No. 00-763

IN THE
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,
v.
E. I. DU PONT DE NEMOURS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of Respondent in this case. The written consent of Respondent E. I. Dupont de Nemours Company has been filed with the Clerk of the Court. Counsel for Petitioner Sharon B. Pollard has been asked but has not given consent.

In support of their motion, EEAC and the Chamber by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes nearly 350 of the nation's largest private sector corporations.

2. The Chamber of Commerce of the United States (the Chamber) is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country.

3. EEAC's and the Chamber's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC and the Chamber an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. Both EEAC's and the Chamber's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

4. All of EEAC's and many of the Chamber's members are employers covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and other workplace nondiscrimination laws.

5. As employers, and as potential defendants to employment discrimination claims asserted under these laws, EEAC's and the Chamber's members have a substantial interest in the issue presented in this case—*i.e.*, whether money awarded as "front pay" to a prevailing plaintiff under Title VII is subject to the caps the Civil Rights

Act of 1991 places on "[t]he sum of the amount of compensatory damages awarded under this section for *future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added).

6. Because of their interest, EEAC and/or the Chamber have filed *amicus curiae* briefs in cases addressing this or related issues in several circuit courts of appeals. They also have participated in a number of other cases before this Court in which important public policy issues involving Title VII and the Civil Rights Act of 1991 were presented.

7. Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully request that the Court grant them leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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March 23, 2001

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave.[1] The brief urges this Court to affirm the decision below and, thus, supports the position of the respondent, E.I. du Pont de Nemours Company.

[1] Counsel for the *amici curiae* authored the brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound programs to end employment discrimination. Its membership now includes nearly 350 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. Its directors and officers include many of industry's leading experts on equal employment opportunity and affirmative action. Their combined experience gives EEAC valuable insight into the practical, as well as legal aspects of equal employment opportunity policies and practices.

The Chamber of Commerce of the United States (the Chamber) is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and other workplace nondiscrimination laws. As employers, and as potential defendants to claims asserted under these laws, EEAC's and the Chamber's members have a substantial interest in the issue presented in this case—*i.e.*, whether money awarded as "front pay" to a prevailing plaintiff under Title VII is subject to the caps the Civil Rights Act of 1991 places on "[t]he sum of the amount of compensatory damages

awarded under this section for *future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section . . . ." 42 U.S.C. § 1981a(b)(3) (emphasis added).

STATEMENT OF THE CASE

Sharon Pollard sued her former employer, E.I. du Pont de Nemours and Company (DuPont), alleging Title VII violations and state law torts. The district court dismissed her tort claims on summary judgment but, after a bench trial, found in Pollard's favor on the Title VII claims. The court awarded Pollard $107,364 in back pay and benefits, plus $300,000 in compensatory damages "in accordance with the statutory cap set forth in 42 U.S.C. § 1981a(b)(3)." *Pollard v. E.I. DuPont de Nemours,* 16 F. Supp.2d 913, 924 (W.D. Tenn. 1998).

The district court said in a footnote that its award of compensatory damages included "front pay" in accordance with Sixth Circuit precedent. *Id.* at 924 n.19. It went on to indicate that, but for the statutory cap, it would have awarded Pollard more than $300,000 in compensatory damages and also would have awarded punitive damages. *Id*. The court, however, did not specify what additional amounts it would have awarded.

On appeal, a three-judge panel of the Sixth Circuit reversed the summary judgment order and remanded the case for trial on one of Pollard's state law claims. Pet. App. 26a. In all other respects, it affirmed the judgment of the district court. *Id*. With regard to the effect of the $300,000 cap on damages, the panel followed the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), which held that front pay is subject to the cap because it is an element of "future pecuniary losses" within the meaning of 42 U.S.C. § 1981a(b)(3). Pet. App. 21a-22a. The panel indicated, however, that had it not been bound by *Hudson v. Reno*, it

would have followed decisions of other circuits that have held the statutory cap inapplicable to front pay. *Id.*

This Court granted certiorari to address the conflict in the lower courts' holdings regarding whether front pay is an element of "future pecuniary losses" covered by the caps on compensatory damages adopted in the Civil Rights Act of 1991.

SUMMARY OF ARGUMENT

In enacting the Civil Rights Act of 1991 (CRA-91), Congress fundamentally revamped the remedial scheme of Title VII. Departing from an employment law tradition begun more than half a century earlier in the National Labor Relations Act, Congress chose in CRA-91 no longer to limit Title VII remedies to measures designed to put an end to unlawful conduct and restore the *status quo ante*. Rather, for the first time in any federal statute dealing specifically with employment, Congress provided in CRA-91 for awards of compensatory and punitive damages.

The importation of these new, tort-style remedies into an employment statute marked a radical change in one of the core policies of federal employment law, and the damages provisions of CRA-91 were, to say the least, controversial. In the end, the controversy was surmounted in Congress only through a carefully crafted, bipartisan compromise. The essence of the compromise was to place specific dollar limits, or "caps," on the total amount of compensatory and punitive damages a successful complaining party could recover, ranging from $50,000 to $300,000 depending on the number of persons employed by the defendant-employer.

The drafters of the bill's damages provisions recognized that one of the keys to making this compromise work was to define precisely what the caps would, and would not, cover. In doing so, they chose words that draw a sharp line between past and future monetary losses. Thus, in a subsec-

tion entitled "Limitations," Congress specified that the caps would apply to, *inter alia*, damages awarded to compensate for "*future pecuniary losses*." 42 U.S.C. § 1981a(b)(3) (emphasis added).

As the Sixth Circuit observed in *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997), the phrase "future pecuniary losses" plainly encompasses "front pay." Indeed, Congress scarcely could have chosen words more clearly descriptive of the type of losses for which front pay is designed to compensate.

This plain meaning of CRA-91's "Limitations" on damages is not negated or rendered ambiguous by the subsection that precedes it, which states that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). For, although some courts had awarded front pay in Title VII cases prior to the 1991 amendments, as the Sixth Circuit correctly recognized, front pay was not expressly "authorized" by Section 706(g). *Hudson v. Reno*, 130 F.3d at 1203. Hence, Section 1981a(b)(2)'s general reference to other types of relief authorized under Section 706(g) of the 1964 Act is insufficient to shelter front pay from the effect of Section 1981a(b)(3)'s specific limitation on damages for "future pecuniary losses." Indeed, by expressly itemizing "backpay" and "interest on backpay" among the exclusions in § 1981a(b)(2), while making no mention of front pay, Congress made it all the more clear that it was capping all types of awards designed to compensate for *future* monetary losses, while allowing courts to continue the tradition of making victims whole for *past* monetary losses.

ARGUMENT

THE PLAIN LANGUAGE OF 42 U.S.C. § 1981a(b)(3) LIMITING DAMAGES FOR "FUTURE PECUNIARY LOSSES" CLEARLY PLACES FRONT PAY SQUARELY UNDER THE STATUTORY CAPS.

I. The Damages Provisions of the Civil Rights Act of 1991 Were the Result of a Carefully Crafted Compromise in Which Congress Placed Caps on Damages for *Future* Monetary Losses, While Allowing Courts To Continue the Tradition of Making Victims Whole for Specific, *Past* Losses.

A. The Amendment Making Compensatory and Punitive Damages Available under Title VII Marked a Departure from a Longstanding Employment-Law Tradition of Limiting Remedies to Injunctive and "Make Whole" Relief.

Until it enacted the Civil Rights Act of 1991, Congress consistently had limited the remedies available under federal employment laws to measures designed to put a stop to unlawful conduct and make victims whole through reinstatement, backpay, and similar measures. Never before in a statute dealing specifically with employment had Congress provided for tort-style awards of general damages not tied to any specific economic losses.

This tradition of limited, preventative and restorative relief began in 1935 under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*., the nation's first comprehensive statute regulating workplace conditions. *See NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) (Reflecting NLRA's objectives, remedies afforded to victims of discrimination under NLRA are designed to reconstruct situation that would have existed had unlawful activity not occurred); *Virginia Electric & Power Co. v.* NLRB, 319 U.S.

533, 540 (1943) (NLRB is authorized to issue orders that restore *status quo ante*, either by divesting wrongdoer of benefits obtained from unfair labor practice or placing parties in positions they would have been in had illegal conduct not occurred); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power [of the NLRB] to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."). Thus, Congress did not authorize awards of general compensatory damages or punitive damages under the NLRA. *Id.* at 235-36.

Congress adhered to this tradition of limited remedies in 1938, when it enacted the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. It provided that an employer who violates that law's minimum wage or overtime pay requirements can be ordered to pay employees "the amount of their unpaid minimum wages, or their unpaid overtime compensation" up to a maximum of two years. In cases of willful violations, the recovery period is extended to three years, and "an additional equal amount' may be awarded as "liquidated damages." 29 U.S.C. § 216. The FLSA also provides for injunctive relief. 29 U.S.C. § 217. But, like the NLRA, it does not provide for awards of compensatory or punitive damages.

In 1963, Congress took the same approach when it enacted the first federal statute banning a form of employment discrimination based on sex—the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Congress made the EPA an amendment to the FLSA and simply incorporated that law's remedial scheme calling for payment of lost wage wages for a maximum of two years, or three years plus "liquidated damages" in cases of willful violation.

In keeping with this federal policy, the following year, when it enacted the Civil Rights Act of 1964, Congress

modeled that law's provisions dealing with remedies for victims of employment discrimination after "the backpay provision of the [NLRA]" and thus provided only injunctive and "make whole" remedies. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 and n.11 (1975) ("The framers of Title VII stated that they were using the NLRA provision as a model."); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976) (describing NLRA as "the model" for Title VII's remedies provision). Thus, Section 706(g) of Title VII permits a court, upon finding intentional discrimination, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). Backpay under Title VII may not accrue from more than two years before the filing of a charge of discrimination. *Id.*

In 1967, when it enacted the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, Congress incorporated by reference the enforcement provisions of the FLSA, including that law's limited provisions for back pay, plus "liquidated damages" in cases of willful violations. 29 U.S.C. § 626(b). It has long been recognized that the monetary remedies available under the ADEA do not include compensatory or punitive damages. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146-48 (2d Cir. 1984) (no compensatory or punitive damages under ADEA). *Accord: Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984); *Naton v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981); *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1293-96 (4th Cir. 1979); *Rogers v. Exxon Research and Eng. Co.*, 550 F.2d 834, 841-42 (3d Cir. 1977).

In 1972, when it first amended Title VII, Congress "strongly reaffirmed the 'make-whole purpose' of [that statute]." *Albemarle Paper Co. v. Moody*, 422 U.S. at 421.

The section-by-section analysis accompanying the Conference Committee Report states:

> In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 7168 (1972).

In 1978, when it again amended Title VII to clarify that discrimination on the basis of sex includes discrimination on the basis of "pregnancy, childbirth or related medical conditions," 42 U.S.C. § 2000e(k), Congress did not change the remedies provided by the statute, but retained the existing "make-whole" remedies.

Other labor and employment laws enacted prior to 1991 also reflect this consistent federal policy of limiting relief to preventative and restorative remedies. Thus, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*; the Davis-Bacon Act, 40 U.S.C. § 276a; the Service Contract Act, 41 U.S.C. § 351 *et seq.*; the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.*; and the employment-related provisions of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b, all provide for "make-whole" remedies, but not for tort-style damages.

Even as recently as 1990, Congress continued this tradition when it enacted the Americans with Disabilities Act. 42 U.S.C. § 12101 *et seq*. As originally introduced in the

Senate, the employment discrimination provisions of that legislation would have provided a plethora of remedies, including compensatory and punitive damages. As ultimately passed, however, it incorporated by reference the remedies and procedures of Title VII, thus reflecting the congressional preference for injunctive and "make whole" remedies. Senator Durenberger explained the reasons for the change:

> [W]e also took great effort to address the concerns many had over the punitive nature of the remedies section. Instead of allowing punitive and compensatory damages as originally introduced, the bill before us today parallels current civil rights legislation under [T]itle II and VII of the Civil Rights Act of 1964. . . . This change will help avoid some of the excessive and unnecessary litigation the original bill would have caused.

135 Cong. Rec. S10721 (Sept. 7, 1989) (statement of Sen. Durenberger).

Prior to 1991, the only exception to the general rule that federal employment-law remedies were limited to preventative and restorative measures was found in cases decided under the Civil Rights Act of 1866, 42 U.S.C. § 1981, commonly known as Section 1981. That law, which guarantees all persons in the United States the same right as "white citizens" to make and enforce contracts, relies for its enforcement on direct resort to civil litigation and places no limitation on the remedies a court may award. Section 1981, however, was not enacted specifically as an employment law. Indeed, its applicability to employment discrimination in the private sector was not established until more than 100 years after its enactment, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

B. To Achieve the Compromise That Secured Passage of the Legislation, the Drafters of the Civil Rights Act of 1991 Chose Their Words Carefully, Capping Damages for "Future Pecuniary Losses" But Not Placing Any New Restrictions on Backpay or Interest on Backpay.

During the congressional debates on CRA-91, proponents of expanding Title VII's remedies argued that then-existing law created a lack of "parity," in that victims of intentional discrimination on the basis of race or national origin could sue under Section 1981 and recover compensatory and punitive damages, while victims of intentional discrimination or harassment on the basis of sex or religion could sue only under Title VII and receive only injunctive and make-whole relief. *E.g.*, H.R. Rep. No. 102-40, pt. 1, at 65 (1st Sess. 1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603. Opponents responded vigorously:

> The fallacy with this argument is that section 1981 is not an employment statute at all. Rather, the section is a broad civil rights statute passed by Congress shortly after the Civil War to prevent racial discrimination in the making and enforcement of contracts. It has been applied to numerous factual situations, including jury service, voting rights, access to country clubs, admissions to schools and hospitals, automobile franchises, licensing requirements, and rental housing. Indeed, it was not until the early 1970s, a hundred years after enactment, that the courts judicially decided that the law even applied to private-sector employment discrimination. [Footnote omitted]. The law's proper applicability to employment discrimination has, thus, never been thoroughly considered by Congress. More importantly, its remedies as applied to employment discrimination are clearly an anomaly in the field of employment law and represent a small divergency, basically judicially created, from a long-standing Congressional pattern.

> In sum, proponents have found one judicially crafted exception to a rule established under many labor statutes and have asserted that this exception should now be the rule, or, put another way, that "yes, indeed, the tail should wag the dog." This hardly seems to be compelling logic. [Footnote omitted].

H.R. Rep. No. 102-40, pt. 1, at 146-147 (1st Sess. 1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 675-76 (Minority Views). Opponents also argued that expanding Title VII's remedies to include compensatory and punitive damages would generate a flood of costly litigation, make the conciliation procedures of the Equal Employment Opportunity Commission a virtual "irrelevancy," and impose onerous burdens, particularly on smaller employers. *Id.* at 147-153, *reprinted in* 1991 U.S.C.C.A.N. 549, 676-82.

In the end, the issue was resolved through a carefully crafted legislative compromise, whereby Congress replaced Title VII's remedial structure with a unique scheme that followed neither the traditional employment-law pattern of limiting relief exclusively to preventative and restorative measures nor the civil tort pattern of leaving it to the courts to determine without any limitation the amount damages to be awarded. The compromise consisted of making compensatory and punitive damages available under certain conditions,[2] but placing "caps" on the total amount of such damages any complaining party could receive.[3]

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[2] Compensatory and punitive damages are available only in cases of intentional discrimination. 42 U.S.C. § 1981a(a)(1). Punitive damages are subject to the additional requirement that the complaining party demonstrate that the respondent acted with "malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). *See Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

[3] The "caps" range from $50,000 to $300,000, depending on how many employees the defendant employer has. For firms with 500 or more

A key element of this compromise was the adoption of statutory language that clearly delineated the kinds of monetary relief that would be subject to the caps, and those that would not. For that purpose, Congress chose words that draw a sharp line between *past* and *future* monetary (or "pecuniary") losses. It provided in 42 U.S.C. § 1981a(b)(2) that the caps would not apply to "*backpay*, *interest* on backpay, or any other type of relief authorized under section 706(g) of [Title VII]." (emphasis added). On the other hand, it specified in 42 U.S.C. § 1981a(b)(3) that the caps would apply to damages awarded for "*future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. . . ." (emphasis added).

Thus, under the compromise finally reflected in CRA-91, Congress preserved the availability of the traditional employment-law remedies of backpay and interest on backpay. At the same time, it authorized courts to award limited compensatory and punitive damages. To avoid opening the door to the unrestricted liabilities feared by opponents of previous versions of the legislation, however, Congress placed caps on the amount any one complaining party could be awarded as compensatory and/or punitive damages, and it made clear that those caps apply to damages for inherently speculative harm such as "future pecuniary losses," as well as for inherently subjective harm such as pain and suffering.

C. The Statutory Phrase "Future Pecuniary Losses" Clearly Describes the Type of Losses for Which Front Pay Is Designed To Compensate.

As the Sixth Circuit correctly recognized, the ordinary meaning of the phrase "future pecuniary losses" plainly encompasses money awarded as "front pay"—*i.e.*, as "a

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employees, such as the Respondent in this case, the maximum cap applies. 42 U.S.C. § 1981a(b)(3).

monetary award for the salary that the employee would have received but for the discrimination." *Hudson v. Reno*, 130 F.3d 1193, 1203 (6th Cir. 1997). Indeed, it is hard to conceive of a phrase more aptly descriptive of the type of loss for which front pay is intended to compensate.

Front pay has been used in employment cases as a substitute for an order directing an employer to reinstate an individual to the position he or she would have held in the absence of unlawful discrimination. Reinstatement is the strongly preferred remedy. *E.g.*, *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 13 (1st Cir. 1997) (stating that "overarching preference" is for reinstatement); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1103 (3d Cir. 1995) (stating that reinstatement "is the preferred remedy to avoid future lost earnings") (quoting *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985)); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) (noting "strong preference in favor of reinstatement"); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987) (referring to reinstatement as the "preferred remedy"). Nevertheless, when circumstances make instatement or reinstatement infeasible or impracticable, courts have sometimes awarded front pay, in effect to take the place of the wages it is estimated the individual would have received had reinstatement taken place. *E.g.*, *Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) (front pay appropriate where reinstatement would present extreme burden); *Selgas*, 104 F.3d at 13 (front pay appropriate as "alternative" for periods in which reinstatement is unavailable); *Starceski*, 54 F.3d at 1103 (front pay appropriate where reinstatement is not feasible); *Cassino*, 817 F.2d at 1346 (same).

Unlike backpay, front pay is not specifically authorized under Title VII. Moreover, although Title VII precludes accrual of backpay from a date more than two years prior to the filing of a charge with the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-5(g)(1), the

statute places no comparable time limit on the accrual of front pay. Thus, while backpay and interest thereon represent compensation for specifically ascertainable, finite losses sustained prior to the award of the remedy, front pay is quite different. Front pay, by its very nature, is a more open-ended and speculative remedy. It is more in the nature of general damages to compensate for the estimated value of an anticipated future loss.

Given these substantial differences in the nature of the two remedies, it is entirely understandable and appropriate that Congress chose to treat backpay and front pay—*i.e.*, remedies for *past* monetary losses and for *future* monetary losses, respectively—differently when it revamped the remedial structure of Title VII in 1991. When it elected, for the first time in any federal employment statute, to make limited compensatory damages available in CRA-91, it made perfect sense for Congress to place caps, as it did, on inherently open-ended damages, including "future pecuniary losses" such as front pay, as well as items such as pain and suffering, while leaving unchanged the traditional employment law remedies of backpay and interest.

II. The Plain Meaning of Section 1981a(b)(3)'s Limitation on Damages for "Future Pecuniary Losses" Is Not Negated or Rendered Ambiguous by Section 1981a(b)(2)'s Exclusion of "Relief Authorized Under Section 706(g)" of Title VII.

A. The *Specific* Language in Section 1981a(b)(3) Subjecting Damages for "Future Pecuniary Losses" to Statutory Caps Controls Over the *General* Language of Section 1981a(b)(2) Excluding "Other Relief Authorized under Section 706(g)" from Compensatory Damages.

As demonstrated above, because the phrase "future pecuniary losses" clearly encompasses the type of monetary losses for which front pay awards are designed to

compensate, the plain meaning of Section 1981a(b)(3) places front pay squarely under CRA-91's caps on damages. This plain meaning is not altered or rendered ambiguous by the preceding subsection of CRA-91, which states that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). For, as the Sixth Circuit correctly recognized, Section 706(g) of Title VII never has specifically authorized front pay. *Hudson v. Reno*, 130 F.3d at 1203. On the contrary, Section 706(g) specifically authorizes *backpay*, subject to certain limitations, but makes no mention whatsoever of *front pay*.

To be sure, courts sometimes have awarded front pay in Title VII cases in reliance on the general provision of Section 706(g) stating that, upon finding an unlawful employment practice, a court may order reinstatement, with or without back pay, "or any other equitable relief as the court deems appropriate." But under established rules of statutory construction, Section 1981a(b)(2)'s reference to this *general* language of Section 706(g) cannot negate the effect of Section 1981a(b)(3)'s *specific* language subjecting damages for "future pecuniary losses" to the statutory caps. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 177-178 (6th ed. 2000 & Supp. 2001) ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail.") (footnote omitted). Thus, it is not necessary for the Court to decide in this case whether or not Section 706(g), in fact, authorizes courts to award front pay in Title VII cases. For, even assuming that it does, the authorization is only in broad, *general* statutory language, which must give way to the *specific* language of Section 1981a(b)(3) when it comes to determining the applicability of that subsection's caps to damages for "future pecuniary losses," such as front pay.

This conclusion is further reinforced by the corollary maxim that "the last provision in point of arrangement within the text of [the same statute] is given effect" over contrary, preceding provisions. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 179 (6th ed. 2000 & Supp. 2001) (footnote omitted). In 42 U.S.C. § 1981a, the general provision of subsection (b)(2) that excludes from compensatory damages "any other type of relief authorized under section 706(g)" *precedes*, and therefore must give way to, the more specific provision of subsection (b)(3) that places caps on damages for "future pecuniary losses" such as front pay. Hence, (b)(3) is controlling, and the caps apply.

B. Under the Maxim of *Expressio Unius Est Exclusio Alterius*, the Express Inclusion in Section 1981a(b)(2) of References to "Backpay" and "Interest on Backpay" Effectively Excludes Front Pay from That Section.

A final confirmation that the general language of Section 1981a(b)(2)'s exclusions from compensatory damages do not remove front pay from the effect of the caps contained in Section 1981a(b)(3) is found in another familiar maxim of statutory construction: *Expressio unius est exclusio alterius—i.e.*, to mention one thing expressly in a statute is to exclude other things, not mentioned. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction 304 (6th ed. 2000 & Supp. 2001). In setting forth "exclusions from compensatory damages" in subsection (b)(2), Congress expressly mentioned "backpay" and "interest on backpay," but made no mention of front pay. Hence, by application of the maxim, forms of monetary relief other than backpay and interest on backpay are excluded from the "exclusions," and consequently are subject to the statutory caps. Thus, this settled rule of statutory construction also leads inexorably to the conclusion that front pay under Title VII is capped at a maximum of $300,000.

CONCLUSION

For the reasons discussed above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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