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Back Pay in Employment Discrimination Cases

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SPECIAL PROJECT

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I. INTRODUCTION

Although the United States abolished slavery following the Civil War, the discriminatory attitudes that tolerated, and even encouraged, the practice of slavery in the antebellum period have yet to be completely erased. Even up to the 1940's a significant number of educated Americans professed the opinion that discrim-

ination was "natural and instinctive" because of the physical differences between the races and, therefore, could not be mitigated.[1] Such comments echoed the viewpoint of the Supreme Court in 1896 when it proclaimed that "[l]egislation is powerless to eradicate social instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[2] On June 25, 1941, President Roosevelt issued Executive Order 8802,[3] which created a Fair Employment Practice Committee (FEPC) in the Office of Production and Management and prohibited discrimination in the defense industry and government.[4] One commentator suspects that "[p]robably not even [Roosevelt] believed that his order would achieve results."[5] The President's committee was the creature of a number of influences: an aroused public opinion,[6] changing social and economic conditions,[7] the experience of previous governmental

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1. L. RUCHAMES, RACE, JOBS, AND POLITICS: THE STORY OF THE F.E.P.C. 3 (1953).
2. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
3. 6 Fed. Reg. 3109 (1941).
4. *Id.* The Order provided in pertinent part,

> WHEREAS it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders . . .
>
> . . . .
>
> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes, and as a prerequisite to the successful conduct of our national defense production effort, I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin.

Id.

5. L. RUCHAMES, *supra* note 1. The *Amsterdam News*, a black newspaper published in New York City, called the Executive Order "epochal to say the least. . . . If President Lincoln's proclamation was designed to end physical slavery, it would seem that the recent order of President Roosevelt is designed to end, or at least curb, economic slavery." Amsterdam News, July 5, 1941, at 14. Another black newspaper, the *Chicago Defender*, however, noted with concern that the order provided no penalties for violations. Chicago Defender, July 5, 1941, at 1. The white press almost entirely failed to cover the issuance of the order. L. RUCHAMES, *supra* note 1, at 23.

6. *See generally* L. RUCHAMES, *supra* note 1, at 14-16.

7. Of major importance was the gradual shift in potential black votes from the South, where they were of almost no importance, to the North, where blacks could exert significant political pressure. As one commentator of the period noted, "The Negro cast his vote where it yielded the greatest returns. In several states his vote became the balance in electoral power. The Negro was no longer a one-party voter." Reid, 12 J. NEGRO EDUC. 465 (1943). In

efforts to eliminate discrimination in employment,[8] the exigencies of war,[9] and the unremitting struggle of black, labor, and religious organizations to achieve equality of opportunity in government and industry.[10] During the 1940's, a number of states followed the federal example and enacted their own fair employment practice commission laws.[11]

In 1954 the Supreme Court declared in *Brown v. Board of Education*[12] that segregated schools are inherently unequal and directed the desegregation of the public schools "with all deliberate speed."[13] Following *Brown,* civil rights activities intensified;

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addition to the newly found political power exercised by blacks themselves, help came from a number of outside sources. For example, the Communications Industry Organization, which had over four million members in 1940, advocated a strong antidiscrimination platform. Other groups also emerged on the pre-war social and political scene and had significant impact in the public arena and in the legislatures. These organizations included the American Civil Liberties Union, the American Federation for Constitutional Liberties, the National Committee to Abolish the Poll Tax, the National Lawyers Guild, and the American Jewish Congress. *See generally* L. RUCHAMES, *supra* note 1, at 10-11.

8. *See generally* L. RUCHAMES, *supra* note 1, at 4-7.

9. While in early 1940 the military's need for soldiers had not yet become critical, the administration realized that eventually it would have to recruit from every available source of manpower in order to succeed in the war effort. Accordingly, if discrimination prevented the most efficient employment of manpower, the government realized that it would soon have to be mitigated, if not completely eliminated. *See generally id.* at 11.

10. In the prewar period black pressure groups increased in size and effectiveness. In 1917, the National Association for the Advancement of Colored People (NAACP), the first national black organization to use group pressure techniques to obtain minority rights, had only 9,282 members in 80 branches throughout the country. By the beginning of World War II, however, the NAACP had grown to a membership of more than 100,000 in 450 branches nationwide. The National Urban League, created in 1910 to obtain more and better jobs for blacks, reached a membership of 26,000 just prior to the war. In addition to these organizational efforts, two key events dramatized the quest for greater economic opportunity for blacks and the elimination of discrimination in the defense industry. On March 30, 1941, the National Urban League, with the participation of the Lieutenant Governor of New York, made a nationwide radio broadcast discussing the plight of blacks in employment and in the defense industry in particular. At the suggestion of A. Philip Randolph, a prominent black labor leader and president of the predominantly black Brotherhood of Sleeping Car Porters, a March-On-Washington Committee was formed, and a march protesting against discrimination was officially scheduled for July 1, 1941. Eventually the number of expected marchers grew to 100,000. The administration's efforts to have the march cancelled included several conferences with Randolph and other black leaders and a letter to Randolph from Mrs. Roosevelt. These efforts were unsuccessful, however, until Randolph and his aides received a draft of the proposed executive order. After some modifications in the draft, the march was called off the day before President Roosevelt issued Executive Order 8802. *See generally id.* at 13-21.

11. The effectiveness of state administrative agencies in dealing with race discrimination has been questioned. Hill, *20 Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations,* 14 BUFFALO L. REV. 22 (1964).

12. 349 U.S. 294 (1954).

13. *Id.* at 301.

marches, sit-ins, boycotts, and freedom rides focused the nation's attention on the plight of blacks in America. Beginning with President Kennedy's Executive Order 10,925[14] issued in 1961, governmental responses to the civil rights movement steadily increased, at least partially because of the increased social and political activism of blacks. Prior to the 1963 civil rights march on Washington, however, congressional bills seeking to create federal regulation of employment practices met with little success. Indeed, even in the wake of the Birmingham riots when the Kennedy administration began to formulate a comprehensive civil rights proposal, its spokesmen feared that inclusion of strong fair employment provisions would endanger the entire bill.[15] After extensive debate, revision, and compromise,[16] however, Congress finally passed the omnibus Civil Rights Act of 1964.[17] Part of the Act included Title VII,[18] which was designed to prohibit discrimination in employment.

In 1968 the Supreme Court expanded the applicability of the post-Civil War civil rights statutes to encompass private acts of discrimination. Since the statutes[19] were based on the fourteenth amendment, the courts had previously interpreted them restrictively and required state action to prohibit discrimination.[20] In 1968, however, the Supreme Court declared in *Jones v. Alfred H. Mayer Co.*[21] that Congress' authority to enact sections 1981 and 1982 came instead from the thirteenth amendment and, therefore, the sections are not restricted by the fourteenth amendment state action requirement. Following *Jones*, these statutes became applicable to private acts of discrimination based on race and alienage.

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14. 26 Fed. Reg. 1977 (1961). The Kennedy order contained the affirmative action obligation that has emerged in the 1970's as the most controversial of the recent civil rights concepts.

15. *See Hearings Before the House Judiciary Comm. on the Civil Rights Bill of 1963*, 88th Cong., 1st Sess., pt. 4, at 2661 (1963) (testimony of Attorney General Kennedy). The original administrative proposal, introduced in the House on June 20, 1963, contained a weak employment title that would have given statutory authority to the already established President's Committee on Equal Employment Opportunity. H.R. 7152, 88th Cong., 1st Sess. (1963).

16. *See infra* notes 40-48 and accompanying text.

17. Pub. L. No. 88-352, 78 Stat. 241 (current version at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000d-6 to 2000h-6 (1976 & Supp. IV 1980)).

18. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980), *amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13.

19. These statutes are now codified at 42 U.S.C. §§ 1981, 1982, and 1983 (1976).

20. *See* Civil Rights Cases, 109 U.S. 3 (1883); Slaughterhouse Cases, 83 U.S. 36 (1872); *see also* Hodge v. United States, 203 U.S. 1 (1905).

21. 392 U.S. 409 (1968); *see infra* notes 112-17 and accompanying text.

Application of these sections to private acts of age and sex discrimination, however, has been uniformly rejected.[22] These statutes are enforced through private litigation; the discriminatory act is considered a form of economic tort.[23] Although the statutory language does not specifically authorize back pay as a remedy, the Supreme Court has found that a successful claimant under section 1981 can obtain both equitable and legal relief.[24] The Supreme Court has also noted that despite the comprehensive nature of Title VII, it did not implicitly repeal section 1981; rather, the remedies under Title VII and section 1981 coexist and may be concurrently available to the discriminatee.[25]

In 1972 Congress significantly amended Title VII and expanded its coverage by including state and local entities, by limiting the available exemptions, including the exemption for certain small businesses, and by specifically including the federal executive branches and the administrative agencies within the prohibitions against employment discrimination.[26] Thus, in its amended form, Title VII currently prohibits discrimination on the basis of race, color, creed, national origin, and sex by employment agencies, labor organizations, and private and public employers.[27] The title created the Equal Employment Opportunity Commission (EEOC), which investigates complaints and seeks to negotiate settlements when the EEOC makes a finding of discrimination.[28] If conciliation fails, either the EEOC or the individual may bring an action in federal court against private employers, employment agencies, and

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22. *See, e.g.*, Kodish v. United Air Lines, Inc., 628 F.2d 1301, 1302 (10th Cir. 1980) (§ 1981 inapplicable to age discrimination in employment); DeGraffenreid v. General Motors Assembly Div., 558 F.2d 480, 486 n.2 (8th Cir. 1977) (§ 1981 inapplicable to sex discrimination in employment); Lee v. Minnock, 417 F. Supp. 436, 439 (W.D. Pa. 1976) (§ 1982 inapplicable to sex discrimination in housing), *aff'd*, 556 F.2d 567 (3d Cir. 1977).

23. *See* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972); *see also* Note, *The Expanding Scope of § 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1977).

24. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); *see infra* note 123 and accompanying text.

25. Johnson v. Railway Express Agency, 421 U.S. 454, 459-61 (1975); *see infra* notes 120-22 and accompanying text.

26. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13 (amending 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980)).

27. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980). Age discrimination is not prohibited under Title VII, but is proscribed under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980).

28. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

labor organizations.[29] If the complaint is against state government employers, the Attorney General rather than the EEOC brings the action.[30]

When Congress drafted Title VII, it included broad language enabling the courts to authorize a number of remedies for employment discrimination: "[T]he court may order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[31] In the early years of Title VII litigation, however, both the courts[32] and commentators[33] focused primarily on the liability stage, or "Stage I," of the proceedings and the establishment of substantive theories of liability. More recently, several commentators have thoroughly discussed the procedural problems associated with Stage I that have remained untouched by the courts.[34] As originally enacted, Title VII permitted only a modest role for suits brought by the government, and until the early 1970's few private suits had reached the recovery stage,[35] or "Stage II," of the proceedings. With the expanded role for government suits created by the 1972 amendments, however, the back pay award assumed increased importance; concomitantly, more litigation has progressed

29. *Id.* § 2000e-5(f)(1976).

30. *Id.*

31. 42 U.S.C. § 2000e-5(g) (1970), *amended by* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(g) (1976).

32. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Alhemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

33. *See, e.g.*, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION (1980); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981); Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1 (1976); *Developments in the Law—Title VII*, 84 HARV. L. REV. 1109 (1971).

34. *See, e.g.*, Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980).

35. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974).

into Stage II and the size of the monetary awards has created front page headlines.[36]

With increasing numbers of private actions reaching the recovery stage and more effective government enforcement of Title VII following the 1972 amendments, courts have confronted back pay claims much more frequently than in the early years of Title VII litigation. Since Congress patterned the Title VII remedy section after a similar provision in the National Labor Relations Act (NLRA),[37] the courts have found some guidance in a long line of case law under the NLRA. The NLRA case law, however, does not always provide an appropriate answer to Title VII back pay questions. In many respects, a discrimination suit requesting back pay relief under Title VII can be much more complicated than a labor dispute requesting similar relief under the NLRA. The Title VII action probably will concern many more employees, will require the court to examine employment policies and practices in effect over a much longer period of time, and will concern claimants who are more likely to be disappointed applicants for jobs or promotions rather than discharged employees. Despite the complexity of the issues facing the courts in the recovery stage of the litigation, however, the back pay remedy has received little analysis in judicial opinions. Thus, rarely have the courts articulated any rationale to accompany their back pay decisions. Consequently, the existing body of case law concerning back pay awards lacks the unity and consistency that a carefully articulated rationale could provide.

This Special Project examines the back pay decisions and analyzes the problems that have confronted the courts dealing with this remedy for employment discrimination in the context of Title VII and section 1981. Because of the enormity of the issues that have arisen in Stage I of the proceedings, however, and the extensive coverage given those problems by the courts and commentators,[38] the Special Project will deal only with the recovery stage, or Stage II, of the litigation.[39] Consequently, the reader should as-

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36. AT&T's agreement to pay $15 million to settle a government suit received front page coverage in the *New York Times*. N.Y. Times, Jan. 19, 1973, § 1, at 1, col. 1. The government's suit was based on both Title VII and the Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1976)). Two years later, in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), the settlement order included $30,940,000 in back pay.

37. *See infra* note 52 and accompanying text.

38. *See* authorities cited *supra* notes 32-34.

39. The terms "recovery or relief stage" and "Stage II" will be used interchangeably throughout the Special Project.

sume that liability for employment discrimination has already been established in each of the cases discussed below. Before reaching the various procedural and substantive issues surrounding back pay awards, however, the Project, in part II, presents an overview of the statutory authority for back pay including the legislative history of Title VII and section 1981. Part II also discusses the development of the appropriate standard for the exercise of judicial discretion in awarding back pay. Part III examines the parties liable for the payment of back pay. In part IV the Project explores presumptive eligibility for back pay and in part V considers possible grounds on which a defendant may seek to rebut the presumption. Parts VI and VII discuss the proof-of-claim procedure that must be followed by discriminatees claiming back pay and the procedure for determining individual awards. Part VIII then identifies and analyzes the various problems facing courts in allocating the burdens of proof that plaintiffs and defendants must meet before the court can determine individual awards. Following the discussion of the order and allocation of the burdens of proof, part IX outlines the various methods used by the courts to compute individual back pay awards and also discusses other issues such as the elements includable and deductible, the mitigation requirement, and the limitation periods for back pay. In part X the Special Project examines the problems that may arise when the parties agree to a settlement of back pay claims.

II. Statutory Authority for Back Pay

A. *Title VII*

1. Legislative History

After numerous unsuccessful attempts to enact civil rights legislation, the eighty-eighth Congress passed the Civil Rights Act of 1964,[40] with Title VII[41] of the Act directed at the problem of employment discrimination. Representative James Roosevelt introduced H.R. 405,[42] the "nominal ancestor" of Title VII,[43] in the

40. Pub. L. No. 88-352, 78 Stat. 241 (current version at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000d-6 to 2000h-6 (1976 & Supp. IV 1980)).

41. 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979), *amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13. Remedying discrimination in employment was an important part of the Act. One congressional supporter of Title VII commented, "No civil rights legislation would be complete unless it dealt with this problem." 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey).

42. H.R. 405, 88th Cong., 1st Sess. (1963). For a detailed discussion of the legislative history of Title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

43. Vaas, *supra* note 42, at 433.

House. As reported by the House Committee on Education and Labor, H.R. 405 provided for enforcement through the creation of the EEOC, which would have powers and duties comparable to those of the National Labor Relations Board (NLRB).[44] The bill would have provided for an Administrator with the power to investigate and prosecute violators of the Act, and for a five-member Board empowered to hear the charges brought by the Administrator and issue cease-and-desist orders upon a finding of discrimination.[45] After significant revisions, including the reduction of part of the EEOC's enforcement powers, the House Judiciary Committee incorporated H.R. 405 into its own civil rights bill, H.R. 7152.[46] The House adopted H.R. 7152, but the Senate further reduced the enforcement powers of the EEOC before it passed the legislation.[47] The House concurred with the Senate amendments and President Johnson signed the bill on July 2, 1964.[48]

The proponents of H.R. 7152 emphasized the corrective nature of Title VII[49] and designed section 706(g)[50] to accomplish this corrective purpose. Section 706(g) provides that upon a finding of employment discrimination "the court may . . . order such affirmative action as may be appropriate, which may include . . .

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44. 29 U.S.C. § 160 (1976).

45. *See* Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 64-65 (1964); Vaas, *supra* note 42, at 435.

46. The Judiciary Committee's version, for example, eliminated the EEOC's proposed enforcement power to issue cease-and-desist orders and instead authorized the EEOC to bring a civil action in the event attempts at conciliation failed. The Committee reasoned that settlement of complaints would occur more rapidly and with greater frequency if the ultimate determination of discrimination rested with the courts rather than the EEOC. The reasons for the changes in the enforcement powers of the EEOC are set forth in the "Additional Views on H.R. 7152" of Rep. McCulloch and others, included in the Judiciary Committee's report, H.R. REP. No. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2515-16.

47. The Senate weakened the EEOC's enforcement power by eliminating the EEOC's authority to bring a civil action and transferring this power to the plaintiff-discriminatee. Pub. L. No. 88-352, 78 Stat. 241, 258-59 (1964) (current version at 42 U.S.C. § 2000e-5 (1976)). The Senate passed H.R. 7152 on June 19, 1964. 110 CONG. REC. 14,511 (1964).

48. 110 CONG. REC. 17,783 (1964).

49. The proponents, however, stated, "It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. . . . Internal affairs of employers and laber organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." H.R. REP. No. 914, *supra* note 46, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2516.

50. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 706(g), 78 Stat. 261 (current version at 42 U.S.C. § 2000e-5(g) (1976)).

reinstatement or hiring of employees, *with or without back pay.*"[51] The drafters of Title VII specifically patterned the language of the remedial section after the language of the back pay provision of the NLRA.[52] The NLRB has consistently interpreted the "discretionary" language of the NLRA[53] to mandate that back pay be the standard form of relief for victims of unfair labor practices.[54] The courts, however, have not followed the NLRB's practice of routinely awarding back pay in Title VII cases.[55] Instead, they have interpreted the same "discretionary" language in Title VII as statutory authorization to award relief "with or without back pay" at the court's discretion.[56]

Despite the conflicting interpretations of the discretionary language contained in both statutes, the NLRA analogy remains a valid indication of the congressional purpose behind the Title VII back pay remedy. In view of the drafters' reliance on language from the NLRA, the "make whole" purpose of the NLRA back pay provision logically can be extended to the Title VII back pay award.[57] Under the NLRA, " '[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.' "[58] Moreover, when Congress passed the Equal Employment Opportu-

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51. *Id.* (emphasis added).

52. *See* 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 7214 (interpretative memorandum of Title VII submitted by Senators Clark and Case). Section 10(c) of the NLRA authorizes "affirmative action including reinstatement of employees with or without back pay" upon a finding of an unfair labor practice by the NLRB. 29 U.S.C. § 160(c) (1976). The Supreme Court expressly recognized Title VII's back pay origin in the NLRA's back pay provision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975).

53. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976); *see supra* note 52.

54. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1975). "The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer." *Id.* at 420 n.12 (quoting NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966)); *see, e.g.*, M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 179 (10th Cir. 1977).

55. *See* Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741, 742-43 (1973).

56. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975); Kaplan v. International Alliance of Theatrical & Stage Employees & Motion Picture Mach. Operators, 525 F.2d 1354, 1363 (9th Cir. 1975). "The discretion to award back pay for violations of Title VII is statutorily provided. . . . The district court has the discretion to determine the amount to be awarded." *Id.* (citation omitted).

57. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). "The 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act." *Id.*

58. *Id.* (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941)).

nity Act of 1972, it re-enacted the back pay provision without any limitation on the judicial power to award back pay, and thus reaffirmed the "make whole" purpose of Title VII.[59] In *Albemarle Paper Co. v. Moody*[60] the Supreme Court acknowledged the "make whole" purpose of the Act[61] and further recognized that the back pay remedy has a deterrent effect on employment discrimination—it serves as the catalyst for employers and unions to examine their employment practices and eliminate discrimination.[62] Thus, the back pay award has a dual nature—it compensates those who have suffered from unlawful employment discrimination and deters employers and unions from engaging in or continuing to engage in discrimination.[63]

2. Standard of Discretion

The language of the statute initially defined the scope of the discretion to award or deny back pay by requiring that the court find an "intentional" unlawful employment practice.[64] The legisla-

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59. Remarks accompanying a Conference Committee report evidence Congress' intention to retain the "make whole" purpose of the Act:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to *make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, submitted by Sen. Williams) (empbasis added).

60. 422 U.S. 405 (1975).

61. *Id.* at 418. The circuit courts frequently cite *Albemarle* as support for the "make whole" purpose of Title VII. *See, e.g.,* Sangster v. United Air Lines, Inc., 633 F.2d 864, 867 (9th Cir. 1980), *cert. denied,* 451 U.S. 971 (1981); Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598, 602 (7th Cir. 1979), *cert. denied,* 102 S. Ct. 612 (1981); Comacho v. Colorado Elec. Technical College, Inc., 590 F.2d 887, 889 (10th Cir. 1979); EEOC v. Local 638, 532 F.2d 821, 832 (2d Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975).

62. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18.

63. The circuit courts rely on *Albemarle* when discussing the dual purpose of a back pay award. *See, e.g.,* Sangster v. United Air Lines, Inc., 633 F.2d 864, 867 (9th Cir. 1980), *cert. denied,* 451 U.S. 971 (1981); EEOC v. Massey-Ferguson, Inc., 622 F.2d 271, 276 (7th Cir. 1980); EEOC v. Local 638, 532 F.2d 821, 832 (2d Cir. 1976); Russell v. American Tobacco Co., 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975).

64. Section 706(g) states, "If the court finds that the respondent has *intentionally engaged in or is intentionally engaging in* an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order

tive history of section 706(g) provides some guidance concerning the congressional interpretation of an "intentional" violation.[65] The original House bill contained no mention of intent, but rather spoke in terms of "engaging in" an unlawful employment practice.[66] One of the proposed Senate amendments would have inserted the word "willfully" before "engaging in."[67] According to Senator Dirksen, the proponent of this amendment, the insertion of the word "willfully" would indicate a "much clearer legislative intent" and would add "a greater degree of certainty" to Congress' position that employers should not be subject to charges under Title VII because of accidental, inadvertent, or unintended acts.[68] The Senate, however, chose not to enact Senator Dirksen's amendment and instead inserted the word "intentionally" in the final version.[69] Senator Humphrey explained that this change was "designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders."[70]

The courts have accepted the Senate's broad interpretation of intent in the remedial section.[71] For example, in *Local 189, United Papermakers & Paperworkers v. United States*[72] the Fifth Circuit construed section 706(g) to require "only that the defendant meant to do what he did, that is, his employment practice was not accidental."[73] Similarly, the Tenth Circuit in *Jones v. Lee Way Motor Freight, Inc.*[74] concluded that the employer had intentionally en-

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such affirmative action as may be appropriate . . . ." 42 U.S.C. § 2000e-5(g) (1976) (emphasis added).

65. *See infra* notes 66-70 and accompanying text.

66. H.R. 7152, 88th Cong., 1st Sess. (1963).

67. 110 CONG. REC. 8194 (1964) (Amendment No. 507 to H.R. 7152 proposed by Sen. Dirksen). This amendment was one of 10 proposed by Senator Dirksen.

68. 110 CONG. REC. 8194 (1964). Senator Dirksen submitted a lengthy definition of the words "willful" and "willfully" obtained from Corpus Juris Secundum to illustrate the appropriateness of the insertion of the word "willfully" into the remedial section. *Id.*

69. *See supra* note 64.

70. 110 CONG. REC. 12,723-24 (1964). Senator Humphrey further explained that "[s]ince the title bars only discrimination because of race, color, religion, sex, or natural [sic] origin it would seem already to require intent, and, thus, the proposed change does not involve any suhstantive change in the title." *Id.* at 12,723.

71. *See generally* Note, *Back Pay for Employment Discrimination Under Title VII—Role of the Judiciary in Exercising Its Discretion*, 23 CATH. U.L. REV. 525, 532-35 (1974).

72. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

73. *Id.* at 996. In support of its interpretation of § 706(g), the court cited the legislative history surrounding Senator Dirksen's proposed amendment. *Id.* at 995-96 n.15.

74. 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

gaged in an unlawful employment practice within the meaning of section 706(g), although the employer had not adopted its transfer policy with the intention of discriminating, but had followed the practice deliberately and not accidentally.[75]

After reaching a consensus on the definition of the "intentionally engaging in" language, the courts continued to develop the standard of discretion for awarding back pay. Prior to 1975 the circuit courts had arrived at no uniform standard[76] and the Supreme Court granted certiorari in *Albemarle Paper Co. v. Moody*[77] in part to resolve this conflict.[78] The district court in *Albemarle* had made a finding of unlawful employment discrimination under Title VII,[79] but refused to award back pay because of a lack of "evidence of bad faith non-compliance with the Act."[80] The Fourth Circuit reversed and held that back pay should ordinarily be awarded under Title VII "unless special circumstances would render such an award unjust."[81] The Supreme Court rejected the "special circumstances" standard.[82] While recognizing that a certain amount of discretion must be involved in deciding whether to award back pay, the Court nevertheless stated that such discretion must be exercised in accordance with the "large objectives of the Act."[83] The Court articulated the following standard for courts to

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75. *Id.* at 250. Apparently not all courts initially accepted this definition of "intentionally." *See generally* Note, *supra* note 71, at 532-35; Comment, *Equal Employment Opportunity: The Back Pay Remedy Under Title VII;* 1974 U. ILL. L.F. 379, 381.

76. For a detailed discussion of the standards that developed among the various circuits, see Note, *supra* note 71, at 535-41; 61 CORNELL L. REV. 460, 465-72 (1976); and 12 WAKE FOREST L. REV. 466, 470-74 (1976).

77. 422 U.S. 405 (1975).

78. *Id.* at 413. Justice Stewart stated, "We granted certiorari because of an evident Circuit conflict as to tbe standards governing awards of backpay . . . ." *Id.* (footnotes omitted).

79. 4 Fair Empl. Prac. Cas. (BNA) 561, 570 (E.D.N.C. 1971), *rev'd,* 474 F.2d 134 (4th Cir. 1973), *vacated & remanded,* 422 U.S. 405 (1975).

80. *Id.*

81. 474 F.2d at 142. Several circuits utilized the "special circumstances" rule until the Supreme Court ruling in *Albemarle. See generally* 61 CORNELL L. REV., *supra* note 76, at 468-69.

82. Albemarle Paper Co. v. Moody, 422 U.S. at 415-21. Actually, the Supreme Court did not expressly reject the "special circumstances" standard. Ratber, the Court held that the Fourth Circuit's reliance on Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), a Title II suit that utilized the "special circumstances" rule for the award of attorney's fees, was misplaced because *Newman* was "not directly in point." 422 U.S. at 415. The Court further stated that "[f]or guidance as to the granting and denial of *backpay,* one must, therefore, look elsewhere." *Id.* (emphasis in original).

83. 422 U.S. at 416 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944)). The Court emphasized the two purposes of Title VII, namely to eliminate employment discrimination and to make persons whole for losses suffered on account of unlawful employment discrimi-

utilize in determining whether to award back pay: "[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."[84]

Subsequent circuit court decisions have recognized that the *Albemarle* standard sharply limits the judge's discretion to deny back pay. For example, in *EEOC v. Local 638*[85] the Second Circuit concluded that *Albemarle* made clear that "back pay is to be the rule rather than exception under Title VII."[86] Similarly, the Eighth Circuit noted in *Womack v. Munson*[87] that "[a]bsent extraordinary circumstances, back pay is awarded to fashion the most complete relief possible for proscribed discrimination."[88]

Although *Albemarle* sharply curtailed the extent to which judicial discretion may be exercised, the Supreme Court did not mandate that back pay be awarded automatically upon a finding of unlawful employment discrimination. That some discretion still exists became evident in *City of Los Angeles Department of Water & Power v. Manhart*,[89] in which the Court found that the Department's pension plan unlawfully discriminated on the basis of sex under Title VII.[90] The Court noted that "[t]he *Albemarle*

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nation. *Id.* at 417-18; *see supra* notes 60-63 and accompanying text.

84. 422 U.S. at 421. The articulation of this standard ended the conflicts among the circuits. *See, e.g.*, Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 518 (8th Cir. 1980); Sangster v. United Air Lines, Inc., 633 F.2d 864, 867 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979); Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598, 602 (7th Cir. 1979), *cert. denied*, 102 S. Ct. 612 (1981); EEOC v. Local 638, 532 F.2d 821, 832 (2d Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975).

Although the circuits now follow the *Albemarle* standard, at least two circuits have not abandoned entirely "special circumstances" language. *See, e.g.*, Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1391 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); Stewart v. General Motors Corp., 542 F.2d 445, 451 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). In particular, "special circumstances" language appears in a number of Fifth Circuit opinions. The Fifth Circuit, however, generally discusses the "special circumstances" rule in conjunction with the *Albemarle* standard, apparently finding no conflict between them. *See, e.g.*, James v. Stockham Valves & Fittings Co., 559 F.2d 310, 357 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

85. 532 F.2d 821 (2d Cir. 1976).

86. *Id.* at 832.

87. 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

88. *Id.* at 1299.

89. 435 U.S. 702 (1978). For a more detailed discussion of the Court's opinion in *Manhart*, see *infra* notes 319-26.

90. *Id.* at 717.

presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate."[91] The Court then concluded that in *Manhart* a retroactive monetary award would be inappropriate.[92] Although *Manhart* concerned whether an employer should be required to refund pension contributions, the Court spoke of Title VII "retroactive liability" in general and relied heavily on *Albemarle.* The principles in *Manhart,* therefore, appear equally applicable to cases such as *Albemarle* in which back pay is in issue. Thus, with its decision in *Manhart,* the Court indicated that some degree of discretion to award or deny back pay still remains after *Albemarle,* although limited by the standard enunciated in that case.[93]

B. 42 U.S.C. § 1981

1. Legislative History

The language of section 1981[94] first appeared in the Civil Rights Act of 1866,[95] enacted by the post-Civil War Congress to

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91. *Id.* at 719.

92. *Id.* at 723.

93. *See* Palmer v. General Mills Inc., 600 F.2d 595, 598 (6th Cir. 1979). In Lorillard v. Pons, 434 U.S. 575 (1978), a case alleging a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979), the Supreme Court noted that although it had held that the discretionary power to deny back pay should only be used if it met the *Albemarle* standard, it nonetheless recognized "that under Title VII some discretion exists." Lorillard v. Pons, 434 U.S. at 584 n.13.

94. Section 1981 provides,

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976).

95. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. Section 1 of the Civil Rights Act of 1866 provided,

> *That all persons born in the United States* and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be *citizens* of the United States; and *such citizens,* of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, *shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence,* to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other,* any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id. (emphasis added). Congress derived § 1981 from the above italicized language. Section

protect the rights of freed slaves. The thirty-ninth Congress passed the Act pursuant to the authority granted by section 2 of the thirteenth amendment.[96] Members of the thirty-ninth Congress, however, disagreed about the scope[97] of the Civil Rights Act and their authority to enact such legislation. Because of doubts about the constitutionality of the Act, Congress proposed the fourteenth amendment, which incorporated the substantive provisions of the 1866 Act.[98]

The Enforcement Act of 1870[99] re-enacted the 1866 Civil Rights Act and in subsequent years became the source of much confusion about the origin of section 1981. Even though section 18[100] of the 1870 Act re-enacted the entire Civil Rights Act of 1866, section 16,[101] enacted pursuant to the fourteenth amendment, contained language almost identical to that of section 1 of the 1866 Act. Most of the disputed history of section 1981 stems from an

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1982 of the same title came from that portion of § 1 of the 1866 Act which deals with property rights. *See* 42 U.S.C. § 1982 (1976); *infra* note 106.

96. The thirteenth amendment provides, "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

97. Ambiguity existed concerning whether the 1866 Act reached private discrimination until the Supreme Court decided Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In *Jones* the Court held that Congress intended the statute to reach such private acts. The legislative history surrounding the passage of the Act, however, contains conflicting notions of congressional intent. *See generally Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 33, 50-56 (1980).

98. The Supreme Court in considering the scope of § 1982 in Hurd v. Hodge, 334 U.S. 24 (1948), noted that "one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Id.* at 32.

99. Act of May 31, 1870, ch. 114, 16 Stat. 140.

100. Section 18 of the Enforcement Act of 1870 provided,

> *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

16 Stat. 140, 144 (1870) (emphasis in original).

101. Section 16 of the Enforcement Act of 1870 provided in part,

> *And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

16 Stat. 140, 144 (1870) (emphasis in original).

historical note appended to the 1874 recodification of the 1866 Civil Rights Act. The note indicates that section 1981 derives solely from section 16 of the 1870 Enforcement Act.[102] Resolving this dispute concerning the source of section 1981 is necessary before the scope of the section can be determined. If the revisers' note is accurate in its statement that section 16 of the 1870 Act constitutes the sole source of section 1981, the omission in the 1874 recodification of any reference to section 18 of the 1870 Act impliedly repealed section 1 of the 1866 Civil Rights Act. Consequently, section 1981 would be limited by its enactment under the fourteenth amendment to claims involving state action.[103] If, however, the 1866 Civil Rights Act remained the source of section 1981, then its coverage would extend to private discriminatory acts.[104] The Supreme Court resolved this controversy in *Runyon v. McCrary*[105] by determining that section 1981 originated from both section 16 of the 1870 Act and section 1 of the 1866 Act.[106] As a result, section 1981 reaches private as well as public discrimination based upon Congress' thirteenth amendment powers.[107]

2. Judicial Development

Despite its enactment over one hundred years ago, section 1981 has only recently been used to prohibit private acts of employment discrimination. Early in the statute's history the Supreme Court circumscribed its potential impact with decisions that narrowly construed its scope. In *Hodges v. United States*,[108] a case

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102. *See* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976).

103. *See id.* at 195-212 (White, J., dissenting).

104. *Id.* at 168 n.8.

105. 427 U.S. 160 (1976).

106. *Id.* at 168 n.8. The majority attributed the revisers' omission of a reference to § 1 of the 1866 Act to either inadvertence or "the assumption that the relevant language in § 1 of the 1866 Act was superfluous in light of the closely parallel language in § 16 of the 1870 Act." *Id.* The majority claimed that

> even assuming . . . the revisers' hypothetical assumption was wrong—there is still no basis for inferring that Congress did not understand the draft legislation which eventually became 42 U.S.C. § 1981 to be drawn from both § 16 of the 1870 Act and § 1 of the 1866 Act.
>
> To hold otherwise would be to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the revisers' marginal notes.

Id. Justice White, joined by Justice Rehnquist, wrote a lengthy dissent, advocating the view that § 18 of the 1870 Act was eliminated in the 1874 codification and, therefore, § 1981 derives solely from § 16 of the 1870 Enforcement Act. *Id.* at 195-212 (White, J., dissenting).

107. *Id.* at 168 n.8.

108. 203 U.S. 1 (1906).

brought under the 1870 Enforcement Act, the Court held that the thirteenth amendment and the legislation enacted thereunder prohibited only involuntary servitude and thus sharply curtailed the use of the 1870 Act and, consequently, section 1981 as civil rights protection.[109] In *Hurd v. Hodge*[110] the Court limited section 1981's application to situations involving state action when it remarked that "[t]he action toward which the provisions of the statute under consideration is directed is governmental action."[111]

Section 1981 did not become a practicable vehicle for redressing private employment discrimination until *Jones v. Alfred H. Mayer Co.*,[112] in which the Supreme Court dispensed with the state action requirement. In *Jones* the Court held that the defendant's refusal to sell the plaintiffs a home because of their race violated section 1982.[113] The Court dismissed as dictum the *Hurd v. Hodge* language indicating that section 1982 was directed only toward "governmental action."[114] On the contrary, Justice Stewart wrote that Congress intended section 1982 to reach private acts of discrimination and the thirteenth amendment authorized such legislation.[115] The Court also expressly overruled *Hodges v. United States,* which had, in effect, restricted section 1981 to cases of involuntary servitude.[116] *Jones* led to a renewed use of section 1981 to attack private acts of employment discrimination.[117] In *Johnson v. Railway Express Agency, Inc.*[118] the Supreme Court endorsed this post-*Jones* line of cases and held that section 1981 "affords a

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109. *Id.* at 18-19.

110. 334 U.S. 24 (1948).

111. *Id.* at 31. In *Hurd* the Court considered the scope of § 1982. Since § 1981 and § 1982 both originated from § 1 of the Civil Rights Act of 1866, courts have applied § 1982 decisions to § 1981 cases. *See supra* note 95. In Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), the Supreme Court, in considering whether a private club could be liable under § 1982, noted, "In light of the historical interrelationship between § 1981 and § 1982, [there is] no reason to construe these sections differently . . . ." *Id.* at 440.

112. 392 U.S. 409 (1968).

113. *Id.* at 413.

114. *Id.* at 419.

115. *Id.* at 438-43.

116. *Id.* at 441 n.78.

117. *See* Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied,* 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970).

118. 421 U.S. 454 (1975).

federal remedy against discrimination in private employment on the basis of race."[119]

The *Johnson* decision also settled the question whether Congress had impliedly repealed section 1981 when it enacted the comprehensive Civil Rights Act of 1964. The Court made clear that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved clearly is not deprived of other remedies."[120] The Court buttressed this proposition with a congressional statement supporting the availability of remedies under both Title VII and section 1981 and further noted that "in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981."[121] The Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[122]

Although section 1981 contains no express authorization for an award of back pay, in *Johnson* the Supreme Court specifically stated that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief."[123] In addition, the lower courts have acknowledged the availability of back pay as an appropriate remedy.[124] For example, in *Campbell v. Gadsen County District School Board*[125] the Fifth Circuit held that the plaintiff should receive back pay "in accordance with prior cases which expressly consider the availability of such relief under

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119. *Id.* at 460.

120. *Id.* at 459.

121. *Id.*

122. *Id.* at 461.

123. *Id.* at 460. Back pay is considered an "equitable remedy" under Title VII. *See, e.g.*, McLaurin v. Columbia Mun. Separate School Dist., 478 F.2d 348, 354 (5th Cir. 1973). Under § 1981, however, it is considered a "legal remedy." *See* Setser v. Novack Inv. Co., 638 F.2d 1137, 1142, *vacated in part & modified on other grounds*, 657 F.2d 962 (8th Cir. 1981). In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), a § 1982 case, the Supreme Court reiterated its holding in *Jones v. Alfred H. Mayer Co.* that "although § 1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an effective equitable remedy." *Id.* at 238. The Court further noted that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239.

124. *See, e.g.*, Williams v. DeKalb County, 577 F.2d 248, 256, *modified on other grounds*, 582 F.2d 2 (5th Cir. 1978); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

125. 534 F.2d 650 (5th Cir. 1976).

section 1981."[126] Similarly, the Fourth Circuit in *Brown v. Gaston County Dyeing Machine Co.*,[127] upon a finding of a violation of section 1981, declared that the plaintiff had a right to an award of back pay.[128]

3. Standard of Discretion

The rationale behind a back pay award under section 1981 apparently parallels the purposes of the Title VII back pay provision.[129] Thus, as under Title VII,[130] the award of back pay under section 1981 has been described as compensatory in nature and a necessary part of a grant of full relief in employment discrimination suits.[131] The standard of discretion governing a back pay award under section 1981, however, has not been as thoroughly developed as under Title VII.[132] No uniform standard apparently exists among the circuits, and some courts, particularly the Fifth Circuit, treat the section 1981 standard and the Title VII standard identically.[133] For example, the Fifth Circuit in *Pettway v. American Cast Iron Pipe Co.*[134] grouped together section 1981 and Title VII when describing the rationale for a back pay award. The court then articulated the standard it believed should govern the exercise of an award under both statutes: "Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should

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126. *Id.* at 658; *accord* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). In *Pettway* the court stated that Congress impliedly authorized courts to grant equitable relief under § 1981 and gave them the discretion to award back pay. *Id.* at 251-52.

127. 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

128. *Id.* at 1379; *see also* Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). In *Davis*, after noting that Title VII vests the judiciary with the power to award broad remedial relief, the court stated, "We do not believe the court lacks equal power under § 1981 to order relief." *Id.* at 1342.

129. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 nn.118 & 119 (5th Cir. 1974).

130. For a discussion of the purposes underlying the Title VII back pay award, see *supra* notes 57-63 and accompanying text.

131. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 n.119 (5th Cir. 1974).

132. The paucity of case law concerning the standard of discretion under § 1981 may have resulted because many plaintiffs who bring § 1981 employment discrimination suits also include a Title VII claim for relief. The courts tend to discuss the Title VII standard of discretion, but do not give the § 1981 discretionary standard separate treatment. For a discussion of the standard of discretion under Title VII, see *supra* notes 64-93 and accompanying text.

133. *See, e.g.*, McCormick v. Attala County Bd. of Educ., 541 F.2d 1094, 1095 (5th Cir. 1976); Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918, 924-25 & 925 n.11 (S.D.N.Y. 1979).

134. 494 F.2d 211 (5th Cir. 1974).

normally be awarded unless *special circumstances* are present."[135] In *Albemarle Paper Co. v. Moody*,[136] however, the Supreme Court rejected the "special circumstances" test[137] as the standard of discretion for Title VII back pay awards and instead announced a stricter standard—a back pay award should be denied only for reasons that "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[138]

In post-*Albemarle* decisions the Fifth Circuit has adhered to its "special circumstances" test enunciated in *Pettway* as the standard of discretion for awarding back pay under section 1981.[139] Whether the court actually invokes a different standard under section 1981 than the one required by the Supreme Court in Title VII suits can be questioned since the Fifth Circuit has also used "special circumstances" language in post-*Albemarle* Title VII cases.[140] The court seems to view the "special circumstances" rule as equivalent to the *Albemarle* standard.[141] Thus, the Fifth Circuit apparently applies the *Albemarle* standard of discretion to claims based on section 1981.

Other circuits, however, have not enunciated clearly the standard of discretion to be used for awarding back pay under section 1981. For example, in *Brown v. Gaston County Dyeing Machine Co.*[142] the Fourth Circuit, after finding racial discrimination under section 1981, held the discriminatee "entitled" to back pay without any discussion of the discretionary standard it had employed in reaching its decision.[143] Several explanations may be offered for a court's decision to award back pay without discussion of the discretionary standard. First, the court may be indicating that a finding of discrimination mandates a back pay award. Second, the court may envision that its role is to make a routine award in the

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135. *Id.* at 252-53 (emphasis added).

136. 422 U.S. 405 (1975).

137. *See supra* note 82 and accompanying text.

138. 422 U.S. at 421. For a more detailed discussion of *Albemarle*, see *supra* notes 77-84 and accompanying text.

139. *See* Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1240 n.7 (5th Cir. 1980); McCormick v. Attala County Bd. of Educ., 541 F.2d 1094, 1095 (5th Cir. 1976).

140. *See, e.g.*, Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1391 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); James v. Stockham Valves & Fitting Co., 559 F.2d 310, 357 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

141. *See supra* text accompanying note 84.

142. 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

143. *Id.* at 1379; *accord* Reynolds v. Abbeville County School Dist., 554 F.2d 638, 644 (4th Cir. 1977).

manner of the NLRB upon finding a violation of the NLRA.[144] Last, the court may have determined that the evidence in these cases so clearly indicated that the discriminatee should be awarded back pay that a discussion of the discretionary standard became unnecessary. The last possibility represents the most plausible explanation for a court's failure to discuss the discretionary standard. In most cases, courts probably do not discuss the standard simply because such a discussion would be superfluous, not because the court has determined that it lacks the discretion to either award or deny back pay.

Logically, the standard of discretion under section 1981 should be the Title VII *Albemarle* standard. This conclusion stems from the similarity in the application of the substantive law of both statutes.[145] Many courts, however, decline to apply Title VII substantive law in determining liability for violations of section 1981.[146] In these jurisdictions, therefore, Title VII remedial standards obviously would not be routinely applied to section 1981 suits. Nevertheless, in light of the similar "make whole" purpose of back pay awards under both Title VII and section 1981,[147] no apparent reason exists not to apply the Title VII *Albemarle* discretionary standard, even when the courts do not utilize Title VII substantive law to determine section 1981 liability.[148]

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144. *See supra* note 54 and accompanying text.

145. A number of courts have noted this similarity. *See, e.g.*, London v. Coopers & Lybrand, 644 F.2d 811, 818 (9th Cir. 1981); Carrion v. Yeshiva Univ., 535 F.2d 722, 729 (2d Cir. 1976); Wells v. Hutchinson, 499 F. Supp. 174, 201 (E.D. Tex. 1980); Swicker v. William Armstrong & Sons, Inc., 484 F. Supp. 762, 770 (E.D. Pa. 1980).

146. *See, e.g.*, Bronze Shields, Inc. v. New Jersey Dep't of Civil Service, 488 F. Supp. 723 (D.N.J. 1980). In a footnote the *Bronze Shields* court cited a group of cases that demonstrates the split among the courts over the proper standard of intent to prove liability under § 1981. *Id.* at 726 n.4. The courts disagree over whether to use the Title VII standard or the constitutional standard. *See* Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207 (1979).

147. *See supra* text accompanying notes 129-31.

148. Support for this conclusion can be found in the Fifth Circuit's application of the constitutional standard of intent for proving liability under § 1981, while it simultaneously applies the Title VII standard of discretion for awarding back pay in § 1981 suits. *See* Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978). In *Williams* the court held that when a plaintiff seeks to prove liability, "a claim under § 1981 is, *for this purpose*, to be equated with a claim under the Fourteenth Amendment dealt with by the Court in Washington [v. Davis, 426 U.S. 229 (1976)], rather than under Title VII of the Equal Employment Opportunity Act." Williams v. DeKalb County, 582 F.2d at 2-3 (emphasis added). For examples of Fifth Circuit cases using the same standard of discretion in awarding back pay under § 1981 as under Title VII, see *supra* note 139.

III. Parties Liable for Back Pay

A. Title VII

Section 706(g) of Title VII expressly provides that back pay may be "payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice."[149] Private employers have been held liable under Title VII since it became effective in 1965.[150] Public employers, however, including federal, state, and local governments, have been covered by the provisions of Title VII only since the Equal Employment Opportunity Act of 1972 expanded the coverage of Title VII to include these public employers.[151] Although the 1972 amendments clearly extended Title VII coverage to the states, the question arose whether the state's immunity under the eleventh amendment[152] barred a federal court from making a back pay award against a state. This question stemmed from the Supreme Court decision in *Edelman v. Jordan*,[153] in which the court held that the eleventh amendment prohibited a retroactive award of welfare payments from a state's treasury. In *Edelman* the Court noted that "[w]hile the [eleventh] Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."[154] The Court distinguished *Ex parte Young*,[155] in which it had permitted suits for injunctions against state officials, on the ground that *Young* related only to prospective injunctive relief, while the plaintiff in *Edelman* sought a retroactive

149. 42 U.S.C. § 2000e-5(g) (1976).

150. Congress enacted Title VII, one of the titles of the comprehensive Civil Rights Act of 1964, on July 2, 1964, and the statute became effective one year later. Section 701(b) of the Equal Employment Opportunity Act of 1972 expanded Title VII's coverage by including private employers with 15 or more employees. 42 U.S.C. § 2000e(b) (1976). Prior to the 1972 amendment the Act only covered private employers with 25 or more employees. Pub. L. No. 88-352, § 701(b), 78 Stat. 253 (1964) (current version at 42 U.S.C. § 2000e(b) (1976)).

151. Section 701(a) expanded the definition of "person" as used in Title VII to include state and local governments. 42 U.S.C. § 2000e(a) (1976). Section 717 further expanded Title VII's coverage to include the federal government. 42 U.S.C. § 2000e-16 (1976).

152. The eleventh amendment provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

153. 415 U.S. 651 (1974).

154. *Id.* at 662-63.

155. 209 U.S. 123 (1908).

monetary award that would be paid from the state treasury.[156] The Court ultimately resolved the eleventh amendment issue in *Fitzpatrick v. Bitzer*[157] when it decided that the amendment does not preclude a Title VII back pay award against a state. Speaking for the Court, Justice Rehnquist reasoned that in passing the 1972 amendments to the Civil Rights Act of 1964, Congress, acting within its enforcement power under section 5 of the fourteenth amendment, had waived the states' immunity to suit under the Act.[158]

Since section 717[159] of the 1972 amendments expanded the coverage of Title VII, the federal government has been the object of numerous employment discrimination suits[160] and has been held liable for back pay.[161] In *Brown v. General Services Administration*[162] the Supreme Court held that section 717 represented the exclusive judicial remedy for federal employment discrimination. The Court in *Brown* based its decision first, on an examination of legislative history indicating that in 1972 Congress intended "to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination"[163] and second, on the "balance, completeness, and structural integrity of section 717,"[164] which indicated that Congress had not "designed [the section] merely to supplement other putative judicial relief."[165]

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156. Edelman v. Jordan, 415 U.S. at 664.

157. 427 U.S. 445 (1976).

158. *Id.* at 456. The Court recognized that

> the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority te enforce "hy appropriate legislation" the suhstantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. . . . Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. (footnote omitted).

159. 42 U.S.C. § 2000e-16 (1976); *see supra* note 151.

160. *See, e.g.*, Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978) (suit against Department of Defense); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (suit against Department of Health, Education, and Welfare).

161. *See, e.g.*, McMullen v. Warner, 416 F. Supp. 1163 (D.D.C. 1976) (suit against Department of the Navy).

162. 425 U.S. 820 (1976).

163. *Id.* at 828-29.

164. *Id.* at 832.

165. *Id.* For a critical discussion of the Court's reasoning in *Brown*, see Reiss, *Requiem For an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies*

The courts have shown no reluctance in holding unions[166] and employment agencies[167] liable for back pay upon a finding of a Title VII violation. For example, the Fifth Circuit in *Parson v. Kaiser Aluminum & Chemical Corp.*[168] held that a union may be jointly liable with the employer for discrimination resulting from the provisions of a collective bargaining agreement and concluded that "any monetary liability imposed upon the employer must be shared by the Union."[169] Most of the litigation surrounding employment agencies, however, has concerned whether the entity involved qualified as an "employment agency" under Title VII,[170] not whether the agencies could be liable for back pay.

B. 42 U.S.C. § 1981

Private employers have been held liable for back pay under section 1981, as previously discussed in part II of the Special Project.[171] Public employers, however, may be able to avoid liability under section 1981. Since *Brown v. General Services Administra-*

For Employment Discrimination, 50 S. CAL. L. REV. 961, 977-82 (1977).

166. *See infra* notes 168-69 and accompanying text.

167. *See, e.g.*, Barnes v. Rourke, 8 Fair Empl. Prac. Cas. (BNA) 1113, 1115-16 (M.D. Tenn. 1973) (employment agency violated Title VII and held liable for back pay because it classified applicants according to sex and either failed or refused to refer female applicants to employers expressing a preference for males in situation in which sex did not constitute a bona fide occupational qualification).

168. 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979).

169. *Id.* at 1389. Other circuits have also held unions liable for back pay. *See, e.g.*, Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), *vacated & remanded on other grounds sub nom.* Retail, Wholesale & Dep't Store Union v. G.C. Murphy Co., 451 U.S. 935 (1981) (employer and union jointly liable); Patterson v. American Tobacco Co., 535 F.2d 257, 270-71 (4th Cir.) (local and international union held liable), *cert. denied*, 429 U.S. 920 (1976); Evans v. Sheraton Hotel, 503 F.2d 177, 186 (D.C. Cir. 1977) (union and employer jointly liable).

170. One of the central issues in several of the employment agency cases concerned whether a newspaper publisher qualified as an "employment agency" under 42 U.S.C. § 2000e-3(b), which prohibits sex-segregated help wanted advertisements to be placed by employment agencies except when sex constitutes a bona fide occupational qualification for the job. The courts have almost uniformly held that a newspaper publisher does not qualify as an employment agency under the Act in this situation. *Compare* Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Cal. 1970) (newspaper publisher not an "employment agency" under Title VII), *aff'd*, 469 F.2d 89 (4th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973) *with* Morrow v. Mississippi Publishers Corp., 5 Fair Empl. Prac. Cas. (BNA) 287 (S.D. Miss. 1972) (question of fact exists whether newspaper publisher qualifies as an employment agency under the Act).

For other cases concerning the question whether the entity qualified as an "employment agency" under the Act, see, *e.g.*, Bonomo v. National Duckpin Bowling Congress Inc., 469 F. Supp. 467 (D. Md. 1979); Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979).

171. *See supra* text accompanying notes 105-07 & 112-19.

tion[172] held that section 717 of Title VII contained the exclusive judicial remedy for federal employment discrimination,[173] such discrimination may be remedied only by a Title VII suit.[174] While states may be subject to suit for a violation of section 1981, the overwhelming weight of authority holds that absent a waiver of immunity from the state, eleventh amendment sovereign immunity precludes liability for back pay.[175] Although the Supreme Court held in *Fitzpatrick v. Bitzer*[176] that Title VII constituted a congressional override of the states' eleventh amendment sovereign immunity, in *Quern v. Jordan*[177] the Court concluded that the enactment of section 1983[178] did not waive the states' immunity. The Court stated in *Quern* that "neither the language of the statute nor the legislative history discloses an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them."[179] In light of *Quern*, the Court is unlikely to find that the enactment of section 1981 constituted an override of the elev-

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172. 425 U.S. 821 (1976); *see supra* text accompanying notes 162-65.

173. 425 U.S. at 835.

174. *See* Weakhee v. Perry, 587 F.2d 1256, 1262 n.11 (D.C. Cir. 1976) (District of Columbia Circuit noted that the trial court dismissed the § 1981 claim against the EEOC, citing *Brown*); Lee v. Bolger, 454 F. Supp. 226, 232 (S.D.N.Y. 1976) (§ 1981 claim dismissed against the United States Postal Service in light of *Brown*).

175. *See, e.g.*, Sessions v. Rusk State Hosp., 648 F.2d 1066, 1069 (5th Cir. 1981) (§ 1981 does not waive states' sovereign immunity). *But see* Taylor v. Jones, 653 F.2d 1193, 1205 n.10 (8th Cir. 1981) (possible that § 1981 did waive states' sovereign immunity).

The district courts have uniformly held that the eleventh amendment bars a monetary claim against the states under § 1981. *See, e.g.*, Jones v. Local 520, International Union of Operating Eng'rs, 524 F. Supp. 487 (S.D. Ill. 1981); McNeil v. McDonough, 515 F. Supp. 113 (D.N.J. 1980), *aff'd on other grounds*, 648 F.2d 178 (3d Cir. 1981); Vaughn v. Regents of Univ. of Cal., 504 F. Supp. 1349 (E.D. Cal. 1981).

176. 427 U.S. 445 (1978); *see supra* text accompanying notes 157-158.

177. 440 U.S. 332 (1979).

178. Section 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

179. Quern v. Jordan, 440 U.S. at 345 n.16. In its search for evidence of legislative intent to override the eleventh amendment immunity, the Court examined the legislative history surrounding § 1 of the Civil Rights Act of 1871, the precursor to § 1983. Because of the lack of any lengthy debate on § 1 of the 1871 Act and no direct mention of the eleventh amendment or the direct financial consequences on the states, the Court concluded that Congress did not intend to waive the states' sovereign immunity when it enacted § 1. *Id.* at 343.

enth amendment.[180]

At least three circuits have dealt with the issue of states' immunity from monetary damages in section 1981 suits. In *Sessions v. Rusk State Hospital*,[181] a racial discrimination suit brought under section 1981 and Title VII, the Fifth Circuit dismissed the section 1981 claim because, as an entity of the state, the defendant had immunity under the eleventh amendment from an award of monetary damages.[182] The court emphasized that "[u]nlike Title VII, Section 1981 contains no congressional waiver of the state's eleventh amendment immunity."[183] In *Rucker v. Higher Educational Aids Board*[184] the Seventh Circuit found the defendant as a state agency immune from federal damages liability by virtue of the eleventh amendment. The Seventh Circuit cited *Quern* as support for its conclusion that the defendant's state immunity protected it from damage claims under sections 1981, 1983, and 1985.[185]

In contrast, the Eighth Circuit in *Taylor v. Jones*,[186] another racial discrimination suit based on both Title VII and section 1981, remanded the question of back pay to the district court to determine whether an award of retroactive monetary damages against the state violated the eleventh amendment. The circuit court questioned whether the *Quern* decision based on section 1983 controlled a suit based on section 1981[187] and noted that "[t]he language, purpose and legislative history of section 1981 are not entirely comparable to section 1983; thus, its effect and scope must be separately examined."[188] Despite the differences between the

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180. *See, e.g.*, Weisbord v. Michigan State Univ., 495 F. Supp. 1347 (W.D. Mich. 1980). The court in *Weisbord* dismissed the § 1981 claim for retrospective relief against the state of Michigan because of the state's eleventh amendment immunity and held, "Such an express [congressional] abrogation has been found under Title VII . . . but found wanting in the legislative history of section 1983. . . . Nor does it appear that section 1981 was intended to abrogate Eleventh Amendment immunity." *Id.* at 1355-56.

181. 648 F.2d 1066 (5th Cir. 1981).

182. *Id.* at 1069.

183. *Id.*

184. 669 F.2d 1179 (7th Cir. 1982).

185. *Id.* at 1184.

186. 653 F.2d 1193 (8th Cir. 1981).

187. *Id.* at 1205 n.10. For a discussion of the *Quern* decision, see *supra* notes 177-79 and accompanying text.

188. 653 F.2d at 1205 n.10. Other than in the context of damages, the Fifth Circuit has recognized differences between § 1981 and § 1983. Garner v. Giarusso, 571 F.2d 1330, 1340 (5th Cir. 1978) (scope of § 1981 much narrower than that of § 1983); *see also* Boyd v. Shawnee Mission Pub. Schools, 522 F. Supp. 1115, 1117 (D. Kan. 1981) (§ 1983 enacted as part of different civil rights act and pursuant to different amendment). The Supreme Court also has

two statutes, the district courts have uniformly followed *Quern* in holding that the eleventh amendment bars a section 1981 award of monetary damages against a state.[189] The only exception to the generally accepted *Quern* rule *may* be in cases in which the court finds that the state has waived its sovereign immunity.[190]

When municipal and local governments are sued for employment discrimination, no reason currently exists to exempt these entities from liability for back pay under section 1981. Prior to 1979, however, a minority of courts[191] had found municipalities immune from section 1981 monetary awards. These courts relied on *Monroe v. Pape,*[192] in which the Supreme Court held that municipal corporations could not be liable under section 1983 because they did not fall within the ambit of the statute.[193] Despite *Monroe,* the majority view maintained that municipal and local governments had no immunity from liability under section 1981.[194] Courts supporting this view emphasized the differences between sections 1981 and 1983 and, therefore, refused to extend the sec-

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pointed out that " '[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources.' " District of Columbia v. Carter, 409 U.S. 418, 423 (1973) (quoting Monroe v. Pape, 365 U.S. 167, 205-06 (1961)). The Supreme Court noted that while § 1983 derives from § 1 of the Civil Rights Act of 1871, passed pursuant to the fourteenth amendment, § 1982 derives from the Civil Rights Act of 1866, enacted under the thirteenth amendment. *Id.* Similarly, § 1983 and § 1981 derive from different statutes. *See supra* notes 95 & 111.

189. *See, e.g.,* NAACP v. California, 511 F. Supp. 1244, 1250 (E.D. Cal. 1981) ("the bar against suit imposed by the Eleventh Amendment applies with equal vigor in the context of actions based on 42 U.S.C. § 1983 and in the context of actions based on 42 U.S.C. § 1981"); Wong v. Calvin, 87 F.R.D. 145, 147 (N.D. Fla. 1980) (court did not distinguish between § 1981 and § 1983 in denying retrospective monetary relief against the state as barred by the eleventh amendment). *See also* district court cases cited *supra* notes 175 & 180.

190. Courts have found a waiver of the states' eleventh amendment immunity in some § 1983 suits. *See, e.g.,* Hodges v. Tomberlin, 510 F. Supp. 1280, 1283 (S.D. Ga. 1980); Marrapese v. Rhode Island, 500 F. Supp. 1207, 1222 (D.R.I. 1980). One court described such a waiver as occurring only in "rare cases." NAACP v. California, 511 F. Supp. 1244, 1250 (E.D. Cal. 1981).

191. *See, e.g.,* Arunga v. Weldon, 469 F.2d 675, 675-76 (9th Cir. 1972); Black Bros. Combined v. City of Richmond, 386 F. Supp. 147, 148 (E.D. Va. 1974).

192. 365 U.S. 167 (1961).

193. *Id.* at 187. The Supreme Court based its holding on the legislative history surrounding the 1871 Act, the precursor of § 1983. The legislative history indicated clearly that Congress rejected an amendment to the Act which would have specifically provided for municipal liability. *Id.* at 189-90. The Court inferred that the rejection of such an amendment indicated that Congress did not intend municipalities to be considered a "person" under the Act. *Id.* at 191.

194. *See, e.g.,* Mahone v. Waddle, 564 F.2d 1018, 1030-31 (3d Cir. 1977), *cert. denied,* 438 U.S. 904 (1978); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1159-80 (9th Cir. 1976).

tion 1983 *Monroe* decision to section 1981 suits.[195] Subsequently, in *Monell v. Department of Social Services*,[196] the Supreme Court overruled *Monroe* insofar as it held local governments wholly immune from section 1983 suits.[197] Since *Monell* removed the only grounds offered by lower courts for finding municipal immunity from suit under section 1981, municipalities are now undoubtedly subject to liability under that section. At least two courts have examined the issue of municipal immunity after *Monell*, and both have concluded that municipal and local governments are now indisputably not entitled to immunity from section 1981 liability.[198]

Unions have also been held to be subject to liability under section 1981. For example, the District of Columbia Circuit in *Macklin v. Spector Freight Systems, Inc.*[199] found section 1981 applicable to cases concerning racial discrimination by unions and employers.[200] Unions may also be held liable for back pay under section 1981.[201] In *Waters v. Wisconsin Steel Works of International Harvester Co.*[202] the Seventh Circuit refused to uphold the union's contention that insufficient evidence existed to support a claim against the union under section 1981.[203] The court reasoned that "[i]t is enough, however, that the union was an integral party to the [collective bargaining] agreement which discriminated against [the plaintiff]"[204] and thus concluded that the union shared

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195. *See* cases cited *supra* note 194.

196. 436 U.S. 658 (1979).

197. *Id.* at 663. The Court reexamined the legislative history surrounding the Civil Rights Act of 1871 and concluded that "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690 (emphasis in original). For a discussion of the Court's earlier, and contrary, examination of the legislative history, see *supra* noto 193.

198. *See* Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 15 (1st Cir. 1979) ("after the decision in *Monell*, it is incontrovertible that a water district does not enjoy an absolute immunity under 42 U.S.C. § 1981"); Moore v. Memphis Light, Gas & Water Div., 21 Fair Emp. Prac. Cas. (BNA) 147, 148 (W.D. Tenn. 1979) ("[t]hese decisions [holding municipalities subject to liability under § 1981] seem even more compelling following the decision in *Monell*").

199. 478 F.2d 979 (D.C. Cir. 1979).

200. *Id.* at 993; *accord* Henry v. Radio Station KSAN, 374 F. Supp. 260, 267 (N.D. Cal. 1974) (§ 1981 "applies to private act of racial discrimination by unions as well as by employers.")

201. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974) (local union jointly liable with employer), *cert. denied*, 425 U.S. 997 (1976).

202. *Id.*

203. *Id.*

204. *Id.*

jointly in the liability of the employer.[205]

IV. PRESUMPTIVE ENTITLEMENT TO BACK PAY

In class action proceedings alleging some form of employment discrimination, the trial generally takes a bifurcated form.[206] In the initial, or Stage I,[207] portion of the proceedings the class must present proof of the employer's discriminatory employment practices and demonstrate that these practices have resulted in economic harm to the class.[208] If the class can thus present a prima facie case of discrimination,[209] and the employer cannot rebut the prima facie case with an affirmative defense,[210] the trial court may find the employer liable to the class. A finding of liability in Stage I leads to a presumption of entitlement to back pay[211] as part of each class member's relief awarded in Stage II[212] of the proceedings. This

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205. *Id.*

206. *See, e.g.*, Myers v. Gilman Paper Corp., 544 F.2d 837, 853-54 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); Stewart v. General Motors Corp., 542 F.2d 445, 450-53 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); Swint v. Pullman-Standard, 539 F.2d 77, 103 (5th Cir. 1976); Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 733-34 (5th Cir. 1976); United States v. United States Steel Corp., 520 F.2d 1043, 1053-54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 443-44 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Ste. Marie v. Eastern R.R. Ass'n, 497 F. Supp. 800, 803-04 (S.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d 395 (2d Cir. 1981); English v. Seaboard Coastline R.R., 12 Fair Empl. Prac. Cas. (BNA) 90, 91 (S.D. Ga. 1975). Bifurcation of the trial is authorized by FED. R. CIV. P. 42(b), which states that the court "may order a separate trial . . . of any separate issue."

207. The Fifth Circuit has taken the lead in the development of the bifurcated approach. *See* United States v. United States Steel Corp., 520 F.2d 1043, 1053-54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 443-44 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257, 259 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374 (5th Cir. 1974). Building on an approach detailed in *Baxter*, 495 F.2d at 443-44, the court first used the terms "Stage I" (the liability phase of the proceedings) and "Stage II" (the relief phase of the proceedings) in *United States Steel Corp.*, 520 F.2d at 1053-54.

208. *See* United States v. United States Steel Corp., 520 F.2d 1043, 1053-54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 443-44 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 797 (1974); Smalls, *Class Actions Under Title VII: Some Current Procedural Problems*, 25 AM. U.L. REV. 821, 849 (1976).

209. *See infra* notes 532-42 and accompanying text.

210. *See infra* notes 543-45 and accompanying text.

211. *See* United States v. United States Steel Corp., 520 F.2d 1043, 1053-54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1374 (5th Cir. 1974).

212. *See generally supra* note 207.

part of the Special Project examines the plaintiff class member's presumptive entitlement to back pay and the scope of the presumption[213] and traces its development through a series of cases.[214] A discussion of the useful purpose served by the presumption within the framework the federal courts have developed for dealing with cases seeking back pay as a remedy is presented later in this Special Project.[215]

A series of cases decided by the Fifth Circuit has defined the scope of the presumption of entitlement to back pay. In *Johnson v. Goodyear Tire & Rubber Co.*[216] the defendant was charged with discriminating against blacks in its workforce through the use of discriminatory diploma requirements and transfer policies, and unvalidated tests.[217] Reversing in part the decision of the trial court, the Fifth Circuit considered as a matter of first impression whether a trial court should be permitted to award class-wide back pay after the class has demonstrated a prima facie case of employment discrimination.[218] The Fifth Circuit correctly anticipated the approach later taken by the Supreme Court in *Albemarle Paper Co. v. Moody*[219] and ruled that victims of discrimination should be compensated if economic loss can be shown.[220] Although Judge Gewin discussed a procedure in which individual plaintiffs would need to prove entitlement to back pay, rather than automatically recovering based on the prima facie case established by the class,[221]

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213. *See infra* notes 216-58 and accompanying text.

214. *See id.* To best demonstrate the development of the presumption, the focus of this part of the Special Project will be on a series of cases decided by a single court, the Fifth Circuit Court of Appeals.

215. *See infra* notes 457-60 and accompanying text.

216. 491 F.2d 1364 (5th Cir. 1974).

217. The Equal Employment Opportunity Commission (EEOC) has promulgated guidelines for validating standardized tests used in employment settings. *See* 29 C.F.R. §§ 1607.5, .14, .15 (1981). The use of any type of selection procedure that has any adverse impact on members of any employee group will be considered discriminatory unless the test has been validated. *Id.* § 1607.3A. For a general discussion of scored tests and validation procedures, see B. SCHLEI & P. GROSSMAN, *supra* note 33, at 65-131 (1976).

218. 491 F.2d at 1375.

219. 422 U.S. 405, 413-25 (1975); *see supra* text accompanying note 84. The *Johnson* court specifically focused on the need to read Title VII as remedying the effects of discrimination incurred by the plaintiffs: "The relief herein ordered is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination. As to monetary relief nothing more is required; nothing less is acceptable." 491 F.2d at 1375.

220. 491 F.2d at 1375.

221. *Id.* This procedure had been mentioned, although in far less detail, in several earlier cases: United States v. Georgia Power Co., 474 F.2d 906, 921-22 (5th Cir. 1973) (Title VII); Jinks v. Mays, 464 F.2d 1223, 1226 (5th Cir. 1972) (fourteenth amendment); Robinson v. Lorillard Corp., 444 F.2d 791, 802 n.14 (4th Cir.) (Title VII), *cert. dismissed,* 404 U.S.

the court ultimately ruled that unless evidence showed that individual plaintiffs had not been harmed by defendant's discriminatory practices, the members of the class were "presumptively entitled" to back pay.[222]

Johnson built the basic framework for the two-stage or bifurcated procedure[223] used in practically all class actions alleging employment discrimination.[224] Although not specifically recognizing a bifurcated approach, the *Johnson* court referred to two distinct stages. In the first stage responsibility for establishing a prima facie case of employment discrimination on behalf of the class rests with the class representative. If the defendant cannot rebut the charges of the class, the trial shifts from the liability stage to the remedy stage. The shift also includes a change from a class-wide approach to an individual-by-individual approach.[225] Thus, in the second stage, each individual claimant must show class membership and economic loss incurred as a result of the defendant's discrimination.

Only one month after *Johnson,* the Fifth Circuit again confronted similar issues in *Pettway v. American Cast Iron Pipe Co.*[226] The plaintiffs in *Pettway* appealed from a decision denying them relief from claims of discrimination in hiring, promotion and transfer, and testing and educational requirements.[227] The Fifth Circuit reversed the district court ruling and remanded the case for further consideration based on the thorough analysis in its opinion.[228] The court began its analysis of the back pay issue with a

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1006 (1973).

222. 491 F.2d at 1374.

223. *See supra* note 207.

224. *See, e.g.,* Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1239 (5th Cir. 1980); Williams v. DeKalb County, 577 F.2d 248, 256 (5th Cir. 1978); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1390-91 & 1391 n.36 (5th Cir. 1978), *cert. denied,* 441 U.S. 968 (1979); Rodriguez v. Taylor, 569 F.2d 1231, 1239-40 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); Myers v. Gilman Paper Corp., 544 F.2d 837, 853-54 (5th Cir.), *cert. dismissed,* 434 U.S. 801 (1977); Stewart v. General Motors Corp., 542 F.2d 445, 450-53 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977); Swint v. Pullman-Standard, 539 F.2d 77, 103 (5th Cir. 1976); Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 733-34 (5th Cir. 1976); United Transp. Union Local 974 v. Norfolk & W. Ry. Co., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied,* 425 U.S. 934 (1976); Mims v. Wilson, 514 F.2d 106, 110 (5th Cir. 1975).

225. Although damages may sometimes he calculated on a class-wide basis, *see infra* notes 706-50 and accompanying text, each class member's eligibility to receive the award must always be determined individually.

226. 494 F.2d 211 (1974).

227. *Id.* at 216.

228. *Id.* at 267.

detailed review of the discretion of the trial court[229] and a discussion of the congressional intent of both Title VII[230] and section 1981[231]—to restore the injured employees to the economic status they would have occupied but for the discrimination. According to the court the intent of the statutes evidenced the narrow scope of the trial court's discretion to award back pay.[232] The court therefore viewed back pay as compensatory in nature and ruled that it should be awarded unless the evidence indicated the presence of "special circumstances."[233] Because the court could not find such special circumstances in the instant case,[234] it perceived the trial court's discretion to be severely limited in deciding whether to award back pay.[235]

The Fifth Circuit in *Pettway* continued with a presentation of the two-stage procedure used in *Johnson.* The court countered the defendant's argument that the award of back pay would be different for each class member when applying the two-step procedure. According to the court, a class-wide showing of entitlement to back pay could be made without first determining the amount that each class member would be eligible to recover.[236] This class-wide showing would create a presumption in favor of back pay for the class.[237] Quoting extensively from *Johnson,* the court commented that the earlier decision had placed a restriction on the unfettered presumption:[238] the individual claimants were required to prove

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229. *Id.* at 251-56.

230. For a discussion of the legislative history of Title VII, see *supra* notes 40-63 and accompanying text.

231. For a discussion of the legislative history of 42 U.S.C. § 1981, see *supra* notes 94-107 and accompanying text.

One year following *Pettway* the Supreme Court, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), joined a number of circuit courts that had interpreted § 1981 to grant a federal remedy against racial discrimination in employment. *See id.* at 459-60 & n.6. "An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory . . . damages." *Id.* at 460.

232. *See generally Pettway,* 494 F.2d at 251-56.

233. *Id.* at 253. The court cited Head v. Timkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973), and Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated,* 422 U.S. 405 (1975), as having adopted the special circumstances approach. 494 F.2d at 211 n.121; *see* 61 CORNELL L. REV., *supra* note 76, at 469-73; *supra* notes 135-37 and accompanying text.

234. The court found that the defendant's good faith, and the defendant's willingness to comply in the future even without a back pay award did not constitute "special circumstances" justifying the denial of back pay. 494 F.2d at 253.

235. *See id.* at 252-53.

236. *Id.* at 257.

237. *Id.* at 259.

238. *Id.* Although both *Johnson* and *Pettway* were Fifth Circuit cases, none of the

that they were indeed class members and that they had suffered economic loss.[239] Although the presumptive entitlement still existed, the presumption did not amount to "per se" eligibility for back pay.[240] Rather, the presumption would shift the trial from Stage I to Stage II and would permit both sides to argue the appropriate amount of back pay for each of the claimants.[241]

Only one month elapsed before another case presented the Fifth Circuit with an opportunity to develop further its analysis of both the presumption of entitlement to back pay and the two-stage procedure. In *Baxter v. Savannah Sugar Refining Corp.*,[242] a class action brought under Title VII, the court scrutinized defendant's discriminatory policies that affected the advancement, both in salary and position, of all black employees. The district court[243] held for plaintiff but refused to grant class-wide back pay. The district court considered defendant's good faith and plaintiff's failure to prove the necessity of back pay for making the class whole valid reasons for denying back pay.[244] The court of appeals, relying on *Johnson*, rejected both of these reasons.[245] The court discussed the bifurcated proceedings found in Title VII class action suits and concluded that if the class can show that it has been injured by the employer's discriminatory practices, then the court should determine whether individual class members have suffered a loss and are therefore entitled to back pay relief.[246] The Fifth Circuit specifically found that individual members of the class need not prove class membership or economic loss at the liability stage.[247] Rather,

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judges deciding *Johnson* heard the *Pettway* case. Circuit Judges Gewin, Ainsworth, and Morgan decided *Johnson* and Circuit Judges Tuttle, Bell, and Goldberg decided *Pettway*.

239. *Id.*

240. *Id.* (citing United States v. Georgia Power Co., 474 F.2d 906, 921-22 (5th Cir. 1973)) (emphasis in original).

241. *Id.* (citing Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379, 1380 (5th Cir. 1974)).

242. 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

243. 350 F. Supp. 139 (S.D. Ga. 1972), *rev'd*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

244. *Id.* at 146.

245. 495 F.2d at 442-43. In *Baxter* Chief Judge Brown joined Judge Gewin, who had sat on the *Johnson* bench, and Judge Goldberg, who had sat on the *Pettway* bench.

246. *Id.* at 443-44. Although the *Baxter* court did not mention the term "presumption," it did state that after a finding of discriminatory treatment, "the court *should* . . . proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and [is] thus entitled to back pay . . . ." *Id.* at 444 (emphasis added). The use of the word "should" indicates both the restriction of the court's discretion and the presumption in favor of back pay.

247. *Id.* at 443.

personal economic loss would be considered once the class has proved discriminatory conduct and the defendant has been found liable.[248] Since the district court had found liability, the court of appeals remanded the case for individual determinations of appropriate back pay awards.[249]

United States v. United States Steel Corp.[250] is the final case in the Fifth Circuit's development of the bifurcated claims procedure. Similar to the findings of the *Baxter* trial court, the trial court in *United States Steel* found the defendant liable for various discriminatory practices under Title VII,[251] but denied back pay to some of the class members. On appeal, the Fifth Circuit once again rejected absence of bad faith as a complete defense to a back pay remedy.[252] The court also declined to accept the notions that the defendant had not been unjustly enriched as a result of its discriminatory employment practices and that other types of affirmative relief were available to the plaintiffs.[253]

The court provided a detailed discussion of the back pay issue, focusing on the two-stage approach developed in the earlier cases.[254] At Stage I in the proceedings attention is focused on the class itself. According to the court's analysis, the class would be required to demonstrate that the defendant's discriminatory practices had affected class members in a broad sense, but the individual members would not be required to present their claims. Rather, once the class has made a prima facie showing of discriminatory conduct on the part of the defendant, "[the class] is *presumptively* entitled to move into Stage II with the presentation of individual back pay claims."[255] The court then explained the purpose of the presumption: "This presumptive entitlement serves the

248. *Id.* at 444.

249. *Id.* at 444-45.

250. 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

251. The seniority system used by defendant locked blacks into "lower paying and less desirable jobs" and thereby perpetuated the racial discrimination actively practiced by defendant prior to Title VII's effective date. *Id.* at 1047.

252. *Id.* at 1052-53.

253. *Id.* at 1053.

254. *See supra* notes 223-49 and accompanying text. The *United States Steel* court was the first to use the terms Stage I and Stage II to refer to the class/liability stage and the individual/recovery stage. *See* 520 F.2d at 1053-54; *see also supra* note 207. The court also explained the reasons for the two-stage approach: "[I]n an effort to relieve tension between management difficulties with numerous, sometimes diverse claimants and Title VII's policy of compensation for discrimination-caused economic injuries, this court has established a bifurcated approach in class actions seeking back pay." 520 F.2d at 1053.

255. 520 F.2d at 1054 (emphasis in original).

important function of filling the logical hiatus between large-scale practices and statistically significant effects, which were shown at Stage I, and individual members' claims for sums of money due, which have not yet been demonstrated."[256] According to the court, in certain limited circumstances the presumption may be predicated upon a threshold showing by the class that it had incurred economic loss and that the defendant caused this loss.[257] The court concluded that requiring the class to make such a showing would not be inconsistent with the "make whole" purpose of Title VII as long as the burden placed on the class was "minimal in weight" and "general in scope."[258]

Once a plaintiff class has met its Stage I burden of proving discrimination and the presumption of eligibility for back pay has arisen, the employer may seek to rebut this presumption. The following part of the Special Project discusses possible methods by which an employer may rebut the presumption that back pay is an appropriate class-wide remedy. If the court determines that back pay is the proper remedy for the class, the employer may seek to prove that the individual plaintiff-class member is not entitled to back pay in Stage II. The procedure for determining whether an individual claimant is eligible for back pay is discussed in part VII.

V. Rebuttals to the Presumption of Class-Wide Entitlement to Back Pay

In recent years, defendant employers have had little success in their attempts to defeat liability for back pay once a trial court has found them guilty of employment discrimination.[259] In *Albemarle*

256. *Id.*

257. *Id.* The court restricted these circumstances to situations in which the defendant can seriously question the class' entitlement to back pay. The court stated that the defendant would rarely be able to bring forth proof that the class, or one of its subclasses, actually outearned or was overpromoted as compared to a similar group of white employees. Even this type of proof, however, would not prevent the proceedings from moving into Stage II if the class representative could show that the defendant's evidence was misleading or that the defendant's discriminatery practices prevented other members of the class from outearning their white counterparts. *Id.* at 1054-55.

258. *Id.* at 1054.

259. A defendant stands a much better chance of defeating back pay before a trial court finds him liable for employment discrimination. Any defense that succeeds in defeating a finding of discrimination naturally forecloses the possibility of liability for back pay. Title VII cases often parallel decisions in cases brought under the NLRA and the Fair Laber Standards Act (FLSA). Among the purposes of these two acts was to ensure that the wrongdoer, rather than the innocent victim, suffer the economic loss ensuing from employment discrimination. *See, e.g.*, NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) (granting relief under the NLRA); Schultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267 (10th Cir.

Paper Co. v. Moody[260] the Supreme Court ruled that back pay should be denied to a class only for reasons that will not frustrate the twin statutory purposes of Title VII—making plaintiffs whole and deterring discrimination.[261] When courts give this discretionary standard a literal reading, the employer may be barred from asserting a successful defense to a claim for back pay since it would necessarily frustrate the twin purposes of Title VII. The *Albemarle* standard, therefore, presents a formidable burden for employers who seek to prove that back pay is not an appropriate remedy once a court has found discrimination under Title VII.

Two types of defenses are potentially available against claims for back pay. The first type, aimed at individual claimants, simply consists of a rebuttal of the prima facie showing of entitlement to an award of back pay made by individual claimants in a class action.[262] This rebuttal usually contains proof that the individual claimant never applied for a job, that he did not qualify for the job, or that no job was ever available.[263] This first type of defense should not be tested against the strict *Albemarle* discretionary standard. The *Albemarle* Court crafted the discretionary standard to aid courts in deciding whether back pay is the appropriate remedy for a proven act of discrimination. The Court, however, did not intend for trial courts to apply the *Albemarle* standard to rebuttals against individual claims made after the courts had already found back pay to be the appropriate remedy.[264]

The second group of defenses is aimed at defeating a class-wide award of back pay rather than individual claims.[265] These defenses must be tested against the *Albemarle* discretionary stan-

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1970) (granting relief under the FLSA); *see also supra* notes 52-63 and accompanying text.

260. 422 U.S. 405 (1975). For a full discussion of the discretionary standard used by courts when awarding back pay under Title VII, see *supra* notes 64-93 and accompanying text.

261. 422 U.S. at 421-22; *see supra* text accompanying note 84.

262. The individual claimants must make a showing of entitlement to back pay. This showing generally comprises two elements: (1) proof that the claimant is a member of the class against which the employer discriminated, and (2) proof that the claimant was injured by the discrimination. For a full discussion of the necessary elements of the individual claimant's prima facie case, see *infra* notes 638-64 and accompanying text.

263. For a discussion of the defense to individual claims, see *infra* notes 593-619 and accompanying text.

264. The Court stated that "[w]hether a particular member of the plaintiff class should have been awarded any backpay, and, if so, how much, are questions not involved in this review." 422 U.S. at 413.

265. This second type of defense often consists of an affirmative defense and, therefore, must be pleaded in accordance with FED. R. CIV. P. 8(c). For a full discussion of the burdens of pleading and proof in discrimination cases, see Belton, *supra* note 34.

dard[266] and, thus, examined in light of the twin statutory purposes of Title VII. If the defense frustrates either of these purposes, it will fail under this standard.[267] This part of the Special Project examines this second group of defenses and outlines the elements a defendant employer must include in his case to overcome a claim for back pay. This part then suggests the analytical approach courts should adopt when deciding back pay cases and discusses the viable defenses available for use against claims for back pay.

A. The Good Faith Requirement

The intent requirement for a violation of Title VII is similar to that commonly used in tort law—to be liable, the defendant employer need not have intended the effects of his act; he need only have intended the act that brought about those effects.[268] Defendants, nevertheless, have asserted their lack of intent, or "good faith," as a factor courts should consider when deciding to award or deny back pay relief.[269]

The Supreme Court in *Albemarle Paper Co. v. Moody*[270] eliminated good faith or lack of bad faith as a *complete* defense against back pay.[271] In *Albemarle* the district court determined that the employer had not intentionally violated Title VII and that instead he made a good faith attempt to halt any apparent discrimination.[272] Relying on the "make whole" purpose of Title VII,[273] the Court responded that "[i]f back pay were awardable only upon a showing of bad faith, the remedy would become a punishment for

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266. Courts generally apply this same test to defenses used against back pay actions brought under 42 U.S.C. § 1981 (1976). *See, e.g.*, McCormick v. Attala County Bd. of Educ., 541 F.2d 1094 (5th Cir. 1976) (per curiam); Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918, 925 (S.D.N.Y. 1979).

267. *Albemarle*, 422 U.S. at 421.

268. Courts have universally accepted this definition of intent for violations of Title VII. *See* 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 55.36(a) (1981). The intent requirement for violations of 42 U.S.C. § 1981 differs from that of Title VII in some circuits. *See supra* note 146 and accompanying text.

269. *See, e.g.*, United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 311 (8th Cir. 1972) (court denied back pay, justified in part by the employer's lack of bad faith), *cert. denied*, 409 U.S. 1116 (1973). For a general discussion of good faith as a defense to back pay, see Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Calif. 1970) (good faith no defense to backpay), *aff'd in part, rev'd in part*, 472 F.2d 631 (9th Cir. 1972). *See also* Annot., 21 A.L.R. FED. 472, 511-26 (1974); 2 A. LARSON & L. LARSON, *supra* note 268, § 55.36; Note, *supra* note 71, at 537-41.

270. 422 U.S. 405 (1975).

271. *Id.* at 422-23.

272. *Id.* at 410 (citing the unreported district court opinion).

273. *See supra* notes 57-61 and accompanying text.

moral turpitude, rather than a compensation for workers' injuries."[274] The *Albemarle* Court reasoned that denying back pay because a defendant has shown good faith would frustrate the purposes of Title VII and specifically noted that Congress directed Title VII at the consequences of discrimination, not simply at its motivations.[275] Thus, the Court ruled that an award of back pay need not be conditioned upon a showing of bad faith.[276]

Although the *Albemarle* Court limited the applicability of the good faith defense, it did not render the defense entirely useless. Evidence of the defense's continuing utility can be found in the Court's statement that "where an employer has shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the chancellor's conscience."[277] Thus, the *Albemarle* standard requires the employer to assert good faith as a threshold defense to defeat a claim for back pay.[278]

The facts that comprise the threshold defense of good faith or lack of bad faith[279] arise under many different settings. The factual settings can be grouped into two categories: (1) reliance on an accepted practice and (2) reliance on external authority. Examples of an employer's reliance on accepted practice as a defense to claims for back pay arise when an employer relies on insurance tables,[280] or on a practice widely accepted throughout an industry.[281] The second category of good faith defenses, reliance on external author-

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274. *Albemarle*, 422 U.S. at 422. The Court further noted that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'" *Id.* The Court supported its reasoning by relying on decisions under the NLRA, the Act from which Congress designed the Title VII remedy for backpay. *Id.* at 422 n.16 (citing NLRB v. Rex-Rutter Mfg., Co., 396 U.S. 258 (1969); American Machinery Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970); and, Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969)); *see supra* notes 57-61 and accompanying text.

275. *Albemarle*, 422 U.S. at 422-23.

276. *Id.*

277. *Id.* at 422.

278. *Id.* The majority stated, "[U]nder Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor." *Id.* Justice Rehnquist asserted in his concurring opinion that "[g]ood faith is a necessary condition for obtaining equitable consideration." *Id.* at 444 (Rehnquist, J., concurring).

279. No special significance is assigned to the difference between "good faith" and "lack of bad faith." The two terms are used synonymously to describe an employer's lack of intent to effect discrimination.

280. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 704-07 (1978).

281. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (testing procedure must be "a reasonable measure of job performance").

ity, is often asserted by the employer when he has relied on an opinion of the EEOC[282] or on a state protective law.[283]

Although the Court in *Albemarle* rejected the first category of good faith defenses—reliance on an accepted practice—as a complete defense to back pay,[284] it did not foreclose other good faith defenses. Some types of good faith, specifically those based upon reliance on external authority, may be sufficient to defeat a claim for back pay.

1. Reliance on EEOC Opinions

Title VII specifically recognizes that employers who engage in a discriminatory employment practice "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the EEOC"[285] have a complete defense to violations of its provisions. The EEOC, however, significantly limited this defense by narrowly defining "written interpretation or opinion." Accordingly, an employer may only rely upon the following:

> (a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or
> (b) Matter published and specifically designated as such in the Federal Register . . ., or
> (c) A Commission determination of no reasonable cause . . ., when such determination contains a statement that it is a "written interpretation or opinion of the Commission."[286]

Thus, courts may disallow use of this defense if the facts in a particular case do not fit precisely within these definitions. For example, in *Sprogis v. United Air Lines, Inc.*[287] the Seventh Circuit refused to allow an employer to assert this defense because the memorandum upon which the employer relied lacked sufficient indicia to designate it an "opinion letter" issued by the EEOC.[288]

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282. *See infra* notes 285-89 and accompanying text.

283. *See infra* notes 290-316 and accompanying text. An employer may also assert the defense of good faith reliance on external authority if it relies on collective bargaining agreements. Courts, however, have uniformly rejected this claim of good faith reliance as a defense against back pay. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 13 Fair Empl. Prac. Cas. (BNA) 1068, 1079-80 (D.C. Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 235 (4th Cir. 1975); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1379 (5th Cir. 1974). In most cases, the labor union's role as a party to a collective bargaining agreement that results in discrimination will be legally sufficient to impose back pay liability on the union. *See, e.g., Carey*, 500 F.2d at 1379.

284. *See supra* notes 270-76 and accompanying text.

285. 42 U.S.C. § 2000e-12(b) (1976).

286. 29 C.F.R. § 1601.33 (1981).

287. 444 F.2d 1194 (7th Cir. 1971).

288. *Id.* at 1200.

The Supreme Court in *Albemarle* recognized the continued vitality of this narrow statutory defense and stated that courts should not undermine the legislative choice to allow a complete but narrowly defined good faith defense.[289]

2. Reliance on State Protective Statutes

Before Title VII, many states had passed laws to protect women from working excessively long hours and from doing work that required any heavy lifting or strenuous physical labor.[290] Many employers were confronted with a dilemma when Congress enacted Title VII: they could either comply with the state protective laws and violate the Title VII mandate against sex discrimination, or change their employment practices in response to Title VII and violate the state protective laws. The courts have uniformly rejected an employer's good faith compliance with state protective laws as a defense against liability for discrimination under Title VII.[291] When considering claims for back pay, however, some courts have accepted good faith compliance with state protective laws as a defense.[292] The circuits recognizing this defense against back pay have accorded a presumption of validity to the state protective statutes: until the courts have considered and resolved the question whether Title VII supersedes a state protective statute, the state law should be presumed valid, and the employer cannot

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289. Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 n.17 (1975). The Court stated, "It is not for the courts to upset this legislative choice to recognize only a narrowly defined 'good faith' defense." *Id.*

290. *See generally* 2 A. LARSON & L. LARSON, *supra* note 268, at § 55.36(b).

291. *See, e.g.*, Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 990 (1972).

292. *See* cases cited *supra* note 291. The courts have also accepted the defense when asserted by unions charged with violations of Title VII. *See* Wernet v. Amalgamated Meat Cutters, Local 17, 484 F.2d 403 (6th Cir. 1973).

In addition to compliance with state protective laws, employers have asserted other defenses based on the unsettled nature of the law. These defenses have met with only limited success. The Eighth Circuit in United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973), denied back pay because the prevailing confusion of the law concerning whether back pay is an appropriate relief did not provide employers with notice that they would be liable for the economic loss that ensued from discriminatory employment practices. *Id.* at 380. Most other circuits, however, have rejected the defense. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375-77 (5th Cir. 1974) (courts reject employer's defense of reliance on unsettled nature of the law); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.) (Title VII entitles plaintiffs to compensation for loss regardless of good faith motives of employer), *cert. dismissed*, 404 U.S. 1006 (1971).

be expected to predict otherwise.[293]

The Supreme Court in *Albemarle* did not decide whether employers may still assert good faith compliance with state protective laws and avoid frustrating the twin statutory purposes of Title VII. Rather, it distinguished ordinary good faith from good faith compliance with state protective laws and carefully reserved determination on whether the latter would justify denial of back pay without frustrating the purposes of Title VII.[294] Since *Albemarle,* at least one circuit has addressed this question. In *Palmer v. General Mills, Inc.*[295] the Sixth Circuit recognized that good faith compliance with state protective laws must be viewed as something more than ordinary good faith.[296] The *Palmer* court explained that the decision by an employer to obey the plain obligations of a presumptively valid law could not be equated with the personal motivations that might prompt an employer to engage in discrimination.[297] If other circuits follow the reasoning in *Palmer,* good faith compliance with protective laws may still be an effective and complete defense against back pay.

This defense, however, has been limited by the courts both before and after the *Albemarle* decision. Typically, when a defendant employer has *notice* that Title VII has invalidated the state protective law, it can no longer claim good faith reliance on the statute.[298] For example, in *Schaeffer v. San Diego Yellow Cabs, Inc.,*[299] a pre-*Albemarle* case, the defendant employer relied upon a California law that limited women's work hours.[300] The Ninth Circuit allowed the employer to assert good faith compliance with the protective statute as a defense to back pay only up to the time when it had notice that the California law was invalid.[301]

The continuing utility of good faith compliance with state protective laws as a defense to back pay depends upon how much in-

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293. *See, e.g.,* Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1098-99 (S.D. Ohio 1971), *rev'd on other grounds,* 474 F.2d 949 (6th Cir. 1972).

294. Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 n.18 (1975). The Court noted, "[S]ome courts have denied backpay, and limited their judgments to declaratory relief, in cases where the employer discriminated on sexual grounds in reliance on state 'female protective' statutes that were inconsistent with Title VII. . . . There is no occasion in this case to decide whether these decisions were correct." *Id.*

295. 600 F.2d 595 (6th Cir. 1979).

296. *Id.* at 598-99.

297. *Id.* at 599.

298. *See infra* notes 301-16 and accompanying text.

299. 462 F.2d 1002 (9th Cir. 1972).

300. *Id.* at 1006.

301. *Id.* at 1007.

formation an employer must have before the courts will hold that he had notice of the state protective law's invalidity. The courts addressing this issue have reached varying conclusions. The *Schaeffer* court refused to "[draw] any hard and fast rule," believing instead "that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer."[302] The Ninth Circuit ruled that since the employer had notice both of an EEOC guideline declaring the state law invalid and of a decision by a district court[303] in the same circuit which ruled that Title VII had superseded the state law, the employer would be liable for back pay for its failure to comply with Title VII.[304] In *Kober v. Westinghouse Electric Corp.*[305] the Third Circuit suggested in dictum that it would allow the employer to assert the good faith reliance defense against back pay liability for the period prior to the time when he had notice of either a judicial or quasi-judicial determination of the protective law's invalidity.[306]

In a post-*Albemarle* decision, the District Court for the Western District of Michigan in *Kreitner v. Bendix Corp.*[307] ruled that a defendant employer could be held to have notice even though it possessed even less information than was required by the Third Circuit in *Kober*. The amount of information required was so slight that, in effect, the *Kreitner* court's ruling disallows the use of good faith compliance as a defense.[308] In *Kreitner* the employer violated

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302. *Id.* The court was unable to articulate a concrete standard. Rather, it said, "[A] court must balance the various equities between the parties and decide upon a result which is consistent with the purpose of the Equal Employment Opportunities Act, and the fundamental principles of fairness." *Id.* at 1006.

303. The court rejected the employer's argument that it should not be held liable for claims of back pay until a *circuit* court renders a "final" decision declaring a protective statute invalid. *Id.* at 1007.

304. *Id.*

305. 480 F.2d 240 (3d Cir. 1973).

306. *Id.* at 248-49. The court stated,

> No basis has been presented on which this court could come to a determination that the trial judge abused his discretion in denying back pay in a situation where he finds that an employer followed the applicable provisions of state law prior to a judicial determination of its invalidity. . . . [S]tate statutes, like federal ones, are entitled to a presumption of constitutionality until their invalidity is judicially determined. . . . [Defendant] Westinghouse did not have the benefit of any judicial or even quasi-judicial determination of the validity of the Pennsylvania statutes until the opinion of the Attorney General on November 19, 1969 and the lower court opinion in this case on March 29, 1971.

Id. at 248.

307. 501 F. Supp. 415 (W.D. Mich. 1980).

308. The court distinguished Palmer v. General Mills Inc., 600 F.2d 595 (6th Cir.

Title VII by complying with a Michigan protective law that restricted the number of hours women were allowed to work.[309] The court denied the employer's motion for summary judgment on the plaintiff's claim for back pay, ruling that the employer *should have known* of the invalidity of the Michigan protective law as soon as it discovered a conflict between the Michigan law and Title VII.[310] The court pointed to a number of circumstances that should have indicated the invalidity of the protective law to the employer: an EEOC Guideline announcing that Title VII superseded the Michigan law, federal court decisions striking down similar laws in other states, and Title VII itself.[311] The *Kreitner* court also cited equitable considerations favoring the plaintiff: that the penalty for violating the protective laws was minimal when compared to the injury done to the plaintiff; that Michigan had not followed a vigorous policy of enforcing its protective law; and that even if the employer had violated the Michigan law and been prosecuted by the state, it could have asserted good faith compliance with Title VII as a complete defense.[312] Thus, according to the *Kreitner* court, the defendant employer was never in a true dilemma: when confronted with a fine as small as ten dollars for violating the Michigan law, and the much more severe sanction of potential liability for back pay under Title VII, the employer should have had sufficient incentive to follow the federal law.[313] The *Kreitner* court, therefore, concluded that the employer had complied with the

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1979), which had allowed an employer to assert good faith compliance with state protective laws as a valid defense against back pay, stating that the *Palmer* court denied back pay because of the plaintiff's failure to show economic loss. *Kreitner*, 501 F. Supp. at 419.

309. *Kreitner*, 501 F. Supp. at 421.

310. *Id.* The court noted that the manager of the plant stated in an affidavit "that he knew of the existence of and relied on the guidelines of the Equal Employment Opportunity Commission regarding the conflict between Title VII and the state statute." *Id.* at 416 (footnote omitted). The manager did not remember when he learned of the EEOC's guideline that announced its view that state protective statutes conflicted with Title VII. *Id.* at 417. The court examined the various sources upon which the defendant asserted that it relied to continue compliance with the state protective law and determined that it had proved "actual reliance." *Id.* at 419.

311. *Id.* at 421.

312. *Id.*

313. *Id.* The court's conclusion implies that the employer never exercised *any* good faith. The outcome of this decision might have been different had the employer demonstrated that he had made a good faith effort to ascertain the validity of the state law, *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), to seek a declaratory judgment that the state protective law is invalid, *see, e.g.*, Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970), or to begin compliance with Title VII once its supremacy over the state law had been clearly established, *see, e.g.*, Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973).

Michigan protective law not under threat of prosecution, but as a corporate policy in total disregard of Title VII.[314]

Thus, the court in *Kreitner* did not allow the employer to rely on the presumption of validity that usually attaches to state protective laws.[315] Instead the court lowered the threshold of required information to give a defendant employer notice of the state law's invalidity to the extent that it actually imposed a duty on the employer to discover the Michigan law's invalidity. The employer's knowledge of a conflict between Title VII and the protective law triggered this duty.[316] Failure to fulfill that duty and comply with Title VII foreclosed the employer's defense against back pay. If other courts follow the reasoning in *Kreitner*, good faith compliance with state protective laws will cease to be even a limited defense against back pay unless the employer can somehow prove that he could not have discovered that Title VII had superseded the state law. Rather, such compliance will be only one factor that courts will consider when weighing the equities involved in claims for back pay.

B. The Trial Court's Analytical Approach

Back pay under Title VII constitutes equitable relief. Accordingly, the courts should consider the equities claimed by both parties.[317] Once a defendant employer has established a threshold defense of good faith, he must then assert other defenses to convince the court to exercise its discretion in favor of a denial of back pay. The *Albemarle* Court implicitly recognized that a court may assess the employer's defenses cumulatively and deny back pay when the equitable balance favors the employer.[318] This approach permits

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314. *Kreitner*, 501 F. Supp. at 421.

315. *See supra* text accompanying note 293.

316. *Kreitner*, 501 F. Supp. at 421.

317. In *Albemarle* the Court recognized this balance of equities when it stated that "under Title VII, the mere absence of bad faith simply opens the door to equity, it does not depress the scales in the employer's favor." Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

318. *Id.* at 425 n.20. The Court noted, "The District Court's stated grounds for denying backpay were, apparently, cumulative rather than independent. The District Court may, of course, reconsider its backpay determination in light of our ruling on the 'good faith' question." *Id.* In his concurring opinion, Justice Rehnquist also recognized that courts should weigh the combined effect of an employer's defenses against backpay. *Id.* at 444-45 (Rehnquist, J., concurring). He stated,

> I do not read the Court's opinion to say, however, that the facts upon which the District Court based its conclusion . . . would not have supported a finding that the conduct of Albemarle was reasonable under the circumstances as well as being simply in

the employer to assert successfully several defenses that, if considered separately, would be insufficient to justify denial of a claim for back pay.

In *Los Angeles Department of Water & Power v. Manhart*[319] the Supreme Court demonstrated the analytical approach it expected trial courts to follow when considering an employer's defenses to a claim for back pay. In *Manhart* the defendant employer relied on insurance mortality tables and its own experience evidencing that female employees live longer than male employees to justify withholding a greater amount of money for a pension fund from the women's paychecks than from the men's.[320] The employer contended that because it had to make more pension payments to the women, it could rightfully withhold more money from their take-home pay.[321] The Supreme Court found that the practice violated Title VII; yet, it refused to grant the women back pay to cover the differential in their take-home pay.[322] Writing for the majority, Justice Stevens observed that until this decision, the administrators of the pension fund could justifiably have assumed that the pension program was lawful.[323] Furthermore, the Court noted that prior to *Manhart* the courts had not addressed the subject, and the administrative agencies had split on the question whether the employer's practice violated Title VII.[324] Once it found that the employer had acted in good faith, the Court weighed the cumulative effect of the employer's other defenses.[325]

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good faith. Nor do I read the Court's opinion to say that such a combination of factors might not, in appropriate circumstances, be an adequate basis for denial of back pay. *Id.* (citation omitted).

319. 435 U.S. 702 (1978).

320. *Id.* at 704-10.

321. *Id.* at 706.

322. *Id.* at 723. The Court vacated the district and appellate court decisions that had awarded back pay.

323. *Id.* at 719-20.

324. *Id.* at 720.

325. The *Manhart* Court examined several circumstances that it considered compelling in its decision to deny back pay. Initially, the Court found no reason to believe that an award of back pay was necessary to deter other employers from discriminating. *Id.* at 720-21. Thus, the Court allowed the defendant to clear one of the hurdles presented by the twin statutory purposes of Title VII—deterring discrimination. The Court provided a test other courts may employ to guide them in future actions for back pay: when no reason exists to believe that a threat of liability for back pay is necessary to cause other employees to conform their practices with the Court's interpretation of Title VII, then the statutory purpose of deterring discrimination will not be frustrated.

For a discussion of the other criteria upon which the Court relied, see *infra* notes 341-49 and accompanying text.

The Supreme Court's decision to deny back pay thus demonstrates the continued utility of the good faith defense when supported by other defenses.[326] These other defenses that an employer may assert along with a good faith defense in his effort to convince the court to deny a class-wide claim for back pay, however, have been steadily narrowed.[327]

1. Eccentric Litigation Behavior

In *Albemarle Paper Co. v. Moody*[328] the Supreme Court held that a district court may exercise its equitable discretion to deny back pay if a plaintiff's litigation behavior improperly and substantially prejudiced a defendant employer.[329] The *Albemarle* Court ruled that "to deny back pay because a particular case has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII."[330] The Court, however, did not explain what kind of "eccentric" litigation behavior might improperly and substantially prejudice a defendant em-

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326. The defendant employer in *Manhart* was able to demonstrate exceptional good faith. The plaintiff in *Manhart* admitted that the basis for the defendant's discrimination—the defendant's reliance on statistics showing that women live longer than men—was indeed true. *Manhart*, 435 U.S. at 707.

327. For example, the courts have rejected difficulty in determining the amount of an award as a defense. Difficulty or impossibility in determining the amount of a back pay award was at one time an effective defense against back pay in at least one circuit. In United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973), the Eighth Circuit ruled that an incalculable back pay award would support a court's decision to deny back pay. Most of the other circuits, however, have rejected this defense to back pay. The Fifth Circuit in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 n.53 (5th Cir. 1974), cited holdings in NLRB cases and concluded that any doubts about back pay awards should he resolved against the employers. Less than a year later the Fifth Circuit refined its ruling in *Johnson* by adding that "[u]nrealistic exactitude" is not required in determining "what an employee would have earned but for discrimination." Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974); *see also* Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 902 (7th Cir. 1973) (when an objective test for determining back pay is inadequate, "the court can devise a method for making a fair and reasonable approximation of the money loss for each individual, with a foundation as adequate as the law requires for an award of damages"). The Supreme Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), eliminated any hope that the defense of difficulty or impossibility in determining the amount of back pay could still be successfully raised. According to the Court, a defense based on the difficulty in figuring the amount of an admittedly required award of back pay would almost certainly frustrate the statutory purpose of making injured plaintiffs whole. *Id.* at 298-99.

328. 422 U.S. 405 (1975).

329. *Id.* at 424.

330. *Id.* The Court, however, made no attempt to explain how a denial of back pay under these circumstances would fail to offend or frustrate the broad purposes of Title VII. The Court later made the eccentric litigation defense available to defendants in actions brought by the EEOC. Occidental Life Ins. Co. v. EEOC, 432 U.S. 335, 373 (1975).

ployer. Rather, the Court delegated these determinations to the district and appellate courts.[331] Conceivably, then, eccentric litigation behavior can include several different kinds of acts. In *Albemarle,* for example, the plaintiffs initially expressed no interest in back pay and, thus, filed a complaint for injunctive relief only. Five years later, however, the plaintiffs filed a claim for back pay.[332] The district court held that although the plaintiffs had not been deliberately dilatory in filing their claim, a grant of back pay under the circumstances would have substantially prejudiced the defendant.[333] The Supreme Court, however, did not decide whether the delay in filing for back pay had *actually* prejudiced the defendant. Instead, the Court left the issue open as a question of fact for the district court to resolve on remand.[334]

Prejudicial delay constitutes the most common type of eccentric litigation behavior asserted as a defense to back pay. This defense has met with success before the determination of liability,[335] but the same argument would probably fail after a court has found a defendant liable for discrimination under Title VII. For example, under facts similar to those in *Albemarle,*[336] an employer would have extreme difficulty proving that the plaintiff's delay had sub-

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331. *Albemarle,* 422 U.S. at 424. The determination whether the plaintiff's eccentric behavior substantially prejudiced the employer's defense involves a factual question. Accordingly, the *Albermarle* Court stated,

> Whether the petitioners were in fact prejudiced, and whether the respondents' trial conduct was excusable, are questions that will be open to review hy the Court of Appeals, if the District Court, on remand, decides again to decline to make any award of backpay. But the standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case . . . .

Id. at 424 (footnote omitted).

332. *Id.* at 409-10.

333. *Id.* at 410.

334. *Id.* at 424.

335. *See* EEOC v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980). The court found a delay of four years and nine months unreasonable. Labeling the defense "laches," the court required the defendant to meet the following criteria before it would allow the use of the defense: (1) The delay must have been unexcused, unreasonable, or inordinate; and (2) the delay must have " 'substantially,' 'materially,' or 'seriously' prejudiced the defendant's ability to conduct his defense." *Id.* at 275-76.

In EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1978), the Eighth Circuit defined the defendant's burden when attempting to prove prejudice. The court held that a defendant must establish "with such clarity as to leave no room for controversy" that the plaintiff's behavior substantially prejudiced the employer's ability to defend his case in order to obtain a summary judgment. *Id.* at 857.

336. In *Albemarle* the plaintiffs initially filed an action for injunctive relief and later added a claim for back pay. *See supra* text accompanying notes 332-33.

stantially prejudiced its defense against back pay; the employer had to defend against injunctive relief from the outset, and most of the defenses and evidence it would assert against back pay are the same as those used against injunctive relief.[337] The defendant's only remaining argument would be that if he had known that the action was one for back pay, a much more severe and costly remedy than injunctive relief, then a prompt trial on the merits would have been in his best interest and he would have proceeded with his defense accordingly.[338] In addition to prejudicial delay, other acts of eccentric litigation behavior might improperly and substantially prejudice an employer's defense. These acts might include failure to comply with discovery orders, threats made to witnesses or the defendant, or any other act that somehow jeopardizes an employer's defense.

2. Extreme Cost

Courts have never considered the potential harm that an award of back pay might have on a defendant employer when deciding whether to award or deny back pay.[339] Any defense based on the employer's inability to pay could certainly frustrate the statutory purposes of Title VII.[340] In *Los Angeles Department of Water & Power v. Manhart*,[341] however, the Supreme Court ruled that the courts should consider the harmful effects that an award of back pay will have on *other* persons besides the defendant. In *Manhart* the defendant employer violated Title VII by withholding more money for an employee pension fund from the paychecks of female employees than from the paychecks of male employees.[342] After

337. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The court in *Robinson* supported its conclusion that the plaintiff's late filing for back pay relief had not prejudiced the defendant by recognizing that any defenses relating solely to the computation of back pay could be asserted when the court assessed individual claims. *Id.* at 803.

338. The employer in *Albemarle* successfully used this argument at the district court level. *Albemarle*, 422 U.S. at 413.

339. Nevertheless, some courts will consider the defendant's ability to pay when figuring the *amount* of an award. For example, in Rios v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), the court stated that "[t]he record lacks any evidence showing that the [defendant] union faces imminent financial distress should backpay be awarded; any evidence on this issue the district court may consider prior to its entry of a final backpay order." *Id.* at 586.

340. *See supra* notes 57-63 and accompanying text.

341. 435 U.S. 702 (1979).

342. *Id.* at 704-06.

finding that the employer withheld the money in good faith,[343] the Court concluded that a grant of back pay to the female employees would be inappropriate in the present case.[344] The *Manhart* Court determined that to grant back pay to these plaintiffs would have precipitated countless similar claims by other women who had participated in the same kind of discriminatory pension fund.[345] The Court reasoned, "The occurrence of major unforeseen contingencies . . . jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect."[346]

After noting the harmful effect that back pay awards might have on pension plans and pension plan participants throughout the economy, the *Manhart* Court then considered the harm that a grant of back pay would have on other employees participating in the particular pension fund in issue.[347] The Court recognized that if the back pay relief were awarded from the existing pension fund "the administrator of the fund will be forced to meet unchanged obligations with diminished assets."[348] Thus, according to the Court, "If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future but also for the unanticipated reduction in the contributions of past employees."[349]

Although the *Manhart* Court considered the harmful economic effects of a back pay award on a pension fund, the same considerations might be made in other employment contexts as well. In order to trigger a court's consideration of these effects, the employer must prove good faith: the employer must prove that neither he nor the appropriate administrative agencies knew that the contested employment practice constituted illegal discrimina-

343. *Id.* at 719-20.

344. *Id.* at 723.

345. *Id.* at 721.

346. *Id.* The Court stated that "we [cannot] ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy." *Id.* The Court further noted that back pay was an inappropriate remedy because "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Id.* (footnote omitted).

347. *Id.* at 722-23. The Court stated that "retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Id.* (footnote omitted).

348. *Id.* at 723 (footnote omitted).

349. *Id.*

tion.[350] Once the defendant makes this initial threshold showing of good faith, he must then prove that two other conditions have been met. First, the employer must demonstrate the pervasive character of the contested discriminatory employment practice. If only a small number of employers engaged in the same form of discrimination, the defendant can hardly claim that a back pay award would create countless similar claims which would have an adverse effect on the economy. On the other hand, if the employment practice in question is widely followed by other employers, the employer stands a much better chance of convincing a court that an award of back pay might harm the economy. Second, the employer must convince the court that his financial resources, like the pension fund in *Manhart*, constitute a limited resource upon which many innocent employees rely. The analogy to the *Manhart* pension fund is not difficult to draw; many small businesses with little capital or large businesses in financial straits do not have unlimited financial resources from which to make awards of back pay. A large award of back pay may severely diminish an employer's limited financial resources and force him to take measures that would almost certainly affect innocent employees. Thus, making the victims of discrimination whole may cause many other employees to be laid off and others to receive cuts in pay. Harm to innocent employees looms even more certain when courts threaten to make large back pay awards during periods of local or national economic downturn. If a defendant employer can make this showing, courts should carefully consider the effect an award of back pay will have on the economy and on innocent employees in deciding whether to grant back pay.

The courts have gradually stripped employers of most of the defenses they once had against class-wide claims for back pay. Although the Supreme Court in *Albemarle* noted that back pay did not constitute an automatic remedy once liability had been determined, very few courts in subsequent actions have declined to award back pay relief. Furthermore, very few employers have found a way to circumvent the strict *Albemarle* discretionary standard for awarding back pay. In effect, then, an award of back pay has become an almost automatic remedy for victims of discrimination. Yet, the Supreme Court's decision in *Manhart* demonstrates that the *Albemarle* discretionary standard is not an insurmounta-

350. In *Manhart* the Court emphasized that this case was "the first litigation challenging contribution differences based on valid actuarial tables." *Id.* at 722.

ble barrier to defenses against back pay, and employers may still successfully assert defenses that do not frustrate the dual statutory purposes of Title VII. Accordingly, a defense does not frustrate the first prong of the dual purposes—deterring discrimination—when the court discovers no reason for believing that an award of back pay is needed to deter similar forms of discrimination. Moreover, a defense does not frustrate the second prong—making plaintiffs whole—once the employer has shown good faith and demonstrated that the court should strike the balance of equities in his favor. The equities that the courts should consider include not only the conduct of the plaintiff and the defendant, but also the consequences an award of back pay will have on innocent employees and on the economy.

VI. Proof-of-Claim Procedure

If, after a finding that the employer engaged in discriminatory employment practices, the court determines that back pay is the proper remedy for the class, it must initiate some form of proceeding to determine whether and to what extent each claimant may participate in the back pay award. If the court were to hold full-scale trials on the merits of each class member's claim, problems of economy would arise for both the judiciary and the individual class member.[351] Yet, if the court were to hold only one trial on the back pay issue, a judgment for the class would bind the employer even though it had no opportunity to challenge the validity of each class member's claim.[352] An adequate balance of the interests of the individual class member, the employer, and the judiciary necessitates the implementation of a proof-of-claim procedure[353] that is both easy to administer and fair to all parties. The Special Project discusses at length the nature of these interests and what value or weight the court should assign to them. This part of the Special Project highlights the mechanics of the proof-of-claim procedure and explores the legal and practical problems that arise when

351. *See infra* notes 461-63 & 494 and accompanying text.

352. *See infra* notes 464-69 and accompanying text.

353. Appellate courts have approved the use of a proof-of-claim procedure as a valid exercise of the district court's discretion under Federal Rule of Civil Procedure 23(d)(2) in both (b)(3) class actions, *see, e.g.*, Robinson v. Union Carbide Corp., 544 F.2d 1258, 1260-61 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977), and (b)(2) class actions, *see, e.g.*, Kyriazi v. Western Elec. Co., 647 F.2d 388, 392-95 (3d Cir. 1981); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 652-53 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); Bing v. Roadway Express, Inc., 485 F.2d 441, 448-49 (5th Cir. 1973).

courts use notice, proof-of-claim forms, and gag orders in employment discrimination class actions.[354]

A. *Mechanics of the Proof-of-Claim Procedure*

Although the mechanics of the proof-of-claim procedure depend on the particular circumstances of each case, the procedure has several customary characteristics. Initially, the court decides whether to administer the Stage II proceedings itself or to grant a special master[355] the authority to supervise the proceedings and determine individual awards. The parties then agree to and the court or master approves the content of the notice[356] and proof-of-

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354. Although this part of the Special Project, analyzing the proof-of-claim procedure, relies in large part on Title VII precedents, it is equally applicable to employment discrimination class suits arising under 42 U.S.C. § 1981. This analysis focuses on class actions because courts do not employ the proof-of-claim procedure in private, nonclass suits.

355. Federal Rule of Civil Procedure 53(b) authorizes the district courts to refer to special masters only issues especially complicated (in jury trials) or exceptional (in nonjury trials) in nature. To illustrate, if the case contains a small number of claims and the award can be easily determined, the court will retain control of the Stage II proceedings. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-63 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441, 452-55 (5th Cir. 1973); Local 186, Int'l Pulp, Sulphite & Paper Mill Workers v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 1294-95 (N.D. Ind. 1969); Edwards, *supra* note 208, at 795-96 (1974). On the other hand, if the determination of each award requires an investigation into circumstances such as promotions, vacancies, and layoffs, the court will refer the matter to a special master. *See, e.g., Pettway*, 494 F.2d at 263; United States v. Lee Way Motor Freight, Inc., 15 Fair Empl. Prac. Cas. (BNA) 1385, 1387 (W.D. Okla. 1977); *Local 186*, 304 F. Supp. at 1294-95.

356. Courts and attorneys face both practical and legal problems when deciding the proper form and content of the notice. One problem concerns the type of notice they should approve. If one of the parties knows the addresses of the absent class members, courts typically will require that notice issue by personal service, *see* Matthews v. Alexander, 20 Empl. Prac. Dec. (CCH) ¶ 30,268, at 12,419 (M.D. Ala. 1979), or by mail, *see, e.g.*, Kyriazi v. Western Elec. Co., 647 F.2d 388, 391 (3d Cir. 1981); *Matthews*, 20 Empl. Prac. Dec. (CCH) at 12,419; Arey v. Providence Hosp., 55 F.R.D. 62, 71 (D.D.C. 1972). On the other hand, if the parties do not know the addresses of absent class members, or if the court decides for whatever reason that notice by mail is not necessary, the court will order notice by publication. *See, e.g., Kyriazi*, 647 F.2d at 391; *Matthews*, 20 Empl. Prac. Dec. (CCH) at 12,419; *Arey*, 55 F.R.D. at 71. The court may order publication through local newspapers, at plant meetings, and on plant bulletin boards. *See, e.g., Kyriazi*, 647 F.2d at 391.

The actual content of the notice constitutes another concern. *See Kyriazi*, 647 F.2d at 395. Ideally, the notice should inform absent class members (1) of the pendency of a contested class action in federal court, (2) that the court has found the employer liable for specific discriminatory practices, (3) that the determination of individual awards will soon begin, (4) that if they desire to participate in these proceedings they must return the proof-of-claim form, and (5) that if they have any questions they should contact counsel for the class. *Id.*; *accord* Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 673-75 (N.D. Tex. 1981).

The question whether the notice meets constitutional requirements parallels the practical concerns of the type and the content of the notice. *See infra* notes 424-29 and accompa-

claim form[357] that absent class members will receive. The notice and proof-of-claim form usually state that the individual class member must file the form with the clerk of the court within a certain time period.[358] After the court or class counsel[359] compiles these claims and sends them to the employer, the employer usually has thirty days to decide which claims it will challenge.[360] If the employer chooses not to contest a claim, the court or master will make an immediate award.[361] An employer's decision to challenge a claim, however, necessitates a determination of the merits of the claim.[362] When making this determination, the court-ordered procedure typically establishes the burden of proof that each party must meet in order to prevail.[363] If the claimant successfully establishes entitlement to back pay, then the court or master will compute the amount of the individual's award.[364]

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nying text. To satisfy due process the notice, like any other notice affecting substantive rights, must sufficiently inform the recipient of his rights and give him an opportunity to respond. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950). Thus, "[i]f the court fashions a notice which makes the request insufficiently specific for lay comprehension, or which otherwise imposes undue burdens of response on individual class members, an abuse of discretion may be found." *Kyriazi*, 647 F.2d at 395; *see* Robinson v. Union Carbide Corp., 544 F.2d 1258, 1265 (5th Cir.) (Wisdom, J., concurring), *cert. denied*, 434 U.S. 822 (1977). The employer also has an interest in ensuring the adequacy of the notice so that it will not be forced to relitigate the claims of class members who did not receive the minimal guarantees of due process. Edwards, *supra* note 208, at 797.

Problems concerning the notice requirement also arise because of the procedural differences between (b)(2) and (b)(3) actions. In (b)(2) actions notice to absent class members is not mandatory, but notice is mandatory in (b)(3) actions. Professor Edwards concludes that to avoid a due process challenge and claim preclusion problems, courts should establish a special procedure when the class members in a (b)(2) action seek monetary relief. He advocates conversion of the class from (b)(2) to (b)(3) after a determination of liability. *Id.* at 797-803.

The question of who pays the costs of notice also merits consideration. After a determination of liability, courts are willing to impose the costs of notification on the employer. *See, e.g.*, Sledge v. J.P. Stevens & Co., 12 Empl. Prac. Dec. (CCH) ¶ 11,251, at 5782 (E.D.N.C. 1976), *aff'd in part, rev'd in part*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

357. For a discussion examining the contents of and rationale behind the proof-of-claim form, see *infra* notes 365-429 and accompanying text.

358. *See infra* notes 383-89 and accompanying text.

359. *See, e.g.*, English v. Seaboard Coastline R.R., 12 Fair Empl. Prac. Cas. (BNA) 90, 94 (S.D. Ga. 1975).

360. *See, e.g.*, Ivey v. Western Elec. Co., 23 Fair Empl. Prac. Cas. (BNA) 1028, 1033 (N.D. Ga. 1978).

361. *See, e.g., id.*

362. *See, e.g.*, Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 669-73 (N.D. Tex. 1981).

363. *See infra* part VIII.

364. *See infra* part IX.

B. Proof-of-Claim Form

Because of the important role that the proof-of-claim form plays in the determination of individual back pay awards, the form has become the object of both criticism[365] and praise.[366] Four categories of issues are at the center of this controversy: the determination of class membership, the contents of the proof-of-claim form, the timeliness of return, and the policy behind the proof-of-claim form. This section of the Special Project examines the issues in each of these categories.

1. Class Membership

Courts agree that the parties should draft the proof-of-claim form so that the responses will evidence whether the individual claimant is a member in the class seeking relief.[367] The claimant's membership in the class, however, depends on the applicability of certain characterizations and limitations that vary from case to case. If the Stage I proceedings determined that the employer had engaged in discriminatory firing practices, any person discharged from the company for discriminatory reasons is clearly a member of the class.[368] Similarly, if the court holds the employer liable for discriminatory conduct relating to promotion or seniority policies, the incumbent employee who applied for promotion or seniority is a member of the protected class.[369] The nonapplicant incumbent, on the other hand, has the burden of proving that he would have applied for promotion but for the discriminatory practices of the employer,[370] and the proof of claim form should be worded to elicit the different information required to evaluate the nonapplicant's membership status. If the court determines that the employer's hiring practices violate either Title VII or section 1981, any applicant for employment obtains membership in the class eligible for

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365. *See* Seymour, *The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions*, 10 CONN. L. REV. 920 (1978).

366. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1441-43 (1976) [hereinafter cited as *Developments*].

367. *See, e.g.*, Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 675-76 (N.D. Tex. 1981). *See generally* International Bhd. of Teamsters v. United States, 431 U.S. 324, 362, 368 & n.52 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 6.5, at 425.

368. *See* B. SCHLEI & P. GROSSMAN, *supra* note 33, at 522-24.

369. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977).

370. *Id.* at 368 & n.52; *see infra* notes 657-64 and accompanying text.

back pay.[371] Although arguably in a position similar to that of the incumbent who did not apply for promotion, the claimant who had not applied for employment probably will fall outside the protected class.[372] Even if the claimant has some characteristic that puts him in the class, time limitations on the filing of charges with the EEOC may prevent his participation in Stage II.[373] While the individual claimant may recover back pay without filing charges,[374] if the time for filing passed before the named plaintiff instituted suit then the courts will exclude him from the award determination stage.[375] Thus, the proof-of-claim form should reflect these concerns in its questions covering class membership, and the claimants who satisfy these standards should file the proof-of-claim form.

2. Contents of the Proof-of-Claim Form

In addition to inquiries designed to determine eligibility for back pay, the proof-of-claim form should ask for information that will assist in computing the claimant's award. The claimant could easily challenge the usefulness and purpose[376] of the form if it sought information already available to the litigants;[377] thus, the

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371. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976). The claimant in a private, nonclass action challenging discriminatory hiring practices has a different hurden. A showing that a qualified applicant unsuccessfully sought a job for which a vacancy existed and for which the employer continued to seek applicants with similar qualifications raises a rebuttable presumption of a violation of Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see supra* part IV. In a class action, however, the employer has the burden to prove the claimant's lack of qualifications and the lack of vacancies, although, in some instances, the employee may rely on other considerations. *See Franks*, 424 U.S. at 772-73.

372. The Supreme Court has not addressed this question, hut it did note in *Teamsters* that the claim of a nonapplicant incumbent "would certainly be more superficially plausihle than a similar claim by a memher of the general public." International Bhd. of Teamsters v. United States, 431 U.S. 324, 368 n.52 (1977); *see* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760, at 581-82 (1972).

373. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, at 409; *see infra* note 898 and accompanying text.

374. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 256 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); Bowe v. Colgate, Palmolive Co., 416 F.2d 711, 719-21 (7th Cir. 1969).

375. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 (D.C. Cir. 1976) *cert. denied*, 434 U.S. 1086 (1978); *see* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

376. *See infra* notes 390-429 and accompanying text.

377. Employers and unions must keep records of any employment practices relevant to possible Title VII violations. 42 U.S.C. § 2000e-8(c) (1976). These records should include information concerning past applicants, employees, and union members, and the "em-

form should request only information that is indispensable[378] to the determination of a fair award for the claimant. The definition of "indispensable" will vary depending on the facts of each case. In many cases the employer cannot ascertain from its records the race or sex of the potential class member.[379] In addition, the employer's files will not provide evidence of discriminatory practices occurring outside the areas of hiring, firing, or promotion.[380] Similarly, neither the employer nor the class representative will know whether the class member had interim earnings from other jobs[381] or unemployment compensation.[382] Since this information is, by its very nature, available only to the claimant, and since the claimant likely desires some compensation for his economic loss, a requirement that he supply this information is not unreasonable. Thus, the proof-of-claim form places the burden of disclosure on the party in the best position to have access to the necessary information and on the party most likely to benefit from full and fair disclosure.

3. Timeliness of Return

In addition to the concerns of who should file the proof-of-claim form and what the form should contain, use of the form raises the issue of when the individual class member must file. A district court may require the class member to file his proof-of-claim form before the court will make a determination of liability.[383] More often, however, "the courts await the adjudication of

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ployer's records, as well as the employer's aid" should be made available to the individual claimant. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974). For a further discussion of the proof-of-claim form's relevance to discovery, see *infra* notes 390-413 and accompanying text.

378. Courts should not consider data contained in the employer's files relating to dates of employment, jobs held, and pay rates as indispensable, because such data can be readily obtained through discovery. *See* Seymour, *supra* note 365, at 920.

379. *Id.* at 920 n.2. *See generally* Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 675 (N.D. Tex. 1981); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1150 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

380. *See* Seymour, *supra* note 365, at 921. *See generally* Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 676 (N.D. Tex. 1981).

381. *See infra* notes 840-83 and accompanying text.

382. *See infra* notes 795-818 and accompanying text.

383. *See, e.g.*, Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1018-19 (W.D. Va. 1979); Seymour, *supra* note 365, at 920. When requiring filing of claims prior to a determination of liability, courts generally rely on the broad discretion granted them under the Federal Rules of Civil Procedure. For example, Federal Rule of Civil Procedure 83 reads, "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83.

the liability issue before adopting procedures to notify class members to come forward and assert their claims."[384] This latter approach probably results in a better balance of the conflicting policies.[385]

If a class member fails to file his claim within the prescribed time, he may risk a determination that his right to recover is forever barred. Many district courts include language of bar in the notices and proof-of-claim forms that they send to absent class members.[386] The Third Circuit, however, has recoguized that a late-filing claimant may still participate in the distribution of the fund upon demonstration of "good cause."[387] The court noted that various facts could evidence good cause, including the claimant's poor health and his fear of retaliation by the employer.[388] In addition to good cause, the claimant could assert that the timely filing requirement unduly limits the employer's liability. Yet, if the court accepts either of these arguments, the employer justifiably may argue that the court has denied it the benefit of res judicata.[389] Thus, when questions of timing arise the court should carefully balance the competing interests.

4. Policies Supporting the Use of Proof-of-Claim Forms

The proper use of a proof-of-claim form siguificantly benefits the interests of the court, the class representative, the absent class member, and the employer. The proof-of-claim form aids the court in determining class membership if it has not yet decided whether to certify the class.[390] The efficient management of a complex class

384. Miller, *Problems in Administering Judicial Relief in Class Actions*, 54 F.R.D. 501, 505 (1972); *see* Kyriazi v. Western Elec. Co., 647 F.2d 388, 392 (3d Cir. 1981); Robinson v. Union Carbide Corp., 544 F.2d 1258, 1261 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977); MANUAL FOR COMPLEX LITIGATION § 1.45, at 51 (5th ed. 1982) [hereinafter cited as MANUAL]; *Developments, supra* note 366, at 1445.

385. *See infra* notes 390-429 and accompanying text.

386. *E.g.*, Vuyanich v. Republic Nat'l Bank, 521 F. Supp. 656, 674 (N.D. Tex. 1981). Federal Rule of Civil Procedure 23 grants sufficiently broad discretion to the court to require timely filing of proof of claim. MANUAL, *supra* note 384, § 1.45, at 50.

387. Kyriazi v. Western Elec. Co., 647 F.2d 388, 396 (3d Cir. 1981); *see also* FED. R. CIV. P. 6(b)(2) (court has discretion to extend filing requirement deadlines if failure to act resulted from excusable neglect).

388. Kyriazi v. Western Elec. Co., 647 F.2d 388, 396 (3d Cir. 1981).

389. *See id.* at 394. By accepting the claimant's argument of good cause or of undue limitation on employer's liability, the court effectively reopens an already adjudicated case in which it decided that the claimant should not recover because of his failure to assert his claim. Such a practice, the employer would argue, conflicts with goals of judicial economy: to encourage settlement and to combine and resolve duplicative issues in one action.

390. *See, e.g.*, Arey v. Providence Hosp., 55 F.R.D. 62, 67-70 (D.D.C. 1972); *Develop-*

action suit also depends heavily on the proper use of the form.[391] Likewise, the form benefits the class representative to the extent that it relieves the burden of independently investigating the claim of each class member.[392] Moreover, the form concisely presents to the court the absent class member's reasons for his entitlement to back pay.[393] Consequently, the court will be better able to determine the value of each class member's award when it has this summary of the individual's claim.[394] The form also protects the interests of the absentee since it provides the court with information concerning the adequacy of representation.[395]

Furthermore, the proof-of-claim form yields benefits to the employer that parallel the policies supporting the discovery rules—to eliminate unfair surprise at trial, to narrow the issues in dispute, and to allow parties to have complete knowledge of all facts and issues.[396] The right to discovery of absentees, however, hinges on some showing of need.[397] Therefore, when applying the appropriate standard to the employer's discovery request, courts ask whether the employer's defense depends upon the receipt of the desired information or whether the request for information merely constitutes a ploy to harass the absent class member and thereby reduce potential liability.[398] If the employer requests dis-

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ments, supra note 366, at 1439-44. Limiting the inquiry to matters relevant to class certification will lessen the harassing effect that interrogatories which explore the merits of the absentee's claim have on the absentee. *See generally id.* at 1441.

391. Kyriazi v. Western Elec. Co., 647 F.2d 388, 392 (3d Cir. 1981); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 n.25 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); Seymour, *supra* note 365, at 932-33.

392. Davidson, *supra* note 55, at 751. This hurden will indeed be significant if the class representative does not know the identity of all potential claimants, if the potential claimants hesitate to involve themselves in litigation because of fear of employer retaliation, and if the employer fails to cooperate with the class representative. *Id.*

393. *See supra* notes 376-82 and accompanying text; Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-60 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973); Edwards, *supra* note 208, at 751.

394. *See supra* notes 376-82 and accompanying text. The proof-of-claim form also aids in determining the value of individual settlement awards. *See, e.g.*, Kyriazi v. Western Elec. Co., 647 F.2d 388, 390-91 (3d Cir. 1981); Penson v. Terminal Transp. Co., 634 F.2d 989, 993-95 (5th Cir. 1981); *see also infra* part X and accompanying text.

395. Davidson, *supra* note 55, at 751.

396. *See* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). *See generally Developments, supra* note 366, at 1444-48.

397. The courts in the Seventh Circuit rely on a standard that requires the party seeking discovery to show that the information is *necessary* for trial preparation. Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

398. Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir.), *cert. denied*, 419

covery of absentees prior to a determination of liability, the court "should determine whether the information sought is relevant to the question of liability."[399] One commentator, however, has noted that courts should not allow discovery of absent class members in employment discrimination cases until after a determination of liability.[400] In addition to requiring that the information be essential to the employer's defense, courts expect the employer to demonstrate that he has no other means for obtaining the requested information.[401] Concomitant to the benefits paralleling the policies of discovery, the proof-of-claim form significantly reduces the employer's litigation costs.[402] Moreover, the form gives the employer an opportunity to ascertain its ultimate liability and to assess the merits of settlement.[403] Finally, the use of the proof-of-claim form protects the employer from frequent relitigation of individual back pay claims because it provides notice to the absentees of an action affecting their rights.[404]

5. Arguments for Limiting the Use of Proof-of-Claim Forms

(a) Frustration of the Policies Behind Federal Rule of Civil Procedure 23

Although the underlying policies of the discovery rules[405] offer strong support for the use of a proof-of-claim form, a court should not approve the form's use without first considering its potentially adverse effects on the class members. Both courts and commentators have expressed concern that the proof-of-claim procedure, a

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U.S. 1070 (1974); *see* Smalls, *supra* note 208, at 870-71 (1976).

399. Smalls, *supra* note 208, at 872.

400. This commentator reasons that the class representative, who has the responsibility of demonstrating liability, possesses all the information the employer might need; consequently, the employer should request this information from the class representative. Yet, once the court makes a finding of liability, "fairness to the defendant—who bears the burden of rebutting the prima facie case [entitlement presumption]—requires that he be able to obtain all necessary information relating to his defense." Edwards, *supra* note 208, at 804.

401. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Smalls, *supra* note 208, at 873; *Developments*, *supra* note 366, at 1445-46.

402. The use of oral depositions, FED. R. CIV. P. 30, or written depositions, FED. R. CIV. P. 31, can often be cost prohibitive and impractical in large class actions. *See* Edwards, *supra* note 208, at 803.

403. Meyers, *Title VII Class Actions: Promises and Pitfalls*, 8 LOY. U. CHI. L.J. 767, 787 (1977); Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325, 337 (1976). *See generally infra* part X.

404. Meyers, *supra* note 403, at 787; Comment, *supra* note 403, at 337.

405. FED. R. CIV. P. 26-37.

practice which often excludes claimants, violates the policy found in rule 23 of aggregating small claims.[406] Moreover, the 1966 amendments to the Federal Rules indicate a policy decision to presume class membership in actions for relief of substantive wrongs.[407] Employers, however, may circumvent this presumption by using the proof-of-claim form to reduce their liability.[408] To illustrate, some class members may fail to respond because they cannot afford to hire an attorney to help them answer or interpret these forms.[409] Others may fear retaliation by the employer if they respond.[410] Whatever their reasons, the form's "forever bar"[411] language may operate to bind their claims "by *res judicata* with respect to future actions" and to bar them "from recovery in the present."[412] Even if the form does not contain such language, the employer may rely on the sanctions of exclusion or dismissal for the class members' failure to reply.[413] If the court unwittingly allows the employer to use the proof-of-claim form as a device to reduce its ultimate liability, that decision clearly frustrates the policies behind rule 23.

(b) Frustration of the Policies Behind Title VII

When deciding whether to use the proof-of-claim form, courts should balance the concerns of the discovery and class action rules with the underlying policies of Title VII. The Supreme Court in *Albemarle Paper Co. v. Moody*[414] stated that Congress had two

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406. Kyriazi v. Western Elec. Co., 647 F.2d 388, 394 (3d Cir. 1981); *see* MANUAL, *supra* note 384, § 1.45, at 50; Seymour, *supra* note 365, at 933-34; Smalls, *supra* note 208, at 871; *Developments, supra* note 366, at 1443-45; Comment, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 610 (1974).

407. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 397-98 (1967); *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 34 F.R.D. 325, 383, 393 (1964).

408. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005-06 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Seymour, *supra* note 365, at 933-34; Smalls, *supra* note 208, at 871; *Developments, supra* note 366, at 1444.

409. *See Developments, supra* note 366, at 1445 & n.268 (quoting Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972)).

410. *Developments, supra* note 366, at 1443 n.262.

411. *See supra* notes 386-89 and accompanying text.

412. Comment, *supra* note 406, at 610.

413. *See* FED. R. CIV. P. 37. In a rule 23(b)(3) action the class member will suffer exclusion from the suit and in a (b)(2) action he will face dismissal of his claim with prejudice. *Id.* Contempt provides another available sanction for failure to comply with a court order. *Id.* 37(a)(2), (b)(2)(D).

414. 422 U.S. 405 (1975).

objectives when drafting the relief provisions of Title VII—"eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[415] Arguably, any proof-of-claim procedure to which potential class members do not reply[416] contravenes the statute's twin objectives. As noted above, the absent class member may fail to respond because he fears retaliation by his employer,[417] because he is unaware of the discrimination,[418] or because he does not want to invest time and money in legal assistance.[419] Despite these disincentives to respond, the countervailing concerns of the court,[420] the class representative,[421] the employer,[422] and, to some extent, the absent class member[423] may operate to require the use of a proof-of-claim form.

(c) Due Process Concerns

Even if the implementation of a proof-of-claim procedure withstands challenges based on the policies of rule 23 and Title VII, the proof-of-claim form, along with the accompanying notice, may be constitutionally inadequate. Since each class member must demonstrate individual entitlement, due process requires that all class members receive notice and an opportunity to prove their entitlement.[424] Nevertheless, a deprivation of due process occurs if a class member receives notice, but does not have the factual knowl-

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415. *Id.* at 421; *see supra* notes 60-63 and accompanying text.

416. One commentator notes that over 60% of the class in White v. Carolina Paper Board Corp., 564 F.2d 1073 (4th Cir. 1977), failed to file proof-of-claim forms, Seymour, *supra* note 365, at 926 n.11, and that only 70 out of a class of 3000 returned claim forms in Robinson v. Union Carbide Corp., 380 F. Supp. 731 (S.D. Ala. 1974), *modified*, 544 F.2d 1258 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977). Seymour, *supra* note 365, at 926 n.10.

417. Professor Seymour argues that "passive reliance on the various statutory prohibitions against retaliation" cannot ameliorate this danger; rather, it "can only be met by actively taking steps to prevent the fear of retaliation from resulting in the effective loss of statutory rights." Seymour, *supra* note 365, at 945.

418. The House Committee on Education and Labor stated that employment discrimination is not just "a series of isolated and distinguishable events," but is "a far more complex and pervasive phenomenon." The Committee concluded, "Particularly to the untrained observer, [the] discriminatory nature [of employment practices] may not appear obvious at a glance." H.R. REP. No. 92-238, 92d Cong., 1st Sess. 8 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2143-44.

419. *See supra* note 409 and accompanying text.

420. *See supra* text accompanying notes 390-91.

421. *See supra* note 392 and accompanying text.

422. *See supra* notes 396-404 and accompanying text.

423. *See supra* text accompanying notes 393-95.

424. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

edge or legal sophistication to understand the merit of his claim.[425] Thus, the court should be sure not only that the absent class member receives notice but also that the notice and proof-of-claim form accurately and intelligibly apprise the recipient of his rights.[426] Even though the notice is itself adequate, the interests of absent parties remain unprotected unless they have an opportunity to be heard.[427] Courts, therefore, should be aware of potential "procedural booby traps" that prevent the litigant from having a hearing on the merits of his claim.[428] Moreover, the employer has an interest in ensuring the constitutional adequacy of the procedure so that the judgment will have res judicata effect.[429]

C. *Bans on Counsel-Initiated Communications with Class Members*

In conjunction with the implementation of proof-of-claim procedures, courts often issue orders banning counsel-initiated contact with absent class members.[430] These "gag orders" typically prevent class counsel from informing absent class members of their rights and from assisting them in completing the forms.[431] Both courts and commentators have supported bans on communication because these orders limit certain abuses of the class action device.[432]

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425. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974); United States v. Trucking Employers, Inc., 561 F.2d 313, 318 (D.C. Cir. 1977); Robinson v. Union Carbide Corp., 544 F.2d 1258, 1260 n.12 (5th Cir.), *cert. denied*, 434 U.S. 822 (1977).

426. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Kyriazi v. Western Elec. Co., 647 F.2d 388, 395 (3d Cir. 1981).

427. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950). *See generally id.* at 313-14; Hansberry v. Lee, 311 U.S. 32, 40 (1940).

428. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966). Although *Surowitz* discussed rule 23 in the context of a shareholder derivative action, the principle seems equally applicable to employment discrimination cases.

429. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

430. *See* MANUAL, *supra* note 384, § 1.45, at 48; Seymour, *supra* note 365, at 922.

431. Seymour, *supra* note 365, at 922.

432. *See, e.g.*, Gulf Oil Co. v. Bernard, 452 U.S. 89, 94-95 & n.5 (1981); Williams v. United States Dist. Court, 658 F.2d 430, 436 (6th Cir. 1981); Zarate v. Younglove, 86 F.R.D. 80, 94-101 (C.D. Cal. 1980); MANUAL, *supra* note 384, § 1.41, at 27 n.43. The *Manual for Complex Litigation* notes that these abuses include the following: (1) solicitation of legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties to the class action of requests by class members to opt out in class actions maintained under rule 23(b)(3); and, (4) communications from counsel or parties that may tend to misrepresent the status, purposes, and effects of the class action or of

This section of the Special Project examines the pros and cons of gag orders from two perspectives—their consistency with the policies of the Federal Rules of Civil Procedure and their ability to withstand constitutional scrutiny.

Because of the effect gag orders had on the substantive rights of claimants in employment discrimination litigation, appellate courts began to scrutinize the use of these orders in light of the policies underlying the Rules Enabling Act[433] and the Federal Rules of Civil Procedure.[434] Recently, the Supreme Court conducted a similar examination in *Gulf Oil Co. v. Bernard.*[435] In that case Gulf Oil filed a motion seeking a gag order to limit communications between the named plaintiffs or their counsel and unnamed class members.[436] The district court, over plaintiffs' objections, entered an order prohibiting parties and their counsel from communicating with potential class members without prior court approval.[437] The district court, however, issued no findings or conclusions to support the order, but relied on the rationale in the *Manual for Complex Litigation.*[438] The Fifth Circuit, sitting en banc, reversed, holding the district court's order unconstitutional because it was a prior restraint on expression that merited first amendment protection.[439] The Supreme Court affirmed and held

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court orders, and that may reflect adversely on the parties involved. *Id.*

433. 28 U.S.C. § 2072 (1976).

434. *See, e.g.*, Williams v. United States Dist. Court, 658 F.2d 430, 435-36 (6th Cir. 1981); Coles v. Marsh, 560 F.2d 186, 187-89 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977); Rodgers v. United States Steel Corp., 508 F.2d 152, 163-66 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

435. 452 U.S. 89 (1981).

436. Gulf Oil and the EEOC entered into a conciliation agreement to resolve alleged discrimination against black and female employees at one of Gulf's refineries. Gulf agreed to offer back pay to the discriminatees. Gulf then sent notices to the employees eligible for back pay, stating the amount available in return for execution of a full release of all relevant discrimination claims. Approximately one month later plaintiffs filed a class action suit in the United States District Court for the Eastern District of Texas on behalf of all present and former black employees and rejected black applicants alleging racial discrimination in employment. *Id.* at 91-92.

437. *Id.* at 94-95. The order exempted (1) "attorney-client communications initiated by the client, and communications in the regular course of business;" (2) communications for which a constitutional right to communicate without prior restraint existed so long as the attorney filed a copy or summary of the communication with the court; and (3) communications from Gulf regarding "the conciliation agreement and its settlement process." *Id.* at 95. Thus, in this instance the gag order had the effect of preventing potential class members from learning of the suit and of forcing them to make a decision about Gulf's offer—which required them to release their right to sue—without knowledge of the suit.

438. *Id.* at 96; *see supra* note 432.

439. Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981).

that the district court exceeded its authority under the Federal Rules of Civil Procedure by imposing a gag order without first making findings that indicated the need for the order.[440]

Noting the importance of the class action procedure and the potential for abuse,[441] the Court acknowledged the discretion that district courts have to control the conduct of class actions, but stated that the exercise of this discretion is subject to review.[442] The Supreme Court began its review by recognizing the need to balance the potential abuses of the class action with the rights of the claimants.[443] In the Court's opinion, the gag order interfered with the absent class member's right to make an informed decision about participation in the litigation and with the class representative's right to discover information relevant to the merits of the case.[444] Accordingly, the Court stated,

> Because of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23.[445]

Applying this standard, the Court found that the district court failed to weigh the competing interests, did not preserve an adequate record for review, and made no findings or conclusions in support of the order.[446] Thus, the Court concluded that the "imposition of the order was an abuse of discretion."[447] The effect of this decision then, is to require that district courts develop a record containing findings and conclusions which indicate a balancing of the potential abuses of the class action device with the interference to the rights of the parties.

Even if the district court maintains a record that reflects a weighing of the various interests of the parties, an appellate court

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440. Gulf Oil Co. v. Bernard, 452 U.S. at 91, 103.

441. *Id.* at 99-100.

442. *Id.* at 100-02.

443. *Id.* at 99-101.

444. *Id.* at 101; *see* Williams v. United States Dist. Court, 658 F.2d 430, 436 (6th Cir. 1981); *see also* Rodgers v. United States Steel Corp., 508 F.2d 152, 162 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); Zarate v. Younglove, 86 F.R.D. 80, 93 (C.D. Cal. 1980); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02(1), at 42 (2d ed. 1982); Comment, *Restrictions on Communication by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360, 368-69.

445. 452 U.S. at 101-02.

446. *Id.* at 102-03.

447. *Id.* at 103.

may find that the gag order imposes too great a restraint on communications among the parties to the controversy.[448] When deciding whether the order violates the first amendment, the appellate court probably will apply a multi-step analysis. Initially, the court will find that the order constitutes a prior restraint because it denies class counsel and the parties they represent the opportunity to confer with absent class members unless they first request and receive permission from the court.[449] This finding will raise a presumption against the validity of the restraint.[450] The court also will conclude that communications with absent class members fall within the scope of constitutional protection, but nonetheless are subject to a court's authority to regulate communications connected with the litigation.[451] This conclusion will require the reviewing court to determine whether the harm posed by dissemination justifies restrictions on the protected activity.[452] Finally, if

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448. Although many courts have acknowledged that gag orders raise serious first amendment issues, *see, e.g., id.* at 101 n.15; Williams v. United States Dist. Court, 658 F.2d 430, 434-35 (6th Cir. 1981); Rodgers v. United States Steel Corp., 508 F.2d 152, 162-63 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), only a few courts have applied constitutional principles to vacate or deny these orders, *see* Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981); Zarate v. Younglove, 86 F.R.D. 80 (C.D. Cal. 1980). *But see* Fauteck v. Montgomery Ward & Co., 24 Fair Empl. Prac. Cas. (BNA) 1101 (N.D. Ill. 1980).

449. Bernard v. Gulf Oil Co., 619 F.2d 459, 467-71 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981). The threat of criminal contempt sanctions for violating the order also has a "chilling" effect on free speech. *Id.* at 470-71.

450. *See, e.g.*, Carroll v. President of Princess Anne, 393 U.S. 175, 180-81 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

451. *See* Eaton v. City of Tulsa, 415 U.S. 697, 698-99 (1974); *In re* Little, 404 U.S. 553, 555 (1972); Wood v. Georgia, 370 U.S. 375, 383-93 (1962); Craig v. Harney, 331 U.S. 367, 371-78 (1947); Pennekamp v. Florida, 328 U.S. 331, 343-49 (1946); Bridges v. California, 314 U.S. 252, 259-67 (1941).

452. *See* Bernard v. Gulf Oil Co., 619 F.2d 459, 473-77 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981). Although the justifications for gag orders seem meritorious, *see supra* note 432, that appearance is often deceiving in the context of employment discrimination litigation. For example, the fear that attorneys will solicit clients to participate in the action should be diminished since such conduct may expose them to disciplinary action. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(5) (1979). Such solicitation, however, will not receive constitutional protection. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-68 (1978). The class representative, on the other hand, probably has a constitutional right to solicit other parties to participate in the action under one of two theories: advancement of political goals, *see In re* Primus, 436 U.S. 412, 421-26 (1978); NAACP v. Button, 371 U.S. 415, 428-45 (1963), or "collective activity undertaken to obtain meaningful access to the courts," United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971). The fear that attorneys will solicit fees from absentees lacks merit because statutes govern the award of attorneys' fees in employment discrimination cases. *See* 42 U.S.C. §§ 1988, 2000e-5(k) (1976). Moreover, if the court allows the suit to proceed as a rule 23(b)(2) class action, the absentee class member has no right to opt out. FED. R. CIV. P. 23(c)(3). Finally,

unrestricted communication with absent class members presents a real threat to the fairness of judicial administration,[453] the court will insist that the order specifically denominate the type of communication which presents the threat.[454] Therefore, even though an order passes scrutiny under the standard announced in *Gulf Oil Co. v. Bernard*,[455] a court still may refuse to enter it because of constitutional infirmities.[456]

VII. Procedures for Determining Individual Awards

Once the individual claimants have complied with the proof-of-claim procedures, the court must then determine whether each individual is entitled to a back pay award. As the group of Fifth Circuit cases discussed in part IV demonstrates, the presumption of entitlement to back pay is a strong one, but this presumption, without more, is not a sufficient basis upon which to grant a back pay award. The individual claimants must still prove class membership and economic loss at the outset of Stage II.[457] As the Fifth Circuit indicated in *United States v. United States Steel Corp.*,[458] the presumption serves most importantly as a bridge between the broad class-wide approach and analysis utilized in Stage I and the

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although misleading statements merit no first amendment protection, *see* Garrison v. Louisiana, 379 U.S. 64, 73-75 (1964), the court must find some "direct, immediate, irreparable harm" before imposing the gag order. *Bernard*, 619 F.2d at 476.

453. *See* Bernard v. Gulf Oil Co., 619 F.2d 459, 476 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981); Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977); Zarate v. Younglove, 86 F.R.D. 80, 103 (C.D. Cal. 1980).

454. An order violates the first amendment if it includes vague language like "may tend to misrepresent," or if it forbids speech that "does not pose any serious and imminent threat of interference with fair administration of justice." Zarate v. Younglove, 86 F.R.D. 80, 103 (C.D. Cal. 1980).

455. 452 U.S. 89 (1981); *see supra* text accompanying note 445.

456. Although a first amendment free speech analysis offers the most logical approach when testing gag orders, freedom of association and due process issues also arise. Bernard v. Gulf Oil Co., 619 F.2d 459, 478 n.34 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981). If the gag order passes the scrutiny of a free speech analysis, it also will pass the less stringent test applied in freedom of association cases. Important considerations in the due process inquiry include the protection of the class representative, the absent class member, and the defendant. For both the class representative and the defendant, a gag order hinders discovery on the merits of the case and thereby impinges on the right to a fair hearing of the claim. For the absent class member, the adequacy of the notice determines whether he receives the minimal guarantees of due process. *See supra* note 356. A gag order in combination with adequate notice does not violate due process, but if the notice does not meet constitutional standards, the due process harm becomes even more egregious. A court, however, can correct inadequate notice by issuing better notice or by allowing absentee class members the assistance of class counsel.

457. *See supra* text accompanying notes 238-40.

458. 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

individual-by-individual procedures utilized in Stage II. By "filling the logical hiatus" between the two stages, the presumption enables the court to apply the finding of liability in Stage I to individual circumstances in Stage II.[459] In so doing, the presumption sets the tone for Stage II in terms of evidence, burdens of proof, and ultimate monetary awards. Courts in other circuits have also recognized the importance of the presumption and the two-stage trial, and have frequently cited the Fifth Circuit back pay decisions for both their framework and their analysis.[460]

The first major issue the court must resolve in Stage II is the proper format for the determination of individual awards. The court may use one of two methods. The method generally favored by plaintiffs is a single class-wide procedure, in which the court considers testimony from the various parties, grants a lump sum award to the class, and then requires the application of a mechanical or mathematical formula to calculate the awards for each of the individual claimants.[461] Under this first approach the individual claimant would still need to prove that he is entitled to class membership and the defendant would still be permitted to rebut the individual's claim with a showing that the claimant is not eligible for the recovery now being sought because of reasons independent of the discriminatory conduct proved in Stage I.[462] Plaintiffs prefer this procedure because it is less costly, less time-consuming, and more readily presented to the court.[463]

Defendants, however, strongly oppose this method and prefer

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459. *See supra* text accompanying note 256.

460. *See, e.g.*, Cohen v. West Haven Bd. of Police Comm'rs, 638 F.2d 496, 502 (2d Cir. 1980); Rodriguez v. Taylor, 569 F.2d 1231, 1239 & n.14, 1240 n.16 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Stewart v. General Motors Corp., 542 F.2d 445, 451-53 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1145-47 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

461. *See* Stewart v. General Motors Corp., 542 F.2d 445, 452-54 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). For a discussion of the computation of back pay awards on a class-wide basis, see *infra* notes 706-50 and accompanying text.

462. *Id.* at 453.

463. The costs and time involved in a trial replete with attorneys, special masters, and court reporters will become substantially maguified if each individual plaintiff must present a claim for an award of back pay. Furthermore, when the defendant is a large corporation it might benefit from being able to outspend the plaintiff class in a series of individual-by-individual procedures. The class-wide procedure will not allow either party to take unfair advantage of its superior financial resources. For a complete discussion of the apparent finding of one court that judicial economy and manageability may dictate the use of the class-wide approach, see *infra* notes 492-94 and accompanying text. *Contra* Kyriazi v. Western Elec. Co., 465 F. Supp. 1141 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

a series of individual-by-individual procedures.[464] Perceiving the class-wide procedure as a short-cut around the proper resolution of individual claims, the defendants interpret the back pay provisions of Title VII as designed to provide an additional form of equitable relief to employees injured by the discriminatory conduct of their employers.[465] The defendants, however, charge that a class-wide award permits individual claimants to benefit from the class' ability to prove economic loss even though not all of the class members are individually entitled to relief. In support of their position, defendant employers rely on the Supreme Court's statement in *Albemarle Paper Co. v. Moody*[466] that "where a legal injury is of an economic character . . . 'the compensation shall be equal to the injury.' "[467] According to the employers, the compensation does not equal the injury if individual claimants are permitted to recover a windfall[468] because of the inexact nature of the class-wide recovery process. Thus, the defendants assert that individual defenses may well be available as responses to the claims of individual plaintiffs, and that if employers are denied the opportunity to disprove each individual claim, their due process rights will be eroded.[469]

Pettway v. American Cast Iron Pipe Co.[470] provides a useful basis from which to analyze the competing interests at stake in determining the proper method to use in calculating a back pay award. In *Pettway* the Fifth Circuit summarized the two procedures as follows:

> The method of computation will be a function of the complexity of the case. If the class is small, or the time period short, or the effect of discrimina-

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464. *See* United States v. United States Steel Corp., 520 F.2d 1043, 1055 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-60 (5th Cir. 1974); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1146 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

465. *See* 42 U.S.C. § 2000e-5(g) (1976).

466. 422 U.S. 405 (1975).

467. *Id.* at 418 (quoting Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)).

468. *See infra* note 471.

469. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 267 (5th Cir. 1974) (Bell, J., concurring); *see also* United States v. United States Steel Corp., 520 F.2d 1043, 1056 (5th Cir. 1975), (class-wide alternatives should only be used when alternative methods are exhausted; Judge Bell's *Pettway* opinion cited) *cert. denied*, 429 U.S. 817 (1976); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1146 (D.N.J. 1979) (due process considerations may require that each award be based on the merits of the individual plaintiff's claims; Judge Bell's *Pettway* opinion cited), *aff'd*, 647 F.2d 388 (3d Cir. 1981). *See generally* Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427, 433 (W.D. Mo. 1973) (due process not expressly discussed; court found that increased manageability at the expense of the presentation of individualized evidence was not an acceptable justification for class-wide approach).

470. 494 F.2d 211 (1974).

> tion straightforward, a fairly precise determination of what each claimant's position would have been, *but for* the discrimination, is possible. This type of individual-by-individual determination was utilized in Bing v. Roadway Express, Inc., [485 F.2d 441, 452-55 (5th Cir. 1973)]. . . . Since there was only one type of job involved, the class was small, and the variables, back pay period and pay rate, readily definable; the court was able to make an individual-by-individual approach. . . .
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> However, when the class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time calls forth the quagmire of hypothetical judgment . . ., a class-wide approach to the measure of back pay is necessitated.[471]

Only infrequently will the decision concerning the proper computation method be clear-cut. This part of the Special Project discusses and analyzes the court decisions that have addressed this issue. This part considers the arguments for and against each of the approaches and attempts to resolve the apparent inconsistencies.

A. The Class-Wide Approach to Back Pay Awards

A variety of circumstances can arise in which individual-by-individual claim procedures usually defer to a more simplistic and efficient class-wide procedure.[472] For example, the *Pettway* court confronted a class of plaintiffs that had been subjected not only to discriminatory testing and hiring, but also to discriminatory seniority systems and training programs.[473] Although the Fifth Circuit recognized the usefulness of individualized claim procedures in certain circumstances,[474] in this particular case the court found that a determination of which jobs the individual plaintiffs would have applied for and obtained absent the discriminatory conduct would be virtually impossible. In reaching this conclusion the court considered a number of circumstances: the size of the class exceeded the number of vacant positions; the individual positions were not in the same pay range; the jobs became vacant over a period of years rather than at the same time; and, the qualifications of the class members, both in terms of ability and seniority, varied substantially.[475] Since the court would need to consider all

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471. *Id.* at 261. The court further commented that "[t]be key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly." *Id.* at 262 n.152.

472. *See id.* at 263 n.154.

473. *See id.* at 218-22.

474. *See supra* text accompanying note 471.

475. 494 F.2d at 260.

of these circumstances in determining each of the individual awards, the Fifth Circuit concluded that individual-by-individual calculations would create "a quagmire of hypothetical judgments."[476]

The Fifth Circuit made clear the principles it used to design procedures for making back pay awards: "(1) unrealistic exactitude is not required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer."[477] With these principles guiding the court through its examination of the facts of the case, the Fifth Circuit recommended[478] a class-wide approach as having "more basis in reality" than an individual-by-individual approach.[479] In light of the complexities involved in *Pettway*, the class-wide procedure serves to prevent the court from falling into the "quagmire of hypothetical judgments."[480] Although this procedure may be inexact, it is far more practical than an individual-by-individual approach in cases such as *Pettway* dealing with complex facts.[481]

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476. *Id.*; *see also* Dickerson v. United States Steel Corp., 23 Fair Empl. Prac. Cas. (BNA) 1088, 1089 (E.D. Pa. 1980) (reconstruction of past hiring absent discrimination found impossible; individual calculations of damages seen as hopeless); Thompson v. Boyle, 22 Fair Empl. Prac. Cas. (BNA) 1500, 1504 (D.D.C. 1980) (impossible to determine which employees would have heen promoted absent discrimination). *See generally* 61 CORNELL L. REV., *supra* note 76, at 476.

477. 494 F.2d at 260-61 (footnotes omitted).

478. *Id.* at 263. The court specifically stated that it had not limited the district court to any particular award method on remand. *Id.* Indeed, despite the court's analysis of the available class-wide procedures, *id.* at 262-63, it also discussed the burdens that could be placed on the individual claimants, *id.* at 259-60. The Fifth Circuit resolved this apparent inconsistency when the court once again encountered the *Pettway* case four years later. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1213 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). In this later opinion, the Fifth Circuit discussed the class-wide approaches which had been previously recommended, but did not order the district court to use a class-wide approach. Rather, the court of appeals stated that the district court could choose an individual approach. *Id.* at 1213 n.67.

479. 494 F.2d at 263.

480. *Id.* at 260; *see also* Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 76 F.R.D. 173 (S.D.N.Y. 1977). The *Women's Committee* court was asked by the plaintiffs to approve a proposed settlement to an employment discrimination suit. Confronted with a large class and incomplete personnel records, the court ruled that the determination of individual damages would be a "speculative" process and the class-wide approach would be more appropriate. *Id.* at 178.

481. Because of the complex nature of the case, the *Pettway* court believed *any* method would require "conjecture." 494 F.2d at 261. Thus, in a complicated case also burdened with a large class, *see* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1166 & n.3 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), the class-wide approach appears to be the only real alternative. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 261-62 (5th Cir. 1974).

Stewart v. General Motors Corp.[482] presented the Seventh Circuit with allegations of discrimination in the defendant's promotion practices. The district court granted the plaintiff class injunctive relief but did not award back pay.[483] Unable to find special circumstances that would support the failure to grant back pay, the Seventh Circuit found the class entitled to such an award.[484] The court then outlined the mechanics of the award procedure. The court supplemented *Pettway*'s basic principles[485] by stating that the district court would have wide discretion to resolve ambiguities no matter which method it used.[486] According to the court, however, the individual-by-individual approach represented the superior procedure for dealing with a group of plaintiffs whose seniority could be used satisfactorily as a benchmark for their award[487] because this method would not reward the plaintiffs with a windfall but rather would fully compensate them for their losses.[488]

The court, however, rejected the individualized approach for dealing with those plaintiffs seeking promotions to salaried jobs because the defendant had not set objective standards for determining which employees deserved promotion to this job class.[489] The court reasoned that to apply the individualized approach without access to objective standards would lead to unnecessary speculation and, consequently, great inaccuracy.[490] Even though the class-wide procedure would result in a windfall for some employees and would, therefore, penalize the employer by not allowing it to rebut individual claims of entitlement, the court considered it the better of the two methods. Although the Seventh Circuit did not consider class-wide relief to be a perfect alterna-

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482. 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

483. *Id.* at 451.

484. *Id.* at 452.

485. *See supra* text accompanying note 477.

486. 542 F.2d at 452.

487. *Id.*

488. *Id.*

489. *Id.* at 452-53.

490. *Id.*; *see also* Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 520 (8th Cir. 1980) (computations of individualized awards would be complex and uncertain); Love v. Pullman Co., 569 F.2d 1074, 1077 (10th Cir. 1978) (circumstances rendered it impossible to reconstruct past with accuracy); Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 901, 902 (7th Cir. 1973) (district court given great discretion in selection of proper form for remedy procedure; individual determinations would be speculative). The *Stewart* court referred to the possibility of a "quagmire of hypothetical judgments" if the individualized approach were employed. 542 F.2d at 452-53 (quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974)).

tive, the court preferred an imperfect award to the denial of recovery.[491] Thus, the *Stewart* court carved out a second instance in which a class-wide approach to back pay is more appropriate than an individualized approach—those situations in which no objective standards monitored the questioned employment practices.

The Fifth Circuit apparently has also recognized another instance in which the class-wide approach is superior to the individualized method. The court again confronted *Pettway v. American Cast Iron Pipe Co. (Pettway IV)*[492] in 1978. In remanding the case to the district court, the Fifth Circuit stated that the district court may consider a class-wide award in order to avoid the "quagmire" associated with the individualized process that it had discussed in the earlier *Pettway* decision (*Pettway III*).[493] The circuit court, however, reminded the district court that although "the physical and fiscal limitations of the court in granting and supervising relief make the task a difficult one, they must not be allowed to preclude an award of back pay to each and every aggrieved employee."[494] By making this statement, the court clearly recognized that the true goal of the back pay remedy is to grant relief to the injured parties. The court also implicitly recognized that the class-wide approach presents a more efficient and economical method which may be utilized provided that each individual employee is given the opportunity to receive back pay. The Fifth Circuit, therefore, asserted that the cost of the proceedings and the size of the class are factors which may make the class-wide approach a more manageable and appropriate procedure than the individual-by-individual method.

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491. 542 F.2d at 452-53; *see also* Kirby v. Colony Furniture Co., 613 F.2d 696, 706 (8th Cir. 1980) (class-wide back pay with individuals required to prove entitlement; district court required to follow *Stewart*); Wells v. Meyers Bakery, 561 F.2d 1268, 1273 (8th Cir. 1977) (district court given great flexibility in designing award procedure consistent with *Stewart*).

492. 576 F.2d 1157 (1978), *cert. denied*, 439 U.S. 1115 (1979). The *Pettway* case has proved a long and arduous undertaking for the judicial system. By the time of the 1978 decision, the case had come before the Federal District Court for the Northern District of Alabama on four different occasions. This decision was also the fourth *Pettway* opinion written by the Fifth Circuit. The most notable *Pettway* decisions are *Pettway III*, 494 F.2d 211 (5th Cir. 1974), and *Pettway IV*, 576 F.2d 1157 (5th Cir. 1978). Since *Pettway IV*, the Supreme Court has denied certiorari, 439 U.S. 1115 (1979), the case has been remanded to the district court, which has in turn referred it to a special master, No. 66-315 (N.D. Ala. July 20, 1981) (Order of Reference), and a petition for writ of mandamus and certiorari has been filed with the Fifth Circuit, No. 81-7647 (5th Cir. Aug. 5, 1981). This case has since been transferred to the newly created Eleventh Circuit. For a detailed discussion of the history of *Pettway* at the time of the Fifth Circuit's 1978 decision, see *Pettway IV*, 576 F.2d 1157, 1165-67 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

493. *See supra* text accompanying note 477.

494. 576 F.2d at 1213.

If the interests of the individual plaintiffs are adequately protected, the court may appropriately implement the class-wide method when confronted with a large class or unmanageable award criteria.

Three situations, therefore, can arise in which courts will award back pay through a class-wide procedure rather than on an individualized basis: first, when the complexities of the case would force the court into a "quagmire of hypothetical judgments"; second, when the lack of objective data would cause the court to rely extensively on speculation; and, last, when judicial economy and manageability dictate the use of the simpler class-wide approach.[495] Although other occasions may arise in which the courts would utilize class-wide relief, the majority of cases using this approach will include one of the situations discussed above. The following section of the Special Project discusses back pay cases utilizing the individualized approach.

B. The Individual-by-Individual Approach to Back Pay Awards

The United States Supreme Court indicated its preference for individual determinations of Title VII awards in *International Brotherhood of Teamsters v. United States*,[496] a pattern or practice action[497] brought against the union and a trucking company for discriminatory hiring practices. The Court vacated the court of appeals decision and made various recommendations for the district court to consider on remand. Although the case only concerned seniority relief from a discriminatory hiring system, several of the Court's statements indicate that it would probably support an individualized approach to back pay awards. Justice Stewart, writing for the majority, commented that the burden of proof required of the Government in the Stage II proceedings must be met

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495. The District Court for the District of New Jersey has stated that due process requires each individual award be based on the merits of the individual's claim. This court, therefore, would reject the "quagmire of hypothetical judgments" and judicial economy as reasons justifying the use of a class-wide procedure; the court might allow a class-wide procedure under the lack of objective standards argument. Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1144 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). *See generally infra* notes 752-58 and accompanying text.

496. 431 U.S. 324 (1977).

497. The Attorney General has the power under 42 U.S.C. § 2000e-6(a) (1976) to bring a civil action against those "engaged in a pattern or practice of resistance to the full enjoyment of any . . . rights secured hy [Title VII] . . . and intend[ing] to deny the full exercise of the rights."

"with respect to each specific individual."[498] Justice Stewart explained that the district court's deliberations would require it "to make a substantial number of individual determinations"[499] in deciding which of the claimants had been injured by the discriminatory practices of the defendant. This language clearly expresses the Supreme Court's preference for the individual approach in this particular case. The Court, however, did not make clear whether it intended its statements to be applied to all Stage II proceedings.

In addition to the Supreme Court's language in *Teamsters*, the judiciary has advanced several reasons in support of the individualized back pay procedure. The first of these reasons focuses on the compensatory nature of the back pay award.[500] Because the Title VII back pay remedy is intended to make the injured party whole, the remedy comes in the form of affirmative relief granted to the plaintiff rather than punitive damages assessed against the defendant.[501] Since the plaintiffs receive compensatory damages, the individual claimants must show their entitlement to damages and must show that without the defendant's wrongful conduct they would not have been economically injured.[502] Without the requirement that each individual show entitlement, the defendant could be victimized by undeserving plaintiffs who would earn a windfall through the use of the class-wide method.[503]

Second, in developing the bifurcated trial,[504] the Fifth Circuit has endorsed the individualized approach as the Stage II method that best complements the Stage I liability proceedings. In *Johnson v. Goodyear Tire & Rubber Co.*[505] the Fifth Circuit stated that a finding of liability in Stage I did not mean that back pay would be awarded to all class members. Rather, the court found separate hearings "*on an individual basis*" necessary to determine not only which plaintiffs were eligible for back pay awards, but also the size

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498. 431 U.S. at 371.

499. *Id.*

500. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-20 (1975).

501. *See* Mims v. Wilson, 514 F.2d 106, 110 (5th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 232 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1971).

502. *See generally supra* notes 464-69 and accompanying text.

503. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 262 n.152 (5th Cir. 1974); *see also* United States v. United States Steel Corp., 520 F.2d 1043, 1055 (5th Cir. 1975) (recovery should be distributed to those most likely to be entitled to it), *cert. denied*, 429 U.S. 817 (1979).

504. *See supra* notes 207 & 216-58 and accompanying text.

505. 491 F.2d 1364 (5th Cir. 1974).

of the individual awards.[506] In *Pettway III*[507] the Fifth Circuit *appeared* to support a class-wide approach.[508] The court, however, also outlined the framework for using the individual-by-individual method in Stage II[509] and held that the presumption in favor of a back pay award in Stage II does not entitle an individual claimant to recover without proof of loss.[510] In *United States v. United States Steel Corp.*[511] the court held that Stage II should include a hypothetical reconstruction of each claimant's work history in order to protect the defendant and to ensure that the back pay is properly distributed to those who are most entitled to it.[512]

Just as other courts have followed the Fifth Circuit on the issue of the presumption of entitlement to back pay and the bifurcated trial procedure,[513] many courts also have fallen in step behind the Fifth Circuit and have favored the individualized approach.[514] Like the Fifth Circuit, those courts that have adopted the bifurcated procedure have found the individualized approach a better complement to the Stage I proceedings than the class-wide

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506. *Id.* at 1375 (emphasis added).

507. 494 F.2d 211 (5th Cir. 1974).

508. *See supra* notes 472-81 and accompanying text.

509. 494 F.2d at 261.

510. *Id.* at 259. The Fifth Circuit reiterated this conclusion in Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974). The *Baxter* court held that if the class can prove discrimination in Stage I, the court should "resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus [is] entitled to back pay or other appropriate relief." *Id.* at 444. Each individual employee would be required to show that he was both qualified and available for promotion. *Id.* at 444-45; *see Pettway*, 494 F.2d at 259-60 (setting maximum burden that could be placed on individual claimants).

511. 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

512. *Id.* at 1055. The *United States Steel* court emphasized its preference for the individual-by-individual procedure by stating that all forms of this procedure should be utilized before resorting to the less certain class-wide approaches. *Id.* at 1056.

513. *See* cases cited *supra* note 460.

514. *See, e.g.*, Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978) (individual plaintiffs must show class membership and economic injury in order to be entitled to back pay award), *cert. denied*, 440 U.S. 981 (1979); Stewart v. General Motors Corp., 542 F.2d 445, 453 (7th Cir. 1976) (permitting defendant to rebut the claims of individual plaintiffs prior to beginning of class-wide award procedure; plaintiffs should introduce history of employment, effects of discriminatory conduct, and qualifications for jobs; defendant permitted to respond to claims of individual plaintiffs), *cert. denied*, 433 U.S. 919 (1977); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975) (individual plaintiffs must show class membership and job status during period of discriminatory conduct in order to be entitled to back pay award), *cert. denied*, 425 U.S. 934 (1976); English v. Seaboard Coastline R.R., 12 Fair Empl. Prac. Cas. (BNA) 90, 93 (S.D. Ga. 1975) (Stage II requires claimants to show class membership and economic losses caused by defendant's discriminatory conduct). *See generally* Western Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (individual proof presented at class stage (Stage I) of trial).

approach.[515]

A final argument in favor of the individualized approach as opposed to the class-wide method concerns the due process rights of all parties to the litigation. In a concurring opinion in *Pettway III*[516] Judge Bell expressed the view that "[d]amage awards must be individualized to avoid constitutional problems which would arise in taking the property of one for another without a showing of loss to the particular recipient."[517] Due process seems to require that the individual seeking a back pay award must present individual proof of personal damages. The defendant should then be permitted to offer defenses necessary to rebut each individual's claim of loss. Individual-by-individual proceedings appropriately allow for the presentation of such defenses, an opportunity not inherent in the class-wide approach. Most courts, however, have not often reached the due process issue, and those that have touched on the subject generally make reference to Judge Bell's concurring opinion in *Pettway*.[518]

Thus, the arguments in favor of the individualized approach to the award of back pay fall into three categories: the compensatory nature of the award requires that it equal the amount of the damages suffered and, therefore, the class-wide approach is not appropriate; the individual method is the better method to be used in the bifurcated trial because it provides an entire stage of the trial for the determination of the back pay award; and due process dictates that the individual plaintiffs state their claims and the defendant be permitted to rebut each of the claims. Following these arguments, the judiciary tends to employ the individualized method, if it is feasible under the circumstances.[519]

When proceedings shift from Stage I into Stage II, the court faces a choice of two very different approaches for determining back pay awards. The individualized approach is more precise than the class-wide approach and thereby satisfies the compensatory

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515. *See generally* cases cited *supra* note 514.

516. 494 F.2d 211, 267 (5th Cir. 1974) (Bell, J., concurring).

517. *Id.* (Bell, J., concurring).

518. *See, e.g.*, United States v. United States Steel Corp., 520 F.2d 1043, 1057 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1146 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). *See generally* City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 73 (D.N.J. 1971) (due process requires individual claims backed by evidence); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (class-wide method is "an unconstitutional violation of the requirement of due process of law"), *vacated on other grounds*, 417 U.S. 156 (1974).

519. *See supra* notes 496-518 and accompanying text.

damages argument,[520] provided sufficient data is available.[521] The individualized approach also allays the due process concerns over the rights of the parties.[522] The individualized approach is deficient, and the class-wide approach noticeably more appropriate, however, when dealing with cases lacking objective criteria with which to calculate the back pay award, having very complex facts,[523] or involving unmanageably large classes.[524]

Although the courts lack objective standards to apply in choosing the proper approach, this deficiency is not a problem if the two methods are seen as complementary rather than antagonistic. The Supreme Court's statements in *Albemarle*[525] and *Teamsters*[526] indicate that an analysis of the individualized process at the beginning of Stage II will not be improper. If the analysis shows the approach to be reasonably precise, efficient, and economical, this method should be chosen. If, however, the individualized approach is so speculative that it will lead to the "quagmire of hypothetical judgments" or if it is not judicially manageable, the court should turn to the class-wide approach.[527] By following this simple analysis, the court will guard the rights of all parties, ensure the best possible remedy, and protect the judicial interests with a manageable procedure.

VIII. Burdens of Proof in the Determination of Individual Awards

Intertwined with the bifurcated trial, the presumptive entitlement to back pay, and the method for awarding back pay is a procedural issue—burdens of proof. The burdens of proof affect the factfinding during the trial as well as the verdict reached at the

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520. *See supra* text accompanying notes 500-03.

521. *See supra* notes 490-91 and accompanying text.

522. *See supra* text accompanying notes 516-18.

523. *See supra* notes 473-81 and accompanying text.

524. *See supra* notes 492-94 and accompanying text.

525. "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (quoting Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)).

526. "Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices." International Bhd. of Teamsters v. United States, 431 U.S. 324, 371-72 (1977).

527. *Contra* Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1146 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). The Federal District Court for the District of New Jersey seemed to indicate in *Kyriazi* that these reasons would not justify the use of a class-wide procedure. *See generally infra* notes 752-58 and accompanying text.

close of the proceedings.[528] The burdens of proof, therefore, play an important role in every employment discrimination trial: they influence the proceedings from the class' attempt to present a prima facie case of discrimination at the beginning of Stage I until the award of back pay at the conclusion of Stage II.

This part of the Special Project discusses the proper order and allocation of burdens of proof in employment discrimination cases. The first section examines the burdens of proof in Stage I of the bifurcated trial.[529] This issue has been heavily litigated and provides a good framework within which to analyze Stage II of the trial. The second section defines the burdens placed on the parties in Stage II and discusses the order and allocation of these burdens.[530] The second section looks specifically at the individual members of the plaintiff class and discusses what must be shown by each class member to establish a prima facie case of entitlement to back pay.[531]

A. Stage I: Order and Allocation of Burdens of Proof

Despite the usefulness of Title VII as a tool for the elimination of discrimination, Congress did not clearly define what is necessary to prove a case of discrimination.[532] As a result, the judiciary has been called upon to interpret Title VII and has pronounced two separate substantive approaches to discrimination. The Supreme Court announced the first approach, the disparate impact theory, in the landmark decision of *Griggs v. Duke Power Co.*[533] This approach makes the assumption that Congress sought to eliminate the effects of discrimination regardless of the intent of the party engaging in the discriminatory practices.[534] The *Griggs* Court read Title VII as directed at the "*consequences* of employment practices, not simply the motivation."[535] Read in this manner, Title VII prohibits any practice that has an adverse impact on any member of a protected minority group. If the defendant's conduct "operates as the functional equivalent of intentional discrimi-

528. *See* Belton, *supra* note 34, at 1207.

529. *See infra* notes 532-67 and accompanying text.

530. *See infra* notes 568-664 and accompanying text.

531. *See infra* notes 638-64 and accompanying text.

532. *See* 42 U.S.C. § 2000e-2 (1976).

533. 401 U.S. 424 (1971).

534. *Id.* at 432. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . ." *Id.*

535. *Id.* (emphasis in original).

nation"[536] it will be held unlawful under Title VII.[537] Thus, the disparate impact theory does not require the plaintiff to show any intent on the part of the defendant to discriminate.[538]

In 1973 the Supreme Court described an alternative approach—the disparate treatment theory—in *McDonnell Douglas Corp. v. Green.*[539] The disparate treatment theory differs dramatically from the *Griggs* formula because it requires proof of a specific intent to discriminate. In order to prove a prima facie case of discrimination under this theory the plaintiff must show that the defendant's conduct was "more likely than not" based in discrimination.[540] The plaintiff may meet the prima facie case 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.[541]

Although *McDonnell Douglas* presented a new theory of discrimination, the Supreme Court did not eliminate the right to bring a Title VII action alleging disparate impact. Rather, the Court distinguished *Griggs* from the instant case but did not overrule it.[542] *Griggs* and the disparate impact cases provide that the defendant may rebut a prima facie showing of discrimination by showing that the challenged conduct was job related or was justified by some business necessity.[543] *McDonnell Douglas* and the disparate treatment cases require the defendant to "articulate some legitimate,

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536. Belton, *supra* note 34, at 1227; *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) ("employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another"); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972).

537. The defendant will have the opportunity to rebut the plaintiff's prima facie case of discrimination by showing that the employment practice is required by a business necessity or is job related. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (job related); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (business purpose), *cert. dismissed,* 404 U.S. 1006 (1971).

538. United States v. Lee Way Motor Freigbt, Inc., 625 F.2d 918, 942 (10th Cir. 1979).

539. 411 U.S. 792 (1973).

540. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978); *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.*

541. McDonnell Douglas Corp. v. Green, 411 U.S. at 802 (1973).

542. *Id.* at 806.

543. *See supra* note 537; Belton, *supra* note 34, at 1232.

nondiscriminatory reason" for its conduct.[544] The reasons for these different defenses are not clear, especially since they originate from the same statute.[545]

1. Disparate Impact Cases

The disparate impact cases are ambiguous about the number of steps in the burden of proof process. The prima facie case, as outlined in *Griggs*, does not place a heavy burden on the plaintiff class. Because this theory does not require proof of intent, the plaintiff class need only prove a statistically significant difference in the effects of the process on whites and on minorities.[546] The burden then shifts to the defendant who must show that the employment practice either is job related or is required because of a business necessity.[547] The *Griggs* Court set out only this two-step approach to the burden of proof. In *Albemarle Paper Co. v. Moody*,[548] however, the Court added a third step to the procedure. *Albemarle* stated that if the defendant can meet its job related/business necessity burden, the class will be permitted to show the availability to the defendant of the other less discriminatory means to achieve the same end.[549] Currently, the Supreme Court's intent in the disparate impact cases is unclear. *Griggs* stands for the proposition that the defendant must prove business necessity by a preponderance of the evidence in order to meet its burden.[550] After

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544. *McDonnell Douglas*, 411 U.S. at 802.

545. *See* Belton, *supra* note 34, at 1232-33 & nn. 114-15.

546. In *Griggs*, for example, the plaintiffs were able to prove a prima facie case of discrimination by showing that the Duke Power Company's diploma and testing requirements eliminated more minorities than whites. *See Griggs*, 401 U.S. at 430 & n.6; Blumrosen, *supra* note 536, at 80; *see also* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980) (prima facie case may be established by "showing that an employer's facially neutral practice has a disparate impact on the plaintiff's racial group").

547. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot he shown to be related to job performance, the practice is prohibited." *Griggs*, 401 U.S. at 431; *see* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980).

548. 422 U.S. 405 (1975).

549. *Id.* at 425; *see* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980). This third step resembles the pretext stage of disparate treatment cases. *See infra* text accompanying note 555. The Supreme Court in *McDonnell Douglas*, the leading disparate treatment case, appeared to indicate that it was not intending its approach to apply to disparate impact cases, 411 U.S. at 802 n.14; yet the Court followed the *McDonnell Douglas* approach in *Albemarle*. 422 U.S. at 425; *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 & n.5 (1981).

550. *Griggs*, 401 U.S. at 432; *see* Belton, *supra* note 34, at 1243 & n.167.

Albemarle, however, the burdens of proof apparently include the third, or "pretext," stage.[551] The courts have not yet reached a consensus on the nature of the burden of proof placed on the plaintiff to show the existence of a less discriminatory alternative.[552]

2. Disparate Treatment Cases

After a period of uncertainty and development, the order and allocation of the burdens of proof in disparate treatment cases have become fixed. In *McDonnell Douglas* the Supreme Court announced four elements the plaintiff must prove to establish a prima facie case of discrimination.[553] After the plaintiff establishes his case, the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its actions.[554] If the defendant meets this burden, the plaintiff is then provided the opportunity to prove that the defendant's legitimate, nondiscriminatory reason is merely a pretext for discriminatory activity.[555]

The uncertainty arising out of the *McDonnell Douglas* opinion concerns the meaning of the term "articulate" as it is used in describing the defendant's burden. Whether the use of the term "articulate" by the Court merely shifts a burden of production to the defendant or whether the burden of persuasion shifts as well is unclear.[556] The Supreme Court sought to clarify this issue in *Furnco Construction Corp. v. Waters*,[557] but the Court's opinion only confused matters further. In *Furnco* the Court stated that the burden which shifts to the defendant "is merely that of *proving* that he based his employment decision on a legitimate considera-

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551. *Albemarle*, 422 U.S. at 425; *see infra* text accompanying note 555.

552. *See* Belton, *supra* note 34, at 1244-46.

553. *See supra* text accompanying note 541.

554. *McDonnell Douglas*, 411 U.S. at 802.

555. *Id.* at 804.

556. *See* Belton, *supra* note 34, at 1237. Professor Belten defines the burden of persuasion as containing "the dual elements of location and weight: the location specifies the party who will lose if the burden is not met, and the weight specifies how persuasive the evidence must be to sustain this burden." *Id.* at 1207. The burden of production sets "the timing of the presentation of the evidence and . . . 'like . . . the burden of persuasion, it provides that when the evidence is inadequate, the party with tbe burden loses.'" *Id.* at 1207-08 (quoting Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 n.3 (1977)). As Professor Belton discusses, the question remaining after *McDonnell Douglas* is whether the defendant need only produce evidence on the legitimate, nondiscriminatory reason for its conduct or whetber it must prove by a preponderance of the evidence tbat it truly was motivated by a legitimate, nondiscriminatory reason. *Id.* at 1237.

557. 438 U.S. 567 (1978).

tion."[558] In the same paragraph, however, the Court concluded that the defendant "need only '*articulate* some legitimate, nondiscriminatory reason for the employee's rejection.' "[559] By using both "prove" and "articulate" in the same context the Court may have intended these terms to be synonymous, but the failure of the Court to define the terms makes its intentions unclear.

Not long after *Furnco*, in *Board of Trustees v. Sweeney*,[560] the Court again sought to clarify the extent of the defendant's burden when it held that a difference does exist between "articulation" and "proof." The Court, in a per curiam opinion, returned to its *McDonnell Douglas* analysis and stated that "articulating" a legitimate, nondiscriminatory reason for rejection "will suffice to meet the employee's prima facie case."[561] By simply relying on the unclear term "articulate" as it was used in *McDonnell Douglas*, however, the Supreme Court failed to provide litigants and lower courts with a definition for the ambiguous term.[562]

The Supreme Court finally resolved the confusion in *Texas Department of Community Affairs v. Burdine*.[563] The Court first clarified the burdens placed on the plaintiff: when proving a prima facie case and when proving pretext, the plaintiff must meet its burden of proof by a preponderance of the evidence.[564] The Court also discussed in detail the nature of the burden placed on the defendant. The plaintiff's prima facie case of discrimination creates a presumption that the employer engaged in discriminatory employment practices. The burden of rebutting this presumption shifts to the defendant who can meet the burden by articulating a legitimate, nondiscriminatory reason for the rejection.[565] The defendant confronts a burden of production, not a burden of persuasion. Thus, the employer must raise a question about whether it discriminated against the plaintiff, but the employer need not persuade the court that the legitimate reasons presented actually mo-

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558. *Id.* at 557 (emphasis added).

559. *Id.* at 578 (emphasis added) (quoting *McDonnell Douglas*, 411 U.S. at 802).

560. 439 U.S. 24 (1978).

561. *Id.* at 25.

562. *See supra* note 556 and accompanying text.

563. 450 U.S. 248 (1981).

564. *Id.* at 252-53. The requirement that the plaintiff must prove a prima facie case by a preponderance of the evidence is an expansion of the *McDonnell Douglas* prima facie doctrine. *See* Belton, *supra* note 34, at 1240. For a thorough discussion of *Burdine*, see *id.* at 1240-43.

565. 450 U.S. at 254.

tivated his actions.[566] All that the employer must produce is "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[567] The plaintiff, of course, retains the opportunity to demonstrate pretext.

B. Stage II: Order and Allocation of Burdens of Proof

1. Plaintiff's Burden

Having found liability in Stage I of the bifurcated trial and having found back pay to be an appropriate remedy,[568] the court must then make determinations of the back pay awards for individual plaintiffs.[569] Emphasis must be placed on the bifurcated nature of the trial. The questions of fact and of law that were resolved in Stage I need not be reconsidered in Stage II. For example, defendant-employers will be unable to claim in Stage II that individual employment decisions were not discriminatory because Stage I will have already established the employer's liability to the class. In Stage II, determinations of individual relief replace those of the defendant's liability.[570]

At the outset of Stage II the burden of proof rests with the individual plaintiffs. Although the finding of liability in Stage I has led to a presumption of entitlement to back pay,[571] courts have traditionally placed some burden of proving entitlement on the class members.[572] The Fifth Circuit Court of Appeals discussed the plaintiff's burden of proof in *Pettway v. American Cast Iron Pipe Co. (Pettway III)*.[573] The court ruled that the presumption was "tempered by an initial burden on the individual employee to

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566. *Id.* at 254-55.

567. *Id.* at 257.

568. Part IV of the Special Project discusses the presumption of class-wide entitlement to back pay and part V examines possible rebuttals to this presumption.

569. This section of the Special Project applies to cases in which the court utilizes either a class-wide method to award back pay, *supra* notes 472-95 and accompanying text, or an individualized approach, *supra* notes 496-519 and accompanying text. Under either approach individual plaintiffs will need to prove membership in the class and economic loss. The individualized approach will then calculate individual awards for each class member, while the class-wide approach will calculate a single award for the class and design a formula for allocating the award to individual class members. The burdens of proof, however, are the same under each method.

570. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977).

571. *See supra* notes 211-58 and accompanying text.

572. *See supra* notes 238-40 and accompanying text.

573. 494 F.2d 211, 259-60 (5th Cir. 1974).

bring himself within the class and to describe the harmful effect of the discrimination on his individual employment position."[574] In addition, the court held that the presumption did not "*per se* entitle" individual class members to back pay without some individual proof.[575] According to the court, the burden of proof placed on the individual class members was not designed to be as onerous as the burden placed upon them in the liability stage; rather, the court reasoned that the defendant ought to bear the heavy burden of rebutting the presumption of the plaintiff's entitlement to back pay.[576] Thus, the court limited the burden that could be placed on an individual class member to the following:

> [A] statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay.[577]

Consistent with the placement of this light burden on the individual plaintiff, the court stated that all uncertainties arising out of back pay award calculations would be resolved in the plaintiff's favor.[578]

Many courts have followed the *Pettway* approach and have placed a lightened burden on the individual plaintiffs in Stage II.[579] Two Supreme Court cases, however, appear to indicate that

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574. *Id.* at 259.

575. *Id.* (citing United States v. Georgia Power Co., 474 F.2d 906, 921-22 (5th Cir. 1973)); *see supra* notes 238-40 and accompanying text.

576. 494 F.2d at 259. Although the Fifth Circuit did not elaborate on this issue, placing the heavy burden of proof on the employer reflects the court's recognition that a finding of liability has already been made and that a presumption in favor of back pay operates for the benefit of the individual claimants.

577. *Id.* at 259-60.

578. *See supra* text accompanying note 477.

579. *See, e.g.*, Myers v. Gilman Paper Corp., 544 F.2d 837, 854 (5th Cir.) (*Pettway* approach), *cert. dismissed*, 434 U.S. 801 (1977); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975) (plaintiff must establish membership in class, income during years of discrimination, and nature of job held), *cert. denied*, 425 U.S. 934 (1976); Mims v. Wilson, 514 F.2d 106, 110 (5th Cir. 1975) (plaintiff must establish membership in class and "deleterious economic consequences" of discrimination); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 445 (5th Cir.) (plaintiff must show availability for promotion and possession of general qualifications for job), *cert. denied*, 419 U.S. 1033 (1974); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1144 (D.N.J. 1979) (plaintiff must show membership in class), *aff'd*, 647 F.2d 388 (3d Cir. 1981); Stevenson v. International Paper Co., 432 F. Supp. 390, 413 (W.D. La. 1977) (plaintiff must show membership in class and "deleterious economic consequences" of discrimination); Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 770 (W.D. Va. 1976) (plaintiff must show economic loss), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977).

even the lightened burden in *Pettway* may be still too burdensome on the plaintiffs. *Franks v. Bowman Transportation Co.*,[580] a class action brought under Title VII alleging discriminatory hiring and discharging of truck drivers,[581] reached the Supreme Court not on the issue of back pay but on the issue of whether seniority status should be awarded to alleged victims of discrimination.[582] Neither the district court nor the court of appeals had granted seniority relief.[583] The *Franks* Court held that seniority relief was within the scope of Title VII's remedial provisions[584] and then discussed the awards to be granted to the individual claimants. The Court treated seniority in a manner similar to back pay: a finding of liability raised a presumption of entitlement to remedial relief and individual evidence was not required until the individual claimants sought to recover.[585] The Court, however, deviated from the lightened burden of proof placed on the plaintiffs in *Pettway* by stating that "the burden will be upon the [defendants] to prove that individuals who [seek relief] were not in fact victims of previous hiring discrimination."[586] Thus, in this situation, which closely resembles back pay cases, the Supreme Court, rather than placing any substantial burden on the plaintiffs in Stage II, placed the burden on the defendant to show that the individual plaintiff had not been a victim of discrimination.

International Brotherhood of Teamsters v. United States,[587] a "pattern or practice"[588] suit brought by the Government alleging discrimination in hiring and assigning truck drivers, again presented the Supreme Court with the question of seniority relief. Finding such relief appropriate, the Court stated that in the remedial stage of the proceedings the Government only needed to show class membership of the individual claimants by establishing that each claimant had applied unsuccessfully for another position and was, therefore, a "potential victim of the proved discrimination."[589]

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580. 424 U.S. 747 (1976).

581. *Id.* at 750-51.

582. *See id.* at 762-70; 42 U.S.C. § 2000e-5(g) (1976).

583. 424 U.S. at 751-52.

584. *See generally id.* at 762-70; 42 U.S.C. § 2000e-5(g) (1976).

585. 424 U.S. at 772.

586. *Id.*

587. 431 U.S. 324 (1977).

588. *See supra* note 497. The Court's description of the "pattern or practice" trial was substantially similar to that of the traditional bifurcated class action proceedings. 431 U.S. at 360-62.

589. 431 U.S. at 362.

Thus, as in *Franks*, the Supreme Court in *Teamsters* appears to have put a lesser burden on the plaintiffs than the Fifth Circuit did in *Pettway*.

In light of the Supreme Court's analysis of plaintiffs' Stage II burden of proof in *Franks* and *Teamsters*, *Pettway*'s burden of proof approach appears to be invalid. The resulting burden of proof requires only that each plaintiff demonstrate class membership, a standard part of all proof-of-claim procedures,[590] and a truly minimal burden. *Pettway*'s requirement that the individual plaintiff describe the effects of discrimination,[591] although not specifically overruled, does not appear able to withstand the lesser burden placed on the individual plaintiffs by the Supreme Court in *Franks* and *Teamsters*.[592]

2. Defendant's Burden

(a) Ultimate Burden

The holdings of the Supreme Court in *Franks* and *Teamsters* make clear that the ultimate burden in Stage II falls on the defendant. Because the plaintiffs are presumptively entitled to back pay and have proved their membership in the class, the defendant's burden is to show good cause for what appears to have been discriminatory conduct. As in the cases dealing with the plaintiff's burden,[593] the nature of the burden placed on the defendant has varied from case to case.[594] The Supreme Court in *Franks*[595] held that once the class has shown the existence of a discriminatory

590. *See supra* text accompanying note 367.

591. *See supra* text accompanying note 574.

592. *See* Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1144 & n.4 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981). The *Kyriazi* court stated that "individual employees should not be put to the almost impossible task of delving into the corporate consciousness to demonstrate how an already proven policy of discrimination exactly impacted each one of them." *Id.* *Kyriazi* also cited as "noteworthy" the fact that *Pettway*, with its greater burden on the individual plaintiffs, was decided before *Franks* and *Teamsters*. *Id.* at 1144 n.4. This opinion seems to indicate a belief that *Pettway* is no longer good law and should not be followed by other courts.

593. *See* cases cited *supra* note 579.

594. *See, e.g.*, Stewart v. General Motors Corp., 542 F.2d 445, 453 (7th Cir. 1976) (defendant must show factors unrelated to discrimination), *cert. denied*, 433 U.S. 919 (1977); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975) (defendant has opportunity to present proof that individual plaintiff was not qualified or had voluntarily foregone opportunity for advancement, or that there were no vacancies), *cert. denied*, 425 U.S. 934 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259 (5th Cir. 1974) (defendant must show factors unrelated to discrimination).

595. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

practice, the burden falls on the defendant to prove that the plaintiffs were not victims of the discrimination.[596] The Court stressed that only when the defendant meets this burden can he avoid liability to individual class members.[597] In *Teamsters*[598] the Supreme Court applied the *Franks* burden of proof approach and ruled that the defendant must prove that the individual applicant was denied the employment opportunity for nondiscriminatory reasons.[599]

Cases touching on the issue of the ultimate burden reveal that the courts are doing little more than applying the same approach used in Stage I of the disparate treatment cases:[600] once an individual plaintiff proves a prima facie case of entitlement to back pay, the burden shifts to the defendant to show a legitimate, nondiscriminatory reason for his action.[601] To meet this burden, the courts have required the defendant to challenge the plaintiff's entitlement to back pay by showing that it had no vacancies, that the plaintiff was not qualified for existing vacancies, or that the plaintiff was not interested in the vacancies.[602] In Stage II, however, the courts apparently have deviated from the Stage I disparate treatment approach in terms of the degree of persuasion required of the defendant. The next subsection of the Special Project treats this issue.

(b) Degree of Persuasion

Although no absolute rule governs the weight of the defendant's burden in Stage II, the burden is clearly more substantial than the defendant's burden in Stage I. While the burden of persuasion remains with the plaintiff class in Stage I,[603] the Supreme Court cases dealing with this issue do not indicate that the burden of persuasion is to remain with the plaintiffs in Stage II.[604] Even

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596. *Id.* at 772; *see supra* text accompanying note 586.

597. 424 U.S. at 773. One way for the defendant to meet this burden of proof is by showing that no vacancies existed or that the individual was not qualified for the available positions, the defendant needs to utilize those standards "actually applied" to successful applicants. *Id.* at 773 n.32.

598. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

599. *Id.* at 362.

600. *See supra* notes 553-67 and accompanying text.

601. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

602. *See supra* note 597 and accompanying text.

603. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). *See generally* 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) (the burden of persuasion never shifts). The *Burdine* case, the latest Supreme Court pronouncement in this area, provides a very useful discussion of Stage I burdens of proof.

604. In 1976, the Court stated in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976),

though no authority specifically states that the burden of persuasion is the burden which has shifted to the defendant, many courts have used the terms "clear and convincing evidence" or "preponderance of the evidence" to refer to this burden, and courts usually reserve these terms for the burden of persuasion.[605]

Courts have invoked the "clear and convincing evidence" standard to refer to the heavy burden placed on the defendant to show a legitimate, nondiscriminatory reason. In *Baxter v. Savannah Sugar Refining Corp.*[606] the Fifth Circuit stated that proof offered by the defendant that a particular plaintiff was unqualified for a job or that there were "other good and sufficient reasons such em-

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that in the class-wide stage the plaintiffs had carried the burden of proving discriminatory conduct and, "therefore, the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Id.* at 772. The Court ruled that defendants could attempt to prove that individual claimants were not entitled to relief, but found no reason "why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Id.* at 773 n.32.

During the following year, the Court decided International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In *Teamsters*, a pattern or practice suit, the Court discussed the burdens of proof during the relief stage of the trial. The defendant argued that since the Government had not presented evidence with regard to each individual claimant during the liability stage (Stage I), the Government should be required to carry this burden in the remedial stage (Stage II). *Id.* at 361. The Court rejected this argument and stated that the Government's proof in the liability stage "does not dissipate" hut rather "supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 361-62. If the Government can show that a claimant was a potential victim of the proven discrimination, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), clearly stated that the burden of persuasion remains with the plaintiff. *Id.* at 253. *Burdine*, however, dealt solely with Stage I and, therefore, can be distinguished from the majority of other cases that place a substantial burden on the defendant in Stage II. *See, e.g.*, EEOC v. Korn Indus., Inc., 662 F.2d 256, 260-62 (4th Cir. 1981); Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1239 (5th Cir. 1980); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

605. *See* Belton, *supra* noto 34, at 1216.

The following cases have used the tenn "clear and convincing evidence": Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1239 (5th Cir. 1980); United States v. United States Steel Corp., 520 F.2d 1043, 1056 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Mims v. Wilson, 514 F.2d 106, 110 (5th Cir. 1975); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974); Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972).

Cases using the "preponderance of the evidence" standard include Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 770 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977).

606. 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

ployee would never have been promoted"[607] would have to meet this "clear and convincing" standard. *Lee v. Washington County Board of Education*[608] phrased the burden in a more general way, stating that the employer must "show by clear and convincing evidence that the individual member of the class seeking relief would not have been hired absent the discrimination."[609]

Other courts have used the "preponderance of the evidence" standard to place the burden on the employer in Stage II. The Fourth Circuit, when discussing the defendant's burden in *United Transportation Union Local 974 v. Norfolk & Western Railway*,[610] stated that the employer should be given the opportunity to present proof that any individual claimant is not eligible for the award of back pay,[611] but that this defense must be established by a preponderance of the evidence.[612] In *Sledge v. J.P. Stevens & Co.*[613] the Fourth Circuit held that if the individual claimants can show class membership during the remedial stage of the trial, the burden then shifts to the employer to prove, by a preponderance of the evidence, "that factors other than the condemned discrimination caused the decision of which the back pay claimant complains."[614]

Professor Belton has stated that courts have applied both the clear and convincing evidence standard and the preponderance of the evidence standard to determine whether, in a particular situation, the burden of persuasion has been met.[615] Although the Supreme Court in *Texas Department of Community Affairs v. Burdine*[616] concluded that the burden of persuasion remains with the plaintiff, the Court specifically limited its discussion to the liability portion of the proceedings.[617] Therefore, without being inconsistent

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607. *Id.* at 445.

608. 625 F.2d 1235 (5th Cir. 1980).

609. *Id.* at 1239; *see* Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980); Day v. Mathews, 530 F.2d 1083, (D.C. Cir. 1976).

610. 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

611. *Id.* at 341. According to the court, a defendant could show ineligibility of a particular claimant by presenting evidence of a "lack of qualification, free and voluntary decision to forego higher-paying work opportunities, lack of higher-paying work opportunities, and the like." *Id.*

612. *Id.*

613. 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

614. *Id.* at 637. The court suggested that the defendant might try to prove the absence of job openings for better jobs or the plaintiff's lack of qualifications for existing vacancies. *Id.*

615. Belton, *supra* note 34, at 1216.

616. 450 U.S. 248 (1981).

617. *Id.* at 253. "The ultimate burden of persuading the trier of fact *that the defen-*

with *Burdine*, one could conclude that after moving into Stage II, the allocation of the burdens of proof has been reversed. The individual plaintiffs need only show that they are members of the class. If they meet this minimal burden of production, the defendant has the burden of persuasion to present a legitimate, nondiscriminatory reason for his conduct.[616] The defendant may meet this burden by complying with the clear and convincing evidence standard or the preponderance of the evidence standard.[619]

3. Qualifications

A major issue in back pay proceedings is the question of which party has the burden of proof concerning whether individual plaintiffs qualified for the positions they were seeking. Courts have recognized that the qualifications of an individual for a particular job are highly relevant when determining eligibility for back pay awards. If the claimant does not have the requisite qualifications for a particular position, he should not benefit from a back pay award arising from discriminatory conduct regarding that position.

Paralleling the decisions that required individual plaintiffs to prove some entitlement to back pay in Stage II,[620] some cases placed the initial burden in Stage II on the individual claimant to show qualifications for the job in question.[621] Some courts, how-

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dant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (emphasis added). *Burdine*, however, did not concern a class action or a bifurcated trial. In a bifurcated trial, Stage I determines the liability issue and, as the Supreme Court stated in *Burdine*, the burden of persuasion remains with the plaintiff. In order to rebut the plaintiff's prima facie case in Stage I, the defendant must meet only the burden of production. *Id.* at 254-56. The language of the Supreme Court in *Franks* and *Teamsters*, however, as well as the language used by other federal courts, indicates that the burdens are allocated differently in Stage II. *See supra* notes 604-14 and accompanying text.

618. Several decisions have indicated that the individual claimant will have the same opportunity in Stage II, as did the plaintiff class in Stage I, *see supra* text accompanying notes 553-55, to assert that the alleged nondiscriminatory reason merely constituted a pretext for discriminatory conduct. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 n.50 (1977); EEOC v. Korn Indus., Inc., 662 F.2d 256, 261 (4th Cir. 1981); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

619. *See supra* notes 605-15 and accompanying text.

620. *See supra* notes 569-92 and accompanying text.

621. *See, e.g.*, Stewart v. General Motors Corp., 542 F.2d 445, 453 (7th Cir. 1976) (employee has initial burden of producing evidence indicating he was qualified for job), *cert. denied*, 433 U.S. 919 (1977); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 444-45 (5th Cir.) (discriminatee must show "general characteristics and qualifications" possessed by higher paid white employees), *cert. denied*, 419 U.S. 1033 (1974); Pettway v. American Cast Iron Pipe Co. (Pettway III), 494 F.2d 211, 259-60 (5th Cir. 1974) (claimant must show evidence that qualified him for desired position).

ever, placed the Stage II qualifications burden on the defendant.[622] This inconsistency was not resolved until the Supreme Court rulings in *Franks* and *Teamsters*. In the 1976 *Franks* opinion the Court specifically stated that in the remedial portion of the proceedings[623] "the burden will be upon [the defendants] to prove that individuals . . . were not in fact victims" of a discriminatory employment practice.[624] Evidence of an individual's lack of qualification for the position sought would be relevant to meeting this burden of proof.[625] Similarly, in *Teamsters* the Court held that in the remedial stage of a pattern or practice trial the burden would be on the employer "to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[626] The Court cited *Franks* for the proposition that the burden of proof on the qualifications issue could not be placed on the individual claimants, but rather shifted to the employer as part of its rebuttal proof.[627]

Although *Franks* and *Teamsters* concerned seniority relief, the approach to qualifications that these cases advocated has been adopted in traditional class action back pay cases. The Fourth Circuit dealt squarely with this issue in *Sledge v. J.P. Stevens & Co.*[628] The court interpreted *Teamsters* to hold that in Stage II, the individual plaintiff must only establish class membership and provide basic information to help the court determine the amount of economic loss.[629] If the claimant meets this light burden, the employer then must try to establish by a preponderance of the evidence "that factors other than the condemned discrimination caused the decision of which the . . . claimant complains, e.g., that

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622. *See, e.g.*, United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975) (employer has opportunity to present proof that any particular class member was not entitled to back pay because of lack of qualifications for position), *cert. denied*, 425 U.S. 934 (1976); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974) (burden on employer to show that employee would not be qualified for any other job); English v. Seaboard Coastline R.R., 12 Fair Empl. Prac. Cas. (BNA) 90, 93 (S.D. Ga. 1975) (proof that claimant was not qualified for a position must be presented as an affirmative defense).

623. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976). The remedy in *Franks*, seniority relief, would be granted when the individual class members sought employment in those more desirable positions from which they had previously been denied access. *Id.*

624. *Id.*

625. *Id.* at 773 n.32.

626. International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977).

627. *Id.* at 359, 362 (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 772, 773 n.32 (1976)); *see supra* text accompanying note 625.

628. 585 F.2d 625 (1978), *cert. denied*, 440 U.S. 981 (1979).

629. *Id.* at 637.

. . . there were no job openings . . . for which he was qualified."[630]

The Federal District Court for the District of New Jersey followed both the *Franks* and the *Teamsters* cases in *Kyriazi v. Western Electric Co.*[631] According to the court, the individual claimant has the burden to show merely the dates of employment or application and the positions held or sought.[632] Once the claimant thus establishes class membership, the burden of proving that the claimant was not in fact the victim of discriminatory conduct shifts to the defendant.[633] The court reasoned that significant problems would result if employees were required to demonstrate how a proven policy of discrimination affected them individually and, therefore, placed the onerous burden of proving an absence of discrimination on the defendant.[634] The Federal District Court for the Eastern District of Pennsylvania also followed *Teamsters* and *Franks* in *Dickerson v. United States Steel Corp.*[635] The court placed a heavy burden on the employer during the remedial phase of the trial, ruling that "[t]he employer may . . . try to prove an individual employee's lack of qualifications . . . measured against non-discriminatory selection standards that were actually applied by the company."[636]

Thus, unless the defendant raises the issue of qualifications in its Stage II rebuttal and meets its burden of proof by the preponderance of the evidence or by presenting clear and convincing evidence, the court will assume that individual claimants were qualified for the positions that they sought. In other words, the clear rule now is that the defendant bears the ultimate burden on the qualifications issue.[637]

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630. *Id.* Since the Supreme Court refused to grant certiorari in *Sledge* and other circuits have not addressed directly the burden of proof question in the context of qualification, *Sledge* remains the most persuasive authority on the issue.

The Fourth Circuit recently confronted a similar issue in EEOC v. Korn Indus., Inc., 662 F.2d 256 (4th Cir. 1981). The court relied heavily on its analysis in *Sledge* and the Supreme Court's analysis in *Teamsters* and stated that if the plaintiff can meet his light burden, *see supra* text accompanying note 629, "the burden shifts to the employer to demonstrate that he had a nondiscriminatory reason for making the challenged employment decision." 662 F.2d at 261. The court's failure to mention specifically the qualifications issue is not significant in light of its references to *Sledge* and *Teamsters.*

631. 465 F. Supp. 1141 (D.N.J. 1979), *aff'd,* 647 F.2d 388 (3d Cir. 1981).

632. *Id.* at 1144.

633. *Id.*

634. *Id.* The court's failure to make specific reference to the plaintiff's qualifications is not significant in light of its references to *Franks* and *Teamsters.*

635. 23 Fair Empl. Prac. Cas. 1088 (BNA) (E.D. Pa. 1980).

636. *Id.* at 1089.

637. If the defendant meets this burden, the claimant will have an opportunity to

4. The Prima Facie Case

Plaintiffs seeking to establish their entitlement to back pay in Stage II can be classified into three groups. First, the incumbent employees are those employees of the company engaging in the discriminatory practices who have applied unsuccessfully for transfer or promotion. Also included in this group are employees no longer seeking transfer or promotion because of age, illness, or retirement and employees who refuse transfers or promotions to traditionally white or male jobs because the transfer would cause them to lose seniority. Second, the rejected applicants are those plaintiffs who have applied for positions with the employer but were unsuccessful because of discriminatory hiring practices. To be classified as a rejected applicant, one must not hold any position with the offending employer. Third, the nonapplicants, or "but for" employees, are those employees who would have applied for promotion or transfer but for the discriminatory practices of the employer that would have made such application futile. Each of these three types of plaintiffs present different problems, and each is affected by the Supreme Court decision in *Teamsters*. This subsection of the Special Project focuses on the means by which a plaintiff, depending on the group into which he falls, can prove a prima facie case of entitlement to back pay in Stage II.

(a) Incumbent Employees

The incumbent employees are the plaintiffs most affected by the Supreme Court ruling in *Teamsters*. In *Pettway v. American Cast Iron Pipe Co. (Pettway III)*[638] the Fifth Circuit placed an initial burden on the individual employee to establish class membership and qualifications for the job desired.[639] Despite the lightened burden which *Pettway* placed on incumbent employees, the Supreme Court's decision in *Teamsters* essentially rejected *Pettway III*.[640] *Teamsters* ruled that the *only* burden that may be placed on the incumbent employees to establish a Stage II prima facie case was a showing of unsuccessful application for a job.[641] *Teamsters*

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prove that the stated reason merely constituted a pretext for a discriminatory activity. *See* EEOC v. Korn Indus., Inc., 662 F.2d 256, 261 (4th Cir. 1981); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

638. 494 F.2d 211, 259-60 (5th Cir. 1974).

639. *Id.* at 259-60; *see supra* text accompanying notes 573-78.

640. *See supra* text accompanying notes 587-92.

641. International Bhd. of Teamsters v. United States, 431 U.S. 324, 363 (1977).

echoed the Court's earlier decision in *Franks*,[642] in which incumbent employees denied access to more desirable positions were given no discernible burden to establish a Stage II prima facie case.[643] In *Sledge v. J.P. Stevens & Co.*[644] the Fourth Circuit followed the *Teamsters* approach and concluded that to establish a prima facie case during Stage II, "[a]ll an individual plaintiff must then establish . . . is . . . his identity as one of the presumed discriminatees—that he is black and that . . . upon being hired was assigned to one of the low-paying jobs."[645] The incumbent plaintiff, therefore, bears only the most minimal of burdens. The finding of liability in Stage I together with the presumptive entitlement to back pay have caused the courts to make the establishment of a prima facie case in Stage II a relatively easy task for the individual employee.

Courts should not differentiate between current applicants for promotion and those plaintiffs who for legitimate reasons such as age, illness, or retirement no longer seek to be promoted or transferred. In *Bowe v. Colgate, Palmolive Co.*[646] the Seventh Circuit acknowledged these individuals as legitimate claimants for back pay. Consequently, the circuit court rejected the trial court's back pay award because it did not take into consideration those employees who had left the defendant's employ before the beginning of the test period on which the back pay award was based.[647] Courts should have no more difficulty dealing with this class of incumbent than they do dealing with the incumbent who is still employed. If the retired employee worked during the period of discriminatory conduct, no reason exists why his prima facie case should differ from that of the incumbent who is still employed—they have suf-

642. *See supra* text accompanying note 586.

643. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).

644. 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

645. *Id.* at 637. The Fourth Circuit utilized this same approach in a recent case, EEOC v. Korn Indus., Inc., 662 F.2d 256, 261 (4th Cir. 1981); *see also* Dickerson v. United States Steel Corp., 23 Fair Empl. Prac. Cas. (BNA) 1088, 1089 (E.D. Pa. 1980) (burden on employer to show employee has suffered no economic loss as a result of discriminatory conduct); Kyriazi v. Western Elec. Co., 465 F. Supp. 1141, 1144 (D.N.J. 1979) (sole hurden on individual plaintiffs was to show they had been employed by defendant during period of discriminatory conduct), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

646. 489 F.2d 896 (7th Cir. 1973).

647. "Leaving them out implies a presumption that they suffered no loss as a result of discrimination, and we think that to the extent any presumption is to be applied, it must be the opposite." *Id.* at 903. The Seventh Circuit also ruled that the back pay award did not accurately take into account those who were ill during the test period. *Id. See generally infra* notes 938-39 and accompanying text.

fered similar harm. His retirement or resignation should affect the size of the back pay award rather than the burdens of proof.

Those employees who have been offered transfers to better jobs but who have rejected the offers because they would lose their seniority under the employer's departmental seniority system present a different issue, but one that is not difficult for the court to resolve. As the Fifth Circuit stated in *Johnson v. Goodyear Tire & Rubber Co.*,[648] "Once it has been determined that blacks have been discriminatorily assigned to a particular department within a plant, departmental seniority cannot be utilized to freeze those black employees into a discriminatory caste."[649] Because the departmental seniority system originated as part of a discriminatory employment practice, the system was deemed violative of Title VII.[650] An employee who rejects such a transfer or promotion offer because accepting it would mean a loss of accrued seniority cannot be estopped from claiming back pay relief at a later date.[651] If the plaintiff presents evidence of this type of transfer or promotion offer, it will combine with the Stage I finding of a discriminatory seniority system and will constitute the plaintiff's Stage II prima facie case.

(b) Rejected Applicants

The *Franks* and *Teamsters* cases limit the burden on those applicants who, because of the defendant's discriminatory conduct, are unsuccessful in their attempts to gain employment. The plaintiffs in *Franks* were rejected nonemployee applicants. The Supreme Court dismissed the defendant's argument that since some rejected applicants might not have been victims of discrimination, insufficient evidence existed upon which to base seniority relief.[652] The Court stated that this lack of evidence was not a valid reason to deny seniority relief to the class and ruled that when individual claimants reapplied for the positions in question, the burden would

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648. 491 F.2d 1364 (5th Cir. 1974).

649. *Id.* at 1373; *see* Hairston v. McLean Trucking Co., 520 F.2d 226, 232 (4th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 223-24 (5th Cir. 1974).

650. 491 F.2d at 1373. *See generally* Johnson v. Ryder Truck Lines, 12 Fair Empl. Prac. Cas. (BNA) 895 (W.D.N.C. 1975).

651. In Johnson v. Ryder Truck Lines, 12 Fair Empl. Prac. Cas. (BNA) 895 (W.D.N.C. 1975), employees had the option to transfer to better positions if they would agree to forfeit all of their accrued seniority. One employee agreed to accept the transfer, but then changed his decision after consulting with his attorney and receiving advice that the seniority loss would be too great. *Id.* at 907.

652. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).

shift to the employer to show that a particular applicant was not entitled to seniority.[653] Thus, in this seniority case the burden on rejected applicants equalled the minimal burden placed on incumbents.[654] Although the Court in *Teamsters* was concerned with incumbent employees who were rejected for promotion, its language applies equally well to rejected applicants:

> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination.[655]

In view of *Franks* and *Teamsters,* rejected applicants apparently will only have to meet the same light standard as that confronting the incumbent employee[656] in order to make a prima facie case. The claimant's application for the position constitutes prima facie evidence of his interest in that job. The burden then falls on the defendant to rebut this prima facie showing.

(c) Nonapplicants

Teamsters constitutes the definitive case on the subject of back pay for employees who failed to apply for positions for which they were eligible.[657] The Court relied on its analysis in *Albemarle Paper Co. v. Moody*[658] as support for its interpretation of the purpose of Title VII.[659] The Court, viewing Title VII broadly as a "make whole" remedy designed to give the claimant the most complete relief possible, determined that the statute provided a remedy for even nonapplicants.[660] Accordingly, the Court did not require a claimant to have submitted an application that he knew would be rejected in order to be eligible for back pay under Title VII.[661] The Court in *Teamsters,* however, did place a different burden on this type of incumbent. The employer's practice standing

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653. *Id.*

654. *See id.*

655. International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977) (footnote omitted).

656. *See supra* notes 638-51 and accompanying text.

657. International Bhd. of Teamsters, 431 U.S. 324, 362-71 (1977).

658. 422 U.S. 405 (1975).

659. *See supra* notes 61-63 and accompanying text.

660. 431 U.S. at 365.

661. *Id.* at 367; *see* Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 150-51 (5th Cir. 1978); Hairston v. McLean Trucking Co., 520 F.2d 226, 231-32 (4th Cir. 1975); Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1263-64 (5th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977).

alone, although evidence that those desiring a job *may* have been deterred from applying for the promotion because of the certain rejection of his application, is not sufficient to meet the claimant's burden of proof. In order to establish a prima facie case each individual nonapplicant "must show that he was a potential victim of unlawful discrimination."[662] Thus, the Court required plaintiff to present the basic information that would be required in a job application[663] and attempt to introduce evidence of interest in the position despite the failure to apply.[664] Because of these proof requirements, the prima facie case for incumbent nonapplicants is slightly more burdensome than for applicants. The court places the burden of production upon incumbent nonapplicants because no documented proof exists that they truly desired the position in question. Accordingly, to carry the burden of proof, some evidence of the employee's desire must be introduced. The burden of persuasion to rebut the nonapplicant's testimony in Stage II, however, remains with the defendant.

IX. Computation of Back Pay Awards

A. *Methods of Computation*

The general formula for the computation of back pay gives the claimant an amount equal to the earnings that he would have received but for the unlawful discrimination,[665] less "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against."[666] In *Pettway v. American Cast*

662. 431 U.S. at 367. *Contra* EEOC v. Local 638, 532 F.2d 821, 832 (2d Cir. 1976).

663. 431 U.S. at 369 n.53.

664. "[T]he . . . Court may find evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire credible and convincing. The question is a factual one for determination by the trial judge." *Id.* at 371 n.58; *see also* Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 150-51 (5th Cir. 1978) (court may consider qualifications, costs, and benefits of transfer or promotion, potential sacrifice involved in loss of seniority).

665. The Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), recognized that in enacting Title VII Congress sought to make persons whole for injuries suffered as a result of unlawful employment discrimination and also that Congress provided for back pay as a means of achieving that "make whole" purpose. *Id.* at 418-19. Furthermore, the Court conducted a section-by-section analysis of the Equal Employment Opportunity Act of 1972, which included language to the effect that the purpose of Title VII " 'requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the discrimination.' " *Id.* at 421 (quoting 118 Cong. Rec. 7168 (1972)); *see also supra* notes 49-63 and accompanying text.

666. 42 U.S.C. § 2000e-5(g) (1976). Congress modeled the back pay provision in Title VII on a similar provision in the National Labor Relations Act, 29 U.S.C. § 160(c), which was designed to accomplish the purpose of the NLRA by making employees whole for loses

Iron Pipe Co.[667] the Fifth Circuit articulated two principles concerning the computation of a back pay award: unrealistic exactitude should not be required[668] and doubts about the actual amount of a claimant's award should be resolved against the discriminating employer.[669] The court also found that the method of computation of the award will vary depending on the complexity of the case.[670] The method chosen to determine the amount of back pay will be a function of the size of the class, the precision with which each claimant's position absent the discrimination can be determined, the actual effect of the discrimination, and the length of the time period involved.[671] In most instances, the element having the greatest influence on the selection of the method of computation will be the size of the class subject to employment discrimination.

1. Non-Class Action

Courts generally have less difficulty computing the measure of damages in cases concerning only an individual plaintiff than in the more complex class action suits. The purpose of the back pay award is to make the plaintiff whole for past injuries suffered as a result of the unlawful discrimination.[672] Thus, the back pay award, before adjustment, pays the individual claimant the amount he would have received but for the unlawful conduct.[673] Four common situations exist in which individuals bring actions seeking back pay: (1) the employer failed to hire the claimant for discriminatory

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suffered because of unfair labor practices. *See, e.g.*, Nathanson v. NLRB, 344 U.S. 25, 27 (1952); Willet v. Emory & Henry College, 427 F. Supp. 631, 636 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978). *See generally supra* notes 52-54 and accompanying text.

667. 494 F.2d 211 (5th Cir. 1974).

668. *Id.* at 260. The court in *Pettway* reaffirmed the principle it had stated in Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), a suit brought under the Equal Pay Act. The *Brennan* court discovered that the discriminatory wage structure of the employer created extreme difficulties in fashioning a remedy and that, as a result, the trial court should be required to compute only a just and reasonable amount of back wages. *Id.* at 242.

669. *Pettway*, 494 F.2d at 260-61. The *Pettway* court followed the approach it had taken in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974). In *Johnson* the court found that doubts about entitlement to back pay in Title VII cases should follow the NLRA model and be resolved against the employer. *Id.* at 1380.

670. *Pettway*, 494 F.2d at 261.

671. *Id.*

672. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); *see supra* note 665.

673. *E.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); Patterson v. Youngstown Sheet & Tube Co., 475 F. Supp. 344, 353 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S. Ct. 674 (1981).

reasons;[674] (2) the employer unlawfully paid the claimant less than another employee for performing the same tasks;[675] (3) the employer discriminatorily passed over the claimant for promotion;[676] or, (4) the employer wrongfully discharged the claimant.[677] The courts generally base awards in these cases on the earnings of the employees occupying the position the claimant would possess but for the discrimination.[678] Courts, however, cannot always make determinations of individual awards with mathematical precision because of the uncertainty inherent in promotions, salary increases, subjectively determined wage rates, and numerous other variables and special circumstances. Therefore, over time courts have utilized ever widening discretion in the methods they use to calculate the most fair and reasonable award possible.

In *Brown v. Rollins, Inc.*,[679] an action brought by a black female alleging racial employment discrimination, the court could not ascertain exactly the amount she would have received if her employer had not discriminated against her. The claimant, whom the employer unlawfully passed over for promotion to the position of sales girl, received damages based not on the earnings of those hired for the sales girl vacancy but, rather, on the earnings of the sales manager.[680] Because of the turnover of sales girls during the claimant's employ,[681] the court apparently felt the sales manager's earnings provided a more adequate basis from which to calculate back pay.[682] The gross amount of the award provided the claimant with eighty percent of what the sales manager earned or should have earned during the applicable period.[683] In justifying the result, the court stated that exactitude when computing back pay is not required and that any uncertainty in the determination of the

674. *E.g.*, Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101 (D. Conn. 1979), *aff'd in part, vacated in part, remanded*, 647 F.2d 256 (2d Cir. 1981).

675. *E.g.*, Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. La. 1980).

676. *E.g.*, Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980); Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981); Helbling v. Unclaimed Salvage & Freight Co., Inc., 489 F. Supp. 956 (E.D. Pa. 1980).

677. *E.g.*, Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).

678. *See, e.g.*, cases cited *supra* notes 674-77.

679. 397 F. Supp. 571 (W.D.N.C. 1974).

680. *Id.* at 579.

681. Within one year after the claimant expressed an interest in the position, the employer hired two white females with no greator qualifications to fill the position. *Id.* at 574-76.

682. *Id.* at 578.

683. *Id.* at 579.

award should be resolved against the employer.[684]

EEOC v. Kallir, Phillips, Ross, Inc.[685] offers another example of a court exercising a wide degree of discretion in computing a back pay award. The court in *Kallir, Phillips* found that the plaintiff, who successfully sued on grounds of wrongful termination, should receive back pay calculated to include estimates of salary increases.[686] The defendant argued that it granted pay raises solely on an individual basis and that, therefore, any award which included salary increases would be too speculative.[687] The court, however, responded that the injured party shall not be deprived of an adequate award merely because an employer's conduct has prevented an accurate computation of damages.[688] The court decided not to calculate back pay based on a comparison with an existing employee because the claimant's rapid and repeated advances in position and salary had resulted in her earning substantially more than other similarly situated employees.[689] Rather, the court chose to estimate the frequency and amount of salary increases she would have received but for the unlawful conduct and calculated the gross amount of her back pay on that basis.[690]

The courts' exercise of discretion in fashioning an individual award has gradually expanded to include consideration of circumstances peculiar to the claimant. In *Unger v. Consolidated Foods Corp.*,[691] an action brought by a female employee claiming unlawful discharge, the appellate court upheld the trial court's calculation of back pay based on the claimant's estimated average earnings for the period, taking into consideration her previous sales record, her subsequent sales efforts, and, most importantly, her intervening physical disabilities.[692] The claimant challenged the award, insisting that the court should have used her successor's sales record to estimate the award.[693] The Seventh Circuit affirmed

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684. *Id.*

685. 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

686. *Id.* at 923-24.

687. *Id.* at 923.

688. *Id.*

689. *Id.* at 924.

690. *Id.*

691. 657 F.2d 909 (7th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2288 (1982).

692. *Id.* at 918.

693. *Id.* The claimant's successor was not disabled and, therefore, generated more sales than the claimant during the back pay period. Consequently, the use of her successor's sales record as a benchmark to fashion relief would result in a larger back pay award than if the court used the claimant's own sales efforts.

the award finding no abuse of discretion in the district court's use of an estimate of the claimant's earnings because of the highly speculative and personal nature of her job.[694] The court recognized that because of the plaintiff's intervening physical infirmities, her work record, rather than that of her successor, presented the more accurate indicator of the true measure of damages.[695]

2. Small Class Action

In small class action suits, courts have advocated an individual-by-individual approach to the calculation of back pay because, without undue burden, they can make a relatively accurate determination of what each class member's position would have been absent the discrimination.[696] The Fifth Circuit adopted the individual approach in *Bing v. Roadway Express, Inc.*[697] because the facts of the case made computation of the award comparatively easy.[698] The *Bing* court found an individual approach more desirable than a class-wide award because all class members had been denied the same type of job, only three members of the class sought back pay on appeal, and variables such as the back pay period and back pay rate could be easily defined.[699] The court deemed an appropriate measure of damages to equal the amount the eligible claimant[700] would have made but for discrimination (calculated as the difference between the claimant's earnings and the earnings of an employee not subject to discrimination[701]), less interim earnings[702] and a reduction for a period during which the

694. *Id.* at 919.

695. *Id.*

696. *E.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 261 (5th Cir. 1974).

697. 485 F.2d 441 (5th Cir. 1973).

698. *Id.* at 452.

699. *Id.* at 452-53.

700. Only one member of the class of five black city truck drivers prevented from transferring to more lucrative positions as road drivers received a back pay award. *Id.*

701. The court remanded this portion of the case to the district court for calculation of the back pay award based on the difference between the earnings of a road driver and the claimant's actual earnings as a city driver from the date the claimant was first qualified for the job until the date of the trial. *Id.* at 453.

702. *Id.* at 453-54. The general measure of damages equals the amount the claimant would have earned absent the discrimination less interim earnings or other amounts earnable with reasonable diligence. *See supra* text accompanying notes 665-66. Interim earnings, in cases of unlawful discharge or failure to employ, are generally considered the amounts earned in alternative employment. As in the instant case, however, interim earnings may also include earnings from part-time jobs or moonlighting if the claimant would have been unable to engage concurrently in both the part-time or moonlighting job and the job discriminatorily denied him. *Bing*, 485 F.2d at 453-54.

claimant would have been laid off.[703] The Fifth Circuit cited the *Bing* decision with approval in *Pettway v. American Cast Iron Pipe Co.*[704] when it acknowledged its preference for the individual-by-individual approach when computing back pay in smaller, less complex class action suits.[705]

3. Large Class Action

The courts have adopted a wide variety of methods to determine back pay awards in large employment discrimination class action suits. Under these methods, courts treat the class members as a group whenever the enormity and complexity of the claims make individual evaluation impractical.[706] A class-wide approach to the computation of back pay avoids the ambiguities and "the quagmire of hypothetical judgments"[707] that arises when calculating complicated individual awards. The selection of an appropriate method is a decision for the trial court subject to correction if the court of appeals finds the selection so unreasonable that it amounts to an abuse of discretion.[708] Four popular approaches to class-wide computation of back pay are the averaging method, the approximation method utilizing a test period, the representative employee earnings formula, and the pro rata distribution method.

(a) Averaging Method

Courts utilizing the averaging method award back pay based on the difference between each class member's actual earnings and an average of the pay rates for employees in more highly skilled jobs. In *Stamps v. Detroit Edison Co.*,[709] an action brought by

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703. *Bing*, 485 F.2d at 453-55.

704. 494 F.2d 211 (5th Cir. 1974).

705. *Id.* at 261.

706. The courts generally agree that individual awards should be calculated in class action suits whenever possible, reasoning that an individual award will justly compensate the discriminatee without unduly penalizing the employer. *See supra* section VII(B); *see, e.g.*, Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 519 (8th Cir. 1980); Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); United States v. United States Steel Corp., 520 F.2d 1043, 1055 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

707. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974).

708. *E.g.*, Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); United States v. United States Steel Corp., 520 F.2d 1043, 1056 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1265 (5th Cir. 1975), *vacated & remanded on other grounds*, 431 U.S. 951 (1977).

709. 365 F. Supp. 87 (E.D. Mich. 1973), *aff'd in part, rev'd in part sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated & remanded on other grounds,*

black employees and the United States alleging racially discriminatory employment practices, the court awarded class members the difference between their earnings at low opportunity jobs and a figure representing the average of pay rates of employees in "high opportunity skilled trades jobs."[710] Ruling that the employer had discriminatorily denied employees economic advancement by blocking avenues to more highly skilled positions, the court sought to calculate a back pay award sufficient to restore claimants to the position they would have held but for the employer's discrimination.[711] After defining the class and ascertaining the length of the back pay period, the court ordered defendants to "pay each of the members of the affected class an amount equal to the average earnings of skilled trades high opportunity jobs . . . less the amount each member . . . actually earned."[712]

(b) Approximation Method Utilizing a Test Period

The approximation method utilizing a test period awards class members the difference between the pay they receive after the implementation of a Title VII decree and the pay they received while their employer's discriminatory policies remained in effect. The Seventh Circuit affirmed the use of the test period approach in *Bowe v. Colgate, Palmolive Co.*,[713] a suit brought by fifty-four female employees and former employees who charged defendant with practicing intentional, sex-based employment discrimination. The *Bowe* court chose to set the test period at a reasonable time *after* a preliminary injunction opened all jobs to class members.[714] According to the court, it intended the delay to allow the class members to exercise all their transfer and secondary department options within the company prior to the beginning of the test period.[715] The measure of damages equalled the difference between

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431 U.S. 951 (1977).

710. *Id.* at 121. The court found that the company employed only a small number of blacks in only a few jobs—janitors, building servicemen, utility servicemen, laborers, and stockmen. Although a few whites were found in these "low opportunity jobs," virtually no blacks were employed in the "high opportunity" positions. *Id.* at 91-92. The high opportunity jobs consisted of skilled trades jobs such as brickmason, carpenter, electrician, mechanic fitter, plumber, welder, cable splicer, and plant operator. *Id.* at 100. The court indicated that the starting pay for the lowest grade high opportunity job (construction) equalled the highest pay grade for low opportunity jobs. *Id.*

711. *Id.* at 119.

712. *Id.* at 120-121.

713. 489 F.2d 896 (7th Cir. 1973).

714. *Id.* at 902-03.

715. *Id.* at 903.

the claimant's earnings during the test period and her earnings between the date of the decree and the enactment of Title VII—during which Colgate, Palmolive had practiced its discriminatory policies.[716] The Seventh Circuit cautioned the trial court to schedule the test period long enough after the imposition of the injunction to ensure that the residual effects of the discrimination would be eliminated.[717] In addition, the court insisted that the back pay award include class members who were not employed during the scheduled test period,[718] and that appropriate adjustments be made to adequately compensate these former employees.[719]

Three years after its decision in *Bowe*, the Seventh Circuit approved a variation of the "test period" approach in *Stewart v. General Motors Corp.*[720] The question in *Stewart* was what measure to use in awarding back pay for an employer's racially motivated failure to promote black employees from hourly wage to salaried positions.[721] Although both the *Stewart* and *Bowe* decisions called their methods "test period" approaches, the two methods were quite dissimilar. The *Stewart* court suggested an analysis of a control group of white hourly employees that was comparable to the group of black employees which was denied advancement.[722] This analysis would trace the employment history of the white group during a test period to determine which members achieved salaried ranks and to what extent they received salary increases.[723] According to the Seventh Circuit, the trial court then could formulate an estimate of the increment in salary that defendant had denied the black employees during the relevant time period.[724] The

716. *Id.* at 902. The court rejected a proposed computation of back pay using the average earning rate of all male employees because such a computation would reflect the assumption that all females would have qualified for and would have chosen to perform the heaviest jobs as often and to the same extent as males. The court found this assumption to be inaccurate. *Id.* at 903.

717. *Id.* at 902.

718. The court wanted to ensure that those victims of the employer's discrimination who were no longer employed by Colgate, Palmolive nevertheless were adequately compensated for the injuries that they had suffered. *Id.* at 903. On its face, the test period method compensated only those employees who were still working for the company and who could exercise transfer and promotion opportunities.

719. *Id.* The court of appeals did not specify how the adjustments were to be made, but left this determination up to the trial court on remand.

720. 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

721. *Id.* at 453.

722. *Id.*

723. *Id.*

724. *Id.*

court stated that the resulting figure would "serve as a benchmark for computation of the actual award."[725] This method presented a retrospective use of the test period approach to compute damages. The *Stewart* court, apparently fearful that a prospective exercise of the test period would not compensate for the residual effects of discrimination, compared the employment histories of white and black employees prior to the institution of the action.[726] Such an approach differs dramatically from the *Bowe* attempt to gauge damages by evaluating a class member's achievements after the implementation of a Title VII decree.[727] In effect, the *Stewart* calculation more closely resembles the operation of the representative employee earnings formula.

(c) Representative Employee Earnings Formula

The representative employee earnings formula compares the claimants' earnings to the earnings of employees not subject to discrimination. The representative earnings formula differs from the averaging method in that the averaging method compares pay rates of occupations while the representative earnings formula compares the actual amounts earned by those provided employment and those discriminatorily treated. In *United States v. Wood, Wire & Metal Lathers International Union, Local 46*[728] the court adopted a comparison method to determine the back pay due black union permit holders discriminatorily denied work. The court determined that eligible claimants should receive the difference between the average earnings of white union members and permit holders, and the amount the claimant earned or, through reasonable efforts, could have earned.[729] According to the court, this comparison method provided a necessary balance: it avoided granting an unjust windfall to claimants at the union's expense, and, at the same time, it prevented excluding deserving claimants—those unable to meet the objective award eligibility criteria[730]—from receiving compensatory benefits.[731]

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725. *Id.*

726. *Id.*

727. Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973).

728. 328 F. Supp. 429 (S.D.N.Y. 1971).

729. *Id.* at 444-45.

730. In order to meet the "objective criteria," a claimant must prove "a sufficient investment of time and effort to show that he was ready, willing and available to take work on referrals" from the union. *Id.* at 443. The court found specifically that a claimant who has shaped a hiring hall for five or more days per month or shaped the hiring hall and/or worked a total of eight days or more per month would meet the objective criteria. *Id.* The

In *Sabala v. Western Gillette, Inc.*,[732] an action brought by black and Mexican-American truck drivers alleging discriminatory employment practices, the Fifth Circuit affirmed the use of a similar form of the representative employee earnings formula. The trial court in *Sabala* first selected a representative—or "reasonably prudent"—member of the group of employees not subject to discrimination and compared his average monthly earnings over the entire back pay period to those of a representative member of the plaintiff class.[733] The court then calculated the gross earnings due a class member by taking his earnings during the back pay period and multiplying that figure by the ratio derived from the above comparison.[734] As a final step in the formula, the court reduced the gross earnings by ten percent for necessary expenses that would have been incurred had the discriminatee been promoted, and also by the amount of any interim earnings.[735]

(d) Pro Rata Distribution Method

When using the pro rata approach, courts calculate the back pay award for the entire class of discriminatorily treated claimants and then distribute the award in pro rata shares.[736] Courts calculating damages for a large number of employees unlawfully denied promotion favor this method because it eliminates the need for an actual determination of which qualified class members would have

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court noted that a claimant need not meet these objective criteria for every month of a period for which the claimant seeks a back pay award if he can prove that other circumstances, such as reports from other persons, observations in the hiring hall, or reports from union representatives, led the claimant to believe job or referral opportunities were so scarce that he would be better off seeking employment elsewhere. *Id.* at 443-44.

731. *Id.* at 443.

732. 516 F.2d 1251 (5th Cir. 1975), *vacated & remanded on other grounds*, 431 U.S. 951 (1977).

733. *Id.* at 1265.

734. As a fraction, the numerator would equal the average earnings of a "reasonably prudent" employee not subject to discrimination, and the denominator would equal the average earnings of a "reasonably prudent" member of the class subject to discrimination.

735. *Sabala*, 516 F.2d at 1265.

736. Early recognition of this method of distribution for use in Title VII class actions came in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 n.154 (5th Cir. 1974). The court briefly described the distribution method as follows:

> [T]he total award for the entire class would be determined. At that point, individual claims would be calculated on *pro rata* shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination.

Id. at 263 n.154.

been promoted but for the discrimination.[737]

The Fifth Circuit strongly recommended use of the pro rata method in *United States v. United States Steel Corp.*,[738] after the class members had successfully shown that the steel manufacturer had discriminatorily denied them access to promotion vacancies for racial reasons.[739] Using this method, the court determined that the amount of the total award for the class should equal the largest loss suffered by a qualified class member multiplied by the number of job vacancies.[740] The court calculated the largest loss as the difference between the earnings of the employee filling the vacancy and the qualified class member with the lowest yearly earnings.[741] To compute individual awards, the court then employed a linear progression formula with the result that the class member who had received the lowest earnings obtained the largest portion of the back pay award.[742]

In *Hameed v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 396*,[743] an action in which the defendant union unlawfully denied black employees access to an apprenticeship program, the Seventh Circuit adopted an alternative pro rata distribution approach. The *Hameed* court estimated the number of blacks that would have filled the existing apprenticeship vacancies in a given year by assuming that under a nondiscriminatory selection process the union would have admitted blacks in roughly the same proportion as whites.[744] Comparing the number of black and white qualified applicants and the actual

737. *See* Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506 (8th Cir. 1980); United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

738. 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

739. *Id.* at 1055-56.

740. *Id.* at 1056.

741. *Id.*

742. *Id.* The court suggested the following example:

> [I]f during a given period white A, with less plant seniority, occupied a job at which he earned $15,000, but blacks B, C, D, E, and F, with respective earnings in lower jobs of $10,000, $11,000, $12,000, $13,000, and $14,000, each were equally capable and substantially equal in superior plant seniority, than [sic] their pro rata recoveries for the period could be computed as follows: $5x + 4x + 3x + 2x + x = \$5000$ [$5000 representing the largest loss suffered by a group member and, therefore, the amount of the class wide recovery]. The variable, x, comes to roughly $333. Thus, B, whose hypothetical loss is five times greater than F's, recovers about $1,665; C recovers $1,332; D takes $999; E recovers $666; while F, who suffers the least economic injury, recovers $333.

Id.

743. 637 F.2d 506 (8th Cir. 1980).

744. *Id.* at 520.

number of apprentices taken, the court determined the number of blacks unlawfully denied admission.[745] The court then chose that same number of white apprentices, computed their aggregate earnings during the back pay period, and subtracted from the aggregate figure the income of the same number of randomly selected black class members.[746] The court concluded that this amount constituted the entire award for the class for the year in question and distributed it in pro rata shares to all the class members.[747] The *Hameed* method appears to be a more flexible approach than the one suggested in *United States Steel* because the court can readily adapt it to fit any number of job vacancies and class members. The *United States Steel* approach, on the contrary, is best suited for cases in which only one job opening was improperly filled[748] and can become very complex when the case concerns more than one vacancy.[749] The *Hameed* court also simplified the computation process by making no mention of distribution based on earnings—apparently each member of the class under the *Hameed* ap-

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745. *Id.*

746. *Id.* at 521.

747. *Id.* The court's formula appears as follows:

$$\frac{\text{Black Applicants}}{\text{Total Applicants}} \times \left(\begin{array}{c}\text{Apprentice positions}\\ \text{available and filled}\end{array}\right) - \left(\begin{array}{c}\text{Number of blacks}\\ \text{admitted that year}\end{array}\right) = \left(\begin{array}{c}\text{Number of blacks discriminatorily}\\ \text{denied admission to the program}\end{array}\right)$$

As an example, the court worked through the formula using 1969 figures. In 1969, 10 blacks and 40 whites applied to the apprenticeship program. The union, however, used only white applicants to fill the 15 available positions. Using the formula, the court reached the following result:

$$\left(\frac{10}{50} \times 15\right) - 0 = 3$$

The court then chose three whito applicants selected to the program and compared their earnings to those of three randomly selected members of the class. The difference in earnings between the two groups represented the class-wide relief for that particular year. *Id.* at 520-21.

748. United States v. United States Steel Corp., 520 F.2d 1043, 1055-56 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976).

749. *Id.* at 1056. The distribution approach suggested in *United States Steel* utilizes a linear progression formula—a formula not easily adaptable to a situation involving more than one job vacancy and numerous job applicants. *Id.; see supra* note 742. The formula suggested in Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 520-21 (8th Cir. 1980), is adaptable to any number of openings and applicants because it does not attempt to make allowances for salary differentials among the members of the class discriminatorily denied promotion. *See supra* notes 744-47 and accompanying text.

proach receives an equal share of the award.[750]

(e) Individual-by-Individual Computation

Although many, if not most, courts utilize a class-wide approach to compute back pay in large, complex class action suits,[751] the class-wide method has not received universal acceptance. For example, in *Kyriazi v. Western Electric Co.*,[752] a sex discrimination class action brought by approximately ten thousand class members, the court rejected as inappropriate any class-wide methods of calculating back pay. The court found that male and female employees with comparable skills entering the workforce at Western Electric would have dramatically different employment histories because discrimination could have manifested itself in a variety of different ways.[753] Recognizing that any class-wide computation approach would not yield an exact measure of damages, the court insisted on the adoption of an individual-by-individual approach.[754] This approach, the court reasoned, would provide the best means for making the injured claimants whole.[755] Although the court recognized that even this individual consideration did not ensure precision, it stated that this method of computation is "no more imprecise than lumping claimants into groups and extracting averages, or otherwise depersonalizing victims of discrimination by running them through a mathematical blender."[756] The court further acknowledged the employer's objection to the use of any class-wide formula to calculate back pay and concluded that, in light of the objection, due process considerations may require that any award fashioned against the employer be on the merits of each individual's case.[757] The court then selected three special masters to reconstruct the individual work histories of all ten thousand class members, make evaluations based

750. Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396, 637 F.2d 506, 520 (8th Cir. 1980).

751. *See supra* text accompanying note 706.

752. 465 F. Supp. 1141 (D.N.J. 1979), *aff'd*, 647 F.2d 388 (3d Cir. 1981).

753. *Id.* at 1145-46. The court hypothesized that during a ten-year period, a woman might have been passed over for promotion, denied entry into training programs, and, because she was thereby locked into low job categories, laid off first notwithstanding her seniority. A male during the same period would have started at a higher pay grade, been promoted several times, and avoided layoffs because of his promotions. *Id.*

754. *Id.* at 1146.

755. *Id.*

756. *Id.*

757. *Id.*

on background, education, work potential, and abilities of all the claimants, and award back pay accordingly.[758]

B. Elements Includable

When it considered the remedial provisions of Title VII, Congress in all likelihood recognized that most job applicants, in choosing among job alternatives, consider the entire compensation package.[759] Thus, in order to achieve its "make whole" purpose, the back pay award must compensate discriminatees not only for lost earnings but also for such items as lost salary supplements, fringe benefits, and sick pay.[760] In accordance with Congress' mandate that the award place victims of discrimination in the position they would have occupied but for the unlawful conduct,[761] courts have held that the denial of full employment benefits frustrates the "make whole" purpose of the remedial provisions of the employment discrimination laws,[762] and at least one commentator has indicated that such denial circumvents Congress' legislative intent.[763] Thus, when calculating the total amount of a back pay award, courts have found claimants entitled to more than straight salary and have compensated them for lost salary supplements and fringe benefits, and have also awarded prejudgment interest for the unlawful withholding of their earnings.[764]

1. Salary Supplements

Courts have often included supplements to the straight salary of discriminatees when calculating back pay awards. In order to make claimants whole for their economic losses, courts have included estimates of overtime pay,[765] estimates of tips,[766] allowances

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758. *Id.* at 1147.

759. Comment, *supra* note 75, at 396.

760. *Id.*

761. *See supra* notes 665, 672 and accompanying text.

762. *E.g.*, Willett v. Emory & Henry College, 427 F. Supp. 631, 635 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978).

763. *See* Comment, *supra* note 75.

764. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); Willett v. Emory & Henry College, 427 F. Supp. 631, 635 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978).

765. *E.g.*, Falcon v. General Tel. Co., 463 F. Supp. 315, 316 (N.D. Tex. 1978), *aff'd in part, remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated & remanded on other grounds*, 450 U.S. 1036 (1981); Willett v. Emory & Henry College, 427 F. Supp. 631, 635 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978).

766. Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423, 426 (D. Colo. 1976).

for shift differentials,[767] and retribution for "loss of job security."[768] Courts also will generally account for any across the board pay increases.[769] Some courts will even attempt to approximate salary increases,[770] while other courts reject such compensation as entirely too speculative.[771]

2. Fringe Benefits

Courts have included a wide array of fringe benefits in the computation of back pay. Thus, courts have awarded monetary adjustments for vacation time,[772] contributions to pension plans,[773] and contributions to profit-sharing programs.[774] Additional adjustments have included increments for sick pay[775] and sick leave.[776] Some courts have further compensated claimants for contributions to life insurance policies[777] and medical insurance programs[778] and

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767. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); Willett v. Emory & Henry College, 427 F. Supp. 631, 635 (W.D. Va. 1977), *aff'd*, 569 F.2d 212 (4th Cir. 1978).

768. Falcon v. General Tel. Co., 463 F. Supp. 315, 316 (N.D. Tex. 1978), *aff'd in part, remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated & remanded on other grounds*, 450 U.S. 1036 (1981).

769. Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), *aff'd in part, vacated & remanded on other grounds*, 434 U.S. 136 (1977).

770. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

771. Falcon v. General Tel. Co., 463 F. Supp. 315, 316 (N.D. Tex. 1978) (recognizing the difficulty of ascertaining damages with any degree of exactitude, the court rejected inclusion of potential promotions in the award), *aff'd in part, remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated & remanded on other grounds*, 450 U.S. 1036 (1981).

772. *E.g.*, Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973).

773. *E.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Sage Roalty Corp., 507 F. Supp. 599, 613 (S.D.N.Y. 1981); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

774. *E.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

775. Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973); *see infra* note 776.

776. Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), *aff'd in part, vacated & remanded on other grounds*, 434 U.S. 136 (1977). Although the *Satty* court refers to "sick leave," *id.*, and the court in *Bowe* mentions "sick pay," Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973), the courts apparently are referring to the same loss of benefits.

777. *E.g.*, Vant Hul v. City of Dell Rapids, 465 F. Supp. 1231, 1233 (D.S.D. 1979); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423, 426 (D. Colo. 1976).

778. *E.g.*, Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 951 (D. Colo. 1979); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

for certain medical expenses they have incurred.[779]

3. Prejudgment Interest

Although Title VII does not mention the inclusion of prejudgment interest in a back pay award, Congress designed the statute to compensate individuals for tangible economic loss from unlawful employment practices.[780] As a result, awards of back pay have tended to include prejudgment interest as part of the just compensation due an injured party.[781] Originally, courts rationalized granting interest by drawing an analogy to back pay awards in other employment cases.[782] Recently, however, courts have justified interest payments because of rampant inflation and long delays caused by court congestion, lack of judicial personnel, and dilatory tactics of counsel.[783] These circumstances, combined with the deterrent and "make whole" purposes of the legislation and with the recognition that the defendants have had the use of the money in question,[784] have lead the courts to grant varying amounts of interest as a part of the back pay award.[785] Nevertheless, the decision to award prejudgment interest remains within the discretion of the trial court,[786] and grants of prejudgment interest have not received universal acceptance. Some courts, exercising their discretion, have simply found interest unwarranted.[787] Courts traditionally have found prejudgment interest unavailable in suits against the federal

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779. *E.g.*, cases cited *supra* note 778; Culp v. American General Transp. Corp., 8 Fair Empl. Prac. Cas. (BNA) 460, 467 (N.D. Ohio 1974).

780. Chastang v. Flynn & Emrich Co., 381 F. Supp. 1348, 1352 (D. Md. 1974), *aff'd*, 541 F.2d 1040 (4th Cir. 1977).

781. Howard v. Ward County, 418 F. Supp. 494, 506 (D.N.D. 1976) (interest serves in part to compensate for the present value of past due sums); EEOC v. Local 2P Lithographers & Photoengravers Int'l Union, 412 F. Supp. 530, 543 (D. Md. 1976) (interest is part of just compensation for the tangible economic loss).

782. *See, e.g.*, Howard v. Ward County, 418 F. Supp. 494, 506 (D.N.D. 1976) (analogy made to an award of prejudgment interest in a Fair Labor Standards Act decision); Chastang v. Flynn & Emrich Co., 381 F. Supp. 1348, 1352 (D. Md. 1974), *aff'd*, 541 F.2d 1040 (4th Cir. 1977) (analogy to NLRA cases).

783. Patterson v. Youngstown Sheet & Tube Co., 475 F. Supp. 344, 355 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S. Ct. 674 (1981).

784. *Id.*

785. Courts have generally awarded interest at annual rates of between 6% and 8%. *See* cases cited *supra* notes 780-83.

786. Taylor v. Philips Indus., Inc., 593 F.2d 783, 787 (7th Cir. 1979); Patterson v. Youngstown Sheet & Tube Co., 475 F. Supp. 344, 355 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S. Ct. 674 (1981).

787. *E.g.*, Unger v. Consolidated Foods Corp., 657 F.2d 909, 919 (7th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2288 (1982).

government absent an express provision to the contrary in the relevant statute.[788] Consequently, since Title VII does not provide for prejudgment interest in its remedial provisions, courts have declined to award interest in Title VII actions brought against the federal government.[789]

C. *Elements Deductible*

After totaling the elements includable when computing the gross back pay award, the trial court must then determine whether facts exist that justify a decrease in the plaintiff's ultimate recovery. The trial court possesses great discretion in identifying the elements that should be deducted from the gross back pay award.[790] This discretion—which is frequently the sole justification for upholding a challenged deduction on appeal[791]—is founded on the intent of the drafters of Title VII to vest the courts with broad remedial authority thoroughly to compensate the victims of unlawful employment discrimination.[792]

Although the language of Title VII stipulates that "[i]nterim earnings or amounts earnable with reasonable diligence . . . shall operate to reduce . . . back pay,"[793] many of the elements deductible evolved exclusively from judicial attempts to fashion equitable compensation. Because the courts fail to agree on which elements are deductible from the back pay award, compensation provided pursuant to Title VII can vary greatly from circuit to circuit. This section of the Special Project identifies the various circumstances

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788. *E.g.*, Blake v. Califano, 626 F.2d 891, 893 (D.C. Cir. 1980); Nitterright v. Claytor, 454 F. Supp. 130, 140 (D.D.C. 1978).

789. *E.g.*, Blake v. Califano, 626 F.2d 891, 893 (D.C. Cir. 1980).

790. Senator Williams, discussing § 2000e-5(g), stated that "[t]he provisions of this subsection are intended to give the courts wide discretion exercising their equitable power to fashion the most complete relief possible." 118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, submitted by Sen. Williams). *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

791. *See, e.g.*, Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981); Higgins v. Harding, 644 F.2d 1348 (9th Cir. 1981); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir. 1976).

792. *See supra* note 790. "[T]he Act . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis of H.R. 7146, the Equal Employment Opportunity Act of 1972, submitted by Sen. Williams); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 923 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203, *cert. denied*, 434 U.S. 920 (1977).

793. 42 U.S.C. § 2000e-5(g) (1976); *see infra* notes 840-83 and accompanying text.

that have prompted courts to decrease gross back pay awards to successful employment discrimination plaintiffs. In addition, with respect to those elements about which the circuits disagree, this section proposes an approach to the question of deductibility designed to accomplish the remedial purposes of the employment discrimination laws.[794]

1. Unemployment Compensation

Reduction of awards by the amount of unemployment compensation received by plaintiffs is the most disputed deduction issue in the computation of back pay.[795] Although many commentators cite persuasive Supreme Court pronouncements which tend to suggest that the deduction is improper,[796] a number of circuits continue to uphold the deduction as a valid exercise of trial court discretion.[797] The ultimate determinations apparently rest on arbi-

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794. The goals of Title VII are to eliminate employment discrimination and to make whole its victims. *See supra* notes 60-63 and accompanying text. In addition to cases under Title VII and 42 U.S.C. § 1981, this section of the Special Project occasionally refers to cases brought under the National Labor Relations Act, 29 U.S.C. §§ 151-197 (1976 & Supp. IV 1980), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980). Decisions interpreting the NLRA are particularly pertinent when considering Title VII cases because Congress modeled the Title VII back pay provisions after similar provisions in the NLRA. *See* Albemarle Paper Co. v. Moody, 442 U.S. 405 (1975); *supra* notes 52-58 and accompanying text. For a valuable discussion on the relationship between the two acts, see Davidson, *supra* note 58. *See also* Youngdahl, *Deducting Employment Compensation From Back Pay: Erosion of a Rational Policy*, 28 LABOR L.J. 587, 590 (1977); Note, *Of Storks and Foxes: Employment Testing and Back Pay*, 34 MD. L. REV. 383, 392 n.44 (1974).

795. The term "unemployment compensation" refers to funds gathered by the states through various forms of employer taxation and ultimately distributed to discharged workers. While the discussion about deductions from back pay generally is applicable to all forms of public assistance, the employer contributions to the unemployment compensation fund make it the most likely form of compensatory payments that should reduce the plaintiff's award. Some commentators conclude that by the time a plaintiff wins a judgment, this indirect distribution of employers' funds will have made the plaintiff at least partially whole at the employer's expense. *See* Davidson, *supra* note 55, at 768-69; Comment, *supra* note 75, at 398. At least one commentator, however, has characterized the monies distributed under the state compensatory programs not as direct employer contributions but merely as "public funds derived from a tax levy and earmarked for specific social uses." Gray, *Back Pay and Unemployment Insurance Benefits*, 8 ARB. J. 114, 114 (1953). Under this argument, reducing a plaintiff's back pay award by the amount of unemployment compensation received creates a windfall for the discriminating employer who clearly was not an intended beneficiary of the compensatory distribution. *See* Gross, *Remedies in Discrimination Cases*, 29 N.Y.U. ANN. CONF. ON LAB. 129, 139 (1976); Youngdahl, *supra* note 794, at 587-90.

796. *See, e.g.*, authorities cited *supra* note 795 (referring to the holding in NLRB v. Gullett Gin Co., 340 U.S. 361 (1951)); *infra* notes 799-803 and accompanying text.

797. *See* cases cited *supra* note 791; *infra* notes 811-18 and accompanying text. The federal appellate courts give such broad deference to the trial courts' discretion in this area

trary characterizations of the unemployment payments as either collateral benefits or direct employer-generated compensation.[798]

In *NLRB v. Gullett Gin Co.*[799] the Supreme Court unanimously upheld the authority of the NLRB to refuse to decrease a back pay award by the amount of unemployment compensation received by the plaintiff. Having previously concluded that the payments were not deductible as interim earnings,[800] the Court rejected the defendant's contention that since state unemployment funds were derived from taxes paid by the employer, they represented a direct payment from the employer to the employee.[801] More importantly, the Court reasoned that the refusal to deduct this "collateral benefit" would not overcompensate an aggrieved employee.[802] Since "no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings," the Court stated that, "manifestly no consideration need be given to collateral benefits which employees may have received."[803]

A minority of courts find the *Gullett Gin* rationale persuasive in Title VII employment discrimination cases.[804] For example, the

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that circuits without a clearly defined rule concerning items properly deductible could uphold almost any trial court decision on this issue.

798. Payments made to an injured party by one other than the person who caused the injury are said to be "collateral benefits," and the sources of such payments thus are termed "collateral sources." Although these payments may compensate the victim for his injury, collateral benefits, as a matter of common law, do not reduce a wrongful actor's financial obligation to the injured party. *See generally* RESTATEMENT (SECOND) OF TORTS § 920A(b) (1979); 22 AM. JUR. 2D *Damages* §§ 206-211 (1965).

799. 340 U.S. 361 (1951).

800. *See* Marshall Field & Co. v. Labor Bd., 318 U.S. 253 (1943).

801. NLRB v. Gullett Gin Co., 340 U.S. at 364; *see supra* note 795. The Court rejected the defendant's "direct payment" argument by pointing out that the unemployment compensation program was intended to "carry out a policy of social betterment for the benefit of the entire state" rather than to discharge any liability or obligation of the recipient's former employer. 340 U.S. at 364.

802. 340 U.S. at 365.

803. *Id.* (emphasis in original). A collateral loss occurs, for example, when, during the period he is without wages, a striking employee is unable to make his payments on goods purchased on credit, with the result that he must forfeit his equity when the seller repossesses the goods. *See* Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir. 1967). The collateral source rule, which prevents reduction of a plaintiff's damage award in a civil action by other compensatory payments such as insurance, is well grounded in tort law. *See* RESTATEMENT (SECOND) OF TORTS § 920A(b) (1979).

804. Several courts also have adopted the rationale in cases brought under the ADEA. *See, e.g.*, EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978); Bishop v. Jelleff Assocs., 398 F. Supp. 579 (D.D.C. 1974); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

Fourth Circuit recently called the reasoning of *Gullett Gin* "particularly convincing" when it refused to deduct unemployment payments from the back pay granted a plaintiff in a sex discrimination case.[805] Any other result, the court claimed, would "undercut to some degree the corrective force of a Title VII back pay award."[806] Other courts decline to deduct unemployment benefits from gross back pay because the awards are intended to promote a social policy beyond simply requiring the employer to "make whole" the victim of its discrimination—the awards also serve to deter employers from committing future acts of discrimination.[807] Seeking to promote this goal of deterring discrimination, these courts are unwilling to permit discriminating employers to benefit from a windfall reduction in their back pay liability.[808] Furthermore, at least one court refused to deduct the unemployment payments because a state statute required the successful plaintiff to repay the unemployment benefits from the proceeds of the back pay award.[809] In other cases, the trial court's refusal to deduct unemployment payments has been justified as simply a legitimate exercise of the trial court's broad discretion.[810]

Despite these arguments, a majority of courts favor reducing back pay awards by the amount of unemployment compensation benefits received by the plaintiff. These courts often impose the deduction without explanation[811] and their action has been upheld

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805. EEOC v. Ford Motor Co., 645 F.2d 183 (4th Cir. 1981). The court earlier had implied in dicta that the payments were not deductible. Florence Printing Co. v. NLRB, 376 F.2d 216 (4th Cir. 1967).

806. EEOC v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981). The court also expressed support for the "independent social purpose" justification for refusing to deduct the payments.

807. *See supra* notes 60-63 and accompanying text.

808. *See* EEOC v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981); Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095 (D. Md. 1977); Inda v. United Air Lines, 405 F. Supp. 426 (N.D. Cal. 1975); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971).

809. *See* Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979); Colorado Employment Security Act, COLO. REV. STAT. § 8-73-110(2) (1973).

810. *See, e.g.*, Helbling v. Unclaimed Salvage & Freight Co., 469 F. Supp. 956 (E.D. Pa. 1980). Although the Ninth Circuit in Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981), recently upheld a trial court's discretionary refusal to deduct unemployment payments on these grounds, dicta in the opinion suggests that the circuit might reject a similar refusal based solely on the collateral source rationale. The court stated, "In most cases, application of the collateral source rule is not necessary to assure a full recovery for the injured party; rather, it allows a 'windfall' to be enjoyed by the injured party rather than by the wrongdoer." *Id.* at 700.

811. *See, e.g.*, Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (N.D. Cal. 1978); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 923 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); Diaz v. Pan American World Airways, Inc.,

on appeal as a valid exercise of discretion.[812] The courts offering a justification for the deduction usually claim that it ensures that the plaintiff will not be made "more than whole."[813] In one notable exception, however, a California court adopted a different approach when it required a successful plaintiff to repay to the state the unemployment benefits she had received prior to judgment, even though no state statute specifically required that she do so.[814]

Courts deducting the unemployment payments from back pay awards have offered justifications that are unpersuasive. Since the Supreme Court rejected the "double recovery" argument concerning back pay awards for victims of unfair labor practices in *Gullett Gin*,[815] the decision regarding unemployment benefits in Title VII actions ultimately must rest on equitable grounds. Courts, therefore, must determine which party should benefit from the states' attempts to ease the burdens imposed on discharged employees. Courts should choose to enhance the deterrent goal of the antidiscrimination legislation by refusing to diminish the back pay liability of former employers by the amount of unemployment compensation. Especially in situations in which the discriminatorily discharged plaintiff worked for a low wage, the deduction of unemployment benefits from the back pay award would cause a near-total elimination of the employer's financial obligation to the employee, and would not further Title VII's goal of eliminating discrimination.[816] Instead, the employer would have little incentive to

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346 F. Supp. 1301 (S.D. Fla. 1972).

812. *See* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 160 (7th Cir. 1981); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir. 1976); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *aff'd in part, vacated & remanded on other grounds*, 434 U.S. 136 (1977).

813. *See, e.g.*, Merriweather v. Hercules, Inc., 631 F.2d 1161 (5th Cir. 1980); *see also* EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 591 (2d Cir. 1976) ("we are not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole"), *cert. denied*, 430 U.S. 911 (1977).

814. EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979). A California statute required successful claimants who received back pay awards under orders from the California Unemployment Insurance Appeals Board to return to the state unemployment benefits received prior to judgment. Even though no similar statute compelled repayment by a successful Title VII plaintiff, the court reduced the plaintiff's net back pay award accordingly because of the "limited nature of the public fisc and the demands placed upon it by increasing unemployment." *Id.* at 1319. Inherent in this argument is the assumption that victims of unlawful employment discrimination should not be made "more than whole." *See supra* note 813 and accompanying text.

815. *See supra* notes 799-803 and accompanying text.

816. *See supra* note 794.

comply with the fair treatment provisions of the Act.[817] If any party should benefit from a "windfall" provided by unemployment compensation, it ought to be the innocent victim of unlawful employment discrimination.[818]

2. Moonlighting Income

Despite Title VII's direction that interim earnings be deducted from back pay awards,[819] trial courts generally will not deduct amounts earned in a part-time job that the plaintiff could have held concurrently with the position he was discriminatorily denied.[820] The Fifth Circuit in *Horton v. Lawrence County Board of Education*[821] stated succinctly the purpose behind the rule:

> While it is true that payment of back wages must be diminished by earnings received during the interim period (the period between the discrimination and judgment), the whole purpose of equitable restoration would be frustrated by deducting compensation obtained from a second unrelated job which a litigant could have held even if he had not suffered from illegal discrimination.[822]

A good general rule regarding interim wages might be to deduct the plaintiff's interim earnings if the performance of either the interim job or the originally denied position would preclude performance of the other.[823] Obviously, if the plaintiff held both jobs concurrently before his unlawful discharge from one position, then he has proven that their dual performance was possible.[824] The number of hours worked in the interim position, however, apparently is not conclusive on this issue because at least one court has refused

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817. An employer could also avoid even the costs of litigating his liability by admitting his guilt. In this situation the discriminatory practice would result in little—if any—financial responsibility for the employer.

818. This argument assumes that the jurisdiction has no law requiring a successful Title VII plaintiff to repay unemployment benefits received prior to judgment. *See supra* text accompanying note 809. This statutory repayment requirement may be the best scheme by which to prevent any party from becoming unjustly enriched while still adhering to the standards enunciated in NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).

819. *See supra* text accompanying note 793.

820. *See, e.g.*, Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Thornton v. East Tex. Motor Freight, 497 F.2d 416 (6th Cir. 1974); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966); Schwartz v. State, 494 F. Supp. 574 (N.D. Fla. 1980); Butta v. Anne Arundel County, 473 F. Supp. 83 (D. Md. 1979). These courts do not require the plaintiff actually to have held the part-time job concurrently with the job from which he was discharged; rather, they refuse to deduct moonlighting income if the jobs could have been held concurrently.

821. 449 F.2d 793 (5th Cir. 1971).

822. *Id.* at 795.

823. *See* Bing v. Roadway Express, Inc., 485 F.2d 441, 453-54 (5th Cir. 1973).

824. *See* Somers v. Aldine Indep. School Dist., 464 F. Supp. 900 (S.D. Tex. 1979).

to deduct interim wages earned at a full-time job.[825]

3. Plaintiff's History of Absenteeism

Some courts reduce a back pay award based on the plaintiff's record of absenteeism. This deduction finds sound precedent in cases interpreting the remedial provisions of the NLRA.[826] The actual computation of the deduction presents a question of fact for the trial court and, thus, rarely is disturbed on appeal.[827] Courts usually calculate the percentage of time the plaintiff missed work before the back pay period and then reduce the gross award by the same percentage.[828] The employee's entire work history, however, need not receive equal weight in the formula. The Seventh Circuit, for example, recently concluded that a trial court had not abused its discretion by weighing a plaintiff's most recent rate of absenteeism more heavily than his absence rate during earlier employment periods.[829] Any deduction for absenteeism, however, would be improper when the gross award for a nonsalaried worker is computed on the basis of his average earnings prior to his discriminatory discharge.[830]

4. Severance Pay

Generally, courts deduct from the gross back pay award any amount—other than already-earned wages—rendered to the employee at the time of his discharge. One court reasoned that because severance pay went directly from the employer to the employee, it must he deducted from the hack pay award, and should not be considered as within the collateral source rule.[831] The pay-

825. Falls Stamping & Welding Co. v. International Union, United Auto., Aircraft & Agricultural Implement Workers, 485 F. Supp. 1097 (N.D. Ohio 1979). Since whether the holding of one job would preclude the plaintiff from working at another constitutes a question of fact, the court required proof that even a full-time job could not have been held concurrently with the discriminatorily denied position. The court cited as relevant to the determination the hours plaintiff worked at each job and whether the plaintiff had held more than one job prior to the defendant's discrimination. *Id.* at 1103.

826. *See, e.g.*, NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14 (6th Cir. 1974); M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 68 n.122 (1981).

827. Merriweather v. Hercules, Inc., 631 F.2d 1161 (5th Cir. 1980).

828. *See, e.g.*, Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 161 (7th Cir. 1981).

829. *Id.* at 161 n.15.

830. *See* NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14, 15 (6th Cir. 1974). Without this rule a plaintiff would not be "made whole" since his absenteeism would have reduced his back pay award twice—once in determining the gross award and again as a separate deduction.

831. EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980). *See supra* note 803 and

ments are deductible only if they were occasioned by the plaintiff's termination.[832] If the plaintiff would have received the money had he remained in the defendant's employ, the court should not deduct the severance pay from the back pay award.[833] The trial court's discretion to deduct severance pay is apparently not affected by the later reinstatement of the discriminatorily discharged plaintiff.[834]

5. Miscellaneous Deductions

In a few cases courts have reduced the gross back pay awards by deducting the amount the defendants would have withheld from plaintiffs' earnings had the plaintiffs not been discharged. Although courts sometimes fail to explain the reasons for their miscellaneous deductions,[835] these deductions usually include local and federal taxes traditionally withheld from the employees' wages.[836] One court reduced the award by the amount already received by the plaintiff in an out-of-court arbitration award.[837] Other items, however, including union strike benefits[838] and expenses the plaintiff would have incurred had he not been discharged,[839] are sometimes found not deductible.

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accompanying text for a discussion of the collateral source rule.

832. Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977).

833. *Id.*

834. In EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979), the court stated that when the employee is later reinstated, "a credit for severance pay is clearly necessary to prevent an inequitable double recovery by the discriminatee." *Id.* at 1318; *cf.* Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978) (back pay award reduced by severance pay received even though plaintiff not reinstated).

835. *See* Jackson v. City of Akron, 411 F. Supp. 680 (N.D. Ohio 1976). In an action brought under 42 U.S.C. § 1981 the court simply stated that it had reduced the back pay by "all deductions defendants were required to make." *Id.* at 690.

836. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979) (the "make whole" nature of the back pay remedy justified a deduction for local, state, and federal income taxes and social security tax); NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir. 1974) (award reduced by all federal and state taxes employer would have withheld).

837. Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973). The court concluded that accepting the arbitration award constituted a *pro tanto* satisfaction of the plaintiff's damage claim. *Id.* at 574.

838. Florence Printing Co. v. NLRB, 376 F.2d 216, 219-20 (4th Cir. 1967). The court specifically noted that the strike benefits were not compensation for the time the strikers spent on union picket lines; the benefits, therefore, were not deductible interim earnings.

839. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979). In *Lee Way Motor Freight* the defendant argued that the plaintiffs would have incurred expenses equal to 20% of their salary had they been promoted to the position of "road driver." The Tenth Circuit upheld the trial court's refusal to reduce the back pay award by 20% based on a lack of evidence introduced at trial and the arbitrary nature of the defen-

D. *Mitigation of Damages: Interim Earnings and Amounts Earnable Through Reasonable Diligence*

Although courts in their discretion generally deduct many items from back pay awards, Title VII only requires one such deduction: the court must reduce the award by the plaintiff's entire earnings during the back pay period and by all amounts deemed to have been earnable through the exercise of reasonable diligence.[840] The rule clearly seeks to prevent the plaintiff from obtaining a windfall recovery exceeding his actual financial damages. Although in furtherance of this aim courts generally will deduct any monetary benefit conferred on the plaintiff by interim employers,[841] some cases suggest that, in fairness to the discriminatee, the back pay award should compensate him for expenses incurred in seeking interim positions.[842] This section of the Special Project examines the problems inherent in the factual determination of whether a court is justified in decreasing or eliminating the gross back pay award when a successful plaintiff mitigated, or could have mitigated, his damages.[843] The cases discussed in the section primarily

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dant's calculation. *But see* Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) (10% deduction allowed for expenses discriminatees would have incurred if promoted), *vacated & remanded on other grounds*, 431 U.S. 951 (1977); *supra* text accompanying note 735.

840. 42 U.S.C. § 2000e-5(g) (1976). *See generally* Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128 (6th Cir. 1969); Falls Stamping & Welding Co. v. International Union, United Auto., Aircraft & Agricultural Implement Workers, 485 F. Supp. 1097 (N.D. Ohio 1979).

841. *See, e.g.*, Merriweather v. Hercules, Inc., 631 F.2d 1161 (5th Cir. 1980); Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971). An exception exists for earnings from jobs the plaintiff could have held concurrently with the job he was discriminatorily denied. *See supra* notes 819-25 and accompanying text.

842. NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 574-75 (5th Cir. 1966) (court reduced interim earnings by amount paid as union hiring hall fees since fees were "compulsory expense" to find work); Morris v. Board of Educ., 401 F. Supp. 188, 215 n.37 (D. Del. 1975) (court upheld recovery of $25 claim for "miscellaneous expenses incurred in seeking other employment").

843. Most Title VII decisions suggest that the plaintiff's failure to exercise reasonable diligence to acquire interim employment merely reduces the portion of the back pay award corresponding to that period of the plaintiff's failure. *See, e.g.*, Jones v. Glitsch, Inc., 489 F. Supp. 990 (N.D. Tex. 1980); Reid v. Memphis Publishing Co., 369 F. Supp. 684 (W.D. Tenn. 1973). When a plaintiff's interim earnings have approximately equalled the back pay award, the court may release the defendant from any back pay liability. Oliver v. Moberly, Mo. School Dist., 427 F. Supp. 82 (E.D. Mo. 1977). Interim earnings that, during a given time period, exceed the pay the plaintiff would have received during that time but for the discrimination, should not reduce the award for those periods in which the plaintiff unsuccessfully exercised reasonable diligence to obtain interim employment. *See* Golay & Co. v.

concern claims under either Title VII or the NLRA.[844]

1. Burden of Proof

Once a plaintiff proves his entitlement to back pay the defendant must assert and prove that the plaintiff failed to exercise reasonable diligence when pursuing interim employment.[845] Thus, the defendant bears the burden of proof when attempting to reduce the plaintiff's gross back pay award on these grounds.[846] Since appellate courts cannot overturn a back pay award unless the trial court's determination is clearly erroneous, absent the defendant's clear proof on the record of the plaintiff's lack of diligence, no grounds for reversal or mitigation will be available even though the facts may suggest that reduction of the back pay award may have been appropriate.[847]

The defendant must prove two facts to meet its burden of proof: (1) suitable positions existed for which the plaintiff was qualified and which the plaintiff could have discovered had he exercised reasonable diligence; and (2) the plaintiff failed to exercise

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NLRB, 447 F.2d 290, 294 (7th Cir. 1971) (in NLRA cases interim earnings are offset against back pay liability on a quarterly basis), *cert. denied*, 404 U.S. 1058 (1972); Somers v. Aldine Indep. School Dist., 464 F. Supp. 900 (S.D. Tex. 1979) (plaintiff acquiring higher paying job ends back pay period but excess earnings do not decrease defendant's back pay liability incurred before the job was acquired).

844. While Title VII reduces the back pay award by "[i]nterim earnings or amounts earnable through reasonable diligence," 42 U.S.C. § 2000e-5(g) (1976), courts reduce back pay awards in NLRA cases only if the plaintiff is guilty of a willful loss of earnings or a clearly unjustifiable refusal to take desirable new employment. *See, e.g.*, Heinrich Motors, Inc., v. NLRB, 403 F.2d 145 (2d Cir. 1968); NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1023 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

845. *See, e.g.*, Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Kaplan v. International Alliance of Theatrical & Stage Employees & Motion Picture Mach. Operators, 525 F.2d 1354 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 517 F.2d 387 (7th Cir. 1975); NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir. 1974); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966); NLRB v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963).

846. This requirement greatly aids the plaintiff because the defendant must prove the existence of facts that are peculiarly within the control of the plaintiff. Refuting a plaintiff's assertions that his job seeking efforts were reasonable is an extremely difficult burden for a defendant. *See infra* notes 851-83 and accompanying text. The defendant's task is nearly impossible when its discriminatory conduct precluded plaintiff from ohtaining interim work. Kaplan v. International Alliance of Theatrical & Stage Employees & Motion Picture Mach. Operators, 525 F.2d 1354 (9th Cir. 1975) (plaintiff could not obtain interim employment because defendant discriminatorily denied him union membership).

847. *See, e.g.*, NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir. 1974); Sparks v. Griffin, 460 F.2d 433 (5th Cir. 1972).

reasonable diligence to find these positions.[848] A presumption of reasonable diligence exists in favor of the plaintiff. Discussing this presumption, the district court in *EEOC v. Kallir, Phillips, Ross, Inc.*[849] stated that the defendant "must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct."[850]

2. Reasonable Diligence

Mitigation of back pay awards turns on the court's determination of whether the plaintiff's efforts to obtain interim employment were reasonable. If the court deems the efforts reasonable then the back pay award will not be reduced.[851] If, however, the court finds the efforts were not reasonable, then the court may reduce the award or eliminate it entirely.[852] The exercise of reasonable diligence when seeking interim employment constitutes a question of fact, and courts resolve most close questions of fact in favor of the plaintiff.[853]

When the question of reasonable diligence arises in class action discrimination suits, the courts must consider the facts and circumstances surrounding each individual plaintiff to determine whether reasonable efforts were made to secure interim employment. Although a comparison of the mitigation efforts of various class members might help the court determine the appropriate reduction for an individual plaintiff found not to have exercised reasonable diligence,[854] generally the court does not engage in a comparison of the efforts of class members.[855] For example, the Fourth

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848. Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Sparks v. Griffin, 460 F.2d 433 (5th Cir. 1972); Hegler v. Board of Educ., 447 F.2d 1078 (8th Cir. 1971); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

849. 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

850. *Id.* at 925.

851. *See supra* note 843 and accompanying text.

852. *Id.*

853. *See supra* notes 846-50 and accompanying text.

854. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979).

855. *Id.* at 936-37; Claiborne v. Illinois Cent. R.R., 583 F.2d 143, 153 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1322-25 (D.C. Cir. 1972), *remanded*, 505 F.2d 391 (D.C. Cir. 1974); Falls Stamping & Welding Co. v. International Union, United Auto., Aircraft & Agricultural Implement Workers, 485 F. Supp. 1097, 1102-04 (N.D. Ohio 1979); Coates v. National Cash Register Co., 433 F. Supp.

Circuit refused to infer a lack of reasonable diligence when one plaintiff earned $294 during the back pay period and another plaintiff with similar skills and experience earned $5,381.40.[856]

Courts have examined a variety of factual circumstances to determine whether a discriminatorily discharged plaintiff has made a reasonable effort to secure interim employment.[857] Of course, a plaintiff fails to act reasonably if he never makes an effort to find employment.[858] In an attempt to establish a standard, courts have suggested that a reasonable effort might include checking want ads, registering with unemployment agencies, and discussing potential job openings with friends and acquaintances.[859] The innumerable ways in which the claimant may demonstrate reasonable efforts, however, limit the utility of specific standards. One court, for example, found that a plaintiff acted reasonably when she utilized the same job search technique she had used to find the job from which she was discriminatorily discharged.[860] Another court concluded that a mere word-of-mouth search sufficed for a plaintiff with excellent contacts within her trade.[861] In other circumstances, courts have discounted the efforts of plaintiffs who failed to follow up job leads[862] or who simply registered with unemployment agen-

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655 (W.D. Va. 1977); McBroom v. Western Elec. Co., 429 F. Supp. 909 (M.D.N.C. 1977).

856. NLRB v. Pugh & Barr, Inc., 231 F.2d 558 (4th Cir. 1956); *cf.* NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 422-23 (1st Cir. 1968) (plaintiff earning 70% of previous pay during back pay period deemed to have exercisod reasonable diligence regardless of actual effort expended to find interim work).

857. Congress' use of the term "reasonable" prohibits courts from holding plaintiffs to a "best efforts" standard in seeking interim employment. *See* Jackson v. City of Akron, 411 F. Supp. 680 (N.D. Ohio 1976); *supra* text accompanying note 850.

The plaintiff may be able to demonstrate that he has initiated reasonable efforts to secure interim employment even after an extended period in which he made no substantial efforts. In *Jackson* the plaintiff made no effort to seek interim employment until two years after his discharge. The court denied back pay only for the two years corresponding to the time in which he made no reasonable mitigation efforts and permitted the award to begin accumulating on the day plaintiff actually began seeking work. 411 F. Supp. at 690.

858. *See* NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1319 (D.C. Cir. 1972); *cf.* Heinrich Motors, Inc., v. NLRB, 403 F.2d 145, 148-49 (2d Cir. 1968) (plaintiff who seeks to establish own business during interim period need not make money to demonstrate reasonable efforts); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575-76 (5th Cir. 1966) (extremely low earnings during back pay period does not establish prima facie case that plaintiff willfully incurred a loss of earnings).

859. *See* Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392 (7th Cir. 1975); Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 964 (E.D. Pa. 1980).

860. Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 950 (D. Colo. 1979) (unannounced calls on potential employers sufficient).

861. Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730-31 (E.D.N.Y. 1978) (plaintiff was vice-president of local trade association).

862. *See, e.g.*, NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 423-24 (1st Cir. 1968).

cies that did not deal in the type of work plaintiff sought.[863] Conversely, since the courts are not impressed by efforts the plaintiff should have known would be fruitless, they will not find the plaintiff's efforts unreasonable simply because he did not pursue "dead ends."[864]

Courts, in some instances, have found plaintiff's refusal of an employment offer to be entirely reasonable. For example, courts generally will not reduce a plaintiff's award solely because he refused to accept defendant's offer of reemployment or transfer without corresponding seniority or back pay.[865] The court reached a similar result when the plaintiff refused an offer of reemployment that would have subjected him to the same discriminatory treatment that had originally prompted him to leave the defendant's employ.[866] Likewise, reduction of the award does not occur when a

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863. NLRB v. Madison Courier, Inc., 505 F.2d 391 (D.C. Cir. 1974). The court in *Madison Courier* found that registration with an unemployment agency was not, in itself, sufficient when the registration was a "mere formality which no one realistically expected to be fruitful." *Id.* at 403.

864. *See* Walston v. School Bd., 566 F.2d 1201, 1206 (4th Cir. 1977) (a discriminatorily discharged teacher "will not be held to make the futile gesture of applying for a position for which she had previously been told that she was unqualified"); Vaughn v. Westinghouse Elec. Corp., 471 F. Supp. 281 (E.D. Ark. 1979) (plaintiff need not bid on job for which she was unlawfully disqualified); United States v. Wood, Wire & Metal Lathers Int'l Union, Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971) (not unreasonable for union laberers to look elsewhere for work when union labor halls proved fruitless).

Courts will not permit defendants to avoid liability because a plaintiff failed to seek work with other employers in the industry who enforced discriminatory rules similar to those of the defendant. Accordingly, a defendant cannot successfully argue that a plaintiff's back pay award should be reduced because the offending employer merely conformed to an industry-wide discriminatory practice. In Inda v. United Air Lines, Inc., 405 F. Supp. 426 (N.D. Cal. 1975), stewardesses, discriminatorily released because they got married, sought interim jobs only as stewardesses despite the industry-wide "no marriage" policy for female flight attendants. The court found plaintiffs' efforts reasonable and refused to reduce defendant's back pay liability simply because the defendant's conduct was consistent with the rest of the industry. *Id.* at 434.

865. See Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated on other grounds*, 414 U.S. 970 (1973), in which the court stressed that "reasonable diligence" could not be "equated with a compulsion to accept [such an] offer." *Id.* at 1047. In Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975), the Fourth Circuit stated that the plaintiff's refusal of a promotion from the defendant would bar a back pay award only if the refusal were "free and voluntary." Since the offered promotion required the plaintiff to forfeit his company seniority, the refusal was based on the plaintiff's "reasonable reluctance to expose himself to another aspect of an employer's discriminatory employment policy." *Id.* at 232. *But see* Ford Motor Co. v. EEOC, 42 SUP. CT. BULL. (CCH) B4055 (June 28, 1982) (unconditional job offer without retroactive seniority tolls the accrual of back pay); Stallings v. Container Corp. of Am., 75 F.R.D. 511, 522-23 (D. Del. 1977) (plaintiff should have accepted promotion even though acceptance would have required him to forfeit his accumulated seniority).

866. Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095, 1114-15 (D. Md. 1977).

plaintiff tires of discriminatory treatment and quits his job with the defendant.[867] This logic has been expanded to preclude reduction of the award even when the plaintiff quits interim jobs, provided the court is satisfied that the plaintiff's reasons for quitting are not inconsistent with a reasonable effort to mitigate damages.[868]

3. Limiting the Scope of the Search for Interim Employment

As the term "reasonable diligence" suggests, a plaintiff need not conduct the most comprehensive of all possible searches for interim work. Nevertheless, courts frequently must consider whether a plaintiff consciously limited his search to such an extent that a reduction in his back pay award is justified. Clearly, certain geographic limitations on the job search are reasonable;[869] similarly, a plaintiff may move to another city in an effort to find employment if the court concludes that the plaintiff's motives were legitimate.[870] In addition, one court has held that a plaintiff may reasonably limit his search to jobs paying a certain minimum salary.[871]

The question whether the plaintiff must "lower his sights"

"There is no requirement of a return to abusive conditions. The responsibility of an employee who has left work because of discriminatory conditions is to make diligent efforts to seek employment where discriminatory conditions do not exist." *Id.* at 114.

867. *See* Sangster v. United Air Lines, Inc., 438 F. Supp. 1221 (N.D. Cal. 1977). The court will not force the plaintiff to "contribute . . . his labor to an employer who has treated him unfairly and who persists in that unfair treatment, or to take less than a whole remedy for injuries suffered." *Id.* at 1230; *see also* Taylor v. Ford Motor Co., 392 F. Supp. 254 (W.D. Mo. 1974) (award not reduced because plaintiff quit assembly line job and took lower paying job in computer field similar to job he was discriminatorily denied by defendant).

868. *See* Lowry v. Whitaker Cable Corp., 348 F. Supp. 202 (W.D. Mo. 1972). In *Lowry* the court upheld an award even though the plaintiff had quit several interim jobs. Plaintiff's reasons for quitting (lack of training for first job, insufficient pay in second job, and unhealthy working conditions of third job) were not inconsistent with a reasonable effort to mitigate damages. *Id.* at 218-19.

869. NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1319 (D.C. Cir. 1972) (NLRA does not require discrimination victim to accept employment an unreasonable distance from his home); Hegler v. Board of Educ., 447 F.2d 1078, 1081 (8th Cir. 1971) (plaintiff need not look outside state for interim employment when spouse worked in original city); Florence Printing Co. v. NLRB, 376 F.2d 216, 219-23 (4th Cir. 1967) (plaintiff need not move family 100 miles to accept interim employment).

870. *See* Stene v. D.A. & S. Oil Well Servicing, Inc., 624 F.2d 142, 144 (10th Cir. 1980). The plaintiff in *Stone* quit a part-time interim job and moved to another city to seek full-time work similar to that which she was discriminatorily denied by the defendant. The Tenth Circuit found that the plaintiff exercised reasonable diligence and noted, "Title VII should not be used to lock partially employed persons, fearful of losing back pay awards, into long-term unproductive geographical commitments." *Id.*

871. NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966).

—accept interim work of a different or less-desirable nature than that which he was discriminatorily denied—presents a more difficult problem. Courts and commentators agree that in cases brought under the NLRA, a plaintiff should, after the expiration of a reasonable time, lower the sights of his job search.[872] This conclusion stems from the Act's dual policy of promoting both production and employment.[873] Despite this general rule, however, a plaintiff need only accept work "consonant with his skills, background and experience" and not "substantially more onerous" than his previous employment.[874]

Courts deciding Title VII cases have not agreed whether "reasonable diligence" requires a plaintiff to lower his sights when seeking interim employment. At least one court flatly rejected the NLRA line of authority on this issue[875]—a conclusion that appears justified in light of the different policies promoted by the acts.[876] Those courts that apply the lower sights doctrine in Title VII cases limit the plaintiff's duty to accepting only those jobs that are reasonably appropriate for his experience and qualifications.[877]

Many courts, however, refuse to enforce the lower sights doc-

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872. *See, e.g.*, NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972); Golay & Co. v. NLRB, 447 F.2d 290 (7th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); NLRB v. Southern Silk Mills, Inc., 242 F.2d 697 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957); NLRB v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955); Note, *Discriminatorily Discharged Employees Must Seek Work Outside Their Trade to Mitigate Back Pay Damages*, 43 FORDHAM L. REV. 889, 892-93 (1975).

873. NLRB v. Madison Courier, Inc., 505 F.2d 391, 397 (D.C. Cir. 1974); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941); *see also* Note, *supra* note 872, at 893. The author suggests that the requirement of lowering one's sights is reasonable since the frequently granted remedy of back pay and reinstatement would make the less desirable work only temporary. *Id.* at 896.

874. *See, e.g.*, NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974).

875. EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979). The court found that reliance on NLRA authority should be limited to "provide guidance in uncharted areas of Title VII construction. . . . [I]t is clear that there is adequate Title VII authority construing the mitigation provision of section 706(g) to make resort to National Labor Relations Act precedents unnecessary." *Id.* at 1317 n.39.

876. *See infra* note 883.

877. *See, e.g.*, Helbling v. Unclaimed Salvage & Freigbt Co., 489 F. Supp. 956 (E.D. Pa. 1980). One commentator noted some difficult problems with the requirement that a plaintiff with little experience or distasteful previous employment lower his sights:

> [A]n employee would be forced to seek work of almost any type at any pay, particularly if he had no past work experience or all his past employments were "distasteful." Furthermore, the employee is faced with the dilemma . . . of not knowing at what point acceptance of lower paying work will be considered necessary to mitigate adequately in order to avoid a willful loss of earnings.

Note, *supra* note 872, at 895; *see* Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 964 (E.D. Pa. 1980).

trine because of a particular plaintiff's special qualifications or professional reputation.[878] Thus, one court did not reduce the back pay of a fashion designer with more than seventeen years of experience who sought work only within her trade.[879] Another court rejected a similar contention that a discriminatorily demoted high school principal should have accepted work as a teacher.[880] In an unusual case, one court even reduced the plaintiff's back pay award because she too quickly accepted an interim job that paid less than one she could have acquired in her original line of work.[881]

Although the lower sights doctrine is not readily reduced to an all-encompassing rule, a few general principles have emerged. A professional should not be forced by the doctrine either to damage his reputation by accepting undesirable work or to risk a reduction in his back pay award.[882] Furthermore, courts should recognize that even menial, unskilled, or inexperienced workers have some value in their professional reputation and therefore should not be forced to accept undesirable interim employment. The broad remedial policies supporting Title VII's back pay provision suggest that great deference should be accorded the plaintiff's job search provided that the court concludes the plaintiff is reasonably qualified

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878. *See* cases cited *infra* notes 879-80. Other courts avoid reducing back pay by simply stating that a plaintiff's duty is only to seek "substantially similar employment." *See, e.g.*, Inda v. United Air Lines, Inc., 405 F. Supp. 426, 435 (N.D. Cal. 1975); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467 (1965).

879. Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 731 (E.D.N.Y. 1978); *see also* EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976) (plaintiff's skill was in limited area of pharmaceutical advertising), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

880. Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242 (4th Cir. 1974). The Fourth Circuit stressed that accepting a teaching position would have been "regarded as an acquiescence . . . in his racially discriminatory demotion," and stated that when a professional seeks interim employment,

> [c]omparability in status is often of far more importance—especially as it relates to opportunities for advancement or for other employment—than comparability in salary. Accordingly, a discharged or demoted employee is not required in mitigation of damages, to accept alternate employment of an "inferior kind", or of a more "menial nature", or employment outside his usual type or for which he is not sufficiently qualified by experience, or employment the inferiority of which might injuriously affect the employee's future career or reputation in his profession.

Id. at 1243.

881. Grindstaff v. Burger King, Inc., 494 F. Supp. 622, 625 (E.D. Tenn. 1980) (plaintiff, who had managed one of defendant's restaurants, accepted job with clothing company even though higher paying jobs in the fast food industry were available).

882. *See supra* note 880.

for the employment he seeks.[883] A deferential presumption in favor of the plaintiff should control the court's case-by-case determination of whether the plaintiff conducted his job search with "reasonable diligence."

E. Time Limitations on Back Pay

Determining the limits of the "back pay period" may be one of the more difficult tasks a court must face in an employment discrimination case. This determination is crucial because it sets the dates on which the defendant's back pay liability begins and ceases to accrue. The court must first decide the date on which the complained-of discriminatory practice began;[884] the employer generally will be subject to liability from that date, provided it falls within the two-year statutory period prior to the plaintiff's filing of a complaint with the EEOC.[885] The courts do not agree whether the back pay period terminates once the plaintiff prevails in an action or only when the discrimination is actually remedied by the defendant's adherence to a court order granting relief.[886] A variety of frequently arising scenarios further complicate the limitation period issue,[887] and several circumstances justify a refusal to award back pay for certain time spans during an otherwise proper back pay period.[888]

This section of the Special Project first discusses the rules, both past and present, applicable to the proper date of commencement of a back pay period. Second, it examines the circumstances that may prompt a court to refuse to award back pay for a portion of an otherwise allowable period. Last, it discusses the variety of events that may signal the end of back pay periods and considers whether the periods should run through the date of judgment or until the court-ordered remedy actually is enforced.

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883. The lower sights doctrine is appropriate for use in cases brought under the NLRA since Congress passed that Act to promote the policies of production and employment. Title VII, however, was designed to end employment discrimination and make its victims whole. *See supra* notes 60-63. Given this dual purpose, a discriminating employer should not be allowed to benefit from its victim's decision to seek only similar interim employment.

884. 2 A. LARSON & L. LARSON, *supra* note 268, § 55.37(a), at 11-52; *see* Davidson, *supra* note 55, at 760.

885. *See infra* notes 898-913 and accompanying text.

886. *See infra* notes 940-44 and accompanying text.

887. *See infra* notes 914-32 and accompanying text.

888. *See infra* notes 933-39 and accompanying text.

1. Commencement of the Back Pay Period

Title VII, in its original form, contained no limitation regarding the commencement of a back pay period. This absence of a limitation provision generated two problems: whether a defendant would be liable for back pay covering a period prior to the Act's effective date, and whether any limit should be imposed on the beginning date of the back pay period. The courts uniformly resolved the first question—the effective date of the Act is the earliest possible date upon which a Title VII back pay award may begin to accrue.[889] Courts justified the rule by stating that prior to the effective date of the Act, employers had no notice that their discriminatory activity violated the law.[890] Even in cases alleging discrimination violations under 42 U.S.C. § 1981[891]—a statute in effect long before the July 2, 1965, effective date of Title VII and the provisions of which employers could reasonably have been assumed to be aware—the courts have refused to order back pay for violations occurring before Title VII's effective date.[892]

The courts also forged a rule in response to the Act's failure to limit the earliest possible commencement date of the award period. This rule limited the start of the award period by applying the "most analogous statute of limitations of the state where the action was filed."[893] Consequently, once the court characterized the nature of the action, it would invoke the applicable statutory period in the forum state to determine the earliest date the plaintiff's back pay award could begin to accrue.[894] Title VII back pay peri-

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889. *See, e.g.*, Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); Gamble v. Birmingham S. R.R., 514 F.2d 678 (5th Cir. 1975); Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918 (S.D.N.Y. 1979); Payne v. Weirton Steel Co., 397 F. Supp. 192 (N.D. W. Va. 1975); Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974), *rev'd*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); 2 A. LARSON & L. LARSON, *supra* note 268, § 55.37(a), at 11-52.

890. Payne v. Weirton Steel Co., 397 F. Supp. 192, 194 (N.D. W. Va. 1975); 2 A. LARSON & L. LARSON, *supra* note 268, § 55.37(a), at 11-52.

891. 42 U.S.C. § 1981 (1976).

892. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974). In Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974), the court considered "the whole area of employment discrimination" and said that in spite of the existence of 42 U.S.C. § 1981, not until Title VII's effective date did employers actually become aware of their accountability for discrimination. *Id.* at 1378.

893. EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975).

894. *See, e.g.*, EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); Johnson v. Goodyear Tire & Ruhber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Trivett v. Tri-State Container Corp., 368 F. Supp. 137 (E.D. Teun. 1973).

ods, therefore, were limited by analogy to state statutes granting recovery for "injuries to persons or property,"[895] wages owed or damages,[896] and violations of federal statutes.[897]

Congress resolved the commencement of the back pay period problem in 1972 when it amended Title VII's remedial provisions and specified that a back pay period may begin no sooner than two years prior to the filing of a claim with the EEOC.[898] Although some congressmen initially proposed an even shorter limitation period designed to favor employers,[899] the supporters of the version ultimately adopted sought to encourage courts to grant back pay awards in more cases.[900] Their intent to increase the use of back pay awards appears consistent with the policies behind the original enactment of Title VII.[901]

Since the amendment became effective while many cases were still pending, courts hearing those cases were forced to decide whether to apply the new limitation retroactively or to continue to use the traditional limitation analysis.[902] Neither alternative won universal approval. The courts applying the two-year limitation period retroactively suggested that the amendment indicated Congress' belief that such a period was reasonable.[903] Other forums re-

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895. EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975).

896. United States v. Georgia Power Co., 474 F.2d 906, 924 (5th Cir. 1973); Taylor v. Armco Steel Corp., 373 F. Supp. 885, 912 (S.D. Tex. 1973).

897. Trivett v. Tri-State Container Corp., 368 F. Supp. 137, 140-41 (E.D. Tenn. 1973).

898. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 107 (codified at 42 U.S.C. § 2000e-(5)(g) (1976)); *see, e.g.*, Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979); Fannie v. Chamberlain Mfg. Corp., 445 F. Supp. 65 (W.D. Pa. 1977).

The statute is clear on its face. The back pay period can begin no sooner than two years prior to the actual filing of the claim. The plaintiff cannot benefit from a longer award period by arguing that the applicable limitation is two years prior to plaintiff's initial contact with an EEOC officer. Nitterright v. Claytor, 454 F. Supp. 130 (D.D.C. 1978). If the plaintiffs are victims of a continuing discriminatory pattern or practice, however, the period may begin two years prior to the filing of the original claim complaining of that pattern or practice, even if the original claim involved different plaintiffs. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 933-34 (10th Cir. 1979).

899. The House considered limiting the period to two years prior to the date the plaintiff actually filed the case in court. *See* H.R. 6760, 92d Cong., 1st Sess. § 3(e) (1971); 61 CORNELL L. REV., *supra* note 76, at 464 n.23 (1976).

900. *See* 61 CORNELL L. REV., *supra* note 76, at 464. Despito the expansive intent of the amendment, the imposition of the two-year limitation on the starting date of the award period clearly prevents a successful plaintiff from being made whole by the defendant for any discrimination that occurred prior to the two-year period. *See* Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314, 321 (W.D.N.C. 1978).

901. *See supra* notes 60-63 and accompanying toxt.

902. *See supra* notes 893-97 and accompanying text.

903. Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382, 1390 (D.D.C. 1974), *modi-*

jected this rationale as unpersuasive.[904] Since, however, the number of active cases filed prior to 1972 is constantly diminishing, this issue is one of decreasing importance.

The two-year limit currently in effect under Title VII does not apply to a successful back pay claim under 42 U.S.C. § 1981.[905] That employment discrimination statute contains no express back pay limitation period and courts, therefore, have determined the beginning date of section 1981 back pay awards by utilizing the same analysis proposed in pre-1972 Title VII cases.[906] When a plaintiff wins a case pleading both a Title VII and a section 1981 claim, the court generally applies the longer of the two limitation periods if it determines that the periods differ.[907] That period, of course, will never be less than two years prior to the filing of plaintiff's claim with the EEOC.[908] Although this limitation method arguably encourages plaintiffs to shop for state forums providing the longest recovery period, no evidence suggests that either Congress or the courts are taking steps to impose a uniform limitation on back pay periods for the two actions.

The two-year limitation imposed by the 1972 amendment establishes the earliest date a back pay period may begin. If the discriminatory act occurred less than two years prior to when the plaintiff filed a claim with the EEOC, then the period begins the date the defendant's discrimination first affected the plaintiff.[909] Determining this date is largely a matter of common sense. If the defendant denied the plaintiff a position the plaintiff could have filled immediately but for the discrimination, the back pay period

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fied, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *see also* Stallings v. Container Corp. of Am., 75 F.R.D. 511, 522 (D. Del. 1977); 2 A. LARSON & L. LARSON, *supra* note 268, § 55.37(a), at 11-54 (explanation of two-year limit).

904. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 471 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir. 1973); Payne v. Weirton, 397 F. Supp. 192, 194 (N.D. W. Va. 1975).

905. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). *But see* Sand, *Back Pay Problems Under Title VII*, 27 N.Y.U. ANN. CONF. ON LAB. 151, 152 n.3 (1974) (§ 1981 back pay liability is "arguably" subject to Title VII two-year limit).

906. *See supra* notes 893-97 and accompanying text.

907. Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 881 n.6 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); EEOC v. Detroit Edison Co., 515 F.2d 301, 315 (6th Cir. 1975); Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918, 926 (S.D.N.Y. 1979).

908. *See supra* note 898 and accompanying text.

909. *See supra* notes 884-85 and accompanying text.

begins on the date of the plaintiff's application.[910] A similar result is appropriate in cases of a discriminatory refusal to promote the plaintiff.[911] If, however, the plaintiff failed to qualify for the position on the date of his application, then the back pay period will not begin until the date he became qualified.[912] If the position denied was not immediately available, the back pay period begins on the date plaintiff would have been hired absent defendant's discrimination.[913]

2. Termination of the Back Pay Period

Determining the termination date of a back pay period presents more difficult problems than ascertaining the commencement date. Initially, courts often must consider whether a plaintiff's actions (or failures to act) justify the cessation of the defendant's back pay liability. Further, the question often arises whether the award should continue to accrue until the defendant's discrimination is remedied or whether liability should cease on the date of final judgment.

(a) Reasons for Termination

No single rule exists for determining the termination date of a back pay period; one court has stated that the decision ultimately must be based on "considerations of fairness and practicality."[914] As this statement suggests, consistent with other areas of Title VII law, the trial court enjoys wide discretionary authority to end the award period whenever it deems appropriate.[915] Some courts, in their discretion, have ended the back pay period on the date the action was filed because the plaintiff sought only back pay without reinstatement.[916] One court ended the award period after deter-

910. Donnell v. General Motors Corp., 576 F.2d 1292, 1301 (8th Cir. 1978).

911. Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

912. Bing v. Roadway Express, Inc., 485 F.2d 441, 453 (5th Cir. 1973); Milton v. Bell Laboratories, Inc., 428 F. Supp. 502, 515 (D.N.J. 1977).

913. Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); Patterson v. Youngstown Sheet & Tube Co., 475 F. Supp. 344, 355 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S. Ct. 674 (1981).

914. United States v. Wood, Wire & Metal Lathers Int'l Union, Local 46, 328 F. Supp. 429, 443 n.1 (S.D.N.Y. 1971).

915. *See supra* notes 790-92 and accompanying text; Thornton v. East Tex. Motor Freight, 497 F.2d 416, 422 (6th Cir. 1974); Comment, *supra* note 75, at 391 n.66.

916. *See* Henry v. Link, 417 F. Supp. 360, 362 (D.N.D. 1976). *But see* Tidwell v. American Oil Co., 332 F. Supp. 424, 436-37 (D. Utah 1971) (finding no indication that Congress

mining that the plaintiff had not sufficiently pursued her claim with the EEOC to ensure that it was being processed as expeditiously as possible.[917]

Defendants often argue that certain changes in the plaintiff's employment situation during the award period warrant ending the back pay period. In one case the court rejected defendant's argument that the back pay period should end when plaintiff quit her job after being denied a deserved promotion.[918] The back pay period may continue even though the plaintiff obtains interim employment,[919] although courts generally terminate the period when the plaintiff acquires a higher paying job and his interim earnings exceed damages.[920] Unless the plaintiff agrees to the contrary,[921] the back pay period usually continues when the defendant offers to reemploy the plaintiff but refuses to offer retroactive back pay or seniority.[922] Even if the defendant offers full reinstatement the period may continue to run if the plaintiff has, in the interim, contractually obligated himself to work for another employer.[923] Finally, one court has held that the defendant's offer of part-time

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intended to distinguish between plaintiffs seeking reinstatement and plaintiffs seeking other damages).

917. Lynn v. Western Gillette, Inc., 564 F.2d 1282, 1287-88 (9th Cir. 1977). *Contra* Sangster v. United Air Lines, Inc., 438 F. Supp. 1221, 1230 (N.D. Cal. 1977) (ending period for this reason frustrates purposes of Title VII).

918. *See* Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 963 (E.D. Pa. 1980) (period does not end simply because plaintiff "left defendant's employ as a result of disagreements with the man who was hired for the position she was discriminatorily denied"); Sangster v. United Air Lines, Inc., 438 F. Supp. 1221, 1229 (N.D. Cal. 1977) (plaintiff not required to accept or retain a position materially different from the position she was discriminatorily denied).

919. This rule is necessary to avoid discouraging plaintiffs from mitigating their damages. EEOC v. Ford Motor Co., 645 F.2d 183, 191 (4th Cir. 1981); *cf.* Goodwin v. City of Pittsburgh, 480 F. Supp. 627, 636 (W.D. Pa. 1979) (period ended on plaintiff's reemployment).

920. Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978); Butta v. Anne Arundel County, 473 F. Supp. 83, 89 (D. Md. 1979); Somers v. Aldine Indep. School Dist., 464 F. Supp. 900, 903 (S.D. Tex. 1979); Milton v. Bell Laboratories, Inc., 428 F. Supp. 502, 515 (D.N.J. 1977); Reid v. Memphis Publishing Co., 369 F. Supp. 684, 690-91 (W.D. Tenn. 1973).

921. See Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1277 (E.D. La. 1969), in which the court ended the back pay period on the date the plaintiff accepted reemployment with the defendant "without regard to her grievance against defendant." *Id.*

922. *See supra* note 865 and accompanying text; Comacho v. Colorado Elec. Technical College, Inc., 590 F.2d 887, 889 (10th Cir. 1979); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). *But see* Ford Motor Co. v. EEOC, 42 SUP. CT. BULL. (CCH) B4055 (June 28, 1982); *but cf.* Stallings v. Container Corp. of Am., 75 F.R.D. 511, 522 (D. Del. 1977) (court reduced back pay for employee who refused a promotion because of seniority forfeiture requirement).

923. Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242, 1244 (4th Cir. 1974).

work will not end the period when the same full-time work is regularly available.[924]

Defendants also argue—often successfully—that a court should terminate the back pay period on the date a discriminatorily discharged employee would have been dismissed even absent the defendant's discrimination.[925] Adopting the nondiscriminatory termination argument, courts have ended award periods at the time at which they determine the plaintiff would have been physically incapable of performing his duties.[926] Other relevant nondiscriminatory termination dates include the date a plaintiff would have retired[927] or the date on which plaintiff's job would have ceased to exist.[928]

As a third tactic, defendants assert that the back pay period ought to end because the plaintiff has voluntarily removed himself from the labor market. This argument has succeeded when the plaintiff enrolled as a full-time college student after his discriminatory discharge.[929] In such a situation the Tenth Circuit stated, "[W]hen an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school . . . would be like receiving a double benefit."[930] Cases in which the plaintiffs enrolled in training courses have received similar treatment.[931] The plaintiff's move to another city, however, has been deemed not to imply that the plaintiff has removed himself from the employment

924. Stone v. D.A. & S. Oil Well Servicing, Inc., 624 F.2d 142, 144 (10th Cir. 1980).

925. Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 963 (E.D. Pa. 1980) (back pay period should continue to run so long as "it can be assumed [plaintiff] would have held the job to which she was entitled").

926. Jones v. Glitsch, Inc., 489 F. Supp. 990, 995 (N.D. Tex. 1980); Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 949 (D. Colo. 1979); Mitchell v. Board of Trustees of Pickens County School Dist. "A", 415 F. Supp. 512, 519 (D.S.C. 1976).

927. Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 730 (E.D.N.Y. 1978).

928. Florsheim Shoe Store Co. of Pittsburgh, Pa. v. NLRB, 565 F.2d 1240, 1247 (2d Cir. 1977) (remaining part-time workers phased out); Helbling v. Unclaimed Salvage & Freight Co., 489 F. Supp. 956, 963 (E.D. Pa. 1980) (date store closed); Edwards v. School Bd., 483 F. Supp. 620, 628 (W.D. Va. 1980) (plaintiff would not have been rehired because of excessive absence from work); White v. Ed Miller & Sons, Inc., 457 F. Supp. 148, 153 (D. Neb. 1978) (defendant released all other workers in plaintiff's capacity).

929. Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).

930. *Id.* at 268.

931. In NLRB v. Ohio Hoist Mfg. Co., 496 F.2d 14, 15 (6th Cir. 1974), the plaintiff was deemed to have removed himself from the labor market when he entered a paid full-time training program. *But see* EEOC v. Ford Motor Co., 645 F.2d 183, 193 (4th Cir. 1981). In *Ford Motor Co.* the plaintiffs, who would have accepted an untainted offer of reemployment, did not cause their back pay period to be terminated when they enrolled in a training program.

market. On the contrary, courts generally refuse to end the back pay period if they believe the plaintiff's move was related to his continued search for interim employment.[932]

(b) *Periods Excludable From the Back Pay Period*

Although a back pay period may not have been terminated for one of the reasons discussed above, certain circumstances will prompt courts to eliminate portions of time from a period when back pay otherwise would have accrued. The circumstance that most frequently arises concerns female plaintiffs who become pregnant during the back pay period. As a general rule, courts do not award back pay for the period during which the plaintiff could not have worked because of her pregnancy.[933] The reduction also may take into account time required for post-natal recovery.[934] Other excludable periods correspond to the times when the defendant would not have had work available for the plaintiff.[935] The defendant, however, bears a heavy burden of proof when it proceeds under this theory,[936] and its strongest case usually can be made when the discharged plaintiff was an irregular or seasonal worker.[937] Periods when the plaintiff was ill and could not have worked often are excluded when calculating back pay awards.[938] Although this illness exclusion seems defensible, one commentator persuasively argues the rule is fair only when applied on a case-by-case basis.[939]

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932. *See supra* note 870 and accompanying text; Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978); Tidwell v. American Oil Co., 332 F. Supp. 424, 437 (D. Utah 1971); Davidson, *supra* note 55, at 762.

933. *See* Walston v. School Bd., 566 F.2d 1201, 1206 (4th Cir. 1977); Sprogis v. United Air Lines, Inc., 517 F.2d 387, 393 (7th Cir. 1975); Grindstaff v. Burger King, Inc., 494 F. Supp. 622, 625 (E.D. Tenn. 1980); Inda v. United Air Lines, Inc., 405 F. Supp. 426, 434 (N.D. Cal. 1975); Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357, 1363 (D. Kan. 1971).

934. Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357, 1363 (D. Kan. 1971).

935. *See, e.g.*, NLRB v. United Contractors, Inc., 614 F.2d 134, 138 (7th Cir. 1980).

936. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 175 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

937. *See, e.g.*, NLRB v. United Contractors, Inc., 614 F.2d 134, 136-37 (7th Cir. 1980).

938. *See, e.g., id.* at 138; Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

939. *See* Davidson, *supra* note 55, at 762. The writer suggests,

> This should not be a hard and fast rule. For example, it would seem unfair to exclude periods of ill health caused by injuries received during substitute employment. Of course, absence from work would cause no loss of earnings in many salaried positions.

(c) Termination as a Result of Judicial Remedy

If no reason exists to terminate the back pay period before trial,[940] the court must determine on what date the awarded back pay ceases to accrue. Many courts terminate the period on the day of the final judgment in the particular case,[941] although the opinions in these cases present no compelling rationale for this rule. Termination of the defendant's back pay liability only when the discrimination actually has been remedied represents a more defensible position. By using this formula, the award would continue to accrue until the plaintiff receives all the back pay to which he is entitled and is permitted to exercise his employment opportunities to the court's satisfaction.[942] Delaying termination of the back pay period until the discrimination has been remedied is the superior approach because it more nearly achieves the "make whole" purposes of the Act[943] and encourages defendants to undertake rapidly the required remedial measures.[944]

X. SETTLEMENTS

Once the court has found the employer liable for discriminatory employment practices, the defendant employer has two alternatives. On the one hand, it may litigate the damage issue in the belief that the plaintiff has prayed for excessive damages. The Spe-

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In such cases, the back pay award should not be affected either. *Id.*

940. *See supra* notes 909-32 and accompanying text.

941. *See, e.g.*, Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978); Stewart v. General Motors Corp., 542 F.2d 445, 454 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); Sabala v. Western Gillette Inc., 516 F.2d 1251, 1266 (5th Cir. 1975), *vacated & remanded on other grounds*, 431 U.S. 951 (1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974).

942. *See, e.g.*, United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 932 (10th Cir. 1979); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1007 (9th Cir. 1972); Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 918, 926 (S.D.N.Y. 1979); Patterson v. Youngstown Sheet & Tube Co., 475 F. Supp. 344, 355 (N.D. Ind. 1979), *aff'd*, 659 F.2d 736 (7th Cir.), *cert. denied*, 102 S. Ct. 674 (1981); Vaughn v. Westinghouse Elec. Corp., 471 F. Supp. 281, 291 (E.D. Ark. 1979), *aff'd*, 620 F.2d 655 (8th Cir. 1980); Stevenson v. International Paper Co., 432 F. Supp. 390, 411 (W.D. La. 1977); Inda v. United Air Lines, Inc., 405 F. Supp. 426, 435 (N.D. Cal. 1975), *cert. denied*, 435 U.S. 1007 (1978); Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382, 1387 (D.D.C. 1974), *modified*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

943. *See supra* note 792 and accompanying text.

944. EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 591 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

cial Project thus far has discussed the issues that arise when the employer challenges a claim for back pay. The employer, however, has a second option—settlement.[945] This option is attractive to both employers and claimants because it eliminates the expense and uncertainty of continued litigation. The employer's decision to settle, however, raises a myriad of problems that it must consider and resolve to ensure that the settlement will have binding effect on all class members.[946] This part of the Special Project highlights some of the issues that the employer encounters when it decides to settle. This part begins with an analysis of the procedures employed by courts for the settlement of class actions as outlined in rule 23(e) of the Federal Rules of Civil Procedure and concludes with a commentary about the unpact that industry-wide consent decrees have had on employment discrimination litigation.

A. Settlement Under Federal Rule of Civil Procedure 23(e)

1. Procedure of Rule 23(e)

Rule 23(e)[947] attempts "to discourage the use of the class action device to secure an unjust private settlement, and to protect the absent class members against prejudice from discontinuance."[948] To accomplish these purposes rule 23(e) requires that all class members be given notice of the proposed settlement and that the court review and approve the compromise before allowing discontinuance of the class action.[949] Before allowing the defendant to send notice, bowever, courts usually conduct preliminary hearings to decide whether the proposed settlement merits the consideration of the entire class.[950] Although a court's decision to inform class members of the proffered agreement suggests the acceptability of tbe offer, this decision "is not a finding that the settlement is

945. Sometimes the plaintiff will initiate the settlement negotiations, but this part of the Special Project focuses on employer-initiated settlements.

946. An absentee class member may collaterally attack any settlement affecting his rights to which *res judicata* does not apply. Sagers v. Yellow Freight Sys., Inc., 68 F.R.D. 686, 689 (N.D. Ga. 1975), *aff'd on other grounds*, 529 F.2d 721 (5th Cir. 1976); 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 5560 (1977).

947. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

948. 3 H. NEWBERG, *supra* note 946, § 4910, at 402.

949. *See supra* note 947.

950. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 6.9, at 432 n.6; MANUAL, *supra* note 384, § 1.46, at 52-53; 68 Nw. U.L. REV. 1140, 1148 (1974).

fair, reasonable, and adequate."[951] Instead, the decision to send notice indicates the court's belief that the question of the offer's fairness deserves a full-scale hearing.[952]

2. Notice of Proposed Settlement

To prevent the deprivation of rights that may result from the absence of notice,[953] rule 23(e) requires that notice of a proposed settlement "be given to all members of the class in such manner as the court directs."[954] Thus, if a district court fails to enforce the notice requirement, its approval of the settlement not only prejudices the rights of absent class members but also constitutes an abuse of discretion.[955] Neither the Constitution nor rule 23(e), however, specifies the type of notice that must be given.[956] Consequently, whether the court gives notice by mail, publication, or other means,[957] the constitutional adequacy of the notice remains the crucial issue.[958] According to the standard set by one circuit court, "To comply with the spirit of [rule 23(e)], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice."[959] The notice also should indicate the class member's right to object to the proposed settlement[960] and the steps that he must follow to put his objection before the court.[961] In some cases the notice must state that an absent class member has a right to opt out of a rule 23 (b)(2) class action and pursue his own relief; otherwise the doctrine of *res judicata* would not prevent his bringing a separate suit for

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951. MANUAL, *supra* note 384, § 1.46, at 54-55. For an outline of the inquiries a court should make at this preliminary hearing, see 3 H. NEWBERG, *supra* note 946, § 5570a, at 472; MANUAL, *supra* note 384, § 1.46, at 53.

952. MANUAL, *supra* note 384, § 1.46, at 55.

953. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1218-19 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); 7A C. WRIGHT & A. MILLER, *supra* note 372, § 1797, at 234; MANUAL, *supra* note 384, § 1.45, at 52.

954. FED. R. CIV. P. 23(e); *see supra* note 947.

955. Sertic v. Cuyahoga, Lake, Geauga & Ashtabula Counties Carpenters Dist. Council, 459 F.2d 579, 583 (6th Cir. 1972).

956. *See, e.g.*, Rota v. Brotherhood of Ry., Airline & S.S. Clerks, 64 F.R.D. 699, 707 (N.D. Ill. 1974); MANUAL, *supra* note 384, § 1.45, at 51.

957. *See supra* note 356.

958. Sometimes the notice includes proof-of-claim forms. *See supra* part VI. In such instances, due process requires that the notice be the best practicable. *See* Greenfield v. Villager Indus., Inc., 483 F.2d 824, 833-34 (3d Cir. 1973).

959. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835 (9th Cir. 1976) (footnote omitted).

960. *Id.*

961. *Developments*, *supra* note 366, at 1567 n.172.

relief at a later time.[962] Clearly, the notice, whatever its form, must adequately and intelligibly inform the absentee of his membership in the class and his right to object to the settlement offer.

3. Approval of the Court

Soon after the absentees receive notice of the proposed settlement the court will hold a hearing to determine whether the settlement is fair, reasonable, and just.[963] At this hearing the court either will presume the fairness of the settlement[964] or will place the burden of proving the fairness of the offer on its proponent.[965] No matter which approach the court adopts, the final decision will depend on a weighing of the various equities. The court, for example, will examine the terms of the settlement agreement, paying particular attention to the eligibility of absent class members to participate in the award,[966] the consideration exchanged for settlement,[967] and other clauses that may favor only certain claimants.[968] The court also will consider the strength of the class' case,[969] the defendant's ability to pay,[970] and the complexity, length, and expense of further litigation.[971] Moreover, the court will review the objections

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962. Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981); *see also* Johnson v. General Motors Corp., 598 F.2d 432, 433 (5th Cir. 1979) (due process requires notice before individual monetary claims of absent class members may be barred); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 877 & n.80 (5th Cir. 1975) (notice may be necessary to have *res judicata* effect), *cert. denied*, 425 U.S. 944 (1976). This right to opt out is not absolute, but may arise under a rule 23(d)(2) order requiring notice to (b)(2) class members. *Penson*, 634 F.2d at 993-95.

963. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974); Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 587 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 6.9, at 432-33.

964. *See* Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 587-88 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975).

965. Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 588 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975); 3 H. NEWBERG, *supra* note 946, § 5600b; 7A C. WRIGHT & A. MILLER, *supra* note 372, § 1797, at 229-30 & 230 n.39.

966. Sand, *supra* note 905, at 159.

967. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 851-64 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); 3 H. NEWBERG, *supra* noto 946, § 5610c; C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 6.9, at 433.

968. MANUAL, *supra* note 384, § 1.46, at 62-66.

969. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974); 3 H. NEWBERG, *supra* note 946, §§ 5610a-5610b; MANUAL, *supra* note 384, § 1.46, at 56.

970. MANUAL, *supra* note 384, § 1.46, at 56.

971. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), *cert. denied*, 419 U.S. 900 (1974); 3 H. NEWBERG, *supra* note 946, § 5610g; MANUAL, *supra* note 384, § 1.46, at 56.

of absent class members, which may range from the form and amount of the settlement to the amount and method of payment of attorneys' fees.[972] Although the judge need not inquire into the merits of each objecting party's claim,[973] the inquiry "must be sufficient to enable the trial court to set forth on the record a reasoned response" to the objections.[974]

Probably the most significant inquiry the court will make during this balancing process is an examination of the adequacy of representation that absentee class members have received during the settlement negotiations. The court's decision on this issue will be of particular importance to the employer because due process requires adequate representation of absent class members before the settlement will have binding effect on them.[975] Consequently, the employer should insist that the court find and resolve any conflicts between the class representative and the absentee class members or between class counsel and the class. Because the court will be particularly sensitive to the possibility of collusion between the employer and the class representative,[976] the employer should avoid making a settlement offer that affords some premium to the representative.[977] Moreover, the court will look for evidence of conflicts of interest among class members.[978] The court will also consider the relationship between class counsel and the entire class; in particular, the court will require the attorney to have some experi-

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972. 3 H. NEWBERG, *supra* note 946, § 5660e.

973. Airline Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 573 F.2d 960, 963 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

974. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 836 (9th Cir. 1976). While the named plaintiff may object to the settlement, *see, e.g.*, Flinn v. FMC Corp., 528 F.2d 1169, 1175-76 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636, 637 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), he does not have an absolute veto right since his objections may not adequately represent the interests of the class, *Flinn*, 528 F.2d at 1174 & n.19.

975. *See* Hansberry v. Lee, 311 U.S. 32, 40-42 (1940).

976. 7A C. WRIGHT & A. MILLER, *supra* note 372, § 1797, at 230.

977. *See, e.g.*, Flinn v. FMC Corp., 528 F.2d 1169, 1176 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); Edwards, *supra* note 208, at 805-06.

978. Circumstances evidencing an employee's inability to adequately represent the class include (1) employees affected by different employment practices, *see, e.g.*, Mason v. Calgon Corp., 63 F.R.D. 98 (W.D. Pa. 1974); Anderson v. Southern Pac. Transp. Co., 13 Fair Empl. Prac. Cas. (BNA) 321 (N.D. Cal. 1973); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971); (2) employees at different geographical locations, *see, e.g.*, Pizano v. J.C. Penney Co., 12 Fair Empl. Prac. Cas. (BNA) 1322 (E.D. Cal. 1975); Smith v. Liberty Mut. Ins. Co., 11 Fair Empl. Prac. Cas. (BNA) 734 (N.D. Ga. 1974); and (3) insufficient nexus among applicants, present employees, and former employees, *see, e.g.*, Moore v. Consolidation Coal Co., 13 Fair Empl. Prac. Cas. (BNA) 305 (E.D. Tenn. 1976); Campbell v. Al Thrasher Lumber Co., 13 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Cal. 1973).

ence and competence in handling employment discrimination cases.[979] The court also will hold the attorney responsible to each individual class member and will not allow him unilaterally to sacrifice the interests of any class member when negotiating the settlement.[980] Furthermore, the court will scrutinize the terms of the agreement that deal with the payment of attorneys' fees because a conflict of interest naturally inheres when the attorney simultaneously negotiates for his fees and for the settlement fund.[981] Although discovering and resolving these problems of inadequate representation places a great burden on the employer, the advantages of *res judicata* should justify the employer's efforts.

B. Impact of Industry-Wide Consent Decrees

Along with the threat of "pattern and practice" suits, the EEOC has brandished one other weapon in the fight against discriminatory employment practices—consent decrees.[982] Like settlement agreements, consent decrees function as both conciliatory devices and vehicles of judicial and private economy.[983] Yet, consent decrees differ from ordinary settlements in that they have "the imprimatur of court approval" from their inception.[984] Because of this difference, consent decrees offer rather unique advantages for the respective parties. For the EEOC, court approval makes contempt sanctions available to aid in the enforcement of various parts of the decree.[985] For the defendant, the consent decree avoids any collateral estoppel effect that an adverse decision might have.[986]

Despite these advantages, however, industry-wide consent decrees present several problems for both discriminatees and nonmi-

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979. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

980. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835 (9th Cir. 1976).

981. Prandini v. National Tea Co., 557 F.2d 1015, 1020-22 (3d Cir. 1977); *see* 51 TEMP. L.Q. 799 (1978).

982. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 14.3, at 848 & nn.2-3.

983. 2 A. LARSON & L. LARSON, *supra* note 268, § 56.00, at 11-81 (1981); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 14.3, at 848-49.

984. 2 A. LARSON & L. LARSON, *supra* note 268, at 11-80; *see* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 14.3, at 856-58.

985. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 14.3, at 848 & n.6.

986. *Id.* at 849. By settling, the defendant suspends adjudication on the merits of the back pay issue. Such suspension gives the defendant the opportunity to challenge less meritorious claims in the future without having to confront a collateral estoppel argument from those future plaintiffs.

nority workers. Because the EEOC has no pecuniary stake in the outcome of the settlement, back pay awards for discriminatees may result in less than compensatory relief.[987] In addition, consent decrees often require that victims of discrimination expressly release their right to sue the employer for past discriminatory practices even though those discriminatees may wish to seek other forms of relief not available under the decree.[988] Moreover, since consent decrees have a binding effect on all employees within the affected class,[989] and since the right of private parties to participate in EEOC-initiated negotiations is unclear,[990] many discriminatees must accept a settlement to which they had no opportunity to voice objections. Moreover, nonminority workers may find that the consent decree has a reverse discriminatory impact.[991] For example, reverse discrimination claims may arise when qualified nonminority workers do not receive scheduled promotions solely because of affirmative action requirements in the consent decree.[992]

Another issue that consent decrees raise is the role that courts should play in approving the decrees. Since settlements and consent decrees have many similarities, courts, as in class action settlements, should require that the agreement be fair to all interested parties.[993] Courts also should take steps to ensure that affected employees understand the conciliation agreement and its

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987. *See* United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C. Cir. 1977); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 853 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

988. Releases of claims arising from *past* discrimination are allowable, but prospective releases are violative of public policy. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 853-60 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

989. In pattern and practice suits brought by the EEOC, an affected employee does not become bound unless he voluntarily chooses to become a party. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 877 n.80 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In a private class action, class members can be bound if they receive notice of the settlement. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974). Of course, if the employee has settled previously, and if he now seeks the benefits to be derived from the EEOC pattern and practice suit, a court will not allow double recovery to the extent that his claim can be individualized. *Allegheny*, 517 F.2d at 876-77.

990. Courts have the discretion to permit private parties to intervene in pattern and practice suits, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 841, 845-46 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), but if a court does not allow intervention, then private parties have no right to participate in the negotiation of the decree. *Id.* at 875.

991. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 33, § 14.3, at 855.

992. *Id.*

993. Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585, 587 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975); *see supra* notes 963-81 and accompanying text.

effects on their claims for back pay.[994] Moreover, although courts generally encourage settlement, they should not dismiss private actions simply because of a pending settlement between the employer and the EEOC.[995] By following these guidelines, the courts will protect the interests of all affected parties and will guarantee adequate judicial review of industry-wide consent decrees.

XI. CONCLUSION

This Special Project has discussed the most important and controversial issues concerning back pay awards in employment discrimination cases. It has considered the difficult legal and factual problems tbat the parties and the courts must confront at each step of the back pay process, beginning with the court's determination of whether back pay is an appropriate remedy for proven acts of discrimination and continuing to the computation of awards for the individual claimants. As the courts face these complex issues and as they apply the discrimination laws to new fact situations, they must, at each step, bear in mind the broad purposes that the back pay awards were desigued to accomplish. As the legislative history indicates, and as the Supreme Court has recognized, Congress adopted Title VII with a view toward making the victims of discrimination whole and of discouraging future acts of discrimination in employment. Only by giving the remedial provisions of the legislation the expansive interpretation Congress intended can the courts accomplish the overall objective of eliminating employment discrimination in the United States.

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994. United States v. Trucking Employers, Inc., 561 F.2d 313, 317-18 (D.C. Cir. 1977).

995. EEOC v. Local 3, Int'l Union of Operating Eng'rs, 416 F. Supp. 728 (N.D. Cal. 1975).