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jurisdictional scope of the Clayton Act. Such an action should not be attributed to Congress without a very clear demonstration of congressional intent. Yet, the Supreme Court in *American Building* reached its conclusion on the basis of arguments that, while valid, fall short of clearly establishing such a congressional intent.

The direct practical implications of the Supreme Court's decision in *American Building* are not crucial since most section 7 actions do involve corporations actually participating in interstate commerce; only a relatively small number of important cases will fall outside the reach of the Clayton Act as a result of the decision. More importantly, however, the *American Building* decision, coupled with the *Gulf Oil v. Copp Paving Co.* decision, suggest a hostility on the part of the Burger Court toward vigorous enforcement of the federal antitrust laws. This hostility may be reflected in the Court's handling of other antitrust issues.

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Civil Rights—A Back Pay Award Standard: Albemarle Paper Co. v. Moody

Title VII of the Civil Rights Act of 1964,[1] as amended by the Equal Employment Opportunity Act of 1972,[2] represents the Congressional effort to eradicate discrimination in public and private employment on the basis of race, color, religion, sex or national origin.[3] Since July 2, 1965[4] the federal judiciary has possessed discretion under Title VII to award back pay to employees and applicants for employment who prove that they were the victims of unlawful employment practices.[5] In exercising this discretion the lower federal courts have devel-

1. 42 U.S.C. § 2000e (1970), *as amended*, (Supp. II, 1972).
2. 42 U.S.C. § 2000e (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).
3. *Id.* § 2000e-2(a)(1)-(2) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-2(a)(1)-(2) (1970).
4. This is the effective date of *id.* § 2000e (1970).
5. *Id.* § 2000e-5(g) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(g) (1970). This section provides that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay* . . . or any other equitable relief as the court deems appropriate (emphasis added).

oped inconsistent and even conflicting standards[6] to determine whether or not to award back pay. On June 25, 1975, almost ten years after the effective date of Title VII, the United States Supreme Court addressed this question for the first time in *Albermarle Paper Co. v. Moody*.[7] The majority opinion,[8] after rejecting the standard applied by the Fourth Circuit, designed a stringent requirement that a district court must meet to justify a denial of back pay to a plaintiff who has successfully proven he was the victim of an unlawful employment practice.[9]

The plaintiff class in *Moody* was comprised of present and former black employees of Albemarle Paper Company's Roanoke Rapids, North Carolina paper mill. One of their major allegations[10] was that the plant's present job seniority system was perpetuating the overt segregation that existed in the plant's departmental assignments prior to July 2, 1965.[11] They sought injunctive and back pay relief.[12] The district court found that the job seniority system constituted an unlawful employment practice and ordered the company to implement a system of plantwide

6. *See* note 43 and accompanying text *infra*.

7. 95 S. Ct. 2362 (1975).

8. *Id.* Mr. Justice Stewart wrote the majority opinion. Justices Marshall, Rehnquist and Blackmun filed concurring opinions. Mr. Chief Justice Burger filed an opinion concurring in part and dissenting in part. Mr. Justice Powell took no part in the consideration or decision of the case.

9. *Id.* at 2370, 2373.

10. The plaintiffs also alleged that the company's pre-employment testing program was being used as a pretext for discrimination. They argued that the company's requirement that applicants for employment in the skilled job classifications possess a high school diploma and pass both a verbal and nonverbal intelligence test was not a valid job-related requirement in accordance with Griggs v. Duke Power Co., 401 U.S. 424 (1971). The district court refused to enjoin this testing program. The Fourth Circuit reversed the district court holding that Albemarle had failed to justify their testing procedures under the "business necessity" test outlined in *Griggs*. The Supreme Court affirmed the Fourth Circuit's decision and remanded the issue to the district court for consideration in accordance with the Court's opinion. For the Supreme Court's coverage of this issue see 95 S. Ct. at 2375-81. For a general coverage of pre-employment testing and the consequences of the *Griggs* decision see Comment, *Employment Testing: The Aftermath of Griggs v. Duke Power Co.*, 72 COLUM. L. REV. 900 (1972).

11. 95 S. Ct. at 2367-68. The district court found that the company had utilized racially discriminatory employment practices that placed blacks in only certain departments in the plant prior to July 2, 1965. It also found that though these practices had been abolished the "job seniority" system that had been instituted under a new collective bargaining agreement with the Halifax Local No. 425, in 1968, was perpetuating this prior overt segregation. This was due to the fact that the former black lines of progression were tacked on to the bottom of the former white lines thus placing the black employees in the lowest paying job categories. Therefore, when layoffs were necessary, the blacks, being in the lowest job categories, were the first to be laid off. White employees who occupied positions in the higher job categories were thus isolated from such actions. The district court ordered the company to institute a system of plantwide seniority where such actions as layoffs and promotions would be determined by the number of years one had with the company, not by one's job classification. *Id.*

12. *Id.* at 2367.

seniority. The court refused, however, to award plaintiffs back pay for losses attributable to the job seniority system because there was no evidence of bad faith non-compliance with the Act.[13] Additionally, the court concluded that Albermarle would be "substantially prejudiced" by such an award since the claim for back pay was not made until five years after the suit was filed.[14] The Fourth Circuit Court of Appeals reversed the denial of back pay, holding that: "[A] plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust."[15] The Supreme Court, although agreeing with the Fourth Circuit's reversal of the district court, rejected the "special circumstances" standard.[16] Instead, the majority fashioned a standard based upon their interpretation of the congressional objectives behind the enactment of Title VII.[17] In articu-

13. *Id.* at 2368. The district court based this conclusion on its findings that Albemarle had as early as 1964 begun an active recruitment of blacks for its Maintenance Apprenticeship Program and that certain lines of progression in the plant had been merged on its own initiative. *Id.* at 2387 n.1.

14. *Id.* at 2368. In an answer to Albemarle's motion for summary judgment filed on November 22, 1966, the plaintiffs stated that they were seeking only injunctive relief. Then, on June 4, 1970, almost five years after the institution of the suit, the plaintiffs informed Albemarle that they planned to amend their complaint and include a prayer for back pay relief. Moody v. Albemarle Paper Co., 474 F.2d 134, 145 (4th Cir. 1973).

15. Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973). The court indicated that the situation in which an employer has instituted a certain employment practice relying upon a state's women's protective statute would be a "special circumstance." *Id.* at 142 n.5. *See* notes 29-31, 57-59 and accompanying text *infra* for a further discussion of states' women's protective statutes and Title VII.

16. 95 S. Ct. at 2370. The Fourth Circuit's standard was based upon Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam), which dealt with the proper standard to be applied by a district court in determining whether to award attorney's fees to a successful plaintiff in Title II (public accomodations) litigation. Though the Supreme Court stated that this would be an appropriate case for determining whether to award attorney's fees to a successful Title VII plaintiff as well, it rejected its use as a precedent concerning back pay awards since it was not directly on point. 95 S. Ct. at 2370.

17. As discussed in Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966), Title VII of the Civil Rights Act of 1964 was a compromise measure of the Eighty-eighth Congress. Much of the controversy centered around the question who was to possess the power to enforce the provisions of the Act and provide remedies for discriminatees. Though there was basic reliance upon the National Labor Relations Act, there was one important deviation from that model that reflects the compromise nature of the Act. Where the NLRA provided for an administrative agency (NLRB) possessing both investigatory and judicial functions, the EEOC under Title VII was given only investigatory and conciliatory functions. *Compare* 29 U.S.C. §§ 160-61 (1970) *with* 42 U.S.C. § 2000e-4(f) (1970), *as amended*, (Supp. II, 1972). This difference reflected the opinion of most congressmen that the final determination of employment discrimination should rest with the federal judiciary, and that the litigation burden should fall upon those private litigants alleging such discrimination. Vaas, *supra* at 436. 42 U.S.C. § 2000e-6 (1970), *as amended*, (Supp. II, 1972), authorized the Attorney General to bring suit on behalf of discriminatees in "pattern and practice" situations. The Equal Employ-

lating these objectives they stressed the use of the National Labor Relations Act as a model in the drafting of Title VII,[18] particularly as to the remedies section, which is almost a verbatim copy of the same provision in the NLRA.[19] Also noted was the fact that under NLRB case law, back pay has been liberally awarded[20] as a means of fulfilling the dual objectives of "reimbursing employees for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges."[21] The majority in *Moody* concluded that the congressional objectives behind Title VII's enactment were analogous to those of the NLRA.[22] Therefore, a denial of back pay to a plaintiff involved in Title VII litigation, who had successfully proven the existence of unlawful discrimination, could only be deemed proper if such a denial would not frustrate the Act's general objectives of eliminating discrimination in employment and providing the victims of such discrimination compensation for economic losses they had suffered.[23]

Prior to *Moody*, the development of conflicting judicial standards governing the award of back pay under Title VII resulted from inconsistent judicial responses to the major defenses that have been asserted by employers to justify a denial of back pay.[24] Probably the most frequently asserted defense has been based upon the language of section 2000e-5(g), which authorizes an award of back pay "[i]f the court finds that the respondent has intentionally engaged in or is intentionally

ment Opportunity Act of 1972, 42 U.S.C. § 2000e (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970), gave the EEOC the power to initiate litigation on behalf of individuals but the final determination of discrimination and the awarding of appropriate relief remains with the federal courts. For a detailed discussion of the EEOA of 1972 see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); Note, *In America, What You Do Is What You Are: The Equal Employment Opportunity Act of 1972*, 22 CATHOLIC U.L. REV. 455 (1973).

18. 110 CONG. REC. 7214 (1964). *See also* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 64-65 (1964); Vaas, *supra* note 17, at 433.

19. *Compare* 29 U.S.C. § 160(c) (1970) *with* 42 U.S.C. § 2000e-5(g) (1970), *as amended*, (Supp. II, 1972).

20. *See, e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

21. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965). *Accord, Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act*, 118 CONG. REC. 7168 (1972) (remarks of Senator Williams).

22. The Court also relied upon its decision in Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971), in identifying the primary objective of Title VII: to eliminate employment discrimination throughout the economy. 95 S. Ct. at 2371.

23. 95 S. Ct. at 2373.

24. The issue of back pay is of course only reached after the existence of unlawful employment practices has been established by the plaintiff. For a more extensive coverage of defenses which have been asserted by employers see Annot., 21 A.L.R. FED. 472, 511-34 (1974).

engaging in an unlawful employment practice . . . ."[25] The argument has been that "intentional" means the plaintiff must prove that the employer's motive in using a particular employment practice was to discriminate. Though this construction has received some acceptance,[26] most courts have instead interpreted "intentional" to mean that the challenged employment practice was undertaken deliberately rather than by accident.[27] This position stresses that relief under this section is designed to *compensate* victims for the consequences of unlawful practices rather than to *punish* employers for the motivation underlying such practices.[28]

A unique version of the "non-intentional" defense has been asserted in a number of sex discrimination cases. This defense involves an employer allegation that the employment practice complained of was instituted in good faith reliance upon a state statute ostensibly designed to protect women,[29] and has been accepted by some courts as a complete defense to a back pay award.[30] Other courts have viewed such good faith reliance as an "intentional" violation within the meaning of the statute, but have nevertheless affirmed denials of back pay as properly within the trial courts' discretion.[31]

Employers have also argued that their present good faith efforts to comply with Title VII should give the court justification for denying back pay. This defense typically involves plaintiffs who, like those in

25. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(g) (1970).

26. *E.g.*, United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

27. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to rule 60*, 404 U.S. 1006 (1971).

28. *E.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

29. These statutes typically limit the number of hours a woman can work per day, or the number of pounds she may be required to lift regularly on the job. *See, e.g.*, ARK. STAT. ANN. § 81-601 (1960); CAL. LABOR CODE §§ 1350, 1350.5 (West 1971).

30. *E.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

31. *E.g.*, Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); Manning v. International Union, 466 F.2d 812 (6th Cir.), *cert. denied*, 410 U.S. 946 (1972); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972).

Moody, are victims of employment practices that are not discriminatory, but that nevertheless perpetuate the effects of prior overt discrimination.[32] Although occasionally accepted at the district court level,[33] this defense has been rejected by all three of the circuit courts of appeal in which it has arisen on the grounds that back pay, by its statutory nature, is compensatory rather than punitive.[34] The only "good faith" defense consistently accepted by the courts is the narrow one contained in section 2000e-12(b) of the Act, which provides that an employment practice instituted in reliance upon a written interpretation or opinion of the EEOC will not constitute an unlawful practice.[35]

Employers have on occasion asserted that the plaintiff was not entitled to back pay, even though unlawful discrimination had been proven, because the plaintiff's claim for such relief had not been filed in a timely manner. The Fourth and Fifth Circuits[36] have both rejected this defense relying upon rule 54(c) of the Federal Rules of Civil Procedure[37] and the broad compensatory purpose behind Title VII. However, it has been indicated that this defense would be effective if the employer could prove actual prejudice as a result of the belated claim.[38]

32. *E.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1972).

33. Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *rev'd*, 495 F.2d 437 (5th Cir. 1974). This defense was also accepted by the district judge in *Moody*. 95 S. Ct. at 2368.

34. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973). The Fifth Circuit's response in *Johnson, supra* at 1376, is representative:

> Goodyear's argument completely misconstrues the nature of a back pay award. The entire thrust of this contention is based on the premise that back pay is punishment for its misdeeds and thus the court in good conscience should consider the motive of the employer in imposing the "penalty." This proposition has been totally rejected by our court. . . . Our Circuit has been steadfast in its determination to insure that sufficient affirmative relief be provided to vindicate the rights guaranteed by Title VII. In short, back pay awards are not designed to punish the employer but to economically elevate the victims to the status which is rightfully theirs (footnotes omitted).

35. 42 U.S.C. § 2000e-12(b) (1970). Cases in which this particular defense has been raised have turned on the issue of whether the interpretation allegedly relied upon was actually "a written interpretation or opinion of the EEOC." *E.g.*, Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to rule 60*, 404 U.S. 1006 (1971).

36. Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971). *See also* Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Rosen v. Public Serv. Elec. & Gas Co., 409 F.2d 775 (3d Cir. 1969).

37. FED. R. CIV. P. 54(c) requires that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

38. *E.g.*, Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Robinson

Additional defenses[39] that have received inconsistent treatment by the lower federal courts have been based upon the uncertain state of the law surrounding back pay,[40] the difficulty in determining the eligibility of discriminatees for back pay,[41] and the difficulty in ascertaining the amount of back pay to award.[42] The inconsistent standards employed by the lower federal courts to govern back pay awards, demonstrated by the unpredictable judicial responses to employer defenses, were expressly noted by the Supreme Court in granting certiorari in *Moody*.[43]

Viewed in the context of prior judicial ambiguity, the primary significance of the *Moody* opinion is its definitive resolution of this judicial uncertainty in favor of a consistently liberal approach toward the award of back pay. Evident throughout the opinion is the proposition that a denial of back pay should be the exception rather than the rule, once a finding of discrimination and economic loss by the discriminatee has been made. This orientation is clearly revealed by the Court's statement that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[44] The affirmation of a liberal approach is

v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971).

39. Two other defenses which are not relevant to the development of judicial standards governing an award of back pay in the *Moody* context have been adequately treated elsewhere. For defenses based on class action requirements *see* Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781 (1974). *See also* 95 S. Ct. at 2370 n.8. For defenses based upon the appropriateness of back pay claims by the government on behalf of discriminatees in "pattern and practice" suits see Annot., 21 A.L.R. FED. 472, 504-08 (1974).

40. *E.g.*, Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974) (defense rejected); United States v. N.L. Indus. Inc., 479 F.2d 354 (8th Cir. 1973) (defense accepted); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971) (defense rejected).

41. *E.g.*, Norman v. Missouri Pac. R.R., 497 F.2d 594 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 826 (1975) (defense accepted); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (defense rejected); United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) (defense accepted).

42. *E.g.*, Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975) (defense rejected); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (defense rejected); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (defense accepted); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *dismissed pursuant to Rule 60*, 404 U.S. 1006 (1971) (defense rejected).

43. 95 S. Ct. at 2369. *Compare* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973) *with* Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

44. 95 S. Ct. at 2373.

also exemplified by the Court's rejection of the district court's "no bad faith" reason for denial of back pay.[45] The Court reasoned that "Title VII is not concerned with the employer's good intent or absence of discriminatory intent for Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[46] The only exception to the Court's firm rejection of the "good faith" defense is the narrow one expressly provided for in section 2000e-12(b).[47]

The carefully articulated standards concerning back pay awards in *Moody* are firmly based upon a perceptive review of the legislative history[48] and prior judicial interpretations of the Act.[49] Having earlier identified the *primary purpose* of Title VII to be the achievement of equality of employment opportunities,[50] the Court rejected as inconsistent with that purpose Albemarle's contention that a district court has virtually unfettered discretion to award or deny back pay,[51] and that the statute provides no further guidance.[52] Instead, they reasoned that any discretion that exists to deny back pay after a finding of unlawful discrimination must be derived from an examination of the possible roles that such an award would have in achieving the congressional objectives of Title VII.[53] Relying upon language from the Eighth Circuit in *United States v. N. L. Industries*,[54] the majority concluded that back pay awards could further the primary objective of guaranteeing equality of employment opportunity by providing employers with a catalyst to reexamine and reevaluate their own employment practices and could thereby lead to the eradication of discrimination through self compliance.[55] The secondary objective of the Act, to compensate or "make

45. *Id.* at 2374.

46. *Id.* This reasoning is the same as that expressed by the various circuit courts of appeals in their rejection of the "good faith compliance" defense discussed in the text accompanying notes 32-35 *supra*, and the majority view of the definition of "intentional" in section 2000e-5(g) discussed in text accompanying notes 25-28 *supra*.

47. The Court stressed the narrowness of this defense saying, "it is not up to the courts to upset this legislative choice to recognize only a narrowly defined 'good faith' defense." *Id.* at 2374 n.17. *See* text accompanying notes 32-35 *supra*.

48. *See* notes 17-22 and accompanying text *supra*.

49. *See* text accompanying notes 24-43 *supra*.

50. The Court also relied upon Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), in identifying this primary objective. 95 S. Ct. at 2371.

51. 95 S. Ct. at 2370.

52. *Id.* at 2370-71. *See* note 16 *supra*.

53. 95 S. Ct. at 2371-72.

54. 479 F.2d 354 (8th Cir. 1973).

55. 95 S. Ct. at 2371-72. For the contrary conclusion drawn by Mr. Chief Justice Burger in his dissent, *see id.* at 2387-88, in which he reasons as follows: "By the same token, if employers are to be assessed backpay even where they have attempted in good

whole" the victims of unlawful discrimination, is obviously supported by an award of back pay.[56] This analysis of the interrelationship between the statutory objectives and back pay results in an almost total repudiation of trial court discretion, once unlawful discrimination has been established.

The *Moody* decision leaves some uncertainty concerning two defenses to back pay awards. One still unsettled defense involves an employer trapped between the dictates of Title VII and a state's women's protective statute.[57] The Court declined to rule on the validity of those decisions that have affirmed denials of back pay under such circumstances.[58] However, cases of this type should be of decreasing significance in the future, since a number of these statutes have been invalidated by lower courts.[59] In jurisdictions in which this has not yet occurred, employers who recognize this judicial trend should rely upon similar local statutes only if actively enforced by state officials. Even under such circumstances, an employer could be reasonably prompted by the *Moody* decision to seek a declaratory judgment as to the validity of the state statute to foreclose any possibility of subsequent liability for back pay.

The other unsettled defense involves the question whether the lateness of the request for back pay in *Moody* was a sufficient reason for denying back pay. Though the majority indicated that a denial on this ground could prevail despite the *Moody* standard, it remanded the issue to the district court for a determination whether Albemarle had been *in fact* prejudiced and whether the plaintiffs' conduct was excusa-

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faith to conform to the law, they will have little incentive to eliminate marginal practices until bound by a court judgment."

56. *See* text accompanying notes 28, 34, 46 *supra.*

57. *See* text accompanying notes 29-31 *supra.*

58. 95 S. Ct. at 2374 n.18.

59. *E.g.*, Burns v. Rohr Corp., 346 F. Supp. 994 (S.D. Cal. 1972); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972). These cases have relied upon the supremacy clause of the United States Constitution and 42 U.S.C. § 2000e-7 (1970), which reads as follows.

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

The effect of such invalidations upon back pay claims is exemplified in Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972), in which the court denied back pay for the period in which the employer had in good faith relied upon a California women's protective statute; but authorized such an award to the plaintiff for a period after the statute had been declared invalid and the employer had nonetheless continued to rely upon it. For the EEOC's position on this subject see 29 C.F.R. § 1604.2(b) (1974).

ble.[60] If the district court does find that Albemarle was unexcusably prejudiced by plaintiffs' late claim and denies back pay, then it must carefully articulate the grounds upon which its conclusion is based.[61] The majority emphasized that review by the Fourth Circuit of such a finding would be governed by the familiar "clearly erroneous" and "abuse of discretion" tests.[62] Mr. Justice Marshall devoted his entire concurring opinion to this issue, concluding that Albemarle had not been substantially prejudiced and that the plaintiffs' actions were excusable.[63] However, Mr. Chief Justice Burger in his dissent stated that the district court had not abused its discretion on this issue.[64] The practical impact is that the Court's handling of this issue in both substance and tone seems to undercut the liberal approach taken by the majority towards back pay awards in general. Although this aspect of the decision could be fatal to the efforts of the *Moody* plaintiffs to secure back pay and could likewise exert an adverse effect on an unknown number of pending Title VII cases, it offers but limited solace to employers who continue to resist the broad egalitarian mandate of the Act. In view of expansive Supreme Court decisions under the Act during the last few years, it may reasonably be anticipated that most recently filed complaints automatically include a claim for back pay; certainly this will be true in the post-*Moody* era. Consequently, even if Justice Marshall's well-reasoned analysis of the laches defense is not accepted by the district court on remand, the *Moody* opinion will effectively achieve its primary objective of using the threat of a back pay award to coerce voluntary employer compliance with the requirements of Title VII.

The standard applied by the majority in *Moody* is a stringent one. The defenses that remain available to employers faced with back pay claims are extremely limited. This will hopefully have the effect of increasing the number of employment discrimination disputes that are settled without litigation and quicken the pace of employers in taking affirmative action to comply with Title VII. It is only through such self-compliance that the primary objective of Title VII, "to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,"[65] can be met.

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60. 95 S. Ct. at 2375.
61. *Id.* at 2373 n.14.
62. *Id.* at 2375.
63. *Id.* at 2383-84.
64. *Id.* at 2388.
65. United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).