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Harnessing Discretionary Justice in the Employment Discrimination Cases: The *Moody* and *Franks* Standards

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"Attainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."†

I. INTRODUCTION

The proliferation of federal discrimination statutes has posed for the federal courts new and difficult questions that have generated a new round of debate concerning the role of the judiciary in a modern statutory setting. Part of the debate concerns the authority of the federal courts pursuant to the doctrine of equitable discretion to deny or otherwise limit injunctive relief in the face of a clear or proven violation of a federal statute. This question recently surfaced in *Weinberger v. Romero-Barcelo*,[1] in which Justice White, writing for the Supreme Court, stated that the "grant of jurisdiction to insure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."[2] Mr. Justice Powell concurred in the opinion of the Court but agreed with Mr. Justice Stevens, the lone dissenter, that Congress may limit a court's equitable discretion in granting remedies under a particular statute, and that some statutes may constrain discretion more than others.[3] This debate also has generated a great deal of scholarly attention.[4] This Article grows out of the larger debate but has as its focus a more limited thesis.

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† Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)).

1. 456 U.S. 305 (1982).

2. *Id.* at 313.

3. *Id.* at 321.

4. *See, e.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (critical discussion of the characteristics of injunctions differentiating them from other remedies); G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that the courts should have the power to treat statutes in precisely the same way that they treat common law); Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982) (arguing that when a court of equity is confronted on the merits with a continuing violation of statutory law, it has no discretion or authority to balance the equities to permit that violation to continue); Laycock, Book Review, 57 TEX. L. REV. 1065 (1979) (reviewing O. FISS, THE CIVIL RIGHTS INJUNCTION (1978)); Mikva, Book Review, 96 HARV. L. REV. 534 (1982) (reviewing G. Calabresi, A. COMMON LAW FOR THE AGE OF STATUTES (1982)); Coffin, Book Review, 91 YALE L.J. 827 (1982) (reviewing G. Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982)). *See also* G. MCDOWELL, EQUITY AND THE CONSTITUTION (1982).

The national policy against discrimination in employment on the basis of race, sex, national origin, religion, and age is firmly embodied in a host of federal statutes and regulations.[5] Although Congress has established two enforcement schemes for these statutes—administrative and judicial—the federal courts have the ultimate enforcement responsibility.[6] The courts often bifurcate the trials in employment discrimination cases because of complex legal rules, the types and quantum of proof that the courts must evaluate to determine the substantive liability issues, and problems of fashioning effective relief. The liability determination phase of the trial, referred to as stage I proceedings, is only the first "sensitive and difficult"[7] step a court faces when a plaintiff or a class of plaintiffs seeks redress from employment discrimination. In the relief stage, referred to as stage II proceedings, a court faces the equally sensitive and difficult responsibility of framing appropriate relief that must be designed to serve a dual purpose: to remedy past violations and to ensure that the defendant will not engage in similar unlawful conduct in the future.[8] The focus of this Article is on the statutory authority of the courts in the stage II proceedings to deny or otherwise limit complete relief in employment discrimination cases.

The basic thesis of this Article is that the Supreme Court has, in *Albemarle Paper Co. v. Moody*[9] and *Franks v. Bowman Transportation Co.*,[10] substantially

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5. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 621–634 (1976 & Supp. IV 1980); Equal Pay Act, 29 U.S.C. § 206(d) (1976 & Supp. III 1979); Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e to 2000e–17 (1976 & Supp. II 1978). *See also* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION (1980); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983).

6. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Congress has provided a mandate to the federal courts under each of these laws to develop theories of liability, standards of proof, and theories of relief through the use of injunctive relief so that, to the extent possible, all prohibited forms of discrimination can be eliminated "root and branch."

The Equal Employment Opportunity Commission (EEOC), established as the federal enforcement agency under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e–5 (1976), has been given the responsibility for administrative enforcement of claims of employment discrimination arising under Title VII, the Equal Pay Act, 29 U.S.C. § 206(d) (1976), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1976 & Supp. III 1979). President Carter's Reorganization Plan No. 1, effective October 1, 1979, Executive Order No. 12068, Fed. Reg. 28,971 (June 20, 1978). The purpose of the Reorganization Plan was to consolidate in one federal administrative agency, to the extent practicable, all of the federal enforcement efforts. The private right of action is retained under all the acts, *e.g.*, Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act.

7. United States Postal Service Bd. of Governors v. Aikens, 103 S. Ct. 1478, 1482 (1983). The federal courts have faced three generations of issues in the employment discrimination cases. The first generation issues are those primarily procedural in nature. The second generation issues are those involving the theories of liability, and the types and quantum of proof necessary to establish a violation under the laws prohibiting discrimination in employment. Finally, the third generation issues involve the task of formulating effective relief. *See* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225, 228 (1976). This Article deals with the third generation issues.

8. The designation of stage I and stage II proceedings in the employment discrimination cases was initially developed in a line of class action cases in the Fifth Circuit. *See, e.g.*, United States v. United States Steel Corp., 520 F.2d 1043, 1053–54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 443–44 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257, 259 (5th Cir. 1974). The court first used the terms "stage I" and "stage II" in United States v. United States Steel Corp., 520 F.2d 1043, 1053–54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976). *Accord*, Stewart v. General Motors Corp., 542 F.2d 445, 450–53 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). FED. R. CIV. P. 42(b) authorizes a court to "order a separate trial . . . of any separate issue." The bifurcated procedure may also be used in the individual cases. The Supreme Court has recognized the appropriateness of bifurcated proceedings in employment discrimination cases. International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).

9. 422 U.S. 405 (1975).

10. 424 U.S. 747 (1976).

narrowed the circumstances that can be relied on by lower courts attempting to apply the traditional notions of equitable discretion to deny or otherwise limit complete and necessary injunctive relief for proven violations in the employment discrimination cases. Although the lower courts have recognized that *Moody* limits the circumstances in which complete relief may be denied under the doctrine of equitable discretion,[11] they have not consistently followed the mandate of *Moody* and *Franks* that requires the application of "principled . . . standards"[12] in the exercise of equitable discretion to remedy proven violations in the employment discrimination cases. The purpose of this Article, then, is to analyze *Moody* and *Franks* and to identify the major guidelines dictated by the Supreme Court for the lower courts to follow. These guidelines were enunciated by the Court to limit reliance on equitable discretion, which "varies like the Chancellor's foot,"[13] frustrates important national goals embodied in the federal statutes on employment discrimination,[14] and "produces different results . . . [in cases] that cannot be differentiated in policy."[15]

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11. *See, e.g.*, Palmer v. General Mills Inc., 600 F.2d 595, 598 (6th Cir. 1979) (*Moody* "laid down extensive guidelines which it ruled were to limit the exercise of the discretion given the trial judge to award or refuse to award backpay [where a finding of discrimination has been made]"); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 469–71 (D.C. Cir. 1976) (*Moody* clarified the scope of discretion to deny relief in employment discrimination cases, but the court noted that no courts had addressed the question whether there is discretion to limit as well as deny back pay).

12. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

13. *Id.* at 417 n.10 (citing Gee v. Pritchard, 36 Eng. Rep. 670, 674 (1818)).

14. *Id.* at 417.

15. *Id.* (citing Moragne v. States Marine Lines, 398 U.S. 375, 405 (1970)). The discussion in this Article is based on the assumption that the plaintiff or a class has established a violation in stage I under the applicable statute on employment discrimination. The Article is further limited to claims of employment discrimination based on federal statutory law. For an excellent discussion of the role of equitable discretion and federal statutory law generally, see Plater, *supra* note 4. The author of this Article found Professor Plater's article both helpful and provocative.

The principal emphasis in this Article is on Title VII, but the award of injunctive relief is subject to the doctrine of equitable discretion regardless of whether the claim arises under Title VII, the Equal Pay Act, or the Age Discrimination in Employment Act. *See, e.g.*, Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 213–15 (1959) (issuance of an injunction under the Fair Labor Standards Act rests within the sound discretion of the district court); Shultz v. Mistletoe Express Service, Inc., 434 F.2d 1267, 1271 (10th Cir. 1970) (when a district court mistakenly believes that an injunction is mandatory once a violation is established, it will be reversed under the abuse of discretion standard). *See also* Lorillard v. Pons, 434 U.S. 575, 584 n.13 (1978) (Age Discrimination in Employment Act). In addition, the courts have regularly used the substantive and procedural theories developed in the Title VII cases as analytical models in the equal pay and age discrimination cases. Brennan v. Cities Stores, Inc., 479 F.2d 235 (5th Cir. 1973) (Equal Pay Act). The recent decision of the Supreme Court in County of Washington v. Gunther, 452 U.S. 161 (1981), construing the Bennett Amendment to Title VII, 42 U.S.C. § 2000e–2(h), has attempted to harmonize the relationship between Title VII and the Equal Pay Act.

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e–1 to 2000e–17 (1976 & Supp. II 1978) ("Title VII"), makes it unlawful for employers (public and private), labor organizations, and employment agencies to discriminate on the basis of race, sex, national origin, or religion in "terms, conditions and privileges of employment," or to classify employees or applicants for employment in "any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" an employee or applicant for employment "because of race, sex, national origin or religion." *Id.* § 2000e–2(a). If a court finds that a defendant has engaged in or is intentionally engaging in practices prohibited by the Act, it may issue injunctive relief and order "such affirmative action as may be appropriate," including back pay reaching two years before the plaintiff filed a charge with the Equal Employment Opportunity Commission. *Id.* § 2000e–5(g). A prevailing plaintiff is also entitled to an award of reasonable attorney's fees. *Id.* § 2000e–5(k).

The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), prohibits an employer from discriminating on the basis of sex in the payment of wages when employees of opposite sex are performing jobs that require equal skill, effort, and responsibility and which are performed under substantially the same working conditions, unless justified by one of the four enumerated affirmative defenses: a seniority system, a merit system, a system that measures pay by quality or quantity of production, or any other factor not based on sex. The Equal Pay Act was enacted in 1963, as an amendment to the Fair Labor Standards Act (FLSA), Pub. L. No. 88–38, 77 Stat. 56 (1963). If a plaintiff proves a substantive violation of the Act, a court may order relief as provided by the FLSA, including unpaid wages and an additional amount as "liquidated damages," 29 U.S.C. § 216(b), (c) (Supp. III 1979). Recovery is normally limited to two years, but is

To aid in an understanding of the effect of *Moody* and *Franks* on the scope of equitable discretion in the stage II proceedings, the source and nature of the issue the Court addressed in these cases will be outlined briefly in Part II of this Article. Part III raises and discusses the question whether it is possible to identify a unitary purpose permeating the federal laws prohibiting various forms of discrimination. A discussion of this question is helpful because Congress' purpose in enacting a statute, and the enforcement scheme established to accomplish that purpose, informs a court of its authority to order relief upon a finding of a violation. *Moody* and *Franks* are analyzed in Part IV. Finally, Parts V and VI discuss and summarize the Supreme Court guidelines the lower federal courts are mandated to follow in stage II proceedings.

II. The Source and Nature of the Problem

In the stage II proceedings of employment discrimination cases the federal district courts are concerned with tailoring remedies. The law of remedies[16] deals with the nature and scope of relief to which a plaintiff may be entitled after he or she or the class represented by the plaintiff has proved a violation of a protected substantive right. Judicial remedies can be classified in several different ways. Thus, for example, it is possible to classify remedies as either equitable or legal. This classification is based upon the history of the development of the courts of law and equity at common law; these courts developed as separate institutions with separate rules of substance, procedure, and relief. It is also possible to separate remedies into four broad categories: damages or monetary relief designed to compensate a plaintiff for economic loss; restitutional relief designed to prevent unjust enrichment; coercive, equitable or injunctive relief backed by the contempt power of a court; and declaratory relief designed to clarify the substantive rights of the parties.[17]

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extended to three years for a "willful violation." 29 U.S.C. § 255 (1976). In 1974, the definition of "employer" in the FLSA was extended to include public agencies, *id.* § 203(d), thus bringing within its coverage state, local, and federal employers.

The EEOC may seek injunctive relief prohibiting future violations of the Equal Pay Act, as well as a restraining order against the withholding of wages due for past violations. In contrast to Title VII and the Age Discrimination in Employment Act, an individual discriminated against may not bring an action for prospective relief. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 581 (1978); Carey v. White, 375 F. Supp. 1327 (D. Del. 1974). A prevailing party is entitled to attorney's fees.

The Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. §§ 621 to 634 (1976 & Supp. IV 1980), makes it unlawful for employers (public and private), labor organizations, and employment agencies to discriminate against any individual between the ages of forty and seventy except, for example, when age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or when the difference in treatment is based on a factor other than age. *See generally* EEOC v. Wyoming, 103 S. Ct. 1054, 1056–58 (1983). A plaintiff who prevails on his or her substantive claim is entitled to "legal and equitable" relief under section 7(b), 29 U.S.C. § 626(b) (1976) and to attorney's fees. *Id.*

16. The term "remedies" has been described as "chameleonic" because, when the context shifts, its meaning takes on different colors and because of the continuing effort to distinguish the concept of a "right" from the concept of a "remedy." K. Parker, Modern Judicial Remedies 10 (1975). I have attempted to use the term "relief" whenever appropriate to avoid the confusion that the "rights/remedy" debate entails.

17. *See* Dobbs, Handbook on the Law of Remedies § 1.1 (1973). The vast array of remedial relief was developed at common law under the private law model of adjudication. The private law model traditionally has been a process of resolving disputes among private parties. The public law model of adjudication developed primarily in connection with public interest litigation and differs significantly from the private law model of adjudication. For a discussion of the

Except where Congress has specifically mandated a particular form of relief or has otherwise limited the form of relief that a court may award upon a finding of a statutory violation, the federal courts have broad discretion under their inherent equitable power to decide the form and extent of relief.[18] Congress has specified the availability of both legal and equitable relief under some statutes on discrimination in employment,[19] but the only form of relief under other statutes is equitable or injunctive.[20]

As one commentator has so aptly noted, the major theme that runs throughout injunctive or equitable relief is judicial discretion; the cases "abound with quaint statements, such as that an application for an injunction is an appeal to the chancellor's conscience; that the injunction is a discretionary remedy; or that a court of equity has the inherent power to create and fashion a flexible remedy."[21] Two of the venerable formulas of equity jurisprudence that have survived the modern statutory setting are that the basis for injunctive relief is irreparable injury and inadequacy of legal remedies, and that an appeal to equity is an appeal to the court's discretion to balance the equities.[22]

Since Congress has not specifically mandated that any particular form of relief such as back pay, reinstatement, or a hiring preference must be awarded upon a finding of unlawful employment discrimination, and because Congress preserved the traditional discretionary powers of the courts to formulate appropriate relief,[23] a major question the lower courts were required to answer was the extent to which traditional notions of equitable discretion remained useable standards for granting, denying or otherwise limiting complete relief in the stage II proceedings. Early in the enforcement efforts under Title VII, the courts adopted a fundamentally liberal philosophy when construing their remedial authority under section 706(g)[24] of the Act. In *Asbestos Workers Local 53 v. Vogler*,[25] for example, one of the leading pre-*Moody* cases on section 706(g), the Fifth Circuit held that although a district court

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distinction between the two modes of adjudication, *see* Chayes, *The Role of The Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Because employment discrimination litigation in both the class action and individual action cases implicate the public interest, this litigation more nearly resembles the public law model rather than the private law model of adjudication. *See generally* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978).

18. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982); TVA v. Hill, 437 U.S. 153, 193 (1978).

19. The Court has characterized all forms of relief under Title VII as equitable. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975). *See also* Lorillard v. Pons, 434 U.S. 575, 584 (1978). The Age Discrimination in Employment Act provides for both legal and equitable relief. 29 U.S.C. § 626(c)(1) (Supp. III 1979); Lorillard v. Pons, 434 U.S. 575 (1978) (upholding the right to trial by jury for legal relief under the Age Act). The Equal Pay Act also provides for legal and equitable relief. 29 U.S.C. § 206(d) (1976).

20. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (relief under Title VII is equitable relief); Lorillard v. Pons, 434 U.S. 575, 584 (1978) (discussing the relationship between legal and equitable relief available under the Age Discrimination in Employment Act).

21. O. FISS, INJUNCTIONS 74 (1972). *See also* Plater, *supra* note 4.

22. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982).

23. *See supra* note 19.

24. 42 U.S.C. § 2000e–5(g) (1976). Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–1 to 2000e–17 (1976 & Supp. II 1978) makes it unlawful for public and private employers to discriminate on the basis of race, sex, national origin or religion. Section 706(g) sets out the authority of the district courts to order relief upon a finding of a violation of the Act. *See infra* text accompanying notes 94–97.

25. 407 F.2d 1047 (5th Cir. 1969).

is vested with a large measure of discretion in molding a decree, a trial court must not simply parrot the language of the Act's prohibitions, but is permitted, if not required, to order such affirmative relief as may be appropriate: "Where necessary to ensure compliance with the Act, the District Court [is] fully empowered to eliminate the present effects of past discrimination" and to bar similar conduct in the future.[26] The basic remedial model of equitable discretion was deemed to be twofold: relief for past violations and the prevention of similar conduct in the future.

Although the broad philosophical standard found in *Vogler* became the basic framework for tailoring relief, the courts nevertheless began to formulate different and conflicting standards on the application of this principle based upon a perceived distinction between the various forms of relief and the mode—individual or class action—in which the claims were presented to the courts. In the seniority discrimination cases the courts adopted the "rightful place" theory of relief.[27] Under the rightful place theory, identifiable victims of seniority discrimination were entitled to be credited with the seniority standing they would have had but for the unlawful employment practices of the employer and union. The courts specifically held, however, that the rightful place theory does not entitle a victim of discrimination to "bump" an incumbent employee who had obtained a competitive economic and employment advantage as a result of the practices found to be unlawful; the theory was designed to prevent the award of employment opportunities on an unlawful basis in the future.[28] In the testing and educational requirements cases, the courts usually enjoined the employer from the continued use of these devices until validated under accepted methodologies; rarely did the court require the employer to adopt objective selection and promotion practices.[29]

The courts differed on the proper standard of discretion in the back pay cases. Some courts held that back pay should be denied unless the plaintiff proved that the unlawful employment practice had been "intentional" in the sense that the defendant was motivated by a subjective desire to discriminate.[30] Most courts, however, construed the term "intentional" to mean only that the challenged employment practice was deliberate rather than accidental.[31] Other courts had adopted varying forms of a

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26. *Id.* at 1052–53.

27. *See* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The rightful place theory of relief was first advanced in Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967), and initially adopted by the courts in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See also* Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). The viability of the rightful place theory has been questioned in light of International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

28. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 268–69 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

29. *See, e.g.*, Stevenson v. International Paper Co., 516 F.2d 102 (5th Cir. 1975); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

30. *See, e.g.*, United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 116 (1973); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Or. 1969).

31. *See, 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); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

good faith defense. In the sex discrimination cases, for example, some courts held that back pay could be denied where a defendant's practice was based upon a state statute enacted to afford special protection to women.[32] Other courts viewed the reliance upon state protective legislation for women as intentional discrimination, but nevertheless denied back pay as a proper exercise of discretion.[33] Still other courts adopted either an "exceptional circumstances"[34] or a "special circumstances"[35] standard.

Although the authority of the federal courts to order race-specific or sex-specific relief quotas had been widely accepted,[36] the courts had not established uniform standards to determine when quotas were appropriate. Some courts held that quotas were appropriate only in the hiring discrimination cases and not in the promotion discrimination cases.[37] Other courts held that quotas were appropriate only in those cases in which the defendant had engaged in a long and egregious history of past discrimination.[38] The courts also appeared to consider the status of the defendant, whether public or private, as relevant to the appropriateness of quota relief.[39]

The difference in application of equitable discretion was further reflected in a comparison between class actions and individual cases. Some courts refused to award complete relief to plaintiffs who opted to proceed on an individual basis rather than on a class action basis, even though the plaintiff was able to prove a pattern and practice of unlawful discrimination in many of the terms and conditions of employment similar to the practices challenged in class action cases.[40] The rationale used to deny individual relief in the systemic cases not brought as class actions was that the plaintiff had failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure.[41] Even after Congress rejected the notion that discrimination involved discrete and isolated instances of intentional attempts to treat individuals differently because of, for example, race or sex,[42] the courts continued to rely upon

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32. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

33. Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246 (3d Cir. 1973); Manning v. International Union, 466 F.2d 812, 816 (6th Cir.), *cert. denied*, 410 U.S. 946 (1972).

34. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 253 (5th Cir. 1974).

35. Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973), *aff'd on other grounds*, 422 U.S. 405 (1975).

36. *See* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 560–68 (1981).

37. *See, e.g.*, Kirkland v. N.Y. State Dep't of Correctional Serv., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

38. *See, e.g.*, White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977).

39. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

40. *Compare, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) (allowing employment discrimination class actions under "private attorney general" theory) *with, e.g.*, Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976), *vacated and remanded*, 431 U.S. 952 (1977); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971) (refusing broad based relief to individual plantiffs because action not brought as a class action). *See also* Note, *To What Extent Can a Court Remedy Classwide Discrimination in an Individual Suit Under Title VII?*, 20 ST. LOUIS U.L.J. 388 (1976); Comment, Goodman v. Schlesinger *and the Headless Class Action*, 60 B.U.L. REV. 348 (1980).

41. *See infra* note 40.

42. The legislative history of the 1972 amendments to Title VII states that:

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply

Rule 23 to limit or otherwise deny complete relief to individual plaintiffs who proved systemic discrimination.[43]

The discharge and refusal-to-hire cases are perhaps the best illustrations of situations in which the lower courts relied upon equitable discretion to grant, deny, or otherwise limit complete relief. The different results reached in these cases, however, could not be justified by policy considerations. The plaintiffs in the discharge and refusal-to-hire cases often sought relief in the form of reinstatement or hiring preferences. Although the courts did not rely on the traditional unwillingness of the courts of equity to enforce contracts for personal service,[44] they nevertheless grounded their decisions in traditional principles of equity. Some courts characterized reinstatement and hiring preferences as extraordinary equitable remedies and were willing to order reinstatement only in those cases in which the plaintiff had suffered from egregious forms of discrimination.[45] Other courts established a strong presumption in favor of reinstatement or a hiring preference and placed the burden on the defendant to prove that this form of relief should not be granted.[46] All of the courts prior to *Moody* and *Franks*, however, whether strongly in favor of or strongly opposed to reinstatement as a matter of course, grounded their decisions in traditional notions of equitable discretion such as irreparable injury, inadequacy of legal relief, and the obligation of the court to balance the equities of the competing interests of the parties.[47] The balancing of the equities principle was the primary factor on which the different results in similar cases were reached, and even under this principle the interests of the plaintiff and defendant were the principal focus, with little attention given to the public interest in the elimination of unlawful employment discrimination.

In light of the liberal philosophical standard that the courts enunciated on their discretionary authority under section 706(g), it is difficult to explain these different and conflicting results. A major factor appears to be that the lower courts felt compelled, in the absence of guidance from Congress or the Supreme Court, to ground their philosophical standard on traditional notions of equitable discretion such as irreparable harm, inadequacy of the legal remedy, and the need to balance the competing interests of the private parties, without factoring the public interest into the calculus.[48]

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intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progressions, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971). *See also* Franks v. Bowman Transportation Co., 424 U.S. 747, 765 n.21 (1976).

43. *See supra* notes 40 & 42.

44. *See generally*, D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 929 (1973); Sampson v. Murray, 415 U.S. 61, 92 n.68 (1974).

45. *See, e.g.*, Young v. Edgcomb Steel Co., 499 F.2d 97 (4th Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Ash v. Hobart Mfg. Co., 483 F.2d 289 (6th Cir. 1973); Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973); United States v. Dillion Supply Co., 429 F.2d 800 (4th Cir. 1970). *Compare, e.g.*, Burton v. Cascade School Dist. Union High School No. 5, 512 F.2d 850 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 839 (1975) *with* Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969).

46. *See, e.g.*, Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026–28 (1st Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); Hairston v. McLean Trucking Co., 62 F.R.D. 642, 671 (M.D.N.C. 1974), *aff'd in part, rev'd in part*, 520 F.2d 226 (4th Cir. 1975); Dobbins v. Local 212 IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

47. *See, e.g., supra* notes 45 & 46.

48. *See id.*

Another reason appears to be that in the stage II proceedings in both the class action and the individual cases, the courts found that cloaking their results in traditional notions of discretion allowed them to avoid complex and technical problems inherent in judicial attempts to remedy past discrimination by restructuring multifaceted employment practices.[49] The courts recognized, even before *Moody* and *Franks*, that formulating effective and complete relief required a court to engage in a "quagmire of hypothetical judgments"[50] to determine the rightful place of victims of discrimination. A further reason appears to be that while the courts were willing to abandon the private law model of adjudication in establishing theories of liability in the stage I proceedings, they felt compelled to retain the private law model for stage II relief proceedings.[51]

III. Legislative Purpose and Enforcement Mechanisms

A. *Legislative Purpose*

The purpose behind congressional enactment of remedial legislation, and the identities of the parties on whose behalf the legislation is passed, are not always clear. The purpose of some legislation is clearer when Congress specifies the purpose in a preamble or purpose clause. In the absence of an express statement, though, the purpose can be subject to much debate. Congress has used both approaches with laws prohibiting discrimination in employment.[52] Even when Congress has included a purpose clause, the courts must often resort to the legislative history to flesh out the congressional intent since the purpose of the legislation is critical to a determination of the nature and scope of the relief a court can order.[53]

It is difficult to identify a unitary purpose underlying the various forms of discriminatory policies and practices Congress has made unlawful, because the historical and social causes of discrimination do not arise from a single source. Dis-

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49. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1183 (5th Cir. 1978).

50. *See id.*

51. *See* Chayes, *supra* note 17.

52. The Preamble to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1976), provides:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skills, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

The final version of Title VII does not have a purpose or preamble clause and thus, the question whether this statute is designed to protect group rights or individual rights has generated much controversy. Support for both views is found in the seminal Title VII case, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

53. *See* TVA v. Hill, 437 U.S. 153, 194–95 (1978) (The purpose and language of a federal statute controls the relief a court may order.) Thus, for example, Congress has withdrawn the injunctive power from the federal court in labor disputes except in limited circumstances. 29 U.S.C. § 101 (1976); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

For a discussion of the debate over the purpose of Title VII, *see* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. Rev. 531, 538–42 (1981). *See also* Abernathy, *Title VI and the Constitution: A Regulatory Model For Defining "Discrimination,"* 70 Geo. L.J. 1 (1981).

crimination against women is based on traditions and historical perceptions about the role of women in society and thus arises from social and psychological factors of complex origins.[54] Discrimination against blacks is based on the historical perception of blacks as an inferior race, a perception that has its foundation in the institution of slavery.[55] Obedience to a higher law is, in part, the basis for religious discrimination.[56] The status of race and sex are immutable characteristics that last a lifetime, but individuals often move in and out of the groups protected by the laws prohibiting age and religious discrimination.

Notwithstanding the different contours and underlying causes of the various forms of discrimination and the difficulty of uncovering the reasons why Congress may have banned various forms of discrimination in employment, it is possible to make some generalizations about the legislative purposes that provide the foundations for these laws. First, the laws prohibiting discrimination establish a national policy that certain forms of discrimination are inconsistent with our democratic form of government.[57] Second, discrimination on the basis of race, sex, national origin, and religion is an affront to human dignity and self-esteem.[58] Third, on the economic and social levels, discrimination results in the waste of human resources and creates an unnecessary burden on the community.[59] Finally, the public interest is best served by the elimination of various forms of discrimination that constitute artificial, arbitrary, and unnecessary barriers to gainful employment when unrelated to job performance and ability.[60]

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54. The Supreme Court declared:

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963). The solution was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Id.*

Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

In a similar vein, the Third Circuit has declared that the Equal Pay Act "was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 908 (1970). *See also* Ammons v. Zia Co., 448 F.2d 117, 119 (9th Cir. 1971) ("both [the Civil Rights Act and the Equal Pay Act] 'serve the same fundamental purpose'"); Dothard v. Rawlinson, 433 U.S. 321, 343 (1977) (Marshall, J., dissenting); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

55. *See generally* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975).

56. *See generally* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599 (1971).

57. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971); Miller v. International Paper Co., 408 F.2d 283, 294 (5th Cir. 1969) ("The ethic which permeates the American dream is that a person may advance as far as his talents and his merits will carry him.")

58. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 235–36 (1982) (a victim of employment discrimination needs employment to restore self-esteem).

59. *See, e.g.*, Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (discrimination in employment is one of the most deplorable forms in our society, for it deals not with the "outer benefits" of being an American citizen, but rather with the ability to provide decently for one's family in a job or profession that he or she chooses).

60. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

B. *Enforcement Schemes*

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment on the basis of race, sex, national origin, or religion.[61] Initially, several senators presented civil rights bills at the session of Congress that eventually enacted Title VII.[62] The various bills proposed a range of enforcement schemes, but the model receiving the most attention was the National Labor Relations Board (NLRB).[63] The NLRB has the primary responsibility of enforcing the national policy on labor-management relations embodied in the National Labor Relations Act (NLRA).[64] A fundamental role of the NLRB is to strike a balance between the legitimate competing interests of labor and management in accordance with the statutory guidelines provided in the NLRA.[65] The NLRB has both investigatory and judicial functions and the courts have held that the NLRB is vested with considerable discretion in establishing rules and remedies to carry out the policy of the Labor Act.[66] The federal courts play a very limited role in the enforcement of the NLRA.[67]

Although some provisions of Title VII were patterned after provisions of the NLRA,[68] Congress ultimately decided not to adopt the NLRA enforcement model but chose instead to establish three interrelated enforcement schemes: private suits in federal courts by aggrieved individuals;[69] an administrative agency, the Equal Employment Opportunity Commission (EEOC), with investigatory powers but no enforcement authority except through "informal methods of conference, conciliation, and persuasion,"[70] and pattern and practice litigation in federal court by the Attorney General.[71]

The enforcement mechanisms that Congress established for the national policy against discrimination in employment reflect the opinions of some members of Congress that the final determination of what constitutes unlawful employment practices and the relief from these practices should be made by the federal judiciary.[72] The rationale for ultimately preferring the federal judiciary to enforce Title VII was based on the belief by some members of Congress that employers and labor unions would thereby have a fairer forum in which to establish innocence.[73] The decision of Congress to vest final enforcement authority in the federal courts was thus a political

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61. Title VII § 703(a)(1), (a)(2), 42 U.S.C. § 2000e (1976).

62. *See* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 & 431 n.2 (1966).

63. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975).

64. *See, e.g.*, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

65. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

66. *See, e.g.*, Leedom v. Kyne, 358 U.S. 184 (1958).

67. *See, e.g.*, UAW Local 238 v. Scofield, 382 U.S. 205 (1965); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

68. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–17 (1975).

69. Title VII § 706(b), (f)(1), 42 U.S.C. § 2000e-5(b), (f)(1) (1976).

70. *Id.*

71. Title VII § 707, 42 U.S.C. § 2000e-6 (1976).

72. H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 2 U.S. Code Cong. & Ad. News 2391 (1964).

73. *Id.* at 2401–08.

decision to select one form of discretionary justice over another. It appears, therefore, that Congress was unwilling to remit the enforcement power to effectuate the national policy against discrimination to the form of discretionary justice administered by a federal administrative agency.[74]

C. *The Interests Protected: Public and Private*

The laws against discrimination in employment are designed to protect public and private interests. The blending of these interests is found in all of the laws. The enforcement provisions of Title VII, for example, as originally introduced in Congress in 1963, were patterned after those of the NLRA.[75] The EEOC was to have been an independent federal agency, like the NLRB, with the authority to issue cease and desist orders.[76] This original enforcement scheme was primarily designed to protect the public interest in eliminating discrimination throughout the economy; the individual right to be free from unlawful discrimination was subordinated to this larger public interest.[77] Title VII, as eventually enacted by Congress, however, denied all enforcement authority to the EEOC, and the agency was left only with informal methods of conciliation and persuasion to effectuate the broad remedial purpose of the Act.[78] Congress substituted private suits for agency enforcement of the Act in an amendment that allowed a private plaintiff to bring an action in federal court after the exhaustion of administrative remedies.[79] The amendment indicated an apparent shift from the primary emphasis on the public interest to a dual emphasis on the vindication of both public and private interests.[80]

The modification of Title VII by Congress did not signal a subordinate role for the vindication of a strong public interest in the enforcement scheme. The concern for the public interest was retained in two forms. First, the EEOC, even without independent enforcement authority, was given an important, albeit limited, role in the enforcement scheme. The EEOC was given, for example, the responsibility for the receipt, investigation, and informal resolution of claims arising under the Act.[81] The Commissioners could file commission charges whenever there were reasonable grounds to believe that a violation of the Act had occurred.[82] The EEOC could appear as amicus curiae in private civil actions and could initiate an action in federal court to compel compliance with a court decree that had been entered in a privately initiated civil action.[83] On a different level, the Attorney General was given authority to seek

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74. *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964). For a perceptive and critical discussion of the role of discretion in the administrative context, *see* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

75. *See* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

76. *Id.*

77. *Id.*

78. Title VII § 205(b), 42 U.S.C. § 2000e-5 (1976).

79. Title VII § 706(b), 42 U.S.C. § 2000e-5(b) (1976).

80. Title VII § 706(a), 42 U.S.C. § 2000e-5(a) (1976).

81. Title VII § 706(i), 42 U.S.C. § 2000e-5(i) (1976) (compliance enforcement provision); General Counsel Opinion Letter, December 3, 1965, *First Digest* 41 (1966); Commission Decision, Nov. 30, 1965, *First Digest* 42 (1966).

82. Title VII § 707, 42 U.S.C. § 2000e-6 (1976).

83. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

preliminary relief in appropriate cases and could initiate pattern and practice[84] suits independent of the scheme for administrative action and private civil suits.

The 1972 amendments to Title VII further underscored the public interest in prohibiting discrimination on the basis of race, sex, national origin, and religion by giving the EEOC independent enforcement authority. Congress still did not give the EEOC cease and desist powers similar to those reposed in the NLRB, but the EEOC can now seek court enforcement through a civil action.[85] The private right of enforcement was retained under the 1972 amendments in the face of the strong congressional opposition asserting that it was no longer necessary, in light of the expanded enforcement authority of the EEOC.[86]

The blending of the public and private interests in the elimination of employment discrimination was soon recognized in the Title VII enforcement efforts. Many of the early Title VII cases were filed as class actions under Rule 23 of the Federal Rules of Civil Procedure.[87] Although Title VII is silent on whether private enforcement actions can be brought as class actions, the courts were extremely receptive to the private class action mode of enforcement. The courts upheld the class action mode of enforcement under several different but related theories. First, the courts adopted the "private attorney general" theory, which holds that a private action brought by an individual is more than a private claim by a single individual seeking to vindicate purely private rights because "[w]hether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."[88] The "private attorney general" theory nearly eliminates the distinction between the common-law mode of adjudication, in which the parties seek resolution of purely private rights, and the public law mode of adjudication, which seeks vindication of public rights.[89] Second, the courts adopted an "across-the-board"[90] theory under which a single individual or

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84. *Id.*

85. *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978).

86. *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978).

87. *See* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 932–34 (1978); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1325 (1976). The substantive theories of liability under Title VII and class action law under Rule 23(b)(2) of the Federal Rules of Civil Procedure had a symbiotic relationship in doctrinal development: neither would be quite the same today were it not for the other. *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976).

Class actions under the Equal Pay Act, 29 U.S.C. § 206(d) (1976), and under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623–634 (1976 & Supp. III 1979), are statutory class actions not subject to Rule 23. Class certification under the Equal Pay Act and the Age Discrimination in Employment Act is governed by § 16(b) of the Fair Labor Standard Act, 29 U.S.C. § 216(b) (Supp. III 1979), which requires class members to file written consent that their claims be included in the cases. For a discussion of some of the issues involved in class actions under the Age Discrimination in Employment Act, see Note, *The Class Action Suit under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications*, 32 HASTINGS L.J. 1377 (1981).

88. Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968).

89. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (employment discrimination is one of the "avatars" of the emerging models of public law litigation). *See generally* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978).

90. The seminal case adopting the "across-the-board" class action theory in employment discrimination cases is Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). Plaintiff in *Johnson* was discharged after complaining of unlawful employment discrimination against blacks; the discharge allegedly was for absenteeism and

a representative group of plaintiffs is allowed to represent all persons similarly situated who are affected by the defendant's discriminatory employment practices. For example, an employee whose individual claim was based upon circumstances surrounding his or her discharge could represent all individuals allegedly affected by discriminatory practices in hiring, promotion, working conditions, and wages.[91] The rationale for the broadly based "across-the-board" class actions was that they were necessary to effectuate the broad remedial purposes of Title VII.[92] Third, the courts held that class actions were appropriate from a policy perspective because this mode of adjudication promotes judicial economy, eliminates the possibility of inconsistent and varying outcomes, and protects the defendant from the possible burden of defending multiple lawsuits challenging the same policy or practice.[93]

D. *Statutory Relief Provisions*

The scope of a court's remedial authority to redress an established violation of a federal statute depends primarily on the terms of the statute and the character of the violation. As a general rule, unless Congress has specifically commanded or withdrawn a particular form of relief, the court retains the inherent equitable power to shape appropriate relief.[94] A basic model that Congress used to define the scope of a

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tardiness. He then filed a Title VII class action in which he sought to represent all black employees of the company who had been discriminated against because of race in hiring, discharge, promotion, and working conditions. The district court limited the class to those employees who, like the plaintiff, had been discharged. The court of appeals reversed and held that the plaintiff's case was an "'across the board' attack on unequal employment practices alleged to have been committed by the [defendant] pursuant to its policy of racial discrimination." *Id.* at 1124. The court of appeals recognized that varying questions of law and fact would arise with regard to individual class members, but held that "'the Damoclean threat of racially discriminatory policy hangs over the racial class [as a whole and thus] is a question of fact common to all members of the class,'" and that broad class treatment was therefore appropriate. *Id.* (quoting Hall v. Wertham Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966)). The across-the-board class action theory focuses broadly on group wrongs and significantly altered the character of employment discrimination litigation. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113–19 (1971); Note, *The Class Action Device in Title VII Civil Suits*, 28 S.C.L. REV. 639 (1977).

91. *See, e.g.*, Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973). The continuing vitality of the across-the-board class action theory has been seriously questioned by the Supreme Court. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977); General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982). *See also* Note, *How Far Across-the-Board: The Permissible Breadth of Title VII Class Actions*, 24 ARIZ. L. REV. 61 (1982).

92. *See* Senter v. General Motor Corp., 532 F.2d 511, 524 (6th Cir.) (court bears special responsibility to vindicate the policies of Title VII regardless of the position of the individual plaintiff), *cert. denied*, 429 U.S. 870 (1976); Barnett v. W.T. Grant Co., 518 F.2d 543, 547–48 (4th Cir. 1975) (across-the-board approach consonant with the broad remedial purposes of Title VII); Piva v. Xerox Corp., 70 F.R.D. 378, 386 (N.D. Cal. 1975) ("[T]he Courts of Appeal, the Congress and indeed the Supreme Court have all emphasized the importance of the broad remedial public policy of Title VII, and . . . we conclude that the effectuation of the broad public policy requires that the commonality and typicality pre-requisites of Rule 23(a) be liberally applied in Title VII actions."), *aff'd*, 654 F.2d 591 (9th Cir. 1981).

Congress, in rejecting legislation which would have limited class action under Title VII, expressly approved the across-the-board class action approach adopted in the seminal Fifth Circuit cases. S. Rep. No. 415, 92d Cong., 1st Sess. 27 ("The committee agrees with the courts that Title VII actions are by their nature class complaints and that any restriction on such actions would greatly undermine the effectiveness of Title VII.") (citing Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968)).

93. *See, e.g.*, Mack v. General Electric Co., 329 F. Supp. 72, 75 (E.D. Pa. 1971). *See generally*, R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 178 (4th ed. 1978); 3B MOORE'S FEDERAL PRACTICE § 23.01, at 23–14 to 23–34 (2d ed. 1979).

94. Weinberger v. Romero-Barcelo, 456 U.S. 305, 309–10 (1982).

court's remedial authority to fashion relief in the employment discrimination cases is found in section 706(g) of Title VII, which provides, in pertinent part:

> 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 . . . .[95]

The legislative history of section 706(g) shows that Congress did not intend to divest the federal courts of all their traditional equitable powers to fashion appropriate relief. The original bill provided that the court shall order appropriate relief upon a finding of unlawful discrimination.[96] Congress changed the mandatory term "shall" to the discretionary term "may" during the legislative debate.

The legislative history of section 706(g) also supports the proposition that the federal courts were not to be bound by traditional notions of equitable discretion in fashioning remedies to vindicate the public and private interests protected under Title VII. In the 1972 amendments, Congress added the phrase "or any other equitable relief" to ensure that the federal courts would have broad discretion to fashion appropriate relief.[97]

There is only one specific statutory limitation on the equitable discretion of the courts under Title VII. The last sentence in section 706(g) provides that a court shall issue no order on reinstatement, hiring preference, promotion, or back pay to any individual who was denied an employment opportunity "for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . ."[98] The exact meaning of this limitation is not clear from the legislative history. This sentence first appeared in the bill reported out of the original House Judiciary Committee in 1964. The bill provided that a court would not require relief for an individual who was denied an employment opportunity, if the decision was based upon "just cause."[99] The just cause standard, like the remainder of the original version of 706(g), was patterned on section 10(c) of the NLRA.[100] Congressman Celler, a strong supporter of Title VII, introduced an amendment to change the just cause standard to the language presently found in section 706(g).[101] The change clarified

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95. 42 U.S.C. § 2000e-5(g) (1976).

96. Amendment No. 656 to H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 11, 930-34 (Mansfield-Dirksen Substitute Bill).

97. The spokesman for the House and Senate conferees believed that Congress gave discretion to the courts to foster a policy of liberal remedies and to encourage the most complete relief possible. 118 CONG. REC. 7168 (1972) (section by section analysis of H.R. 1746). *See generally* Sape and Hart, *Title VII Revisited: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

98. Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1976).

99. H.R. 7152 § 707(e), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, 2012 (1968).

100. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); 110 CONG. REC. 6549 (remarks of Senator Humphrey), 7214 (Clark-Case Interpretive Memorandum) (1964).

101. In introducing the amendment to what is now § 706(g), Congressman Celler stated:

> [T]he purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race,

Congress' intent not to require that a defendant meet a formal definition of cause so long as that defendant could show that his or her actions were motivated by a legitimate nondiscriminatory reason.[102]

The courts have reached different results as to the proper construction of the last sentence in section 706(g). Some courts have construed this sentence to apply only to the substantive violation determination in stage I proceedings. Other courts have taken the position that this sentence is applicable to the relief formulation stage.[103] If the employer can show that the plaintiff would have been denied the employment opportunity even in the absence of the practice found discriminatory in the liability determination stage, the court is precluded from granting any form of relief.[104]

IV. ANALYSIS OF *MOODY* and *FRANKS*

A. Albemarle Paper Co. v. Moody

Moody is the first and most significant Supreme Court decision that addresses the use of equitable discretion in the district courts to deny or otherwise limit full relief on a finding of unlawful employment discrimination.[105] *Moody* presented the

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color, religion, or natural origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin. That is the purpose of this amendment.

110 CONG. REC. 2567 (1964). Similarly, Congressman Gill stated that under § 706(g) as amended, "we would not interfere with discharges for ineptness, or drunkeness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act." 110 CONG. REC. 2570 (1964).

102. *See* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 438 (1966).

103. *See, e.g.*, United States v. International Union of Elevator Constructors, Local Union No. 5, 538 F.2d 1012, 1019 (3d Cir. 1976).

104. *See, e.g.*, Day v. Mathews, 530 F.2d 1083, 1085–86 (D.C. Cir. 1976); Harbison v. Goldschmidt, 693 F.2d 115, 117 (10th Cir. 1982).

105. It cannot be said, however, that the issue the Court addressed in *Moody* was novel, except to the extent that the Court was dealing with the question of equitable discretion in the context of a new statute. The Court had much precedent to rely on from cases raising similar issues in analogous statutory provisions.

Hecht Co. v. Bowles, 321 U.S. 321 (1944) is, perhaps, the leading case on the effect of a statute on the traditional equitable discretion of a court. The issue in *Hecht* was whether the administrator of the Emergency Price Control Act was entitled to an injunction in the face of a clear violation of the Act. The Government argued that since the statutory provision on relief had used the operative word "shall" rather than "may" in instructing the courts on injunctive relief, it was mandatory that the district court issue the injunction. The Supreme Court, in a unanimous decision, rejected this argument. In language that has been often cited on the role of equitable discretion in the context of a statutory prescription on certain forms of conduct, the Court, backed by "several hundred years of history," said:

> A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made . . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity had distinguished it. The equities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims . . . . We do not believe that a major departure from that long tradition as is here proposed should be lightly implied.

Id. at 329–330. *Hecht* established two major doctrinal principles on the relationship between equitable discretion and statutes. The first principle is that unless Congress has explicitly mandated a particular form of relief, the courts retain equitable discretion in choosing the form and extent of the relief that they deem appropriate to compel compliance with the statute. Second, when a plaintiff has proven a statutory violation, the court must exercise its discretion in a fashion that achieves compliance with the statutory purpose. For a recent and perhaps the most definitive treatment of *Hecht*, see Plater, *supra* note 4, at 546–56.

The Court in *Hecht* noted the good faith efforts of the company to comply with the Act and that once the violations were discovered, the company took vigorous steps to prevent future occurrences. *Hecht* thus supports the position that a

Court with the opportunity to either confirm or modify the liberal philosophical construction the lower courts had given to section 706(g)[106] and to address the conflicting standards that had been adopted for the various forms of unlawful discrimination.

Moody, like many of the earlier Title VII cases, arose against a backdrop of open discrimination against blacks prior to the effective date of Title VII. The defendants were a private employer and a labor organization. Although the employer had not completely excluded blacks from its workforce, it had a policy of limiting its black employees to racially segregated jobs and departments. The major allegations of the plaintiffs were that the employer's testing and educational requirements had a disparate impact on the employment opportunities of the black employees and were not justified by business necessity, and that the job seniority system adopted by the employer and the union perpetuated the overt discriminatory practices that existed in the employer's departmental assignments prior to the effective date of Title VII. The plaintiffs sought broadly based injunctive relief, including back pay.

The district court found the educational requirements unlawful and enjoined the employer from their further use, but upheld the testing practice on the ground that the employer had validated the tests.[107] The district court also found that the job seniority system constituted an unlawful employment practice and ordered the employer and the union to implement a plantwide seniority system under the "rightful place" theory of relief.[108] The court refused to award the plaintiffs back pay for the economic loss they had suffered, relying on two grounds; the court found no evidence of bad faith noncompliance with the Act,[109] and further reasoned that the employer would be substantially prejudiced by an award of back pay since the plaintiffs had not specifically requested back pay until five years after the complaint had been filed in federal court.[110] The court of appeals reversed the finding of the lower court on the testing requirements and directed that an injunction be issued against their further use. The court of appeals also reversed the denial of back pay by holding that "a plaintiff or 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."[111] The Supreme Court granted review to re-

court may properly consider a good faith defense in determining whether to grant, deny, or otherwise limit relief for a proven statutory violation. Few courts in the employment discrimination cases directly relied on the *Hecht* precedent, but a number of the courts had accepted a good faith defense as a basis on which to deny or otherwise limit full relief.

In one of the later cases, Porter v. Warner Holding Co., 328 U.S. 395 (1946), also arising under the Emergency Price Control Act, the Court elaborated further on the role of equitable discretion in the statutory setting. The district court had declined to exercise jurisdiction to order a restitution remedy for rents that defendant had collected in excess of the federal regulation there at issue. The Court reversed, noting that "[r]estitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded" under the statute. *Id.* at 402. Thus, when an enforcement proceeding seeks restitution under a statute which is designed to protect the public interest, the petitioner is acting "in the public interest" and when a court orders restitution, it is acting "within the recognized power and within the highest tradition of a court of equity." *Id.*

106. *See, e.g.*, Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

107. 422 U.S. 405, 410 (1975).

108. *Id.* at 409.

109. *Id.*

110. *Id.* at 411.

111. *Id.* at 411–12.

solve, *inter alia*, the conflict between the circuits as to the appropriate equitable standard under which a court can deny back pay even after making a finding of unlawful employment discrimination.[112]

The petitioners in *Moody*—the employer and the union—advanced several arguments for reversal of the court of appeals. First, the petitioners focused on the term "may" in section 706(g) and the legislative history of the change from shall to may to argue that Congress did not intend to deprive the federal courts of their traditional equitable power to grant or deny relief.[113] Second, the petitioners relied on a litany of maxims that courts have used in applying equitable discretion. They noted that as a general rule, a court of equity is not inflexibly bound to direct any particular form of relief; a court of equity has full power to grant or withhold the particular form of relief sought by fashioning a remedy that will best serve the ends of justice in the particular circumstances. They went on to note that justice requires a balancing of the equities, which, in this case, included a statute of limitation, laches, economic reality, and physical and fiscal limitations on the court's ability to grant and supervise the relief.[114]

The *Moody* respondents supported the special circumstances rule on the ground, *inter alia*, that it was a clear standard for the exercise of discretion and that it provided for predictability in the law, in addition to facilitating the voluntary settlements that are a preferred enforcement measure. They argued that standardless discretion would result in the abandonment of the remedial scheme to the varying and inconsistent interpretations of hundreds of federal district court judges.[115]

Ultimately, the Court did not fully accept either the petitioners' or the respondents' positions. The Court, although agreeing with the court of appeals' decision on the back pay issue, rejected the special circumstances standard with an exception for awards of attorney's fees to prevailing plaintiffs in Title VII cases.[116] The Court found it necessary to "look elsewhere"[117] to find an appropriate standard for exercising discretion in the fashioning of relief for victims of discrimination. The Court first looked to the statutory language Congress had chosen to define the scope of a court's equitable discretion. Noting that Congress had deliberately chosen the term "may" and had specifically rejected the term "shall" in section 706(g), the Court initially determined that the statutory standard did not clearly mandate an award of back pay even when a plaintiff or a complaining class had suffered economic injury as a result of a proven violation.[118] The Court immediately thereafter made clear, however, that the congressional choice of the discretionary term "may" is not a standardless or meaningless term:

> [D]iscretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" . . . . The power to award backpay

112. *Id.* at 413.
113. Brief for the Petitioner Employer at 51–55, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
114. Brief for Petitioner Halifax Local No. 425 at 23–24, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
115. Brief for Respondent Moody at 43–60, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
116. 422 U.S. 405, 415 (1975).
117. *Id.*
118. *Id.* at 415–16.

> was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power "in light of the large objectives of the Act." . . . That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960), this Court held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award lost wages to workmen unlawfully discriminated against under . . . the Fair Labor Standards Act . . . . The Court simultaneously noted that "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement."[119]

The Court then established the doctrinal theme that it directed the lower courts to follow in exercising discretion in the relief formulation stage:

> It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." . . . But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is *required* is the *principled application of standards* consistent with those purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy . . . ."[120]

To aid the lower courts in the application of "sound legal principles" and "principled . . . standards," the Court next identified two broad purposes behind the enactment of Title VII. The first was a "prophylactic" purpose found in *Griggs v. Duke Power Co.*, [121] the seminal substantive Title VII case; it was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[122] The second purpose was to "make persons whole" for injuries suffered because of unlawful discrimination.[123] The make-whole theory was grounded in the historic purpose of equity: to "secure complete justice"[124] and to afford all "necessary relief"[125] when federal rights have been invaded.

The Court then looked to the National Labor Relations Act and the cases decided under it, because Congress had initially relied on the NLRA, particularly the remedial section, as a model in the drafting of Title VII.[126] The remedial sections of Title VII and the NLRA are almost identical[127] and the Court noted that under NLRA decisional law, back pay had been liberally awarded as a means of effectuating the NLRA's twin purposes of reimbursing employees for actual losses suffered as a result of discriminatory discharges and of furthering the public interest in deterring such discharges.[128]

After identifying the sources of analysis for the exercise of equitable discretion, the Court then announced its fundamental holding on equitable discretion: "[G]iven a

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119. *Id.* at 416.
120. *Id.* at 417 (emphasis added).
121. 401 U.S. 424 (1971).
122. *Id.* at 429–30.
123. 422 U.S. 405, 419 (1975) (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).
124. *Id.* at 418 (citing Brown v. Swann, 10 Pet. 497, 503 (1936)).
125. *Id.* (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).
126. *Id.* at 419.
127. *See id.* at 419 n.11, n.16.
128. *Id.* at 421.

finding of unlawful employment discrimination, back pay 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."[129] The Court underscored the importance of this rule by mandating that the district courts "carefully articulate [their] reasons" for the denial of complete justice and necessary relief.[130]

The Court did not construe section 706(g) to eliminate totally all discretion regarding relief. Thus, for example, the Court indicated that the lateness of plaintiffs' request for back pay could be a basis on which to deny back pay despite the liberal standard.[131] The Court remanded this issue for further consideration by the district court to determine whether the defendants had actually been prejudiced by the lateness of the claim.[132]

Viewed in the context of the inconsistent and conflicting standards enunciated by the lower courts, *Moody* is significant for several reasons. First, the two-pronged objective against which a court must exercise its equitable discretion must be viewed as a more stringent substantive limitation on the power of the courts to deny or otherwise limit complete relief in the employment discrimination cases than the court has adopted in other statutory cases. In *Moody*, the Court read both the statutory language in section 706(g) and the congressional purpose as establishing a public interest standard of discretion, and not as imposing the traditional equitable standard that derives from the common law and is appropriate for litigation between private parties.[133] The importance of *Moody* cannot be completely understood, however, without some appreciation of the development of the common-law courts, the courts of equity, and the role discretion played in this development.[134] *Moody* thus mandates that the traditional common-law notions of equitable discretion are inappropriate when the standards of the public interest measure the propriety and need for injunctive relief. Second, the Court initiated the development of a single standard, more fully elaborated in *Franks*, for the exercise of equitable discretion with respect to all forms of relief. Thus, for example, the Court, in rejecting a good faith defense based on the defendants' efforts to comply with Title VII, noted that the acceptance of this defense would "open an enormous chasm between injunctive and back pay relief" when there was nothing in the legislative history to justify the "creation of drastic and categorical distinctions between those two remedies."[135] The good faith defense is likely to be limited to that small class of cases in which defendants can

129. *Id.*

130. *Id.* at 421 n.14.

131. *Id.* at 424.

132. *Id.*

133. *See* Plater, *supra* note 4, and *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965), for discussions of the traditional common-law notion of discretion and its development as applied in a modern statutory context.

134. No attempt has been made to treat the development of the doctrine of equitable discretion in this Article because it has been treated adequately elsewhere. *See generally* Winner, *The Chancellor's Foot And Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477 (1979).

135. 422 U.S. 405, 423 (1975).

successfully assert the section 713(b) defense by showing reliance on a written interpretation or opinion of the EEOC.[136] *Moody* also establishes a strong presumption in favor of full and complete relief.[137]

Finally, the *Moody* standard on equitable discretion is consistent with the congressional purpose to vindicate both the public and private interest for injuries caused by unlawful employment discrimination. The public interest is protected under the *Moody* standard by the Court's emphasis on the mandate to the lower courts that denial or limitation of relief must be consistent with the congressional purpose of eliminating discrimination throughout the economy. Relying on reasoning from the Eighth Circuit in *United States v. N.L. Industries*,[138] the Court held that a presumptive entitlement to back pay, in addition to injunctive relief, furthers the public policy embodied in Title VII by providing defendants with a "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[139] The private interests of victims of unlawful employment discrimination are protected under the *Moody* standard by the mandate to the lower courts that the victims of unlawful employment discrimination must be made whole because Title VII deals with legal injuries of an economic character occasioned by racial and other antiminority discrimination.[140]

B. Franks v. Bowman Transportation Co.

In *Franks*, the Supreme Court expanded on and refined the *Moody* standard in significant respects.[141] Unlike *Moody, Franks* involved a form of relief—retroactive or rightful place seniority[142]—that required the Court to balance the equities because of the competing interests of the plaintiffs, who were found to be victims of unlawful employment discrimination; the employer, whose employment practices were found to have been unlawful; the union, who, with the employer, was a signatory to the seniority provision in the collective bargaining agreement; and white employees, whose employment expectancies would be affected by the award of complete justice and necessary relief under the *Moody* standard.

The district court found that the employer had discriminated against the plaintiffs' class by refusing to hire them at an earlier date because of race. Plaintiffs were subsequently employed but were given a seniority date as of the original date of hire rather than the seniority status they would have had if they had not been wrongfully denied employment earlier. The district court refused to award the plaintiffs constructive seniority under the rightful place theory of relief on the ground that the

136. *Id.* at 422–23 & n.17.
137. *Id.* at 420 n.12 (citing NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965)).
138. 479 F.2d 354, 379 (8th Cir. 1973).
139. 422 U.S. 405, 417–18 (1975).
140. *Id.* at 418.
141. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).
142. "Retroactive seniority" is the equivalent of "rightful place." *See* Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047, 1052–53 (5th Cir. 1969).

seniority system was not unlawful on its face or as applied to these plaintiffs. The court of appeals affirmed the denial of seniority relief.[143]

Two important questions were raised in *Franks*. The first was whether the *Moody* standard on equitable discretion applied only to relief in the form of back pay. The second was whether the *Moody* standard on back pay, in which only the interests of the plaintiffs and defendants were at stake, applied to a different form of relief when the employment expectancies of innocent third parties[144] would be adversely affected. The back pay form of relief in *Moody* could be awarded without consideration of the impact on the employment expectancies of other employees because only the defendants' interests were at stake. As a threshold matter, the Court in *Franks* rejected the Fifth Circuit's view that section 703(h),[145] which protects bona fide seniority systems, limits the remedial authority of the courts under section 706(g). The Court noted that the bona fides of the seniority system were not at issue and the relief the plaintiffs sought would not result in a modification or elimination of the extant system.[146]

On the question of the reach of the *Moody* standard of discretion, *Franks* emphatically rejected the argument that *Moody* is limited to relief in the form of back pay and held that all forms of relief are to be governed by an equitable discretion rule of complete relief:

> We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . and ordained that its policy of outlawing such discrimination should have the "highest priority" . . . . Last Term's *Albemarle Paper Co. v. Moody* . . ., consistently with the congressional plan, held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[147]

The Court found the application of the *Moody* equitable discretion standard to all forms of relief supported by Congress' "emphatic confirmation" in the 1972 amendments to Title VII.[148]

Franks found no principled reason to distinguish between the various forms of relief, to give one a greater preference, or to select from among them, if all forms of relief were necessary to effectuate the congressional purpose. Thus, for example, the Court held that adequate relief may well be denied in the absence of a seniority remedy slotting the victim of employment discrimination into the position he would have had but for the unlawful employment practices of the defendants.[149]

The dissenters in *Franks* agreed with the general proposition that the *Moody* equitable discretion standard applies to all forms of relief, but believed that a court

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143. 424 U.S. 747, 753 (1976).
144. *See id.* at 788 (Powell, J., dissenting).
145. Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1976).
146. 424 U.S. 747, 758 (1976).
147. *Id.* at 763 (emphasis added).
148. *Id.* at 764.
149. *Id.* at 764–65.

should have flexibility to decide to give alternative relief in the form of back pay or front pay rather than the more complete relief of a seniority adjustment.[150] The *Franks* majority clearly rejected this reading of *Moody*:

> [T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do. "[S]eniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past."[151]

The *Franks* Court expanded the *Moody* standard by construing the term "affirmative action" in section 706(g). Affirmative action is designed to "recreate the conditions and relationships" that would have been created or established but for the unlawful employment discrimination.[152] Although the Court relied on NLRA precedent in support of its interpretation, the Court also held that the federal courts in Title VII cases have broader discretion than the NLRB has under a similar provision of the NLRA.[153]

Having established that the *Moody* standard applies to all forms of relief, the Court then addressed the question of the potential reach of a district court's discretion. This question was raised by the defendants' argument that a court is obligated to balance the interests of the employment expectancies of innocent third parties[154] who, in this case, apparently were the white male employees who obtained a seniority advantage over some of the plaintiffs only because of the discriminatory hiring practices of the employer.[155] This question had been repeatedly raised in the lower courts, but with conflicting results.[156] The issue was raised in its most troubling form in the quota cases because of the theoretical conflict that has been suggested to exist between the concepts of affirmative action and reverse discrimination.[157] Implicit also in this argument is the legality of the "bumping" remedy under which a plaintiff who has been denied a position because of impermissible discrimination asks the court to displace the incumbent employee.[158] On another level, this argument raises problems of identifying the interests affected and defining the scale on which they should be weighed under a balancing of the equities approach. On the question of identifying the interests, the majority declared:

> [W]e find untenable the conclusion that this form of relief [retroactive or rightful place seniority] may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of

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150. *Id.* at 793–94 (Powell, J., concurring in part, dissenting in part).

151. *Id.* at 768 n.28 (citing Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 225 (1975)).

152. 424 U.S. 747, 769 (1976).

153. *Id.*

154. *Id.* at 773–79.

155. *See supra* note 144 and accompanying text.

156. *See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981).

157. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Watkins v. United Steelworkers, Local 2369, 516 F.2d 41 (5th Cir. 1975).

158. Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

> employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[159]

Thus, the bare fact that other employees may be unhappy about the loss of employment expectancies simply is not an interest worthy of placing in the calculus and a court should not entertain evidence on this. Under the *United Steelworkers of America v. Weber*[160] decision, a court would be justified in weighing the legitimate employment expectancies of the majority group employees, but it appears that those legitimate expectancies must not have been obtained as a result of unlawful discrimination by the defendant.[161] If, however, the employment expectancies of innocent employees were gained as a result of unlawful employment discrimination by the defendant, *Franks* held that "a sharing of the burden of past discrimination is presumptively necessary—[and this sharing] is entirely consistent with any fair characterization of equity jurisdiction . . . ."[162] In essence, the Court appears to be saying that in employment discrimination, there are no innocent victims because no employee has a vested right in his or her employment status when the continued exercise of that right is antithetical to the strong public policy manifested in Title VII.[163]

The majority and the dissenters, in an opinion by Mr. Justice Powell, disagreed on whether the *Moody* make-whole standard, as construed in *Franks*, significantly stripped the district courts of their inherent equitable powers to deny or otherwise limit complete relief in its various forms on a finding of unlawful employment discrimination. Mr. Justice Powell was of the opinion, for several reasons, that *Franks*, under the majority's construction of *Moody* had, "to a significant extent," stripped the district courts of this power.[164] First, Justice Powell believed that nothing in either the plain language of section 706(g) or the 1972 amendments to this section "suggest[s] that rectifying economic losses from past wrongs requires the district courts to disregard normal equitable considerations."[165] Second, he asserted that under normal equitable considerations,[166] innocent third parties have a greater claim to the chancellor's conscience than victims of illegal employment discrimination.[167] Even though Justice Powell had to admit that the form of relief at issue in *Franks* "arguably furthers one of the objectives of Title VII,"[168] the make-whole purpose, he was unwilling to deprive the district courts of their inherent equitable power to decide how the scarce and limited economic advantages of employment opportunities should be allocated between victims of illegal employment discrimination and the innocent third-party[169] employees or applicants. Under Justice Powell's analysis, the

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159. 424 U.S. 747, 775 (1976).
160. 443 U.S. 193 (1979).
161. *Id.* at 209.
162. 424 U.S. 747, 777 (1976).
163. *See id.* at 770, referring to the need to formulate relief to effectuate the national policy against discrimination and noting the public interest protected under the laws against discrimination.
164. *Id.* at 786 (Powell, J., concurring in part and dissenting in part).
165. *Id.* at 785.
166. *Id.*
167. *Id.* at 789.
168. *Id.* at 787.
169. *Id.* at 788.

make-whole purpose of Title VII could be accommodated by awarding the victims of illegal discrimination back pay since "backpay is a remedy central to achieving the purposes of the Act,"[170] but leaving the innocent third party with the employment opportunity.

The majority disagreed with Justice Powell's criticism by affirmatively stating that the *Franks* presumption of entitlement to complete relief in all forms comports with the notion that any fair characterization of equity jurisdiction allows for "nice adjustment" of public and private interests[171] on the basis of "what is necessary, what is fair, and what is workable."[172] The majority further noted that the form of relief at issue in *Franks* could hardly be the kind of complete relief that *Moody* demands because even with retroactive seniority, the plaintiffs would not truly be restored to the actual seniority they would have had but for the unlawful employment practices of the defendants.[173]

The disagreement between the majority and Justice Powell on the reach of the *Moody* standard turns on a balancing of the equities between private and public interests on the one hand, and purely private interests on the other. Both the majority and the dissenters agree that a balancing of the equities is not a *sine qua non* where the form of relief is monetary or deals only with relief for past discrimination.[174] The only interests at stake in these forms of relief are the public interest, the financial concerns of the defendants, and the loss of past income earning potential of the plaintiffs. The public interest in eradicating discrimination throughout the economy and making the plaintiff whole through back pay would clearly outweigh the interest of the defendants in their pocketbooks. The majority, unlike Justice Powell, tips the balance of equities in favor of the victims of illegal employment discrimination to locate just results,[175] unless it can be shown that circumstances peculiar to the particular case[176] suggest that the balance be tipped in favor of the innocent third party.

The majority clearly stated how the balance should be struck between complete relief for the victims of employment discrimination and the innocent victims:

> [O]ur holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that generally would not be found in Title VII cases.[177]

The Court thus clarified the "facts and circumstances peculiar to particular cases" language in *Moody*; a district court is justified in denying or limiting complete relief

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170. *Id.* at 783.

171. *Id.* at 777 n.39.

172. *Id.*.

173. *Id.* at 776–77.

174. *Id.* at 773 (weighing competing interests), 790 (Powell, J., dissenting) ("consider and weigh competing equities").

175. 422 U.S. 405, 424–25 (1975).

176. 424 U.S. 747, 770–71 (1976).

177. *Id.* at 779 n.41. The concept of unusual adverse impact is intended to be equivalent to the unusual circumstances doctrine.

only in those cases in which the defendant can prove unusual circumstances in the particular case, and the court must carefully articulate those circumstances.[178] Generalizations, unwarranted assumptions, or circumstances that are inherent in any Title VII litigation are insufficient to deny complete relief. *Franks* can be read as adopting an unusual circumstances doctrine as the primary, if not the only, basis on which a court may deny or otherwise limit complete relief by selecting from the vast array of available relief.

C. Moody *and* Franks *Successors*

The Court returned to the problem of equitable discretion in the employment discrimination cases in *City of Los Angeles Department of Water and Power v. Manhart*[179] and *Ford Motor Co. v. EEOC*.[180] The defendant in *Manhart* required its female employees to make larger monthly contributions than its male employees to a

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178. *Id.*

179. 435 U.S. 702 (1978).

180. 458 U.S. 219 (1982).

The Court considered the application of the *Moody* and *Franks* equitable discretion in several other cases in which it either refined or clarified the scope of a court's discretion on a finding of unlawful employment discrimination. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), dealt with the question whether a district court abuses its discretion if it adopts a per se rule that bars relief to potential victims of discrimination who claim that they did not apply or otherwise seek an employment opportunity with a defendant because of the existence of an unlawful employment policy or practice. The Court had left this question open in *Franks*. *Id.* at 363. The Court rejected the application of a per se rule to the claim of a person allegedly discriminated against:

> The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of [the protected class]. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination—those that extend to the very hope of self-realization. Such a *per se* limitation on the equitable powers granted to the courts by Title VII would be manifestly inconsistent with the "historic purpose of equity to 'secur[e] complete justice'" and with the duty of the courts in the Title VII cases "to render a decree which will so far as possible eliminate the discriminatory effects of the past."

Id. at 367 (citing *Moody*, 422 U.S. 405, 418 (1975)).

Teamsters thus adopted the futile acts doctrine that the lower courts had enunciated in similar cases. *See, e.g.*, Hairston v. McLean Trucking Co., 520 F.2d 226, 231–33 (4th Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 451 (5th Cir. 1973). *See also* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (noting that an applicant or employee could recognize the futility of seeking an employment opportunity and the effect of this recognition on the relevant statistical evidence regarding the issue of liability in stage I). Although *Teamsters* held that the nonapplicant has the benefit of the *Franks* presumption of entitlement to complete relief in stage II if he can show that he was deterred from seeking employment, 431 U.S. 324, 367–68 (1977), the Court noted also that this threshold showing by the claimant will be a "difficult task." *Id.* at 364.

Teamsters also reaffirmed the need for the district courts to attempt to reconstruct the history of conditions and relationships of the claimant to the employer and nonvictim employees as a predicate to the application of the balancing of the equities principle. *Id.* at 371–72.

The Court considered the question of seniority relief in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). The Court considered and rejected three arguments advanced by the union petitioner. First, the Court held that the failure of every class member to have the administrative remedies before the EEOC does not preclude an award of seniority relief to nonexhausting class members as long as the representative plaintiff has exhausted his administrative remedies. The Court thus treated the issue in the text in *Zipes* whereas it had dealt with the same issue in a footnote in *Moody*. *Id.* at 392. Second, the Court rejected the union's argument that a subclass had not been found to be the subject of unlawful employment discrimination. *Id.* at 393. Finally, the Court rejected the union's argument that the district court had abused its discretion by awarding seniority relief based on a collective bargaining agreement when the union signatory to the agreement had not been found to have violated Title VII. Relying on *Teamsters*, the Court held that a finding of discrimination against the employer is an adequate basis on which to award seniority relief even if there is no finding that the union has also been found guilty of discrimination. *Id.* at 394.

pension plan. The contributions were withheld from their paychecks and as a result the female employees took home less pay than similarly situated male employees earning the same salary. On retirement, however, males and females of the same age, seniority standing, and salary, received equal monthly benefits, despite the disparity in contribution rates. The district court found that the contribution differential violated the female plaintiffs' rights under Title VII, issued an injunction against defendant's reliance on sex-based actuarial tables, and ordered the defendant to refund the excess contributions.[181] The court of appeals affirmed.[182]

The Supreme Court upheld the finding of liability, but reversed on the form of relief granted. The Court noted that the *Moody* presumption of retroactive liability can seldom be overcome,[183] but based its reversal on two grounds. First, the Court apparently was willing to judicially notice that conscious and intelligent pension plan administrators may have assumed that sex-based actuarial tables were entirely lawful under Title VII because of the absence of prior rulings on this subject and because of the conflicting views of federal administrative agencies.[184] Second, the Court reasoned that relief in the form of back pay would have a substantial adverse effect on the economic well-being of the insurance and pension plan industry and an award of back pay on the facts of the case would be harmful to the nation generally.[185]

It is possible to argue that the denial of back pay in *Manhart* is contradictory to the *Moody* and *Franks* holdings. In *Moody*, the Court held that the clearly erroneous standard of review should be used by the appellate courts to determine whether the trial court abused its discretion in denying back pay.[186] In *Manhart*, however, the Court failed to apply the clearly erroneous rule but relied instead on a standard of "insufficient attention"[187] to the equitable nature of Title VII remedies. *Moody* also involved a question of first impression on the proper validation of employment tests. After deciding this question, the Court remanded the testing issue to the trial court for further consideration in light of the newly enunciated legal rule.[188] In *Manhart*, however, which also involved a question of first impression, the Court decided the remedial question rather than remand the issue to the district court. The unusual circumstances rule of *Franks* requires consideration of only those unusual circumstances in the facts of a particular case to provide a reason for denying a particular form of relief.[189] The defendant in *Manhart* had not asserted that it would suffer economic hardship if it were required to comply with the district court's back pay order.[190] Rather than focus on the particular circumstances in *Manhart*, the Court

181. 435 U.S. 702, 706 (1978).
182. *Id.*
183. *Id.* at 719.
184. *Id.* at 719–20.
185. *Id.* at 721.
186. 422 U.S. 405, 424 (1975).
187. 435 U.S. 702, 719 (1978). The Court noted, however, that *Moody* is still good law and that *Manhart* did not qualify the presumption in favor of retroactive relief. *Id.* at 723.
188. 422 U.S. 405, 436 (1975).
189. *See supra* note 178 and accompanying text.
190. 435 U.S. 702, 722 & n.42 (1978).

chose instead to focus on the impact on the larger community—the insurance and pension plan community.

It is also possible to argue that *Manhart* is consistent with *Moody* and *Franks*. *Moody* recognized that a particular form of relief could be denied if that denial would not defeat the congressional purpose of eradicating discrimination throughout the economy.[191] The Court, in *Manhart*, found no reason to believe that the threat of back pay was needed to act as a spur or catalyst to cause other defendants with similar sex-based pension programs to reform their practices to comply with its decision on the substantive violation.[192] It is possible also to rationalize the results in *Manhart* by observing that it is sometimes the practice of the Court to decide a new legal issue narrowly, leaving to lower courts the responsibility of fleshing out its ruling in the context of specific cases.[193] *Manhart* may be viewed additionally as an illustration of the level of unusualness that must be found before the court is justified in denying a particular form of make-whole relief. However one reads *Manhart* on the relief question, whether as consistent or inconsistent with *Moody* and *Franks*, the important principle that *Manhart* confirms is that a finding of unlawful employment discrimination carries with it a strong presumption of entitlement to full and complete make-whole relief and that, unless a court finds unusual circumstances in the particular case, a court abuses its discretion if it denies or otherwise limits full redress.

The plaintiffs in *Ford Motor Co. v. EEOC*[194] had been denied employment because of their sex. Subsequent to the denial, the defendant offered the plaintiffs employment, but did not offer the seniority the plantiffs would have had but for the earlier discriminatory denial of employment. The plaintiffs refused the offer on the grounds that the defendant should have included the lost seniority status as well. The plaintiffs prevailed on the substantive merits of their claim in stage I proceedings brought by the EEOC, but in stage II proceedings the district court limited the back pay to the period between the original denial of employment and the rejection by the plaintiffs of defendant's offer.[195] The court of appeals reversed, relying on the *Moody* standards.[196] The Supreme Court reversed the court of appeals.

The issue in *Ford Motor* was whether an employer who has engaged in unlawful employment discrimination in hiring can toll the continuing accrual of back pay by unconditionally offering the plaintiff the job previously denied without including all the make-whole relief to which the plaintiff may be entitled.[197] The Court answered this question in the affirmative. First, the Court found that a rule tolling the accrual of

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191. *See supra* note 129 and accompanying text.

192. 435 U.S. 702, 720–21 (1978).

193. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161 (1981) (Court construes the relationship between the Bennett Amendment under Title VII, 42 U.S.C. § 2000e–2(h) (1976), and the Equal Pay Act); International Bhd. of Teamsters v. United States, 431 U.S. 324, 362–71 (1977) (holding that nonapplicants may be entitled to relief under Title VII and remanding for further consideration by the district court); Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975) (Court pronounces new guidelines on test validation and remands to the district court for further consideration in light of the new guidelines).

194. 458 U.S. 219 (1982).

195. *Id.* at 3061.

196. EEOC v. Ford Motor Co., 645 F.2d 183, 190 (4th Cir. 1981).

197. 458 U.S. 219, 220 (1982).

back pay after an offer of employment has been made serves the goal of ending discrimination throughout the economy because it encourages a victim of discrimination to minimize his or her damages under the duty to mitigate rule found also in section 706(g).[198] Second, the Court reasoned that the rule is consistent with the *Moody* make-whole rule because it encourages the plaintiff to end the potential ill effects of the defendant's refusal to hire and does not make the employer the insurer of the eventual unemployment of the plaintiff.[199] Finally, the Court supported the rule on the ground that it protects the innocent third party against eventual displacement in his or her job because of a claim that might not be established by the plaintiff at trial.[200]

Like *Manhart*, it is possible to read *Ford Motor* in several ways. First, the case may be construed as a substantial refinement of the *Moody* equitable discretion standard: a plaintiff who refuses to accept an unconditional offer of employment from a discriminating defendant, even when the offer fails to satisfy the *Moody* make-whole principle, has failed, as a matter of law, to suffer economic injury that should be redressed under section 706(g). It is also possible to read the case as involving a failure to mitigate damages and that the court has, as in *Manhart*, articulated a defense to a particular form of relief.

Perhaps the more meaningful way to read *Ford Motor* is to limit its application to the duty to mitigate damages rule because the Court, relying on NLRB precedents, noted that the duty to mitigate damages does not require a victim of hiring or discharge discrimination to seek employment that is not consonant with his or her particular skills, background, and experience or that imposes conditions that are substantially more onerous than the employment opportunity in question.[201] The jobs in *Ford Motor* were quite similar.[202] Any other reading of this case would be inconsistent with *Moody* and *Franks*, and the Court in *Ford Motor* emphatically reaffirmed the standard of equitable discretion established in *Moody*.[203] Arguably, the status of the plaintiffs in *Ford Motor* was analogous to the status of the rejected applicants in *International Brotherhood of Teamsters v. United States*,[204] but the Court in *Teamsters* did not have to reach the question that it examined in *Ford Motor*.

The concern for innocent victims was again raised in *Ford Motor*,[205] but the Court did not attempt to consider adequately what interests of the innocent victims

198. *Id.* at 230, 236.

199. *Id.* at 234. The Court also expressed concern that the rights of "innocent employers" might be adversely affected by any other rule because if the plaintiffs were not ultimately successful on the merits but had been offered full relief prior to a judicial determination of liability, the "innocent employer" would have no recourse against the plaintiff for cost of the retroactive seniority that the plaintiff erroneously received. *Id.* at 240 n.29.

200. *Id.* at 239–40.

201. *Id.* at 231 n.16.

202. *Id.* at 221. The *Ford Motor* job was as a "picker-packer"; the job at the General Motors warehouse was as a warehouseman.

203. *Id.* at 226–27.

204. 431 U.S. 324 (1977).

205. Without attempting to define who is an innocent employee, the Court simply noted that the rule adopted by the lower court places a particularly onerous burden on the employer's innocent employees, and the rule adopted by the lower court may require the innocent employee to yield his or her seniority to a person who has not proved and may never prove unlawful discrimination. 458 U.S. 219, 239 (1982).

should be considered or the weight that should be given to these interests under the notion of balancing the equities. The opinion suggests, however, that when a plaintiff has failed to mitigate damages, the interests of the innocent victim might outweigh the interests of the plaintiff, but only in cases in which the form of relief is back pay.[206] Since the question was not raised on the facts of the case, the Court did not consider the competing interests of the plaintiff and the innocent victims and their possible effects on other forms of relief.

V. THE *MOODY-FRANKS* Guidelines

Moody and *Franks* mandated that the lower courts apply sound legal principles in exercising their equitable discretion in the choice of forms of relief for established claims of unlawful employment discrimination, and abhored the granting of relief that is based on "standardless discretion" or is granted only when a court finds a defendant's violation "peculiarly deliberate, egregious, or inexcusable."[207] Unlike some cases in which the Court decides a new legal issue narrowly but leaves to the lower courts the responsibility of fleshing out its ruling in the context of specific cases, the analysis of *Moody* and *Franks* establishes some clear guidelines for a principled application of equitable discretion on matters of relief for proven claims of unlawful discrimination. Although the Court did not attempt to be exhaustive in the guidelines that it established, the guidelines should inform courts how discretion should be applied to all forms of relief not specifically dealt with in *Moody, Franks, Manhart,* and *Ford Motor*. This section will specify those guidelines; a clear understanding of them will inform the parties and the courts of the approach to relief in stage II proceedings that best effectuates the purposes of the laws against discrimination.

A. *Make-Whole Relief*

1. *Presumptive Entitlement*

Perhaps the most fundamental guideline that emerges from *Moody* and *Franks* is that a principled application of equitable discretion, even in its historic setting, is to "secur[e] complete justice" and to grant "necessary relief."[208] In the context of federally protected rights under the laws against employment discrimination, the lower courts have not only the power but the duty to render a decree that will, so far as possible, remedy past discrimination as well as bar similar discrimination in the future.[209] The first principle that emerges, then, is that plaintiffs who have prevailed in stage I have the benefit of a strong presumption of entitlement to all forms of complete make-whole relief. Under this presumption, a court must, in the first step of analysis in stage II proceedings, undertake to reconstruct the past to determine what the terms, conditions, and privileges of employment were and what the relationship

206. *See id.* at 3070 (If a claimant fails to prevail on the merits, and an innocent employee has been displaced, the innocent employee would have no recourse for the wrong done to him or her.)

207. Albemarle Paper Co. v. Moody, 422 U.S. 405, 420 (1975).

208. *Id.* at 418.

209. *Id.* (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)).

of the plaintiff to the defendant and other employees (or applicants) would have been but for the unlawful discrimination. This can be called the reconstructed history step in the analysis and it is not limited to back pay claims.[210]

The process of attempting to reconstruct the past will not be an easy undertaking because the courts will have to consider not only what the terms and conditions of employment might have been for the victims of unlawful discrimination, but also what the terms, conditions, and relationships might have been for the nonvictims. Although the process of creating the past will necessarily involve a degree of approximation and imprecision,[211] any initial uncertainty should be resolved against the defendant and the innocent nonvictim because of the presumptive entitlement to complete relief. The courts have regularly applied the uncertainty rule against defendants on the back pay form of relief,[212] but have not been consistent in applying this rule to other forms of relief.[213] Moreover, *Moody* and *Franks* also support the position that the defendant should not unduly influence the decision maker as to what the reconstructed history should be because this would give the defendant an opportunity effectively to reopen the issue of discrimination that was determined in stage I. Giving the defendant this opportunity is like sending the fox into the henhouse to fetch the chicken.[214]

The presumptive entitlement principle appears to be at odds with the presumption that most of the lower courts have adopted against the bumping of incumbents.[215] Under the lower court rule, an incumbent who occupies a position is,

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210. The Supreme Court approved of the reconstructed history approach in International Bhd. of Teamsters v. United States, 431 U.S. 324, 371–72 (1977), in the context of relief for nonapplicants and seniority relief.

211. *Id.* at 372 ("After the victims have been identified, the court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination. *Franks*, 424 U.S. at 769. This process of recreating the past will necessarily involve a degree of approximation and imprecision.") The determination of what the relationships and conditions would have been is a factual question to be decided by the trial court. 431 U.S. 324, 371 n.58 (1977).

212. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260–61 (5th Cir. 1974). The Fifth Circuit articulated two principles concerning the computation of back pay that other courts have generally followed: Unrealistic exactitude is not required and all doubts about ascertaining the exact amount of back pay are to be resolved against the defendant. *Pettway* followed the Fifth Circuit's decision in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), in which the court held, relying on NLRA cases, that all doubt about computation must be resolved in favor of the back pay claimant.

213. Compare the cases cited *supra* note 212, with, *e.g.*, EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

214. The Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), used a similar analogy, relying on one of Aesop's fables, in describing the adverse impact of a test that has not been shown to be job related: "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. Congress has now required . . . that the vessel in which the milk is proffered be one all seekers can use."

215. *See, e.g.*, Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); Harper v. General Grocers Co., 590 F.2d 713 (8th Cir. 1979) (immediate reinstatement would be the most complete relief, but immediate reinstatement would be denied where such relief would displace another employee); Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978) (allowing victims of discrimination to bump employees with less seniority to avoid layoffs would penalize innocent victims); Reed v. Arlington Hotel Co., 476 F.2d 721, 726 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969) (the rightful place theory of relief does not require that incumbents be bumped out of their present positions), *cert. denied*, 397 U.S. 919 (1970). *Accord*, Spagnuolo v. Whirlpool Corp., No. 82-2048, slip op. at 15 (4th Cir. Sept. 1, 1983) ("[T]he district court's authority in preparing a scheme whereby relief will be provided to injured employees does not, in the first instance, extend to ordering the displacement or bumping of injured employees.") *But see* Sebastian v. Texas Dep't of Corrections, 541 F. Supp. 970, 978 (S.D. Tex. 1982) (female employee entitled to be reinstated, and if plaintiff can not be otherwise accommodated, the male incumbent must be displaced).

under the reconstructed history analysis, given a preference to remain in the position over the plaintiff who has been found to have been a victim of unlawful employment discrimination. In these cases, the courts generally have awarded the plaintiffs front pay to compensate for any economic loss between the back pay award and the future date the plaintiff obtains his or her rightful place.[216] The presumption against bumping may be justified if it can be demonstrated that most of the jobs in question are fungible and that performance in one position does not necessarily provide training for consideration for another position, or that the learning time for a new position is relatively short.[217] The presumption against bumping for the upper level jobs,[218] however, fails to take into account the plaintiff's interests in professional pride, professional development, opportunities, and professional dialogue[219] that are likely to be impaired when the plaintiff must suffer a substantial delay in reaching his or her rightful place.

2. *Application to All Forms of Relief*

The apparent distinction that some courts make between the various forms of relief (for example, between monetary compensation in the form of front pay and reinstatement),[220] is not justified under the make-whole theory of relief. *Franks* is emphatic confirmation that the *Moody* make-whole theory applies to all forms of relief that may be necessary to do complete justice. Additionally, *Franks* affirmatively states that the public interest in eliminating discrimination throughout the economy is not served by preferring back pay,[221] and, by implication, front pay as well, over the rightful place form of relief.

3. *A Presumption Seldom Overcome*

Nothwithstanding the denial of back pay relief, *Manhart* establishes that the *Moody* presumption in favor of complete make-whole relief is seldom overcome. To overcome the presumption, a defendant must prove unusual circumstances peculiar to

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216. *See, e.g.*, Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980); EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

217. *See, e.g.*, James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977).

218. The reluctance of the courts to regularly apply to the upper level jobs such as professional, managerial, and technical positions, the same substantive standards that the courts have enunciated and applied in the lower level skilled and unskilled positions, has been the subject of critical commentary. *See, e.g.*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); Friedman, *Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37 (1981); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973). It appears that the courts have been equally hesitant to order full relief in the upper level jobs even when there has been a finding of unlawful employment discrimination. This tendency is most evident in the reinstatement cases.

219. *See, e.g.*, Crawley v. Board of Educ. of Marion County, 658 F.2d 450, 452 (6th Cir. 1981) (court takes judicial notice that principals and teachers take great pride in their professional status); Gibson v. United States Immigration and Naturalization Service, 541 F. Supp. 131, 136 (S.D.N.Y. 1982) (loss of professional status not capable of monetary calculation).

220. For example, back pay is not subject to the balancing of the equities, but the court balances the equities in the reinstatement cases.

221. 424 U.S. 747, 768 n.28 (1976).

the particular case. It appears that the special circumstances rule that the lower courts had adopted for some forms of relief is not as stringent as the unusual circumstances rule that *Moody* and *Franks* adopt. *Moody* retained the special circumstances rule only for awards of fees in the employment discrimination cases. A review of the lower court decisions on the application of the special circumstances rule in the fee award cases suggests, however, that the presumption of entitlement to fees for a prevailing plaintiff is seldom overcome.[222] Moreover, the courts have broadly defined fees to include the full range of economic items properly attributable to the services of an attorney.[223] The discretion of the court in stage II proceedings should be exercised in a similar fashion for the victims of discrimination under the unusual circumstances doctrine.

B. *Irrelevancy of Irreparable Injury and Adequacy of Legal Relief*

The Supreme Court has held that a congressional grant of jurisdiction to the federal courts to insure compliance with a federal statute through injunctive relief does not limit a court's inherent equitable power.[224] The basis for injunctive relief has always been irreparable injury and inadequacy of legal relief.[225] In *Weinberger v.*

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222. *See, e.g.*, Maher v. Gagne, 448 U.S. 122 (1980); Northcross v. Board of Educ. of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); Price v. Pelka, 690 F.2d 98, 100 (6th Cir. 1982); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

223. *See, e.g.*, Northcross v. Board of Educ. of Memphis City Schools, 611 F.2d 624, 636–40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

224. Copper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983).

225. Hecht Co. v. Bowles, 321 U.S. 321 (1944). The discussion of irreparable injury and inadequacy of remedies at law in the American cases can be traced back to Chancellor Kent's opinion in Jerome v. Ross, 7 Johns Ch. 315 (N.Y. ch. 1823). O. FISS, INJUNCTIONS 13 (1972). The requirements of irreparable injury and inadequacy of legal remedies must still be met when an employment discrimination claimant seeks a preliminary injunction pursuant to Rule 65, FED. R. CIV. P. *See, e.g.*, EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981). The courts are divided, however, on whether a district court has jurisdiction to entertain a motion for preliminary relief, to maintain a motion for preliminary relief, or to maintain the status quo of the parties prior to exhaustion of administrative remedies. *Compare, e.g.*, Berg v. Richmond Unified School Dist., 528 F.2d 1208 (9th Cir. 1975) (court has jurisdiction), *vacated and remanded on other grounds*, 434 U.S. 158 (1977); Drew v. Liberty Mutual Ins. Co., 480 F.2d 69 (5th Cir. 1973) *with, e.g.*, McGee v. Purolator Courier Corp., 430 F. Supp. 1285 (N.D. Ala. 1977); Jerome v. Viviano Food Co., 489 F.2d 965 (6th Cir. 1974) (expressing doubt about jurisdiction).

Much of the unsettled state of the law on preliminary injunctions is traceable to the Supreme Court's decision in Sampson v. Murray, 415 U.S. 61 (1974), in which the Court held that a strong showing of irreparable injury is required prior to the issuance of a preliminary injunction. *Sampson* held also that the temporary loss of income, ultimately to be recovered, does not constitute irreparable injury. *Id.* at 90. The Court reached the same result on the allegation of damage to reputation. *Id.* at 91. The Court recognized, however, that "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." But the Court emphasized that "insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual." *Id.* at 92 n.68. Thus, under *Sampson*, the issuance of preliminary relief is reserved for the "genuinely extraordinary situation." *Id.*

The lower courts have recognized the harshness of the *Sampson* rule and have begun to identify the widespread nature of the manifestations of injuries caused by discriminatory discharges that qualify these cases as meeting the "genuinely extraordinary situation" rule. *See, e.g.*, Morrow v. Inmont Corp., 30 Empl. Prac. Dec. (CCH) 33,142, ¶ 34,285 (W.D.N.C. Sept. 2, 1982); Gibson v. United States Immigration & Naturalization Service, 541 F. Supp. 131 (S.D.N.Y. 1982); Gonzalez v. Chasen, 506 F. Supp. 990 (D.P.R. 1980). In an age discrimination case, EEOC v. Chrysler Corp., 546 F. Supp. 54, 70 (E.D. Mich. 1982), for example, the court found:

> The record reflects that claimants have suffered emotional stress, depression and increased drug use . . .; decrease in feelings of a useful and contracted social life . . .; increased cigarette consumption . . .;depression

Romero-Barcelo,[226] for example, the Court held that a federal court may properly decide not to issue an injunction even in the face of a proven violation unless irreparability of injury and inadequacy of legal relief is shown.

Although it is not completely clear whether irreparability of injury and inadequacy of legal remedies are factors to be considered in the employment discrimination cases, *Moody* and *Franks* strongly suggest that they are not. First, the majority of the Justices did not discuss these equitable maxims in their opinions. Second, implicit in *Moody* is that a finding of unlawful employment discrimination is presumptive proof of irreparable injury and that the nature of the injury cannot be adequately compensated with legal relief.[227] Another reason is based on the federal rules. Rule 65(b) of the Federal Rules of Civil Procedure requires a finding of irreparable injury prior to the issuance of temporary relief.[228] Rule 65(d) contains no such requirement concerning permanent injunctive relief. The only requirement for the issuance of a permanent injunction under Rule 65(d) is the obligation of the court to set forth the reasons for issuance and a specification of the act sought to be restrained.[229]

Rondeau v. Mosinee Paper Corp.,[230] decided just eight days before *Moody*, seems to be at odds with the conclusion that irreparability and inadequacy of legal remedies are not important factors in the relief stage in employment discrimination cases. The case arose under the Securities and Exchange Act of 1934.[231] The Act requires full disclosure of information needed by investors who participate in the securities market. The defendant failed to make full disclosure and the plaintiff sought injunctive relief. The district court denied the injunction, but the court of appeals reversed on the ground, *inter alia*, that irreparable injury was not a prerequisite to injunctive relief. The Supreme Court reversed, holding that a showing of irreparability of injury and inadequacy of legal remedies is necessary before a private litigant can obtain injunctive relief under section 13(b) of the Act.[232] Chief Justice Burger, writing for the majority and relying in part on *Hecht Co. v. Bowles*,[233] held that injunctive relief is a "remedy whose basis 'in the federal courts has always been

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and lassitude . . .; sexual problems . . .; depression and reduced sense of well-being . . . . It is significant to the Court's decision that the psychological and physiological distress suffered by the claimants is the very type of injury Congress sought to avert when it banned involuntary retirement.

226. 456 U.S. 305 (1982).

227. Perhaps the reason that the courts have not found the irreparability rule to be a necessary requirement for the issuance of a permanent injunction in the employment discrimination cases is based on the willingness of the courts to adopt an almost conclusive presumption that a finding of unlawful employment discrimination constitutes irreparable injury. See, *e.g.*, United States v. Hayes Int'l. Corp., 415 F.2d 1038, 1045 (5th Cir. 1969), in which the court stated that when statutory rights of employees are involved and an injunction is authorized by statute, the usual prerequisites of irreparable injury need not be established. *See also* Middleton-Keirn v. Stone, 655 F.2d 609 (5th Cir. 1981) (irreparable injury presumed in both the public and private sectors). *But see* EEOC v. Anchor Hocking Corp., 666 F.2d 1037, 1041 (6th Cir. 1981).

228. FED. R. CIV. P. 65(b).

229. FED. R. CIV. P. 65(d).

230. 422 U.S. 49 (1975).

231. 15 U.S.C. §§ 78a-kk (1982).

232. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975).

233. 321 U.S. 321 (1944).

irreparable harm and inadequacy of legal remedies.'"[234] It is difficult to distinguish *Rondeau* from *Moody* on any rational basis insofar as the role of equitable discretion is concerned, except to note that the Court was unwilling to extend the concepts of irreparability and inadequacy of legal remedies to the employment discrimination cases.

C. *The Unusual Circumstances Doctrine*

1. *Burden of Proof*

Two separate issues are involved when considering the allocation of burdens of proof. The first is issue allocation, that is, which party has the risk of nonpersuasion on a given issue in a case, and the second concerns the standard to be used for the satisfaction of that burden—preponderance of the evidence, clear and convincing evidence, or some lighter or heavier burden.[235] The plaintiff has the burden of proof on all issues in the liability determination stage, except on those defenses properly classified as affirmative defenses.[236] Once a plaintiff has prevailed in the liability determination stage, he or she has the benefit of the strong *Moody* presumption of entitlement to complete relief and the burden of proof on the issue of denial of complete relief or denial of a particular form of relief is on the defendant. The clear and convincing standard is the measure the court should use to determine if the defendant has satisfied the burden.

The Supreme Court did not specifically address the burden of proof issue for stage II proceedings. The Court stated in *Franks*, however, in reference to future applicants under the hiring relief ordered by the trial court, that "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on" the issue of showing that future applicants, who have the benefit of a presumption of liability, were not in fact victims of previous hiring discrimination.[237] Similar reasoning should be applied as a general proposition in stage II proceedings. The lower courts have allocated the burden of proof, by a clear and convincing standard,[238] to the defendants to show reasons why back pay should be denied,[239] but the presumptive entitlement to make-whole relief should relieve the plaintiff of the burden of proof in stage II on all forms of relief.

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234. 422 U.S. 49, 57 (1975).

235. *See generally* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

236. *Id.* at 1214; FED. R. CIV. P. 8(c).

237. 424 U.S. 747, 773 n.32 (1976).

238. The difficult standards of proof involved in stage II proceedings are discussed in *Special Project—Back Pay*, 35 VAND. L. REV. 893, 982–94, 983 n.605 (1982).

239. *See, e.g.* Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Special Project—Back Pay*, 35 VAND. L. REV. 893, 981–92 (1982). The order and allocation of the burdens of proof that the Court established for stage I proceedings in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), are not applicable in stage II proceedings. *Burdine* requires the plaintiff to establish his or her claim of a statutory violation by the preponderance of the evidence. *See also* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

2. *Balancing the Equities*

Neither *Moody* nor *Franks* dispensed with the equitable notion of balancing the equities in the relief formulation stage. These cases collectively, however, show that this notion is relevant only to those aspects of relief that are designed to compel future compliance by the defendants. *Moody* and *Franks* also make clear that the balance of the equities must be tipped in favor of the victim of employment discrimination rather than the innocent employees or applicants for employment unless a court is persuaded that there are unusual circumstances tipping the balance in favor of the innocent third parties. The unusual circumstances doctrine is perhaps the least clarified aspect of *Moody* and *Franks*. *Manhart* and *Ford Motor* are simply illustrations of specific examples of unusual circumstances that would justify balancing the equities in favor of the innocent third parties; these cases, however, offer little doctrinal direction to the lower courts.

Thus, a major task for the lower courts after *Moody* and *Franks* is to design principled standards for the application of the unusual circumstances doctrine. This task will necessarily require the court to identify with more particularity the interests of both the victim of the employment discrimination and the innocent third parties. This task, at a minimum, appears to involve three separate but interrelated issues: a definitional statement of who qualifies as an innocent third party; an identification of the interests of both the victim of unlawful employment discrimination and the innocent third party; and a determination of who has standing to raise the interests of the innocent third parties. The Court in *Moody* and *Franks* did not examine these questions; both the majority and the dissenters simply assumed that innocent third parties existed and that it was appropriate for the defendants to represent, or at least make an argument on behalf of, the innocent third parties. Thus, for example, the employer in *Franks* was concerned only about the efficiency and trustworthiness of job performance, whether done by the victims of discrimination or the innocent third parties.[240] This section will offer some suggestions on the three questions raised above.

a. *Defining the Innocent Victims*

The court should find that an employee or applicant is an innocent victim if he or she has received an employment benefit that would not have been available but for the defendant's unlawful employment discrimination. This working definition of the innocent victim seems valid because an employee who has obtained an advantage in employment opportunity not based on the unlawful employment discrimination of the defendant should remain unaffected by any relief a court may order. The reconstructed history approach that the courts have adopted in the back pay cases should ease the problem of determining who would not have received an employment opportunity but for the unlawful conduct of the defendant. The courts will have to second-guess when making the determination of what the conditions and relationship would

240. 424 U.S. 747, 787 n.5 (1976) (Powell, J., dissenting).

have been but for the unlawful conduct. The courts should avoid the temptation to use "hindsight logic,"[241] and should engage in every reasonable assumption in favor of the victim of discrimination.

b. *Standing to Raise Interests of Innocent Victims*

Most courts have assumed that the defendants have standing to raise the interests of innocent third parties in employment discrimination cases. The problem in allowing the defendants to raise the issue of innocent victims is that defendants have a vested interest in the status quo.[242] When the issue of innocent third parties is raised, the court should provide notice to these parties and should allow intervention by them so they may assert their own interests. Once the potential third parties have been identified with reasonable certainty and have been given the opportunity to be heard, due process will not be offended if the court grants complete relief even when no third parties appear. Notice and opportunity to be heard are procedures that the courts regularly use in class action cases in both the certification stage and in the settlement of cases.[243] The courts have also allowed liberal intervention in the quota cases.[244] Allowing the defendant to represent the interests of third parties raises an ethical problem similar to the situation in which an attorney in an employment discrimination case simultaneously negotiates a settlement for a plaintiff and his own attorney's fees.[245] The courts in the settlement and fee negotiation cases have held that the apparent conflict of interest must be avoided.[246]

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241. *See* Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (discussing the standard for fee awards to prevailing defendants in Title VII cases). The balancing of the equities doctrine has been aptly described by Mr. Justice Frankfurter:

> "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring). Moreover, Chief Justice Burger found it necessary to conclude in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971), that in "seeking to define the scope of remedial power . . . of courts in an area as sensitive as [school desegregation], words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern . . . ." *See also* Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1305 (11th Cir. 1982) (reinstatement is a basic element of appropriate relief for a wrongful discharge and, except in extraordinary cases, is required).

242. *See, e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Spagnuolo v. Whirlpool Corp., 548 F. Supp. 104 (W.D.N.C. 1982).

243. *See* F. R. Civ. P. 23. Rule 23(c)(2) requires notice to class members in a 23(b)(3) class, but Rule 23(d)(2) leaves it to the court to decide whether to provide notice in the (b)(2) class. Most class actions in the employment discrimination cases are certified as (b)(2) class actions. *See, e.g.*, General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local 396, 568 F.2d 558 (8th Cir. 1977); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

244. *See, e.g.*, Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); Jones, *Litigation Without Representation: The Need for Intervention To Affirm Affirmative Action*, 14 Harv. C.R.-C.L. L. Rev. 31 (1979). *See also* United Airlines v. McDonald, 432 U.S. 385 (1977).

245. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338, 1352 (9th Cir. 1980); Prandini v. National Tea Co., 557 F.2d 1015, 1020–21 (3d Cir. 1977). *See generally* Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized*, 14 Clearinghouse Rev. 515 (1980).

246. *See supra* note 245.

c. *Interests to be Protected*

The Court has vacillated between characterizing the interests of the innocent victims as employment expectancies[247] and as vested rights.[248] It seems clear that the interests of the innocent victims are properly characterized as employment expectancies. The injury to victims of discriminatory employment practices include more than the loss of employment expectancies. The range of identifiable injuries that can be suffered by persons who are victims of discrimination is pervasive. The injured interests include: Financial,[249] psychological,[250] and social,[251] as well as damage to the plaintiff's physical well-being,[252] professional pride,[253] professional opportunity,[254] self-esteem, and self-worth.[255] The courts must begin to take account of these interests and injuries in factoring and weighing under the balance of the equities calculus. Some courts accord these nonpecuniary factors great weight.[256] Other courts tend to disparage these factors or question the evidentiary basis for their support.[257] A principled approach to balancing the equities must consider these and other factors because of their well-recognized impact.

Defendants often rely on the hostility and antagonism that has either developed as a result of litigation or would be likely to ensue if complete relief (for example, reinstatement or a hiring preference), was granted.[258] Hostility or antagonism that results from an individual seeking vindication of rights protected under federal law is a factor hardly worthy of consideration, particularly in those cases in which the

247. *See, e.g.*, Franks v. Bowman Transportation Co., 424 U.S. 747, 778 (1976); Tilton v. Missouri Pacific R. Co., 376 U.S. 169 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

248. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977).

249. *See, e.g.*, Gonzalez v. Chasen, 506 F. Supp. 990, 998–99 (D.P.R. 1980); Morrow v. Inmont, 30 Empl. Prac. Dec. (CCH) ¶ 33, 142 (W.D.N.C. 1982). *But see* Sampson v. Murray, 415 U.S. 61 (1974). The courts fail to recognize that employability is the greatest asset most people have. *Id.* at 95 (Douglas, J., dissenting).

250. *See, e.g.*, Foster v. MCI Telecommunications Corp., 555 F. Supp. 330, 337 (D. Colo. 1983) (discrimination proximately caused embarrassment, humiliation, severe anxiety, and great emotional stress).

251. *See, e.g.*, EEOC v. Chrysler Corp., 546 F. Supp. 54, 70 (E.D. Mich. 1982).

252. *Id.*

253. *See, e.g.*, Crawley v. Board of Educ. of Marion County, 658 F.2d 450, 452 (6th Cir. 1981); Foster v. MCI Telecommunications Corp., 555 F. Supp. 330, 337 (D. Colo. 1983).

254. *See, e.g.*, Farkas v. New York State Dep't of Health, 554 F. Supp. 24, 26 (N.D.N.Y. 1982) (monetary compensation insufficient to repair damage to professional reputation).

255. *See, e.g.*, Ford Motor Corp. v. EEOC, 458 U.S. 219 (1982).

256. *See, e.g.*, Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982). The courts are in disagreement over the applicable standard for reinstatement, hiring preference, and promotion. Some courts hold that reinstatement must be ordered unless extraordinary circumstances are present. *See, e.g.*, Burton v. Cascade School Dist., 13 Fair Empl. Prac. Cas. (BNA) 283 (9th Cir. 1975). Other courts hold that a weighing of the equities is inappropriate in the reinstatement cases. *Id.* at 286. (Lumbard, J., dissenting). Other courts consider the reinstatement remedy to be a drastic form of relief. *See, e.g.*, Seymour v. Olin Corp., 666 F.2d 202, 211 & n.7 (5th Cir. 1982). The Supreme Court has noted that "because of what we have found to be the statutory purpose, there is doubtless little room for the exercise of discretion not to order reinstatement." Mitchell v. DeMario Jewelry, 361 U.S. 288, 296 (1960).

257. *See, e.g.*, Monroe v. United Airlines, 31 Empl. Prac. Dec. (CCH) ¶ 33,330 (N.D. Ill. Jan. 12, 1983); Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981) (collecting cases).

258. *See, e.g.*, Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982) (argument accepted); Cline v. Roadway Express, Inc., 689 F.2d 481, 489 (4th Cir. 1982) (argument rejected); Sterzing v. Fort Bend Indep. School Dist., 496 F.2d 92 (5th Cir. 1974) (argument rejected). *See also* Pred v. Board of Public Instruction, 415 F.2d 851, 856 (5th Cir. 1969). The courts have generally rejected the common-law theory of personal services contract as a basis to deny relief, or have simply not considered this theory applicable in the discrimination case.

plaintiff proved that he or she is the victim of unlawful discrimination. For a court to accept this reasoning as a basis for denying or otherwise limiting complete make-whole relief is incongruous with the purpose of the private attorney general theory that the courts have used to describe these cases, and would involve the court itself as an instrument of perpetuating those practices that Congress wishes eliminated.[259]

3. *Reasons Must Be Articulated When Complete Relief Denied*

Moody requires the courts to "carefully articulate"[260] its reasons when it denies or otherwise limits complete relief or a just result based on the circumstances peculiar to the particular case. This obligation is not onerous in most instances because Rule 52(a) of the Federal Rules of Civil Procedure requires a court, sitting without a jury, to make findings of fact. The predicate for relief should be set out in those findings so that, in the relief formulation stage, a court need only add to these findings. Too often, the courts, with nothing more than a bow to fact finding on the basis of equitable discretion, deny or otherwise limit complete relief.[261] *Moody* and *Franks* dictate an end to this practice.

4. *Good Faith*

The good faith defense was soundly rejected in *Moody* as a basis for denial of relief in the form of back pay, although the Court recognized that the doctrine of laches may be available to reduce the award. The Court has not spoken directly to the good faith defense in a case involving a form of relief other than back pay. There appears to be no reason that the good faith defense should be available as a defense to other forms of relief in light of the *Franks* expansion of *Moody* to nonmonetary forms of relief. The defense of good faith can be asserted in many guises by a defendant, but the courts must be sensitive to the multi-faceted methods of asserting this defense.

VI. CONCLUSION

Griggs v. Duke Power Co. and *McDonnell Douglas v. Green*[262] established an important doctrinal framework for the evaluation of substantive claims of liability in stage I proceedings. The lower courts have attempted to fashion principled standards within the guidelines set by *Griggs* and *McDonnell Douglas*. An equally important aspect of achieving the national policy embodied in the federal laws against employment discrimination involves the relief formulation phase to remedy proven violations. *Moody* and *Franks* have established the doctrinal framework for the relief formulation stage and have mandated that the courts apply principled standards in this

259. *See* Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968).
260. 422 U.S. 405, 421 n.14 (1975).
261. *See, e.g.*, Leftwich v. Harris-Stowe State College, 31 Empl. Prac. Dec. (CCH) ¶ 33, 429 (8th Cir. 1983).
262. 411 U.S. 792 (1973).

phase of the litigation. Too little attention has been given to the development of principled standards and it is the hope that this Article will act as a "spur or catalyst" for the courts to begin that process—in earnest—by recognizing the new dimensions of equitable discretion in the relief formulation stage of employment discrimination cases.