

**SUPREME COURT DECIDES FRONT PAY  
AWARDED UNDER TITLE VII IS NOT  
SUBJECT TO DAMAGES CAPS IMPOSED BY  
THE CIVIL RIGHTS ACT OF 1991**

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On June 4, 2001, the United States Supreme Court issued a unanimous decision in *Pollard v. E.I. du Pont de Nemours & Company*, No. 00-763, 121 S. Ct. 1946 (2001) which resolved the conflict between the United States Court of Appeals for the Sixth Circuit and the remaining courts of appeals over whether front pay awarded under Title VII of the Civil Rights Act of 1964 ("Title VII") is an element of compensatory damages and therefore subject to the statutory caps of up to \$300,000 imposed by the Civil Rights Act of 1991 ("1991 Act"). Noting that front pay in the Title VII context is simply backpay occurring after the date of judgment, that Title VII specifically authorized backpay as a remedy prior to the 1991 Act, and that awards of backpay are expressly excluded by the caps imposed in 1991, the Court held that front pay is not an element of compensatory damages under the 1991 Act. Accordingly, front pay is not subject to the Act's cap on compensatory and punitive damages.

**THE FACTS AND HOLDINGS OF THE LOWER  
COURTS IN THE POLLARD CASE**

In *Pollard*, the employee, Sharon Pollard, alleged that she had been subjected to a hostile work environment because of her sex, in violation of Title VII. Pollard claimed, *inter alia*, that her co-workers made daily derogatory comments about women, told her assistants not to associate with her because she was a woman, kept information from her to make her seem incompetent, and left Bible passages for her that addressed women's subservience to men. After enduring more than a year of this treatment, Pollard took a medical leave of absence for psychological and psychiatric treatment. DuPont subsequently dismissed Pollard for refusing to return to the same work environment at the conclusion of her leave.

Following a non-jury trial, the district court determined that Pollard had been subjected to a hostile work environment based on her gender and found that supervisors had been aware of Pollard's hostile work environment yet failed to take prompt and appropriate corrective action. The court awarded Pollard back pay and benefits, attorney's fees, and compensatory damages. The compensatory damages award, in which the court included front pay, was limited to the amount permitted under the statutory cap established by the 1991 Act in accordance with the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (1997). The court expressed regret that it was constrained by *Hudson* and observed that the award of \$300,000 in

compensatory damages did not adequately compensate Pollard for the “psychological damage, pain and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement.” 16 F. Supp. 2d 913, 924 n. 19 (W.D. Tenn. 1998).

The Sixth Circuit affirmed the lower court’s finding that DuPont was liable to Pollard for hostile work environment sexual harassment. 213 F.3d 933 (6<sup>th</sup> Cir. 2000). In addition, the court of appeals agreed with Pollard’s arguments that front pay is not a component of compensatory damages and therefore not subject to the \$300,000 compensatory damages statutory cap, however, it declined to overturn the district court’s decision because it was bound by the earlier panel discussion in *Hudson* under existing circuit law.

### THE SUPREME COURT DECISION

The Supreme Court granted certiorari because the Sixth Circuit’s decision in *Hudson* that front pay was subject to the statutory cap on compensatory damages conflicted with the jurisprudence of every other circuit. Justice Thomas delivered the unanimous opinion of the Court, with Justice O’Connor not participating in the case. The Supreme Court framed the issue as whether a front pay award is an element of compensatory damages under the Civil Rights Act of 1991. The Court concluded that it is not.

First, the Court defined front pay, investigated its origins, and determined that Title VII authorizes its award. The Court recognized that “front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement” and that courts often award front pay when an employee cannot be reinstated until a position opens up or when reinstatement is not appropriate because of remaining hostility between the parties or psychological injury. The Court determined that these awards are authorized by section 706(g) of Title VII, which provides that if an employer has intentionally engaged in an unlawful employment practice, “the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay.” 42 U.S.C. § 2000e-5(g)(1). Because this language closely parallels language in the National Labor Relations Act, and the National Labor Relations Board has often made awards of compensation up to the date the employee was reinstated even if reinstatement occurred after the judgment, the Court reasoned that section 706(g) also allows the awarding of backpay after judgment. Furthermore, in 1972, Congress amended section 706(g) to provide courts with the broader discretion to award “any other equitable relief as the court deems appropriate.” The amendment permitted courts wider latitude to award front pay under section 706(g), both for the time up until reinstatement and when reinstatement is not feasible. The Court concluded that front pay must be available in lieu of reinstatement, *e.g.*, when reinstatement is not possible because of continuing hostility or psychological injury, to avoid the strange result of providing lesser sanctions for worse violations of Title VII.

Second, the Court determined that the 1991 Act, which gave Title VII plaintiffs the right to compensatory and punitive damages subject to statutory limits, did not affect the ability of

the courts to continue to award front pay beyond the statutory maximum. The 1991 Act provides, in pertinent part, that “the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, *in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.*” 42 U.S.C. 1981a(a)(1) (emphasis added). Subsection (b)(3) sets forth caps on damages ranging from \$50,000 to \$300,000, depending upon the number of people the employer employs. In *Pollard*, the Sixth Circuit limited the front pay awarded to \$300,000, the cap for an employer with more than 500 employees, because it considered front pay to be compensatory. The Supreme Court, however, found that front pay is not compensatory within the meaning of section 1981a and thus is not subject to the statutory cap. While the statute limits “compensatory damages ... for future pecuniary losses,” a phrase which might on its own seem to encompass front pay, the Court noted that the statute should be analyzed as a whole to define the meaning of this phrase. Specifically, section 1981a(b)(2) provides, “[c]ompensatory damages awarded under [§ 1981a] shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.” The plain language of the statute indicates that these new compensatory and punitive damages were “in addition” to the remedies allowed for in 706(g). §1981a(a)(1). Because the Court determined that front pay is authorized by section 706(g), it found that front pay is excluded from the meaning of compensatory damages in section 1981 and therefore not limited by its cap. Rather, the Court determined, Congress intended section 1981a to expand the remedies available to employment discrimination plaintiffs, without limiting the previously available remedies.

#### THE SIGNIFICANCE OF THE COURT’S DECISION

Congress and the Court together have created a lengthening list of non-mutually-exclusive remedies for employment discrimination. As originally enacted, the only remedies authorized by Title VII were injunctions, reinstatement, backpay and lost benefits. Congress expanded the available remedies to include any other equitable relief the court deemed appropriate, such as front pay, in 1972. The Civil Rights Act of 1991 permitted the award of compensatory and punitive damages, subject to a statutory cap. The Court’s decision in *Pollard* affirms that the other circuits determined correctly that front pay is not a component of compensatory damages proscribed by the 1991 Act. Although *Pollard* does not introduce a new remedy for discrimination or expand an existing remedy, it certainly will raise the consciousness of plaintiffs seeking damages in excess of the statutory cap.

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