received such a warning, she could not be dismissed. For the foregoing reasons, we reverse the order of the Circuit Court of Cook County.

Case Study 6.2 Review Questions

Hegener v. Board of Education of City of Chicago

1. State the names of the plaintiff and defendant, the volume number, page number and name of the reporter, and the court that decided the case.
2. Describe the facts of the case.
3. What was the cause of action?
4. What was the court's disposition of the case?
5. What was the Chicago Board hearing officer's conclusion in this situation? What was the rationale behind that decision?
6. On what two concepts did the appellate court analyze and critique the case?
7. What did the court decide in regard to the allegation of conduct unbecoming a teacher?
8. How was remediable conduct defined? When does remediable conduct become irremediable?
9. For the dismissal of the plaintiff to be upheld, what steps should the school district have taken?
10. What policies for supervising employees working with minors in a recreation or sport setting can be culled from this case?

Case Study 6.3

Moore v. University of Notre Dame

22 F. Supp. 2d 896 (N.D. Ind. 1998)

This cause is before this court on plaintiff's Motion for Award of Reinstatement/Front Pay and plaintiff's Bill of Costs. Plaintiff, Joseph R. Moore (Moore), filed a claim in this court against The University of Notre Dame (Notre Dame) alleging age discrimination, retaliation, and defamation. Only the age discrimination claim survived summary judgment. The case went to trial in Lafayette on July 9, 1998. On July 15, 1998, the jury found that Notre Dame had violated the Age Discrimination in Employment Act (ADEA) and awarded Moore back pay in the amount of $42,935.28. Additionally, because the jury determined that Notre Dame's violation of ADEA was willful, plaintiff also was awarded liquidated damages in the additional amount of $42,935.28. Judgment must and now does enter in favor of the plaintiff, Joseph E. Moore, and against the defendant, Notre Dame, in the amount of $85,870.56. Accordingly, the court now considers Moore's post-trial motions.

The remedial scheme for a discriminatory discharge is designed to make a plaintiff who has been the victim of discrimination whole through the use of equitable remedies. When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees. Additionally, in the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the backpay award. Moore now asks the court to reinstate him in his former coaching position, or to award five year's front pay in lieu of reinstatement. Notre Dame contends that Moore has received all relief to which he was entitled and therefore asks this court to deny Moore's Motion for Reinstatement/Front Pay.

Although reinstatement is the preferred remedy in a discrimination case, it is not always appropriate. The factors that should be considered when determining its propriety include hostility in the past employment relationship and the absence of an available position for the plaintiff. Additionally, under ADEA, when a period for reinstatement is relatively short, such that plaintiff is close to retirement, the strong preference in favor of reinstatement is neutralized by the increased certainty of potential loss of pay permitting consideration of a front pay award.

The decision to reinstate a discriminatorily terminated employee is consigned to the sound discretion of the district court, which should not grant reinstatement "where the result would be undue friction and controversy." Evidence that hostility developed between the employer and employee during litigation may also be considered, but is not dispositive. In the present case, Moore's reinstatement would cause significant friction as well as disruption of the current football program. Moore and Davie, his direct supervisor, are no longer on speaking terms. During trial, sufficient evidence was presented to infer that Moore and Davie would be unable to engage in a workable relationship. Reinstatement in this instance is impracticable. Moreover, even if hostility and undue friction were not a problem, reinstatement is not appropriate in this case.

The Seventh Circuit has also held that reinstatement can reasonably be denied when "someone else currently occupies the employee's former position." Other circuits hold similarly. The law is clear. Even if this court determined that reinstatement is warranted, it is not an appropriate remedy in this case as there is no available position to which Moore could return. Therefore, the court turns to the more difficult issue of whether front pay is warranted.

Plaintiff is incorrect in stating that "if the Court rejects Moore's request for reinstatement, it must award him front pay." Front pay is an available remedy under ADEA, however, such an award remains discretionary with court. The Seventh Circuit has defined front pay as "a lump sum . . . representing the discounted present value of the difference between the earnings (an employee) would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis, inferior, employment." *McKnight v. General Motors Corp.*, 908 F.2d 104, 116. Such a remedy may especially be indicated when the plaintiff has no reasonable prospect of obtaining comparable employment or when the time period for which front pay is to be awarded is relatively short. The court determines the amount of front pay to award depending on whether (1) the plaintiff has a reasonable prospect of obtaining comparable employment, (2) the time period for the award is relatively short, (3) the plaintiff intends to work or is physically capable of working, and (4) liquidated damages have been awarded. Front pay is awarded for a reasonable period of time, until a date by which the plaintiff, using reasonable diligence, should have found comparable employment. Moreover, an award must be grounded in available facts, acceptable to a reasonable person and not highly speculative. It cannot be based simply on a plaintiff's own stated intentions with regard to how long he or she would have worked.

Notre Dame contends that Moore is not entitled to front pay because (1) evidence acquired by Notre Dame after Moore's discharge would have led to his discharge based on legitimate, nondiscriminatory reasons, (2) Moore's award of liquidated damages has already made him whole, and (3) Moore has failed to make reasonable efforts to mitigate his damages.

The fact that Moore is entitled to damages based on the jury's finding of a willful violation does not conclusively preclude front pay. Front pay may be less appropriate when liquidated damages are awarded. Authority clearly states that liquidated damages is one factor to be considered in awarding front pay and does not stand for the proposition that front pay and liquidated damages may never be awarded to the same plaintiff. Furthermore, an award of front pay, constituting an estimate of what the employee might have earned had he been reinstated at the conclusion of trial, is necessarily speculative; this speculative aspect should not deter courts from fashioning awards that accomplish ADEA's goal of making a wronged employee whole.

In the present case, Notre Dame argues that Moore's jury award of $42,935.28 and liquidated damages award of $42,935.28 make him whole and that further compensation would "be a total award greater than the statute contemplates." The court disagrees. Moore's 1996-97 annual salary was $79,552.08. Assuming an annual increase of 4%, his 1997-98 salary would have been $82,734.16 and his 1998-99 salary $86,043.53. In addition to loss of salary, Moore also lost several benefits. It is unlikely he will be able to duplicate the benefits and prestige the Notre Dame position provided him. Moreover, as Moore is at or near retirement age, it is unlikely he will find comparable employment at the salary level he enjoyed while at Notre Dame. The evidence showed that Moore had coached at Notre Dame for nine years and intended to continue in that position until retirement. Moore has been unable to replace his Notre Dame position with a comparable one. He is currently earning $46,600 and working three jobs. In this court's opinion, the jury award has not "made him whole" and front pay may be appropriate.

Notre Dame also asserts that Moore is not entitled to front pay because Notre Dame administrators made it clear that had they known of Moore's alleged physical and verbal abuse of players, they would have terminated him immediately. Notre Dame argues that evidence of the alleged abuse was "after acquired" and therefore precludes both front pay and reinstatement. What sets an after-acquired evidence case apart from a mixed-motives case . . . or a pretext case . . . is that the articulated "legitimate" reason for terminating the employee was nonexistent at the time of the adverse decision and could not possibly have motivated the employer to the slightest degree. Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge. It is this court's opinion that Notre Dame's argument fails on both points.

First, the after-acquired evidence doctrine does not bar front pay to a discharged employee whose alleged wrongdoing was known to the employer at the time of the discharge and was asserted as being a reason for the discharge. It is this court's opinion that defendant's knowledge of Moore's coaching behavior does not fall within the ambit of after-acquired evidence as set forth in McKennon. Moore coached football at Notre Dame for nine years. Davie knew of, and in fact argued that Moore's behavior was one of the reasons for his termination. The record is replete with such evidence. The jury apparently rejected this argument. Based on its defense at trial, Notre Dame cannot now claim that this "legitimate" reason was nonexistent at the time of the adverse decision and could not possibly have motivated it to the slightest degree.

Notre Dame has also failed to establish that Moore's alleged wrongdoing was of such severity that he in fact would have been terminated on those grounds alone. Football is an aggressive sport. Coaching a winning team requires a degree of "killer instinct." Notre Dame's blanket assertion that if certain administrators had known of Moore's alleged abuse of players, Moore would have been immediately fired is insufficient to prove that such would have actually occurred. This assertion is nothing more than an excuse made after the fact. Additionally, this court will not speculate, like defendant does, as to the reason the jury did not award a large amount of back pay. An award of back pay less than requested does not necessarily mean the jury concluded Moore would have been terminated for nondiscriminatory reasons and it does not therefore preclude front pay. Accordingly, this court finds defendant's after-acquired evidence argument without merit.

Notre Dame finally argues that Moore is not entitled to front pay because he failed to undertake reasonable efforts to mitigate his damages. This court disagrees. Generally, an ADEA plaintiff satisfies the mitigation of damages requirement that he use "reasonable diligence in attempting to secure employment" by demonstrating his commitment to seeking active employment and by remaining ready, willing, and able to work. However, a plaintiff's duty to mitigate his damages is not met by using reasonable diligence to obtain any employment, rather the employment must be comparable employment. The Seventh Circuit has defined "comparable work" as a position that affords "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status" as the previous position. The goal of mitigation is to prevent the plaintiff from remaining idle and doing nothing. Furthermore, an employee is not required to go to heroic lengths in attempting to mitigate his damages, but only to take reasonable steps to do so. Furthermore, a claimant has no obligation to accept lesser employment . . . or relocate to a new community.

When evaluating the reasonableness and duration of a job search a court may consider the plaintiff's background and individual characteristics. Moreover, it is the defendant's burden to prove that a plaintiff has failed to discharge his duty. In the present case, Notre Dame has not met this burden. Moore sought and obtained employment shortly after his discharge. He currently works at three different jobs. The fact that he did not accept a position at Cornell does not indicate a failure to mitigate. That position offered a $40,000 salary, significantly less than Moore's former salary, and involved a tenuous situation where the head coach was seeking other employment. Nor does the fact that Moore did not apply for certain positions mentioned by defendant indicate a failure to mitigate. Moore is presently sixty-six years old. The options available to him are not as great as those available to someone younger. Moore has demonstrated his willingness to work, but, the chances of finding "comparable work" as defined by the Seventh Circuit, *supra*, are slim. It is this court's opinion that Moore used reasonable diligence in attempting to obtain employment.

The purpose of front pay under the Age Discrimination in Employment Act is to ensure that a person who has been discriminated against on the basis of age is made whole, not to guarantee every claimant who cannot mitigate damages by finding comparable work and annuity to age 70. Furthermore, the risk of noncontinuity of future employment in a "volatile" field must be considered in determining an award of front pay . . . and the court has considered this fact. Defendant's argument that front pay is too speculative when the plaintiff's profession has a high turnover rate does not preclude a front pay award. In this case, such an award is not "highly speculative." The court has solid evidence concerning Moore's annual salary and the number of years he hoped to continue his employment. While Moore asserts that five years front pay is warranted, this court disagrees. The evidence presented at trial establishes that Moore expressed a desire to work two more years and then retire. There was no guarantee that Davie would remain at Notre Dame longer than his current contract or that Moore would indefinitely remain in Davie's employ. The evidence also suggests that Moore and Davie had philosophical differences that may have led to a parting of the ways. With all evidence considered, the court finds an award of two years front pay sufficient. The front pay is calculated as follows: Had Moore remained at Notre Dame his total 1998 salary would have been

$84,388.84. Subtracted from this amount is Moore's annual salary from his present employment. Moore testified that he currently earns $1,600 for his services as assistant football coach at Cathedral Preparatory School, $15,000 for his work with the Baltimore Ravens, and $30,000 from his work with Tollgrade Communications. His total current yearly earning amount is therefore $46,600. The difference between Moore's Notre Dame salary and his current salary is $37,788.84 per year. This amount is multiplied by a period of two years and yields a total of $75,577.68. Because the court is not including an additional amount for lost benefits and is not factoring in any increase for the second year, no discounting of the front pay award is warranted. Thus, the total front pay award equals $75,577.68 plus postjudgment interest.

For the preceding reasons it is hereby ordered that plaintiff's Motion for Reinstatement is DENIED. Plaintiff's Motion for Award of Front Pay is GRANTED. Plaintiff is awarded front pay in the amount of $75,577.68 plus postjudgment interest. It is further ordered that plaintiff's Motion for Costs and Fees is GRANTED in part as modified herein. Plaintiff is awarded costs in the total amount of $9,672.45. Plaintiff is also awarded attorney fees and expenses in the total amount of $394,865.74. Finally, pursuant to jury verdict, the plaintiff is awarded $42,935.28 in back pay and an additional $42,935.28 in liquidated damages.

Case Study 6.3 Review Questions

Moore v. University of Notre Dame

1. State the names of the plaintiff and defendant, the volume number, page number and name of the reporter, and the court that decided the case.
2. Describe the facts of the case.
3. What was the cause of action?
4. What was the court's disposition of the case?
5. What are considered appropriate remedies for violations of the ADEA?
6. When is reinstatement an appropriate remedy? Why was it not appropriate in this case?
7. What is front pay? How is the amount of front pay determined?
8. What arguments did Notre Dame use in an attempt to influence the court against awarding the plaintiff front pay? What could Notre Dame have done in managing their personnel to get the court to uphold their arguments?
9. Explain the failure to mitigate concept. What was the court's ruling and rationale regarding failure to mitigate in this case?
10. Do you agree with the court's damages ruling for the plaintiff? Why or why not?

Case Study 6.4

Perdue v. City University of New York

13 F. Supp. 2d 326 (E.D. N.Y. 1998)

Plaintiff, Molly Perdue (Perdue), the former women's basketball coach and women's sports administrator at Brooklyn College, brought suit against Brooklyn College, the City University of New York (collectively, except as otherwise indicated, referred to as CUNY), and the individually-named defendants, alleging violations of the Equal Pay Act (EPA), 29 U.S.C. § 206(d); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Civil Rights Act of 1871, 42 U.S.C. § 1983; Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*; and the New York Human Rights