

2 - - - - -X

3 SHARON B. POLLARD, :

4 Petitioner :

5 v. : No. 00-763

6 E.I. DU PONT DE NEMOURS :

7 COMPANY :

8 - - - - -X

9 Washington, D.C.

10 Monday, April 23, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:04 a.m.

14 APPEARANCES:

15 KATHLEEN L. CALDWELL, ESQ., Memphis, Tennessee;
16 on behalf of the Petitioner.

17 MATTHEW D. ROBERTS, Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; for the
19 United States, as amicus curiae, supporting
20 Petitioner.

21 RAYMOND M. RIPPLE, ESQ., Wilmington, Delaware; on behalf
22 of the Respondents.

23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF KATHLEEN L. CALDWELL, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF MATTHEW D. ROBERTS, ESQ. On behalf of the United States, as amicus curiae, supporting Petitioner	18
ORAL ARGUMENT OF RAYMOND M. RIPPLE, ESQ. On behalf of the Respondent	27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-763, Sharon Pollard v. E.I. Du Pont de Nemours.

Ms. Caldwell.

ORAL ARGUMENT OF KATHLEEN L. CALDWELL
ON BEHALF OF THE PETITIONER

MS. CALDWELL: Mr. Chief Justice, and may it please the Court:

Congress never intended to include front pay as a type of compensatory damages when it enacted the Civil Rights Act of 1991. This is made clear by looking at the Act itself, Section 2 of the Act, which provided that the congressional purpose was to provide additional remedies. This was intended to deter harassment and to prevent intentional discrimination in the workplace, just as in the Vinson case.

This legislation was stated by Congress to be necessary to provide these --

QUESTION: What about the terms of the legislation itself, rather than what members of Congress might have said about it?

MS. CALDWELL: All right. That's the next analysis, Your Honor. If you look at (a) (1) of the

1 legislation itself, 1981a-(a)(1), it provides that the
2 complaining party -- and this is a quote from page 2 of
3 the blue brief. The complaining party may recover
4 compensatory and punitive damages as allowed in subsection
5 (b), in addition to any relief authorized by Section
6 706(g).

7 Now, what that means is that Congress was not
8 enacting --

9 QUESTION: This is on page 2 of the blue brief?

10 MS. CALDWELL: It's page 1, Your Honor.

11 QUESTION: Page 1. Thank you.

12 MS. CALDWELL: It starts on page 1 and goes over
13 onto page 2.

14 What Congress was saying was that we're not
15 changing what the status quo was. We're adding to it, and
16 they did it very carefully in (a)(1) of the Act. You then
17 look to (b)(2) of the Act, which is the first part that is
18 pertinent to our analysis. In this particular part --

19 QUESTION: Where is this?

20 MS. CALDWELL: Page 2.

21 QUESTION: Page 2.

22 MS. CALDWELL: Where it says, Exclusions from
23 Compensatory Damages. Compensatory damages awarded under
24 this section shall not include back pay, interest on back
25 pay, or any other type of relief authorized under Section

1 2000e-5(g) of the Civil Rights Act of 1964, which is the
2 same as 706(g).

3 Now, what this language specifically says is
4 that we're not disturbing the status quo. What was
5 available previously is still available. We're simply
6 adding the supplemental or the additional remedy.

7 QUESTION: But, Ms. Caldwell, the status quo
8 that you're talking about is the status quo created by
9 courts, because at no point did the statute use the words
10 front pay.

11 MS. CALDWELL: That's correct, Your Honor.

12 QUESTION: It did use the words back pay.

13 MS. CALDWELL: It did use the word back pay. If
14 you look at the original language -- and it's provided
15 again on the quote that starts on page 1 -- the language
16 talks -- of the original Act, 706(g), in 1964 provided,
17 and can order such affirmative action as may be
18 appropriate, which might include but is not limited to
19 reinstatement or hiring of employees with or without back
20 pay.

21 Then in 19 --

22 QUESTION: Well, then it goes on to say, or any
23 other equitable relief as the court deems appropriate.

24 MS. CALDWELL: That's correct. And that was the
25 language --

1 QUESTION: So the question boils down here to
2 whether or not so-called front pay is equitable relief,
3 doesn't it, as opposed to damages?

4 MS. CALDWELL: The central question for this
5 Court is, what was the intent of Congress?

6 QUESTION: We look to the intent of Congress, I
7 suppose, by looking at the laws that it wrote.

8 MS. CALDWELL: That's right. And the laws that
9 it wrote in 1972, there was an intent of Congress to
10 provide additional relief to what had been provided under
11 the 1964 Act, and they added the language, or any other
12 equitable relief as the court deems appropriate, clearly
13 discretionary with the court and therefore equitable, Your
14 Honor.

15 QUESTION: Do you think a court of equity has
16 ever traditionally awarded damages in the sense of front
17 pay? That is, you promised to hire me for five years. I
18 work for the first year. You fire me for no reason. I
19 sue you. I want the balance of what I would have earned
20 in the next four years, minus whatever damages I've
21 mitigated. To me, that's classical damages awarded by a
22 common law court, not by equity.

23 MS. CALDWELL: It does sound like straight legal
24 relief, Your Honor, but if you look at specific
25 performance, which is a form of equity, and if the relief

1 that would normally be required of the person, which would
2 be injunctive in nature, is not available for whatever
3 reason, such as the land no longer exists on the market,
4 then relief can be given, which would be equitable, and
5 yet be monetary in nature.

6 QUESTION: I thought there was a doctrine where
7 contracts for personal services were not specifically
8 enforceable, Longley against Wagner.

9 MS. CALDWELL: That's correct, Your Honor. But
10 I think there is an analogy in equity, in the maximums of
11 equity, which do lend credence to what Congress created,
12 which was a form of equitable relief involving monetary
13 relief, both back pay and later the court-created remedy
14 of front pay.

15 QUESTION: When you speak of front pay, do you
16 mean an award calculated as it was in the Chief Justice's
17 hypothetical? In other words, you take -- if you have a
18 term contract, you take the term of the contract, figure
19 out what portion of it is unexpired, and in effect, award
20 pay equal to what would have been earned in that
21 unexpired term --

22 MS. CALDWELL: Not at all, Your Honor, and
23 that's one of the central problems of the concept of front
24 pay as a purely legal remedy.

25 QUESTION: All right. Well, how, then, is front

1 pay calculated, because that was going to be my question.
2 I understand it in his hypo, and you didn't take exception
3 to that, but you now say, Well, that isn't the way we
4 calculate it. How is it calculated?

5 MS. CALDWELL: Front pay is much more fluid. It
6 depends on the circumstances. The first consideration is
7 not whether the person's entitled to front pay. The first
8 consideration is whether that plaintiff should be
9 reinstated, and is there a compelling reason why they
10 should not be reinstated, and there are numerous examples
11 of circumstances where reinstatement would be
12 inappropriate.

13 For example, there's another employee in the
14 place in which the plaintiff -- to which the plaintiff
15 would be reinstated.

16 QUESTION: Okay. Let's just take that case.
17 Assume that. How is front pay going to be calculated?

18 MS. CALDWELL: Some courts have fashioned it as,
19 we'll give the company two years to find an appropriate
20 position for this plaintiff, given the training,
21 experience, background. And during that two-year period,
22 that person will be paid the pay that they otherwise would
23 have missed.

24 QUESTION: All right. Now, if at the end of the
25 two-year period, there hasn't been a reinstatement, is

1 there any further front pay ever awarded, or do you say at
2 that point, it's over with and any future award would have
3 to be an award of damages?

4 MS. CALDWELL: Often it comes right back to the
5 court, and in the Sixth Circuit case of Shore v. Federal
6 Express, which went up on appeal twice to the Sixth
7 Circuit -- and it's one of the leading cases from the
8 Sixth Circuit in which the Sixth Circuit recognizes front
9 pay as equitable -- the plaintiff was held by the judge
10 not to be required to go back to that employment because
11 of the hostile environment, the painful situation she
12 would find herself in.

13 QUESTION: This is after something like the two-
14 year period has passed?

15 MS. CALDWELL: Well, what he did was he
16 fashioned the remedy, saying that she would never again
17 find a job equivalent in pay to what she had Federal
18 Express, and each year Federal Express is required to pay
19 her the difference between what she earned and what she
20 would have earned.

21 QUESTION: Okay. But that -- I just don't see
22 how when the front pay so-called becomes that extensive, I
23 don't see how you distinguish it from an award of lost
24 future earnings not attributable to loss of earning
25 capacity, which is a recognized form of damages at law.

1 MS. CALDWELL: The hallmark really is the
2 discretion of the court.

3 QUESTION: Ms. Caldwell, you're describing this
4 as the typical substitute for reinstatement, but you did
5 say that front pay covers a wide range, and at least one
6 area that it covers is a person qualifies for the
7 promotion or for the job, doesn't get it because of
8 discrimination. But then there's a seniority system, so
9 the job isn't there. Front pay is you pay the person at
10 the job level where they are now until there's a vacancy.

11 Or if there's a training program, she hasn't
12 been promoted but she would need a training program, you
13 pay her while she gets the training program at the higher
14 rate. And front pay in those situations was conceived of
15 as an incentive to stop the employer from foot-dragging.

16 So you're treating this in the most questionable
17 case where front pay is originally, in the situations I
18 describe, it's much more easy to characterize as
19 equitable. Is that not so? And you're giving us these
20 cases where she's never going to be in the job.

21 MS. CALDWELL: Well, front pay applies to both
22 instances, and normally this is one of the reasons why it
23 should remain with the court rather than with a jury.

24 QUESTION: Ms. Caldwell, would you tell me how
25 it works so far as the jury's concerned. I think you

1 pointed out that from your standpoint, there's a real
2 problem with the respondent's position as to what the jury
3 should be instructed, but even if your position is
4 accepted, I'm not quite sure how it works.

5 Is the employer entitled to an instruction to
6 the jury? Ladies and gentlemen of the jury, if you find
7 that there is liability and if you reach the point of
8 punitive damages and future damages, you should not take
9 into account any lost future earnings. Is that the way it
10 works, if you prevail?

11 MS. CALDWELL: If I prevail, that's not the way
12 it would work, Your Honor.

13 QUESTION: How does it work?

14 MS. CALDWELL: The way it would work --

15 QUESTION: Just as -- for the preface, because
16 it would seem to me that the employer would want the jury
17 to know that they shouldn't worry about future pay and
18 future earnings, and there should be some instruction to
19 that effect.

20 MS. CALDWELL: There should be an instruction to
21 that effect, but there are certain future pecuniary
22 amounts that the jury would be instructed on.

23 QUESTION: And what are those?

24 MS. CALDWELL: And those would be such things as
25 future medicals, moving expenses, those sorts of items,

1 which are clearly within the confines of what Congress
2 allowed in enacting this legislation.

3 QUESTION: Ms. Caldwell, can I call your
4 attention to the text of the statute again which you cited
5 us to? Compensatory damages shall not include back pay or
6 any other type of relief authorized. I assume that means
7 currently authorized, not that used to be authorized. And
8 isn't one of the problems with your case that, assuming
9 you're relying on the equitable nature of this award, it's
10 clear that you do not give equitable relief where legal
11 relief is available. Equity only steps in when the law
12 doesn't cover the problem.

13 Now, once upon a time, this front pay may have
14 been available under 2000e-5(g) of the Civil Rights Act as
15 equitable relief, but once you have enacted a new
16 provision for compensatory damages, it seems to me you do
17 not need that equitable relief of front pay. You have
18 legal relief.

19 MS. CALDWELL: It does not function the same as
20 a sum certain that a jury would find as to future losses.
21 It's a different animal. Also I believe if you look to --

22 QUESTION: Well, do you deny that if you have
23 legal ability to get your future earnings, you cannot ask
24 a court of equity to give you your future earnings without
25 jury trial and everything else that goes with it?

12

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202) 289-2260
(800) FOR DEPO

1 MS. CALDWELL: It would certainly thwart the
2 intent of Congress to provide make-whole relief.

3 QUESTION: I don't understand that.

4 QUESTION: What do you call this -- is there a
5 universe of compensatory and punitive damages? And then
6 what's the term that you call these other damages?
7 Equitable damages?

8 MS. CALDWELL: Equitable relief.

9 QUESTION: No. Equitable relief but not
10 damages?

11 MS. CALDWELL: Well, damages are a portion or a
12 type of equitable relief which have been fashioned and
13 made available under Title VII.

14 QUESTION: Well, that's just contrary to the
15 most fundamental understanding of the difference between
16 equity and law. The law awards damages. Equity awards
17 other kinds of relief when damages are not sufficient.

18 MS. CALDWELL: And the difficulty here -- and
19 perhaps I'm not expressing it clearly enough -- is that
20 when a court reaches the issue of front pay, the court is
21 normally joining it with some form of injunctive relief
22 that's certainly not within the provenance of a jury.

23 QUESTION: Well, under the new law as written,
24 you can get compensatory damages.

25 MS. CALDWELL: You can get compensatory damages

1 under the Act. If you look at (b)(2), it excludes damages
2 that were previously available. It says, compensatory
3 damages awarded under this section. In other words,
4 1981a. It does not include the prior relief, and that
5 would include front pay, because front pay was part of the
6 relief that had been awardable and had been recognized by
7 eleven of the circuit courts of appeal.

8 QUESTION: It used to be, because under your
9 theory, it was equitable relief, and it was -- and the
10 same money was not available through the law. But when
11 you have a new statute that says you can get this
12 compensation, I don't see any justification for giving you
13 front pay on an equitable basis.

14 MS. CALDWELL: We have legislative history which
15 makes clear that all the persons who expressed any
16 statement on the new Act --

17 QUESTION: You're not looking at me, are you?

18 MS. CALDWELL: Yes, Justice Scalia, I am.

19 QUESTION: Are you saying, Ms. Caldwell,
20 essentially that front pay is post-judgment back pay, that
21 is, that they are identical animals, and Congress
22 characterized back pay as equitable?

23 MS. CALDWELL: Absolutely.

24 QUESTION: And front pay, since it is of the
25 same character, is as much equitable.

1 MS. CALDWELL: Is equitable. And, again, very,
2 very briefly, because --

3 QUESTION: Does the jury award back pay?

4 MS. CALDWELL: Historically the jury did not
5 award back pay. They do now.

6 QUESTION: Then it seems to me back pay and
7 front pay ought to be treated the same under 1981a-(b)(2).

8 QUESTION: Are you sure that that's the right
9 answer? Under the statute, back pay is not awarded by the
10 jury, as I understand it.

11 MS. CALDWELL: Well, that is -- I believe
12 Justice Kennedy asked a question of practicality in terms
13 of how it has been working in the court systems. But it
14 is in their discretion --

15 QUESTION: Well, you mean the courts are
16 violating the statute?

17 MS. CALDWELL: Sir?

18 QUESTION: The courts are violating the statute?
19 I read the statute the way Justice Ginsburg says it. Just
20 from a statutory reading, I would think the jury shouldn't
21 award back pay, but I'm pretty sure also that's not the
22 way it works.

23 MS. CALDWELL: I believe it should not work that
24 way. I think in actuality the judge has the discretion to
25 give the instruction on back pay, and if the judge gives

1 the instruction, then there's a calculation by the jury.
2 But that's a different animal from front pay to that
3 extent, because there is a two-step process in front pay.
4 First, the issue of reinstatement entirely for the court.
5 Second, the issue of front pay which is a matter of not
6 straight calculation.

7 QUESTION: What about someone who has been
8 discriminated against and wants damages but does not want
9 reinstatement?

10 MS. CALDWELL: If you look at 706(g) itself,
11 that allows an award of back pay and other equitable
12 relief regardless of reinstatement.

13 QUESTION: So -- but you're saying that the
14 court must always first deal with reinstatement before it
15 gets to back pay or --

16 MS. CALDWELL: Before it gets to front pay.

17 QUESTION: To front pay. But in a situation
18 where the plaintiff, although wronged, does not wish
19 reinstatement, that's not going to be the case.

20 MS. CALDWELL: The converse is equally
21 difficult. If this Court decides that front pay is now
22 awardable exclusively under 1981a, the effect will be that
23 persons who were discriminated against but not
24 intentionally will no longer be able to get front pay.
25 That will certainly thwart the make-whole purposes of the

1 Act.

2 QUESTION: Isn't it true that the original
3 characterization of back pay as equitable, that that was
4 done way back in '64, because there was frankly distrust
5 in how southern juries would deal with Title VII?

6 MS. CALDWELL: Absolutely.

7 QUESTION: So Congress created this thing that
8 they call back pay, which one might characterize as
9 compensatory whether it was called back pay, and then the
10 court said, well, front pay is the same, is post-judgment
11 back pay, so the courts put it under the same heading.

12 MS. CALDWELL: And keep in mind that front pay
13 did not -- that term was not coined until 1977, some five
14 years after the 1972 amendment.

15 QUESTION: You said in response to an earlier
16 question of Justice Ginsburg that the statute -- or you
17 agreed that the statute characterizes front pay as
18 equitable. The 1991 statute, where does it do that?

19 MS. CALDWELL: I didn't mean to say that.

20 QUESTION: It doesn't call it equitable. It
21 doesn't even call back pay equitable. It says, shall not
22 include back pay, interest on back pay, or any other type
23 of relief authorized under the Civil Rights Act of '64.
24 It doesn't characterize any of them as equitable.

25 MS. CALDWELL: It does not, but the original

1 706(g) as enacted in 1972 certainly does that. Back
2 pay --

3 QUESTION: It would have to be equitable.
4 Otherwise, there would be a jury trial. Right?

5 MS. CALDWELL: That's right.

6 QUESTION: And that's what Congress was trying
7 to prevent in '64.

8 MS. CALDWELL: And this Court certainly was well
9 aware of it in the Albemarle Paper v. Moody case in which
10 the Court strongly expressed the need for make-whole
11 relief to prevent discrimination.

12 If I may reserve my -- I'm up. Thank you.

13 QUESTION: Thank you, Ms. Caldwell.

14 Mr. Roberts, we'll hear from you.

15 ORAL ARGUMENT OF MATTHEW D. ROBERTS

16 ON BEHALF OF THE UNITED STATES

17 AS AMICUS CURIAE, SUPPORTING PETITIONER

18 MR. ROBERTS: Mr. Chief Justice, and may it
19 please the Court:

20 A front pay award under Title VII is not subject
21 to the cap on compensatory and punitive damages added by
22 the 1991 Civil Rights Act. The 1991 Act provided new
23 relief and generally capped that new relief, but the Act
24 did not cap remedies that were already authorized such as
25 front pay, which has traditionally been awarded when

1 reinstatement is delayed or impractical. And the 1991 Act
2 expressly excludes from the cap damages relief authorized
3 under Section 706(g).

4 QUESTION: Not relief that used to be
5 authorized, but relief that is authorized.

6 MR. ROBERTS: Yes, Your Honor. At the time
7 Congress drafted the 1991 Act, which is when it said is
8 authorized, the courts of appeals had uniformly held that
9 front pay was authorized under Section 706(g), so when
10 Congress --

11 QUESTION: As equitable relief.

12 MR. ROBERTS: As affirmative action or other
13 equitable relief. Yes, Your Honor.

14 QUESTION: Well, let's leave affirmative action
15 aside. That may be a different question. But if you're
16 relying on the equitable relief portion, it seems to me
17 that with the new legislation, it's no longer equitable
18 relief.

19 MR. ROBERTS: Well, I don't think it has to be
20 characterized as other equitable relief. It could fall
21 under such affirmative action language, but even assuming
22 that it falls under the other equitable relief, there was
23 no legal relief that was provided in 1991 that's a
24 substitute for the equitable relief that was already
25 available --

1 QUESTION: Well, there was certainly
2 compensatory damages provided.

3 MR. ROBERTS: Yes. Compensatory damages were
4 provided, but Congress was careful to indicate that it
5 meant those damages to be in addition to the relief that
6 was available, and that it was -- that the relief that was
7 available under Section 706(g), it excluded it from the
8 compensatory --

9 QUESTION: It didn't say, the relief that was
10 available. It says, the relief that is available.

11 MR. ROBERTS: That is available, that is
12 authorized.

13 QUESTION: I mean, you're being circular. If,
14 indeed, you can get the compensatory damages, you have no
15 need for equitable relief. You have no entitlement to
16 equitable relief.

17 MR. ROBERTS: I think our arguments are equally
18 circular when Congress --

19 QUESTION: Well, the statute simply doesn't make
20 that choice. It doesn't say, is authorized or was
21 authorized. It says authorized.

22 MR. ROBERTS: It says authorized, and there are
23 two factors there to consider. One, that the courts of
24 appeals had uniformly held that it's authorized. And
25 two -- and so Congress incorporated that understanding

1 under accepted principles of statutory construction. And
2 also we know from the legislative history for those on the
3 Court that are interested in looking at it that Congress
4 did intend to incorporate that understanding.

5 QUESTION: You think authorized -- you agree
6 with Justice Souter. Authorized means previously
7 authorized.

8 MR. ROBERTS: No. I think it means is
9 authorized, but I think that Congress understood --
10 Congress ratified the understanding of what was
11 authorized, so what was authorized became what is
12 authorized, and --

13 QUESTION: All right. Suppose that's wrong --

14 MR. ROBERTS: -- and they're not divisible --

15 QUESTION: Let me ask the question in another
16 way. Are you arguing, in effect, that Congress did not
17 intend to subtract anything from what was previously
18 authorized by 706?

19 MR. ROBERTS: Yes. I am completely arguing
20 that.

21 QUESTION: Tell me if there was a --

22 MR. ROBERTS: In fact, we know from the statute
23 --

24 QUESTION: No, go ahead. Go ahead.

25 MR. ROBERTS: We know from the statute that it

1 didn't intend to subtract anything. In the Findings
2 section which it put in as part of the Act, it said that
3 it wanted to provide additional remedies. In (a)(1), it
4 said that the new relief was in addition to the relief as
5 authorized, and it excluded the relief that's authorized
6 from the new relief, and that's because the whole -- what
7 was going on is Congress wanted to provide added relief in
8 the forms of compensatory and punitive damages. It knew
9 that that relief would be subject to a jury determination,
10 and there were Members of Congress and the Administration
11 that was worried that those new damages, subject to jury
12 awards, might be excessive, and so they wanted to cap the
13 new relief, but there was no concern about existing
14 relief. Nothing had been expressed that there was
15 excessive relief then, and Congress had no desire to touch
16 existing relief at all. It wanted to leave it alone, add
17 something new, limit what was new.

18 And it was correct -- the courts of appeals were
19 correct that front pay was authorized under 706(g),
20 because it's discretionary relief of the same character as
21 back pay and reinstatement. And like back pay --

22 QUESTION: It's much closer to traditional
23 damages, front pay.

24 MR. ROBERTS: It's no closer to traditional
25 damages than back pay. In fact, less close, because

1 damages are traditionally retrospective. Also --

2 QUESTION: Well, no. Not damages for a breach
3 that goes into the future.

4 MR. ROBERTS: Well --

5 QUESTION: Are you suggesting that, you know, if
6 I am terminated before the time for my performance of
7 services contract expires, that I can't get damages?

8 MR. ROBERTS: No, Your Honor. Under the current
9 rule of a breach of contract, you could, but interestingly
10 enough, if one's looking back for law versus equity and
11 analyze back to the 18th Century, the rule then was that
12 you couldn't get future lost wages as damages for a breach
13 of contract because they were too speculative, so you
14 couldn't get them at law, you couldn't get them in equity
15 then.

16 Congress provided for new remedies of the type
17 that don't have a precise parallel to what was
18 traditionally available at law and equity.

19 QUESTION: It specifically named back pay. I
20 mean, it seems to me it doesn't get you very far to say
21 that front pay no more resembles equitable relief or no
22 less resembles equitable relief than does back pay,
23 because Congress mentions back pay in Section 706(g)(1).

24 MR. ROBERTS: Yes, it does, Your Honor, but it
25 also mentions back pay as an illustration in a statute

1 that allows the court to order such affirmative action,
2 including reinstatement and in a statute that also allows
3 it to award other equitable relief.

4 QUESTION: Well, but that may have been
5 referring back to reinstatement or hiring of employees.
6 That's certainly equitable relief.

7 MR. ROBERTS: Yes, Your Honor. But --

8 QUESTION: With or without back pay.

9 MR. ROBERTS: There's never been a question that
10 the back pay under title VII is equitable relief. This
11 Court has repeatedly characterized it as equitable relief,
12 in the Albemarle case, in the Burke case. In Curtis v.
13 Lothar, it took care to say that Title VII's back pay is
14 equitable relief. And, in fact, back pay -- the courts
15 refer to back pay under the Fair Labor Standards Act as
16 equitable relief.

17 QUESTION: Do you think that Congress can
18 eliminate the right to jury trial by simply denominating
19 relief in the '64 Act as equitable relief?

20 MR. ROBERTS: No, Your Honor.

21 QUESTION: I mean, it seems like a simple
22 remedy. We mistrust southern juries, and we're therefore
23 going to call this legal relief, equitable relief so that
24 the defendant doesn't get a jury.

25 MR. ROBERTS: No, Your Honor. Although

1 Congress's characterization of the relief, the Court has
2 indicated, does count for something, but --

3 QUESTION: What happens with back pay, a) under
4 the statute as you interpret it, and b) as a matter of
5 practice insofar as the jury's function is concerned?
6 Does a jury consider back pay?

7 MR. ROBERTS: Back pay is a matter for the
8 court. There's no right to a jury trial on back pay, just
9 as front pay is a matter for the court and there's no
10 right to a jury trial on front pay.

11 QUESTION: As a matter of practice, do juries
12 ever do back pay?

13 MR. ROBERTS: To the extent that juries might in
14 some cases do back pay, which I'm not specifically aware
15 of, I would assume that they're doing that in an advisory
16 capacity, which the court is allowed to ask the jury to
17 do.

18 QUESTION: And do you view that as consistent
19 with our opinion in Chauffeurs Union?

20 MR. ROBERTS: Yes, Your Honor. I think that the
21 back pay and front pay under Title VII are both
22 restitutionary in nature and intertwined with other
23 injunctive relief, and therefore, they are equitable
24 remedies. It's restitutionary in nature, because they
25 both put the -- they require the employer to pay the

1 employee the wages that the employer would have paid the
2 employee if there had been no discrimination.

3 QUESTION: In that sense --

4 QUESTION: But that's true of damages, too.

5 QUESTION: Damages are restitutionary, if that's
6 how you define restitution.

7 MR. ROBERTS: Damages would apply even in a tort
8 case where the --

9 QUESTION: But in a contract case, a contract
10 for personal services --

11 MR. ROBERTS: Yes. It's true in that case, but
12 the additional features that are here are that it's
13 discretionary with the court. It's not automatically
14 available. It's not available --

15 QUESTION: I don't see how that would affect the
16 right to jury trial.

17 MR. ROBERTS: Well, Your Honor suggested in your
18 concurring opinion in Albemarle Paper that the
19 discretionary nature was relevant to the question of
20 whether it's equitable relief or whether it's legal
21 relief, and we would agree with that. Discretion is a
22 hallmark of equity, as this Court has repeatedly noted.

23 QUESTION: Even if you were to lose on that
24 point and even if it should be determined that it was
25 subject to a jury trial, you might very well be correct

1 about this case as to what Congress intended to exclude
2 from the cap by the reference to the word other. I mean,
3 isn't that the nub of this case?

4 MR. ROBERTS: That it said other relief, but it
5 excluded all relief authorized under 706(g), not just
6 equitable relief.

7 QUESTION: It doesn't count toward the -- what
8 is it -- \$300,000, whatever the cap is.

9 MR. ROBERTS: It is true that in (b)(2),
10 Congress did not limit the relief that's excluded to
11 equitable relief, and if you think that 706(g) authorizes
12 more than -- relief that's more than equitable relief,
13 then, yes, that would be true, Your Honor.

14 QUESTION: Thank you, Mr. Roberts.

15 Mr. Ripple, we'll hear from you.

16 ORAL ARGUMENT OF RAYMOND M. RIPPLE

17 ON BEHALF OF THE RESPONDENT

18 MR. RIPPLE: Mr. Chief Justice, and may it
19 please the Court:

20 The issue before the Court today involves the
21 division of responsibilities between the judge and jury
22 under this restructured remedies program under the '91
23 Act, and that is the one that exists today and did exist
24 at the time of trial. The division follows fairly
25 conventional system. The judge retains authority over

1 equitable matters. The jury has its powers to assess
2 damages.

3 A facial reading of the statutory scheme, in
4 fact, shows that compensatory damage and, as we get to it,
5 one of its component parts, future pecuniary losses, are
6 subject to decision by the jury.

7 Now, what I would like to do just briefly is
8 step back and see where the parties agree here and really
9 where we shouldn't differ. I listened very closely to
10 Petitioner this morning, and I thought there was no
11 disagreement, and maybe there isn't, on the question of
12 what front pay is. Historically when you boil it down,
13 the court said that front pay is future lost earnings or
14 wages.

15 QUESTION: Just as back pay is past loss of
16 earnings.

17 MR. RIPPLE: That's generally true.

18 QUESTION: So you can't distinguish the two. I
19 think it is an accurate characterization, is it not, that
20 front pay is post-judgment back pay? That is, back pay is
21 past loss of earnings, front pay is future loss of
22 earnings.

23 MR. RIPPLE: As far as that goes, that's
24 correct. There is a great difference, I believe, also
25 between back pay and front pay, back pay being generally

1 restitutionary, named by Congress specifically as an
2 equitable remedy directed by Congress in, I believe it is,
3 (a) (1) of the statute to exercise its discretion
4 specifically on back pay. Nothing, of course, has ever
5 been said about front pay anywhere in the statutory
6 scheme.

7 But what I was just going to get to was I think
8 there is agreement between the parties as to what this
9 front pay means, which is critical to this case, and then,
10 in fact, petitioner in her opening brief, on page 14,
11 concedes that, in effect, it is lost future earnings. The
12 Government also acknowledges in their brief that, in fact,
13 front pay is by calculation lost future earnings or wages.
14 I believe in the Government's brief, it's footnote 12.

15 I think there's general agreement among the
16 parties as to what front pay means. Good starting point.

17 QUESTION: But it means, according to the
18 Government, the same thing as back pay.

19 MR. RIPPLE: Again, as I said before, I don't
20 think it does exactly at all. In fact, this whole title
21 of post-judgment back pay was new to me when I saw it.

22 QUESTION: It's for loss of wages. One is for
23 past loss of wages, the other is for future loss of wages.
24 They're both for loss of wages, and if you characterize
25 the one legal, you could characterize the other as legal.

1 The Government tells us the difference here, why it's not
2 strictly damages at law, is that it's discretionary with
3 the judge. They don't have to be awarded.

4 MR. RIPPLE: As to which? I'm sorry.

5 QUESTION: As to both, as to back pay and front
6 pay are both discretionary with the judge.

7 MR. RIPPLE: I agree that as to back pay, based
8 on the statute, the court had discretion. I do not see
9 that as to front pay.

10 QUESTION: I think that's what all the courts
11 have said, courts of appeals have said, about front pay
12 since they modeled it on back pay, that it was
13 discretionary.

14 MR. RIPPLE: Whether they modeled it on back
15 pay, I think -- I would take exception to that. What they
16 said is, for whatever reason up to 1991, if you had a
17 situation -- take the hard case where equity has failed,
18 frustrated. They can't reinstate. For whatever reasons,
19 rule of necessity, whatever, the lower courts invented
20 this front pay, called it front pay. If you get beyond
21 that step, of course the courts are going to say it's
22 within their discretion. Many of the courts --

23 QUESTION: Mr. Ripple, am I not right in
24 thinking that front pay was first developed in the context
25 of seniority systems where someone was denied the

1 promotion, and Title VII preserves seniority systems, so
2 that person was kept on the job at the lower level, paid
3 at the higher rate. And the idea was to speed up getting
4 them into the more advanced position. It came up with
5 seniority systems, and it came up with training, that
6 people could not immediately be put in their rightful
7 place because they needed training or because there was a
8 seniority system. That was what front pay came out of,
9 was it not?

10 MR. RIPPLE: I'm not sure that was the first
11 case. The first one I remember was not a seniority case.
12 I think it was the Patterson case, Fourth Circuit. I
13 can't remember the date. I think one or the other of us
14 have cited it in the brief, but --

15 QUESTION: Does this really matter?

16 MR. RIPPLE: No -- well, it does -- if Justice
17 Ginsburg has a question, it matters.

18 QUESTION: Thank you.

19 MR. RIPPLE: And I'm trying to be helpful -- I'm
20 trying to be helpful, not facetious, but I'm trying to be
21 helpful.

22 I think the next point, though, where we do
23 differ but we shouldn't perhaps is that future pecuniary
24 losses, the statutory term, really, when you look at it,
25 we don't need Webster, Bouvier, or Black. It should be

1 inclusive of future lost earnings just by plain English.
2 We really shouldn't disagree on that, and maybe -- I was
3 listening carefully, but maybe we don't disagree on that.

4 Where we do part company -- and this is critical
5 to the case. Where we part company is over Section
6 (b)(2), the exclusion to compensatory damages. Now, you
7 remember that says, compensatory damages will not include
8 back pay, interest on back pay, or remedies under 706(g),
9 the old equity statute.

10 Now, if we understand the petitioner's argument,
11 at least in their reply brief, what they're saying is, if
12 we go -- I'm sorry. Front pay is now a legal remedy.
13 What of this language in the exclusionary clause? And the
14 answer is really, in our judgment, quite simple. There
15 are a number of other monetary reliefs that are available
16 in an equitable form other than front pay. They are --
17 let me just give you a few examples.

18 In promotional cases Justice Ginsburg was
19 mentioning, very often there's a monetary sum involved.
20 There have been cases involving equitable accounting,
21 usually involve professional organizations such as law
22 firms, accounting firms --

23 QUESTION: Go back to the first one. I don't
24 understand what you're talking about. In promotional
25 cases --

1 MR. RIPPLE: In promotional cases --
2 QUESTION: -- there's a sum involved. Of course
3 there is.
4 MR. RIPPLE: That's right.
5 QUESTION: But other than back pay?
6 MR. RIPPLE: In some cases, yes. It could be a
7 going-forward pay, either in lump sum or in grade.
8 QUESTION: What is the difference between going-
9 forward and front pay?
10 QUESTION: Yeah. You've got to explain why
11 that's different --
12 MR. RIPPLE: That's what I mean, going-forward,
13 front pay.
14 QUESTION: -- from front pay for me to follow
15 the argument.
16 MR. RIPPLE: Well, you can have -- and this gets
17 really to the next point, but you can have a situation
18 where, for instance, equitable relief is granted and still
19 have monetary relief as it relates going forward. If --
20 QUESTION: That's one variety of front pay,
21 isn't it?
22 MR. RIPPLE: Some courts have called it that.
23 Whatever moniker you want to put on it --
24 QUESTION: In other words, the reason I think
25 it's significant is we're not here to determine this

1 morning what the ultimate limit of front pay by a court of
2 equity may be. We've had some disagreement about it.
3 What we're here to determine is whether there is any
4 species of an award that an equity court can make which is
5 customarily called front pay that survives, and it seems
6 to me that your answer to the question says, yeah, there's
7 one variety that survives, and I'm using the term going-
8 forward, but it's what these other people are using by the
9 term front pay, and that seems to me like the end of the
10 case.

11 MR. RIPPLE: I guess I would disagree with you,
12 Justice Souter, on one point. I think the point I was on
13 is not bound in with the existence or nonexistence of
14 front pay. The question is, is there any other equitable
15 monetary sum?

16 QUESTION: Right. You were saying, this is not
17 an empty set, if you include front pay, and you've --

18 MR. RIPPLE: That's right. If you pulled front
19 pay --

20 QUESTION: -- given an example of why it's not
21 an empty set, an example of what most people would call
22 front pay, not the most extravagant example perhaps but an
23 example.

24 MR. RIPPLE: Not necessarily. Again, the usual
25 use of front pay is when there is no equitable relief. In

1 a promotion case, there's usually an order.

2 QUESTION: Okay. There may be cases in which we
3 will argue. Maybe it will get to this Court as to how far
4 front pay can go. But it doesn't seem to me that what
5 you're saying excludes your example from what is meant by
6 front pay.

7 MR. RIPPLE: The --

8 QUESTION: You're saying front pay is equitable,
9 so long as it is connected to the equitable relief of a
10 promotion.

11 MR. RIPPLE: Can be.

12 QUESTION: But it is not equitable if it's not
13 connected to the equitable relief.

14 MR. RIPPLE: Under Tull, if it's somehow
15 incident to or -- I think the word used is adjunct to the
16 equitable relief --

17 QUESTION: Yes. But the other side is going to
18 say, front pay is equitable relief if it's attached to the
19 equitable relief of the requirement of rehiring.

20 MR. RIPPLE: Of the requirement of rehiring?

21 QUESTION: Yes.

22 MR. RIPPLE: That's possible. Let me stake
23 out --

24 QUESTION: So the only case in which you say
25 it's not equitable relief is where you award front pay

1 without any other equitable imposition upon the employer.

2 MR. RIPPLE: No, not completely. If, in fact,
3 an injunction is entered, if, in fact, a reinstatement is
4 ordered, and there is, for instance, a period of time,
5 short period of time, until that slot opens up where you
6 can put the person back in, that sum of money, whatever
7 you call it, is probably incident to the equitable relief,
8 and therefore can be considered as equitable rather than
9 legal.

10 In this case, of course, what we're dealing with
11 is there will not be a reinstatement. Apparently she does
12 not want to be reinstated, and apparently the judge was
13 not going to order it, so this is a pure case of front pay
14 or whatever we call it now in lieu of --

15 QUESTION: What is important here, I take it, is
16 that -- are these things excluded from compensatory
17 damages which are capped? Of course, the way you describe
18 front pay is something that would be so insignificant that
19 it could never be -- it would never be -- rise up anywhere
20 close to the cap. Isn't that correct?

21 MR. RIPPLE: We don't think, in our view of the
22 case, that there will be many situations where pure front
23 pay, let's say, front pay in lieu of reinstatement like
24 our case, would rise up to that level. That would be, I
25 think, rather unusual. The --

1 QUESTION: Well, what is the amount of the cap?

2 Is it --

3 MR. RIPPLE: 300,000.

4 QUESTION: Well, but there are smaller
5 employers. There's a \$50,000 limit, and I assume there
6 are many jobs, say, that pay 40-, \$50,000 a year, and one
7 or two years of front pay just could -- front pay under
8 your theory would completely exhaust the cap, no matter
9 how outrageous the employer's conduct was, and then there
10 would be no punitive damages. That's the consequence of
11 your theory.

12 MR. RIPPLE: That's also the consequence, Your
13 Honor, of the statutory scheme --

14 QUESTION: The statutory argument, as I
15 understood it on their side, was not so much that the
16 words other type of relief is an empty set without front
17 pay. Rather it was that front pay had been authorized,
18 and that's the end of it. Now, very simply, if we're to
19 hold to the contrary, we'd have to say that in this later
20 statute, the court -- the Congress changed the meaning of
21 old 706(g), which seems to me fanciful, or we would have
22 to say that front pay never was authorized, and all the
23 courts of appeals were wrong, and when we held that, our
24 reasoning would also say, probably back pay isn't
25 authorized either.

1 Therefore, if we take that route, we are tearing
2 the statute apart. And then they say, by the way, if you
3 want to know what they thought, why don't you just look to
4 the words of the sponsors who without any contradiction on
5 the floor of the Senate, said, this amendment includes
6 front pay, in those words.

7 All right. Now, that I take it was their basic
8 argument, and I would like to hear what's wrong with it.

9 MR. RIPPLE: I think one place to start -- and
10 please stop me, Justice Breyer, if I'm not getting to your
11 question on that. I think one place to start is again go
12 back and look at (b) (2) exclusions as we were doing.
13 Where I was was the -- for instance, there is the example
14 of other monetary sums equitable in nature involving cases
15 involving unions.

16 QUESTION: Cases involving --

17 MR. RIPPLE: Unions. I'm sorry, Your Honor.
18 Unions, where the union is the defendant in the case
19 brought by the employees, where union dues have had to
20 have been paid back to the employees, where they -- monies
21 paid in levies to the unions or whatever program they had
22 going at the time were required to be paid back. That
23 wouldn't be in the traditional sense of true back pay.
24 It's a different relationship with the union, but there
25 have been some cases on that.

1 QUESTION: Is this under the NLRA, because the
2 NLRA also has --

3 MR. RIPPLE: No. No, no. This is under
4 Title --

5 QUESTION: Is it Title VI?

6 MR. RIPPLE: -- VI. That's right. As you know,
7 under 706(g) --

8 QUESTION: Unions as well as employers can
9 discriminate.

10 MR. RIPPLE: That's right. Employers and
11 employment agencies would also be covered. Our case --
12 let me answer your question, Justice Breyer, in this
13 manner, and maybe I can satisfy it. Our case is that
14 such -- looking at front pay now, it is a monetary sum.
15 It certainly carries the presumption, being a monetary
16 sum, that it is a legal remedy. The question is, does it
17 fall into exceptions to that? Our argument is, no, first,
18 it is not incident to, especially in this case, incident
19 to another -- an equitable remedy, so it doesn't fall into
20 the Tull exception, intertwined or incident to. Second,
21 it's not really restitutionary in nature as back pay, this
22 Court, I think, has recognized is basically restitutionary
23 in nature. I think that was the Curtis --

24 QUESTION: Well, my question really as the
25 dilemma they put you -- I think, are trying to put you

1 into is, in giving that definition, are you saying that
2 Congress changed the meaning of 706(g)? Or are you saying
3 that always was the meaning of 706(g)? Hence, all the
4 courts of appeals holding to the contrary were wrong.
5 Now --

6 MR. RIPPLE: That's our ultimate --

7 QUESTION: -- it seems to me -- all right.
8 That's what you say. All right. Then my next question
9 from that would be, is isn't it true that if we write
10 those words on paper, that by writing those words, we will
11 cast considerable doubt on back pay as well, because it
12 will suggest that that is a legal remedy and not an
13 equitable remedy, hence calling into play the
14 constitutional requirement for a jury?

15 MR. RIPPLE: Answer to your last question is no.

16 QUESTION: Because?

17 MR. RIPPLE: Because back pay has a history in
18 this Court and all the other courts of being traditionally
19 an equitable remedy.

20 QUESTION: But the conceptual distinction
21 between the back pay that you're going to call equitable
22 and the front pay that in your ideal we will write into
23 our opinion is not equitable. The conceptual distinction
24 is going to be what, because it's always possible that
25 future courts will try to follow the logic of our opinion.

1 MR. RIPPLE: Back pay traditionally highly
2 restitutional in nature, equitable, restitutional.
3 Secondly, specifically named by Congress, and that's worth
4 something. We said so in Terry case. It is easily
5 calculable --

6 QUESTION: Let's go back. So it's named. So
7 what? That shows you can get it. It doesn't show whether
8 it's equitable or not equitable.

9 MR. RIPPLE: Front pay or back pay?

10 QUESTION: You say one reason is back pay is
11 equitable and front pay isn't is that back pay is named by
12 Congress. So what?

13 MR. RIPPLE: I don't think in the context of
14 this case, whether or not back pay is implicated is really
15 terribly important in the long run.

16 QUESTION: No, but the concern is that if we
17 suggest that, in fact, back pay shouldn't have been
18 awarded, for the same reason that front pay shouldn't have
19 been, then, in fact, there won't be any front pay under
20 your theory awarded by the court, there won't be any back
21 pay awarded by the court. And the cap will have a very
22 different significance from the cap as it was enacted,
23 which was supposed to be a cap that at least excluded back
24 pay. That's why Justice Breyer said that wrecks the
25 statute.

1 MR. RIPPLE: No. I think I understand now. If
2 you're referring -- Justice Breyer perhaps referring a bit
3 to our last argument, what I consider the equity
4 jurisdiction argument, did the district courts ever have
5 authority to create front pay?

6 QUESTION: And your answer to that was?

7 QUESTION: Was no.

8 MR. RIPPLE: No. Under that theory, the larger
9 theory, no.

10 QUESTION: And now his concern -- is there an
11 implication for that about back pay?

12 MR. RIPPLE: No. I don't believe so.

13 QUESTION: Why not?

14 MR. RIPPLE: I think this Court could write the
15 opinion that because under the historical analysis, front
16 pay, what we call now front pay, is not incident to the
17 granting of another equitable relief. Equity never had
18 jurisdiction for that, at least at the time of the
19 founding of the country.

20 QUESTION: Well, the founding of the country --

21 QUESTION: The statute provides a jury trial for
22 back pay anyway, so we don't need to worry about that.
23 But the practical consequence of your argument is, is that
24 the jury has to award front pay, but the judge hasn't
25 determined whether there's going to be reinstatement or

1 not. he doesn't know if there's basic liability. He
2 doesn't know what the jury's findings are going to be with
3 reference to how egregious it is on certain counts. I
4 just don't know how your theory's going to work.

5 MR. RIPPLE: I have -- we have great faith in
6 the Federal district judges, and I don't see --

7 QUESTION: Well, that's reassuring, but I just
8 don't see how mechanically this can work under your view
9 --

10 MR. RIPPLE: I don't think -- I'm sorry, Your
11 Honor. I don't think there's a serious practical problem
12 here. Anyone that's tried one of these cases -- there are
13 points in a case where the judge can make the decision.
14 Am I going to reinstate this person or not? Certainly
15 before the prayer conference, that decision can be made.
16 Therefore -- and we would suggest these cases only be
17 tried to jury on special interrogatories, the only way it
18 makes sense, and the only way if you have --

19 QUESTION: That might be a suggestion, but
20 certainly it's nothing that a judge is required to do.
21 The rules give the judge the option.

22 MR. RIPPLE: That's right. Absolutely. And one
23 of the strengths of the Federal district judges is they
24 have the full panoply of the rules and any -- some other
25 inherent powers --

1 QUESTION: Just -- the other part of their
2 argument is just in case your answer to this part, in
3 their view, has shown that this whole thing is very
4 complex, what about looking to what the sponsors have done
5 for us, what they happened to say, senator -- I get two
6 senators and on the House side, in memorandum signed by
7 both of them, and in statements, compensatory damages does
8 not include back pay or front pay.

9 I mean, I can understand not using legislative
10 history when it's ambiguous, when there are two sides.
11 This seems to be absolutely clear, consistent with the
12 language, without anybody saying to the contrary. So
13 can't we at least take it as a hint as to what they were
14 driving at?

15 MR. RIPPLE: Answer your question, first, we
16 believe obviously you need to look at the statute first.
17 But if you get there, if you get there, there are some
18 stray remarks regarding --

19 QUESTION: Stray remarks?

20 MR. RIPPLE: Yes. I think -- not the technical
21 term of that remark.

22 QUESTION: Senate sponsors' memorandum,
23 interpretive memorandum of Representative Edwards, as well
24 as floor statement.

25 MR. RIPPLE: The floor statements are

1 individualized remarks. They're isolated remarks. There
2 is also the other side of the coin.

3 QUESTION: Did the President sign onto those
4 floor --

5 MR. RIPPLE: No.

6 QUESTION: The bill required his signature,
7 didn't it?

8 MR. RIPPLE: It did in 1991.

9 QUESTION: Did he sign onto those floor
10 statements?

11 MR. RIPPLE: He did not. In fact --

12 QUESTION: What about the House of
13 Representatives? Were they the sponsors, these two
14 individuals who made these statements? Were they the
15 sponsors of the bill in the House?

16 MR. RIPPLE: In the House, no.

17 QUESTION: Yeah, Representative Edwards did say
18 that in the House, didn't he?

19 MR. RIPPLE: He did in the House, and he was one
20 of the sponsors, but --

21 QUESTION: May I ask two questions?

22 MR. RIPPLE: Yes.

23 QUESTION: I don't think that people are going
24 to change their views on legislative history at this
25 particular point.

1 MR. RIPPLE: I didn't think so.

2 QUESTION: First of all, was there a demand for
3 a jury trial in this case?

4 MR. RIPPLE: No, there was not.

5 QUESTION: And, secondly, is there anything
6 either in the statute or the legislative -- you can go
7 either way you want on this -- to suggest that the purpose
8 of (b) (2) had any purpose other than to impose a cap on
9 the additional relief that was authorized by the statute?

10 MR. RIPPLE: (b) (2) --

11 QUESTION: To exclude --

12 MR. RIPPLE: Right.

13 QUESTION: Did it have any purpose except
14 related to the cap?

15 MR. RIPPLE: I don't know any legislative
16 history that says, if you get down to legislative history,
17 that says that it was related to the cap, the (b) (2)
18 exclusion.

19 QUESTION: But isn't it perfectly clear, just
20 looking at the statute itself, the sole purpose of this is
21 to exclude certain things from the cap?

22 MR. RIPPLE: From -- yes. All right. On its
23 face, yes. It excludes it for compensatory damages. That
24 seems to be --

25 QUESTION: And the things that are excluded are

1 those that were put in that had not been in the statute
2 before.

3 MR. RIPPLE: I'm sorry. I misunderstood your
4 first question. I think, looking at the exclusionary
5 section, it was certainly one way to exclude certain
6 matters, to make sure that they weren't subject to the
7 cap. Yes, yes.

8 QUESTION: Can I ask you this question? The
9 case has been argued, because this is what the -- your
10 opponents have placed the stress on, on the assumption
11 that front pay has to be equitable relief, or it wouldn't
12 be covered under 706(g)(1). But, in fact, why can't it
13 just be -- instead of being considered equitable relief,
14 just be considered affirmative action?

15 That phrase, affirmative action as may be
16 appropriate, which may include but is not limited to
17 reinstatement or hiring of employees with or without back
18 pay or any other equitable relief as the court deems
19 appropriate. That last phrase, or any other equitable
20 relief as the court deems appropriate, that was added
21 later on. And the original phrase, affirmative action as
22 may be appropriate, was in the National Labor Relations
23 Act, and they copied that almost verbatim from the NLRA as
24 I recall.

25 MR. RIPPLE: That's correct.

1 QUESTION: And under the NLRA, the Board had
2 awarded back pay, hadn't it? And --

3 MR. RIPPLE: They had. Yes, Your Honor.

4 QUESTION: And had awarded at least a form of
5 front pay, hadn't they?

6 MR. RIPPLE: Without calling it that, there were
7 some --

8 QUESTION: Without calling it that, they had
9 done it.

10 MR. RIPPLE: Yes.

11 QUESTION: So I don't maybe even need the
12 equitable portion of the statute to find that what this
13 statute seemed to do was to simply suck up what the NLRA
14 had done and spit it out into this new statute, in which
15 case you get back pay and front pay.

16 MR. RIPPLE: I think that was the intent in '72.

17 QUESTION: The problem with it is you will have
18 the worst of both worlds, because in which case, there
19 would be front pay, and both front pay and back pay would
20 not be equitable, but would be legal relief, and you'd get
21 a jury trial on both of them. Would you like a jury trial
22 for back pay as well as for --

23 MR. RIPPLE: Usually back pay is a practical
24 matter in these cases. It's relatively manageable, it's
25 understandable, it's calculable and by statute only goes

1 back two years anyway.

2 QUESTION: Well, if I rely on the National Labor
3 Relations Act language which was embodied in the original
4 version of this statute, why don't I reach the same result
5 that your opponents say should be reached in this case?

6 MR. RIPPLE: I guess I don't understand that
7 argument, Your Honor. I'm sorry.

8 QUESTION: The argument is that this constitutes
9 affirmative action as may be appropriate, whether or not
10 it's equitable relief, because that's all that the
11 National Labor Relations Act language said, and under that
12 language, the NLRA awarded both back pay and front pay.
13 And when Congress adopted that language in this statute,
14 they expected courts to do the same thing.

15 MR. RIPPLE: I don't know if I've ever seen it
16 construed that way. It's an interesting observation. I
17 don't think I've ever seen it construed. Usually the
18 affirmative action --

19 QUESTION: I try to stick to the words of the
20 statute rather than --

21 MR. RIPPLE: I understand, Your Honor.

22 QUESTION: -- the floor statement.

23 MR. RIPPLE: I understand. The -- I don't think
24 I've ever seen it construed quite that way. Usually
25 affirmative action is more of an injunctive type relief.

1 That's when I have seen it, but I'm -- I just have not
2 seen it played out that way.

3 QUESTION: Well, you acknowledge the Board had
4 done that -- had granted relief of that sort, and the
5 courts had upheld it.

6 MR. RIPPLE: Back pay certainly. Yes, back pay
7 certainly, and my memory is --

8 QUESTION: And some forms of front pay.

9 MR. RIPPLE: Some prospective maybe incident to
10 other more affirmative relief. Yes. There are some cases
11 of that.

12 Mr. Chief Justice, unless the Court has any
13 further questions, we'll submit the matter.

14 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,
15 Mr. Ripple. The case is submitted.

16 (Whereupon, at 12:04 p.m., the case in the
17 above-entitled matter was submitted.)

18
19
20
21
22
23
24
25