UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
ROSE ROMANO,	)	CASE NO. 07-23061 JPK
	)	Chapter 7
Debtor.	)	

ORDER DETERMINING DEBTOR'S MOTION FOR AN ORDER DIRECTING THE TRUSTEE-IN-BANKRUPTCY TO ABANDON THE CLAIM FOR REINSTATEMENT TO EMPLOYMENT AND TO ALLOW HER TO PROCEED ON THE CLAIM IN THE FEDERAL DISTRICT COURT ["MOTION"]

Kenneth A. Manning, as Trustee of the Chapter 7 bankruptcy estate of Rose Romano in Case No. 07-23061 ("Trustee"), entered into a compromise with the City of Hammond ("Hammond") with respect to claims arising in a law suit filed by Rose Romano ("Romano"), as plaintiff, against the city of Hammond which asserted that Hammond committed acts of discrimination against her in violation of the Americans with Disabilities Act ("ADA"). Romano objected to the Trustee's compromise, and extensive preliminary pretrial procedures have ensued to place the contested matter initiated by that objection in a position for an evidentiary hearing necessary to determine whether the court will approve the Trustee's compromise with Hammond. Late in the game in these preliminary pretrial procedures, Romano filed the Motion. Due to the novelty of the issue raised by the Motion to this court, the court directed that Romano, the Trustee and Hammond submit legal memoranda with respect to the relief requested by the Motion.[1] The briefing schedule is now closed, and the matter is now before the court for determination.

The court determines that it has full subject matter jurisdiction over all matters raised by

[1]Neither the Americans with Disabilities Act nor issues which arise under it are novel to the author of this decision. During his tenure in the office of the United States Attorney for the Northern District of Indiana, the undersigned was the offices's principal ADA attorney and the principal liaison between the United States Attorney's office and the Disability Rights section of the Civil Rights Division of the United States Department of Justice. In this capacity, the undersigned became very familiar with the ADA, particularly in the context of public access cases involving access of disabled persons to public facilities and services. However, the particular issue now before the court did not arise in any matter in which the undersigned was involved. It is this issue – not the ADA generally – which is novel to the court.

the Motion, and that it has full final judgment authority with respect to those matters. Pursuant to 28 U.S.C. § 1334(e) and delegations by the United States District Court for the Northern District of Indiana to the United States Bankruptcy Court for the Northern District of Indiana, this court has exclusive jurisdiction "of all the property, wherever located, of the debtor as of the commencement of [Romano's case], and of property of [her] estate." The matter before the court is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

The issue which is before the court is stated as follows in the opening paragraph of the Motion:

> The Debtor, Rose Romano, by and through her attorney, Stuart K. Jones, hereby moves the court, pursuant to Section 544 and 541 of the Bankruptcy Code, to order the Trustee-in-Bankruptcy to abandon Ms. Romano's claim for reinstatement to employment and to allow her to proceed on the claim in the federal district court.

The court will determine the Motion on its substantive legal merits. Both Hammond and the Trustee have presented arguments that Romano's failure to disclose her ADA claim in early and intermediate stages of her Chapter 7 bankruptcy proceeding bars/estops her from asserting the arguments which she advances in the Motion. Without taking the time to specifically address them, the court is aware that there is case law – including that of the United States Court of Appeals for the 7th Circuit – which bars an individual from asserting a cause of action on her/his own behalf in a circumstance in which that claim was not disclosed in bankruptcy proceedings and the bankruptcy case was closed without the Trustee's or the court's awareness of that claim. In the court's view, with respect to Hammond, this issue is properly raised in the case in which the non-disclosing debtor seeks to raise the claim under those circumstances, and thus in the context of this particular circumstance, properly raised in the United States District Court for the Northern District of Indiana in the lawsuit which was

commenced by Romano.[2] The concept of "estoppel" is an affirmative defense under Rule 8(c)(1) of the Federal Rules of Civil Procedure, and that is precisely how the issue has been addressed by Hammond in the District Court litigation, and precisely how it should have been addressed. Thus, Hammond's assertions with respect to this issue are left to the United States District Court. The Trustee's assertions are directed at a different subissue, i.e., Romano's ability to present the Motion to the court in a circumstance in which she did not disclose matters relating to her ADA claims to the Trustee during the initial processing of the Chapter 7 case. Because the compromise is a matter for this court to determine, that issue cannot be addressed to the United States District Court. The court is sensitive to the Trustee's arguments concerning the necessity of disclosure of claims of the nature of Romano's to the Trustee during the initial processing of the case. However, the court definitely prefers to decide the novel issue presented by the Motion on its merits. Moreover, the court notes that despite the justified chagrin expressed by the Trustee arising from Romano's essentially after-the-fact disclosure of the case to the Trustee, the Chapter 7 bankruptcy estate has experienced no actual prejudice from the late disclosure. The Trustee was able to effectively intervene in the United States District Court case and to assert the interest of the estate in that case; the Trustee was able to process the claims asserted in that case on behalf of the Chapter 7 bankruptcy estate.

Based upon the foregoing, the court determines that Romano is not estopped from presenting the Motion to the court.

A person who asserts that she has been aggrieved by a violation of the ADA in employment has access to certain remedies under the ADA. Romano has asserted her employment with Hammond was illegally terminated in violation of the ADA. In this context, the

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[2] The court takes judicial notice of the record in case number 2:06-CV-342 in the United States District Court for the Northern District of Indiana, in which this issue was raised by Hammond.

potential relief which may be accorded to Romano if she were successful in establishing illegal termination is comprised of the following spectrum, as the parties have defined the requested relief for the purposes of this case:

1. Compensatory damages for "back pay" and "back benefits" from the date of the illegal termination to the date of determination of the claims asserted by the complaint.

2. If successful in obtaining a judgment, attorney's fees incurred by the plaintiff in asserting her rights.

3. In appropriate cases, the foreword-looking remedy of reinstatement of the plaintiff to the employment denied her by illegal discrimination.

4. In appropriate cases, "front pay" <u>in lieu of and mutually exclusive of</u> the alternative foreword-looking remedy of reinstatement.

Romano concedes – as she must under applicable law – that her claims for compensatory damages (in this case back pay and the value of "back" benefits) is property of the Chapter 7 bankruptcy estate and therefore subject to the control of the Chapter 7 Trustee. She also concedes – as again she must under applicable law – that "front pay damages' are also property of the Chapter 7 bankruptcy estate, subject to the control of the Chapter 7 Trustee. Romano's Motion asserts that the potential remedy of reinstatement is a totally severable claim, apart from the remedy of front pay, which can only be asserted by the debtor individually – essentially because it has no value to the Chapter 7 estate and any employment compensation to be earned as a result of reinstatement is excluded from property of the Chapter 7 estate. From this derives Romano's argument that she alone can assert reinstatement, and that the Trustee's compromise with Hammond cannot affect her right to assert the remedy of reinstatement for alleged violations of the ADA.

Romano's argument essentially confuses the concept of severable claims or causes of action available to a plaintiff who alleges a violation of the ADA, with the concept of remedies

which may be determined to redress illegal discrimination as determined by a court. Several cases at first blush appear to support Romano's position. For example, in *Sherrell v. WIL-BFK Food Services, Inc.*, 2009 WL 3378991 (W.D.Mo. 2009) the court determined that a former bankruptcy debtor had standing to assert a claim for reinstatement, despite her claims for damages arising from violations of the Family and Medical Leave Act were property of her Chapter 7 bankruptcy estate and therefore subject to the control of the Chapter 7 Trustee. However, upon closer review, in that case the Trustee had not sought to intervene as the plaintiff in the case, and had not asserted any interest in the plaintiff/debtor's claim for reinstatement. Similarly, in *Equal Employment Opportunity Commission v. Merchants State Bank*, 554FSupp.2d 959 (D.South Dakota 2008) the court sustained the position of the EEOC that an individual's claim for reinstatement under the ADA would suffer from any interest of the asserted injured party in his bankruptcy case. However, again in that case, there is no indication whatsoever that the Chapter 7 Trustee had asserted any interest in any forward-looking remedy available to the debtor, or had compromised the estate's interest in claims of the debtor under the ADA in an all-inclusive settlement involving both back and forward-looking claims. There are other cases which the court will not cite which discuss a debtor's interest in a remedy of reinstatement with respect to alleged discriminatory conduct, and determined that the reinstatement remedy is of no value to the bankruptcy estate and is therefore valueless. However, in none of those cases is there any indication that the Chapter 7 bankruptcy Trustee had asserted any interest in any forward looking remedy or had intervened in the case to seek to control the forward looking remedies of front pay/reinstatement.

Romano has conceded that any remedy involving "front pay" with respect to the ADA violations which she has alleged are property of the bankruptcy estate, and thus subject to the Trustee's control. This concept is a uniform determination in decided cases; See, *In re Sherman,* 322BR889 (Bankr.N.D.Fla. 2004); *In re Ballard,* 238BR610 (Bankr.N.D.La. 1999).

Romano bases her contention concerning abandonment by the Trustee of assertion of the remedy of reinstatement upon a misperception of the nature of forward looking remedies in an ADA case or other cases involving alleged discrimination in which those remedies are available. Romano contends that the alternative remedies of reinstatement and of front pay are separate claims or causes of action with respect to an ADA case. In fact and in law, contentions of reinstatement or of front pay are mutually exclusive alternative remedies. Moreover, which of those remedies is appropriate in a particular case is a determination to be made independently by the trial court; it is not based upon contentions by the plaintiff as to a sought-for election of remedies, or the opposition of the defendant to one or other of the remedies. As stated in *Pace v. Pottawattomie Countryclub, Inc.,* 2009 WL 4843403 (N.D.Ind. 2009);

> The court has the discretion to order reinstatement for a violation of the ADEA. 29 U.S.C. § 626(b); *EEOC v. Century Broad. Corp.*, 957 F.2d 1446, 1462 (7th Cir.1992) (ADEA). "[R]einstatement is the preferred remedy for victims of discrimination, and the court should award it when doing so is feasible." *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 861 (7th Cir. 2001) (citations omitted) (Title VII). A court isn't, however, "required to reinstate a successful plaintiff where the result would be a working relationship fraught with hostility and friction." *Bruso v. United Airlines*, 239 F.3d at 861. "[R]einstatement may become particularly infeasible if the plaintiff would no longer enjoy the confidence and respect of [her] superiors once reinstated." *Brusov. United Airlines*, 2 39 F.3d at 862; see also *Downes v. Volkswagen of Am., Inc*., 41 F.3d 1132, 1141 (7th Cir.1994) (stating that reinstatement is the preferred remedy, but is not always appropriate). The court should consider hostility in the employment relationship and lack of an available position. *Downes v. Volkswagen*, 41 F.3d at 1141. The employer's anger or hostility toward the plaintiff for having filed suit, however, cannot be a basis to deny reinstatement. *Bruso v. United Airlines*, 239 F.3d at 862.

In *Blim, et al v. Western Electric Company, Inc.,* 731 F2nd 1473, 1478-79 (10th Cir.1984), the District Court had awarded front pay to a class of plaintiffs in lieu of repromotion. During the trial of the case, the plaintiffs indicated they would prefer front pay damages over repromotion.

Thus, in the context of this case, in *Blim* the plaintiffs had sought to "elect" a remedy of front pay damages. In reversing the District Court, the United States Court of Appeals for the 10th Circuit stated:

> The trial court awarded each plaintiff front pay from the date of judgment to the date of their respective projected dates of retirement. The amount equalled the difference between the salary being received at the time the judgment was entered and what each plaintiff would have made until the assumed retirement dates had they been repromoted. The plaintiffs originally requested the equitable remedy of repromotion to their desired section chief positions. However, at trial they indicated that they would prefer front pay damages over repromotion. Apparently all the plaintiffs except Mr. Kinghorn remain employed at Western Electric in nonsupervisory positions.
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> [9] [10] [11] [12] The district court has the equitable power to repromote the plaintiffs under the ADEA, 29 U.S.C. § 626(b). The trial court must exercise its discretion in awarding equitable remedies in light of the objectives of the statute being enforced. *Hecht Co. v. Bowles*, 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944). The district court's decision not to order offers of reinstatement must be measured against the purposes of the ADEA. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975). The ADEA has a broad purpose of insuring that "older individuals who desire to work will not be denied employment opportunities solely on the basis of age." H.R.Rep No. 950, 95th Cong., 2d Sess., reprinted in [1978] U.S.Code Cong. & Ad.News 504. Therefore, equitable remedies fashioned by the trial court which further the intent, purpose and language of the ADEA should be upheld.
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> [13] In *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir.1980), we found that the trial court did not abuse its discretion by ordering offers of reinstatement even though some plaintiffs previously stated that they would not accept reemployment with the defendant. We pointed out that reinstatement has the dual purpose of protecting the discharged employee and demonstrating the employer's good faith to the other employees. *EEOC v. Sandia Corp.*, 639 F.2d 600, 638 (10th Cir.1980). Although preferences expressed by the parties may help the trial court fashion appropriate remedies, the determination of equitable remedies rests with the court. The court's judgment should be guided by sound legal principles. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975).
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> [14] In Albemarle the Supreme Court pointed out that a district

> court may deny an equitable remedy permitted by a federal statute if it does not frustrate the central purpose of that statute. Since the trial court's decision must be examined in light of the statute's intent and purposes, the trial court should express its reasons for denying the equitable relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975).
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> The only reason stated by the trial court for not repromoting the plaintiffs was that they preferred damages. The court said:
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> "The plaintiffs were ready, willing and able to serve as Section Chiefs on the dates of the first promotions and repromotions and have been so up to the present time, although each at trial expressed*1479 a preference for 'front pay' in lieu of reinstatement."
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> The ADEA enforcement section, 29 U.S.C. § 626(b), provides for both equitable and legal remedies.
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> [15] Assuming, without deciding, that a court may award front pay under the ADEA, compare *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.1982), cert. denied, 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed.2d 113, with *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n. 4 (1st Cir.1982), we conclude that the trial court erred in granting front pay in the instant case. Reinstatement is the preferred remedy under the ADEA. The focus of the congressional statement of purpose is on the continuing employment of older workers. See 29 U.S.C. § 621. Thus, reinstatement best serves Congress' purpose in enacting the ADEA. Furthermore, an award of front pay is always somewhat speculative. We therefore hold that courts should order reinstatement under the ADEA whenever it is an appropriate remedy.
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> [16] In the instant case, the only reason that the trial court gave for awarding front pay rather than repromotion is that plaintiffs preferred damages. Standing alone plaintiffs' preference for damages clearly does not justify awarding front pay rather than reinstatement. Repromotion is particularly appropriate in the instant case. An atmosphere of hostility does not appear to exist between plaintiffs and defendant. All plaintiffs still work for defendant; all have been section chiefs, the position to which they would be repromoted. The Western Electric plant where plaintiffs work employs many section chiefs, and vacancies in that position are frequent. We hold that the trial court erred in granting front pay instead of reinstatement.

In a somewhat rambling dissertation, part of which appears to be *dicta,* in *Price v.*

Marshall Erdman & Associates, Incorporated (966 F.2nd 320, 324-26 (7th Cir. 1992) [rehearing and rehearing on En Banc denied August 4, 1992], the United States Court of Appeals for the 7th Circuit held clearly that it is the trial court's obligation, as a court of equity, to choose between reinstatement and front pay, and not the prerogative of the plaintiff, stating:

> We move to the issue of front pay. *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir.1991), itself an age discrimination case on the relevant issue, holds that both entitlement to and amount of front pay are equitable issues to be decided by the judge rather than legal issues and hence for the jury. An equity judge can always submit an issue to a jury for advice, but he is not bound by the advisory verdict. *Yatvin v. Madison Metropolitan School District,* 840 F.2d 412, 418 (7th Cir.1988); *Wilson v. City of Aliceville,* 779 F.2d 631, 635-36 (11th Cir.1986); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2335, at p. 126 (1971). The contrary is intimated in *Doyne v. Union Electric Co.*, 953 F.2d 447, 450-51 (8th Cir.1992), but its citation to *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 (8th Cir. 1982), suggests that the court confused the effect of an advisory jury's verdict (none) with the effect of a real jury's finding of fact on issues tried to the judge in the same case (preclusive). *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir.1986); *EEOC v. Century Broadcasting Corp.*, *supra*, 957 F.2d at 1463; *Davenport v. DeRobertis*, 844 F.2d 1310, 1313-14 (7th Cir.1988); *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.1990). Judge Shabaz was free to disregard the $750,000 award.
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> One reason we concluded in Fortino that front pay is an equitable issue is that it can be awarded only if reinstatement, clearly an equitable remedy, is impracticable. We shall not disturb the judge's ruling that it was impracticable in this case, though the reasons he gave-"mutual dislike and defendants' continued opinion that plaintiff is incompetent"-are not satisfactory. The passage we have just quoted implies that it makes no difference whether the employee dislikes the idea of working for the employer, or the employer dislikes the idea of having the employee work for him ("defendants' continued opinion that plaintiff is incompetent"); either way, or both ways ("mutual dislike"), reinstatement should not be ordered. A more discriminating analysis is necessary. Take first the employee's disinclination to return to working for his employer. If the disinclination is rational and sincere (rather than a maneuver to get front pay), it is a good reason for allowing the employee to elect his alternative remedy of front pay. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir.1984). The employer's

dislike of the employee's returning is a far more problematic ground for declining to order reinstatement. This would be obvious in a case of racial discrimination in which the employer pleaded hostility to the entire group (blacks, or women, or whomever) to which the plaintiff belonged, as a ground for refusing to order reinstatement. To decline to order reinstatement in such a case would reward the employer for the very attitudes that precipitated his violation of the law, by giving him a choice of remedies.

The intermediate case is where the employer dislikes the employee for reasons independent of the latter's membership in a protected class, and where the feasibility of awarding front pay in lieu of reinstatement makes the burden on the court of supervising a coerced employment relation between the parties disproportionate to any gains from giving the plaintiff his preferred remedy. In such a case a refusal to order reinstatement would be within the trial judge's equitable discretion. So a belief by the defendants that Price is incompetent could be a proper reason for denying reinstatement. The problem with using it here is that although the judge was not bound by the jury's decision to award front pay, or by the jury's decision on the appropriate size of the award, a jury's findings within its jurisdiction-here its findings that the defendants violated the Age Discrimination in Employment Act (and owed so much backpay)-bind the judge, as we noted earlier, when he goes to make findings on his part of the case, here the issue of front pay. (All this assumes of course that the jury's findings are not set aside. *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir.1987).) A finding that the defendants did not really believe Price incompetent seems implicit in the jury's verdict in his favor, since the main strut of his case was that he was more competent than the person who replaced him. If this finding can fairly be deemed entailed by the verdict, it would be binding on the district judge when he came to decide whether to order Price reinstated. *EEOC v. Century Broadcasting Corp., supra*, 957 F.2d at 1463.

But Price does not appeal from the denial of reinstatement, and we think he is right not to. It is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division. But to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation, even when as here the plaintiff is a salesman who spends much of his working time away from his office and so is not constantly rubbing shoulders with his enemies. If Price is reinstated, every time he is

> denied credit for a sale, or denied a raise or a bonus, or has a squabble with Halverson, he will be tempted to run to the district court for further equitable relief ancillary to the reinstatement order or even for a finding of contempt of the order. There is an analogy to the common law's refusal to grant specific performance of a contract of employment. A federal district court is not equipped to be the labor relations equivalent of a domestic relations court. Reinstatement in the circumstances that we have described would be justified only if front pay could not be computed.

In the context of Title VII remedies – essentially parallel to remedies under the ADA – the United States District Court for the Southern District of Indiana stated the following in *Ward v. Tipton County Sheriff Department* (937 F.Supp. 791, 796) (S.D.Ind.1996);

> A victim of discrimination in violation of Title VII is presumptively entitled to complete relief. *Hutchison v. Amateur Elec. Supp., Inc.*, 42 F.3d 1037, 1044 (7th Cir.1994) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975)). In that regard, a successful Title VII plaintiff may obtain appropriate injunctive relief, which may include (but is not limited to) reinstatement or hiring, with or without back pay, "or any other equitable relief as the court deems appropriate." See 42 U.S.C. § 2000e–5(g). Under certain circumstances, and in lieu of reinstatement, courts have the discretion to award an amount of damages for front pay.FN3 *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141 (7th Cir.1994). Front pay is an equitable substitute for reinstatement. *Dominic v. Consolidated Edison of New York, Inc.*, 822 F.2d 1249, 1253 (2d Cir.1987).
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> FN3. Front pay is a lump sum "representing the discounted present value of the difference between the earnings [an employee] would have received in his old employment and the earnings he can expect to receive in his present and future, and by hypothesis inferior, employment." *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141, n. 8 (7th Cir.1994).
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> Although reinstatement is the preferred remedy, it is not always appropriate. Hutchison, 42 F.3d at 1045. A number of factors should be considered when determining its propriety, including hostility in the past employment relationship and the absence of an available position for the plaintiff. Downes, 41 F.3d at 1141. If reinstatement is deemed inappropriate, it becomes necessary to assess the proper amount of front pay damages that would make the plaintiff whole.

In *Pals v. Schepel Buick & GMC Truck, Inc.,* 220 F3d. 495, 499-501 (7th Cir. 2000), the

United States Court of Appeals for the 7th Circuit held that the ultimate determination of whether to award reinstatement or whether to award front pay – as mutually exclusive alternative remedies – was solely the province of the trial court, stating:

> Before affirming on the basis of this forfeiture, however, we must consider the possibility that even with the parties' acquiescence a jury may not determine the amounts of back and front pay. Section 1981a(c) provides: "If a complaining party seeks compensatory or punitive damages under this section-(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section." Pals demanded and was entitled to a jury trial-but on what issues? The parties and the magistrate judge assumed (without giving the matter detailed attention) that the answer is "every issue," but that can't be right. "The issue, not the action, is the basic unit for determining jury-triability ... and the rules contemplate that in the one action some issues will be tried to the court and others will be tried to the jury." Charles Alan Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2331 (2d ed.1994). Suppose Pals and Schepel disagreed about whether reinstatement was superior to front pay. Choosing between reinstatement and front pay and, if the latter, the amount of front pay, would have been subjects for the judge under § 706(g)(1). Likewise, one supposes, with other equitable remedies: juries don't draft injunctions. Back pay and front pay are equitable remedies under § 706(g)(1) and therefore matters for the judge even after § 1981a(c), as the only published appellate decisions on point conclude. *EEOC v. W & O, supra* 213 F.3d at 619; *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n. 19 (5th Cir.1998). When assessing back pay, or awarding front pay in lieu of reinstatement, the judge must respect the findings implied by the jury's verdict. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Dranchak v. Akzo Nobel Inc.*, 88 F.3d 457, 458-59 (7th Cir.1996); *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.1990). But whatever discretion the facts allow with respect to back pay and front pay belongs to the judge rather than the jury.

To the same effect, See, *Hybert v. Hearst Corp.*, 900 F2d 1050 (7th Cir. 1990) [rehearing and rehearing on En Banc denied May 20, 1990].

The foregoing cases make clear the legal proposition that in a ADA case the alternatives of front pay and of reinstatement are alternative remedies, determined by the court exclusive of

the asserted positions of either the plaintiff or of the defendant. The concept espoused by Romano that she somehow has an election of remedies in her own right with respect to reinstatement is unsupported by any reported decision in the circumstances of this case. An excellent analysis in circumstance very similar to those in this case is stated in *Toussaint v. Howard University,* 2005 WL 6778614 (D.D.C. 2005). Rather than essentially restate the entirety of that case, the court adopts the analysis and determination of that case in support of its determination in this case. The bottom line of *Toussaint* is that the Chapter 7 Trustee is the proper party plaintiff with respect to all claims and all remedies which may be asserted by a bankruptcy debtor with respect to asserted violation of rights guaranteed by federal statutes which occurred prior to the date of filing of the bankruptcy case. The entire cause of action asserted by the debtor/plaintiff – including forward-looking remedies – is property of the Chapter 7 bankruptcy estate, and only assertable by the Trustee. As the final determination in *Toussaint* states:

> This cause of action for employment discrimination arose before plaintiff filed her bankruptcy petition. Under 11 U.S.C. § 541(a), the cause of action thus constitutes "property" of the bankruptcy estate. As a result, plaintiff's trustee is the real party in interest under Fed.R.Civ.P. 17, and, under the facts of this case, **only plaintiff's trustee may pursue the entire cause of action, regardless of the nature of the relief sought.** Accordingly, the Court will grant the motions to reconsider filed by defendant and plaintiff's trustee, and will substitute plaintiff's trustee for plaintiff in full. (emphasis supplied).

The circumstances of the instant case must be carefully noted when one views court decisions which allow a debtor/plaintiff to pursuit reinstatement, or to continue as a separate plaintiff in a pending case to assert reinstatement. If the case proceeds to trial with the Trustee as the plaintiff, it is still within the province of the trial court to award the remedy of reinstatement in lieu of front pay damages, in which event the benefits of the reinstatement award would not inure to the Chapter 7 estate. However, that is not the circumstance here.

The Trustee has determined to compromise all claims of the debtor/estate which could be asserted in the litigation pending in the United States District Court, including any forward-looking claims of which the Trustee is the sole master. Thus, if as in the case at hand, a Chapter 7 Trustee substituted as the plaintiff in an ADA action arising from conduct which occurred prior to the filing of a debtor's petition decides to compromise all remedies with respect to the alleged illegal conduct, there is no independent claim of the debtor to somehow independently pursue forward-looking remedies, whether those be front pay or reinstatement. This control over the alternative forward-looking remedies is a financial benefit to the estate and results in value to the estate for the purposes of either trial of the case and determination of remedies by the trial court, or compromise of the litigation based upon risks perceived by the Trustee and by the defendant(s) in relation to forward-looking remedies. In the context of this case, it is totally erroneous for Romano to assert that the remedy of reinstatement is valueless to the bankruptcy estate, and therefore must be abandoned pursuant to 11 U.S.C. § 554(a).

Based upon the foregoing, the court determines that Romano's Motion should be denied.

IT IS ORDERED that the Debtor's Motion for an Order Directing the Trustee-In-Bankruptcy to Abandon the Claim for Reinstatement to Employment and to Allow Her to Proceed on the Claim in the Federal District Court filed by Rose Romano is Denied.

Dated at Hammond, Indiana on February 14, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee