St. John's Law Review

Volume 60
Number 4 *Volume 60, Summer 1986, Number 4*

Article 5

June 2012

# Designing Procedure to Suit Title VII's Purpose: Bibbs v. Block

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# COMMENTS

## DESIGNING PROCEDURE TO SUIT TITLE VII's PURPOSE: *BIBBS v. BLOCK*

Under Title VII of the Civil Rights Act of 1964 ("Title VII"),[1] an allegedly discriminatory employment decision that affects an individual employee may be challenged in a disparate treatment action.[2] To establish Title VII liability under this theory, the plaintiff must prove the employer's discriminatory motive,[3] and that

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (1982)("Title VII"). The Civil Rights Act of 1964 was the first comprehensive federal legislation designed to remedy the various manifestations of racial discrimination in modern American society. *See* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 8 (1966).

One section of Title VII prohibits the following discriminatory employment practices:

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

[2] *See* L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES § 1.8 (1980). Disparate treatment cases involve the less favorable treatment of single or multiple employees on account of "their race, color, religion, sex, or national origin." *See id.* at 335 n.15 (1977).

The Supreme Court has identified two distinct types of employment discrimination: disparate treatment and disparate impact. *See* International Bhd. of Teamsters, 431 U.S. 324, 335 (1977). Disparate treatment actions generally involve intentional discrimination directed at one individual, *see* Fourth Circuit Review, *Allocation of Burdens of Proof in Disparate Treatment Cases of Title VII Litigation*, 39 WASH. & LEE L. REV. 637, 638 (1982), while a disparate impact plaintiff claims "that a facially neutral employment practice actually falls more harshly on one racial group," and results in an adverse or disparate impact on the whole group. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 583 (1977) (Marshall, J., concurring in part and dissenting in part). *See generally* 3 A. LARSON, EMPLOYMENT DISCRIMINATION §§ 72.00-80.00 (1986) (discussion of employment practices, procedural and evidentiary devices, defenses and individual relief in disparate impact suits).

[3] *International Bhd. of Teamsters*, 431 U.S. at 335 n.15 (proof of discriminatory motive critical); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130 (1980) (impermissible discriminatory motive re-

discriminatory animus played a causal factor in the employment decision.[4] However, Title VII's affirmative remedies of retroactive promotion and backpay[5] will not automatically be awarded upon a

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quired). Specific intent or willfulness is not necessary to establish discriminatory motive if the employer's "general intent to discriminate" meets statutory muster, *see* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 454-55 & n.171 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), because of the plaintiff's difficulty in producing direct evidence on discriminatory motivation. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 16 (1976). Circumstantial evidence may adequately establish this intent. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983); *cf.* Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17, 18 (1984) (discriminatory intent may be inferred from objective facts). However, an adverse employment decision itself is insufficient to demonstrate discriminatory motive. *See International Bhd. of Teamsters*, 431 U.S. at 358 n.44. Instead, the Title VII plaintiff must at least prove that the adverse employment decision did not result from "absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Id.*

A procedure that enables plaintiffs to show an employer's discriminatory intent was developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The *McDonnell* standard consists of a three-step approach: The first step places upon the plaintiff the initial burden of establishing a "prima facie case of racial discrimination," *id.* at 802, which can be satisfied by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* Once a plaintiff establishes his prima facie case by a preponderance of the evidence, a rebuttable presumption of discriminatory motive is created. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). The burden of production thereafter shifts to the defendant to rebut this prima facie case. *Id.* at 254-55 & n.8. A successful rebuttal is accomplished when the defendant "articulate[s] some legitimate, non-discriminatory reason" for the employment decision, *McDonnell Douglas Corp.*, 411 U.S. at 802, and introduces evidence sufficient to raise "a genuine issue of fact" concerning motivation for the decision. *See Texas Dep't of Community Affairs*, 450 U.S. at 254-55. In the final step, plaintiff must demonstrate that the defendant's articulated business reason was "in fact pretext[ual]." *McDonnell Douglas Corp.*, 411 U.S. at 804.

Some examples of pretextual evidence given by the *McDonnell* Court include prior treatment of the plaintiff, defendant's reaction to any civil rights activities of the plaintiff and defendant's general treatment of other minority employees. *Id.* at 804-05. *See generally* 2 A. LARSON, *supra* note 2, at § 50.73(a) (factual illustrations of pretext).

[4] *See* Dougherty v. Barry, 37 Fair Empl. Prac. Cas. (BNA) 1201 (D.D.C. 1985) Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1223-24 (1981). Uncertainty exists as to the exact causation standard needed to establish Title VII liability, American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 716 F.2d 47, 51 n.2 (D.C. Cir. 1983), and courts have adopted different causal standards. *See, e.g.*, Satz v. I.T.T. Fin. Corp., 619 F.2d 738, 746 (8th Cir. 1980) (causal standard requires race as factor in decision); Marshall v. Kirkland, 602 F.2d 1282, 1289 (8th Cir. 1979) (motivating factor standard); Barnes v. Costle, 561 F.2d 983, 990-91 (D.C. Cir. 1977) (substantial factor standard).

[5] *See* 42 U.S.C. § 2000e-5(g)(1982), which states in pertinent part: "If the court finds that the [employer] has intentionally engaged . . . in an unlawful employment practice . . .

finding of Title VII liability.[6] The weight of authority suggests that first a higher standard of causation must be established by the plaintiff seeking these affirmative remedies,[7] and second, to avoid imposition of these affirmative remedies, the evidentiary burden is on the Title VII defendant to demonstrate that, absent the discrimination, the identical employment decision would have resulted.[8] Recently, in *Bibbs v. Block*,[9] the United States Court of Appeals for the Eighth Circuit reaffirmed this post-liability analysis by holding that the employer's discriminatory motive must be the "but for" cause of the employment decision before Title VII's affirmative remedies will be awarded[10] and that the plaintiff bears

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[it may] order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay. . . ." *Id.* In some instances, retroactive promotion is also an available remedy. *See* 2 A. LARSON, *supra* note 2, at § 55.23. For purposes of this Comment, the terms retroactive hiring and reinstatement will be used interchangeably with the phrase retroactive promotion.

The back pay provision of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c) (1982), served as the model for Title VII's back pay provision. *See Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 893, 904 (1982). However, when compared to NLRA cases, Title VII's affirmative remedies are not granted as liberally by courts. *See id.* Additional remedies available for Title VII discrimination victims include injunctive relief against future discriminatory practices and awards for attorney fees. *See* 42 U.S.C. § 2000e-5(g),(k) (1982). *See generally* A. LARSON, *supra* note 2, at §§ 58.00 - 58.32 (issues in awarding attorney fees).

[6] *See* 42 U.S.C. § 2000e-5(g) (1982), which states in relevant part:

> No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin.

*Id.* Therefore, back pay and retroactive promotion are not mandatory remedies even if a Title VII violation is established; rather, such a remedial award lies in the discretion of the court. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975) *See also* 118 CONG. REC. 7168 (1972) (under remedial provision, courts possess "wide discretion" to fashion relief). The equitable nature of Title VII relief justifies the broad discretion given the court. *See* Comment, *Back Pay for Employment Discrimination Under Title VII - Role of the Judiciary in Exercising its Discretion*, 23 CATH. U.L. REV. 525, 529 (1974).

[7] *See, e.g.*, Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166-67 (9th Cir. 1984) (retroactive remedial award justified when discrimination constitutes "but for" cause of employment decision); King v. Trans World Airlines, 738 F.2d 255, 259 (8th Cir. 1984) (same); Patterson v. Greenwood School Dist. 50, 696 F.2d 293, 295 (4th Cir. 1982) (same).

[8] *See, e.g.*, Caviale v. Wisconsin Dep't of Health & Social Serv., 744 F.2d 1289, 1296 (7th Cir. 1984) (defendant must sustain burden of proving that discriminatory factor was not "but for" cause); Richerson v. Jones, 551 F.2d 918, 924-25 (3d Cir. 1977) (same); A. LARSON, *supra* note 2, at § 55.34 (same).

[9] 778 F.2d 1318 (8th Cir. 1985)

[10] *Id.* at 1319.

the burden of proof on this issue.[11]

In *Bibbs*, a black employee of the United States Department of Agriculture, Thomas Bibbs, unsuccessfully sought promotion to a vacant supervisory position.[12] Subsequently, Bibbs instituted a Title VII action alleging that racial discrimination constituted the primary reason for the promotion denial.[13] At the district court hearing, the court found that the "key figure" on the selection committee[14] that evaluated these promotion applications had uttered racially derogatory remarks about the plaintiff and other minority employees on several occasions.[15] Additionally, the district court noted that the credibility of the selection committee members' testimony in support of their promotion decision was highly suspect.[16] However, the court found that the white employee selected for the supervisory position was an acceptable candidate and that the plaintiff "had a history of disciplinary and interpersonal problems."[17] The district court concluded that although race was a "discernible factor" in the decision, it was not the "but for" cause required to establish a Title VII violation, and therefore held for the defendant.[18]

On appeal, the Court of Appeals for the Eighth Circuit, in a

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[11] *Id.* at 1319, 1325.

[12] Bibbs v. Block, 32 Empl. Prac. Dec. (CCH) ¶ 33,779, at 30,745 (W.D. Mo. 1983). Bibbs was employed as an offset press operator and applied for the position of offset press operator supervisor. He was the only black applicant in a pool of seven. *Id.*

[13] Bibbs v. Block, 749 F.2d 508, 509 (8th Cir. 1984). Bibbs also alleged age discrimination because the successful applicant was thirty-three years old, ten years younger than Bibbs. *Bibbs*, 32 Empl. Prac. Dec. at ¶ 30,745. The district court concluded that age was not a factor in the decision and consequently dismissed this claim. *See id.* at ¶ 30,748.

[14] *Bibbs*, 32 Empl. Prac. Dec. at ¶ 30,745. All members of the selection committee were white. *Id.*

[15] *Id.* at ¶ 30,746. Evidence was introduced indicating that the "key figure," Joseph Tresnak, used such racially disparaging statements as "boy" and "nigger" in the presence of other black employees. *Id.* Additionally, Tresnak directed some of his remarks at the plaintiff, calling him a "black militant." *See id.* The district court stated that "[t]he remarks are some evidence of discriminatory feelings on Tresnak's part, which somewhat taint the selection process." *Id.*

[16] *See id.* The court noted that the committee members' testimony was "guarded" and "defensive." *Id.*

[17] *Id.* at ¶ 30,746-47. The white employee had both technical expertise and supervisory experience, *id.* at ¶ 30,746, whereas Bibbs' employment history indicated an inability to work cooperatively with others. *Id.* at ¶ 30,746-47.

[18] *Id.* at ¶ 30,747. However, the court "invite[d] correction from the Court of Appeals in the event it concludes that plaintiff need only establish that race was a discernible factor at the time of the decision." *Id. See also infra* notes 20-21 and accompanying text (court of appeals' conclusion).

panel decision, vacated the district court's judgment, remanded the case and instructed the district court to enter judgment for the plaintiff.[19] Chief Judge Lay wrote that the district court erred when it required the plaintiff to prove "but for" causation.[20] Rather, a finding that race was a discernible factor in the promotion decision sufficiently demonstrated that more likely than not, the decision was influenced by race, and was thereby in violation of Title VII.[21]

The Eighth Circuit, sitting *en banc*, granted the defendant's petition for rehearing and therefore automatically vacated the panel court's decision.[22] Nonetheless, the *en banc* court reaffirmed the panel court's application of the discernible factor standard in determining Title VII liability.[23] The majority further held that the defendant may avoid a remedial order of retroactive promotion and backpay if he establishes by a preponderance of the evidence

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[19] Bibbs v. Block, 749 F.2d 508, 513 (8th Cir. 1984). In addition, the district court was ordered to determine the proper remedy "to make plaintiff whole." *Id.*

[20] *Id.* at 512. *See also supra* note 4 (discussing array of causal standards applied by federal courts). The court stated that the "but for" standard was an excessive burden because it unreasonably required the plaintiff to prove the "hypothetical fact" that a different decision would have resulted absent discrimination. *Bibbs*, 749 F.2d at 512. In effect, this required the plaintiff to disprove the defendant's allegations of its subjective intent. *Id.* at 512-13. The defendant's "superior access to proof of its actual motivation" made the plaintiff's ability to prove such subjective intent unrealistic. *Id.* at 513.

[21] *Bibbs*, 749 F.2d at 511-13. The court noted that the discernible factor standard was proper in light of the Supreme Court's ruling in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). *Bibbs*, 749 F.2d at 511-13. Chief Judge Lay stated that the district court's discernible factor finding implied that the court had progressed to the third stage of the *McDonnell* analysis. *See id.* at 510-11. *See also supra* note 4 (discussion of *McDonnell* analysis). The court asserted that the district court's additional finding that the same decision would have resulted absent discrimination was inapposite to the *McDonnell* analysis, *see Bibbs*, 749 F.2d at 511, and "inherently inconsistent" with the district court's finding that race was a discernible factor in the employment decision. *See id.* at 512. However, in a footnote, Chief Judge Lay noted the difficulties of applying *McDonnell* to mixed motive cases. *See id.* at 511 n.1 (pretext rationale assumes single motive in decision). This observation is inconsistent with the Chief Judge's subsequent *en banc* concurrence in which he suggests that the *McDonnell* is equally appropriate for mixed motive cases. *See infra* note 33 and accompanying text.

[22] Bibbs v. Block, 778 F.2d 1318, 1319 (8th Cir. 1985).

[23] *Id.* The majority stated that the district court's finding that race constituted a discernible factor in the promotion decision was equivalent to a determination that race was a "motivating factor," and sufficient for Title VII liability. *See id.* at 1321 n.4. Judge Arnold stressed that Title VII liability exists when the defendant's consideration of race puts the plaintiff "at a disadvantage in the competition for promotion." *Id.* at 1321. "Every kind of disadvantage resulting from racial prejudice in the employment setting is outlawed," notwithstanding the fact that Bibbs would not have been promoted absent discrimination. *Id.* at 1322.

that the same decision would have resulted irrespective of any discrimination.[24]

Stressing that the defendant's decision was based upon mixed motives,[25] Judge Arnold, writing for the court, stated that the appropriate analysis for such cases requires separation of the liability and remedial determination issues.[26] The opinion emphasized that the justification for this methodology is readily apparent in the language of Title VII,[27] which utilizes comparatively lenient terms to define illegal conduct,[28] while demanding more rigorous require-

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[24] *Id.* at 1319, 1325. Judge Arnold noted that some courts have imposed upon the defendant a clear and convincing burden of proof standard in this remedial stage. *Id* at 1324 n.5. *See also infra* note 54 and accompanying text (discussion of various burdens of proof). However, the court stated that the Eighth Circuit has rejected the clear and convincing standard in similar contexts, citing Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 470 n.8 (8th Cir. 1984). *See Bibbs*, 778 F.2d at 1324 n.5. *But see infra* note 35 and accompanying text (Judge McMillan supports clear and convincing standard).

In a concurrence, Judge Bright agreed with the application of the "same decision test" in the remedial stage. *See Bibbs*, 778 F.2d at 1328 (Bright, J., concurring). Judge Bright hypothesized that in a situation when race comprises only a minor factor, it is unfair not to allow the employer an opportunity to rebut back pay and retroactive promotion remedies. *See id.* at 1328-29 (Bright, J., concurring). Without the "same decision" test, an employer would be forced to reinstate unqualified employees in such hypothetical situations. *See id.* at 1329. (Bright, J., concurring).

[25] Mixed motivation decisions occur when legitimate business reasons as well as discriminatory considerations induce the business decision. *See* Note, *Determining a Standard of Causation for Discriminatory Discharges Under Section 8(a)(3) of the National Labor Relations Act*, 59 WASH. U.L.Q. 913, 917 (1981). This factual scenario is distinguishable from single motivation decisions "in which the issue is whether illegal or legal motives, but not both, were the 'true' motives behind the decision." *See* NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n.5 (1983).

[26] *See Bibbs*, 778 F.2d at 1321. For support of this procedure, the majority cited an article by Professor Brodin, who argues that to establish Title VII liability, the plaintiff must prove that race was a motivating factor in the decision; however, the "but for" causation standard applies to the remedial stage. *See* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 323-26 (1982). Additionally, the court noted that this two step liability/remedial analysis has been employed by other federal circuits. *See Bibbs*, 778 F.2d at 1323. *See,* Caviale v. Wisconsin Dep't of Health & Soc. Serv., 744 F.2d 1289, 1295-96 (7th Cir 1984); Pollard v. Grinstead, 741 F.2d 73, 75 (4th Cir. 1984). *See also infra* notes 41-50 and accompanying text. (justifications for independent analyses of liability and remedy).

Judge Arnold noted that the *McDonnell* evidentiary procedure discerns whether legal or illegal motives, but not both, actuated the employment decision, and therefore, is not applicable to mixed motive decisions. *See Bibbs*, 778 F.2d at 1320.

[27] *Bibbs*, 778 F.2d at 1332.

[28] *See* 42 U.S.C. § 2000e-2(a) (1982). An "unlawful employment practice" includes a failure to promote or actions which otherwise "discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race. . ." *Id.* Judge Arnold interpreted this provision as outlawing any discrimination that detrimentally affects a worker in his employment setting. *See Bibbs*, 778 F.2d at 1322. *See*

ments for an award of affirmative remedies.[29] As a result, Judge Arnold concluded that by successfully proving Title VII liability without more, the plaintiff is entitled only to an injunction against future employment discrimination and attorney fees.[30]

In his concurrence, Chief Judge Lay criticized the majority's application of the "same decision" test, arguing that the use of this test in disparate treatment suits will result in "hollow victories" to discrimination victims,[31] and will "inject total confusion into the already difficult process faced by litigants who pursue relief under Title VII."[32] Chief Judge Lay further asserted that the *McDonnell* analysis is equally suited to mixed motive cases.[33] In his concurring opinion, Judge McMillan agreed that in applying the "same decision" test, the court properly allocated the burden to the defendant-discriminator,[34] but stressed that a clear and convincing standard is more beneficial than the majority's preponderance standard.[35]

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*also infra* notes 41-42 and accompanying text. (policy justifications for lenient liability terms).

[29] *See* 42 U.S.C. § 2000e-5(g) (1982): "No order of the court shall require the . . . promotion . . . or . . . payment to him of any back pay, if such individual was refused . . . advancement . . . for any reason other than discrimination . . ." *Id.* Hence, the court stated that the statute does not mandate the award of retroactive promotion and back pay unless it is appropriate. *See Bibbs*, 778 F.2d at 1322. An affirmative remedies award is proper only when the discriminatory factor was the "but for" cause of the employment decision. *See id.* Judge Arnold noted that this "but for" analysis is "consistent with Title VII's intended purpose of making persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). *See also infra* note 42 and accompanying text (separate liability and remedial determinations are consistent with objective of making victims whole).

[30] *Bibbs*, 778 F.2d at 1324. *See generally supra* note 5 (discussion of statutory authority for attorney fees and injunctive relief).

[31] *See Bibbs*, 778 F.2d at 1326-27 (Lay, C.J., concurring). Chief Judge Lay asserted that applying the same decision test will, in effect, require the plaintiff to additionally demonstrate that race was the "sole cause," and allow the defendant a second chance to "exculpate" himself. *See id.* (Lay, C.J., concurring).

[32] *Id.* at 1328. (Lay, C.J., concurring). The burden shifting "same decision" test is inappropriate under the principles of *McDonnell*. *See id.* at 1327-28 (Lay, C.J., concurring). This method is relevant to "constitutionally protected conduct cases," stated the Chief Judge, not Title VII cases. *Id.* at 1328 (Lay, C.J., concurring). *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (applying method to first amendment retaliatory discharge cases).

[33] *See Bibbs*, 778 F.2d at 1328. (Lay, C.J., concurring). *But see supra* note 21 (panel court's assertion that *McDonnell* may be inappropriate for mixed motive cases).

[34] *Bibbs*, 778 F.2d at 1329 (McMillan, J., concurring).

[35] *Id.* (McMillan, J., concurring). Judge McMillan asserted that this higher standard is justified because it deters employment discrimination, and because the defendant's unlawful conduct made it more difficult to prove that the same decision would have occurred in any

In a dissenting opinion, Judge Ross argued that a finding of Title VII liability requires a showing that race played a motivating factor in the employment decision; a mere discernible factor standard is insufficient.[36] Therefore, Judge Ross concluded that the plaintiff did not even prove a Title VII violation.[37]

The *Bibbs* majority stated that support for a two-step analysis is implicit within Title VII's statutory language.[38] This Comment will suggest that Title VII's objectives and procedure will be further facilitated by independent liability and remedial determinations. With respect to the causation standard in the liability stage, a minimum causal standard that best advances Title VII's objective of eradicating all discrimination in the workplace will be advocated. Finally, this Comment will suggest a higher burden of proof standard for the remedial stage that will both prevent the unjust enrichment of the discrimination victim and serve to deter discrimination by the employer.

## POLICY AND PROCEDURAL JUSTIFICATIONS FOR A TWO STAGE ANALYSIS

United States Supreme Court interpretations of Title VII indicate that its objectives are twofold: the achievement of equal employment opportunities through the elimination of discriminatory obstacles in the work place[39] and compensation for injuries caused by unlawful employment discrimination.[40] Separate determinations of liability and remedies most effectively advance these policy objectives. When Title VII liability is conditioned on a separate determination that requires a rigorous test standard, the deterrence of all forms of employment discrimination will be a natural consequence, regardless of this discrimination's effect on the em-

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event. *Id.* (McMillan, J., concurring).

[36] *Id.* at 1330 (Ross, J., dissenting). Judge Ross indicated that statutory language in Title VII requires a causal standard while the majority's discernible factor standard implies that no causal relationship is necessary for Title VII liability. *See id.* at 1330-31. (Ross, J., dissenting). The motivating factor standard, Judge Ross stated, is consistent with previous Supreme Court holdings which discuss proof of intentional discrimination. *See id.* at 1331 (Ross, J., dissenting); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[37] *See Bibbs*, 778 F.2d at 1330, 1332 (Ross, J., dissenting).

[38] *See id.* at 1322. *See also supra* notes 28-29 and accompanying text (discussing basis for separate liability and remedial determinations).

[39] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[40] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

ployment decision.[41] Moreover, allowing employers to rebut post-liability awards of back pay and retroactive promotion is consistent with Title VII's "make whole" purpose since only those Title VII plaintiffs who have suffered actual financial loss will receive back pay and retroactive promotion.[42] Thus, this two-step analysis provides the most effective procedure for promoting the twin statutory objectives of Title VII.

In addition to the policy justification for a two-step analysis, this methodology will facilitate the resolution of the separate causal standards found in the liability and remedial determinations. A plaintiff establishes Title VII liability when he demonstrates that a discriminatory motive was a factor in the employment decision.[43] This may be proved either by resorting to the *McDonnell Douglas Corp. v. Green* procedure[44] or by offering direct evidence of employment discrimination.[45] A different causal standard is employed once a plaintiff shows that discriminatory motives played a role in the employment decision.[46] The defendant employer may avoid the back pay and retroactive promotion remedies by establishing that his discrimination was not the "but for" cause of the decision.[47] Therefore, the division of liability and re-

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[41] *See* Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983) (Tamm, J., concurring) (lower liability causal standard reflects Title VII's "deterrent purpose"). *Cf.* Case Note, Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), 53 U. CIN. L. REV. 863, 874-76 (1983) ("but for" liability causation standard encourages discriminatory decisions).

[42] *See Toney*, 705 F.2d at 1373 (Tamm, J., concurring). "If the employer were not allowed to show that the same employment decision would have resulted even absent discrimination, the Title VII plaintiff who receives retroactive relief might be placed in a better position than he or she would have occupied if the employer had not acted unlawfully." *Id.* *See also* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 9.1 (1980 & Supp. 1985) (retroactive remedies should be limited to discrimination victims with substantiated economic loss).

[43] *See Toney*, 705 F.2d at 1372 (Tamm, J., concurring); Satz v. I.T.T. Fin. Corp., 619 F.2d 738, 746 (8th Cir. 1980). *See also infra* notes 49 and 50 and accompanying text (discernible factor standard most appropriate).

[44] 411 U.S. 792 (1973). *See also supra* note 3 (general discussion of *McDonnell* framework).

[45] *See* Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir.) (*McDonnell* formula does not apply where direct evidence of discrimination is shown), *cert. denied*, 467 U.S. 385 (1985); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983) (same), *cert. denied*, 467 U.S. 1204 (1984).

[46] *See supra* note 5 and accompanying text.

[47] *See Bibbs*, 778 F.2d at 1323-24. *See also supra* note 9 and accompanying text. Thus, the plaintiff can conceivably prove sufficient causation to establish liability, but insufficient causation for retroactive relief. *See Bibbs*, 778 F.2d at 1321-22; Taylor v. Franklin Drapery Co., 441 F. Supp. 279, 291-93 (W.D. Mo. 1977).

medial determinations into two separate procedural processes provides courts with the most orderly method to dispose of these different causation issues.[48]

### CAUSAL INCONSISTENCIES IN THE LIABILITY STAGE

In determining whether a Title VII violation exists, federal courts in Title VII cases have applied a varied array of causal standards ranging from the "discernible factor" standard to a "but for" causation standard.[49] In *Bibbs*, Judge Arnold's advocation of a "discernible factor" standard and Judge Ross' approval of a "motivating factor" standard typifies this inconsistency.[50] The proper standard should most effectively advance Title VII's policy objective of eradicating all forms of employment discrimination.[51] Thus, it is suggested that an "unlawful employment practice" may be demonstrated whenever discrimination, in any degree, played a factor in the employment decision.

### THE REMEDIES STAGE: INCREASE THE DEFENDANT'S BURDEN

Retroactive promotion and back pay constitute the most common forms of Title VII relief available to employment discrimination victims.[52] Although the courts agree that upon a finding of liability, the defendant employer has the burden of proof on the affirmative remedies issue,[53] courts have disagreed regarding the exact measure of the burden — clear and convincing evidence or

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[48] *See* 2 A. LARSON, *supra* note 2, at § 55.34:

> It is important to separate the process of determining whether or not to award back pay to a victorious plaintiff . . . from the determination of the claim on the merits. If the plaintiff loses on the merits the back pay issue never arises. If, however, the plaintiff wins . . . the defendant must have the opportunity to oppose the award through its own affirmative defenses.

*Id.*

[49] *Compare Bibbs*, 778 F.2d at 1324 (discernible factor standard) *with* Lewis v. University of Pittsburgh, 725 F.2d 910, 917 (3d Cir. 1983) ("but for" causation standard), *cert. denied*, 105 S. Ct. 266 (1985). *See also* Brodin, *supra* note 26, at 293 (discussion of different liability causal standards applied by federal courts).

[50] *See Bibbs*, 778 F.2d at 1324; *id.* at 1330 (Ross, J., dissenting).

[51] *See supra* note 41 and accompanying text (discussing how lower liability causal standard promotes elimination of all employment discrimination). *See also* 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey, floor manager) ("What the bill [Title VII] does . . . is simply to make it an illegal practice to use race as a factor in denying employment.").

[52] *See* W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY § 1.02(3)(b)(1984); L. MODJESKA, *supra* note 2, at § 2.17. *See also supra* note 5 (background information on Title VII's affirmative remedies).

[53] *See supra* note 8 and accompanying text.

preponderance of the evidence — to be placed on the defendant.[54] In *Bibbs*, Judge Arnold's preponderance standard and Judge McMillan's clear and convincing standard exemplify this dispute.[55] It is suggested that the clear and convincing standard[56] most favorably achieves Title VII's objective of eradicating employment discrimination without making Title VII plaintiffs more than whole.[57] This higher measure of persuasion is justified since the defendant has increased the difficulty of determining whether the employer's discrimination was the "but for" cause of the employment decision by injecting discriminatory factors in the employment decision.[58] Furthermore, a Title VII plaintiff's inability to recover compensatory or punitive damages provides an additional reason for increasing the evidentiary burden of the defendant employer.[59]

## CONCLUSION

The separation of Title VII liability and remedial determina-

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[54] *See* Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983) (Tamm, J., concurring). Some courts have required the defendant to prove by clear and convincing evidence that his discriminatory motive was not the "but for" cause of his decision, *see, e.g.*, Patterson v. Greenwood School Dist. 50, 696 F.2d 293, 295 (4th Cir. 1982) (higher standard seems to be majority rule); Ostroff v. Employment Exch., Inc., 683 F.2d 302, 304 (9th Cir. 1982) (same), while other courts have required proof by a preponderance of the evidence. *See, e.g.*, Richerson v. Jones, 551 F.2d 918, 924 (3d Cir. 1977); United Transp. Union Local, No. 974, AFL-CIO v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

[55] *See Bibbs*, 778 F.2d at 1324 n.5; *id* at 1329 (McMillan, J., concurring).

[56] "[P]roof by clear and convincing evidence calls for a greater burden of persuasion than is ordinarily required in a civil action, for unless this were so the term would be without meaning." E. FISCH, FISCH ON NEW YORK EVIDENCE § 1090 (2d ed. 1977).

[57] *See Toney*, 705 F.2d at 1373 (Tamm, J., concurring) ("higher standard of proof may well discourage unlawful conduct by employers"); *see also Bibbs*, 778 F.2d at 1339 (McMillan, J., concurring) (same); C. MCCORMICK, MCCORMICK ON EVIDENCE § 340 (E. Cleary 3d ed. 1984) (clear and convincing standard often utilized when claim is "disfavored on policy grounds").

[58] *Cf.* NLRB v. Transp. Management Corp., 462 U.S. 393, 399-400 (1983).

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

*Id.* at 403.

[59] *See* Miller v. Walker Div. of Butler Mfg. Co., 577 F. Supp. 948, 950 (S.D. W. Va. 1984). Compensatory and punitive damages are not available under Title VII because such legal damages are not statutorily authorized. *See* Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368-69 (S.D.N.Y. 1975) (equitable remedies only recoverable). *But see* Loo v. Gerarge, 374 F. Supp. 1338, 1341 n.6 (D. Hawaii 1974) (remedial objectives indicate legal damages should be allowed).

tions is not a novel procedure for disparate treatment suits, but as exemplified by the *Bibbs* court, the present state of the law evidences causal and evidentiary inconsistencies. This Comment has attempted to resolve these analytical disagreements by justifying the severing of liability and remedial issues in all disparate treatment actions, minimizing the requisite causal standard in the liability stage, and advocating a stringent evidentiary burden in the remedial stage. It is urged that these proposals equitably balance Title VII's policy objectives with business realities.

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