

**BREEDING EMPLOYMENT LITIGATION – HOW THE  
MULTIPLYING OF FRONT PAY AWARDS WILL ENCOURAGE  
EMPLOYMENT LAWSUITS TO MULTIPLY IN MINNESOTA: THE  
IMPLICATIONS OF THE MINNESOTA SUPREME COURT’S  
DECISION IN *RAY V. MILLER MEESTER ADVERTISING***

**TABLE OF CONTENTS**

|             |   |     |
|-------------|---|-----|
| <b>I.</b>   | <b>INTRODUCTION</b>   | 517 |
| <b>II.</b>  | <b>STATEMENT OF THE CASE</b>  | 518 |
|             | <i>A. FACTS</i>   | 518 |
|             | <i>B. HENNEPIN COUNTY DISTRICT COURT</i>  | 518 |
|             | <i>C. MINNESOTA COURT OF APPEALS</i>  | 519 |
|             | <i>D. MINNESOTA SUPREME COURT</i>   | 520 |
| <b>III.</b> | <b>BACKGROUND</b>   | 526 |
|             | <i>A. MINNESOTA HUMAN RIGHTS ACT (“MHRA”)</i>   | 526 |
|             | <i>B. DISTINGUISHING LEGAL AND EQUITABLE RELIEF</i>   | 526 |
|             | <i>C. FRONT PAY</i>   | 529 |
|             | <i>D. EXAMINATION OF FOUNDATIONAL CASE LAW</i>  | 530 |
|             | <i>E. FRONT PAY AS EQUITABLE RELIEF UNDER THE<br/>FMLA, THE ADEA, AND THE ADA</i>   | 535 |
| <b>IV.</b>  | <b>ANALYSIS</b>   | 536 |
|             | <i>A. THE THREE-PRONGED TEST UTILIZED BY COURTS<br/>TO DETERMINE WHETHER A CAUSE OF ACTION IS<br/>LEGAL OR EQUITABLE REVEALS THAT AN ACTION<br/>FOR FRONT PAY IS AN EQUITABLE CLAIM</i>   | 537 |
|             | <i>B. SIMILARITIES BETWEEN THE DAMAGE<br/>PROVISIONS OF TITLE VII AND THE MHRA<br/>SUPPORT A FINDING THAT FRONT PAY UNDER<br/>THE MHRA IS AN EQUITABLE REMEDY, AS THE<br/>UNITED STATES SUPREME COURT CONCLUDED<br/>WITH RESPECT TO TITLE VII</i> | 540 |
|             | <i>C. THE MAJORITY’S DECISION IN RAY V. MILLER<br/>MEESTER ADVERTISING DOES NOT PROVIDE AN<br/>ADEQUATE BASIS FOR ITS SHARP DEPARTURE IN<br/>THE CHARACTERIZATION OF FRONT PAY AS<br/>EQUITABLE</i>   | 542 |

|   |     |
|---|-----|
| <i>D. THE MAJORITY'S DECISION IN RAY V. MILLER<br/>MEESTER ADVERTISING IS INCONSISTENT WITH<br/>THE PURPOSE OF AN AWARD OF FRONT PAY</i>    | 546 |
| <i>E. MULTIPLYING FRONT PAY AWARDS WILL HAVE<br/>DAMAGING CONSEQUENCES ON MINNESOTA'S<br/>STATE COURT SYSTEM AND MINNESOTA<br/>EMPLOYER</i> | 548 |
| <b>V. CONCLUSION</b>  | 548 |

**BREEDING EMPLOYMENT LITIGATION – HOW THE  
MULTIPLYING OF FRONT PAY AWARDS WILL  
ENCOURAGE EMPLOYMENT LAWSUITS TO MULTIPLY IN  
MINNESOTA: THE IMPLICATIONS OF THE MINNESOTA  
SUPREME COURT’S DECISION IN RAY V. MILLER  
MEESTER ADVERTISING**

*Carrie Doom*<sup>1</sup>

**I. INTRODUCTION**

In a decision that will flood the Minnesota state court system and bankrupt small local businesses the Minnesota Supreme Court in *Ray v. Miller Meester Advertising* held that an award of front pay under the Minnesota Human Rights Act (“MHRA”) is a form of actual (legal) damages subject to multiplication under the Act.<sup>2</sup> Characterizing front pay as a legal as opposed to an equitable remedy is significant because legal damages are capable of multiplication, where as equitable remedies are not subject to multiplication.<sup>3</sup> In the face of well-established precedent holding that front pay is an equitable remedy, the Minnesota Supreme Court got it wrong when it declared that front pay is a legal remedy and thus subject to judicial damage multiplication.<sup>4</sup>

The following casenote explores the Minnesota Supreme Court’s decision and rationale in *Ray v. Miller Meester Advertising* and advocates for the reversal of the court’s holding that front pay is subject to multiplication

---

<sup>1</sup> Candidate for Juris Doctor, May 2005. The Author would like to thank the staff of Hamline Law Review, with special thanks to Editors Brian Axell, Greg Smith, and Shelley Ryan. The Author would also like to thank God, her husband, and family.

<sup>2</sup> *Ray v. Miller Meester Adver.*, 684 N.W.2d 404, 407 (Minn. 2004). Front pay is a remedy available to victims of employment discrimination under circumstances where reinstatement is not feasible. *See infra* notes 94-106 and accompanying text. An award of front pay compensates the aggrieved party for a reasonable period of time after entry of judgment. *See infra* notes 94-98 and accompanying text. A front pay award is the amount of pay the successful plaintiff would have received had she continued in her position after a judgment in her favor. Eileen Kuklis, *The Future of Front Pay Under the Civil Rights Act of 1991: Will It Be Subject To The Damage Caps*, 60 ALB. L. REV. 465, 467 (1996).

In contrast, back pay is the amount of pay a successful plaintiff would have received but for the employer’s unlawful and discriminatory actions, less any currently earned income, from the time of discharge up to the time the court renders a decision in the matter. *Id.* at 500 n.13. For example, assume the plaintiff is discharged in January 2002 and files suit against her employer for discrimination. The court finds in favor of the plaintiff in January 2004. The court could award back pay from 2002 through January 2004 and, if reinstatement was not feasible, front pay for a reasonable period of time after the judgment.

<sup>3</sup> *See infra* notes 74-86 (discussing the distinction between legal and equitable remedies).

<sup>4</sup> *See infra* notes 110-38 (discussing federal precedent holding that front pay is an equitable remedy).

under the MHRA. Part II of this casenote addresses the facts presented in *Ray*, the opinions of the Hennepin County District Court and the Minnesota Court of Appeals, and the majority and dissenting opinions of the Minnesota Supreme Court.<sup>5</sup> Part III initially focuses on the distinction between legal and equitable remedies.<sup>6</sup> Part III then discusses the precedents leading up to and influencing the court's decision in *Ray*.<sup>7</sup> Part IV of this casenote argues that *Ray* was wrongly decided because it conflicts with the law of remedies, the MHRA, and well-established precedent, in addition to the purpose underlying an award of front pay.<sup>8</sup>

## II. STATEMENT OF THE CASE

### A. Facts

Miller Meester Advertising, Inc. ("MMA") hired Patricia Ludowese Ray in June 1996 to the position of Vice President and Group Creative Director.<sup>9</sup> In June 1998, MMA promoted Ray to the position of Creative Director.<sup>10</sup> Two months later, Robert V. Miller, MMA's owner, ordered Ray's termination.<sup>11</sup> MMA terminated Ray without warning and with no prior criticism of her job performance.<sup>12</sup> Ray filed suit against MMA and Miller for unlawful gender discrimination under the MHRA and Title VII of the federal Civil Rights Act of 1964, as amended in 1991 ("Title VII").<sup>13</sup>

### B. Hennepin County District Court

Pursuant to the MHRA's mandate that a plaintiff's cause of action be tried before the court sitting without a jury, the trial judge reviewed Ray's MHRA claim.<sup>14</sup> The judge, however, used the jury in an advisory capacity

---

<sup>5</sup> See *infra* notes 9-66 and accompanying text.

<sup>6</sup> See *infra* notes 67-106 and accompanying text.

<sup>7</sup> See *infra* notes 110-38 and accompanying text.

<sup>8</sup> See *infra* notes 155-262 and accompanying text.

<sup>9</sup> *Ray v. Miller Meester Adver.*, 684 N.W.2d 404, 405 (Minn. 2004). When MMA hired Ray, she had 21 years of experience in the advertising industry. *Id.*

<sup>10</sup> *Id.* Ray was the first woman to hold the position of Creative Director. *Id.*

<sup>11</sup> *Id.* Ray was terminated by Marchio, a vice-president and the director of human resources, at the direction of Miller. *Ray v. Miller Meester Adver.*, 664 N.W.2d 355, 360 (Minn. Ct. App. 2003). When Ray asked Marchio what she had done wrong, Marchio said she had done nothing wrong and it was a "Bob decision." *Id.* In the termination letter he prepared, Marchio stated that Ray's termination was a result of her management style which created morale problems for employees. *Id.*

<sup>12</sup> *Ray*, 684 N.W.2d at 404. During Ray's tenure, Marchio commended Ray's abilities. *Ray*, 664 N.W.2d at 360. In addition, Ray's immediate supervisor, Ruhland, never expressed dissatisfaction with Ray's management. *Id.*

<sup>13</sup> *Ray*, 684 N.W.2d at 404. Only the claim brought under the MHRA was at issue before the Minnesota Supreme Court. *Id.* at 406.

<sup>14</sup> *Id.* at 405. Ray's Title VII claim was tried to the jury. *Id.*

with regard to Ray's claim under the MHRA.<sup>15</sup> On June 7, 2001, the court concluded that MMA terminated Ray in violation of the MHRA and Title VII.<sup>16</sup> The court ordered in excess of \$1 million in damages on both claims.<sup>17</sup> Of this, the MHRA damage award included \$123,004 for three years of front pay.<sup>18</sup> Pursuant to its authority under the MHRA to multiply damages, the court doubled Ray's damages to \$246,008.<sup>19</sup>

### C. Minnesota Court of Appeals

MMA appealed the ruling.<sup>20</sup> Among its claims of error, MMA asserted that the district court's doubling of the front pay award was not authorized under the MHRA.<sup>21</sup> The crux of MMA's argument on appeal was that because the United States Supreme Court had concluded that front pay is not an element of legal damages (compensatory damages) in Title VII cases, the same distinction applies to claims brought under the MHRA.<sup>22</sup> MMA urged the court to follow the Court's precedent because finding that front pay is an equitable remedy as opposed to a legal remedy would render an award of front pay incapable of multiplication.<sup>23</sup>

The court of appeals reversed the entire Title VII award due to evidentiary errors as well as the district court's award of emotional distress damages under the MHRA.<sup>24</sup> With respect to the multiplication of the front pay award, the court of appeals held that front pay is an "actual loss" and therefore subject to multiplication under the MHRA.<sup>25</sup> The court stated that front pay is "simply money awarded for lost compensation during the period

---

<sup>15</sup> *Id.* By special verdict, the jury found that MMA terminated Ray on the basis of her gender and awarded past wage loss in the amount of \$73,866, past compensatory damages in the amount of \$95,000, future compensatory damages in the amount of \$42,250, and punitive damages in the amount of \$500,000. *Id.* at 406.

<sup>16</sup> *Ray*, 684 N.W.2d at 406.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The court, acting on its authority under the MHRA, doubled the award of front pay damages. *Id.* Under the MHRA, when a court finds that an employer engaged in an unfair discriminatory practice, the court shall order the employer to pay "compensatory damages in an amount up to three times the actual damages sustained." *Id.* (quoting MINN. STAT. § 363.071, subd. 2 (2000)).

<sup>20</sup> *Ray*, 684 N.W.2d at 406.

<sup>21</sup> *Id.* In addition, MMA asserted that the district court abused its discretion by admitting testimony that was either an improper lay opinion, irrelevant, unduly prejudicial, or an improper expert opinion. *Id.* at n.2. MMA argued that the admission of inadmissible evidence resulted in prejudicial error in both the Title VII jury trial and the MHRA bench trial. *Id.*

<sup>22</sup> *Ray*, 664 N.W.2d at 368.

<sup>23</sup> *See id.*

<sup>24</sup> *Ray*, 684 N.W.2d at 406. The court of appeals found no other errors in the district court's evidentiary rulings or determination of liability and damages under the MHRA. *Id.*

<sup>25</sup> *Ray*, 664 N.W.2d at 370.

between judgment and reinstatement or in lieu of reinstatement.”<sup>26</sup> The court followed the reasoning in *Phelps v. Commonwealth Land Title Ins., Co.*<sup>27</sup> that the MHRA unambiguously vests trial courts with the discretion to multiply damages and that multiplying damages is appropriate when the amount awarded does not adequately compensate the plaintiff, as in the case of lost wages.<sup>28</sup>

#### ***D. Minnesota Supreme Court***

The Minnesota Supreme Court granted MMA’s petition for review on the issue of whether front pay is subject to multiplication under the MHRA.<sup>29</sup> The court held, with one judge dissenting, that front pay is a component of actual damages subject to multiplication under the MHRA.<sup>30</sup>

##### ***1. Majority Opinion***

In the majority opinion, authored by Justice Meyer, the court confined the issue to whether front pay is subject to multiplication under the provision of the MHRA that authorizes the multiplication of compensatory damages in an amount up to three times the actual damages sustained.<sup>31</sup> The majority opined that the resolution of this issue is dependent on the meaning of “actual damages” contained in the MHRA.<sup>32</sup> The majority defined actual damages as: “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.”<sup>33</sup> The court held

---

<sup>26</sup> *Id.* (quoting *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)).

<sup>27</sup> 537 N.W.2d 271, 275 (Minn. 1995).

<sup>28</sup> *Ray*, 664 N.W.2d at 370. The court stated that the “multiplication of damages may be appropriate when the plaintiff is left uncompensated by an unaugmented award of compensatory damages, such as in the case of loss of potential income or loss of potential raises.” *Id.* The court in *Ray* determined that because reinstatement was impossible, *Ray* was left uncompensated for the loss of potential income and raises and would find it difficult to secure a comparable job in the field. *Id.* The court concluded that:

[b]ecause the district court awarded front pay for a reasonable period of three years and district courts are vested with the discretion to multiply damages, front pay can be considered an element of compensation in the context of lost wages. *Phelps* suggests that front pay may be used to augment an award of compensatory damages; and Minn. Stat. § 363.071 subd. 2, allows ‘compensatory damages in an amount up to three times the actual damages sustained.’ Thus we hold that front pay is an actual loss and may be trebled under the MHRA in this case.

*Id.* (citing *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995)).

<sup>29</sup> *Ray*, 684 N.W.2d at 406.

<sup>30</sup> *Id.* at 407.

<sup>31</sup> *Id.* at 406-07. This is an issue of statutory construction which the court reviews de novo. *Id.* at 407.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 406 (quoting BLACK’S LAW DICTIONARY 394 (7th ed. 1999)).

that “front pay is a form of actual damages because it is an award that is the ‘natural, necessary and usual result’ of an employer’s discriminatory behavior.”<sup>34</sup>

In reaching this conclusion, the court relied on three sources for its reasoning. First, the court accepted the definition of actual damages adopted by the court in *Phelps v. Commonwealth Land Title Ins. Co.*<sup>35</sup> In *Phelps*, the court expressed approval with the definition of actual damages found in *Black’s Law Dictionary*,<sup>36</sup> which defines actual damages as compensation for proven loss or injury.<sup>37</sup> Based on this definition of actual damages, the court in *Phelps* concluded that compensatory damages are comprised of both general and special damages.<sup>38</sup> Where general damages are the natural *and* necessary damages, and special damages are the natural *but not* necessary damages.<sup>39</sup>

Second, the majority relied on the Restatement (Second) of Torts definition of compensatory damages, which provides for damages sustained

---

<sup>34</sup> *Ray*, 684 N.W.2d at 407-08. In reaching this conclusion, the majority relied on the nature of front of pay as expressed by the court in *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 709 (Minn. 1992) (quoting *Zeller v. Prior Lake Pub. Sch.*, 108 N.W.2d 602, 606 (1961)).

“In employment contracts, the general rule is that ‘[t]he measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms.’” However, a court may award future damages, or front pay, for lost compensation that occurs after the time of trial. The potentially speculative nature of front pay awards is limited by the plaintiff’s duty to mitigate damages, the evidence presented concerning the extent of the potential damages, and the principle that front pay awards are limited to the damages caused by the breach of the contract.

*Id.*

<sup>35</sup> *Ray*, 684 N.W.2d at 407. The legislature did not provide a definition of actual damages in the MHRA. *Id.*

<sup>36</sup> *Id.* *Black’s Law Dictionary* defines actual damages as “[a]n amount awarded to a complainant to compensate for proven injury or loss; damages that repay actual losses. Also termed compensatory damages.” *Id.* (citing BLACK’S LAW DICTIONARY 394 (7th ed. 1999)). The court also referenced the definition of compensatory damages found in the Restatement (Second) of Torts, which defines compensatory damages as “the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.” *Id.* at 407 n.3 (citing RESTATEMENT (SECOND) OF TORTS § 903 (1979)). The court further noted that the Restatement recognizes that “a victim of a tort is ‘entitled to damage past, present, and prospective legally caused by the tort.’” *Id.* (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 910 (1979)).

<sup>37</sup> *Ray*, 684 N.W.2d at 407 n.3.

<sup>38</sup> *Id.* “In general, compensatory damages, consist of both general and special damages. General damages are the natural, necessary and usual result of the wrongful act or occurrence in question. Special damages are those which are the natural but not the necessary and inevitable result of the wrongful act.” *Id.*

<sup>39</sup> *Id.*

by the victim of the tortfeasor.<sup>40</sup> Despite the past tense terminology contained in the definition, the majority observed that in another provision, the Restatement (Second) of Torts authorizes a victim of a tort to recover for all harm “past, present, and prospective.”<sup>41</sup>

Third, the majority relied on the acceptance by Minnesota courts of the” common law principle that actual or compensatory losses may include future losses.”<sup>42</sup> The majority reasoned that under Minnesota common law, actual or compensatory damages may include future losses as evidenced by courts authorizing future medical expenses in tort cases.<sup>43</sup>

In reaching its decision, the majority rejected two arguments set forth by MMA. First, MMA argued that front pay cannot be a component of actual damages because the MHRA provides for reinstatement as a remedy for employment discrimination in addition to actual damages.<sup>44</sup> Accordingly, it was MMA’s position that because front pay is an alternative to reinstatement it cannot be awarded as part of actual damages.<sup>45</sup> In response to this argument, the majority opined that “[f]ront pay is not a substitute” for the remedy of reinstatement but a “distinct measure of damages that may be awarded” alongside reinstatement.<sup>46</sup>

Second, MMA urged the court to adopt the approach taken by the federal courts in interpreting front pay awards under Title VII.<sup>47</sup> The federal

<sup>40</sup> *Id.* The Restatement defines compensatory damages as “the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 903 (1979)).

<sup>41</sup> *Ray*, 684 N.W.2d at 407 n.3.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See, e.g., *Pietrzak v. Eggen*, 295 N.W.2d 505, 507-08 (Minn. 1980) (finding that the jury should have been instructed on future medical expenses as a component of special damages); *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977) (holding that the jury could consider a special damage award that consisted of future medical expenses and future wage losses). The court, in concluding that future damages are recoverable under Minnesota law, found that future damages remain recoverable even though it may be difficult to ascertain the precise amount of those future damages. *Ray*, 684 N.W.2d at 407.

<sup>44</sup> *Id.* at 408.

<sup>45</sup> *Id.* In so arguing, MMA relied on the following language contained in the MHRA: “[i]n addition to the aforesaid remedies, in a case involving discrimination in (a) employment, the court may order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination with or without back pay . . . or any other relief the court deems just and equitable.” *Id.* (citing MINN. STAT. § 363.071, subd. 2).

<sup>46</sup> *Id.* In rejecting MMA’s argument, the majority relied on its decision in *Phelps*, where the court rejected a similar argument with respect to back pay. *Id.* The court in *Phelps* stated:

[w]e do not believe the statute precludes the inclusion of back pay as an element of damages that is subject to multiplication because MINN. STAT. § 363.071, subd. 2 gives a court the discretion to award back pay either as actual damages or as damages attendant to the hiring, reinstatement or upgrading of an aggrieved party.

*Ray*, 684 N.W.2d at 408 (citing *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 277-78 (Minn. 1995)).

<sup>47</sup> *Id.*

approach holds that front pay is only available in those circumstances when the equitable remedy of reinstatement is not feasible, “and, therefore, does not constitute actual damages subject to multiplication under the MHRA.”<sup>48</sup> In rejecting MMA’s contention, the majority noted that “[i]n construing the MHRA [it has] at times relied on principles developed under Title VII but that [it is] not bound by the interpretations of Title VII.”<sup>49</sup>

The majority concluded that the scope of damages under the MHRA is not similar to those provided under Title VII and therefore declined to adopt Title VII damage principles when applying the MHRA.<sup>50</sup> The majority reached this conclusion despite the Eighth Circuit’s holding that front pay awards are not subject to multiplication under the MHRA.<sup>51</sup> In a footnote, the majority dismisses the Eighth Circuit’s reasoning on the basis that the court’s interpretation “was almost wholly based on Title VII case law.”<sup>52</sup>

Accordingly, based on the definition of actual damages contained in *Black’s Law Dictionary*, reliance on common law principles of damages, and

---

<sup>48</sup> *Id.* The United States Supreme Court held that front pay is included in the equitable remedies and is intended under Title VII as an alternative remedy to reinstatement. *Id.* at 409 (citing *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853-54 (2001)).

<sup>49</sup> *Id.* at 408 (citing *Turner v. IDS Fin. Serv. Inc.*, 471 N.W.2d 105, 107 (Minn. 1991). Recognizing that it is not bound by the interpretation of Title VII, the court stated that the “question is whether the MHRA is sufficiently similar to Title VII in its treatment of damages such that we should adopt Title VII principles with respect to front pay” under the MHRA. *Id.* at 409 (emphasis omitted).

<sup>50</sup> *Ray*, 684 N.W.2d at 409. The court noted that remedies provided under Title VII authorize a court to “order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay . . . or other equitable relief as the court deems appropriate.” *Id.* (quoting 42 U.S.C. § 2000e-5(g) (2000)). The court went on to note that under Title VII, a party may recover “compensatory and punitive damages as allowed in subsection (b) of this section, *in addition* to any relief authorized by 42 U.S.C. § 2000e-5(g).” *Id.* (quoting 42 U.S.C. § 1981a(a) (2000)). After considering the damages language of Title VII, the majority explained the distinction between the damage provisions of the MHRA and those contained in Title VII. *Id.* The majority stated:

[i]n contrast, the plain language of the MHRA not only allows a court to multiply a compensatory damage award, it gives a court the power to “order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination with or without back pay . . . or any other relief the [court] deems just and equitable. As discussed above, our interpretation of the damages language of the MHRA is based on the common law of damages, and does not characterize its monetary remedies as equitable remedies or substitutes for equitable relief. Because Congress includes an award of back pay within the equitable remedies available under Title VII, we conclude that scope of damages under the MHRA is not similar to those provided under Title VII and we decline to adopt Title VII damages principles for the MHRA.

*Id.* at 409.

<sup>51</sup> *Id.* at 409 n.6. See *Mathieu v. Gopher News Co.*, 273 F.3d 769, 781-82 (8th Cir. 2001).

<sup>52</sup> *Ray*, 684 N.W.2d at 409 n.6.

the declination of Title VII damage principles, the majority concluded that front pay is a component of actual damages subject to multiplication under the MHRA.<sup>53</sup>

## 2. *Dissenting Opinion*

Justice Gilbert authored a dissenting opinion in which he expressed his disapproval of the majority's characterization of front pay as actual damages subject to multiplication under the MHRA.<sup>54</sup> Justice Gilbert argued that stacking federal and state relief and then multiplying the award of front pay leads to a result not contemplated by the legislature.<sup>55</sup>

Justice Gilbert criticized the majority's reliance on personal injury tort cases and the Restatement (Second) of Torts to define compensatory damages on the basis that the court has affirmatively declared that employment discrimination is not a tort.<sup>56</sup> Justice Gilbert found it curious that the majority would attempt to read tort principles into a cause of action that the court has clearly stated is not a tort.<sup>57</sup> Even assuming that tort principles may be instructional in deciding the issue, the dissent noted that the majority grossly misinterpreted the Restatement (Second) of Torts.<sup>58</sup> Specifically, the definition from the Restatement (Second) of Torts that the majority relied on allows for damages for harm *sustained*, but does not provide for any sort of prospective or future harm.<sup>59</sup>

---

<sup>53</sup> See *supra* notes 31-52 and accompanying text.

<sup>54</sup> *Ray*, 684 N.W.2d at 409.

<sup>55</sup> *Id.* "Stacking of the federal and state relief and then multiplication of large portions of the relief, without providing a rationale for that multiplication, plus punitive damages, leads to a result that I do not believe was contemplated by our legislature." *Id.* Justice Gilbert posited that the multiplying provision in the MHRA was created to be a compensatory rather than a punitive measure. *Id.* To support this conclusion, Justice Gilbert relied on the court's statement in *Phelps*, where the court noted: "although the trebling function in this statute has a deterrent effect, it is primarily a compensatory measure which is made all the more clear by the statute's explicit labeling of the treble damages as compensatory." *Id.* (quoting *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 277 (Minn. 1995)).

<sup>56</sup> *Id.* Justice Gilbert noted that the court previously distinguished between tort claims and claims under the MHRA by holding that the court does not allow double recovery for concurrent MHRA claims and tort claims. *Ray*, 684 N.W.2d at 409. Justice Gilbert further noted that federal and state courts around the country have repeatedly declined to classify employment discrimination as a tort. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Justice Gilbert noted that the definition of compensatory damages contained in section 903 of the Restatement (Second) of Torts utilizes the past tense of the word "sustain" and thus does not provide for any prospective or future harm reference. *Id.* Justice Gilbert stated:

Next, the majority cites to [s]ection 910 of the Restatement, which states that a person injured by a tort is entitled to recover damages for all harm, past, present and prospective legally caused by the tort. It is not so obvious, however, that [s]ection 910 is directly tied to 903 as the majority

Justice Gilbert first argued that front pay falls within the definition of “prospective damages” rather than “compensatory” or “actual damages.”<sup>60</sup> Prospective damages are future damages, whereas, compensatory or actual damages are damages that compensate for a proven loss.<sup>61</sup> Justice Gilbert reasoned that the court had previously acknowledged the prospective nature of front pay awards.<sup>62</sup> The dissent further noted that the United States Supreme Court in interpreting Title VII of the Civil Rights Act of 1964, and the Eighth Circuit in construing the MHRA, have both concluded that front pay is not an element of compensatory (actual) damages.<sup>63</sup>

Lastly, the dissent argued that multiplying front pay damages would overcompensate the victim and could threaten to bankrupt businesses.<sup>64</sup> Justice Gilbert stated:

[m]ultiplying an award of front pay would overcompensate a victim by allowing a greater reward than an equitable substitution for reinstatement. In addition, it would create an unwarranted incentive for a victim not to seek reinstatement or subsequent employment, because the victim is being compensated at a greater, multiplied rate than the assessed value of the victim’s future work.<sup>65</sup>

---

asserts. Section 910 generally provides for damages but does not express the type of damages that should be awarded. In addition, nowhere in the comments to [s]ection 910 does it mention the terms compensatory or actual damages.

*Ray*, 684 N.W.2d at 410.

<sup>60</sup> *Id.* at 411.

<sup>61</sup> *Id.* Prospective damages are “[f]uture damages that, based on the facts pleaded and proved by the plaintiff, can reasonably be expected to occur,” *id.* (citing BLACK’S LAW DICTIONARY 396 (7th ed. 1999)), whereas actual damages are “[a]n amount awarded to a complainant to compensate for a *proven* injury or loss; damages that repay actual losses,” *id.* (citing BLACK’S LAW DICTIONARY at 394).

<sup>62</sup> *Id.* at 412 (discussing the court’s decision in *Feges v. Perkins Rests. Inc.*, 483 N.W.2d 701, 710 (Minn. 1992), where the court recognized the “inherent speculative nature of front pay awards”).

<sup>63</sup> *Ray*, 684 N.W.2d at 412. The United States Supreme Court and the Eighth Circuit both reasoned that front pay is an alternative to the equitable remedy of reinstatement. *Id.*

<sup>64</sup> *Id.* at 413.

<sup>65</sup> *Id.* In the present matter, the total portion of Ray’s judgment under the MHRA amounts to \$900,000. *Id.* The court concluded:

[i]n context, when Ray was terminated in August of 1998 she was earning approximately \$100,000 per year, plus benefits. At the time of the trial, [two and a half] years had gone by and she could not find a substantially equivalent job, but to her credit, started her own company and had mitigated her damages in the year 2000 to the extent of \$65,000 per year. Even assuming that Ray was forced to take an unjustified and significant pay cut due to appellant’s discriminatory practice, the MHRA judgment amounts to almost nine times her prior salary for one year. If Ray continues to earn her reduced income of \$65,000 per year, the final judgment equals more than 25 times the difference between her previous salary and her present salary (\$35,000 difference).

Further, the multiplication of front pay would be inconsistent with the intent of the damage provisions contained in the MHRA, which the court had previously recognized is intended to place the victim of discrimination in the position she would have been in had the discrimination not occurred.<sup>66</sup>

### III. BACKGROUND

#### A. *Minnesota Human Rights Act (“MHRA”)*

The MHRA, in relevant part, authorizes an administrative law judge to make findings of fact and conclusions of law.<sup>67</sup> Upon a finding that the defendant has engaged in unfair discriminatory practice, the MHRA provides that “the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained.”<sup>68</sup> In addition to this remedy, in a case involving employment discrimination, the judge may order the hiring or reinstatement of the aggrieved party with or without back pay.<sup>69</sup>

#### B. *Distinguishing Legal and Equitable Relief*

The divergence between the majority and the dissent’s resolution of whether front pay constitutes “actual damages” resides in their differing characterizations of front pay as legal as opposed to equitable relief.<sup>70</sup> The majority concludes that front pay is a form of legal damages,<sup>71</sup> whereas the

---

*Id.*

<sup>66</sup> *Ray*, 684 N.W.2d at 414. The damage provisions of the MHRA are “designed to restore a victim of discrimination as near as possible, to the same position she would have attained had there been no discrimination.” *Id.* at 413 (quoting *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 627 (Minn. 1988)).

<sup>67</sup> MINN. STAT. § 363A.29, subd. 3 (2004). The MHRA was previously numbered section 363.071 but was renumbered in 2004.

<sup>68</sup> MINN. STAT. § 363A.29, subd. 4.

<sup>69</sup> MINN. STAT. § 363A.29, subd. 5(1). In addition to the remedy in subdivision 4, the statute states:

in a case involving discrimination in employment . . . the administrative law judge may order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay, admission or restoration to membership in a labor organization, or admission to or participation in an apprenticeship training program, on-the-job training program, or other retraining program, or any other equitable relief the administrative law judge deems just and equitable.

*Id.*

<sup>70</sup> See *supra* notes 31-66 and accompanying text.

<sup>71</sup> See *supra* notes 31-53 and accompanying text.

dissent considers front pay a form of equitable relief.<sup>72</sup> This distinction is important because equitable remedies are usually not subject to multiplication.<sup>73</sup>

### 1. Legal Relief

*Black's Law Dictionary* defines a legal remedy as “a remedy available in a court of law,” thus preventing the party from obtaining equitable relief.<sup>74</sup> Historically, the damage remedy was a legal remedy that carried with it the right to a jury trial.<sup>75</sup> The United States Supreme Court, in *Scott v. Donald*, defined legal damages as “compensation which the law will award for an injury done . . . .”<sup>76</sup> The distinguishing features of legal remedies include: “their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use.”<sup>77</sup> Thus, legal remedies can be calculated objectively and without the exercise of judicial discretion.<sup>78</sup>

### 2. Equitable Relief

Equitable relief is defined in *Black's Law Dictionary* as a “species of relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance instead of money damages.”<sup>79</sup> However, all forms of monetary relief are not considered legal in nature.<sup>80</sup>

---

<sup>72</sup> See *supra* notes 54-66 and accompanying text.

<sup>73</sup> See *infra* notes 79-86 and accompanying text. For instance, an injunction is a type of equitable remedy. When the court grants an injunction, there is nothing capable of multiplication.

<sup>74</sup> BLACK'S LAW DICTIONARY 1297 (7th ed. 1999).

<sup>75</sup> 1 DAN B. DOBBS, LAW OF REMEDIES § 1.2 (2d ed. 1993).

<sup>76</sup> 165 U.S. 58, 86 (1897).

<sup>77</sup> 1 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 109 (4th ed. 1918).

<sup>78</sup> DOBBS, *supra* note 75.

<sup>79</sup> BLACK'S LAW DICTIONARY 539 (6th ed. 1990).

<sup>80</sup> *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (“we need not, and do not go so far as to say that any award of monetary relief must necessarily be legal relief.”). Plaintiff brought suit on charges of violation of fair housing provisions under Title VIII of the Civil Rights Act of 1964. *Id.* at 189. Defendant made a timely demand for a jury trial; however, the district court denied the request finding that a jury trial was not authorized under Title VIII or the Seventh Amendment. *Id.* at 190-91. On appeal, the United States Supreme Court held that a damages action under Title VIII is an action to enforce legal rights within the meaning of the Seventh Amendment. *Id.* at 195. The Court reached this conclusion despite the fact that courts have held that a jury trial is not required under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment. *Id.* The Court distinguished Title VII and Title VIII on the basis that the damage provisions of Title VII authorize the award of equitable remedies, whereas Title VIII strictly authorizes legal remedies in the form of compensatory and punitive damages. *Id.* at 197.

The distinctive characteristics of equitable remedies are threefold.<sup>81</sup> First, a petitioner bringing an equity action is not entitled to a jury trial.<sup>82</sup> Second, in awarding equitable relief, courts exercise a high degree of discretion.<sup>83</sup> Third, actions brought in equity are subject to equitable defenses that do not present themselves in actions brought at law.<sup>84</sup> For instance, the court can deny or reduce an award of equitable relief when the plaintiff comes before the court with “unclean hands,”<sup>85</sup> or where the defendant subsequently acquires evidence of the plaintiff’s wrongdoing.<sup>86</sup>

### 3. *Distinguishing Legal and Equitable Causes of Action*

Originally, actions at law (legal actions) were enforced in the common-law courts and by means of common-law forms of action.<sup>87</sup> In contrast, causes of action in equity were enforced only in courts of equity and by means of suits in equity.<sup>88</sup> Courts of equity and courts of law as separate entities have ceased to exist in most jurisdictions.<sup>89</sup> Consequently, the same court now has jurisdiction over actions brought in law and equity.<sup>90</sup> Notwithstanding the abolition of the distinction between actions at law and suits in equity for jurisdictional purposes, identifying whether an action is equitable or legal remains significant.<sup>91</sup> Following the abolition of courts of law and equity, courts now consider three factors to determine whether a particular cause of action is legal or equitable: (1) how the cause of action was handled prior to the merger of courts of law and courts of equity; (2) the nature of the remedy sought; and (3) whether the issues raised by the cause of action are within the abilities of a jury to comprehend.<sup>92</sup> In assessing

---

<sup>81</sup> DOBBS, *supra* note 75, at § 2.1(1).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 808 (Kan. 2004) (holding that reinstatement or front pay is precluded by a defendant’s after-acquired evidence of wrongdoing).

<sup>87</sup> 1 AM. JUR. 2D *Actions* § 6 (1994).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). Plaintiffs brought a stockholders’ derivative suit and demanded a jury trial. *Id.* at 531. The Court held that, although the complaint alleged breaches of fiduciary duty by directors of a corporation and brokers engaged by the corporation, a closed-end investment company, where it also alleged ordinary breach of contract against brokers and gross negligence against directors, stockholders were entitled to a jury trial on the corporation’s claims. *Id.* at 540. The court reasoned that the corporation’s claim is, at least in part, a legal one. *Id.*

whether a claim is legal or equitable, it is not necessary to discuss all three prongs if the assessment of one or two of the prongs is dispositive.<sup>93</sup>

### C. Front Pay

*Black's Law Dictionary* does not explicitly define "front pay;" however, it does define "front wages" as "prospective compensation paid to a victim of job discrimination until the denied position becomes available."<sup>94</sup> Similarly, the United States Supreme Court has defined front pay as "simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement."<sup>95</sup> For example, an award of front pay is appropriate where a suitable position for the plaintiff is not immediately available without displacing an incumbent employee.<sup>96</sup> When this situation arises, the courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs.<sup>97</sup> Thus, front pay is considered an alternative to the preferred equitable remedy of reinstatement.<sup>98</sup>

Courts calculate front pay by discounting the "present value of the difference between the earnings the plaintiff would have received in his old employment and the earnings he can be expected to receive in his present and future employment."<sup>99</sup> The award of front pay is left to the discretion of the court.<sup>100</sup> An award of front pay is inherently speculative in length of time and when considering possible mitigation by reason of other employment,<sup>101</sup> it is based on probabilities rather than actualities.<sup>102</sup> In awarding front pay, the court may opt for a court-monitored installment approach to ensure that

---

<sup>93</sup> *Id.*, see also *Curtis v. Loether*, 415 U.S. 189, 195-98 (1974) (discussing only the nature of the remedy sought in a Title VIII action, which prohibits discrimination in housing, and concluding based solely on this prong, that the remedy was legal in nature).

<sup>94</sup> BLACK'S LAW DICTIONARY 396 (7th ed. 1999).

<sup>95</sup> *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 844 (2001).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Mathieu v. Gopher News Co.*, 273 F.3d 769, 781 (8th Cir. 2001).

<sup>99</sup> *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 116 (7th Cir. 1990). Employee brought suit under section 1981 of the United States Code and Title VII claiming that General Motors fired him both because he is black and in retaliation for having filed claims of racial discrimination against the company. *Id.* at 104. The court entered judgment in favor of the employee on both his section 1981 and Title VII claims. *Id.* The district court declined to order the employee's reinstatement and the employee appealed. *Id.* On appeal, the court remanded the case back to the district court to reconsider whether the employee should be reinstated and if not, whether he is entitled to receive front pay in lieu of reinstatement. *Id.* at 117. Factors that are considered in calculating front pay include: the relationship of damages to the employer's wrongdoings, the employee's years to retirement, and employee's lost opportunities. Brian H. Redmond, J.D., Annotation, *Award of Front Pay Under State Job Discrimination Statutes*, 74 A.L.R. 4th 746, at § 6 (1989).

<sup>100</sup> *Mathieu*, 273 F.3d at 781.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

the plaintiff is made whole yet fulfills the continuing duty to mitigate future losses.<sup>103</sup>

The goal of front pay is to put the victim in the financial position he should have enjoyed in the event that circumstances make it inappropriate to direct the employer to continue employment of the plaintiff.<sup>104</sup> Accordingly, front pay cannot extend past the time a reasonable person needs to achieve the same or an equivalent position in the absence of discrimination.<sup>105</sup> Thus, when reinstatement is not a feasible option, the front pay award is only intended to bring the employee to the point where he or she would have been had the unlawful termination not occurred. In other words, front pay exists to make the employee “whole.”<sup>106</sup>

#### ***D. Examination of Foundational Case Law***

Three critical cases decided prior to the Minnesota Supreme Court’s decision in *Ray* are important in understanding the background under which *Ray* was decided. In the first case, the United States Supreme Court held that front pay does not constitute compensatory damages under Title VII.<sup>107</sup> In the second case, the Eighth Circuit held that front pay does not constitute actual damages under the MHRA.<sup>108</sup> Lastly, the Minnesota Supreme Court held that an award of back pay may, at the discretion of the court, be multiplied under the MHRA.<sup>109</sup>

##### ***1. Pollard v. E.I. du Pont de Nemours & Co.***

The United States Supreme Court, in *Pollard v. E.I. du Pont de Nemours & Co.*, held that because front pay was not an element of compensatory damages within the meaning of the Title VII, it was not

---

<sup>103</sup> Christy Wheeler Showalter, *Front Pay Under the Damage Caps of the Civil Rights Act of 1991: Legal Remedy or Equitable Relief*, 30 U. MEM. L. REV. 887, 898 (2000).

<sup>104</sup> *Biondo v. City of Chicago*, 382 F.3d 680, 691 (7th Cir. 2004) (holding that the district court’s award of 12 years of front pay to plaintiffs who were denied promotions in violation of Title VII exceeded the district court’s equitable discretion).

<sup>105</sup> *Id.*

<sup>106</sup> *Duke v. Uniroyal*, 928 F.2d 1413, 1423 (4th Cir. 1991), *cert. denied*, 502 U.S. 963 (1991) (reversing the district court’s decision to let the jury decide the amount of plaintiff’s front pay award and reasoning that front pay is an equitable remedy that should be decided by a court sitting in equity); *Carter v. Sedgwick County*, 929 F.2d 1501, 1505 (10th Cir. 1991) (vacating the district court’s award of front pay where the district court failed to specify an ending date and take into account plaintiff’s earning capacity. The court reasoned that front pay is intended to make the victim whole and as such must specify an ending date and take into account the amount that the plaintiff could earn using reasonable efforts.).

<sup>107</sup> *See infra* note 110 and accompanying text.

<sup>108</sup> *See infra* note 124 and accompanying text.

<sup>109</sup> *See infra* note 134 and accompanying text.

subject to the statutory caps on compensatory damages.<sup>110</sup> In so holding, the Court first considered the nature of an award of front pay.<sup>111</sup> The court defined front pay as compensation owed to the plaintiff during the period between judgment and reinstatement or in lieu of reinstatement.<sup>112</sup>

Under this definition of front pay, the Court examined the damage provisions of Title VII to determine where front pay fit into the mold.<sup>113</sup> The Court noted that, as originally enacted, Title VII only authorized the awarding of equitable remedies.<sup>114</sup> Specifically, section 706(g) of the Civil Rights Act of 1964 entitled a plaintiff alleging employment discrimination to recover damages including injunctions, reinstatement, back pay, lost benefits, and attorney's fees.<sup>115</sup> In 1991, Congress expanded the remedies under Title VII to include the recovery of legal damages.<sup>116</sup> The 1991 Amendment permitted the awarding of compensatory and punitive damages in addition to the equitable remedies already available under section 706(g).<sup>117</sup> Thus, the damage provisions of Title VII provide for two distinct categories of damages: group I damages, which authorize legal relief under the 1991 Amendment, and group II damages, which authorize the award of equitable relief under section 706(g).<sup>118</sup>

Compensatory damages under the Civil Rights Act of 1991 include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."<sup>119</sup> Despite the incorporation of "future pecuniary losses" within the definition of compensatory damages, the Court found that front pay did not comprise

---

<sup>110</sup> 532 U.S. 843, 845 (2001). Plaintiff sued defendant alleging that she had been subjected to a hostile work environment based on her sex in violation of the Civil Rights Act of 1964. *Id.* The district court awarded the plaintiff \$107,364 in back pay and benefits, \$252,997 in attorney's fees, and \$300,000 in compensatory damages. *Id.* While the district court observed that the \$300,000 award in compensatory damages was insufficient to compensate the plaintiff, it felt that it was bound by the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (1997), which held that front pay was a form of compensatory damages and thus subject to the cap. 532 U.S. at 844. Contrary to the Sixth Circuit's decision, the other courts of appeals to consider the issue have concluded that front pay does not constitute a form of compensatory damages and therefore is not subject to the statute caps. *Id.*

<sup>111</sup> *Id.* at 846.

<sup>112</sup> *Id.* Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Id.* "In cases in which 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, courts have ordered front pay as a substitute for reinstatement." *Id.*

<sup>113</sup> *Pollard*, 532 U.S. at 847.

<sup>114</sup> *Id.* at 848.

<sup>115</sup> *Id.* at 847-48.

<sup>116</sup> *Id.* Under the 1991 Amendments, Congress also granted plaintiffs claiming compensatory and punitive damages the right to a jury trial. 42 U.S.C. § 1981a(c)(1) (2000).

<sup>117</sup> *Pollard*, 532 U.S. at 848.

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* The Sixth Circuit concluded that front pay constitutes compensatory damages in that front pay falls within the scope of future pecuniary losses. *Id.*

compensatory damages because while not explicitly mentioned in the Civil Rights Act of 1964, front pay was a remedy available under the 1964 Act.<sup>120</sup> The Court reasoned that in the abstract, front pay could be considered compensation for “future pecuniary losses,” but the term could not be considered in isolation.<sup>121</sup> Rather, when read in conjunction with section 706(g) and the courts’ application of that provision, the Court concluded that front pay was a remedy available under section 706(g) and therefore not within the meaning of compensatory damages.<sup>122</sup>

## 2. *Mathieu v. Gopher News Company*

The Eighth Circuit, in *Mathieu v. Gopher News Company*, considered the application of the damage multiplier under the MHRA to an award of front pay.<sup>123</sup> The court noted that while traditionally it has left questions of front pay to the discretion of the district court, there are numerous reasons why the MHRA’s authorization to multiply actual damages provides no basis for the multiplication of an award of front pay.<sup>124</sup>

The court first explained that the MHRA authorizes multiplication of actual damages sustained, and that front pay is an equitable remedy, not a form of actual (legal) damages.<sup>125</sup> The court noted that front pay is the alternative to the preferred equitable remedy of reinstatement.<sup>126</sup> Therefore, the court reasoned that an award of reinstatement is not capable of

---

<sup>120</sup> *Id.* at 850. Under section 706(g) of the Civil Rights Act of 1964 as originally enacted, when a court found that an employer committed intentional discrimination, the court was authorized to enjoin the employer from engaging in the unlawful employment practice and order such affirmative action, which may have included, but was not limited to reinstatement or hiring of employees, with or without back pay. *Id.* The statutory language was modeled after the National Labor Relations Act, which had consistently been used to make awards of what it called “back pay” up to the date the employee was reinstated or returned. *Pollard*, 532 U.S. at 850. This form of “back pay” is known under Title VII as “front pay.” *Id.* In 1972, Congress expanded the remedies available under Title VII by authorizing the court to award, in addition to those previously authorized, the award of any other equitable relief deemed appropriate. *Id.* Subsequent to this amendment, the courts endorsed an award of front pay. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 852.

<sup>123</sup> 273 F.3d 769, 780 (2001). In *Mathieu*, a jury found that Gopher News Company discriminated against the plaintiff on the basis of his disability. *Id.* The magistrate judge, sitting by consent of the parties, entered judgment on the verdict and awarded the front pay recommended by the jury. *Id.* The judge multiplied the award 1.5 times pursuant to the damage multiplier under the MHRA. *Id.*

<sup>124</sup> *Id.* at 781.

<sup>125</sup> *Id.* at 782.

<sup>126</sup> *Mathieu*, 273 F.3d at 782. The court relied on its prior decision in *Kramer v. Logan County School District*, where it described front pay as “not so much a monetary award for the salary that an employee would have received but for the discrimination, but rather the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible.” *Id.*

multiplication because there is no monetary award to multiply, and consequently its equitable alternative should not be multiplied.<sup>127</sup>

The court, in so holding, further relied on the discretionary nature of front pay awards.<sup>128</sup> The court observed that an award of front pay is speculative and based on probabilities given the plaintiff's continuing duty to mitigate her damages.<sup>129</sup> The court explained that the discretionary nature of front pay renders front pay easily distinguishable from actual damages that have been sustained.<sup>130</sup> Lastly, in reaching its conclusion, the court relied on the United States Supreme Court's determination that front pay is not a component of compensatory damages.<sup>131</sup> Accordingly, the court found that under these circumstances, there is little justification for a judge to multiply an award of front pay under the MHRA.<sup>132</sup>

### 3. *Phelps v. Commonwealth Land Title Insurance Company*

#### a. *Majority Opinion*

In *Phelps v. Commonwealth Land Title Insurance Company*, the Minnesota Supreme Court considered whether back pay, as opposed to front pay, constitutes actual damages subject to multiplication under the MHRA multiplier provision.<sup>133</sup> The majority, looking solely at the statutory language, concluded that back pay can constitute a form of actual damages and therefore is subject to multiplication under the MHRA.<sup>134</sup> The majority

---

<sup>127</sup> *Id.* The court stated that “[it] should be obvious that the multiplier under the Minnesota statute would not be awarded on top of reinstatement; there is no monetary award to be multiplied when reinstatement is determined proper. This counsels against multiplying its equitable alternative.” *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* “An award of front pay is also inherently speculative in length of time and when considering possible mitigation by reason of other employment. It is based on probabilities rather than actualities.” *Mathieu*, 273 F.3d at 782.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> 537 N.W.2d 271, 277 (1995). Plaintiff brought suit alleging discrimination on the basis of age and disability. *Id.* at 273. The trial court determined that the plaintiff presented evidence of actual damages totaling \$80,382.33. *Id.* Relying on the MHRA, the trial court multiplied this figure by two and awarded the plaintiff \$160,764.66 as compensatory damages. *Id.* On appeal, the court of appeals rejected the defendant's argument that the trial court abused its discretion by doubling the actual damages. *Id.* On appeal to the Minnesota Supreme Court, the defendant also argued that the trial court erred in including back pay in the amount of actual damages. *Id.* at 277.

<sup>134</sup> *Phelps*, 537 N.W.2d at 277. Specifically, the court considered the following language:

In all cases where the administrative law judge finds that respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay the aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained . . . . In addition to the

reasoned that the MHRA vests in the trial court the discretion of awarding back pay as part of actual damages or merely awarding back pay in conjunction with the hiring, reinstatement, or upgrading of the plaintiff.<sup>135</sup>

*b. Dissenting Opinion*

Justice Stringer authored a dissent in which he disagreed with the majority's conclusion that back pay comprises actual damages under the MHRA.<sup>136</sup> The dissent argued that the inclusion of back pay as actual damages is inconsistent with the language of the statute.<sup>137</sup> Justice Stringer noted:

[T]he statute speaks clearly and without ambiguity: “*in addition to the aforesaid remedies, in a case involving discrimination in . . . employment, the administrative law judge may order the hiring, reinstatement or upgrading of an aggrieved party with or without back pay . . .*” It is difficult to imagine how the statutory scheme of remedies could be clearer: a claimant under the MHRA is entitled to the general “aforesaid remedies” accorded all victims of discrimination under the MHRA, and, in addition, if the claimant is specifically a victim of employment discrimination, then the claimant may also be entitled to an award of back pay and other job related remedies. To sweep the specific remedy of back pay in the general category of damages, as the majority does, rewrites the legislature’s remedial scheme.<sup>138</sup>

---

aforesaid remedies, in a case involving discrimination in employment, the administrative law judge may order the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay.

*Id.* at 277-78 (quoting MINN. STAT. § 363.071, subd. 2).

<sup>135</sup> *Id.* at 278. The court stated:

We do not believe the statute precludes the inclusion of back pay as an element of damages that is subject to multiplication. The statute gives a trial court the option of including back pay as a part of actual damages subject to multiplication, or merely awarding back pay attendant to the hiring, reinstatement, or upgrading of an aggrieved party. Thus we conclude the trial court did not err by including back pay in the amount of actual damages that were subsequently multiplied.

*Id.*

<sup>136</sup> *Id.* at 278-79.

<sup>137</sup> *Id.* at 280.

<sup>138</sup> *Id.*

***E. Front Pay as Equitable Relief Under the FMLA,  
the ADEA, and the ADA***

We have already seen that for purposes of Title VII, front pay is an equitable, not a legal remedy.<sup>139</sup> Front pay is similarly characterized as an equitable relief under several other federal employment laws, including, the Family Medical Leave Act (FMLA), Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).<sup>140</sup>

***1. Front Pay Under the Family Medical Leave Act (“FMLA”)***

The FMLA’s damage provisions allows for “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.”<sup>141</sup> The most common form of equitable relief under the FMLA is a court order for reinstatement.<sup>142</sup> Where reinstatement is not feasible, the FMLA grants to the courts the discretion to award front pay.<sup>143</sup> While the courts are vested with the power to award front pay, the courts have consistently recognized that under the Act, front pay is only optional and less preferable than reinstatement.<sup>144</sup> The courts have further held that because an award of front pay is an equitable remedy, a court rather than a jury should make the determination.<sup>145</sup>

***2. Front Pay Under the Age Discrimination in Employment Act (“ADEA”)***

The enforcement scheme of the ADEA grants the court the power to award such

---

<sup>139</sup> See *supra* note 110 and accompanying text.

<sup>140</sup> See *infra* notes 141-54 and accompanying text.

<sup>141</sup> 29 U.S.C. § 2617(a)(1)(B)(2000). The purpose of the FMLA is to “balance the demands of the workplace with needs of the families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.” 29 U.S.C. § 2601(b)(1) (2000). The FMLA entitles employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. *Id.* at § 2601(b)(2).

<sup>142</sup> Deborah F. Buckman, J.D., Annotation, *Award of Damages under Family and Medical Leave Act*, 176 A.L.R. FED. 591, at § 2(a) (2002).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* § 7(a). *Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496 (4th Cir. 2001) (holding that although front pay may be included in the equitable relief available to wrongly terminated employees, an award of front pay is within the discretion of the court and must be “tempered” by the “potential windfall” to a plaintiff); *Hardin v. Caterpillar, Inc.* 1999 WL 960034 (N.D. Miss. May 28, 1999), *rev’d on other grounds*, 227 F.3d 268 (5th Cir. 2000) (holding that an award of front pay is inappropriate where an award of lost wages sufficiently made the employee whole again).

<sup>145</sup> Buckman, *supra* note 142, at § 7(a).

legal or equitable relief as may be appropriate to effectuate the aim of the statute.<sup>146</sup> The ADEA does not expressly provide for an award of front pay; however, the prevailing view among courts is that “front pay is available to compensate victims of age discrimination in employment when reinstatement is an inappropriate remedy.”<sup>147</sup> As was the case under the FMLA, courts generally prefer reinstatement to front pay as a remedy for victims of age discrimination.<sup>148</sup> The decision whether or not to award front pay for violations of the ADEA lies in the discretion of the courts, and is available only under a limited number of special circumstances where reinstatement is inappropriate or unfeasible.<sup>149</sup>

### 3. *Front Pay Under the Americans with Disabilities Act (“ADA”)*

The ADA<sup>150</sup> expressly incorporates the remedies provided for under the Civil Rights Act of 1991.<sup>151</sup> A plaintiff may, where appropriate, recover front pay in a suit brought under the ADA.<sup>152</sup> While a plaintiff may recover front pay, reinstatement is the preferred remedy under the ADA.<sup>153</sup> For instance, an award of front pay was considered appropriate where the worker had been employed for six years, worker’s performance was adequate, and the job the worker was able to procure after his discharge paid less.<sup>154</sup>

## IV. ANALYSIS

The Minnesota Supreme Court in *Ray* was wrong when it concluded that front pay is a form of actual damages subject to multiplication.<sup>155</sup> First, *Ray* was wrongly decided because an award of front pay is an equitable claim under the three-pronged test used by the courts to distinguish legal and equitable claims.<sup>156</sup> Secondly, the similarities between the damage provisions of the MHRA and Title VII support a finding that front pay should not be treated as a compensatory damage in accordance with

---

<sup>146</sup> 29 U.S.C. § 629(b) (2000). The ADEA makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.” 29 U.S.C. § 623(a) (2000).

<sup>147</sup> Brian L. Porto, J.D., Annotation, *Award of Front Pay under Section 7 of the Age Discrimination in Employment Act*, 175 A.L.R. FED. 359, at § 2(a) (2002).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 42 U.S.C. § 12117(a) (2000).

<sup>151</sup> Mary L. Topliff, J.D., Annotation, *Remedies Available under Americans with Disabilities Act*, 136 A.L.R. FED. 63, at § 2(a) (1997).

<sup>152</sup> *Id.* at § 5.5.

<sup>153</sup> *Id.*

<sup>154</sup> *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 489-90 (5th Cir. 2001).

<sup>155</sup> See *infra* notes 156-262 and accompanying text (discussing the grounds supporting the reversal of the decision in *Ray*).

<sup>156</sup> See *infra* notes 160-89 and accompanying text.

precedent established by the United States Supreme Court.<sup>157</sup> Third, the majority's decision in *Ray* does not provide an adequate basis for its sharp departure for its characterization of front pay.<sup>158</sup> Fourth, the multiplication of front pay is inconsistent with the purpose of an award of front pay.<sup>159</sup> Finally, the decision ignores the damaging effects on the Minnesota court system and small Minnesota businesses.

***A. The Three-Pronged Test Utilized by Courts to Determine Whether a Cause of Action is Legal or Equitable Reveals that an Action for Front Pay is an Equitable Claim***

The courts consider three factors in determining whether a cause of action is a legal or an equitable claim: (1) how the cause of action was handled prior to the merger, (2) the nature of the remedy sought, and (3) whether the issues raised by the cause of action are within the abilities of a jury to comprehend.<sup>160</sup> The application of the second and third factors to an award of front pay is dispositive on the issue.<sup>161</sup> In looking at the nature of an award of front pay and the role of the jury in awarding front pay,<sup>162</sup> it is apparent that front pay is an equitable remedy and therefore should not be subject to multiplication.

***1. Nature of the Remedy Sought is Equitable, Not Legal***

The nature of an award of front pay shows that the remedy is equitable in nature, as opposed to legal.<sup>163</sup> First, a suit brought in equity is not entitled to a trial by jury.<sup>164</sup> The MHRA does not grant the charging party with the right to a jury trial; rather, an administrative law judge makes the determination of whether the respondent engaged in a discriminatory

---

<sup>157</sup> See *infra* notes 190-206 and accompanying text.

<sup>158</sup> See *infra* notes 207-48 and accompanying text.

<sup>159</sup> See *infra* notes 249-62 and accompanying text.

<sup>160</sup> See *supra* note 92 and accompanying text (discussing the three prong test used by the courts to determine whether an action is legal or equitable following the abolition of courts of law and equity).

<sup>161</sup> See *supra* note 93 and accompanying text (explaining that it is not necessary to consider all three prongs where the application of one prong is dispositive on the issue).

<sup>162</sup> See *supra* notes 92-93 and accompanying text (stating that two of the factors that should be considered in determining whether a cause of action is legal or equitable are (1) the nature of the remedy sought and (2) whether the issues raised by the cause of action are within the abilities of a jury to comprehend).

<sup>163</sup> See *supra* notes 79-86 and accompanying text (discussing the three distinctive features of an equitable remedy).

<sup>164</sup> See *supra* note 82 and accompanying text (stating that one of the features of an action brought in equity is the unavailability of jury trial).

practice.<sup>165</sup> In *Ray*, the district court judge decided plaintiff's claim under the MHRA, whereas plaintiff's Title VII claim was tried before a jury.<sup>166</sup> While the court in *Ray* used a jury in an advisory capacity with regard to the MHRA claim,<sup>167</sup> the court was vested with the duty to make findings of fact and conclusions of law and to render an appropriate award based on those conclusions.<sup>168</sup>

Second, the award of an equitable remedy, and front pay in particular, requires the court to exercise a considerable amount of discretion.<sup>169</sup> The court must ascertain the value of the award based on the plaintiff's expected earning capacity, an inherently speculative exercise.<sup>170</sup> Additionally, the court must determine the method in which the award of front pay will be paid out.<sup>171</sup> The Eighth Circuit relied on the discretionary nature of front pay in finding that front pay was an equitable remedy.<sup>172</sup>

Finally, an equitable remedy, as opposed to a legal remedy, is subject to equitable defenses.<sup>173</sup> An award of front pay is subject to reduction or elimination where a plaintiff fails to mitigate his damages.<sup>174</sup> The majority in *Ray* recognized the duty of the plaintiff to mitigate damages,<sup>175</sup> a duty which *Ray* adhered to as evidenced by her starting her own company when she was unable to find comparable employment.<sup>176</sup>

---

<sup>165</sup> See *supra* note 67 and accompanying text (discussing the provisions of the MHRA which provides that an administrative law judge shall make findings of fact and conclusions of law).

<sup>166</sup> See *supra* note 14 and accompanying text (explaining that the MHRA claim was decided by the court and the Title VII claim was decided by the jury).

<sup>167</sup> See *supra* note 15 and accompanying text.

<sup>168</sup> See *supra* note 14 and accompanying text.

<sup>169</sup> See *supra* note 83 and accompanying text (noting that the second characteristic of an equitable remedy is the need for the court to exercise discretion in rendering the award).

<sup>170</sup> See *supra* note 99 and accompanying text (describing that front pay is calculated by discounting the present value of the difference between the earnings the plaintiff would have received in his old employment and the earnings he can be expected to receive in his present and future employment).

<sup>171</sup> See *supra* note 103 and accompanying text (explaining that the court may opt for a court-monitored approach to ensure that the plaintiff is continuing his obligation to mitigate damages while simultaneously ensuring that the plaintiff is made whole).

<sup>172</sup> See *supra* notes 128-30 and accompanying text (discussing the Eighth Circuit's holding in *Mathieu v. Gopher News Company* where the court found that front pay was not actual damages subject to multiplication under the MHRA).

<sup>173</sup> See *supra* notes 84-85 and accompanying text (explaining that an equitable remedy is subject to equitable defenses, such as where a plaintiff comes into court with unclean hands).

<sup>174</sup> See *supra* notes 100-03 and accompanying text (discussing that an award of front pay requires that the plaintiff mitigate their damages).

<sup>175</sup> See *supra* note 65 and accompanying text.

<sup>176</sup> See *supra* note 65 and accompanying text.

## 2. *An Award of Front Pay is Not Within the Abilities of a Jury to Comprehend*

The fact that the MHRA does not authorize jury trials suggests that causes of action brought under the MHRA are not within the abilities of the jury.<sup>177</sup> However, that may not be an entirely accurate conclusion in light of the fact that Title VII, the MHRA's sister statute under federal law, does expressly grant plaintiffs the right to a trial by jury for causes of action under Title VII.<sup>178</sup> That being said, the Minnesota legislature has continued to keep causes of action under the MHRA within the ambit of the judge, even though Title VII was amended to include the right to jury trials.<sup>179</sup>

Not only are causes of action under the MHRA not within the ambit of the jury, an award of front pay has traditionally been left to the discretion of the court.<sup>180</sup> Under Title VII, the ADA, the FMLA, and the ADEA, awarding front pay remains in the sole jurisdiction of the court.<sup>181</sup> The award of front pay has remained within the province of the court and not the jury because of the difficulties in awarding front pay.<sup>182</sup> First, a court may only direct an award for front pay under those limited circumstances when reinstatement is impossible.<sup>183</sup> Therefore, the court must first decide whether reinstatement is a feasible option.<sup>184</sup> If not, then the court needs to consider the earnings the plaintiff would have received and the earnings that he can be expected to receive in the future.<sup>185</sup> These complicated calculations require the consideration of the years until plaintiff obtains the age of retirement, employment opportunities that were lost, as well as the plaintiff's ongoing duty to mitigate his damages.<sup>186</sup> Such considerations require knowledge that

---

<sup>177</sup> See *supra* notes 67 and 92 and accompanying text (explaining that under the MHRA, an administrative law judge, not a jury, renders the findings of facts and conclusions of law and that the third prong of the legal/equitable test requires a determination of whether the cause of action is within the ambit of the jury).

<sup>178</sup> See *supra* note 117 and accompanying text (discussing how Title VII as originally enacted did not grant plaintiffs the right to a trial by jury, but that the 1991 Amendments secured for plaintiffs the right to a jury trial).

<sup>179</sup> See *supra* note 67 and accompanying text (stating that an administrative law judge serves as the fact-finder in causes of actions brought under the MHRA).

<sup>180</sup> See *supra* notes 128-30, 141-54 and accompanying text (explaining that front pay awards have traditionally been left to the discretion of the court under federal employment discrimination laws).

<sup>181</sup> See *supra* notes 128-30, 141-54 and accompanying text.

<sup>182</sup> See *supra* notes 99-103 and accompanying text (explaining the requisite considerations in determining whether an award of front pay is appropriate, and if front pay is appropriate, the method under which front pay is calculated).

<sup>183</sup> See *supra* notes 95-98 and accompanying text (noting that front pay should only be awarded when reinstatement is not feasible).

<sup>184</sup> See *supra* note 98 and accompanying text (explaining that front pay is an alternative to the preferred remedy of reinstatement).

<sup>185</sup> See *supra* note 99 and accompanying text (stating the formula for calculating an award of front pay).

<sup>186</sup> See *supra* note 99 and accompanying text.

a jury is not in the position to ascertain and accurately apply.<sup>187</sup> Further, the jury is not in a position to monitor the award to ensure that the plaintiff continues to mitigate his or her damages.<sup>188</sup> Accordingly, in light of the nature of an award of front pay as well as the jury's role in a cause of action brought under the MHRA, it is apparent that an award of front pay is an equitable remedy.<sup>189</sup>

***B. Similarities Between the Damage Provisions of Title VII and the MHRA Support a Finding that Front Pay Under the MHRA is an Equitable Remedy, as the United States Supreme Court Concluded with Respect to Title VII***

The United States Supreme Court, in a case decided prior to the Minnesota Supreme Court's decision in *Ray*, conclusively recognized that front pay is an equitable remedy and not compensatory damages under Title VII.<sup>190</sup> Because of the similarities that exist between the damage provisions of Title VII and the MHRA, the majority in *Ray* incorrectly decided not to follow the authority of the United States Supreme Court.<sup>191</sup> The damage provisions of Title VII contain two parts: the 1991 Amendment which authorizes the award of compensatory and punitive damages *in addition* to the remedies previously authorized;<sup>192</sup> and the pre-1991 remedies, under section 706(g) of the statute, which authorize the award of equitable remedies including injunctions, reinstatement, back pay, lost benefits, and attorney's fees.<sup>193</sup> Thus, Title VII's damage provisions provide for two distinct categories of remedies, the legal remedies authorized under the 1991 Amendment, group I remedies, and the equitable remedies provided for under section 706(g), group II remedies.<sup>194</sup> There is no intersection between the types of remedies that fall into groups I and II because the 1991 Amendment expressly states that the remedies provided for under the Amendment are "in addition to" to the remedies previously provided for under section 706(g).<sup>195</sup> While front pay was not expressly provided for

---

<sup>187</sup> See *supra* note 99 and accompanying text.

<sup>188</sup> See *supra* note 103 and accompanying text (noting that an employee has a continuing duty to mitigate his or her damages).

<sup>189</sup> See *supra* note 92 and accompanying text (explaining the three-prong test used by the courts to ascertain whether a remedy is legal or equitable).

<sup>190</sup> See *supra* note 110 and accompanying text (discussing the Court's holding in *Pollard v. E.I. du Pont Nemours & Co.* where the Court found that under Title VII, front pay did not constitute compensatory damages).

<sup>191</sup> See *infra* notes 192-206 (noting the similarities that exist between the statutory language of Title VII and the MHRA).

<sup>192</sup> See *supra* note 117 and accompanying text (discussing the remedies available under the 1991 Amendment to the Civil Rights Act of 1964).

<sup>193</sup> See *supra* note 115 and accompanying text (discussing the remedies originally available under the 1964 Act).

<sup>194</sup> See *supra* notes 115-17 and accompanying text.

<sup>195</sup> See *supra* note 117 and accompanying text.

under either group I or group II, the United States Supreme Court found that it fit more appropriately within group II as evidenced by the fact that it was awarded prior to the availability of the remedies in group I.<sup>196</sup> Accordingly, the Court in *Pollard* reasoned that because front pay fell within group II, it could not also be included in group I.<sup>197</sup>

A similar type of argument can be made with respect to the damage provisions of the MHRA.<sup>198</sup> The damage provision of the MHRA, with respect to employment discrimination, is twofold.<sup>199</sup> First, the MHRA authorizes the award of “compensatory damages in an amount up to three times the actual damages sustained.”<sup>200</sup> These damages will be referred to as group I damages. Additionally, the MHRA provides for, “in addition” to the award of compensatory damages, “the hiring, reinstatement or upgrading of an aggrieved party, who has suffered discrimination, with or without back pay . . . or any other relief that the administrative law judge deems just and equitable.”<sup>201</sup> These damages will be referred to as group II damages. Here again, as was the case with Title VII, the group I and group II damages do not intersect as evidenced by the incorporation of the language “in addition to.”<sup>202</sup> Again, front pay is not expressly provided for in group I or group II.<sup>203</sup> Therefore, it needs to be determined what category the remedy more appropriately falls into. In looking at the group II remedies of Title VII and the group II remedies of the MHRA, there are some very distinct similarities, namely the discussion of equitable remedies, back pay, and reinstatement.<sup>204</sup> Thus, since front pay fit under group II remedies under Title VII, it should similarly fit in under group II remedies with respect to the MHRA due to this similarity in statutory language.<sup>205</sup> Accordingly, because front pay fits more appropriately under the remedies provided for under group II of the MHRA, and the group II remedies of the MHRA are “in addition to” the remedies in

---

<sup>196</sup> See *supra* notes 120-22 and accompanying text (discussing the availability of front pay prior to the 1991 Amendments).

<sup>197</sup> See *supra* note 122 and accompanying text.

<sup>198</sup> See *infra* notes 199-206 and accompanying text (explaining how the statutory structure of the MHRA is remarkably similar to the statutory structure of Title VII).

<sup>199</sup> See *supra* notes 68-69 and accompanying text (discussing the two damage provisions under the MHRA in cases involving discrimination in employment).

<sup>200</sup> See *supra* note 68 and accompanying text (noting the legal remedies available under the MHRA).

<sup>201</sup> See *supra* note 69 and accompanying text (noting the equitable remedies available under the MHRA in cases of employment discrimination).

<sup>202</sup> See *supra* note 69 and accompanying text.

<sup>203</sup> See *supra* note 68-69 and accompanying text (explaining the two damage provisions under the MHRA in cases involving employment discrimination).

<sup>204</sup> See *supra* notes 69, 115 and accompanying text (discussing the equitable remedies provisions of the MHRA and Title VII).

<sup>205</sup> See *supra* note 122 and accompanying text (noting the Court’s reasoning and conclusion in *Pollard*).

group I, front pay is not actual damages subject to multiplication under the statute.<sup>206</sup>

***C. The Majority's Decision in Ray v. Miller Meester Advertising  
Does Not Provide an Adequate Basis for its Sharp Departure in the  
Characterization of Front Pay as Equitable***

In its decision, the majority provides two justifications for characterizing front pay as compensatory damages: the dictionary definition of actual damages and the treatment of prospective damages under tort law and common law principles of damages.<sup>207</sup> In relying on these justifications, the majority rejects past precedent finding that front pay is not a legal damage, but rather an alternative to the equitable remedy of reinstatement.<sup>208</sup>

***1. The Definition of Actual Damages Does Not Support a Finding that Front Pay is a Form of Actual Damages***

The majority's reliance on the definition of actual damages does not lend credence to the characterization of front pay as compensatory damages.<sup>209</sup> The dictionary definition of actual damages relied on by the majority encompasses damages that are paid to compensate for *proven* loss.<sup>210</sup> The discretionary nature of a front pay award removes front pay from the ambit of a *proven* loss.<sup>211</sup> An award of front pay cannot be a *proven* loss where the nature of award is inherently speculative.<sup>212</sup> The court cannot ascertain with exact certainty the exact loss the plaintiff will sustain because the court cannot narrow down with certainty the length of time the plaintiff will be unemployed or underemployed, the amount by which plaintiff will be underemployed, nor how the plaintiff will continue to satisfy his duty to mitigate damages.<sup>213</sup> Consequently, because of the inherently speculative

---

<sup>206</sup> See *supra* notes 68-69 and accompanying text.

<sup>207</sup> See *supra* notes 34-43 and accompanying text (noting the reasoning of the majority in *Ray* in concluding that front pay is a form of actual damages subject to multiplication).

<sup>208</sup> See *supra* notes 44-49 and accompanying text (noting the court's rejection of Title VII principles with respect to an award of front pay).

<sup>209</sup> See *supra* note 35 and accompanying text (noting the dictionary definition of actual damages and the majority's reliance on said definition).

<sup>210</sup> See *supra* note 36 and accompanying text (stating the dictionary definition of actual damages).

<sup>211</sup> See *supra* notes 100-01 and accompanying text (discussing the discretionary nature of an award of front pay).

<sup>212</sup> See *supra* note 101 and accompanying text.

<sup>213</sup> See *supra* notes 99-103 and accompanying text (discussing the method of calculating front pay, the relevant considerations, and the speculative nature of an award of front pay).

nature of front pay, the more appropriate characterization of front pay would be that front pay is a prospective damage as opposed to an actual damage.<sup>214</sup>

## ***2. Tort Law and Common Law Principles of Damages do not Warrant a Finding that Front Pay is a Form of Actual Damages***

The majority's second argument sounds in tort law.<sup>215</sup> Specifically, the majority notes the Restatement (Second) of Torts definition of compensatory damages as compensation for harm *sustained* by him.<sup>216</sup> As Justice Gilbert's dissent notes, this definition suffers from the same infirmity that the definition of actual damages suffers from, specifically, the use of the word *sustained* in the definition.<sup>217</sup> The Restatement's use of the past tense, *sustained*, suggests that prospective or future harm damages would not constitute compensatory damages under this definition.<sup>218</sup> The majority works its way around this language by noting that the Restatement (Second) of Torts recognizes that a victim of a tort is entitled to damages, past, present, and prospective caused by the tort.<sup>219</sup> Assuming the majority is correct that prospective damages arising out of a tort fall within the category of "damages sustained," the majority's reliance on the treatment of damages under tort law is not binding with respect to the MHRA.<sup>220</sup> Furthermore, tort damage principles provide little persuasive value in light of the fact that courts, including the Minnesota Supreme Court, have declined to categorize employment discrimination as a tort.<sup>221</sup>

Assuming *arguendo* that the majority's reliance on tort law is persuasive for the issue at hand, the parallel that the majority tries to draw between front pay and tort damages is flawed.<sup>222</sup> The majority's argument is to the effect that in tort cases, the court has recognized that future medical damages constitute "special damages," and that the special damages allowed in those cases are the same special damages that the court tied to

---

<sup>214</sup> See *supra* notes 99-103 and accompanying text.

<sup>215</sup> See *supra* note 40-41 and accompanying text (discussing the tort principles relied on by the majority in rendering its decision).

<sup>216</sup> See *supra* note 40 and accompanying text.

<sup>217</sup> See *supra* note 59 and accompanying text (noting Justice Gilbert's contention that the majority's reliance on the definition of actual damages contained in the Restatement (Second) of Torts is erroneous).

<sup>218</sup> See *supra* note 59 and accompanying text.

<sup>219</sup> See *supra* note 41 and accompanying text (noting that while the Restatement (Second) of Torts definition of actual damages provides for only past damages, another provision of the Restatement's allows for future damages as well).

<sup>220</sup> See *supra* note 56 and accompanying text (explaining that courts, including the Minnesota Supreme Court, have concluded that employment discrimination is not a tort).

<sup>221</sup> See *supra* note 56 and accompanying text.

<sup>222</sup> See *infra* notes 223-26 (explaining why the majority's connection between front pay and tort damages is flawed).

compensatory damages in *Phelps*.<sup>223</sup> However, the connection the majority makes is tenuous at best for two reasons.<sup>224</sup> First, future damages in employment discrimination cases are calculated in a different manner than future medical expenses.<sup>225</sup> Second, future medical damages offer a different degree of certainty in light of the fact that the future damages are inextricably tied to future surgery.<sup>226</sup>

### ***3. The Majority Inappropriately Rejects Precedent Holding That Front Pay is Not a Form of Actual Damages, as well as Authority that Front Pay is an Alternative to the Equitable Remedy of Reinstatement***

Not only is the reasoning of the majority tainted by misplaced reliance on the definition of actual damages and the treatment of damages under the Restatement (Second) of Torts, the majority sidetracks around two very important principles relevant to the issue at hand: 1) precedent stating that front pay does not constitute compensatory damage, and 2) the fact that courts consistently hold that front pay is an alternative to the equitable remedy of reinstatement.<sup>227</sup>

First, the majority declines to follow the United States Supreme Court's decision in *Pollard*, where the court found that under Title VII, front pay does not constitute legal (compensatory) damages.<sup>228</sup> While the Court's decision is not binding on the Minnesota Supreme Court's interpretation of the MHRA, the majority disregards the persuasive value of the decision.<sup>229</sup> The majority simply states that while it has relied on principles developed under Title VII, it is not bound by interpretations of Title VII.<sup>230</sup> However, the majority's logic is unsound in light of the similarities in the statutory language of Title VII and the MHRA discussed above.<sup>231</sup> The majority goes on to say that in this instance it is not going to follow Title VII principles because the "MHRA is based on common law principles of damages, and

---

<sup>223</sup> See *supra* note 38 and accompanying text (discussing the link the Minnesota Supreme Court has previously made between special damages and compensatory damages).

<sup>224</sup> See *infra* notes 225-26 and accompanying text (explaining the deficiencies in the connection the majority makes between tort damages and damages in an employment discrimination case).

<sup>225</sup> See *supra* note 43 and accompanying text (noting the majority's reasoning that compensatory damages can include future losses as evident by the court's willingness to award future medical expenses in tort cases).

<sup>226</sup> See *supra* note 43 and accompanying text.

<sup>227</sup> See *supra* notes 44-52 and accompanying text (discussing the majority's rejection of the *Pollard* and *Mathieu* cases).

<sup>228</sup> See *supra* notes 48-50 and accompanying text (noting the majority's rejection of the Court's decision in *Pollard*).

<sup>229</sup> See *supra* notes 48-50 and accompanying text.

<sup>230</sup> See *supra* note 49 and accompanying text (noting the majority's conclusion that it is not bound by Title VII principles when interpreting the MHRA).

<sup>231</sup> See *supra* notes 190-206 and accompanying text (discussing the similarities in statutory language between Title VII and the MHRA).

does not characterize monetary remedies as equitable remedies or substitutes for equitable remedies.”<sup>232</sup> The majority reasons that it does not characterize money damages as equitable remedies; however, the MHRA authorizes an award of back pay or any other relief deemed equitable.<sup>233</sup> This language thus suggests that back pay, a monetary award, is a form of equitable relief. Further, the fact that a particular damage is monetary does not mean that it is not an equitable remedy.<sup>234</sup>

The majority, in a footnote, also disregards the Eighth Circuit’s conclusion that front pay is not subject to multiplication under the MHRA.<sup>235</sup> The majority rejects the decision on the basis that the Eighth Circuit relied “almost wholly on federal case law under Title VII.”<sup>236</sup> While it is true that the Eighth Circuit relied on Title VII case law, Title VII principles did not provide the only basis for the court’s decision.<sup>237</sup> First, the Eighth Circuit reasoned that front pay was a remedy in lieu of reinstatement and reinstatement cannot be multiplied; therefore, front pay should similarly not be subject to multiplication.<sup>238</sup> Second, the Eighth Circuit relied on the discretionary nature of front pay to distinguish an award of front pay from actual damages.<sup>239</sup> Accordingly, while Title VII precedent was discussed by the Eighth Circuit, the court also relied on the nature of a front pay award, which is the second prong of the test used by courts to ascertain whether a remedy is legal or equitable.<sup>240</sup> The majority does not even attempt to confront these arguments in favor of finding that front pay is an equitable as opposed to an actual damage, but rather glosses over the case in a footnote.<sup>241</sup>

---

<sup>232</sup> See *supra* note 50 and accompanying text (noting the majority’s rejection of Title VII principles with respect to awards of front pay).

<sup>233</sup> See *supra* notes 50, 69 and accompanying text (noting the majority’s conclusion that money damages are not characterized as equitable remedies, despite the fact that the language of the MHRA specifically includes back pay, a form of monetary damages, within the list of equitable remedies authorized under the MHRA).

<sup>234</sup> See *supra* note 80 and accompanying text (explaining that the courts have been unwilling to hold that all monetary damages are legal damages).

<sup>235</sup> See *supra* note 51 and accompanying text (noting the majority’s rejection of the Eighth Circuit’s decision in *Mathieu*).

<sup>236</sup> See *supra* note 52 and accompanying text (explaining the reasoning of the majority in rejection *Mathieu*).

<sup>237</sup> See *supra* notes 125-32 and accompanying text (noting the reasoning of the Eighth Circuit in rendering its decision in *Mathieu* that front pay is not an actual damage under the MHRA).

<sup>238</sup> See *supra* notes 125-27 and accompanying text.

<sup>239</sup> See *supra* notes 128-30 and accompanying text.

<sup>240</sup> See *supra* notes 125-32 and accompanying text.

<sup>241</sup> See *supra* note 51 and accompanying text (noting that the majority’s rejection of *Mathieu* appeared in a footnote).

The only authority that the Minnesota Supreme Court relied on in rendering its decision was the *Phelps* case involving an award of back pay.<sup>242</sup> The court reasoned that because it allows the multiplication of a back pay award, it should similarly allow the multiplication of a front pay award.<sup>243</sup> However, back pay does not require the level of discretion required of the court in ordering front pay, nor is back pay consistently viewed as an alternative to the equitable remedy of reinstatement.<sup>244</sup>

The majority not only disregards persuasive case law, it also disregards the fact that an award of front pay is consistently considered an alternative to reinstatement when reinstatement is not possible.<sup>245</sup> The courts in construing Title VII, the FMLA, the ADA, the ADEA and the MHRM have consistently recognized that an award of front pay is less preferable than reinstatement and should only be granted in those circumstances that render reinstatement impossible.<sup>246</sup> The majority in *Ray* departs from well-established authority and finds that front pay is a separate measure of damage that may be awarded in connection with reinstatement.<sup>247</sup> The only rationale the court gives for its characterization rests in its reliance on common law principles of damages.<sup>248</sup>

***D. The Majority's Decision in Ray v. Miller Meester Advertising is Inconsistent with the Purpose of an Award of Front Pay***

The Minnesota Supreme Court previously recognized that the purpose of the damage provisions of the MHRM is to "restore a victim of discrimination as near as possible to the same position she would have attained had there been no discrimination."<sup>249</sup> Specifically, an award of front pay is designed to put the victim in the financial position she should have

---

<sup>242</sup> See *supra* note 35 and accompanying text (noting the majority's reliance on the Minnesota Supreme Court's decision in *Phelps* where the court found that back pay was a form of actual damages under the MHRM).

<sup>243</sup> See *supra* notes 36-38, 133-35 and accompanying text (explaining the majority's reliance on *Phelps* in the *Ray* case, as well as the reasoning of the court in the *Phelps* case).

<sup>244</sup> See *supra* notes 94-103 and accompanying text (discussing the characteristics of an award of front pay).

<sup>245</sup> See *supra* notes 96-97, 112, 141-54 and accompanying text (noting that front pay is considered an alternative to reinstatement under federal employment discrimination statutes).

<sup>246</sup> See *supra* notes 112, 141-54 and accompanying text.

<sup>247</sup> See *supra* note 46 and accompanying text (noting the majority's conclusion that front pay is a distinct measure of damages that can be awarded in conjunction with reinstatement).

<sup>248</sup> See *supra* notes 42-43 and accompanying text (noting the majority's reliance on tort damage principles).

<sup>249</sup> See *supra* note 66 and accompanying text (explaining the purpose of an award of front pay).

enjoyed when circumstances make it inappropriate to direct reinstatement.<sup>250</sup> Allowing the multiplication of an award of front pay goes beyond making the plaintiff “whole” and becomes a punitive measure.<sup>251</sup>

Justice Gilbert’s dissent illustrates how the multiplication of front pay can lead to results that far exceed making the employee “whole” again.<sup>252</sup> In the present case, the total award under the MHRA was approximately \$900,000.<sup>253</sup> At the time of judgment, Ray mitigated her damages to an annual \$35,000 difference in pay.<sup>254</sup> Assuming Ray continues to work at a \$35,000 reduction in pay, the final judgment under the MHRA amounts to more than twenty-five times the difference between her previous salary and her present salary.<sup>255</sup>

Recognizing that the dissent’s illustration is a bit exaggerated because it takes into account the entire award under the MHRA, not just the front pay award, the hypothetical is still illustrative.<sup>256</sup> Aggrieved parties will be made more than “whole” to the detriment of the employer.<sup>257</sup> This becomes problematic not only because it becomes punitive for the employer, but also because it creates a windfall for the employee who cannot get reinstated.<sup>258</sup> For example, assume instead of just firing Ray, MMA also fired another employee who held a similar position. Assume both individuals made \$100,000. Ray is not reinstated and is awarded \$246,000 in front pay, and gets a new job making \$65,000.<sup>259</sup> Over the course of three years, Ray recovers approximately \$440,000.<sup>260</sup> Ray’s counterpart, who is reinstated, would earn approximately \$300,000 over the same three year period. Ray gets an additional \$140,000 because she was not in a position to get reinstated. As the dissent notes, this creates an unwarranted incentive for a victim not to seek reinstatement or subsequent employment.<sup>261</sup> Consequently, the multiplication of front pay awards frustrates the purpose

---

<sup>250</sup> See *supra* notes 104-06 and accompanying text (noting that front pay is intended to make an employee “whole” under circumstances when reinstatement is not feasible).

<sup>251</sup> See *supra* notes 104-06 and accompanying text.

<sup>252</sup> See *supra* note 65 and accompanying text (noting Justice Gilbert’s explanation as to why the multiplication of front pay will result in making the aggrieved party more than “whole”).

<sup>253</sup> See *supra* note 65 and accompanying text.

<sup>254</sup> See *supra* note 65 and accompanying text.

<sup>255</sup> See *supra* note 65 and accompanying text.

<sup>256</sup> See *supra* note 65 and accompanying text (noting Justice Gilbert’s example of how multiplication of front pay results in making the plaintiff more than “whole”).

<sup>257</sup> See *supra* notes 55, 106 and accompanying text (discussing that the goal of front pay is to make the employee whole and that the multiplication of front pay becomes a punitive measure).

<sup>258</sup> See *supra* note 65 and accompanying text.

<sup>259</sup> See *supra* note 65 and accompanying text.

<sup>260</sup> See *supra* note 65 and accompanying text.

<sup>261</sup> See *supra* note 65 and accompanying text (explaining that plaintiffs would not seek reinstatement because if awarded front pay, the victim is compensated at a greater rate than the assessed value of the victim’s future work).

of front pay in that it results in making the employee more than “whole,” punishing the employer and discouraging the preferred remedy of reinstatement.<sup>262</sup>

***E. Multiplying Front Pay Awards Will Have Damaging Consequences on Minnesota’s State Court System and Minnesota Employers***

The decision in *Ray* opens the door for damaging consequences for both the Minnesota court system as well as Minnesota businesses. Allowing the multiplication of front pay when the Eighth Circuit does not will lead to an influx of cases being filed at the state, as opposed to the federal, level. The relatively small state system is already flooded with cases, and now it will begin taking on numerous complicated employment cases. Additionally, the decision invites forum shopping. Minnesota serves as the headquarters for several corporations that employ individuals nationwide. Aggrieved individuals from across the nation that are able to establish jurisdiction in Minnesota may elect to file suit in Minnesota state court because of the availability of a multiplied front pay award.

The decision is also damaging to businesses and may be particularly devastating to small employers. The multiplication of front pay amounts to paying as many as four people to do one job: the person who replaces the plaintiff, and then up to three times the amount payable to the plaintiff. This could certainly become more than a small business could handle. Additionally, it could discourage businesses from venturing into Minnesota. Accordingly, the multiplication of front pay is not worth the risks to the state court system or to Minnesota businesses.

## V. CONCLUSION

The decision in *Ray* was wrongly decided because it is inconsistent with the law and creates the possibility for damaging consequences. The *Ray* decision ignores basic remedy principles by characterizing front pay as legal as opposed to equitable when remedy principles clearly characterize front pay as equitable in nature. The decision also disregards the similarities between the MHRA and Title VII, and dismisses persuasive federal authority that is precisely on point. Finally, the decision redefines the purpose of an award of front pay. The decision in *Ray* results in making the employee more than “whole” at the expense of the Minnesota court system and Minnesota businesses.

---

<sup>262</sup> See *supra* notes 106, 55, and 65 and accompanying text.