiffs for the loss of all employment-related income, including lost unemployment compensation and social security benefits. At the same time, the courts must recognize that receipt of such benefits mitigates a plaintiff's loss, and reduce back pay awards accordingly. Consistent application of the "job-related benefits" concept to the calculation of damages and set-offs will best effectuate Congress's intent and bring a much-needed element of certainty to ADEA cases.

90. *See* EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, REPORT COVERING ACTIVITIES UNDER ADEA DURING 1978, at 4 (1979).