NOTE

HOW THE MITIGATION DOCTRINE PRODUCES UNEQUAL PROTECTIONS AGAINST WORKPLACE DISCRIMINATION

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INTRODUCTION

Employment discrimination weakens the American economy, contributes to inequality, and deprives individuals of career opportunities. Estimates place the annual cost of

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employment discrimination at over sixty-four billion dollars.[1] Economic research further documents earnings differentials of more than thirty percent between members of different racial groups[2] or genders.[3] To combat employment discrimination, Congress enacted a series of statutes including Title VII of the Civil Rights Act (Title VII), the Age Discrimination and Employment Act (ADEA), and the Americans with Disabilities Act (ADA).[4] These statutes have the two-fold purpose of eliminating employment discrimination and providing make-whole relief to those who experience such discrimination.[5] Of the several remedies Congress provided to realize these twin objectives, courts most frequently grant back pay and front pay. These remedies, however, prove insufficient to fully realize the promise of federal antidiscrimination law.

Back pay and front pay can restore plaintiffs to the financial positions they would have held absent discrimination but fail to deter discrimination equally against all classes of workers. Back pay and front pay provide a monetary award equivalent to the earnings a plaintiff loses because of employment discrimination.[6] However, plaintiffs have a duty to mitigate their losses.[7] The mitigation doctrine requires courts to subtract from back pay and front pay the amount the plaintiff actually earned or could have earned through reasonable efforts to attain alternative employment.[8] This rule requires less specialized workers, who often find alternative employment quickly due to the many open positions they can fill, to mitigate away most of their damages. In juxtaposition, specialized workers who cannot quickly find employment receive compensation for larger damages. The mitigation doctrine thereby undermines the deterrence function of back pay and front pay by reducing the financial penalties imposed on employers who discriminate against less specialized workers.

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1 Crosby Burns, *The Costly Business of Discrimination* 1, CTR. FOR AM. PROGRESS (Mar. 2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf?_ga=2.141884530.1318959557.1671054431-1633663940.1671054430 [https://perma.cc/J29L-ZZ35].

2 Kevin Lang & Ariella Kahn-Lang Spitzer, *Race Discrimination: An Economic Perspective*, 34 J. ECON. PERSPS. 68, 70 (2020).

3 Orkideh Gharehgozli & Vidya Atal, *Revisiting the Gender Wage Gap in the United States*, 66 ECON. ANALYSIS & POL'Y, 207, 207 (2020).

4 Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

5 *Id.* at 418.

6 Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1040–41 (10th Cir. 2021).

7 Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983).

8 *Tudor*, 13 F.4th at 1040.

Diminished financial penalties on employers who discriminate against less specialized workers frustrate the goal of eliminating employment discrimination. Some employers adopt antidiscrimination measures out of a genuine concern for justice or a desire to strengthen their businesses.[9] Other employers would not take steps to combat workplace discrimination without a sufficient financial incentive created by law. Consider how one study found reduced risk of litigation contributes to higher rates of discrimination against low wage workers.[10] Indeed, reduced penalties for discrimination against less skilled workers may partially explain the finding that such workers experience the worst racially based wage discrimination.[11]

The scale and nature of the problem becomes more apparent when one considers the large number of less specialized workers in America who can obtain relatively similar work from many potential employers. For example, just over thirty million employees work in the retail and hospitality sectors.[12] Both sectors have a multiplicity of available openings which makes mitigation easy under current labor market conditions.[13] This contrasts with highly specialized workers, like professors or industrial workers in small towns, who may face notoriously difficult labor markets.[14]

Courts have not found an adequate solution to this problem. To avoid applying the mitigation doctrine, some courts establish a high evidentiary bar for demonstrating a plaintiff's failure to mitigate.[15] This approach lacks predictability because it necessarily relies on whether the defense attorney gathers evidence

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9 *See* Donna Chrobot-Mason & Nicholas P. Aramovich, *The Psychological Benefits of Creating an Affirming Climate for Workplace Diversity*, 38 GRP. & ORG. MGMT. 659, 664 (2013).

10 Devah Pager, Bruce Western & David Pedulla, *Employment Discrimination and the Changing Landscape of Low-Wage Labor Markets*, 2009 U. CHI. LEGAL F. 317, 326–27 (2009).

11 *See id.* at 317; Daniel Borowczyk-Martins, Jake Bradley & Linas Tarasonis, *Racial Discrimination in the U.S. Labor Market: Employment and Wage Differentials by Skill*, 50 LAB. ECON. 45, 45 (2018).

12 *Employment by Major Industrial Sector*, U.S. BUREAU OF LAB. STAT. (Sep. 8, 2022), https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm [https://perma.cc/JH4A-XPZX].

13 *See* Noam Scheiber, *Despite Labor Shortages, Workers See Few Gains in Economic Security*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/2022/02/01/business/economy/part-time-work.html [https://perma.cc/79YJ-JVCX].

14 *See* Colin Dickey, *The Academic Job Market is a Nightmare. Here's One Way to Fix It*, WASH. POST (Apr. 15, 2019), https://www.washingtonpost.com/outlook/2019/04/15/job-market-academics-is-nightmare-heres-one-way-fix-it/ [https://perma.cc/8CM6-2JUD]; Irvin Sobel & Richard C. Wilcock, *Labor Market Behavior in Small Towns*, 9 INDUS. & LAB. RELS. REV. 54, 54 (1955).

15 *Infra* note 98.

necessary to demonstrate availability of similar job openings. The inequality created by the mitigation doctrine remains unresolved by the courts and requires a more reliable solution.

To ensure the many less specialized workers, who can easily mitigate, still enjoy strong protections against discrimination, Congress should impose a mandatory civil penalty in addition to back pay and front pay. The penalty would increase with the number of employees and the proceeds would go to the United States Treasury. Successful plaintiffs could reclaim part of the penalty from the Treasury to the extent necessary to compensate for the emotional costs and unpleasantries of bringing employment discrimination suits. The addition of a civil penalty would ensure employers pay a cost for unlawful discrimination regardless of the employee's ability to mitigate. At the same time, the payment of the fine to the Treasury would avoid overcompensating plaintiffs in violation of the make-whole principle. This new penalty would further the purposes of federal employment discrimination law by preserving make-whole relief while strengthening the deterrent against discrimination, regardless of the worker's level of specialization.

The argument proceeds in seven sections. Section one reviews the debate over the mitigation doctrine and make-whole relief in the context of employment discrimination cases and private litigation more generally. Section two discusses the methodological approach. The third section provides an overview of the general rules governing the award of back pay and front pay. Sections four and five demonstrate how those rules differentially affect the damage awards in cases that involve specialized and less specialized workers. Section six explores how the courts have imposed high burdens of proof on plaintiffs as a way of lessening the mitigation doctrine's adverse effects on less specialized workers. That section also explains why a higher burden of proof does not provide a long-term solution to the problems created by relying on mitigatable back pay and front pay awards as a deterrent to discrimination. The proposed solution, set forth in section seven, would use a mandatory civil penalty to further the law's deterrence objective while leaving back pay and front pay to fulfill the make-whole relief objective. The final section summarizes the findings and reiterates the call for reform.

I
Debating Damages in Employment Discrimination Cases

A handful of scholars note how the mitigation doctrine reduces back pay and front pay and, thereby, undermines the

deterrence objective of employment discrimination statutes.[16] However, none identify the way mitigation undermines deterrence for some workers more than others. The argument made here contributes by identifying the unequal effect the mitigation doctrine has on the protections afforded to workers based on their degree of specialization. In addition, the proposal offered here differs from other solutions insofar as it recommends pursuing deterrence through a separate penalty instead of by modification to the mitigation doctrine. By contrast, one author, who argues the mitigation doctrine reduces deterrence, suggests largely ignoring the doctrine when calculating the amount defendants must pay.[17] Such a solution has the downside that it removes most limits on back pay and front pay because, apart from the retirement age, courts use the mitigation doctrine to craft a cutoff point for those awards.[18] This Note, in contrast, recommends correcting for the inequitable effect the mitigation doctrine has on deterrence through the introduction of a simple civil penalty paid in addition to back pay.

Relatedly, scholars of tort and contract law debate the functions of damage awards and the role of mitigation in other contexts. Many observe that damage awards serve both a deterrence[19] and make-whole relief function.[20] Others further identify a fairness function served by requiring those who cause harm to bear the costs.[21] Advocates of the mitigation doctrine counter that it promotes economic efficiency by requiring those most able to ameliorate costs to do so or face a reduction in their damage awards.[22] The make-whole principle also requires mitigation since full compensation for a plaintiff's lost earnings in addition to replacement earnings would

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16 *See* Robert M. Worster II, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1083 (2003); Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating its Negative Impact*, 69 U. CIN. L. REV. 7, 20 (2000).

17 Eglit, *supra* note 15, at 72–75.

18 Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1040–41 (10th Cir. 2021).

19 John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 521–22 (2003).

20 John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 441 (2006).

21 Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1771 (2009).

22 Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 178 (1996).

put the plaintiff in an improved position.[23] This debate identifies tradeoffs that arise when using damage awards to realize multiple objectives. The proposal made here helps reduce the tensions between the two judicially recognized goals of federal employment discrimination law by pursuing make-whole relief through back pay, front pay, and realizing deterrence through a separate mandatory civil penalty.

One should also note a related, but distinct, literature that critiques back pay and front pay for undercompensating plaintiffs by focusing on the earnings lost due to wrongful termination. Social justice scholars note that markets tend to undercompensate minority workers.[24] Hence, using the plaintiff's lost market earnings to calculate back pay and front pay does not compensate for the full economic costs created by workplace discrimination.[25] Relatedly, behavioral economists demonstrate that workers put value on their lost earnings that surpasses the earnings' cash value compensated for by back pay and front pay.[26] While meritorious, these criticisms primarily focus on the inadequacies of back pay and front pay at providing make-whole relief. The proposal here addresses the inability of those remedies to create an effective deterrent against discrimination for all workers.

II
METHODOLOGICAL APPROACH

Subsequent pages illustrate the argument made here with a comparison of federal employment discrimination cases from various jurisdictions. Inclusion of multiple jurisdictions illustrates the pervasive nature of the shortcoming this Note identifies in federal employment discrimination law. Each selected case involves a wrongfully terminated plaintiff who afterwards remained under or unemployed for a prolonged period. The cases differ in that some involve specialized employees who face relatively limited options for reemployment, while others concern less specialized employees who qualify for many available positions. In each case, the court considered whether the

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23 Eglit, *supra* note 15, at 34 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197–98 (1941)).

24 *See, e.g.*, Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L. J. 661, 686–92 (2017).

25 *Id.* at 697-98.

26 *See, e.g.*, Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor,"* 51 WM. & MARY L. REV. 183, 183–85 (2009).

plaintiff satisfied the duty to mitigate given the plaintiff's lack of replacement employment. This comparison demonstrates how the mitigation doctrine differentially affects back pay and front pay awards depending on the plaintiff's degree of specialization.

To contrast cases concerning specialized and less specialized workers, one first needs to identify professions that qualify as highly specialized. The term "specialized workers" refers to workers with skill sets useful in only a small number of available roles.[27] On an individual level, specialized workers face what economics calls a downward-sloping demand curve.[28] Such a curve indicates these workers can find very few replacement positions without accepting a lower wage.[29] In contrast, less specialized workers have skill sets that allow them to fill numerous available roles and, therefore, face a flat demand cure such that they can easily find alternative employment at the same wage.[30] Hence, specialized and unspecialized workers have skill sets that affect their ability to find reemployment and to mitigate damages.

Professors and college athletic coaches fall into the specialized worker category. For example, a professor of European history or a college hockey coach, respectively, could not teach Latin American history or coach college basketball. Their expertise leaves open a narrow range of roles in which they can use their skill sets. Further, few employers offer openings for such specialized positions.[31] Within a locality, industrial workers with know-how useful in only one sector likewise face a limited job market for their unique skills. Hence, the following comparative analysis includes cases that concern college professors, a professional coach, and a skilled railroad worker.

Less specialized workers have more versatile skills that do not lock them into one professional role. For example, a sales associate at a clothing store could likely work in a variety of alternative customer service positions. In most localities, a variety of employers hire for those roles at similar salaries.[32]

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27 Sunwoong Kim, *Labor Specialization and the Extent of the Market*, 97 J. POL. ECON. 692, 692–94 (1989).

28 *See* William M. Boal & Michael R. Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LITERATURE 86, 90–91 (1997) (providing a mathematical illustration).

29 *See* John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 63–64 (2001) (providing an example in footnote 92).

30 *See* Kim, *supra* note 27, at 692–94.

31 *See* Kevin Carey, *The Bleak Job Landscape of Adjunctopia for Ph.D.s*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/05/upshot/academic-job-crisis-phd.html [https://perma.cc/3M9D-QJ3E].

32 *See* Sarah Nassauer, *Retailers' Wage Increases to Attract Workers Aren't Yet Denting Profits*, WALL ST. J. (Feb. 28, 2022), https://www.wsj.

A warehouse worker could fill most jobs categorized as light labor, an area in which many employers hire. For these workers the economy often provides a multiplicity of possible positions. Therefore, the cases also include less specialized workers involved in general labor or retail positions.

III
Remedies Under Federal Employment Law

Federal employment antidiscrimination statutes provide a range of remedies to help eliminate workplace discrimination and to provide make-whole relief. Among the available remedies, courts typically grant reinstatement, back pay, and front pay. While courts prefer reinstatement as a remedy for discrimination,[33] back pay and front pay appear more frequently used by courts for two reasons. First, sometimes reinstatement proves infeasible either because excessive hostility between the parties makes a productive workplace relationship impossible[34] or because no available positions remain.[35] Second, even when reinstatement proves feasible, the plaintiff often will have experienced monetary damages for which only back pay or front pay can compensate.[36] For these reasons back pay and front pay play a central role in the federal statutory scheme that seeks to make plaintiffs whole while eliminating workplace discrimination.

Back pay and front pay compensate for the lost earnings experienced by a plaintiff because of an unlawful employment practice.[37] The lost earnings that back pay and front pay compensate for include salaries, wages, and fringe benefits like health insurance, retirement contributions, and paid vacation.[38] Back pay and front pay only differ insofar as the former compensates for earnings lost between the deprivation of employment and the judgment, while the latter compensates for earnings lost after the judgment.[39] No statutory cap applies

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com/articles/target-is-raising-its-minimum-wage-to-24-an-hour-in-some-markets-11646061589 [https://perma.cc/93ZE-5GYU].

33 Gotthardt v. National R.P. Passenger Corp., 191 F.3d 1148, 1154 (9th Cir. 1999).

34 Teutscher v. Woodson, 835 F.3d 936, 951 (9th Cir. 2016).

35 *See* Patterson v. Am. Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976); Ford Motor Co. v. EEOC, 458 U.S. 219, 241 (1982).

36 *Ford*, 458 U.S. at 225–226.

37 Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1345–46 (9th Cir. 1987).

38 Traxler v. Multnomah County, 596 F.3d 1007, 1011 (9th Cir. 2010).

39 Pollard v. E. I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

to back pay or front pay.[40] The lack of a statutory cap and the broad definition of earnings help further the goals of make-whole relief and deterrence.[41]

To receive full compensation for lost earnings the plaintiff must make reasonable efforts to mitigate those losses by seeking substantially equivalent employment.[42] When a plaintiff fails to seek new employment, the court reduces back pay and front pay by the amount the plaintiff could have earned through reasonable effort at finding alternative employment.[43] However, defendants bear the burden of proof to demonstrate a failure to mitigate.[44] To make this showing a defendant must demonstrate (1) the availability of positions substantially equivalent to the position the plaintiff previously held and (2) that the plaintiff failed to exercise reasonable diligence in securing those positions.[45] A majority of circuits do not further define substantially equivalent employment except to say the plaintiff "need not go into another line of work, accept a demotion, or take a demeaning position."[46] However, a minority of circuits use a supposedly stricter standard by defining substantially equivalent as employment that offers "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status" to the plaintiff's prior position.[47] As evidenced by the following analysis, the two standards rarely make a difference to the mitigation doctrine's effect on the size of back pay and front pay awards. Rather, differences in workers' ability to find comparable employment and in prior earnings determine the size of damages.

IV
The Duty to Mitigate in the Context of Specialized Employees

Highly specialized employees often receive large damage awards because they cannot easily mitigate their losses and

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40 *Id.* at 848.

41 *See* Thompson v. Sawyer, 678 F.2d 257, 292–93 (D.C. Cir. 1982); Thornton v. Kaplan, 961 F. Supp. 1433, 1436 (D. Colo. 1996).

42 *Cassino*, 817 F.2d at 1346–47.

43 Suggs v. ServiceMaster Educ. Food Mgmt., 72 F.3d 1228, 1235 (6th Cir. 1996).

44 Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983).

45 *Id.*

46 *See* Booker v. Taylor Milk Co., 64 F.3d 860, 866 (3d Cir. 1995) (citing *Ford*, 458 U.S. at 231).

47 *See* Rasimas v. Mich. Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983); Sellers v. Delgado Cmty. Coll., 839 F.2d 1132, 1138 (5th Cir. 1988).

because they tend to work in higher-wage professions. As the subsequent examples demonstrate, this occurs under both the substantially similar and the virtually identical standards. The cases selected to illustrate this phenomenon deal with workers who face notoriously limited job markets for their skill sets, including academics, athletic coaches, and small-town industrial workers.[48]

Courts recognize the difficulty academics face in mitigating lost earnings, which prompts courts to grant damage awards designed to compensate for lengthy periods of under or unemployment. Consider the Tenth Circuit's decision in *Tudor*, which applied the substantially equivalent standard in the case of a transgender English professor wrongfully denied tenure at a four-year university.[49] Despite expressing disapproval of the virtually identical standard on the grounds that no two positions share identical responsibilities or benefits, the court nonetheless adopted the exacting rule that a substantially equivalent position in academia must offer similar compensation, tenure prospects, prestige, job responsibilities, and teaching duties.[50] In effect, full mitigation would require the English professor to attain another tenured English professorship at a four-year institution. Given the difficulty in obtaining such positions, the appellate court held the fourteen months it took the professor to obtain a position teaching English at a community college could not serve as the cutoff point for front pay.[51] The court accordingly directed the district judge to increase the back pay and front pay award to account for the English professor's inability to fully mitigate her losses through alternative employment.[52]

Similarly, in *Lavely*, a district court held that a discharged philosophy professor had not failed to mitigate, despite sending out no job applications for three years.[53] The court based its ruling on the limited number of substantially equivalent positions the professor could have obtained given his specialization.[54] Available philosophy professorships either paid less compensation, required teaching different subjects, or offered

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48 Dickey, *supra* note 14.

49 Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1040 (10th Cir. 2021).

50 *Id.* at 1042.

51 *Id.* at 1044.

52 *Id.* at 1045, 1049.

53 Lavely v. Trs. of Boston Univ., No. 83–955–G, 1987 WL 17539, at *23–26 (D. Mass. Aug. 28, 1987).

54 *Id.*

fewer academic opportunities than did the philosophy professor's prior tenured position at Boston University.[55] Likewise, in *Thornton*, a district court reasoned a fifty-four-year-old accounting professor likely could not secure new employment teaching given the limited academic job market.[56] The court cited the accounting professor's limited job prospects as justification for granting a front pay award designed to cover lost earnings sustained up until the point of retirement.[57] These examples illustrate how, in cases concerning academics, the difficult job market leads courts to grant large damage awards little restrained by the duty to mitigate.

Professional athletic coaches likewise confront a limited job market for their unique skill set that curtails their ability to mitigate damages.[58] For instance, in *Miller*, a district court dealt with the question of what kind of position would qualify as substantially equivalent to that of a D1 head hockey coach.[59] Without specifying whether it adopted a substantially equivalent or virtually identical standard, the court noted the former female head hockey coach need not take a demotion or change professions.[60] Consequently, the court reasoned the mitigation doctrine only required the plaintiff to accept a position as a head hockey coach at a different D1 program.[61] Work as an assistant coach or at a D2 or D3 school would count as a demotion.[62] The court acknowledged this left the former head coach with fewer opportunities to fully mitigate than most "low-level employees" would receive.[63] This contributed to the court granting the former coach five years' worth of back pay and front pay. To justify the five-year cutoff, the court explained the coach's excellent professional reputation may allow her to secure new employment despite the limited job market[64] and that the frequency with which colleges dismiss coaches meant, even absent sex discrimination, the coach may not have

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55 *Id.*

56 Thornton v. Kaplan, 961 F.Supp. 1433, 1440 (D. Colo. 1996).

57 *Id.* at 1438, 1440.

58 Miller v. Bd. of Regents, No. 15-CV-3740 (PJS/LIB), 2019 WL 586674, at *9–11 (D. Minn. Feb. 13, 2019).

59 *Id.* at *1, *9–11.

60 *Id.* at *9.

61 *Id.* at *9–11.

62 *Id.* at *10.

63 *Id.* at *13–14.

64 *Id.* at *13.

remained in her post much longer.[65] The five-year period remains relatively long. That period, coupled with the plaintiff's status as the highest paid women's D1 hockey coach, resulted in a damage award of $461,278—even after subtracting what the plaintiff earned as a part-time assistant coach for a professional hockey team.[66]

Mitigation has a similarly limited effect on the back pay and front pay granted to specialized industrial workers in small towns given their meager opportunities for reemployment. Take the situation confronted by the Ninth Circuit in *Wooten*, in which a small town railroad worker wrongfully lost his position.[67] The railroad worker developed a specialized skill set only useful in the transport industry, and no other railroad would likely pay the worker more than sixty percent of his previous salary.[68] In fact, the railroad worker had one of the best paying positions in the local area.[69] This left the worker with an "essentially non-existent job market" for comparable employment.[70] Here, the circuit court did not say whether it applied a substantially similar or virtually identical standard. Rather, the circuit court justified the calculation of a damage award up until the point of retirement by citing the fact, important under either standard, that the worker likely could not find a position in the railroad industry that would offer anything close to his previous salary.[71] Here, one sees another example of how a limited job market for specialized workers blunts the effect of mitigation on damage awards.

For highly specialized workers, these cases illustrate how back pay and front pay simultaneously realize the twin objectives of make-whole relief and effective deterrence. These workers tend to have higher salaries and a limited ability to mitigate their losses, factors that produce higher damage awards. As noted in *Wooten*, the "vast majority" of back pay and front pay awards would compensate for no more than a few years of lost earnings.[72] For skilled workers, however, the period can become much longer. The need to compensate for those lengthy

65 *Id.* at *13–14.

66 *Id.* at *17.

67 Wooten v. BNSF Ry. Co., 819 F. App'x 483, 487 (9th Cir. 2020).

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

periods of lost earnings produced damage awards of hundreds of thousands of dollars in each of the above cases.[73] While not a universal outcome, the large awards in those cases typify a result seen in many other cases concerning skilled workers.[74] Hence, back pay and front pay compensate for the lost earnings of specialized workers while also generating a strong financial deterrent against those who may discriminatorily dismiss such workers.

V
The Duty to Mitigate in the Context of Less Specialized Employees

In juxtaposition, less specialized workers rarely receive sizeable back pay and front pay awards because of their greater ability to mitigate by finding substantially equivalent employment. This section demonstrates how the mitigation doctrine reduces the damage awards paid to less specialized workers by analyzing cases concerning general laborers.

For instance, in *Farmer Bros. Co.*, the court held that once an "unskilled machine operator" at a food processing company ceased looking for work, she lost her entitlement to further back pay and front pay.[75] The unskilled operator had lost her position in a layoff scheme designed to reduce the number of female employees.[76] To find a failure to mitigate, the plaintiff must cease looking for work despite the availability of open positions.[77] Here, the plaintiff stopped submitting applications despite advertisements for 148 comparable openings with nearby companies and the reported success of other laid-off workers in quickly finding replacement employment.[78] The court held this evidence established the "wide[] availab[ility]" of substantially equivalent positions.[79] The court affirmed a

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73 Wooten v. BNSF Ry. Co., 387 F. Supp. 3d 1078, 1091, 1102 (D. Mont. 2019), *aff'd*, 819 F. App'x 483 (9th Cir. 2020).

74 *See* Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1152 (9th Cir. 1999) (granting large damage award for specialized railroad engineer); Lavely v. Trs. of Boston Univ., No. 83–955–G, 1987 WL 17539, at *2 (D. Mass. Aug. 28, 1987) (granting a large award because of a philosophy professor's inability to find new employment).

75 EEOC v. Farmer Bros. Co., 31 F.3d 891, 894, 906 (9th Cir. 1994).

76 *Id.* at 895.

77 *Id.* at 906.

78 *Id.*

79 *Id.*

reduced back pay award given the availability of substantially equivalent employment opportunities.[80]

Wide availability of reemployment opportunities helped produce a comparable outcome in *Booker*.[81] The Third Circuit affirmed a reduction in back pay and front pay for a former "probationary laborer and dock handler" given the dock handler's failure to look for work despite a plethora of advertisements for comparable positions.[82] Application of the supposedly more stringent virtually identical standard provided no added protection to the dock handler.[83] Even under the virtually identical standard, the court reasoned the plaintiff's former position primarily involved loading and unloading trucks and that any general or light labor job would qualify as substantially equivalent.[84] To demonstrate the availability of substantially equivalent positions, the defendant provided thirty-three months' worth of advertisements from a local newspaper for general laborer positions that paid more than the plaintiff's prior post.[85] The court greatly reduced the plaintiff's back pay and front pay award in light of the many comparable open positions.[86]

A similar outcome occurred in *Fedio*, in which the court almost halved a back pay award for a former retail worker who remained unemployed for just ten and one-half months.[87] The worker lost her job after an extended period of leave following a "nervous breakdown" induced by a hostile work environment.[88] The retail sector did well economically and expanded during the period, creating a plethora of openings.[89] Prior to her wrongful termination, the retail worker had developed the skills and work history necessary to gain reemployment with one of the many retailers who had available openings.[90] This led the court to find that the retail worker could easily have been reemployed and that the worker failed to mitigate by remaining out of work

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80 *Id.*

81 Booker v. Taylor Milk Co., 64 F.3d 860, 863–64 (3d Cir. 1995).

82 *Id.*

83 *Id.* at 866.

84 *Id.*

85 *Id.* at 864.

86 *Id.* at 867.

87 Fedio v. Cir. City Stores, Inc., No. 97-5851, 1998 WL 966000, at *13 (E.D. Pa. Nov. 4, 1998).

88 *Id.* at *2, *6.

89 *Id.* at *13.

90 *Id.*

for an extended period.[91] The plaintiff ultimately received a greatly reduced damage award reflecting only a few months of lost wages.[92]

Likewise, in *Wagner*, the appeals court greatly reduced the back pay award for a sales clerk at a large department store who had her job offer revoked after the sales clerk discussed medical leave in relation to her pregnancy.[93] Originally, the jury awarded back pay for an almost thirteen-month period.[94] The appeals court reversed the jury award and left in place back pay for a four-month period equal to just over five thousand dollars.[95] The court reasoned that the plaintiff's termination of her job search vitiated her claim to back pay for the longer period because not seeking available comparable employment constituted a failure to mitigate.[96] This case similarly illustrates the difficulty that less specialized workers have in securing sizeable back pay and front pay awards given their ample opportunities to find reemployment with reasonable diligence.

These cases illustrate how the wide availability of positions for less specialized workers makes it easier for them to mitigate, thereby reducing their back pay and front pay awards. Less specialized workers can either accept new employment, thereby mitigating away most of their damages, or they can decline to seek reemployment, thereby forfeiting back pay and front pay for failing to mitigate. As a result, back pay and front pay provide make-whole relief to less specialized workers but create only a small financial deterrent for those who would discriminate against such employees.

VI
An Unsatisfactory Solution

Courts seem to recognize the downsides of plaintiffs mitigating away their damages. To solve this problem while working within the confines of federal employment discrimination statutes, some courts have imposed on defendants a relatively high evidentiary burden to establish the plaintiff's failure to mitigate. The courts who adopt this solution ask defendants to demonstrate, through statistical analysis or collections of

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91 *Id.* at *14.

92 *Id.*

93 Wagner v. Dillard Dep't Stores, Inc., 17 F. App'x 141, 144–45 (4th Cir. 2001).

94 *Id.* at 152.

95 *Id.* at 154.

96 *Id.* at 153–54.

job advertisements, the availability of comparable positions.[97] Further, defendants must explain why the available positions qualify as substantially equivalent to the plaintiff's former position.[98] Defendants who fail to meet this evidentiary standard lose the benefits of the failure to mitigate defense.

For example, in *Abercrombie*, the district court held a clothing retailer failed to demonstrate an unsuccessful applicant for a sales clerk position had not mitigated because the retailer did not present evidence of the availability of other nearby entry-level minimum-wage positions.[99] After the retailer declined to hire the applicant for religiously discriminatory reasons, the applicant did not subsequently apply for any other jobs.[100] While the court agreed that any "minimum wage position, with virtually no benefits" would qualify as substantially equivalent, the retailer could not establish the plaintiff's failure to mitigate because the retailer did not provide advertisements that showed the availability of such positions.[101] Instead, the defendant retailer noted the plaintiff had previously applied for minimum wage openings at Starbucks and FedEx.[102] The court held the defendant could not depend on a plaintiff's testimony about the past availability of such positions to show availability in the present.[103] This case illustrates how a relatively high evidentiary burden on defendants—one that requires defendants to demonstrate even the almost certain availability of minimum-wage positions—can help preserve back pay and front pay awards for less skilled workers.

The solution used in *Abercrombie* and like cases has a drawback insofar as it depends on defense attorneys' continued failure to meet the evidentiary standard. Competent attorneys will soon view as standard practice the provision of job advertisements and an accompanying explanation of why the positions qualify as substantially equivalent. Such a practice would defeat the effectiveness of the court's solution. Hence, a statutory fix designed to directly address the mitigation doctrine's tendency to undercut the deterrence function of back pay and front pay would prove more desirable long term.

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97 *See, e.g.*, Hughes v. Mayoral, 721 F. Supp. 2d 947, 967–68 (D. Haw. 2010).

98 *Id.* at 968.

99 United States EEOC v. Abercrombie & Fitch Stores, Inc., No. 5:10-CV-03911-EJD, 2013 WL 1435290, at *2, *39 (N.D. Cal. Apr. 9, 2013).

100 *Id.* at *3–9.

101 *Id.* at *38.

102 *Id.* at *3, *39.

103 *Id.* at *39.

VII
The Proposal for a Mandatory Civil Penalty

Congress should replace optional punitive damages with mandatory civil fines for those who violate federal employment discrimination statutes to better realize the twin objectives of make-whole relief and effective deterrence. Effective deterrence requires employers to expect discriminatory practices will result in meaningful financial penalties. However, make-whole relief requires smaller damage awards for plaintiffs who can easily mitigate their lost earnings. For such plaintiffs, back pay and front pay remedies cannot simultaneously achieve make-whole relief while guaranteeing wrongdoers face the substantial financial penalties that generate effective deterrence. The solution advocated here would help promote deterrence through the introduction of a mandatory civil fine paid by the employer in addition to back pay and front pay.

Under this proposal, any employer found to violate a federal employment discrimination statute would pay a mandatory fine to the United States Treasury. The fine would increase with the number of employees working for an employer and, to incentivize enforcement, would allow successful plaintiffs to receive a share of the fine's value from the Treasury as compensation for the emotional burdens and unpleasantries of litigation. While Congress may wish to use an updated formula, the caps on Title VII punitive damages provide an example for how to adjust penalties based on the employer's size. This model would require employers with 15–100 employees to pay $50,000, with 101–200 employees to pay $100,000, with 201–500 employees to pay $200,000, and with over 500 employees to pay $300,000.[104]

The replacement of the caps on optional punitive damages with a similar, but updated, scale for a mandatory civil penalty has the political advantage of making the proposal appear as a modification to a relatively uncontroversial set of laws. This proposal simply furthers a well-established federal policy of eliminating discrimination by modifying the way the law imposes financial costs to deter unlawful employment practices. With that said, the Title VII punitive damage scale provides only a model that Congress may nonetheless wish to update to account for two policy considerations.

First, Congress should set penalties high enough to create an effective deterrent. No set of sanctions can fully eliminate

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104 42 U.S.C.S. § 1981(b)(3).

undesirable behaviors from society. Nonetheless, elementary economics indicates that as an activity becomes more expensive fewer people engage in the behavior.[105] Likewise, scholars have demonstrated increased financial penalties diminish socially undesirable behavior.[106] Congress should investigate what level of penalty would make the great majority of discriminatory employers choose to forgo discrimination rather than risk paying the fine. While exact calculation of an appropriate fine goes beyond the scope of this discussion, Congress may elect to increase penalties considering how current law has fallen short of its objective of near total elimination of discrimination.[107] Updating the penalty scale to account for inflation may likewise prove necessary to preserve a constant level of deterrence. Second, Congress should not set penalties higher than necessary, as such could adversely affect innocent third parties. For instance, unnecessarily harsh financial penalties deprive employers of resources to reinvest and hire additional workers. To balance these policy considerations, any new penalty scale should set fines just high enough to deter discrimination.

To help realize a uniform deterrent without unnecessarily punitive measures, the proposal recommends the civil penalty adjust based on an employer's size. Most penalties imposed by employment law have this feature. The same fine creates differing levels of economic pain based on an employer's ability to pay. For example, managers at a larger firm may regret actions that result in a $300,000 fine, while owners of a small downtown shop might close in response to such a penalty. Smaller fines for smaller employers create similar economic difficulties, and, therefore, deterrence, as larger penalties would for larger employers. These considerations make plain two justifications for varying penalties by the size of the employer. First, outsized financial hardship on smaller firms produces negative externalities on innocent third parties like employees, suppliers, or creditors who face termination or nonpayment. Wrongdoers, to the extent possible, should exclusively bear the costs of their

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105 Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. Rev. 1193, 1206 (1985).

106 Katharina Laske, Silvia Saccardo & Uri Gneezy, *Do Fines Deter Unethical Behavior? The Effect of Systematically Varying the Size and Probability of Punishment*, SSRN ELIBRARY at 2, 3 (Apr. 4, 2018), http://dx.doi.org/10.2139/ssrn.3157387 [https://perma.cc/K2VW-3WJR].

107 *See* Pager, Western & Pedulla, *supra* note 10; Borowczyk-Martins, Bradley & Tarasonis, *supra* note 11.

inequities. Second, wrongdoers should face similar levels of deterrence regardless of their economic circumstances, a goal better realized by adjusting penalties based on the employer's economic resources.[108] Adjusting the penalty for the size of the employer accounts for those two considerations by helping to establish a uniform deterrent without unnecessary economic pain.

A. How the Proposal Advances the Purposes of Federal Employment Discrimination Law

This proposal advances the twin objective of employment discrimination law in three respects. First, it ensures that no matter a plaintiff's ability to mitigate, discriminators pay a price and thereby face a deterrent. As noted above, the current set of remedies impose few financial consequences on employers who discriminate against workers that can quickly find alternative employment. Since deterrence tends to increase as expected penalties rise,[109] the lack of consequences for some employers likely undermines deterrence. Employers face the fewest financial consequences for discriminating against less specialized workers—such as retail, service, and general laborer employees—especially in times with strong labor market conditions. This proposal rectifies that shortcoming by ensuring that regardless of an employee's ability to mitigate, the employer pays the same guaranteed civil penalty. Hence, this new civil penalty would ensure employers have an increased incentive to adopt practices designed to prevent employment discrimination regardless of the employee's level of specialization.

Second, payment of most of the penalty to the Treasury creates a deterrent without undermining the make-whole relief principle. If plaintiffs received the penalty amount in addition to back pay and front pay, they would find themselves in a financial position better than if they had remained employed. Overcompensation violates make-whole relief just as does under compensation. Hence, the Treasury should receive the civil penalty less any deductions necessary to compensate plaintiffs for the effort they invest in litigation.

Some may suggest Congress should earmark the penalty for a particular purpose, like a litigation fund or antidiscrimination program. Congress can earmark the funds if it wishes;

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108 *See* A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. Econ. 89, 90 (1984).

109 Posner, *supra* note 102, at 1206.

however, one need not tie funding for such programs to the civil penalties paid under this proposal. Money has a fungible quality such that it does not matter from the government's perspective what revenue source gets allocated to what program. Relatedly, linking the civil penalty to a particular program would require further policy decisions that could hinder the penalty's adoption by the legislature. For this reason, the proposal simply recommends defendants pay the civil penalty to the Treasury, thereby leaving it to Congress's later discretion how to further allocate the revenue.

Third, this proposal would assist enforcement and make-whole relief by allowing successful plaintiffs to claim a share of the fine's value from the Treasury as compensation for the costs of litigation. Congress recognized reduced damage awards would diminish the incentives America's many contingency-fee-based plaintiff's attorneys have to accept employment discrimination cases. To solve the problem, Title VII, ADEA, and the ADA provide for a fee-shifting provision that requires defendants to pay the reasonable attorney's fees incurred by a successful plaintiff.[110] The government-funded Equal Employment Opportunity Commission can also bring enforcement actions under certain conditions.[111] While valuable, these litigation-facilitating provisions overlook the need for a plaintiff to also have an incentive to bring claims. Plaintiffs might not want to go through the unpleasantries of litigation if they receive very little in return. Civil litigation often involves lengthy depositions, emotionally trying testimony, and considerable time commitments from the plaintiff. Congress should set the value of the lump sum payment at a level that, *ceteris paribus*, would make most potential plaintiffs indifferent between bearing the personal costs of litigation and accepting the lump sum payment. The lump sum amount would assist with enforcement by compensating for and, thereby removing, some of the disincentives plaintiffs face when bringing litigation.

Further, the lump sum payment would not undermine the make-whole relief principle so long as the payment only compensates for the unpleasantries of litigation and not the lost earnings from discrimination. In fact, a modest lump sum payment would further the make-whole principle since the current

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110 42 U.S.C.S. § 2000e-5(k) (Title VII); 42 U.S.C. § 12205 (ADA); 29 U.S.C. § 216(b) (ADEA).

111 *Overview*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/overview [https://perma.cc/539A-39VP] (last visited Dec. 14, 2022).

system compensates for past lost earnings but then asks plaintiffs to invest uncompensated time and effort into litigation. The net result of the current system still leaves plaintiffs worse off than if they had never faced discrimination in the first place. It follows that a lump sum payment to compensate successful plaintiffs for the opportunity costs of litigation would both remove impediments to litigation, thereby strengthening deterrence, and further the make-whole relief objective.[112]

Critics may contend that enhanced payments to successful plaintiffs could incentivize meritless litigation. This concern overlooks the fact that only successful claimants would receive these payments. Meritless lawsuits tend to lose, and, therefore, lawyers who help claimants bring such litigation would likely receive no payments under this proposal.[113] Rather, these payments to successful plaintiffs would reduce the costs of bringing suits against discriminators in cases where the plaintiff successfully mitigated away most of their damages.

B. Why Replace Punitive Damages

The introduction of a mandatory civil penalty makes necessary the removal of optional punitive damages. Both a mandatory civil penalty and punitive damages serve to penalize behaviors that normal compensatory damages would not sufficiently deter. Congress currently allows punitive damages under Title VII and the ADA but imposes a cap on the amount courts may award. That cap reflects a policy judgment about the upward boundary on the non-compensatory penalties an employer should face in any discrimination case. This proposal does not *necessarily* seek an upward revision to that cap or the creation of a higher minimum penalty floor. Rather, it seeks to ensure discriminators *uniformly* pay a penalty sufficient to deter their wrongful behavior. With the introduction of a mandatory and uniform penalty sufficient to realize deterrence, the further award of punitive damages would become unnecessary.

This raises the question of why Congress should prefer a mandatory penalty over punitive damages. The answer emerges when one considers how infrequently courts grant

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112 This lump sum payment would compensate for the plaintiff's opportunity costs (lost time and effort) of commencing with litigation. It would not compensate for emotional distress or psychological costs associated with job loss.

113 Herbert M. Kritzer, *Litigation in a Free Society: Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739, 754 (2002).

optional punitive damages. One study estimated that in 2004 and 2005 plaintiffs filed over six hundred Title VII claims in federal court, of which only twenty-four resulted in punitive damages.[114] This reluctance on the part of the courts to grant punitive damages makes punitive damages an unreliable tool for furthering the deterrence objective of Title VII. Moreover, the ADEA does not even allow for punitive damages.[115] Just as back pay and front pay fall short insofar as they do not deter employment discrimination equally against all classes of workers, punitive damages likewise cannot assist with the creation of uniform deterrence. For this reason, Congress can better realize the statutory purpose of eliminating discrimination through deterrence by the replacement of optional punitive damages with mandatory civil penalties.

C. Political Feasibility of the Proposal

A further advantage of this proposal emerges from its political viability and ease of implementation. As noted above, the proposal has the advantage of modifying a relatively popular statutory scheme in a rather simple and easily administrable way. It does not call for the abolition of bedrock legal principles, like the duty to mitigate, or for the introduction of cumbersome programs. This indicates the proposal would likely not trigger strong political opposition, at least, not to the degree that alternative solutions might.

Skeptics may nonetheless worry that political polarization could render legislative changes to civil rights or employment statutes unviable. While polarization potentially paralyzes many legislative proposals,[116] the concern appears somewhat less applicable in this context. Elimination of workplace discrimination remains an uncontroversial goal.[117] Further, as Americans become increasingly aware of ongoing discrimination in our society, politicians might look for ways to implement

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114 Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 741 (2008).

115 Dean v. Am. Sec. Ins. Co., 559 F.2d 1036, 1037 (5th Cir. 1977).

116 *See* David R. Jones, *Party Polarization and Legislative Gridlock*, 54 POL. RSCH. Q. 125, 125–26 (2001).

117 *See* Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AMERICAN PROGRESS (June 2, 2011), https://www.americanprogress.org/article/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/ [https://perma.cc/2L42-KQZZ].

policies like this proposal.[118] Simultaneously, uniform penalties for discrimination do not artificially alter labor market supply or demand in a manner that should trouble pro-market politicians.[119] While political polarization and paralysis presents a challenge to almost any legislative initiative, the proposal offered here should invite less resistance than many legislative programs.

Conclusion

Back pay and front pay constitute one of the most important remedies awarded by courts in federal employment discrimination cases. However, these remedies cannot realize make-whole relief while equally deterring discrimination against all workers. Less specialized workers find it relatively easy to mitigate their losses through alternative employment, which diminishes the incentives for discriminatory employers to comply with federal antidiscrimination law. To provide for more uniform and effective deterrence, this proposal calls for the introduction of a mandatory civil penalty paid in addition to back pay and front pay. That penalty should adjust based on an employer's size and allow successful plaintiffs to reclaim a portion of the fine as compensation for the emotional burdens and unpleasantries of litigation. This would ensure that regardless of an employee's ability to mitigate, employers pay a minimum penalty for their wrongful conduct.

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118 *See* Jeffrey M. Jones & Camille Lloyd, *Larger Majority Says Racism Against Black People Widespread*, Gallup (July 23, 2021), https://news.gallup.com/poll/352544/larger-majority-says-racism-against-black-people-widespread.aspx [https://perma.cc/NJ4V-ZE4H]; Megan Brenan, *Gender Disparities in Views of Women's Equality Persist*, Gallup (Oct. 15, 2021), https://news.gallup.com/poll/355958/gender-disparities-views-women-equality-persist.aspx [https://perma.cc/8GGN-BAP7].

119 *See* Howard Gensler, *The Economics of Employment Law*, 13 Glendale L. Rev. 1, 11–12 (1994).