

January 2000

## Employment Discrimination - Gotthardt v. National Railroad Passenger Corp

Jennifer T. DeWitt

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Jennifer T. DeWitt, *Employment Discrimination - Gotthardt v. National Railroad Passenger Corp*, 30 Golden Gate U. L. Rev. (2000).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol30/iss1/11>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

## EMPLOYMENT DISCRIMINATION

### *GOTTHARDT v. NATIONAL RAILROAD PASSENGER CORP.*

191 F.3D 1148 (9TH CIR. 1999)

#### I. INTRODUCTION

In *Gotthardt v. National Railroad Passenger Corp.*,<sup>1</sup> the United States Court of Appeals for the Ninth Circuit held that front pay awards<sup>2</sup> in Title VII cases are not subject to the compensatory damages caps stated in 42 U.S.C. § 1981a (b)(3).<sup>3</sup> This was an issue of first impression in the Ninth Circuit.<sup>4</sup> Other circuits had decided the issue and were split.<sup>5</sup> The Ninth Circuit joined the majority of the federal circuits in

---

<sup>1</sup> *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999).

<sup>2</sup> Front pay is the monetary equivalent of reinstatement. It represents what the plaintiff would have earned between the date of the award and at some point in the future. As was true for Meriola, it is sometimes appropriate to grant front pay until the plaintiff's retirement. 5 EMPLOYMENT DISCRIMINATION 2d § 92.12 (Matthew Bender 1999)

<sup>3</sup> See *Gotthardt*, 191 F.3d at 1155. 42 U.S.C.A § 1981a(b)(3) states, in relevant part, that "[t]he sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party ... [\$300,000 in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year.]

<sup>4</sup> See *Gotthardt*, 191 F.3d at 1151.

<sup>5</sup> See *id.* at 1153 (citing *Hudson v. Reno*, 130 F.3d 1193, 1202-1204 (6th Cir. 1997) (stating that front pay awards do fall within the caps); *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999), *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999), *Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998) (stating that front pay awards fall outside the caps).

holding that front pay awards are not subject to the section 1981a caps.<sup>6</sup>

## II. FACTS AND PROCEDURAL HISTORY

Meriola Z. Gotthardt ("Meriola") began working for the National Railroad Passenger Corporation, dba Amtrak ("Amtrak"), in 1988.<sup>7</sup> She was an assistant engineer, working as a "fireman" [sic] on Amtrak's trains.<sup>8</sup> In 1990 and 1991, Meriola attempted to qualify for engineering positions on the Oakland to Santa Barbara Route.<sup>9</sup> Amtrak requires its engineers to qualify for each route they cover.<sup>10</sup> Qualifying for a particular route consists of passing an oral examination and actually performing the route with a supervisor present.<sup>11</sup> This "checkride" allows the applicant to demonstrate his or her skill in handling the train and negotiating the route.<sup>12</sup> Meriola attempted to qualify for the Oakland to Santa Barbara Route fifteen times.<sup>13</sup> As a result, she was removed from service in July, 1991 because she was unable to operate the train in a safe manner.<sup>14</sup> However, Meriola eventually qualified for the route in October, 1991.<sup>15</sup> During two of her attempts to qualify for the route,

---

<sup>6</sup> See *Gotthardt*, 191 F.3d at 1154.

<sup>7</sup> See *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148, 1151 (9th Cir. 1999).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 1151, 1158.

<sup>10</sup> See *id.* at 1151.

<sup>11</sup> See *Gotthardt*, 191 F.3d at 1151.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* at 1158.

<sup>14</sup> See *id.* Observers stated that Meriola did not operate the train in a safe manner. *Id.* at 1159.

<sup>15</sup> See *id.* at 1158.

## 194 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1]

Meriola endured hostile work environment sexual harassment.<sup>16</sup>

In 1993, Meriola took a position as an “overnight shift yard engineer.”<sup>17</sup> She took this position, in part, because she was suspended due to a rules violation while operating a train.<sup>18</sup> During her tenure as an overnight shift yard engineer, Meriola’s supervisors called her degrading names and engaged in other harassing behavior while at work.<sup>19</sup> Based on the harassment she endured during this period, Meriola sued Amtrak on September 13, 1993, alleging Title VII violations (“*Gotthardt I*”).<sup>20</sup> Meriola asserted that she had been discriminated against because of her sex, subjected to hostile work environment sexual harassment,<sup>21</sup> retaliated against<sup>22</sup> and falsely imprisoned.<sup>23</sup>

---

<sup>16</sup> See *Gotthardt*, 191 F.3d at 1158. The opinion does not describe the conduct that created the hostile work environment.

<sup>17</sup> See *id.* at 1151. The opinion does not indicate whether this position was a demotion; nor does it describe Meriola’s duties while she held this position.

<sup>18</sup> See *id.* at 1158, 1159.

<sup>19</sup> See *id.* at 1151. The opinion does not describe the “other harassing behavior” that Meriola endured.

<sup>20</sup> See *id.* at 1152. Title VII states that “[i]t shall be an unlawful employment practice for an employer to (1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin; or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C.A § 2000e-2(a).

<sup>21</sup> See *Gotthardt*, 191 F.3d at 1152. The Equal Employment Opportunity Commission defines hostile environment sexual harassment as conduct which “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a)(3). Such conduct must be “severe or pervasive” to constitute actionable sexual harassment under Title VII. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

<sup>22</sup> See *Gotthardt*, 191 F.3d at 1152. The following elements constitute a prima facie case of retaliation under Title VII: (1) plaintiff engaged in protected activity under Title VII (e.g., filing a complaint with the Equal Employment Opportunity Commission) (2) the employer made an employment decision adverse to the plaintiff, and (3)

Amtrak eliminated Meriola's overnight shift yard engineer position in April 1995.<sup>24</sup> Consequently, Meriola applied for an engineer position on the "Capitol Run," a route which travels through Oakland, San Jose and Sacramento.<sup>25</sup> She was trained for this route and scheduled a checkride to demonstrate her skill on the route in the presence of a supervisor.<sup>26</sup> Unfortunately, Meriola never completed the qualification process for the Capitol Run.<sup>27</sup> She took a medical leave beginning May 5, 1995 and never returned to work.<sup>28</sup> Meriola's treating psychologist, Dr. Jeanne Rivoire, later attributed this illness to Post Traumatic Stress Disorder ("PTSD"), which was caused by the harassment Meriola endured while working for Amtrak.<sup>29</sup>

Soon after leaving Amtrak, Meriola filed a second action on July 5, 1995 alleging similar Title VII violations ("*Gotthardt II*").<sup>30</sup> The United States District Court for the Northern District of California consolidated Meriola's actions.<sup>31</sup>

---

plaintiff must demonstrate a causal link between the protected activity and the employer's action. See *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999) (citing *Yartsoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987)).

<sup>23</sup> See *Gotthardt*, 191 F.3d at 1152. False Imprisonment is a common law tort. The plaintiff must prove that defendant restrained him, either by physical barriers or threats of force. Plaintiff must be aware of such a restraint and that such restraint was against his will. See W. PAGE KEETON, ET. AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 11, at 47-54 (5th ed. 1984).

<sup>24</sup> See *Gotthardt*, 191 F.3d at 1151-1152. The opinion does not indicate whether Amtrak gave a reason for eliminating Meriola's overnight shift yard engineer position.

<sup>25</sup> *Id.* at 1152.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 1152, 1155.

<sup>29</sup> See *Gotthardt*, 191 F.3d at 1152, 1155-1156. Dr. Rivoire was also Meriola's expert at trial. *Id.*

<sup>30</sup> See *id.* at 1152. The opinion does not specifically describe any other events that gave rise to *Gotthardt II*, although there were indications that Meriola's medical leave was involuntary. *Id.* at 1156.

<sup>31</sup> See *id.*

The district court dismissed the false imprisonment and retaliation claims in *Gotthardt I*.<sup>32</sup> Furthermore, the court found that Meriola failed to prove employment discrimination based on sex.<sup>33</sup> She had, however, proved that Amtrak was liable for hostile work environment sexual harassment.<sup>34</sup> Nevertheless, the court did not award damages on the hostile environment claim because Meriola "failed to present testimony regarding the extent of her damages."<sup>35</sup> Meriola appealed this denial of backpay to the Ninth Circuit.<sup>36</sup>

*Gotthardt II* was tried to a jury.<sup>37</sup> The jury returned a verdict in Meriola's favor on the hostile work environment claim and awarded her \$350,000 in compensatory damages.<sup>38</sup> However, the jury found against her on the retaliation and sex-based discrimination claims.<sup>39</sup> The district court adopted the verdict, but reduced the damages award to \$300,000 pursuant to 42 U.S.C. § 1981a(b)(3), which caps compensatory damages in Title VII cases.<sup>40</sup>

Next, the district court calculated equitable relief.<sup>41</sup> The court made three crucial findings after an evidentiary hearing.<sup>42</sup> First, the court concluded that Meriola's PTSD prevented her from returning to work at Amtrak.<sup>43</sup> Second, given

---

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See Gotthardt*, 191 F.3d at 1152.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.* *Gotthardt I* was not decided by a jury because the claims in that action arose before Congress amended Title VII 1991, which provided for jury trials in Title VII cases. *Id.* at n. 3.

<sup>38</sup> *See id.*

<sup>39</sup> *See Gotthardt*, 191 F.3d at 1152.

<sup>40</sup> *See id.* *See also, supra*, note 3.

<sup>41</sup> *See Gotthardt*, 191 F.3d at 1152.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* Dr. Rivoire's testimony indicated that Meriola's stressed condition prevented her from working altogether. *See id.* at 1156. Moreover, it is often the case

Meriola's age and background, the court found that she would be unable to begin another career.<sup>44</sup> Third, the court determined that, but for the PTSD, Meriola would have qualified for the Capitol Run route, which she had applied for before she fell ill.<sup>45</sup> Further, the court assumed that Meriola would have remained on the Capitol Run route until she retired.<sup>46</sup> Based on the findings described above, the court awarded \$124,010.46 in back pay.<sup>47</sup> The court also awarded front pay in the amount of \$603,928.37.<sup>48</sup> Amtrak did not appeal the findings of liability.<sup>49</sup> Rather, Amtrak appealed the remedies fashioned by the district court.<sup>50</sup> Meriola appealed the denial of back pay in *Gotthardt I.*<sup>51</sup>

### III. THE NINTH CIRCUIT'S ANALYSIS

As stated in Part I, the primary issue on appeal was whether the damages caps specified in 42 U.S.C. § 1981a(b)(3)

---

that hostility between the parties makes reinstatement inappropriate, either because of the litigation, or because of the hostilities that existed prior to the litigation. *See* 5 EMPLOYMENT DISCRIMINATION 2d § 92.12 (Matthew Bender 1999).

<sup>44</sup> *See Gotthardt*, 191 F.3d at 1152. Meriola was 59 years old at the time of the award. *Id.*

<sup>45</sup> *See id.* The court based this assumption on several facts. First, she was sufficiently skilled and experienced to handle the route. Second, the route was less difficult than other Amtrak routes. Third, although she had missed work on some occasions, there was no evidence that these absences were habitual or would be a problem in the future. All of these facts were appropriate considerations in calculating front pay. *See id.* at 1157.

<sup>46</sup> *See Gotthardt*, 191 F.3d at 1152-1153

<sup>47</sup> *See id.* This amount represented the pay she would have received from the date of qualification for the Capitol Run to the date the court issued its findings, minus the disability benefits she had already received, plus prejudgment interest. *See id.*

<sup>48</sup> *See id.* at 1152. This amount represented the pay and benefits Meriola would have received if she had worked as an engineer on the Capitol Run from the date of the court's decision until she reached Amtrak's mandatory retirement age of 70 years old, discounted to the present cash value. *See id.*

<sup>49</sup> *See id.* at 1153.

<sup>50</sup> *See id.*

<sup>51</sup> *See Gotthardt*, 191 F.3d at 1153.

apply to front pay awards.<sup>52</sup> The district court concluded that section 1981a(b)(3) does not cap front pay awards.<sup>53</sup> The Ninth Circuit affirmed the district court's decision.<sup>54</sup>

The Ninth Circuit also determined whether front pay was appropriate.<sup>55</sup> The court found that the district court did not err in awarding and calculating front pay as it did.<sup>56</sup> Finally, the Ninth Circuit addressed Meriola's argument that the district court erred in denying back pay in *Gotthardt I.*<sup>57</sup> Again, the Ninth Circuit affirmed the district court's decision.<sup>58</sup>

#### A. WHETHER FRONT PAY IS SUBJECT TO THE 42 U.S.C.A § 1981A CAPS

The Ninth Circuit focused on the relationship between sections 1981a, and 2000e-5(g).<sup>59</sup> Section 1981a was enacted in 1991 and authorized compensatory and punitive damages in Title VII cases.<sup>60</sup> However, section 1981a(b)(3) also caps the amount of damages, depending on the size of the employer.<sup>61</sup> In Meriola's case, such damages are capped at \$300,000.<sup>62</sup> The Ninth Circuit noted that, in addition to the damages described

<sup>52</sup> See *Gotthardt v. National Railroad Passenger Corp.*, 191 F.3d 1148, 1153 (9th Cir. 1999).

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 1151, 1159.

<sup>55</sup> See *id.* at 1155.

<sup>56</sup> See *id.*

<sup>57</sup> See *Gotthardt*, 191 F.3d at 1158.

<sup>58</sup> See *id.* at 1158, 1159.

<sup>59</sup> See *id.* at 1153. 42 U.S.C.A § 2000e-5(g) states, in relevant part: "If the court finds that the respondent has intentionally engaged in...an unlawful employment practice,...the court may enjoin the respondent...and order...reinstatement...with or without back pay...or any other equitable relief as the court deems appropriate."

<sup>60</sup> See *Gotthardt*, 191 F.3d at 1153. Prior to 1991, Title VII plaintiffs could not recover these types of damages. See *id.*

<sup>61</sup> See 42 U.S.C.A. § 1981a(b)(3).

<sup>62</sup> See *Gotthardt*, 191 F.3d at 1153 (quoting 42 U.S.C.A. § 1981a(b)(3)). Because Amtrak has more than 300 employees, section 1981a(b)(3) caps damages at \$300,000.



above, Title VII itself has always authorized courts to grant equitable relief to successful plaintiffs.<sup>63</sup> Further, it is important to recognize that when section 1981a was enacted, Congress left these provisions intact.<sup>64</sup>

With the foregoing principles in mind, the Ninth Circuit stated that whether front pay is subject to the caps depends on whether the award is a future pecuniary loss as described in section 1981a(b)(3) or equitable relief authorized under section 2000e-5(g).<sup>65</sup> The circuit split arises here.<sup>66</sup> For example, in *Hudson v. Reno*,<sup>67</sup> the Sixth Circuit held that front pay falls within the cap because front pay is not specifically stated as a type of authorized equitable relief in section 2000e-5(g).<sup>68</sup> The *Hudson* court noted that Sixth Circuit precedents have consistently treated front pay as a legal, rather than equitable, remedy.<sup>69</sup> Furthermore, the Sixth Circuit stated in *Hudson* that the future pecuniary loss described in § 1981a(b)(3) could only be front pay.<sup>70</sup> In contrast to the Sixth Circuit's approach, the majority of circuits have held that front pay is an equitable remedy within the meaning of § 2000e-5(g) and is therefore excluded from the caps by the very language of section 1981a.<sup>71</sup>

---

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* See *infra* notes 67-71 for citations to cases illustrating the circuit split.

<sup>67</sup> 130 F.3d 1193 (6th Cir. 1997) (cited in *Gotthardt v. National Railroad*, 191 F.3d 1148, 1153-1154 (9th Cir. 1999)).

<sup>68</sup> See *Gotthardt*, 191 F.3d at 1153-1154.

<sup>69</sup> See *Hudson*, 130 F.3d at 1203 (cited in *Gotthardt v. National Railroad*, 191 F.3d 1148, 1153-1154 (9th Cir. 1999)).

<sup>70</sup> See *id.* at 1204 (cited in *Gotthardt v. National Railroad*, 191 F.3d 1148, 1154 (9th Cir. 1999)).

<sup>71</sup> See *Gotthardt*, 191 F.3d at 1154 (citing *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999), *pet. for cert. filed*, 67 U.S.L.W. 3717 (U.S. May 12, 1999) (No. 98-1829); *Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998)).

## 200 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1]

The Ninth Circuit examined the language and intent of section 1981a.<sup>72</sup> The court stated that Congress included language in section 1981a that evinced an intent to leave the courts' existing equitable powers intact.<sup>73</sup> Moreover, the Ninth Circuit noted that, before section 1981a was enacted, courts had treated front pay as an equitable remedy under section 2000e-5(g).<sup>74</sup> This remedy was used to make plaintiffs whole when reinstatement was impractical.<sup>75</sup> Since Congress is presumed "to have had knowledge of the interpretation given to the incorporated law," the Ninth Circuit stated that Congress understood front pay to be one of the existing equitable remedies and therefore not within the cap imposed by section 1981a(b)(3).<sup>76</sup>

The court also quoted portions of the Congressional Record which indicated that the drafters of section 1981a recognized that front pay was an existing equitable remedy not subject to the section 1981a caps.<sup>77</sup> In addition, the Ninth Circuit found the Equal Employment Opportunity Commission's ("EEOC") view of this issue persuasive.<sup>78</sup> The EEOC stated that front pay is one of the types of equitable relief contemplated in section 2000e-5(g) and is therefore not a type of compensatory

---

<sup>72</sup> See *Gotthardt*, 191 F.3d at 1154.

<sup>73</sup> See *id.* (citing 42 U.S.C.A. § 1981a(a)(1), (b)(2)). Section 1981a(a)(1) states, in relevant part, that "the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, *in addition to any relief authorized by section [2000e-5(g)] of the Civil Rights Act of 1964...*" (emphasis added). Section 1981a(b)(2) states, in relevant part, that "[c]ompensatory damages awarded under this section *shall not include backpay, interest on backpay, or any other type of relief authorized under section [2000e-5] of the Civil Rights Act of 1964.*" (emphasis added).

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *Gotthardt*, 191 F.3d at 1154.

<sup>78</sup> See *id.* at 1154 n.6 (citing EEOC: Policy Guidance on Compensatory and Punitive Damages under 1991 Civil Rights Act, 8 Lab. Rel. Rep. Fair Empl. Prac. Manual (BNA) 405:7091, 7094 (July 7, 1992)).

damages subject to the section 1981a caps.<sup>79</sup> The Ninth Circuit stated that, since the EEOC is charged with interpreting Title VII, it was appropriate for the court to defer to the agency's interpretation.<sup>80</sup>

Based on the analysis described above, the Ninth Circuit concluded that front pay was not subject to the section 1981a caps.<sup>81</sup> The court then discussed the district court's calculation of Meriola's front pay award.<sup>82</sup>

#### B. WHETHER MERIOLA'S FRONT PAY AWARD WAS APPROPRIATE

The Ninth Circuit's discussion centered on two determinations: first, the preliminary question of whether awarding front pay was appropriate; and second, the actual calculation of the award.<sup>83</sup>

Before front pay is available, a Title VII plaintiff must prove that the employer's unlawful practices caused a loss of employment.<sup>84</sup> Stated another way, this causal connection requires a plaintiff to show that he or she was forced to leave the job because of discriminatory working conditions.<sup>85</sup> The district court concluded that there was a nexus between Meriola's intolerable working conditions and her loss of employment.<sup>86</sup> The district court based its finding primarily on the testimony

<sup>79</sup> See *id.* (citing EEOC: Policy Guidance on Compensatory and Punitive Damages under 1991 Civil Rights Act, 8 Lab. Rel. Rep. Fair Empl. Prac. Manual (BNA) 405:7091, 7094 (July 7, 1992)).

<sup>80</sup> See *id.* (citing *Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 370 (9th Cir. 1999)).

<sup>81</sup> See *id.* at 1155.

<sup>82</sup> See *Gotthardt*, 191 F.3d at 1155.

<sup>83</sup> See *id.* at 1155, 1156.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* Specifically, the district court found, and the Ninth Circuit agreed, that Amtrak's hostile work environment caused Meriola's PTSD, which forced her to take a medical leave and eventually resign. There was some indication that Amtrak forced Gotthardt to take the medical leave. See *id.*

## 202 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1]

of Meriola's psychologist, Dr. Rivoire.<sup>87</sup> Dr. Rivoire testified that the hostile working environment at Amtrak caused Meriola's PTSD, which in turn caused Meriola to resign.<sup>88</sup> In reviewing for clear error, the Ninth Circuit found that the district court's determination was plausible and therefore declined to disturb the ruling.<sup>89</sup>

Amtrak argued on appeal that the district court should have ordered reinstatement rather than front pay.<sup>90</sup> While it is true that reinstatement is the preferred remedy, front pay is an appropriate award when reinstatement is impossible.<sup>91</sup> Amtrak argued that reinstatement was appropriate because it could offer Meriola several positions in a non-hostile work environment.<sup>92</sup>

However, the district court concluded that Meriola's medical and psychological condition made returning to Amtrak impossible.<sup>93</sup> Furthermore, Meriola's circumstances prevented her from entering another career.<sup>94</sup> Therefore, the Ninth Circuit concluded that the district court did not abuse its discretion.<sup>95</sup>

---

<sup>87</sup> See *Gotthardt*, 191 F.3d at 1156 & n.9

<sup>88</sup> See *id.* at 1156.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *Gotthardt*, 191 F.3d at 1156.

<sup>93</sup> See *id.* Dr. Rivoire's testimony indicated that Meriola's stressed condition prevented her from working altogether. See *id.* Moreover, it is often the case that hostility between the parties makes reinstatement inappropriate, either because of the litigation, or because of the hostilities that existed prior to the litigation. See LARSON, 5 EMPLOYMENT DISCRIMINATION 2d § 92.12 (1999).

<sup>94</sup> See *Gotthardt*, 191 F.3d at 1156. Meriola's medical and psychological condition, age, and background indicated that returning to Amtrak, or working anywhere else, would be impossible. See *id.* at 1152, 1156.

<sup>95</sup> See *id.*

Amtrak next argued that the district court's front pay calculation was incorrect.<sup>96</sup> Specifically, Amtrak asserted that the court abused its discretion by determining that Meriola would have qualified for the Capitol Run and worked steadily on that route until she retired.<sup>97</sup> Amtrak further argued that the district court failed to account for Meriola's duty to mitigate her damages and the effect of disability payments in the future.<sup>98</sup>

The Ninth Circuit addressed Amtrak's arguments in turn.<sup>99</sup> As to Meriola's projected career path, the Ninth Circuit stated that the calculation was only appropriate if Meriola would have qualified for the Capitol Run absent the hostile working environment at Amtrak.<sup>100</sup> The Ninth Circuit concluded that Meriola possessed the skills and ability to qualify for the Capitol Run.<sup>101</sup>

The Ninth Circuit also rejected Amtrak's contention that Meriola's award should have accounted for her duty to mitigate her damages.<sup>102</sup> Specifically, the court stated that, since her PTSD rendered her unable to work at any job, she could not be charged with a duty to find work in order to mitigate her damages.<sup>103</sup> Finally, the Ninth Circuit turned to Amtrak's assertion that future disability benefits that Meriola might receive should be deducted from her award.<sup>104</sup> The court rejected Amtrak's argument because Amtrak could only speculate as to whether Meriola would be entitled to these benefits in the fu-

---

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* Specifically, Amtrak argued that future disability payments should have been deducted from Meriola's award. *See id.*

<sup>99</sup> *See Gotthardt*, 191 F.3d at 1156-1158.

<sup>100</sup> *See id.* at 1156.

<sup>101</sup> *See id.* at 1157. Amtrak supervisors reported that Meriola was "a highly capable engineer." Evidence also indicated that the Capitol Run was less difficult than other routes. These facts were sufficient to support the finding that Meriola would have qualified for the Capitol Run. *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See Gotthardt*, 191 F.3d at 1157-1158.

## 204 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1]

ture.<sup>105</sup> Therefore, the Ninth Circuit concluded that front pay was appropriate in Meriola's case and that the district court did not err in its calculation of the award.<sup>106</sup>

### C. WHETHER THE DISTRICT COURT ERRED IN DENYING MERIOLA'S BACK PAY

Meriola appealed the district court's denial of back pay in *Gotthardt I.*<sup>107</sup> Meriola asserted that denying her back pay was clearly erroneous because she presented evidence that she lost 168 days of work.<sup>108</sup> Amtrak conceded that she had lost 168 days of work.<sup>109</sup> However, the district court found that Meriola did not prove that her absences were due to Amtrak's unlawful conduct.<sup>110</sup>

The Ninth Circuit stated that the burden of proving damages is on the plaintiff.<sup>111</sup> Accordingly, Meriola had to prove, not simply that she missed work, but that her absences were due to Amtrak's discrimination.<sup>112</sup> Meriola's missed work arose from her removal from service after she could not qualify for the Oakland-Santa Barbara Route and a disciplinary suspen-

<sup>105</sup> See *id.* at 1158. Interestingly, there is also a circuit split on whether collateral benefits, such as disability, should be taken into account when calculating front pay. See *id.* (citing *Lussier v. Runyon*, 50 F.3d 1103, 1107-1108 (1st Cir. 1995) (holding that courts should deduct such benefits from front pay awards) and *Hamlin v. Charter Township of Flint*, 165 F.3d 426, 433 (6th Cir. 1999) (holding that courts are prohibited from deducting collateral benefits from front pay)). The Ninth Circuit did not have to decide this issue here because Amtrak's assertion that Meriola would be entitled to disability benefits was speculative. See *id.*

<sup>106</sup> See *Gotthardt*, 191 F.3d at 1158.

<sup>107</sup> See *id.* Back pay is the difference between what the plaintiff actually earned and what the plaintiff would have earned in the absence of defendant's discrimination. See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *Gotthardt*, 191 F.3d at 1158.

<sup>112</sup> See *id.*

sion of 56 days for a rule violation.<sup>113</sup> She did not prove that these instances were the result of Amtrak's discrimination.<sup>114</sup> As to Meriola's removal, Amtrak had a legitimate nondiscriminatory reason for removing Meriola from service: she was unable to handle the route safely.<sup>115</sup> Thus, it was her lack of skill on the route, not discrimination, that resulted in her missed work.<sup>116</sup> As to the 56 day suspension, Meriola alleged that the usual suspension for similar violations was 30 days.<sup>117</sup> However, the district court found that the difference in treatment was not discriminatory because other engineers had received similar suspensions for the same violations.<sup>118</sup> Thus, because Meriola could not prove her damages, the Ninth Circuit affirmed the district court's denial of back pay in *Gotthardt I.*<sup>119</sup>

#### IV. IMPLICATIONS OF THE DECISION

The Ninth Circuit wisely joined the majority of circuit courts in holding that the section 1981a caps do not apply to front pay awards. Because the United States Supreme Court recently denied a petition for certiorari on this issue,<sup>120</sup> the split in the circuits remains. The Court should therefore grant certiorari on the next available opportunity to definitively determine whether front pay awards are subject to the section 1981a caps. Until such a resolution occurs, the calculation of front pay will continue to depend on where a Title VII plaintiff happens to suffer discrimination. It is not likely that the drafters of section 1981a intended this result.

---

<sup>113</sup> See *id.*.

<sup>114</sup> See *id.*.

<sup>115</sup> See *id.* at 1158-1159.

<sup>116</sup> See *Gotthardt*, 191 F.3d at 1158-1159.

<sup>117</sup> See *id.* at 1159.

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

<sup>119</sup> See *id.*.

<sup>120</sup> See *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999), *pet. for cert. denied*, 120 S.Ct. 48 (1999).

## 206 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 30:1]

In resolving the circuit split, the Court should follow the reasoning of the Ninth Circuit and majority.<sup>121</sup> While the Sixth Circuit's statement that a future pecuniary loss could only be front pay<sup>122</sup> is a plausible reason to include front pay in the caps, the Ninth Circuit persuasively concluded that plain language and legislative history of section 1981a indicate that front pay awards are excluded from the caps.<sup>123</sup> In addition, the Court should defer to the EEOC's determination that front pay is not subject to the section 1981a caps.<sup>124</sup>

*Jennifer T. DeWitt\**

---

<sup>121</sup> See *supra* notes 59-82 and accompanying text.

<sup>122</sup> See *supra* notes 67-70 and accompanying text.

<sup>123</sup> See *supra* notes 59-82 and accompanying text.

<sup>124</sup> See *Gotthardt* at 1154 n.6 (citing EEOC: Policy Guidance on Compensatory and Punitive Damages under 1991 Civil Rights Act, 8 Lab. Rel. Rep. Fair Empl. Prac. Manual (BNA) 405:7091, 7094 (July 7, 1992)).

\* J.D., Golden Gate University School of Law, 2000. B.A., Anthropology, DePauw University, 1996. Editor-in-Chief, Golden Gate University Law Review. Many thanks to Scott Sanford for his hard work on the Ninth Circuit Survey issue and his helpful comments on this summary. In memory of Ruth Elizabeth Smith, whose grace and strength continue to inspire me.