UNDERSTANDING ADMINISTRATIVE AND JUDICIAL PROCEDURES & JUDICIAL RELIEF

by

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I. SECTION 1981, SECTION 1983 AND EPA ACTIONS

Section 1981 and § 1983 actions are very easy to implement since no federal agency is entrusted with enforcing these statutes. As a result, plaintiffs can pursue their private suits in state or federal court without having to first exhaust their administrative remedies. Also, the statute of limitations for filing a § 1981 action is two years, while the statute of limitations for filing a § 1983 action is borrowed from each respective state's statute covering personal injury actions.

As for Equal Pay Act, or "EPA" claims, since the EPA is an amendment to the FLSA, plaintiffs need not resort to a governmental agency before filing suit in either state or federal court. The statute of limitations for an EPA violation is either two or three years, depending on whether or not the employer's violation was willful.

However, Title VII, ADA and ADEA claims are much more complicated.

II. TITLE VII, ADA AND ADEA CLAIMS

A. Procedure And Statute Of Limitations

When a person feels his rights under either Title VII, the ADA, or the ADEA have been violated, the plaintiff must first file a charge with the Equal Employment Opportunity Commission, or the EEOC.

If no corresponding state civil rights agency exists, then the plaintiff has 180 days from the date of the offense to file a charge with the EEOC. If a corresponding state civil rights agency does exist, as do in most states, then the plaintiff has 300 days to file a charge with the EEOC instead of the normal 180 days.

However, if the plaintiff files a charge with the EEOC, the EEOC will ordinarily defer the charge to the state's civil rights agency. This is referred to as a "deferral" arrangement, since the EEOC defers the charge to the state agency

before beginning its investigation.

Therefore, in order to give the state agency time to investigate the matter, in a "deferral" state, the plaintiff's statute of limitations for filing a charge with the EEOC is extended to 300 days, and the statute of limitations for filing with the state agency varies from state to state. (Ordinarily, the state's statute of limitations is 180 days.)

The rationale behind this deferral arrangement is efficiency and expediency. Since the EEOC is entrusted with investigating civil rights violations in employment for the entire United States, it is much simpler to have as many of these cases solved at the state level as possible.

After the plaintiff has filed his charge with the state, the plaintiff is not permitted to file a charge with the EEOC until the state completes its investigation or until the state has had 60 days to investigate the matter, which either comes first. However, once the plaintiff receives notice from the state civil rights agency entrusted with investigating the matter that it has concluded its investigation, the plaintiff then has 30 days to file a charge with the EEOC if he is not satisfied with the results of the state's investigation.

For some time, it was believed that if a plaintiff missed his filing deadline with the state that he would lose his right to file with the EEOC. However, the U.S. Supreme Court has held that an untimely filing with the state does not bar a plaintiff's claim with the EEOC.

For instance, if a plaintiff waits 290 days after his rights have been violated to file his claim with the appropriate state agency, thus missing the time limit for filing his charge with the state, and the state then refuses to investigate, the plaintiff may still file his claim with the EEOC. Since § 706(c) of Title VII states that the plaintiff may file his charge with the EEOC in a deferral state either 60 days after filing his charge with the state or within 30 days after the state concludes its investigation, the plaintiff may file his charge with the EEOC immediately since the state will be viewed as having completed its investigation once it refuses to investigate. Since the plaintiff is still within the EEOC's 300 day time frame for deferral states, the plaintiff's filing with the EEOC will be seen as being filed in a timely manner.

In reality, most states have a "work-sharing" agreement with the EEOC, which means that even if a plaintiff files his charge with the state's civil rights agency, filing with the state will also suffice as filing a charge with the EEOC. Such arrangements waive the 60-day state investigation requirement.

In order to clarify these time frames, consider the following examples: If a plaintiff files a charge with the state 90 days after the date of the alleged offense in a state where no work-sharing agreement exists, but it is a deferral state, when can the plaintiff file with the EEOC? Sixty (60) days later or within 30 days of receiving notice from the state that it has completed its investigation. What if it is

a work-sharing state? Then the point is moot. The plaintiff filed simultaneously with the state *and* the EEOC when he filed his charge with the state.

Once the plaintiff files a charge with the EEOC, the EEOC then has 10 days to notify the employer of the charge. The EEOC must then be afforded 180 days to investigate. The plaintiff is then not permitted to file a private cause of action until the EEOC has been given this 180-day period to investigate. After this 180-day investigation period has lapsed, the plaintiff may request a right-to-sue letter from the EEOC.

However, if the EEOC completes its investigation before the end of 180 days, it will typically issue to the plaintiff a right-to-sue letter, which allows the plaintiff the opportunity to file his own private suit against the employer. Once the plaintiff receives his right-to-sue letter, he has 90 days to file suit against the employer or he will lose his right to sue.

Of course, if at the end of this 180-day investigation period the EEOC has not completed its investigation, the plaintiff is permitted to request a right-to-sue letter, but he is not required to ask for one. The plaintiff may allow the EEOC to continue its investigation for as long as he likes. The 90-day statute of limitations for filing a private cause of action only begins to run once the right-to-sue letter is issued to the plaintiff by the EEOC.

If the EEOC finds there is no "reasonable cause" to believe that a discriminatory practice has occurred, then it will notify all of the parties of its finding and issue a private right-to-sue letter to the plaintiff. If the EEOC finds that there is reasonable cause to believe that the plaintiff was illegally discriminated against, the EEOC first tries to conciliate the parties' differences. If its efforts to mediate an agreement between the plaintiff and the employer fails, then a hearing is scheduled before an administrative officer.

The EEOC may also file suit against the employer, which is referred to as a "Commissioner's Charge." However, the EEOC usually files suit on behalf of an aggrieved employee only when larger policy issues are involved since it has so many cases brought before it. If the EEOC does not file suit, then it issues a right-to-sue letter to the plaintiff so he may pursue his own private cause of action, which is what usually happens, considering the EEOC's workload.

Also, the U.S. Supreme Court has held that the statute of limitations for filing a charge can be tolled, or will not begin to run, in certain situations. (Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)). For instance, if the employer fails to post the required EEOC notices for its employees to view, or if the employer is indecisive in making or in communicating its discriminatory decision to the employee, or if mistakes are made by the EEOC regarding the filing of a charge, then the fact that the statute of limitations for filing a claim has expired will not negate the plaintiff's claim. Likewise, if the employer fails to plead that the plaintiff has missed his filing deadlines, such a defense will be deemed as having been waived by the employer.

Of course, if the employer's offense is a continuing violation, such as in the case of a discriminatory policy or a continuing illegal pattern and practice, then the statute of limitations will not begin to run until the employer's policy or the pattern and practice ends. For instance, if a plaintiff was denied a job two years earlier due to an employer's use of an illegal height requirement, but the policy was still in place until just 30 days ago, the plaintiff would still be permitted to file a discrimination charge with the EEOC since the statute of limitations would only have started to run within the last 30 days. Therefore, the plaintiff's charge could still be filed in a timely manner even though the actual offense against this plaintiff occurred two years ago.

The reasoning behind such a policy is if the plaintiff had reapplied for the position while the employer's discriminatory practice was still in place, the plaintiff would not have been hired anyway. To require the plaintiff to reapply for the position would have been futile since the violation was continuous.

Also, it is important to note that filing a grievance with the employer regarding the unlawful practice with the employer will not toll the statute of limitations from beginning to run. Therefore, if a plaintiff is aware of the fact that he has been unlawfully discriminated against, and if the offense is not a continuous one, then the statute of limitations for filing a charge with the EEOC begins to run regardless of whether or not the plaintiff decides to pursue any type of conflict resolution, grievance, or arbitration procedure with the employer.

Additionally, regarding discriminatory seniority systems, the Civil Rights Act of 1991 amended Title VII (§ 706(e)(2)) to state that an unlawful employment practice occurs when the seniority system is adopted, when the plaintiff becomes subject to it, or when the plaintiff is injured by it if the seniority system was adopted for the purpose of intentionally discriminating against its employees, which either comes later.

As for filing the charge itself, any written statement sufficiently precise to identify the parties and which generally describes the unlawful practice will be acceptable. The plaintiff must then swear to the statement under oath.

B. State Administrative Procedures

Many states also require employees to file their claims with the state's civil rights agency before filing a lawsuit in state court. However, some states, like Ohio, allow plaintiffs to file their claims directly in state court without first going through the administrative process of the state's civil rights agency.

Therefore, it is important to remember that just because employees are required to go through the EEOC's administrative process before filing their federal claims in court, this is not necessarily true for filing state claims.

C. Notice Of Decision Rule = When Does An Offense Occur?

In Delaware State College v. Ricks, 499 U.S. 250 (1980), Columbus Ricks, a black professor from Liberia, who was teaching at Delaware State College, was denied tenure. Ricks was then told that he would be given a one-year contract, and at the end of that one-year contract, he would no longer be employed by the college.

Ricks taught at the college for the next year. However, just before his one-year contract was about to expire, he filed a claim of race discrimination with the EEOC under Title VII. The college argued that Ricks had missed his filing deadline with the EEOC since the decision to deny Ricks' tenure was made almost a year before Ricks filed his charge. Ricks, on the other hand, argued that the discriminatory act did not occur until his one-year contract actually expired, so he was well within Title VII's statute of limitation deadlines.

The U.S. Supreme Court agreed with the college. The Court held that the 180-day time period (or 300-day time period in a deferral or work-sharing state) begins to run when the unlawful employment practice occurs *and* the employee becomes aware of the illegality of the employer's act. In this case, the alleged unlawful act occurred when Ricks was denied tenure and given his one-year contract. This was when the decision was final, not when the one-year contract ended.

Therefore, the Supreme Court outlined two requirements that must be met in order for the statute of limitations to begin running on a plaintiff's claim, which include:

1. When the **final** decision affecting the plaintiff is made **and**

2. When the plaintiff becomes **aware** of the employer's illegal motive.

As a result, if the plaintiff is lied to regarding why a certain employment decision is made, and the plaintiff later discovers that the employer's motive for the decision was illegal, then the statute of limitations will begin to run once the plaintiff becomes aware of the employer's discriminatory intent.

D. Coordinating State And Federal Proceedings

In Kremer v. Chemical Construction Corporation, 456 U.S. 461 (1982), the U.S. Supreme Court held that if a state court rules on a plaintiff's unlawful discrimination claim, the suit is then barred in federal court under 28 U.S.C. § 1738, which says that state judicial proceedings "shall have the same full faith and credit in every Court within the United States..." As a result, a plaintiff cannot file suit in state, lose, and then file the same suit again in federal court.

However, if the plaintiff files a charge of discrimination with the state civil rights agency in a nonwork-sharing state, the plaintiff can refile with the EEOC if he is unhappy with the state's decision. Therefore, no preclusive effect exists between

state and federal administrative agencies in nonwork-sharing status as exists in the court system.

Still, in reality, the EEOC will give considerable weight to the state civil rights agency's decision if the plaintiff decides to "appeal" to the EEOC from a state administrative agency. If a plaintiff is unhappy with the decision of the state civil rights agency in a work-sharing state, the plaintiff can request a "Substantial Weight Review" of the case by the EEOC.

In state court, the state civil rights agency's findings are admissible as evidence. However, if the plaintiff files suit in federal court, the EEOC's findings are not admissible, although as a practical matter, most federal courts will often admit these findings into evidence.

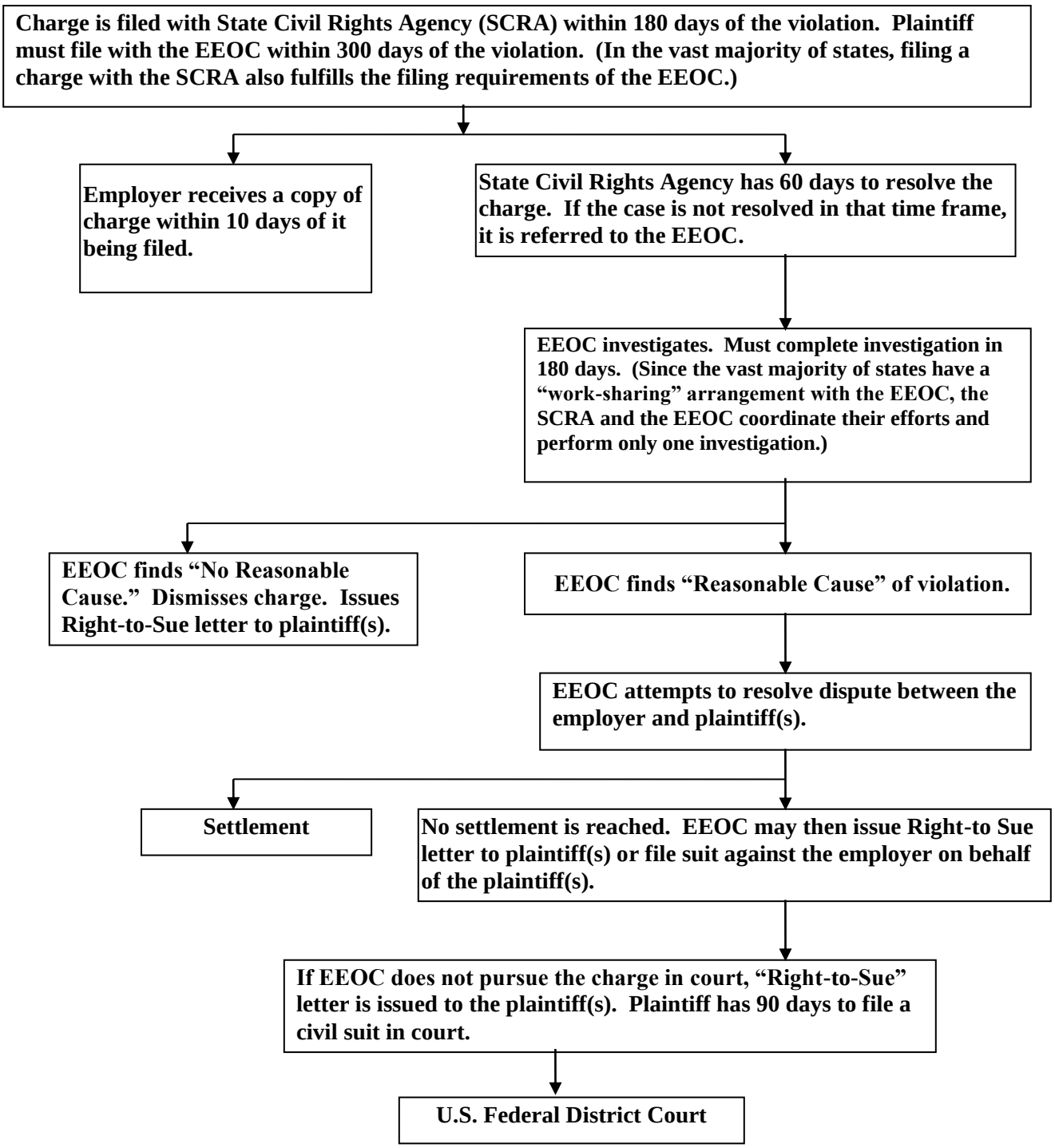
E. Public v. Private Suit

If the EEOC decides to sue the employer on behalf of the aggrieved individual, which is referred to as a Commissioner's Charge, then the individual is precluded from filing his own private action against the employer. However, the individual can intervene into the action and join the EEOC in the suit if he desires.

The opposite is also true. If the plaintiff files suit first, the EEOC cannot file its own independent action against the employer, but it too can intervene into the action. But what does it mean when the EEOC intervenes? There are three possibilities, depending on the court.

First, some courts hold that if the EEOC intervenes, the EEOC then becomes the principal party in the suit. Other courts disagree and say that both the EEOC and the plaintiff can proceed together in the same suit as separate principals. And finally, some courts see the intervening party as being solely an intervening party with the original primary party retaining the principal role in the suit.

EEOC CIVIL RIGHTS CHARGE PROCESS



III. JUDICIAL RELIEF

A. Back Pay

The goal of Title VII relief has been to provide the plaintiff with "make whole" relief, which means the courts try and put the plaintiff back into the same position he would have been in had he not been discriminated against. Back pay, or lost wages, includes all the compensation the plaintiff would have received if he had not been discriminated against (make whole), which includes lost wages, raises, overtime wages, bonuses, vacation pay, and retirement benefits, to mention a few.

In Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), the U.S. Supreme Court held that back pay should be denied to a plaintiff only when doing so would support Title VII's purpose of eradicating discrimination and making persons whole for the injuries they have suffered through past discrimination. The Court reasoned that the courts have a duty to render a remedy that will eliminate the discriminatory effects of the past discrimination as much as possible, as well as bar any future discrimination. Consequently, awarding back pay awards to successful plaintiffs is very common, as is prejudgment interest.

In limiting the amount of back pay that can be awarded to a plaintiff, § 706(g)(1) governs Title VII, the ADA, and the Rehabilitation Act on this issue. Section 706(g)(1) states that back pay cannot be paid for a period of time any longer than two years prior to the filing of a charge with the EEOC.

For instance, if a female plaintiff was discriminated against because of her sex for three years before she filed a charge with the EEOC, her back pay period would still only cover the two-year period prior to filing this charge. Even so, the discriminatory practices that occurred before this two-year recovery period can still be used to prove the plaintiff's case.

As for § 1981 and § 1983 causes of action, neither contain a limitation on the back pay period that may be awarded to a plaintiff. Instead, the relevant state statute would supply the proper limitation on the time period used for calculating back pay.

Calculating back pay is a very fact-specific analysis. Many factors must be considered, which includes determining what the plaintiff's raises would have been over this period, who holds the plaintiff's job now and what is this successor earning, how large have the company's raises been over this period of time, how large were the plaintiff's previous raises, was the plaintiff at the top of his wage scale when the discriminatory act occurred, what were the fringe benefits that were lost, and how much interest did the plaintiff lose? Any and all of these factors may be relevant in determining the amount of the plaintiff's back pay award.

The back pay award period then normally ends on the date the judgment is made on the case. On the other hand, sometimes it ends *before* this date, such as if the

plaintiff has died or if he would have been permanently laid off prior to the date of judgment. However, the back pay period may also end on the date the plaintiff voluntarily resigned his position with the employer or on the date the plaintiff rejected a subsequent offer of comparable employment.

B. The Duty To Mitigate Damages

Section 706(g)(1), which applies to Title VII, ADA, and Rehabilitation Act actions, requires that the amount of back pay owed to the plaintiff to be reduced by the amount that the plaintiff earned or could have earned with reasonable diligence from other employment. The same principle is also applied in ADEA, § 1981 and § 1983 actions.

However, it is the employer who has the burden of proving that the plaintiff's back pay award should be reduced based on the theory that the plaintiff has failed to mitigate his damages with reasonable diligence. In carrying this burden, the employer must show that a comparable employment opportunity existed, the amount the plaintiff would have earned in this job, and that the plaintiff's lack of diligence was the reason the plaintiff failed to secure employment.

However, the U.S. Supreme Court has held that a plaintiff need not go into another line of work, move or travel a great distance to find another job, accept a demotion, or take a demeaning position in an effort to mitigate his damages. Instead, the proper inquiry to make is whether or not the plaintiff's new or prospective job is "substantially similar" to his old job. If a plaintiff fails to pursue an employment opportunity with reasonable diligence or fails to accept a job that is found to be substantially similar to his previous position, then the plaintiff has failed to mitigate his damages (Ford Motor Company v. EEOC, 458 U.S. 219 (1982)).

However, in Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990), the Fifth Circuit held that a plaintiff failed to mitigate his damages when he refused to accept a demotion with his current employer. Therefore, some courts draw a distinction between whether a plaintiff must accept a demotion in order to mitigate his damages depending on whether the offer comes from the plaintiff's current employer or whether it comes from a prospective new employer. Consequently, some courts hold plaintiffs to a stricter standard in requiring them to mitigate their damages when it is their current employer who is making the offer.

In determining whether the plaintiff exercised reasonable diligence in trying to mitigate his damages, several factors must be considered, such as how marketable is the plaintiff? Is there an abundance of substantially similar work available? And how did the plaintiff go about conducting his job search? All such inquiries may be used to determine whether the plaintiff mitigated his damages. Therefore, making such a determination is very fact specific.

C. Instatement, Reinstatement, Retroactive Seniority And Injunctive Relief

There are many forms of relief available to the courts which they may use in order to provide the plaintiff with an adequate remedy. Some of these forms of relief include injunctive relief, reinstatement, instatement and retroactive seniority.

Almost universally, the courts refuse to displace a current jobholder in order to either instate or reinstate the aggrieved plaintiff. However, such displacement has been ordered in exceptional cases, such as when an incumbent employee has been hired in violation of a court order. (Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986); Spagnuolo v. Whirlpool Corporation, 717 F.2d 114 (4th Cir. 1983)). Still, instead of displacing a current job holder, the courts often prefer to fashion some other sort of remedy, such as ordering the employer to give the next job opening to the plaintiff, and then awarding the plaintiff front pay in the meantime in order to compensate the plaintiff for future lost wages.

On the other hand, if reinstatement or instatement is ordered, either now or in the future, the majority of jurisdictions hold that awarding retroactive seniority is pretty much presumed. Still, if no incumbent is displaced, the courts prefer instatement or reinstatement.

As for injunctive relief, which is basically a cease and desist order, the courts have held that unless there is some "clear and convincing" proof that the offense cannot occur again, injunctive relief is mandatory (James v. Stockham Valves and Fittings Company, 559 F.2d 310 (5th Cir. 1977)).

D. Front Pay

Front pay is basically awarded in order to compensate the plaintiff for wages he will lose **after** the judgment but **before** he is instated or reinstated with the employer, since courts are reluctant to displace an incumbent worker. However, front pay is also awarded for the wages the plaintiff will lose after the judgment date even if instatement or reinstatement is not ordered at all.

In some instances, the hostility that is created between the plaintiff and the employer becomes so severe that instatement or reinstatement is not feasible. When this situation arises, the courts may award front pay in order to make the plaintiff whole in relation to his future losses. However, the normal "wear and tear" of litigation is not enough to destroy the relationship between the employer and the plaintiff to the point that front pay is awarded in lieu of instatement or reinstatement. Additionally, the courts are pretty much in agreement that deciding whether or not to award front pay is a decision made by the judge, whereas the decision regarding the amount of front pay to be awarded is made by the jury.

In determining for how long the front pay award should continue, many factors

should be considered, such as how long would the plaintiff have continued working for the employer? Some courts presume that the plaintiff would have continued until retirement, while others examine the plaintiff's work history and the industry's standard. In general, the normal award for front pay is often for the next one to two years.

E. Compensatory And Punitive Damages

Both compensatory and punitive damages are available under § 1981, while only compensatory damages are generally available in § 1983 actions. The ADEA, on the other hand, does not permit either, but it does allow recovery of liquidated damages.

(When it is difficult to estimate the correct measure of damages, the courts are sometimes empowered by Congress to award "liquidated damages," which are often double damages. The theory is that since it is difficult to estimate the true damage suffered by an employee, the court will simply double the actual damage award, hoping this sum will cover any damages incurred by the employee, such as loss of investment opportunity, etc.)

Under the Civil Rights Act of 1991 (§ 1981 (a)), both compensatory and punitive damages are available for Title VII, ADA and Rehabilitation Act claims if the charge is based on a disparate treatment or systemic disparate treatment theory and if the plaintiff does not also file a § 1981 action. (Additionally, the Civil Rights Act of 1991 allowed for the use of jury trials in Title VII, ADA, and Rehabilitation Act cases in determining compensatory and punitive damages.) However, unlike § 1981 and § 1983 actions, the Civil Rights Act of 1991 places statutory limits on the amount of compensatory and punitive damages juries can award to plaintiffs depending on the number of people an employer employs.

Under the Civil Rights Act of 1991, if an employer employs between 100 and 15 employees, the limit on such damages is $50,000. If the employer has between 101 and 200 employees, the limit is $100,000. If the employer has between 201 and 500 employees, the limit is $200,000. And if the employer has 501 or more employees, the limit placed upon these damages is $300,000.

The Civil Rights Act of 1991 also states that any award allowed under § 706(g)(1) of Title VII, such as back pay, front pay and interest, shall not be considered as being part of the plaintiff's compensatory damages. Consequently, any such awards made to the plaintiff will not count toward these monetary caps of the Civil Rights Act of 1991.

Since punitive damages are awarded if the employer acted with "malice or reckless indifference," punitive damages cannot be recovered in ADA or Rehabilitation Act claims if the employer showed "good faith" in its efforts to reasonably accommodate the plaintiff, which is why it is a good idea for an employer to ask its disabled employees what accommodations they require. Punitive damages may not be recovered from a governmental agency or a political

subdivision of the government.

F. Attorney's Fees And Costs

Under the ADEA, the court is required to award attorney's fees and costs to the prevailing plaintiff. However, such an award is not available to the prevailing employer unless the suit is shown to be "frivolous."

Title VII (§ 706(k)) allows the courts to award reasonable attorney's fees to the successful plaintiff, including expert witness fees, as part of the plaintiff's costs. Section 1981, § 1983, the ADA and the Rehabilitation Act generally follow Title VII and also allow such awards. However, the ADA does not explicitly allow for expert fees, although it does allow for litigation expenses.

IV. AFTER-ACQUIRED EVIDENCE RULE

In the 1980s, a theory developed in the law which says if an employer illegally discriminates against an employee but the employer later discovers that the employee should have never been hired in the first place (i.e., lied on application regarding a relevant matter) or that the employee should have been terminated before the employer's illegal act occurred for some reason (i.e., employee was embezzling funds), then the plaintiff's claim against the employer should be barred. This theory is referred to as the "After-Acquired Evidence Rule," or AAE.

Proponents of the AAE claim that since the employee would have never been hired in the first place, or since the employee would have been fired before the employer's illegal act occurred if the employer had only known of the employee's misrepresentation or conduct, then the employer should not be in this current discrimination suit at all, so the employee should not be allowed to make a claim. By deceiving the employer, the plaintiff's hands are "dirty," so the plaintiff should not be able to prosper from such deception.

On the other hand, opponents of the AAE Rule claim that allowing such evidence to bar an employee's illegal discrimination claim could allow for rampant illegal discrimination since an employer can almost always find some problem with an employee that could be used to make the argument that the employee should have been fired before the alleged discriminatory act occurred, thus opening the door for the AAE Rule to bar a legitimate claim.

In McKennon v. Nashville Banner Publishing Company, 115 S.Ct. 879 (1995), Christine McKennon filed suit against her employer of approximately 30 years, Nashville Banner Publishing, for age discrimination under the ADEA. However, Nashville Banner Publishing defended itself by claiming that after it terminated McKennon, it discovered that she had been removing confidential documents from the office which, under the AAE Rule, precluded her recovery since McKennon would have been fired for such an offense had the employer known of it earlier.

The U.S. Supreme Court held that the AAE Rule cannot act as a complete bar to a

plaintiff's claim since an ADEA claim cannot be disregarded. Nevertheless, the Court reasoned that the after-acquired evidence regarding an employee's wrongdoing must be taken into account in determining which remedies are available to the plaintiff. Otherwise, the Court would be ignoring the legitimate concerns of employers.

Still, determining which remedies are available to the plaintiff in light of such evidence must be decided on a case-by-case basis. However, as a general rule, neither reinstatement or front pay are appropriate remedies to award since the employer has produced evidence that the employee would have been legitimately fired regardless of whatever illegal motive prompted the employer to act later.

As for the payment of back pay, the starting point for calculating such a remedy should begin with the employer's illegal act and it should continue to the point when the employee's violation was discovered by the employer, which would be when the plaintiff's employment should have rightfully ended.

The Court's decision therefore attempts to strike a balance between the employer's rights, the employee's rights, and public policy. The employee cannot prosper beyond what he would have if the employer's illegal act had never occurred, so the employer's concern over rewarding a deceptive employee is alleviated. Also, the employer's illegal act goes on record, thus serving the public policy concern that the AAE rule would allow an employer's discriminatory acts to run rampant.

V. ARE PRIVATE SUITS ALLOWED AGAINST PRIVATE INDIVIDUALS?

If a plaintiff has a cause of action under § 1981, § 1983, Title VII, the ADEA, the ADA or the Rehabilitation Act against his employer, can the plaintiff also file suit against the individual who committed the discriminatory act personally?

In § 1981 actions, the answer is probably "yes." Section 1981 applies to "all persons," thus covering employers and private individuals alike. Still, private individuals can defend themselves by claiming that they were acting within the scope of their employment and are therefore not liable for these actions, which is available as a defense by any employee who is sued personally for his actions committed on behalf of his employer. Even so, § 1981 still seems to allow for suits against private individuals.

As for Title VII actions, the Act specifically covers employers of 15 or more employees working 20 or more weeks per year. Therefore, those who are opposed to allowing suits against private individuals under Title VII claim that the Act was intended to only apply to employers, so suits against private individuals should not be permitted.

On the other hand, those who claim that suits against private individuals should be allowed cite § 701(b) of the Act which specifically includes any "agents" of the employer as also being covered by Title VII. Therefore, since employees are "agents" of the employer, some argue that suits against private individuals for violating Title VII should be allowed.

However, the trend in this area of the law is clearly to *not* allow Title VII to be used as a

cause of action against private individuals. Not surprisingly, the same arguments that are used both pro and con for allowing suits against private individuals under Title VII are also used for the ADEA, the ADA, and the Rehabilitation Act. The courts have also tended to hold the same on this issue for these other Acts as they have held for Title VII suits against private individuals.

As for the Family and Medical Leave Act and the Fair Labor Standards Act, the courts have held that private suits against individuals are permitted. Therefore, those managers who violate the provisions of these Acts may not only incur liability for their companies, but they may incur personal liability as well.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott Warrick, JD, MLHR, CEQC, SHRM-SCP (www.scottwarrick.com & www.scottwarrickemploymentlaw.com) is both a practicing Employment Law Attorney and Human Resource Professional with almost 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

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