No. 10-2212

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

BRUCE M. BARTON,
Plaintiff-Appellant

v.

ZIMMER, INC.,
Defendant-Appellee

Appeal from the United States District Court
For the Northern District of Indiana, Fort Wayne Division
Case No. 1:06-cv-0208
The Honorable Judge Theresa L. Springmann, Presiding

BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT, BRUCE M. BARTON

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STATEMENT OF INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of all older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce those rights. Approximately one half of AARP's members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Vigorous enforcement of the ADEA is of paramount importance to AARP, its working members, and the millions of other workers who rely on it to deter and remedy age discrimination in employment.

To help to ensure that the rights of older workers are protected, AARP has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts regarding the proper interpretation of the ADEA. *See, e.g., Gross v. FBL Financial Servs.,* 129 S.Ct. 2343 (2009); *Kentucky Retirement Sys. v. EEOC*, 554 U.S. 135 (2008); *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008); *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005).

AARP's concern in this case is that the district court's rejection of back or front pay as relief for the plaintiff's disability that stemmed directly from the defendant's intentional age discrimination improperly places limits on the congressionally mandated protections of an employee's "compensation, terms, conditions, or privileges of employment" in the ADEA, 29 U.S.C.§ 623(a)(1) and frustrates courts' ability to provide "make whole" relief to the victims of the most egregious instances of age discrimination.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to

working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized.

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to the defendant on plaintiff's claim that he is entitled to "make whole" relief in the form of back pay and front pay to compensate him for the wages he was denied as a consequence of the defendant's age discrimination. The Supreme Court has held that front pay awards are not compensatory damages and are appropriate when reinstatement is not possible due to injuries caused by the employer's discrimination. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853 (2001). The district court's mischaracterization of the damages sought by Barton as compensatory, and therefore unavailable under the ADEA, enables employers to avoid liability by acting in a discriminatory manner that is so egregious that it renders an employee unable to return to work.

Seventh Circuit precedent in Title VII cases and precedent from other circuits in ADEA cases support the availability of front pay when an employee is unable to work because of the discrimination they experienced at the hands of their employer. Denying recovery when discriminatory conduct has these results frustrates the purposes of the ADEA, ignores congressional intent to make plaintiffs whole, and allows the worst offenders to escape liability. And, because the burden is on the plaintiff to establish that the employer's intentional discrimination was so egregious that it caused them to incur psychological injuries that prevent them from being able to work, recognizing the availability of damages in these cases will not open the floodgates to recovery for mere hurt feelings or minor emotional distress.

ARGUMENT

I. DENYING AGE DISCRIMINATION VICTIMS RELIEF WHEN THEIR EMPLOYER'S DISCRIMINATORY ACTIONS CAUSE THEM TO BE UNABLE TO WORK IS AT ODDS WITH THE ADEA'S BROAD REMEDIAL PURPOSES.

Courts have broad power to order all legal and equitable relief that will fulfill the remedial purpose of the ADEA. 29 U.S.C. § 626(b) (2006) ("In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . ."). The remedial provisions are designed to provide "make whole" relief to victims of age discrimination. *See McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 118 (7th Cir. 1986) ("Section 626(b) grants broad remedial powers that enables the courts to fashion whatever remedy is required to make the plaintiff whole."); *Rodriquez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977) ("The make whole standard of relief should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct of employers.").

A. Barton is Seeking Make Whole Relief in the Form of Front Pay Which the Supreme Court has Confirmed is Not an Element of Compensatory Damages.

Barton's claim that the age discrimination he endured while employed at Zimmer caused his mental health problems that prevent him from being able to work, is not based on self-interested lay testimony but instead is supported by expert medical testimony. [R Vol9 Part 1 p112]. He is seeking recovery for the economic losses he incurred because of the defendant's discrimination. Specifically, he requests an award of both back pay and front pay. He does not seek compensatory damages.

Front pay awards, which are intended to compensate a plaintiff for wages and benefits he would have received from the employer in the future if not for the discrimination, are essential to

courts' ability to grant "make whole" relief to victims of age discrimination. This Court has affirmed that front pay is an appropriate remedy under the ADEA whose purpose "is to compensate successful plaintiffs for 'the post-judgment effects of past discrimination.'" *EEOC v. Century Broadcasting Corp*., 957 F.2d 1446, 1464 (7th Cir. 1992) (quoting *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158 (6th Cir. 1985)).

The Supreme Court has declared that "front pay is not an element of compensatory damages, but rather a replacement for the remedy of reinstatement in situations in which reinstatement would be inappropriate." *Pollard b. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847 (2001); *accord Williams v. Pharmacia, Inc.*, 137 F.3d 944, 952 (7th Cir. 1998) ("front pay is the functional equivalent of reinstatement"). In providing examples of situations where front pay is an appropriate remedy, the *Pollard* Court describes facts virtually identical to this case. *Pollard* states that front pay should be awarded when reinstatement is not viable "because of continuing hostility between the plaintiff and the employer or its workers, *or because of psychological injuries suffered by the plaintiff as a result of the discrimination* . . . ." 532 U.S. at 846 (emphasis added).

B. This Court Has Already Decided This Issue in the Context of Title VII and Should Apply That Precedent to this Case.

The district court erred by ignoring circuit precedent that is directly on point solely because it "is not an ADEA case." *Barton v. Zimmer, Inc.*, 2010 U.S. Dist. LEXIS 42807, at *17 n. 5 (N.D. Ind. April 30, 2010). The district court rejected reliance on this Court's decision in *King v. Board of Regents of University Wisconsin System*, 898 F.2d 533 (7th Cir. 1990), which upheld a damage award for future earnings under 42 U.S.C. § 1981 because the jury found that the employer's race discrimination caused the plaintiff to be unable to seek future employment. *King* cited this Court's earlier decision in *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1294 (7th Cir. 1987), in which the Court acknowledged that an employer may be liable for an employee's inability to work "if the emotional instability [leading to the inability to work] came from" discrimination.

Both of these decisions were issued well before the enactment of the Civil Rights Act of 1991, which amended Title VII, but not the ADEA, to provide for compensatory and punitive damages in appropriate cases. Thus, even though the damages available under Title VII at the time of the *Williamson* and *King* decisions were precisely the same as those available under the ADEA today, the district court rejected any reliance whatsoever on those decisions.[1]

Moreoever, Title VII and the ADEA "share a common purpose, the elimination of discrimination in the workplace," *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *McKennon v. Nashville Banner Pub. Co.* 513 U.S. 352, 358 (1995), and Congress included virtually identical language to ensure that victims are entitled to "make whole" relief in both statutes. As this Court stated in *McKnight v. General Motors Corp.*, "When we evaluate the relief awarded by the district court, we may look to both Title VII and ADEA (Age Discrimination in Employment Act) cases." 973 F.2d 1366, 1369 n.1 (7th Cir. 1992). *See also Syvock v. Milwaukee Boiler Mfg. Co*., *Inc.*, 665 F.2d 149, 162 n.19 (7th Cir. 1981) ("both Title VII and ADEA vest trial courts with similar broad discretion in awarding such legal and equitable relief as the courts deem appropriate.") (comparing 42 U.S.C. § 2000e-5(g) with 29 U.S.C. § 626(b)).

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[1] The rule that "an employee who is unable to work due to a disability is not precluded from receiving back pay when the employer 'caused' the disability," *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 383-84 (1st Cir. 2004), has been embraced within the Title VII context by at least four circuits, in addition to the Seventh Circuit. *See, e.g.*, *Lathem v. Dep't of Children and Youth Servs.*, 172 F.3d 786, 794 (11th Cir. 1999) ("[W]e hold that a Title VII claimant is entitled to an award of back pay where the defendant's discriminatory conduct caused the disability" that "precluded [the claimant] from obtaining other employment."); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157 (3d Cir. 1999) ("Because [the employer's] conduct affirmatively impaired [plaintiff's] ability to mitigate her damages, it would be inequitable to reduce her back pay award in this case."); *Knafel v. Pepsi-Cola Bottlers, Inc.*, 899 F.2d 1473, 1479-80 (6th Cir. 1990) (upholding district court's award for back pay for a period when plaintiff was unable to work because of the "overwhelming evidence" that defendant's discriminatory action exacerbated plaintiff's back injury). "This rule is merely a logical corollary of the principle that the victims of discrimination should be restored, 'so far as possible . . . to a position where they would have been were it not for the unlawful discrimination.'" *Johnson*, 364 F.3d at 384 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

As the Supreme Court recognized in *McKennon*, "Congress designed the remedial measures [in the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)). Denying relief to age discrimination victims who suffer from a physical or mental disability that was caused by their employer's discrimination and that prevents them from being able to work, would thwart the ADEA's dual goals of making the plaintiff whole and of deterring discrimination.

C. Other Circuits Have Held that Holding Employers Liable When Age Discrimination Victims are Unable to Work Because of the Employer's Discriminatory Actions is Consistent with the Purposes of the ADEA.

The district court's superficial conclusion that Barton's request to be made whole for the economic damages he suffered as a result of the defendant's age discrimination "was not anticipated by the drafters of the ADEA," *Barton*, 2010 U.S. Dist. Lexis 42807, at *16-17, conflicts with precedent from other circuits. Two circuits have recognized that employers may be liable for future economic harm under the ADEA if an employee is unable to work because of discrimination by the employer. In *Smith v. Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985), the Fifth Circuit recognized that "in a case . . . where the plaintiff is unable as a result of discrimination to earn his livelihood, an award of front pay probably would be necessary to 'effectuate the purposes of the Act.'" *Id.* at 262 n.2. The court noted that in order to accomplish the congressional intent of providing a remedy for employees "injured by age discrimination," an employee "who *lost his ability to work due to age discrimination would have to be entitled to recover his lost wages*." *Id.* (emphasis added). Failure to compensate age discrimination victims like Barton, who are unable to work as a consequence of the harmful effects of the employer's age discrimination, would frustrate the goals and purposes of the ADEA.

In *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277 (11th Cir. 1992), a case very similar to the instant case, the Eleventh Circuit recognized the availability of front pay for an employee who was no longer able to work due to the discriminatory acts of his employer. In *Lewis*, the plaintiff suffered documented depression caused by his employer's age discrimination and as a result, the plaintiff was unable to return to work. *Id.* at 1280. The court found that the evidence demonstrated that "the discrimination endured by [the plaintiff] in effect *disabled* him." *Id.* at 1281 (emphasis in the original). Because the plaintiff "emerged from an antagonistic, discriminatory work environment with an emotional disturbance that rendered him unfit to return to that environment," the court held that the plaintiff was entitled to front pay for lost future wages. *Id.* The facts in this case support the same result.

II. AWARDING ECONOMIC DAMAGES TO AGE DISCRIMINATION VICTIMS WHO ARE UNABLE TO WORK AS A RESULT OF THE DISCRIMINATION FULFILLS THE ADEA'S GOAL OF PROVIDING MAKE WHOLE RELIEF BUT WILL NOT LEAD TO AN EXPLOSION OF CLAIMS.

Recognizing the availability of economic damages if an employee is unable to work because of psychological or emotional injury caused by an employer's intentional age discrimination will not open the floodgates for claims under the ADEA for mere hurt feelings or minor emotional distress. Psychological injuries that result in a complete inability to return to work will only occur in the most extreme circumstances, when an employer's conduct is so egregious that it disables an employee. An award of front pay in these cases will not alter or unduly expand the limited availability of these awards under the ADEA. To the contrary, such an award will make the victim whole and penalize the employer for discrimination, precisely fulfilling the intent of Congress in enacting the ADEA.

This is not "automatic relief" but instead is a self-limiting group of cases. The plaintiff must establish both that he is psychologically disabled and that the defendant's discrimination is

responsible for the disability. *See Wilson v. DaimlerChrysler Corp.*, 236 F.3d 827, 829-30 (7th Cir. 2001) (evidentiary hearing held to determine whether employer's discrimination contributed to plaintiff's disability); *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148, 1155-56 (9th Cir. 1999) (holding that the extensive testimony by plaintiff's expert supported a finding that the employer's discrimination caused the plaintiff's disability that made her unable to return to work for the defendant or to perform any job). In *Lewis v. Federal Prison Indus., Inc.*, the ADEA case cited above in which the Eleventh Circuit awarded front pay in a case strikingly similar to this case, the court cautioned that: "Front pay remains a special remedy, warranted only by egregious circumstances. . . Here, Lewis emerged from an antagonistic, discriminatory work environment with an emotional disturbance that rendered him unfit to return to that environment, within a time frame that left him only four years until the date of his mandatory retirement. Not every claim, however legitimate, will produce circumstances, which so clearly mandate the remedy of front pay." 953 F.2d 1277, 1281 (11th Cir. 1992). *Compare Tobin v. Liberty Mutual Ins. Co.*, 553 F.3d 121, 141-44 (1st Cir. 2009) (finding "a causal link was explicitly drawn" where plaintiff's psychiatrist testimony and other evidence allowed jury to find employer's discrimination "precipitated [plaintiff's] total inability to function in the workplace"), *with Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 384 (1st Cir. 2004) (recognizing the "rule" that "if the employer's unlawful conduct caused the employee's inability to mitigate damages, then the employer should be liable for the resulting consequences," but holding that the equivocal evidence provided by the plaintiff did not allow him "to take advantage of this rule.").

CONCLUSION

The ADEA's broad remedial provisions are intended to restore age discrimination victims to the position where they would have been had the employer not discriminated against them. Allowing Barton, and other victims of age discrimination, to recover back pay and front pay when

the employer's unlawful conduct causes them to be unable to work would fulfill this purpose and at that same time deter the most egregious forms of age discrimination.

For the foregoing reasons, the district court's order granting summary judgment on damages should be reversed.

Dated: August 4, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in a 12-point Times New Roman font for the body and a 12-point Times New Roman font for the footnotes.

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CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the foregoing, Brief *Amici Curiae* of AARP and the National Employment Lawyers Association, as well as a CD-Rom containing same, were served upon all parties listed below by placing the same in First-Class United States Mail, postage pre-paid, on the 4th day of August, 2010 as follows:

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