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DAMAGES IN AGE DISCRIMINATION CASES—THE NEED FOR A CLOSER LOOK

I. BACKGROUND

A. *The ADEA in General*

Prior to 1967, older workers throughout the country were virtually unprotected from discrimination in their employment based on age.¹ In the 1960's Congress first attempted to combat such discrimination against the elderly; however, none of the enacted statutes had an express prohibition on age discrimination.²

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA).³ Congress was concerned about the tragic waste of valuable human resources in denying or restricting employment opportunities to older Americans.⁴ It was found that older workers were disadvantaged in their efforts to remain employed, and once discharged, in their efforts to regain employment.⁵ Employers engaged in the common practice of setting arbitrary age limits regardless of potential for job performance, with the grave two-fold result of high unemployment among the elderly and deterioration of skill, morale, and acceptance in the work force.⁶ Thus, to protect the older worker, the ADEA was enacted. Congress articulated a three-part purpose in the statute: (1) to promote employment of older persons based on ability rather than age; (2) to prohibit arbitrary age discrimination in employment; and (3) to help employers and workers find solutions to problems arising from the effect of age on employment.⁷

B. *Elimination of Discrimination Through Education*

Congress was concerned not only with prohibiting discrimination based

1. C. EDELMAN & I. SIEGLER, *FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW* 59-67 (1978). Prior to 1967, employment discrimination based on age was prohibited by statute in many states, but not in all. *Id.*

2. See Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 219 (codified at 42 U.S.C. §§ 3001-3056f (1976)); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. §§ 2701-2996 (1976)); Manpower Development and Training Act of 1962, Pub. L. No. 93-567, 88 Stat. 1845 (codified at 42 U.S.C. §§ 2571-2628 (1976)).

3. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980).

4. See, e.g., 113 CONG. REC. 34745 (1967) (remarks of Rep. Eilberg); 113 CONG. REC. 34741 (1967) (remarks of Rep. Steiger); 113 CONG. REC. 31256 (1967) (remarks of Sen. Young); 113 CONG. REC. 31254 (1967) (remarks of Sen. Javits).

5. Age Discrimination in Employment Act, 29 U.S.C. § 621(a)(1); 113 CONG. REC. 31254 (1967) (remarks of Sen. Javits).

6. 29 U.S.C. § 621(a)(2), (3).

7. *Id.* § 621(b).

on age but also with educating employers and the public about the aging process.⁸ By dispelling misconceptions⁹ which lead to age discrimination,¹⁰ Congress expected to eliminate the problem. The education functions were seen as means of effecting changes in attitude, thus inducing compliance and making enforcement measures unnecessary.¹¹ To inform labor unions, management, and the general public about the needs and abilities of older workers, the ADEA required the Secretary of Labor to carry on a continuing program of education and information.¹²

Congress was also concerned about keeping abreast of the situation itself. The Act required an annual report to Congress by the Secretary of Labor, in addition to the continuing education program so that Congress could be apprised of changing conditions and situations.¹³ From the beginning, this continuing education program has been an important part of administering and obtaining compliance with the Act.¹⁴ There is evidence, however, that this program has not accomplished its purpose of reducing or eliminating age discrimination.¹⁵ Courts have suggested that allowing a wider scope of relief might better effectuate the purposes of the Act.¹⁶ This comment will review the relief currently available under the ADEA and consider whether such relief has been successful in encouraging compliance with the Act.

C. Coverage of the ADEA

In general, the ADEA "broadly prohibits arbitrary discrimination in the workplace based on age."¹⁷ The statute's remedial nature entitles it to

8. H.R. REP. No. 805, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214.

9. One study revealed that the general public considers older workers to be less flexible, more accident prone, and less productive than younger workers. Rosen & Gerdee, *The Nature of Job Related Stereotypes*, 61 J. APPL. PSYCH. 180, 181-82 (1976).

10. The Senate Special Committee on Aging stated that "[the] ADEA was enacted not only to enforce the law, but to provide facts that would help change attitudes." STAFF OF SENATE COMM. ON AGING, 93d Cong., 1st Sess., *IMPROVING THE AGE DISCRIMINATION LAW* iii (Comm. Print 1973).

11. H.R. REP. No. 805, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2216.

12. 29 U.S.C. § 622(a) (1976 & Supp. IV 1980).

13. 29 U.S.C. § 632. As of July 1, 1979, all ADEA functions vested in the Secretary of Labor were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 354 (Supp. III 1979), and in 92 Stat. 3781 (1978).

14. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMIN., *AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967*, at 14 (1979).

15. See notes 166-67 *infra*, and accompanying text.

16. *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 112 (1st Cir. 1978); *Hassan v. Delta Orthopedic Medical Group, Inc.*, 476 F. Supp. 1063, 1065 (E.D. Cal. 1979).

17. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

liberal interpretation.¹⁸ The protected group within the purview of the ADEA are persons at least forty years of age, but less than seventy years of age.¹⁹ Employers,²⁰ unions,²¹ and employment agencies²² are prohibited from discriminating against employees²³ or applicants²⁴ in hiring, discharge, promotion, training, compensation, or terms of employment because of the individual's age.²⁵ In addition to prohibiting direct actions which are discriminatory, the Act also prohibits practices which have the effect of discriminating against older workers.²⁶

Consistent with the goal of conciliation when a violation is alleged,²⁷ the ADEA requires that certain administrative prerequisites be met by the plaintiff before filing an individual action.²⁸ Recognizing that "enforcement procedures are necessary to get the required attention of employers and others,"²⁹ Congress allowed both the Equal Employment Op-

18. *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd by equally divided court*, 434 U.S. 99 (1977).

19. 29 U.S.C. § 631(a) (1976 & Supp. IV 1980).

20. 29 U.S.C. § 630(b) (1976). An "employer" is defined as 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: . . . any agent of such person, and a State or political subdivision of a State . . . and any interstate agency, but such term does not include the United States or a corporation wholly-owned by the government of the United States. *Id.* The reference to commerce provides a basis for federal action. The commerce clause of the United States Constitution empowers Congress "[t]o regulate commerce . . . among the several states. . . ." U.S. CONST. art. I, § 8.

21. 29 U.S.C. § 630(d). "Labor organization" is defined as a labor organization engaged in an industry affecting commerce, . . . in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board or joint council so engaged which is subordinate to a national or international labor organization.

Id.

22. 29 U.S.C. § 630(c). An "employment agency" is defined as "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person, but shall not include an agency of the United States." *Id.*

23. 29 U.S.C. § 630(f). "Employees" are defined as individuals "employed by any employer except that the term 'employee' shall not include any person elected to public office in any state or political subdivision of any state . . .," *id.*, the personal staff of such officials, appointed policy-makers, or immediate advisors who are not subject to the civil service laws of a state government, agency, or political subdivision. *Id.* See also *supra* text accompanying note 19.

24. 29 U.S.C. § 623(a)(1) (1976 & Supp. II 1978).

25. 29 U.S.C. § 623 (1976 & Supp. IV 1980).

26. *Hays v. Republic Steel Corp.*, 12 Fair Empl. Prac. Cas. (BNA) 1640, 1650 (N.D. Ala. 1974), *rev'd in part on other grounds*, 531 F.2d 1307 (5th Cir. 1976).

27. See 29 U.S.C. § 621(b) (1976). See also *Rogers v. Exxon Research and Eng'g Co.*, 550 F.2d 834, 841 n.11 (3d Cir.), *cert. denied*, 434 U.S. 1022 (1977).

28. 29 U.S.C. § 626(d) (1976 & Supp. IV 1980). See also *Rogers*, 550 F.2d at 841.

29. H.R. REP. No. 805, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. CODE CONG. & AD.

portunity Commission (EEOC)³⁰ and private parties to institute suits to enforce the ADEA.³¹ Prior to filing suit, however, a private party must file a timely complaint with the EEOC³² and give the EEOC time to investigate the charges and attempt to effect compliance with the Act through negotiation and conciliation.³³

D. *Relief Under the ADEA*

The enforcement provisions and remedies under the ADEA are found in subsections (b) and (c) of section 626.³⁴ In this section, Congress specifically adopted the "powers, remedies, and procedures provided in sections 211(b), 216 (except subsection (a) thereof), and 217"³⁵ of the Fair Labor Standards Act of 1938.³⁶ Under the FLSA, an employee may be entitled to receive an award consisting of unpaid minimum wages, unpaid overtime compensation, and an equal amount of liquidated damages upon the finding of a violation of its provisions.³⁷ The ADEA specifies that amounts owed to a person for a violation of the Act will be treated as minimum wages and overtime compensation under the FLSA framework.³⁸ The FLSA provision for an award of liquidated damages is also incorporated into the ADEA.³⁹ The ADEA, however, modifies this remedy by conditioning the award on the finding of a willful violation.⁴⁰ The liq-

News 2213, 2215.

30. 29 U.S.C. § 626(b) and (c).

31. *Id.* § 626(c).

32. *Id.* § 626(d) and (e). A complaint must be filed with the EEOC within 180 days of the alleged discriminatory act. Then the complainant must wait at least 60 days after the filing of the charges before commencing suit to allow the EEOC to attempt conciliation with the charged party and to attempt to eliminate the alleged unlawful practice without resort to the courts. *Id.* § 626(d)(1). In a deferral state (one with a state agency whose administrative procedures and remedies must be resorted to and exhausted first, *id.* § 633(b)), the complainant must file charges with the EEOC within 300 days of the alleged unlawful act or within 30 days of receipt by the complainant of notice that the state agency has terminated its proceedings whichever is earlier. *Id.* § 626(d)(2). For a list of designated deferral agencies, see 29 C.F.R. § 1601.74(a) (1982).

33. 29 U.S.C. § 626(d) flush language.

34. *Id.* § 626 (1976 & Supp. IV 1980).

35. *Id.* § 626(b). Subsection (a) of section 216 of the FLSA provides criminal liability for willful violations of section 215 of the FLSA. *Id.* § 216(a) (1974). This criminal liability does not apply in ADEA cases. *Id.* § 626(b) (1976 & Supp. IV 1980).

36. *Id.* § 626(b).

37. Fair Labor Standards Act of 1938 § 16(b), 29 U.S.C. § 216(b) (1976 & Supp. IV 1980).

38. 29 U.S.C. § 626(b).

39. *Id.* See *supra* text accompanying notes 35 & 36.

40. 29 U.S.C. § 626(b). In defining a "willful violation," the courts in general have rejected an analogy to criminal willfulness and have adopted the traditional civil definition. Under this standard an employer's discriminatory act is willful when it is shown that the act was intentional, voluntary, not accidental, mistaken, or inadvertent. See, e.g., *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980).

liquidated damages award is equal to the amount awarded the plaintiff for the violation of the Act,⁴¹ in effect doubling the actual damages the plaintiff receives if the violation is willful.⁴²

In addition to the incorporated FLSA remedies, the ADEA further provides that a court may grant "such legal or equitable relief" as is necessary to carry out the purposes of the Act.⁴³ This language is found in both the section applicable to actions brought by the EEOC⁴⁴ and the section applicable to actions brought by the individual employee.⁴⁵

The ADEA specifically provides examples of equitable relief available to the plaintiff,⁴⁶ including "judgments compelling employment, reinstatement or promotion . . ." ⁴⁷ However, the words "without limitation" precede the list of examples, evidencing an intent by Congress to afford a court wide latitude in fashioning such equitable relief.⁴⁸ At least one court has designated an award of pension benefits as equitable relief to a prevailing plaintiff where the pension rights had not yet accrued due to the violation of the ADEA.⁴⁹ Other courts have viewed lost pension rights as an aspect of overall damages.⁵⁰

In the same section of the Act, examples of legal relief available to a plaintiff are provided.⁵¹ The court may thus enforce "liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."⁵² The same "without limitation" language seems to

41. 29 U.S.C. § 216(b).

42. This definition of liquidated damages differs from the usual concept, which is that amount agreed to by the parties to a contract to be paid for a breach of contract. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 232-36 (2d ed. 1977); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.5 (1973).

43. 29 U.S.C. § 626(b).

44. *Id.*

45. *Id.* § 626(c).

46. *Id.* § 626(b).

47. *Id.*

48. *Id.*

49. *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980). The plaintiff in this case was a 55-year-old teacher. The jury awarded her \$15,190 in damages. The district court judge viewed this award as a factual conclusion that Ms. Geller was deprived of only one year's employment by the defendant's discriminatory action and concluded that reinstatement was inappropriate. The circuit court agreed, adding that Ms. Geller had never been formally hired and that permanent reinstatement was therefore not warranted. The circuit court, however, disagreed with the district court that lost pension benefits were damages assessable by the jury. The circuit court characterized these benefits as equitable relief, available to a plaintiff under a "make-whole" theory. *Id.* Cf. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979) (trial court should use its discretion in computation of award, and pension benefits may be appropriate even though plaintiff's time with defendant employer does not meet minimum vesting period).

50. See, e.g., *Fellows v. Medford Corp.*, 431 F. Supp. 199, 201 (D. Or. 1977).

51. 29 U.S.C. § 626(b).

52. *Id.* In their opinions, the courts do not denominate which relief is legal and which is

apply equally to this legal relief.⁵³ There seems to be no question that back pay and other lost benefits may be awarded.⁵⁴ The problem arises, however, with respect to other traditional types of legal relief.

The inclusion of the narrowly-defined FLSA remedies with the broad phrase "such legal or equitable relief as may be appropriate to effectuate the purpose of this chapter"⁵⁵ in the ADEA, has created an unresolved controversy in the federal courts on the issue of the availability of compensatory and punitive damages under the Act. There is no express provision in the ADEA for such damages. Compensatory damages generally are intended to reimburse the nonpecuniary harm of physical or emotional injury caused by the discriminatory act,⁵⁶ while punitive damages usually focus on the act of the wrongdoer.⁵⁷ Generally, an award of punitive damages serves to deter future violations, to encourage victims to file suit, and to punish the violator.⁵⁸ A majority of the district courts⁵⁹ and all the circuit courts of appeal which have addressed the issue⁶⁰ have denied recovery of both compensatory and punitive damages. A considerable minority of district courts, however, has ruled that one or both are recoverable.⁶¹ In addition, the two remedies have been treated inconsistently,

equitable.

53. *Id.*

54. *See, e.g.,* *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971). *See also* Comment, *Relief Under the Age Discrimination in Employment Act of 1967*, 31 *BAYLOR L. REV.* 217, 218-19 (1979).

55. 29 U.S.C. § 626(b).

56. *DOBBS, supra* note 42, § 12.5.

57. *Id.*; *C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES* § 79 (1935); *W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971).

58. *DOBBS, supra* note 42, at 205.

59. *See, e.g.,* *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287 (S.D.N.Y. 1981); *Ginsberg v. Burlington Indus.*, 500 F. Supp. 696 (S.D.N.Y. 1980); *Harris v. United States Dep't of Treasury*, 489 F. Supp. 476 (N.D. Ill. 1980); *Knerr v. Norge Co.*, 476 F. Supp. 1352 (S.D. Ill. 1979); *Douglas v. American Cyanamid Co.*, 472 F. Supp. 298 (D. Conn. 1979); *Stevenson v. J.C. Penny Co.*, 464 F. Supp. 945 (N.D. Ill. 1979); *Riddle v. Getty Refining & Marketing Co.*, 460 F. Supp. 678 (N.D. Okla. 1978); *Dunwoodie v. Chrysler Corp.*, 459 F. Supp. 971 (E.D. Mich. 1978); *Schlicke v. Allen-Bradley Co.*, 448 F. Supp. 252 (E.D. Wis. 1978); *Ellis v. Philippine Airlines*, 443 F. Supp. 251 (N.D. Cal. 1977); *Fellows v. Medford Corp.*, 431 F. Supp. 199 (D. Or. 1977); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215 (D. Colo. 1977); *Looney v. Commercial Union Assurance Co.*, 428 F. Supp. 533 (E.D. Mich. 1977); *Newkirk v. General Elec. Co.*, 20 *Fair Empl. Prac. Cas. (BNA)* 1588 (N.D. Cal. 1979); *Brin v. Bigsby and Kruthers*, 19 *Fair Empl. Prac. Cas. (BNA)* 415 (N.D. Ill. 1979).

60. *See, e.g., Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Naton v. Bank of Cal.*, 649 F.2d 691 (9th Cir. 1981); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez 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), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

61. *See, e.g., Kalli v. Great Amer. Ins. Co.*, 516 F. Supp. 1273 (D. Minn. 1981); *Wise v. Olan Mills Inc. of Texas*, 485 F. Supp. 542 (D. Colo. 1980); *Hassan v. Delta Orthopedic Medical Group, Inc.*, 476 F. Supp. 1063 (E.D. Cal. 1979); *Flynn v. Morgan Guar. Trust Co.*,

with compensatory damages allowed in cases in which punitive damages were denied.⁶²

II. THE AVAILABILITY OF COMPENSATORY DAMAGES UNDER THE ADEA

Prior to 1975, the ADEA was narrowly construed by the courts to preclude an award of either compensatory or punitive damages.⁶³ This construction was supported by commentaries which viewed the ADEA as primarily providing employment restitution instead of pecuniary damages.⁶⁴ In 1975, however, in the landmark case of *Rogers v. Exxon Research & Engineering Co.*,⁶⁵ the court granted an award of compensatory damages for pain and suffering. The district court acknowledged the lack of precedent for such an award,⁶⁶ but it concluded that the broad language of the ADEA which permits the granting of "legal and equitable relief as may be appropriate to effectuate the purposes of this chapter,"⁶⁷ includes a compensatory damage award.⁶⁸ The district court judge found support for his decision through analogies to Titles VII and VIII of the Civil Rights Act of 1964.⁶⁹ He determined that since the ADEA created a new statutory tort, the full range of legal and equitable relief was available to a prevailing plaintiff.⁷⁰ Following the *Rogers* decision, other federal district courts awarded compensatory damages for pain and suffering.⁷¹ In 1977, however, the Third Circuit reversed the district court on the issue of compensatory damages.⁷² Its decision was based on the ADEA's silence on the availability of such damages, on congressional intent, and on potential impairment of the administrative conciliation process, a key element in

463 F. Supp. 676 (E.D.N.Y. 1979); *Morton v. Sheboygan Memorial Hosp.*, 458 F. Supp. 804 (E.D. Wis. 1978); *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462 (N.D. Ohio 1978); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706 (E.D. Wis. 1978); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976), *aff'd on rehearing*, 432 F. Supp. 952 (N.D. Ill. 1977); *Paulo v. Stiefel Laboratories*, 22 Fair Empl. Prac. Cas. (BNA) 489 (S.D.N.Y. 1979); *Karjolic v. Illinois Bell Tel. Co.*, 19 Fair Empl. Prac. Cas. (BNA) 447 (N.D. Ill. 1977).

62. See, e.g., *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462 (N.D. Ohio 1978). The court concluded that Congress intended liquidated damages to take the place of punitive damages. *Id.* at 464.

63. See, e.g., *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971).

64. Agatstein, *The Age Discrimination in Employment Act of 1967: A Critique*, 19 N.Y.L.F. 309, 319 (1973).

65. 404 F. Supp. 324 (D.N.J. 1975), *rev'd*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

66. 404 F. Supp. at 331.

67. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

68. 404 F. Supp. at 333.

69. *Id.* at 331-33.

70. *Id.* at 333.

71. See *supra* text accompanying notes 59-62.

72. *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

the ADEA statutory scheme.⁷³ The court voiced the concern that the availability of a compensatory award would jeopardize attempts at conciliation and lessen the chances that employees and employers would settle their differences out of court.⁷⁴ With the reversal of *Rogers*,⁷⁵ courts began to reconsider compensatory damage relief under the ADEA.

A. *Arguments for Recovery of Compensatory Damages*

The most persuasive argument for allowing recovery of compensatory damages for pain and suffering is the language of the ADEA itself. Section 626 permits the court to grant "legal . . . relief as may be appropriate to effectuate the purposes of this chapter, including without limitation . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation. . . ."⁷⁶

In *Lorillard v. Pons*,⁷⁷ an ADEA case in which the Supreme Court decided the issue of the right to a jury trial under the Act, the Court found it necessary to define the term "legal," as used in this section of the Act.⁷⁸ The Court explained that the word "legal" is a term of art.⁷⁹ When words having a well known meaning at common law are used in a statute they are presumed to have been used with that meaning.⁸⁰ Therefore, the Court inferred that Congress knew the meaning of the term "legal" when it included that word in the statute.⁸¹ Compensatory damages are traditional legal relief.⁸² Because *Lorillard* decided the issue of the right to a trial by jury, its application to the issue of damages in ADEA actions is in dispute.⁸³

The relief articulated in the statute is also to be "appropriate to effectuate the purposes of this chapter."⁸⁴ The purposes of the ADEA are to promote employment of older workers, to prohibit discrimination in employment based on age, and to find solutions to problems arising from the impact of age on employment.⁸⁵ The availability of compensatory damages to counteract all possible adverse effects of age discrimination is nec-

73. 550 F.2d at 841.

74. *Id.*

75. 550 F.2d 834.

76. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

77. 434 U.S. 575 (1978).

78. *Id.* at 583.

79. *Id.*

80. *Id.*

81. *Id.*

82. See *supra* text accompanying notes 55-56.

83. See *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008 (D. Colo. 1978). Cf. *Slatin v. Stanford Research Inst.*, 590 F.2d 1292 (4th Cir. 1979) (court did not allow damages for pain and suffering).

84. 29 U.S.C. § 626(b).

85. *Id.* §621(b).

essary to accomplish this purpose.

In *Rogers v. Exxon Research & Engineering Co.*,⁸⁶ the district court looked at the legislative history of the Act and found that it was designed to protect older workers from more than just the purely economic effects of job discrimination based on age.⁸⁷ Thus, to remedy "the full scope of the evil against which Congress sought to legislate,"⁸⁸ a compensatory damage award would be proper in the appropriate factual circumstances.⁸⁹

In addition, the "without limitation" language in the Act⁹⁰ is unexplainable if Congress did intend to limit a plaintiff's recovery to back wages. Furthermore, subsection (b) of Section 626 is not the only subsection dealing with damages. Subsection (c)(1) allows a private right of action "for such legal . . . relief as will effectuate the purposes of this chapter. . . ." ⁹¹ In this subsection, there is no mention of the FLSA remedies or any other limitation.⁹² "A central rule of statutory construction requires that where possible, a statute should not be construed in such a way as to render any of its parts superfluous or redundant."⁹³ To avoid redundancy between subsections (b) and (c)(1), it must be concluded that Congress provided relief in two separate locations, one with qualifications and one without.⁹⁴

Other possible arguments may be made in favor of allowing damages for pain and suffering. Out-of-pocket losses are often negligible when compared to the psychological and emotional injuries caused by an employer's discriminatory conduct based on age.⁹⁵ Such an award would encourage employees to seek redress for violations and would deter employers from each illegal conduct. Also, compensatory damage awards could contribute to the education of the public concerning the effects of age on employment, as well as enhance public understanding of the statute.⁹⁶ Fi-

86. 404 F. Supp. 324 (D.N.J. 1975).

87. *Id.* at 330 n.3.

88. *Id.* at 331 n.3.

89. *Id.* at 330.

90. 29 U.S.C. § 626(b).

91. *Id.* § 626(c)(1).

92. *Id.*

93. *Hassan v. Delta Orthopedic Medical Group, Inc.*, 476 F. Supp. 1063, 1065 (E.D. Cal. 1979). See also *Patagonia Corp. v. Board of Governors*, 517 F.2d 803, 813 (9th Cir. 1975).

94. See *Hassan*, 476 F. Supp. 1063.

95. See *Rogers v. Exxon Research & Eng'g Co.*, 404 F. Supp. 324, 329 (D.N.J. 1975), *rev'd*, 550 F.2d 834, 839-40 (3d Cir. 1977), *cert. denied*, 434 (U.S. 1022 (1978)). For some sources of evidence which can be used in age discrimination cases to support adverse physical and psychological effects of forced retirement, see the Senate Report accompanying the 1978 amendments to the ADEA. S. Rep. No. 493, 95th Cong., 2d Sess. 3-4, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 506-07.

96. See Comment, *Compensatory and Punitive Damages in Age Discrimination in Employment*, 32 U. Fla. L. Rev. 701, 729-30 (1980).

nally, a few courts have construed the ADEA broadly to create a new statutory tort.⁹⁷ Therefore, under traditional tort principles, a court should allow any recovery which would make the plaintiff whole.⁹⁸

B. *Arguments for Denial of Compensatory Damages*

The most widely cited authority for limiting the monetary relief available to a plaintiff under the ADEA is the Third Circuit's decision reversing the district court in *Rogers*.⁹⁹ The Third Circuit reasoned that the right of a court to grant "such legal or equitable relief as may be appropriate"¹⁰⁰ must be analyzed in light of the administrative nature of the Act as a whole.¹⁰¹ Private actions under the ADEA are secondary to the administrative remedies,¹⁰² and the congressional committees which fashioned the bill "emphasized that the most favored method of enforcement was conciliation and mediation."¹⁰³ The court noted that the possibility of compensatory damages would hamper informal attempts at settlement and would complicate administrative procedures.¹⁰⁴

Another rationale for limiting the plaintiff's recovery is found in *Slatin v. Stanford Research Institute*.¹⁰⁵ In *Slatin*, the Fourth Circuit focused on the incorporation of the FLSA powers, remedies, and procedures into the ADEA.¹⁰⁶ Judicial interpretations of the remedies available under the FLSA had not permitted the recovery of compensatory damages.¹⁰⁷ Since it is presumed that Congress was aware of these interpretations when drafting the Act, Congress must have meant for the ADEA to be similarly limited.¹⁰⁸ Other arguments may be made to limit damages under the ADEA. The volume of litigation would increase substantially if employees were urged on by the prospects of a large damage award. Also, the Conference Committee Report accompanying the 1978 Amendments to the ADEA suggested that compensatory damages for pain and suffering were not covered by the Act.¹⁰⁹

97. See, e.g., *Rogers*, 404 F. Supp. at 327.

98. *Id.* at 328.

99. *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

100. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

101. 550 F.2d at 841.

102. *Id.*

103. *Id.*

104. *Id.*

105. 590 F.2d 1292 (4th Cir. 1979).

106. *Id.* at 1293-94.

107. See, e.g., *Martinez v. Behring's Bearings Serv., Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959); *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949).

108. 590 F.2d at 129.

109. H.R. CON. REP. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 535. "The ADEA as amended by this act does not provide remedies

These arguments, however, hardly support a refusal to award pain and suffering damages. Knowing that a court would not award more than back wages, it is likely that employers would refuse to settle disputes at the administrative level. Also, the FLSA limitations do not apply to the subsection allowing an action by an individual.¹¹⁰ The flood of litigation and the frustration of the conciliation process arguments appear to be more the product of judicial disillusionment with pain and suffering damages than an interpretation of the ADEA.¹¹¹ Furthermore, the opinion of the 1978 Conference Committee is not persuasive. The intent of the Congress that enacted a particular piece of legislation should influence the courts, not the opinion of a subsequent Congress.¹¹²

III. THE AVAILABILITY OF PUNITIVE DAMAGES UNDER THE ADEA

In 1976, *Murphy v. American Motors Corp.*¹¹³ expanded the district court's decision awarding compensatory damages in *Rogers*¹¹⁴ to allow recovery of punitive damages under the ADEA.¹¹⁵ The court noted that the ADEA authorizes both equitable and legal relief and that punitive damages are traditionally legal relief.¹¹⁶ Thus, the court concluded that under the *Rogers* statutory tort analysis, punitive damages are available under the Act.¹¹⁷ Following these two decisions, several other district courts awarded punitive damages under the ADEA.¹¹⁸ Punitive damages were again awarded in the northern district of Georgia in *Dean v. American Security Insurance Co.*¹¹⁹

In 1977, however, the Third Circuit reversed the district court's decision in *Rogers*.¹²⁰ Accordingly, the courts began to reconsider the availability of punitive damages under the ADEA. The Fifth Circuit followed the Third Circuit by reversing *Dean v. American Security Insurance*

of a punitive nature." *Id.* at 535 (emphasis added).

110. 29 U.S.C. § 626(c).

111. See *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 664 (W.D. Va. 1977).

112. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 46.06 (C. Sands 4th ed. 1972).

113. 410 F. Supp. 1403 (N.D. Ga. 1976), *rev'd* 570 F.2d 1226 (5th Cir. 1978).

114. *Rogers v. Exxon Research & Eng'g Co.*, 404 F. Supp. 324 (D.N.J. 1975).

115. 410 F. Supp. at 1405.

116. *Id.*

117. *Id.*

118. See, e.g., *Dean v. American Sec. Ins. Co.*, 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd* 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Wilson v. American Motors Corp.*, 15 Fair Empl. Prac. Cas. (BNA) 1158 (N.D. Ga. 1976); *Williams v. General Motors Corp.*, 15 Fair Empl. Prac. Cas. (BNA) 411 (N.D. Ga. 1976), *vacated*, 15 Fair Empl. Prac. Cas. (BNA) 413 (1977); *Davis v. Adams-Cates Co.*, 15 Fair Empl. Prac. Cas. (BNA) 397 (N.D. Ga. 1976).

119. 429 F. Supp. 3 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

120. 550 F.2d 834 (3d Cir. 1977).

Co.¹²¹ and holding that neither punitive damages nor compensatory damages are available under the ADEA.¹²² The court concluded that congressional silence on the availability of punitive damages and the statutory liquidated damages award available under the Act indicated the congressional preference for liquidated damages in lieu of punitive damages.¹²³ Shortly after reversing *Dean*, the Fifth Circuit reversed *Murphy*¹²⁴ on the same grounds.¹²⁵ As a result of these cases, there is little judicial support for the availability of a punitive damages award under the ADEA.¹²⁶ A majority of district courts¹²⁷ and the circuit courts of appeal which have considered punitive damages¹²⁸ have denied such an award. However, some courts do offer such relief.¹²⁹

A. Arguments Favoring Recovery of Punitive Damages

As in the case of compensatory damages, the arguments for allowing recovery of punitive damages center on the language of the ADEA itself.¹³⁰ Courts allowing punitive damages generally have found the language in the statute to be broad and unambiguous.¹³¹ The ADEA is remedial legislation. Thus, its broad remedial provisions do not limit punitive damages as much as some courts have suggested. Punitive damages are generally recoverable in an action based on a statute unless the statute expressly denies their availability.¹³² The ADEA does not specifically negate punitive relief and such relief may indeed be inferred from the statute. Section 626(b) provides that "the court shall have jurisdiction to

121. 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

122. 559 F.2d at 1040.

123. *Id.* at 1039-40.

124. *Murphy v. American Motors Corp.*, 570 F.2d 1226 (5th Cir. 1978).

125. *Id.* at 1226.

126. *See Wise v. Olan Mills of Texas*, 485 F. Supp. 542 (D. Colo. 1980); *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008 (D. Colo. 1978); *Walker v. Pettit Constr. Co.*, 437 F. Supp. 730 (D.S.C. 1977), *rev'd*, 605 F.2d 128 (4th Cir. 1979); *Karijolic v. Illinois Bell Tel. Co.*, 19 Fair Empl. Prac. Cas. (BNA) 447 (N.D. Ill. 1977) (an example of the few courts which have awarded punitive damages).

127. *See, e.g., Stevenson v. J.C. Penney Co.*, 464 F. Supp. 945 (N.D. Ill. 1979); *Riddle v. Getty Ref. & Mktg. Co.*, 460 F. Supp. 678 (N.D. Okla. 1978); *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462 (N.D. Ohio 1978); *Quinn v. Bowmar Publishing Co.*, 445 F. Supp. 780 (D. Md. 1978); *Jaeger v. American Cyanamid Co.*, 442 F. Supp. 1270 (E.D. Wis. 1978); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215 (D. Colo. 1977).

128. *See, e.g., Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982); *Walker v. Pettit Constr. Co.*, 605 F.2d 128 (4th Cir. 1979); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

129. *See supra* text accompanying notes 131-37.

130. *See generally supra* text accompanying notes 75-85, 91-93, for a discussion of the language of the ADEA.

131. *Wise v. Olan Mills Inc. of Texas*, 485 F. Supp. 542, 544 (D. Colo. 1980); *Flynn v. Morgan Guar. Trust Co.*, 463 F. Supp. 676, 678 (E.D.N.Y. 1979).

132. *See generally* PROSSER, *supra* note 57, § 2.

grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act."¹³³ In addition, the language of the section uses the words "without limitation" to precede the list of examples of equitable relief available to the plaintiff.¹³⁴ These two provisions suggest that the Act makes all legal and equitable relief available, if appropriate, in addition to the illustrations Congress provided.¹³⁵ The ADEA provides a broad range of legal remedies. Since punitive damages are traditionally legal relief,¹³⁶ it would seem that such damages may be awarded.¹³⁷

B. *Arguments For an Award of Punitive Damages*

The principle objection to an award of punitive damages is the ADEA's express statutory provision for liquidated damages.¹³⁸ Section 626(b) of the ADEA incorporates the liquidated damages provision of section 216(b) of the FLSA, limited by the proviso "[t]hat liquidated damages shall be payable only in cases of willful violations of [the Act]."¹³⁹ An award of liquidated damages under the FLSA is generally not considered to be punitive in nature.¹⁴⁰ However, the ADEA, by conditioning liquidated damages on a willful violation, has focused the availability of such an award on the nature of the defendant's act.¹⁴¹ Thus, the liquidated damages provision of the ADEA appears to be punitive in nature, and several courts have so concluded in their interpretation of this provision.¹⁴² If both liquidated and punitive damages are available, a plaintiff could recover an excessive judgment. Therefore, Congress apparently meant the liquidated damages provision to serve as a substitute for puni-

133. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

134. *Id.*

135. The principle of *eiusdem generis* has been used to limit relief under these sections. *Looney v. Commercial Union Assurance Cos.*, 428 F. Supp. 533, 537 (E.D. Mich. 1977). Under this principle of statutory construction, "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated . . ." *Campbell v. Board of Dental Examiners*, 53 Cal. App. 3d 283, 285 n.2, 125 Cal. Rptr. 694, 696 n.2 (1975) (citations omitted). However, this principle should be used solely when the wording leaves some uncertainty about the purpose of the statute and should not be applied when the context shows a contrary intention. *Gooch v. United States*, 297 U.S. 124, 128 (1936); *BLACK'S LAW DICTIONARY* 464 (5th ed. 1979).

136. *See supra* text accompanying notes 57-58.

137. *See, e.g., Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008 (D. Colo. 1978).

138. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

139. *Id.*

140. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

141. *See supra* text accompanying notes 39-42.

142. *See, e.g., Walker v. Pettit Constr. Co.*, 605 F.2d 128, 130 (4th Cir. 1979); *Wagner v. Sperry Univac*, 458 F. Supp. 505, 518 (E.D. Pa. 1978); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 217-18 (D. Colo. 1977).

tive damages.¹⁴³

Other rationales used by the courts in denying an award of punitive damages also center on the statutory language. Because the ADEA does not expressly provide for punitive damages, a court may not infer such relief from the statute.¹⁴⁴ Second, the enumeration of remedies in the Act is limiting rather than illustrative; therefore, only the listed remedies are available.¹⁴⁵ Third, the enforcement mechanisms of the FLSA are incorporated by reference into the ADEA; and only those damages available under the FLSA are available under the ADEA.¹⁴⁶ Punitive damages are not available under the FLSA.¹⁴⁷ Finally, the House Conference Report on the 1978 amendments to the ADEA states that "[t]he ADEA as amended by this act does not provide remedies of a punitive nature."¹⁴⁸

The first three of these arguments may be countered by an analysis of the statutory language, as discussed above.¹⁴⁹ The statement in the House Conference Report should not be read as a part of the legislative history of the Act.¹⁵⁰ The implications of this statement are inconsistent and ambiguous. It does not state that punitive damages are unavailable under the ADEA. The liquidated damages argument is more difficult to counter. However, the standard under which liquidated damages are awarded differs from that under which punitive damages are awarded. Liquidated damages are awarded upon a finding of a willful violation.¹⁵¹ The standard generally applied to this provision is "voluntary and not accidental, mistaken or inadvertent."¹⁵² On the other hand, the standard for an award of punitive damages usually involves outrageous conduct on the part of the defendant, with intentional or deliberate disregard of the consequences to others.¹⁵³ Thus, two different types of conduct are required to trigger these different remedies. The scope and amount of the awards are also different. Liquidated damages are a doubling of the amount of damages owing as a result of the violation of the Act.¹⁵⁴ Punitive damages are measured in light of the circumstances surrounding the employer's act

143. 113 CONG. REC. 2199, 7076 (1967) (comments of Sen. Javits).

144. *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Boddorff v. Publicker Indus.*, 488 F. Supp. 1107, 1112-13 (E.D. Pa. 1980); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1336 (E.D. Pa. 1976).

145. See *supra* text accompanying notes 133-34.

146. *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 839-40 (3d Cir. 1977); *Boddorff v. Publicker Indus.*, 488 F. Supp. 1107, 1113 (E.D. Pa. 1980).

147. 29 U.S.C. § 216(b).

148. H.R. REP. No. 950, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 535.

149. See *supra* notes 129-36 and accompanying text.

150. See *supra* text accompanying notes 109 & 112.

151. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

152. *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980).

153. *McCORMICK*, *supra* note 57, at 280; *PROSSER*, *supra* note 57, at 9.

154. See *supra* note 39-42 and accompanying text.

and his outrageous conduct.¹⁵⁵ Thus, the two remedies are completely distinguishable.

IV. POLICY CONSIDERATIONS IN THE PURPOSE OF THE ADEA

After the consideration of the major statutory and conceptual problems under the ADEA, the court must still consider whether the remedies of compensatory and punitive damages are "relief as may be appropriate to effectuate the purposes of [the Act]."¹⁵⁶ The purposes articulated in the ADEA are "[promotion of] employment of older persons based on their ability rather than age; [prohibition of] arbitrary age discrimination in employment; [and helping] employers and workers find ways of meeting problems arising from the impact of age on employment."¹⁵⁷ Two concerns are likely to be important in considering the effectiveness of compensatory and punitive damages: their effect on the conciliation process, and their ability to decrease the incidence of age discrimination.

A prerequisite to suit under the ADEA, whether brought by the EEOC or by an individual, is an attempt by the EEOC to eliminate the discriminatory practice and to settle through conciliation.¹⁵⁸ There are arguments that the availability of such damages would encourage conciliation¹⁵⁹ and arguments that they would hamper conciliation.¹⁶⁰ Rather than making an employee less willing to settle voluntarily with his or her employer, compensatory and/or punitive damages would merely shift some of the bargaining power from the employer to the employee.¹⁶¹ This shift may even enhance conciliation and make employers more willing to settle.¹⁶² The First Circuit in *Vazquez v. Eastern Air Lines, Inc.*,¹⁶³ noted that "[i]f an employer realizes that the most it stands to lose in a private suit is lost wages, possibly doubled for a willful violation, we think it . . . might be less likely to compromise the claim short of a lawsuit."¹⁶⁴ Also, the fact is that a great majority of suits under the ADEA are not resolved by conciliation.¹⁶⁵

Compensatory and/or punitive damages may decrease and deter future violations of the ADEA by encouraging employees to enforce the Act when it otherwise would not be economically feasible or when the EEOC

155. See *supra* text accompanying note 152.

156. 29 U.S.C. § 626(b) (1976 & Supp. IV 1980).

157. *Id.* § 621(b).

158. *Id.* § 626(b).

159. *Wise v. Olan Mills Inc. of Texas*, 485 F. Supp. 542, 544-45 (D. Colo. 1980).

160. See, e.g., *Boddorff v. Publicker Indus., Inc.*, 488 F. Supp. 1107, 1112-13 (E.D. Pa. 1980); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 217 (D. Colo. 1977).

161. See *Wise*, 485 F. Supp. at 544-45.

162. *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 111 (1st Cir. 1978).

163. 579 F.2d 107.

164. *Id.* at 111.

165. *Id.* at 111 & n.4. In 1976, the success rate for conciliation was 32%. *Id.* at 111.

will not or cannot act. Although Congress intended to eliminate age discrimination through educating the employers and the public,¹⁶⁶ events have not transpired as Congress originally had hoped. Despite the Department of Labor's educational and promotional programs, age discrimination has not diminished. In fact, the number of complaints has increased dramatically since the early years of the ADEA.¹⁶⁷ Thus, it appears that the congressional plan of eliminating age discrimination through education, information, and conciliation is not working. Awards of compensatory and/or punitive damages could act as more effective means of informing, educating, and eliminating age discrimination in employment. They would compensate for harm done and deter future violations. They would make an employer reconsider the economic consequences of his discriminatory act. Even though the older worker increases the employer's costs of pension, health, and insurance plans,¹⁶⁸ an award of actual damages, possibly doubled, as well as compensatory and/or punitive damages could more seriously affect the economic situation of the individual employer.

V. CONCLUSION

The enactment of the Age Discrimination in Employment Act evidences a strong concern for the plight of the older worker in America. Recent trends point to denial of awards for compensatory and/or punitive damages as relief for violations under the Act. However, given the failure of Congress' earlier conciliatory and educational strategy, the logical conclusion is to permit age discrimination plaintiffs to recover compensatory and punitive damages in ADEA actions. As predicted by the First Circuit in *Vazquez*,¹⁶⁹ the time has come when "without [such] a damage remedy the purposes of the Act cannot be realized."¹⁷⁰

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166. See *supra* notes 9-17 and accompanying text.

167. U.S. DEP'T OF LABOR, *supra* note 14, at 8.

168. *Id.* at 16.

169. *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978).

170. *Id.* at 112.