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Discrimination in Employment-Remedies-Standards Governing Backpay Awards for Violations of Title VII of the Civil Rights Act of 1964

Michael S. Piraino

Discrimination in Employment—Remedies—STANDARDS GOVERNING BACKPAY AWARDS FOR VIOLATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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

In *Albemarle Paper Co. v. Moody*[1] the Supreme Court has considered, for the first time, the standards which should govern awards of backpay to minority employees adversely affected by discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964.[2] In reaching its decision, the Court had to define the basic philosophy of Title VII and make some accommodation between this philosophy and the competing interests of employers and minority employees. This question has vexed the courts of appeals; they have been unable to agree as to when backpay awards may be denied because, until now, there has been no generally accepted rationale for granting the awards.[3] The conflict in the circuits has focused on whether an employer's good faith efforts to comply with Title VII should be a defense to

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[1] 422 U.S. 405 (1975).

[2] 42 U.S.C. § 2000e (1970), *as amended*, (Supp. III, 1973). Backpay as a remedy for discrimination may also be imposed as a condition of contracting with the federal government under proposed guidelines from the Office of Federal Contract Compliance. 41 C.F.R. §§ 60-1.1 to -1.9 (1975).

[3] *Compare* Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir. 1974) (class members denied backpay where employer acted in good faith), *and* Head v. Timken Roller Bearing Co., 6 CCH E.P.D. ¶ 8679, at 5037 (S.D. Ohio 1972), *rev'd*, 486 F.2d 870 (6th Cir. 1973) (error to deny backpay absent exceptional circumstances), *with* Bush v. Lone Star Steel Corp., 373 F. Supp. 526 (E.D. Tex. 1973) (class awarded backpay although employer's racial motivation not shown), *and* United States v. Bricklayers Local 1, 5 CCH E.P.D. ¶ 8480, at 7305 (W.D. Tenn. 1973), *aff'd sub nom.* United States v. Masonry Contractor's Ass'n, 497 F.2d 871 (6th Cir. 1974) (backpay an appropriate remedy in "pattern or practice" suit). These cases indicate the conflicting results obtained before the Fourth, Fifth, and Sixth Circuits adopted similar backpay standards. A direct conflict can be found by comparing the district court's action in *Albemarle* (for the substance of this decision, see the opinion of the court of appeals, Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973)) with the opinion in Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *aff'g* 319 F. Supp. 835 (M.D.N.C. 1970), *petition for cert. dismissed*, 404 U.S. 1006 (1971). On almost identical facts, one court denied backpay and the other granted the relief. *See* notes 27-49 and accompanying text *infra*. Inconsistent results on whether or not to award backpay are still being obtained in some circuits. *Compare* United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) (backpay denied where employer's bad faith not shown), *with* United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) (backpay granted in absence of a showing of specific intent to discriminate).

backpay claims. Some courts have allowed the defense,[4] some have considered it as a factor in guiding the court's discretion,[5] and others have found it totally irrelevant.[6]

The Supreme Court's opinion is a blend of doctrines enunciated by the courts of appeals, as well as an attempt to resolve their conflicts. Because *Albemarle* is the culmination of a line of decisions in the circuits, it is essential to understand this background. This Note will therefore examine the statute and its legislative history to outline the purposes of the backpay remedy, study the various solutions of the courts of appeals (with special emphasis on the good faith defense), and analyze the *Albemarle* opinions to see to what extent the Supreme Court has circumscribed the power of the district courts to deny backpay.[7]

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[4] *See* notes 27-49 and accompanying text *infra.*

[5] *See* notes 43-44 and accompanying text *infra.*

[6] *See* notes 50-74 and accompanying text *infra.* Actions which have been asserted as good faith efforts to comply with Title VII include the voluntary abolition of segregated departments, affirmative action hiring programs, validation of tests used for hiring and promotion, efforts to conform to judicial interpretations of the Act, and efforts to modify discriminatory provisions of collective bargaining agreements. *See, e.g.,* Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated,* 422 U.S. 405 (1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973).

[7] This Note does not deal with the issue, also involved in *Albemarle,* of employment testing and the quantum of proof necessary under the Act to show that these tests are job related. *See* 422 U.S. at 425-35. The Act allows such testing as long as it is not used to discriminate. 42 U.S.C. § 2000e-2(h) (1970). The issue of employment testing is primarily relevant to the preliminary determination of Title VII liability, although the issue here is the range of remedies available after a violation has been found. The Supreme Court had already dealt with the broad testing issue, and it placed the burden on the employer to prove the job relatedness of the tests he uses. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

An important issue in *Albemarle* was the deference to be given to the guidelines established by the Equal Employment Opportunity Commission (EEOC) on test validation. 29 C.F.R. §§ 1607.1-.14 (1975); *see* note 60 *infra.* In recent years, the courts of appeals have required increasingly strict application of these guidelines. *See, e.g.,* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). In *Albemarle,* the Court did not give these guidelines the force of law. It did decide, however, that, as a source of professionally accepted standards and an administrative interpretation of the Act by the enforcing agency, the guidelines are to be given deference. 422 U.S. at 431. The import of this part of the decision may, however, be questioned since a contrary holding would have considerably weakened the validation requirements. For example, the Wonderlic aptitude test was used by Alhemarle for hiring and promotion purposes. This test has been held by every court of appeals considering it to have an adverse impact on blacks and not to be job related. *See* Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Young v. Edgcomb Steel Co., 499 F.2d 97 (4th Cir. 1974). The *Albemarle* decision also seems to leave room for an employer to avoid the guidelines by producing convincing evidence of professional disagreement with them. *See* 422 U.S. at 435. *See generally* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers,* 41 GEO. WASH. L. REV. 505 (1973); 10 HOUSTON L. REV. 989 (1973).

I

BACKPAY AND THE SCHEME OF TITLE VII

In discussing the applicability of Title VII remedies, courts have stressed the need to look to the broad purposes of the Civil Rights Act. In the *Albemarle* decision, the Supreme Court stated:

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[8]

It is therefore essential to understand the basic foundation of the Act.

Title VII outlaws present and future job discrimination, including facially neutral employment practices when they are superimposed on a history of discrimination and perpetuate its effects.[9] Discriminatees may bring suit in federal court if they have exhausted the administrative remedies in the Act.[10] If the court finds an unlawful employment practice, it is authorized to "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."[11]

The backpay remedy was patterned on that of the National Labor Relations Act (NLRA).[12] Originally, the drafters of the Civil Rights Act intended that the criteria for awarding such relief would

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[8] 422 U.S. at 421.

[9] *See, e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

[10] The EEOC is the administrative agency created by the Act with which charges must first be filed. The agency then investigates the charges and seeks voluntary compliance through conciliation. Once the charge has been filed with the EEOC and that agency has given notice to the aggrieved individual that it has not heen able to achieve voluntary compliance within 30 days, a suit may be filed in the district court. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973). *See* Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

[11] 42 U.S.C. § 2000e-5(g) (Supp. III, 1973). The courts have uniformly held the backpay provision to be discretionary. *See, e.g.*, Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975); Paper Mill Workers Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284 (N.D. Ind. 1969). Attorney's fees may also be awarded. 42 U.S.C. § 2000e-5(k) (1970).

[12] *See* 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey); *id.* at 7214 (interpretative memorandum of Senators Clark and Case); H.R. 405, 88th Cong., 1st Sess. § 9(j) (1963). The National Labor Relations Act authorizes "affirmative action including reinstatement of employees with or without back pay" when the Board has found an unfair labor practice. 29 U.S.C. § 160(c) (1970).

be drawn from judicial and administrative interpretations of the NLRA provision.[13] Under that statute, the National Labor Relations Board (NLRB) has consistently awarded backpay,[14] and the Supreme Court has endorsed these actions as part of the affirmative action needed to remedy past abuses.[15] Thus, the original intent was that backpay be liberally awarded. The NLRA analogy, however, is imperfect because of amendments made by the Senate to ensure that the Equal Employment Opportunity Commission (EEOC) would not become as large as the NLRB.[16] As a result, Congress did not give the EEOC the right to institute a civil action, and the amendments to the Civil Rights Act emphasize that backpay awards are discretionary.[17]

Despite these changes, the NLRA analogy remains a valid indication of congressional intent. Originally, the Civil Rights Act was based on the public policy of eliminating discrimination throughout the economy, and individual rights were subordinated to this policy. The amendments focused on the individual vindication of private rights through court action. Commentators have observed that, given this new focus, backpay should never be denied,[18] and one case has followed a similar approach to Title VII

[13] 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey). Senator Humphrey and Senator Kuchel were the general leaders of the Senate debate on Title VII. One of the reasons for the passage of a federal statute and inclusion of a backpay provision was the inadequate enforcement record of state fair employment practices commissions. The states rarely used the backpay remedy. *See* Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations,* 14 BUFFALO L. REV. 22 (1964). *See generally* Vaas, *Title VII: Legislative History,* 7 B.C. IND. & COM. L. REV. 431 (1966).

[14] *See, e.g.,* NLRB v. A.P.W. Prods. Co., 316 F.2d 899, 904 (2d Cir. 1963), *enforcing* 137 N.L.R.B. 25 (1962); *In re* Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935); 2 NLRB ANN. REP. 148 (1937). *But see In re* McKesson & Robbins, Inc., 19 N.L.R.B. 778, 802 (1940).

[15] *See, e.g.,* Radio Officer's Union v. NLRB, 347 U.S. 17 (1954); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[16] Amendment No. 656 to H.R. 7152, 88th Cong., 2d Sess., tit. VII, 110 CONG. REC. 11,930-34 (1964). The objections were primarily those of Senator Dirksen, who worked informally with the House and Senate conferees. *See* 110 CONG. REC. 6445-51 (1964) (remarks of Senator Dirksen).

[17] The original version provided that the court "shall" order affirmative relief, but this wording was changed to "may" order relief. Amendment No. 656 to H.R. 7152, 88th Cong., 2d Sess., tit. VII, § 706(g), 110 CONG. REC. 11,930-34 (1964) (Mansfield-Dirksen substitute bill). The only other change affecting the backpay provision was a reduction of the award by the amount of interim earnings. These were the amendments adopted by the Senate after much debate. *Id.* at 14,511 (1964). The House concurred in them without change. *Id.* at 15,897 (1964). That individualized relief was not originally of primary importance is indicated by the provision added in the Mansfield-Dirksen substitute bill under which the EEOC would only act in the public interest to obtain general compliance with Title VII, rather than to seek individual redress. H.R. 7152, 88th Cong., 1st Sess. § 707(b) (1963).

[18] *See, e.g.,* Moroze, *Backpay Awards: A Remedy Under Executive Order 11246,* 22 BUFF. L. REV. 439 (1973); Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of*

enforcement.[19] But a more consistent analysis of congressional intent must recognize that the rights protected by the Act have both a public and a private character. The Senate amendments added to, but did not supplant, the original purposes of the legislation.[20] Thus, because of the public interest in protecting individual discriminatees,[21] backpay should be awarded whenever it will help make the victim whole.

This "make whole" purpose of Title VII remedies was reaffirmed by the 1972 amendments to the Act.[22] At that time, Congress limited the accrual period for backpay to two years before the filing of charges with the EEOC.[23] The purpose of this limitation was not, apparently, to withhold complete relief. Rather, it seems to have been intended to encourage the courts to grant backpay in more cases.[24] Further evidence of this intent to strengthen the enforcement provisions is the authority given the EEOC to institute a suit on behalf of the "aggrieved party" when conciliation fails.[25] Beyond the make whole purpose for including the backpay remedy, the legislative history can provide few additional guidelines because it is often inconsistent and incomplete.[26]

1964, 46 TEXAS L. REV. 516, 522 (1967). It is doubtful, however, that the drafters realized the implications of this change.

[19] *See* Hall v. Werthan Bag Corp., 61 L.R.R.M. 2458 (M.D. Tenn. 1966).

[20] Senator Humphrey noted that "[t]he basic coverage and the substantive prohibitions of the title remain almost unchanged." 110 CONG. REC. 12,721 (1964). The powers finally given the EEOC show this combination of public and private interests protected by the Act. Thus, the Commission may file its own charges or, subject to the approval of the court in cases of "general public importance," intervene in a private action. 42 U.S.C. § 2000e-5(f) (Supp. III, 1973), *amending* 42 U.S.C. § 2000e-5 (1970).

[21] *Cf.* UAW v. Scofield, 382 U.S. 205, 220 (1965).

[22] Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (Supp. III, 1973), *amending* 42 U.S.C. § 2000e (1970).

[23] 42 U.S.C. § 2000e-5(g) (Supp. III, 1973). Originally, the only time limit was the July 2, 1965, effective date of the Act. The final backpay limitation was much less restrictive than the one offered in the House, which would have limited the accrual period to two years before the case was filed in court. H.R. 6760, 92d Cong., 1st Sess. § 3(e) (1971). The limitation on backpay was the only change made in the remedies subsection.

[24] The spokesmen of the House and Senate conferees, Congressman Carl Perkins and Senator Harrison Williams, believed that Congress gave discretion to the courts in order to foster a policy of liberal remedies and encourage "the most complete relief possible." 118 CONG. REC. 7168 (1972) (Section-by-Section Analysis of H.R. 1746 by House and Senate Conferees). Restoration of the discriminatee to his rightful place was specifically mentioned as an objective of the amendments. *See* notes 67-72 *infra*. *See generally* Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

[25] 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

[26] Much of the history is found in the Mansfield-Dirksen amendments adopted by the Senate, but these were formulated in informal sessions between the House and Senate leaders, and there were, therefore, no conference committee reports. *See* Vaas, *Title VII:*

It was therefore left to the courts to determine the circumstances in which backpay could be denied without contravening the broad purposes of the Civil Rights Act.

II

LOWER COURT RESPONSES TO BACKPAY CLAIMS

The issue of when backpay relief may be denied has arisen most often in cases where facially neutral practices have perpetuated the effects of past discrimination. In such cases, the employers have generally attempted in good faith to comply with Title VII, yet their minority employees have continued to suffer economically.[27] Both sides therefore have strong arguments concerning the propriety of a backpay award. In choosing between these two interests, the courts of appeals have developed two different rules. The special circumstances rule is based on the remedial principle of complete relief to the discriminatee; the equitable rule, on the other hand, balances both sides, but places special emphasis on fairness to the employer.

Those courts which generally uphold denials of backpay consider, as did the district court in *Albemarle,* the employer's innocence either as a mitigating factor or as a bar to recovery. The good faith defense has been accepted most often in sex discrimination cases where the employer complied with a state female protective statute.[28] These state laws existed before the passage of the Civil Rights Act, and employers developed employment practices in compliance with them. These same employment practices were later found violative of the federal statute.

Legislative History, 7 B.C. IND. & COM. L. REV. 431, 457 (1966). The length of the debate, the great public interest, and the multiplicity of viewpoints add to the inconsistencies in the legislative history.

[27] *See, e.g.,* Duhon v. Goodyear Tire & Rubber Co., 494 F.2d 817 (5th Cir. 1974); Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Sprogis v. United States Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969).

[28] These statutes regulated working conditions, hours, and wages of female workers, and prohibited the employment of females in certain occupations. *See, e.g.,* N.Y. LABOR LAW §§ 172, 203-b (McKinney 1965), *as amended,* N.Y. LABOR LAW § 172 (McKinney Supp. 1975); OHIO REV. CODE ANN. §§ 4107.42-.43, 4107.46 (Page 1973); PA. STAT. ANN. tit. 43, §§ 101, 103(c) (1972). Congress seems to have intended to preempt only state laws requiring an act unlawful under Title VII. 42 U.S.C. § 2000h-4 (1970). The state female protective laws have generally been held to be preempted under this provision. *See, e.g.,* Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds,* 474 F.2d 949 (6th Cir. 1972). *See also* Ash v. Hobart Mfg. Co., 483 F.2d 289 (6th Cir. 1973); CCH EEOC DECISIONS ¶ 6104, at 4153 (1973).

A few courts have held that there is no violation of Title VII when a female protective law is involved. In one such case, *Garneau v. Raytheon Co.*,[29] the employer had applied for a waiver of the state law and later terminated compliance with the statute immediately after it was ruled invalid.[30] The court in *Garneau* reasoned that an innocent employer could not intentionally commit an unlawful employment practice.[31] This rationale, however, is inconsistent with the prevailing view of Title VII liability,[32] and has not been widely accepted.

The Third Circuit followed a more persuasive rationale in *Kober v. Westinghouse Electric Corp.*[33] In that case, Westinghouse had refused to promote a female employee to the position of computer console operator because a Pennsylvania law prohibited her from working the hours required for the job.[34] Specifically rejecting the special circumstances rule,[35] the Third Circuit chose a more flexible approach to backpay. Although it admitted there was an intentional violation of Title VII, the court believed that the employer's good faith reliance on the state law overshadowed the plaintiff's need for recovery.[36]

Thus, an employer's good faith is irrelevant to the initial finding of a Title VII violation, but may limit the defendant's available remedies.[37] The reason for this conclusion is the employer's dilemma of choosing between compliance with the federal law or the presumptively valid state law.[38] If an employer has reason to know the state law has been preempted, he, of course, cannot rely on the *Kober* defense. The courts, however, have not agreed on

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[29] 341 F. Supp. 336 (D. Mass. 1972). *See also* Baxter v. Birkins, 311 F. Supp. 222 (D. Colo. 1970).

[30] 341 F. Supp. at 338.

[31] *Id.*

[32] It is now generally accepted that the word "intentional" in the statute requires only that the employment practice itself be intentional and not an accidental occurrence. As long as the practice was a deliberate one and caused discrimination in fact, there is a violation of Title VII whether or not the employer intended the discriminatory effects. *See* note 65 *infra*.

[33] 480 F.2d 240 (3d Cir. 1973).

[34] *Id.* at 243. The Pennsylvania law limited females to a five hour work period with thirty minute rests between periods. PA. STAT. ANN. tit. 43, §§ 101, 103(a), 107 (1964), *as amended*, (Supp. 1975).

[35] 480 F.2d at 247. In support of this action, the court cited the dissenting opinion of Judge Boreman of the Fourth Circuit in *Albemarle*. Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975).

[36] 480 F.2d at 248.

[37] *Accord*, Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973).

[38] 480 F.2d at 249. *See also* Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974).

what constitutes sufficient notice to invalidate the defense. The *Kober* court suggested that only a judicial determination would suffice.[39] Other courts have also required a judicial determination or a declaration by a state attorney general, but not necessarily a final decision.[40] The Act itself suggests an administrative ruling by the EEOC would suffice.[41] And at least one court has suggested the passage of Title VII itself was sufficient notice of illegality.[42]

A court following the equitable rule need not adopt a per se rule to apply the *Kober* defense, in which good faith by itself may be sufficient to require denial. Instead, the courts may consider good faith reliance as one factor to be considered.[43] The results of some of these decisions, however, are inconsistent with the reason for allowing the defense. The defense should only be allowed to a defendant who was required by a state statute to perform a discriminatory act. In one case, a union was allowed to assert the defense.[44] This extension of the good faith reliance rule seems unwarranted since it was the employer who was regulated by it and who would be liable for damages under the Act.

Sex discrimination is not the only area in which backpay has been withheld on good faith grounds. A few district courts have refused to grant backpay awards in any case absent a showing of racial motivation,[45] and others have put the burden on the claimant

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[39] 480 F.2d at 249.

[40] *See, e.g.,* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1007 (9th Cir. 1972); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[41] Title VII provides, in pertinent part:

> [N]o person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . .

42 U.S.C. § 2000e-12(b) (1970). But such an opinion must be a definite legal judgment signed by the General Counsel. *See* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[42] Although in this case there was no conflicting state law, the Fifth Circuit has stated that "the unsettled nature of the law applicable to a particular employment practice does not constitute a legally cognizable defense to a claim for back pay in a Title VII suit." Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974).

[43] *See* Williams v. General Foods Corp., 492 F.2d 399, 407 (7th Cir. 1974); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1007 (9th Cir. 1972). *But see* Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

[44] Wernet v. Meat Cutters Local 17, 484 F.2d 403 (6th Cir. 1973).

[45] Banks v. Seaboard Coast Line R.R., 360 F. Supp. 1372 (N.D. Ga. 1973); Davis v. Ameripol, Inc., 55 F.R.D. 284 (E.D. Tex. 1972). The Eigbth Circuit has denied backpay where an employer had not acted in bad faith, although the court did order the defendant to give minority workers their rigbtful place of employment. United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 310-11 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973). *But see* United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

to prove his own good faith.[46] These courts have often required the claimant to meet four standards. First, he must satisfy the job-related[47] requirements for the higher position. Second, a job vacancy must have existed which he could have filled but for the discrimination. Third, the job opportunity must have arisen within the backpay limitation period. Fourth, the claimant must show that he would have accepted the new position. To some extent, these decisions confuse the standards for granting classwide backpay with the methods for determining individual grants.[48] They erroneously conclude that, because backpay is individual redress, it is necessarily distinguishable from classwide remedial relief.[49] The two are separate but related determinations. Once discrimination has been proved, the court may award backpay to the class as a whole, but further proceedings are necessary to determine which individuals are entitled to relief and in what amounts.

III

STANDARDS ADOPTED BY THE SUPREME COURT

Like the Fourth,[50] Fifth,[51] and Sixth[52] Circuits, the *Albemarle* Court adopted a rule which directs the district courts to exercise

[46] Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Larson v. United States, 296 F.2d 167 (8th Cir. 1961).

[47] The Supreme Court clarified the standards for proving job-relatedness in *Albemarle*. 422 U.S. at 425-35. *See* note 7 *supra*.

[48] *See* United States v. United States Steel Corp., 11 BNA F.E.P. CASES 553 (5th Cir. 1975). Originally, the courts would grant an injunction for the entire class, but would grant backpay only to named plaintiffs. The reason was that only the named plaintiffs had filed charges with the EEOC; other class members had not exhausted the administrative remedies. *See* McCoy v. Safeway Stores, Inc., 5 CCH E.P.D. ¶ 8405 (D.D.C. 1973); Broussard v. Schlumberger Well Services, 315 F. Supp. 506 (S.D. Texas 1970). Courts have applied the same principle to named intervening plaintiffs. Austin v. Reynolds Metals Co., 327 F. Supp. 1145 (E.D. Va. 1970). This result was thought to be mandated by Rule 23(b)(2), which mentions only injunctive or declaratory relief for a class as a whole. FED. R. CIV. P. 23(b)(2). *See* Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1972). However, more recent cases have allowed classwide relief if the named plaintiffs satisfy the requirements of Rule 23(b)(2). It is now common to have a separate proceeding to determine entitlement on an individual basis after the issue of liability has been tried. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257-63 (5th Cir. 1974). At this second proceeding such issues as job vacancies, pay rates, qualifications, and mitigation may be considered. Rule 23(b)(2) is now interpreted to allow the courts to grant other relief. *See* Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1975). *See* notes 101-02 and accompanying text *infra*.

[49] 422 U.S. at 414 n.8.

[50] Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

their discretion and award backpay unless special circumstances are shown which would render it substantially unjust. The Court did not accept good faith as a special circumstance because it was found irrelevant to the goals of eliminating discrimination in various sectors of the economy.[53]

A. *The Special Circumstances Rule*

Albemarle was brought by former and present black employees against their employer and union.[54] The plaintiffs alleged that job seniority and non-job-related tests discriminated against them. Although the employer, Albemarle Paper Company, had ended its overt racial discrimination before the effective date of Title VII, the seniority system continued the effects of its prior discrimination until after 1968.[55] The district court found that this system violated Title VII, enjoined its future use, and ordered the imposition of plantwide seniority.[56] But the court, applying the equitable rule, refused backpay for at least two reasons. First, it found that Albemarle had acted in good faith because it had voluntarily merged its formerly segregated lines of progression, took steps to conform to judicial interpretations of the Act, and generally paid higher wages than its competitors.[57] Second, the plaintiffs had originally stated they did not seek backpay—their claims were asserted five years after charges were filed, although still before trial.[58] Several other factors may have influenced the court, including the difficulty of determining individual grants and the absence of unjust enrichment to Albemarle.[59]

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[51] Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

[52] Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

[53] Good faith is specifically mentioned in Title VII only in one subsection providing that good faith reliance on an EEOC written opinion is an affirmative defense to liability. 42 U.S.C. § 2000e-12(b) (1970).

[54] 422 U.S. at 408.

[55] This seniority system was mandated by the collective bargaining agreement. *Id.* at 409.

[56] The district court found Albemarle's tests to be job-related, so that the backpay issue arises only in connection with the seniority system. However, both the Fourth Circuit and the Supreme Court overturned this ruling on job relatedness and stated that equitable relief would be available for testing violations as well. *Id.* at 436.

[57] *Id.* at 410.

[58] *Id.*

[59] It is unclear whether the district court considered these factors independently or cumulatively as reasons for denying backpay. *See* Petitioner's Brief at 59-60, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The unjust enrichment argument has been successfully used to avoid backpay under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1970). Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267, 1272 (10th Cir. 1970). *Cf.* Landaas v. Canister Co., 188 F.2d 768, 770-71 (3d Cir. 1951).

On appeal, the plaintiffs challenged the denial of backpay as an abuse of discretion.[60] The Fourth Circuit, relying upon *Newman v. Piggie Park Enterprises,*[61] held that backpay should have been awarded,[62] and followed a line of Fifth Circuit cases that formulated the special circumstances rule. One such case was *Johnson v. Goodyear Tire & Rubber Co.*[63] which, like *Albemarle,* involved a discriminatory departmental seniority system and claims of good faith compliance by the employer.[64] Prior to 1968, Goodyear employed blacks primarily in low-paying jobs in separate departments. In that year, the employer instituted an affirmative action program allowing blacks to transfer freely to new departments, but the collective bargaining agreement's seniority system gave them no credit for prior service in their former department.[65]

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[60] The court's failure to enjoin Albemarle's testing program was also appealed. The district court had accepted the conclusions of Albemarle's industrial psychologist, based on his comparisons between test scores and supervisory judgments of competence, that the tests were job-related. 474 F.2d at 137-38. However, this validation study did not comply with EEOC guidelines requiring separate validation for minority and nonminority groups, nor did it consider the possibility of alternative selection procedures. *See* 29 C.F.R. §§ 1607.5(b)(5), 1607.7 (1975). For these reasons, the Supreme Court did not accept the finding of job relatedness. 422 U.S. at 436. Under these guidelines, an employer must show a relationship between the aptitudes tested and the requirements of the job. If the test attempts to forecast future advancement, the testing is only allowed if the advanced employment would be attained reasonably quickly. Although the Supreme Court has shown no desire to strike down the guidelines, the *Albemarle* opinion might allow an employer to use a professionally acceptable alternative method, such as job sample tests. The Court thought the guidelines provided certain minimum standards for determining job-relatedness, but did not indicate that an employer must comply with every technicality of the guidelines. *See* 422 U.S. at 435.

[61] 390 U.S. 400 (1968). *See* note 66 *infra.*

[62] 474 F.2d at 142.

[63] 491 F.2d 1364 (5th Cir. 1974). The action was brought both under Title VII and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970).

[64] The actions claimed to have constituted good faith included termination of segregated departments, abandonment of testing and education requirements, and attempts to modify the collective bargaining agreement which imposed departmental seniority. 491 F.2d at 1369.

[65] *Id.* at 1369-70. The program originally required the employee to have a seventh grade education and pass a written examination, but in 1971 these requirements were dropped.

Departmental seniority systems have uniformly been held violative of Title VII. *See, e.g.,* Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). The employer's motivation is considered irrelevant to the finding of liability under Title VII. An intentional employment practice is discriminatory for the purposes of Title VII if it affects blacks disproportionately to whites, even though it was not adopted for that purpose. All that need be shown is that the employment practice itself was intentional and not the result of accident or oversight. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The union in *Johnson* was also held liable for backpay as a party to the collective bargaining agreement which produced the discriminatory system. 491 F.2d at 1381-82. *See*

The *Johnson* court held that, as a matter of law, Goodyear's good faith was irrelevant to the backpay claim and all discriminatees were "presumptively entitled to an appropriate award of back pay."[66] The court reasoned that the purpose of the remedy was to put the discriminatee in his rightful economic place, a question on which the employer's state of mind had no bearing.[67] Thus, in calling for a class approach to backpay relief, the court resolved any doubts on entitlement in favor of the employee. The burden of proof was first on the claimant to show that he was a member of the aggrieved class. Then the employer had to meet a high burden of proof in showing that the employee would never have transferred from his department.[68] Thus, the only relevant special circumstance was that an individual was never kept from his rightful place of employment.

The same court elaborated upon the "rightful place" doctrine in *Pettway v. American Cast Iron Pipe Co.*[69] One of the issues in that case was whether the district court could deny backpay based on the employer's assertions that the award was not necessary to ensure his future compliance. In rejecting this additional element of the defense, the court stated that the question of future compliance is relevant to injunctive relief, but that backpay is concerned only with the continuing effects of past injuries.[70] This is

also Bush v. Lone Star Steel Co., 373 F. Supp. 526 (E.D. Texas 1973). *Lone Star* rejected the argument that practices based on the seniority and promotion provisions of a collective bargaining agreement could not be intentionally discriminatory.

[66] 491 F.2d at 1374-75. The Supreme Court has applied a similar rule to the awarding of attorney's fees in Title II cases. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). The statute makes attorney's fees discretionary. 42 U.S.C. § 2000a-3(b) (1970). The same standards seem to apply to attorney's fees under Title VII. *Id.* § 2000e-5(k). *See* Northcross v. Board of Educ., 412 U.S. 427 (1972). The analogy between attorney's fees and backpay awards is not convincing. The purpose of the award of attorney's fees is to help provide representation for victims of discrimination, but backpay serves a compensatory purpose. The analogy was rejected by the Court in *Albemarle.* 422 U.S. at 415.

[67] 491 F.2d at 1375. The Fourth Circuit, in rejecting a similar good faith argument, reasoned that

> back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition.

Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971).

[68] 491 F.2d at 1375.

[69] 494 F.2d 211 (5th Cir. 1974). Here, as in *Albemarle,* the employer used certain tests for hiring, promotion, and transfer purposes, without an intent to discriminate. Despite the company's efforts to validate the tests, and the approval of the tests by the Office of Federal Contract Compliance, statistics showed an adverse impact on blacks, and therefore, the court held the testing program illegal under the standards of Griggs v. Duke Power Co., 401 U.S. 424 (1971). 494 F.2d at 216-19.

[70] 494 F.2d at 253. *Accord,* Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir.

the basic approach of the Supreme Court in *Albemarle;* the purpose of the remedy is to give an employee the advancement he would have had but for the discrimination.[71] Backpay, therefore, should be awarded even though it inflicts punishment on the employer.[72] The "rightful place" doctrine thus seems to require backpay relief for all "but for" effects of prior discrimination.

In addition to good faith, a defense sometimes asserted is one predicated on the doctrines of waiver or laches. This arises when the claimant has delayed his request for backpay until late in the litigation, thereby prejudicing the defendant insofar as he will not be able to present all his possible backpay defenses. The three circuits considering this defense have held that, because of its importance, the backpay claim must still be considered.[73] This is the area, however, in which the Supreme Court differed with the "special circumstances" courts. The range of special circumstances accepted by those courts is so narrow it may be nonexistent in practice. Those decisions left the trial courts no discretion to deny

1973). This is a revival of a similar rightful place argument often used in NLRB cases that eventually led to the rule that when economic hardship results from undeservedly low earnings, backpay must be awarded even if some hardship results for the employer. *See, e.g.,* Nathanson v. NLRB, 344 U.S. 25 (1952). *Cf.* NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969). A variation of the rightful place doctrine, less favorable to discriminatees, was applied by the Fifth Circuit in Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). In that case, the doctrine was used to deny minority workers the right to "bump" incumbent white workers as a remedy for discrimination. *See* 80 HARV. L. REV. 1260 n.2 (1967).

[71] This "but for" relationship between racial discrimination and an individual's failure to advance can present significant problems of proof for individual claimants. By creating a presumption of entitlement to backpay and placing the burden on the employer to defeat it, the Fifth Circuit's approach avoids much of this difficulty. *See* notes 102-03 and accompanying text *infra.*

[72] 494 F.2d at 253. The rightful place doctrine has recently been used in a different context to deny Title VII relief to minority workers, hired under affirmative action programs, who are laid off pursuant to a "last hired, first fired" seniority system. *See* Watkins v. Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Central Power and Light Co. v. IBEW Local 377, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974). The *Waters* case was brought under § 1981, but Title VII standards were used in the analysis. In each case, the doctrine was used to determine that there was no Title VII violation. In that context, the "rightful place" concept refers only to employment position, rather than economic position as it was used in *Pettway.*

[73] Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir.), *cert. denied,* 414 U.S. 870 (1973); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971). In each of these cases, the claim was merely presented after the end of the trial. The Supreme Court, however, reversed the denial of backpay in an NLRB case where there was a five-year delay. NLRB v. Rutter-Rex Mfg. Corp., 396 U.S. 258 (1969). The delay defense is closely linked to good faith defenses. Where the claimant originally disclaimed any intention to seek backpay, the defendant might argue it is bad faith on the claimant's part to assert the claim late in the litigation. *See* notes 91-95 and accompanying text *infra.*

backpay on a classwide basis, although a court may withhold individual grants in some cases.[74] The Supreme Court fell short of saying there were no circumstances in which backpay relief could be denied to all members of a class.

B. *Restrictive View of Trial Court Discretion*

In the majority opinion,[75] Justice Stewart borrowed heavily from the special circumstances rule on the good faith question and measured the denial of backpay against the purposes of Title VII. The major purpose, according to the opinion, was to make whole the victim of discrimination, and the good faith defense was rejected as inconsistent with this purpose. But outside the ambit of good faith, the opinion left much to the discretion of the trial court.[76] Justice Blackmun concurred in the judgment, but disagreed with the majority's suggestion that good faith could never be a defense.[77] Chief Justice Burger, concurring in part and dissenting in part, did not agree with the majority's restrictive view of trial court discretion.[78]

Recognizing the importance of consistency in the law,[79] Justice Stewart's first task was to decide where to look for guidance on the denial of backpay. Rejecting the analogy to *Piggie Park*,[80] he looked almost exclusively to the legislative history of Title VII and found that "the primary objective [of the backpay provision] was a prophylactic one."[81] It was meant both to compensate the victim and to deter the employer. Consequently, the majority decided that any denial of backpay must now be measured against these two purposes; a district court denying backpay must show that this denial would not frustrate either of these objectives.[82] Justice Stewart further attempted to define the roles of the district courts and the courts of appeals in backpay cases:

[74] *See* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974).

[75] 422 U.S. at 408-36.

[76] *Id.* at 436.

[77] *Id.* at 447-49.

[78] *Id.* at 449-53.

[79] *Id.* at 416-17. Although acknowledging that some flexibility must remain, Justice Stewart emphasized that "[i]mportant 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.' " *Id.* at 417, *quoting* Moragne v. States Marine Lines, 398 U.S. 375 (1969).

[80] *See* note 66 *supra*. The Court treats this as a case of first impression on the backpay issue. Prior Supreme Court cases are referred to only as an aid in interpreting the broad aims of Title VII. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[81] 422 U.S. at 417. The opinion specifically endorses the NLRA analogy and the rightful place doctrine.

[82] *Id.* at 421.

> The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.[83]

The Court's standard greatly restricts all defenses based on the employer's state of mind. Justice Stewart was compelled by his view of the purposes of Title VII to reject the *Kober* standard and find good faith an insufficient reason to deny backpay.[84] Furthermore, the opinion suggests that good faith is never a factor to be considered because it would defeat the purpose of the statute.[85] Such a conclusion is reasonable in light of the Act's dual purposes since the good faith argument assumes that the primary purpose of backpay is punitive rather than compensatory.[86] The logical effect of the Court's "statutory purposes" standard would seem to be to disallow the good faith defense even in female protective law cases. The majority declined to decide this issue,[87] but Justice Blackmun noted that this conclusion follows from the Court's reasoning.[88]

Injunctive and backpay relief are to be considered as complementary remedies under Title VII, according to Justice Stewart.[89] This linking of backpay with injunctive relief is a strict limitation on trial court discretion, but it is designed to ensure "the most complete relief possible."[90] The effect will be to require backpay awards on a classwide basis, even though the claim is not brought by an individual. Class actions should therefore be an effective remedy for individuals (through backpay) as well as for the class and society as a whole (through injunctive relief). Public policy, which may require that emphasis be placed upon the elimination of discrimination in certain sectors of the economy, need not sacrifice the interests of individuals. Their interests will be protected through classwide backpay relief.

C. *Remaining Discretionary Authority*

Although the Court's opinion severely limits the discretion of the district courts in denying backpay, it does not go so far as the special circumstances rule, nor does it necessarily provide a more workable standard. Many cases must still be left to the trial court's

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[83] *Id.* at 421-22.
[84] *Id.* at 422.
[85] *Id.* at 423.
[86] *Id.* at 422.
[87] *Id.* at 423 n.18.
[88] *Id.* at 448.
[89] *Id.* at 423.
[90] 118 CONG. REC. 7168 (1972) (Section-by-Section Analysis of Title VII).

discretion due to "circumstances peculiar to particular cases."[91] Justice Stewart recognized this when he dealt with Albemarle's second defense to backpay, the delay argument. The district court apparently accepted Albemarle's assertion that it would have defended more vigorously had it known of the backpay claims earlier.[92] Justice Stewart agreed that relief may be denied when delay in asserting a backpay claim causes substantial prejudice in fact.[93] On such "issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution."[94] Thus, whenever the statutory purposes do not obviously favor the claimant, as in the prejudicial delay question, there is no presumption of entitlement and the trial court may use "its traditional discretion"[95] to deny backpay.

Unfortunately, the result here is not mandated by the remedial and deterrence principles, making it inconsistent with the Court's treatment of the good faith defense. Delay in asserting a claim is not more relevant to the need for relief than is an employer's good faith. Furthermore, if injunctive and backpay relief are such closely linked remedies, the defenses asserted at trial for injunctive relief should also apply to backpay. For these reasons, Justice Marshall noted in his concurring opinion that the bar of substantial prejudice should be an especially difficult one to establish, and should only be used to limit the accrual period for backpay.[96]

Other situations in which the district courts may deny backpay under this standard include cases in which employment is sought for the purpose of testing the employer's practices.[97] In such a case, the statutory purposes favor denial because there is no need to make the person whole, and a backpay award would be punitive. Similarly, the relief may be denied when an employer shows that the claimant acted in bad faith. A potential backpay windfall may induce an employee to seek relief even though he would never have transferred to the higher paying job. The denial in such a case might be based on a clean hands theory,[98] as well as the statutory purposes analysis.

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[91] 422 U.S. at 422.

[92] 474 F.2d at 135.

[93] 422 U.S. at 424.

[94] *Id.* at 425, *quoting* Moody v. Albemarle Paper Co., 474 F.2d 134, 141 (4th Cir. 1973).

[95] 422 U.S. at 424.

[96] *Id.* at 441 & n.* (concurring opinion). Additional defenses could be presented when individual entitlement is determined.

[97] *See* Roberts v. Hermitage Cotton Mills, Inc., 498 F.2d 1397 (4th Cir. 1974); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969), *aff'd in part,* 438 F.2d 86 (4th Cir. 1971).

[98] Justice Stewart's opinion recognized that "the court's discretion is equitable in nature . . . ." 442 U.S. at 416. *See also* Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

The practical difficulties of determining an award present another problem which may justify denial to individuals, although the difficulty of ascertainment cannot be used to preclude backpay relief to *every* employee in a class.[99] The courts have been unable to supervise backpay relief in cases where the class was ill-defined, individual awards were small, or the amounts due were not easily ascertainable.[100] In these cases, the expense of determining the awards might be prohibitive. Especially where classwide backpay is awarded to unnamed class members,[101] the make whole objective is often irrelevant because of the impossibility of determining an individual's rightful place.

The district courts will retain much discretion over the method of awarding backpay to individuals. After the first stage of a Title VII suit, the finding of discrimination creates a presumption in favor of entitlement for each member of the affected class. In the second stage of the suit, each individual must show that he is a member of the class and that he was affected by the discrimination.[102] In simple cases, the person may be able to do this by reconstructing his work history; the court would then award backpay to those individuals it believes would have filled job vacancies that actually existed during the period of discrimination. This reconstruction of a claimant's work history, however, cannot be precise, especially in complex fact situations. In those cases, the court might use as a guideline a similar employee group which was not injured by the discrimination. Another solution would be to award pro-rata shares of backpay, with adjustments for the number of years the individual would have been available for promotion. In applying such a formula, the court might obtain help from a special master or from the EEOC. In any case, the defendant would have a very heavy burden if he wished to prove an individual was not entitled to relief.[103]

[99] 422 U.S. at 442 (concurring opinion, Rehnquist, J.). *See* United States v. United States Steel Corp., 11 BNA F.E.P. CASES 553 (5th Cir. 1975).

[100] This argument might be used in cases in which the plaintiffs claim they were not allowed to advance to a craft requiring a greater degree of skill. Years later, it may be impossible to decide which discriminatees who are now unqualified for the higher position would have been qualified but for the racial discrimination. *See* Norman v. Missouri Pac. R.R., 497 F.2d 594 (8th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). Thus, to determine which claimants need to be made whole, the courts would be forced to make a speculative projection of each individual's potential. In such situations, the special circumstances rule has the advantage of consistency since it resolves such doubts in the employee's favor.

[101] *See* 422 U.S. at 414 n.8.

[102] *See* United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975).

[103] *Id.* The defendant might be able to show that an individual was not entitled to relief by showing that there was a significantly higher rate of refusal of promotions by blacks than by others.

In these cases, the statutory purposes analysis used in *Albemarle* provides no ready solution. To some extent, then, the standards governing backpay awards continue to be vague. Some Title VII plaintiffs must therefore still rely on injunctive relief alone, which will be insufficient to restore them to their rightful places, thus allowing some of the effects of prior discrimination to go unchecked.

CONCLUSION

The Supreme Court's decision in *Albemarle* will necessarily have a great impact on the overall effectiveness of Title VII, since backpay is not only a factor in motivating individuals to seek relief, but also a deterrent to future discrimination. As Title VII cases proliferate, these two purposes will become more important. The decision significantly restricts the power of the district courts to deny backpay relief in Title VII cases. Claims must now be measured against the Title VII objectives identified by the Court. Therefore, absent procedural difficulties, classwide backpay relief may only be denied if there is a specific showing that an award would neither make the claimant whole nor discourage future discrimination. On the one hand, the defense that the employer acted in good faith is no longer sufficient to deny backpay. On the other hand, delay in asserting a claim may be sufficient grounds for denial. As to the methods by which awards are to be determined, the decision provides only limited assistance, and the district courts will retain more discretion over this aspect of the backpay remedy.

Michael S. Piraino