THE FEDERAL INCOME TAX CONSEQUENCES OF STATES' LAWS AGAINST DISCRIMINATION: WHY *BLANEY* WAS RIGHT AND WHY NEW JERSEY'S LAW AGAINST DISCRIMINATION SHOULD BE AMENDED

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I. Introduction

"[T]he victims of job discrimination want jobs, not lawsuits."[1] Even before the United States Supreme Court recognized this, Congress, in fashioning Title VII of the Civil Rights Act of 1964 ("Title VII"),[2] was fully aware that the vast majority of the work force simply want a fair chance to work, irrespective of immutable characteristics such as race and gender.[3] To this end, both federal and state anti-discrimination statutes aim to do nothing less than end discrimination in the workplace.[4] However, where that effort fails, anti-discrimination statutes aim to place victims in the same financial position that they would have been were it not for their employer's statutory violation.[5] Unfortunately for the victims of discrimination, the tax consequences of awards granted pursuant to anti-discrimination statutes generally prevent the award from truly making the victims whole.[6] A successful plaintiff's award is

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[1] Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982).

[2] 42 U.S.C. §§ 2000e-2000e-17 (2005).

[3] *Ford Motor Co.*, 458 U.S. at 230 (quoting 118 CONG. REC. 7168 (1972) (remarks of Rep. Dent during debate on 1972 amendments to Title VII)). "Most people just want to work. That is all. They want an opportunity to work. We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment." *Id.* at 230 n.13.

[4] *See id.* (stating that the goal of Title VII is to end discrimination); *see also* N.J. STAT. ANN. § 10:5-6 (West 2002) (stating that the purpose of New Jersey's Law Against Discrimination is to prevent and eliminate discrimination against certain classes); WASH. REV. CODE ANN. § 49.60.010 (West 2003) (stating that the purpose of Washington's Law Against Discrimination is to prevent and eliminate discrimination against certain classes).

[5] *Ford Motor Co.*, 458 U.S. at 230.

> [W]hen unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, [the statute] aims "to make the victims of unlawful discrimination whole" by restoring them, "so far as possible . . . to a position where they would have been were it not for the unlawful discrimination."

Id. (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).

[6] *See* O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000).

> [I]f the plaintiff must pay a higher tax on the present value of his earnings, this leaves less for investment. Hence, the plaintiff will not, in fact, realize an investment gain large enough to equal the future wages that he is not getting as a result of the defendant's discriminatory conduct. As the television advertisement of a few years ago said: "It's not

almost always reduced as a result of the tax consequences mandated by the Internal Revenue Code, which dramatically increases a plaintiff's federal marginal tax rate. This is because the Internal Revenue Code only exempts from gross income damages awards intended to compensate those who have suffered *physical* injuries; there is no such exemption for awards granted to victims of unlawful discrimination.[7]

Recently, state courts in Washington[8] and New Jersey[9] have increased awards in discrimination cases brought under state law to compensate for the adverse tax consequences of those awards. While these two jurisdictions have adopted different rationales for granting such increased awards, both have acknowledged that victims of unlawful discrimination should be made whole such that an award is not split with the Internal Revenue Service.[10]

II. The Equitable Remedy of Title VII

The general aim of most anti-discrimination laws is to "protect individuals from the stereotypical ascription of presumed group characteristics."[11] To do so, many anti-discrimination statutes vest courts with broad equitable powers to make victims of unlawful discrimination whole. Similarly, Title VII allows grants the courts wide latitude in fashioning remedies to make aggrieved

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how much you make, it is how much you *keep*."
Id. (emphasis added).

[7] *See* 26 U.S.C. § 104(a)(2) (2002) (stating that gross income does not include the amount of damages, other than punitive damages, received due to *physical* injury or sickness) (emphasis added). Incongruously, "damages received because of an automobile accident or slip-and-fall, often caused by *negligence*, [are] tax free, [while] damages to compensate for injury caused by *intentional discrimination* [are taxed]." Bruce A. Fredrickson, *Tuition, Back Pay and Attorneys' Fees in Employment Cases*, GEO. C.L.E. (2003).

[8] Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757 (Wash. 2004) (stating that successful plaintiffs under Washington's Law Against Discrimination may recover for the negative federal tax consequences of their front and back-pay awards).

[9] Ferrante v. Sciaretta, 839 A.2d 993 (N.J. Super. Ct. Law Div. 2003) (stating that successful plaintiffs under New Jersey's Law Against Discrimination may recover for the negative federal tax consequences of their front and back-pay awards).

[10] *See supra* notes 8-9.

[11] Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 177 (2000).

plaintiffs whole.[12]

Title VII is designed to fight discriminatory employment practices.[13] Title VII forbids any employer from hiring, firing or otherwise discriminating against any individual on the basis of "race, color, religion, sex, or national origin."[14] To give teeth to this prohibition, Title VII provides that once a court has found a violation it may enjoin the unlawful action, order remedial affirmative action, or order "*any other equitable relief* as the court deems appropriate."[15] The United States Supreme Court characterizes this discretion as a "judgment . . . to be guided by sound legal principles."[16]

The appropriateness of any remedy granted pursuant to Title VII must be viewed against the objectives of the statute.[17] These objectives are twofold: (1) "to achieve equality of employment opportunities" and (2) "*to make persons whole* for injuries suffered on account of unlawful employment discrimination."[18] Again, as a broad, remedial statute, Title VII allows the courts significant discretion in fashioning equitable discrimination awards.[19] The award of a tax offset often determines whether the make-whole policy of Title VII is achieved. With this in mind, more federal courts are granting plaintiffs' requests to recover sufficient damages to offset the negative tax consequences of unlawful discrimination awards.[20]

The judiciary's reactions to requests for tax offsets have been mixed. For example, in *Sears v. Atchison, Topeka & Santa Fe Railway, Co.*, the Tenth Circuit affirmed the award of a tax offset in a race discrimination class action, citing the trial court's "wide discretion in fashioning remedies to make victims of discrimination whole."[21] Although the general rule is that offsets

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[12] *See generally* 42 U.S.C. § 2000e-5 (2002).

[13] Larry M. Parsons, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1441-42 (1989).

[14] 42 U.S.C. § 2000e-2(a)(1) (West 2003).

[15] *Id.* § 2000e-5(g)(1) (emphasis added).

[16] Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).

[17] *Id.* at 416-17.

[18] *Id.* at 417-18 (emphasis added).

[19] Franks v. Bowman Trans. Co., 424 U.S. 747, 763-64 (1976).

[20] *See infra* note 32 and accompanying text.

[21] 749 F.2d 1451, 1456 (10th Cir. 1984).

are not recoverable without expert testimony,[22] and the plaintiffs did not offer expert testimony, the Tenth Circuit held that the trial court's remedy was appropriate because of "the protracted nature of the litigation."[23] The Tenth Circuit granted the offset partly because forty percent of the class members had died and those still living would have been forced into the highest marginal tax bracket upon receiving the award.[24]

Conversely, in *Dashnaw v. Pena*, the District of Columbia Circuit denied a plaintiff's request for an offset award following an award of damages pursuant to the Age Discrimination in Employment Act ("ADEA"), holding that a successful plaintiff is responsible for all taxes incurred as a result of a favorable judgment.[25] In so holding, the court wrote that such an award would be contrary to the "general rule" that successful plaintiffs must pay taxes on their awards.[26] The *Dashnaw* Court wrote, "[w]e know of no authority for such relief, and appellee points to none. *Given the complete lack of support in existing case law for tax gross-ups*, we decline so to extend the law in this case."[27] Relying on *Dashnaw*, a District of Illinois Court denied a tax offset following an award of damages for a successful Americans with Disabilities Act ("ADA") claim.[28]

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[22] *See, e.g.*, EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998) (holding that plaintiff was not permitted an offset under Title VII because he did not produce sufficient evidence of any negative tax consequences, but that such an offset was within the trial court's discretion); Barbour v. Medlantic Mgmt. Corp., 952 F. Supp. 857, 865 (D.D.C. 1997) (holding that plaintiff's failure to offer any evidence as to additional tax liability as a result of his § 1981 award made the award of an offset inappropriate); *see also infra* note 32.

[23] *Sears*, 749 F.2d at 1456.

[24] *Id.*

[25] Dashnaw v. Pena, 12 F.3d 1112, 1116 (D.C. Cir. 1994).

[26] *Id.* This "general rule" stemmed almost entirely from a now-defunct five-year averaging provision of the Internal Revenue Code that nearly eliminated the negative tax consequences of such awards. *See, e.g.*, Driscoll v. Exxon Corp., 366 F. Supp. 992, 993-94 (S.D.N.Y. 1973).

[27] *Dashnaw*, 12 F.3d at 1116 (emphasis added). But the *Dashnaw* Court failed to cite to *Sears*, which held that an offset award is appropriate in some Title VII cases. *See supra* text accompanying notes 21-24.

[28] Best v. Shell Oil Co., 4 F. Supp. 2d 770, 776 (N.D. Ill. 1998). The District Court also relied on Hukkanen v. Int'l Union of Operating Engineers, 3 F.3d 281, 287 (8th Cir. 1993). However, the *Hukkanen* Court merely affirmed a lower court's decision, which denied the offset because the plaintiff had not offered sufficient evidence as to potential tax liability. *Id.* The *Hukkanen* Court hinted that it would allow an offset if

While Title VII, the ADEA[29] and the ADA[30] differ with respect to prohibited types of discrimination, these statutes are all designed to remedy invidious discrimination by vesting courts with broad equitable powers.[31] Now, especially in the Third Circuit, resistance to allowing for an offset is primarily based on a lack of expert proof as to a plaintiff's newfound tax liability, not on any statutory prohibition.[32] Where a plaintiff can sufficiently prove adverse tax liability based on an award of front and/or back pay; however, the award of an offset is becoming more common.[33] For example, in 2000, the Eastern District of Pennsylvania held in *O'Neill v. Sears, Roebuck & Co.* that the make-whole doctrine of the ADEA permits an award to offset a plaintiff's negative tax consequences where the plaintiff offers expert testimony as to his or her newfound tax liability.[34] Again, in 2002, the Eastern District of Pennsylvania found that a successful plaintiff is entitled to an offset for the negative tax consequences of an ADEA award where he or she provides expert testimony to that effect.[35]

Courts may refuse to grant an offset if a plaintiff fails to provide adequate proof of the tax consequences of an award intended to remedy unlawful discrimination. For example, in *Meacham v. Knolls Atomic Power Laboratory*, the Northern District of New York refused the plaintiffs' request for an offset after a successful ADEA claim.[36] The court distinguished the decision in *O'Neill* primarily on the basis that the plaintiffs in *Meacham* offered no evidence as to any adverse tax consequences.[37] Since the

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the need for such an offset was made by an appropriate showing. *Id.*

[29] 29 U.S.C. §§ 621-634 (2004) [ADEA].

[30] *Id.* §§ 12101-12213 [ADA].

[31] Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67, 69 (2004).

[32] *See, e.g.*, Anderson v. Conrail, No. Civ.A. 98-6043, 2000 WL 1622863, at *5 (E.D. Pa. Oct. 25, 2000) (stating that successful ADEA plaintiff was not entitled to offset without expert testimony); Becker v. ARCO Chem. Co., 15 F. Supp. 2d 621, 638 (E.D. Pa. 1998) (stating that denial of offset was appropriate); Shovlin v. Timemed Labeling Sys., Inc., No. 95-CV-4808, 1997 WL 102523, at *2-*3 (E.D. Pa. Feb. 28, 1997) (holding that successful plaintiff in ADEA action was not entitled to offset because no proof of tax consequences was presented). *See also supra* note 22.

[33] *See infra* notes 34-35 and accompanying text.

[34] O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 446-47 (E.D. Pa. 2000).

[35] Jordan v. CCH, Inc., 230 F. Supp. 2d 603, 617 (E.D. Pa. 2002).

[36] 185 F. Supp. 2d 193, 238 (N.D.N.Y. 2002).

[37] *Id.* The *Meacham* Court also distinguished O'Neill on the basis that the

plaintiffs offered only a "conclusory demonstration," the court refused to perform the "speculative task of determining future tax liability."[38] As explained by the New Jersey Superior Court in *Ferrante v. Sciaretta*, neither a court nor a jury has the expertise to calculate a successful plaintiff's newfound tax liability; both the timing and the nature of the award make a post-trial motion the appropriate avenue for obtaining an offset.[39]

While sometimes disallowing offsets for lack of proof, the aforementioned cases clearly demonstrate that several courts now consider offsets a viable option for successful plaintiffs in federal discrimination cases, including those brought under Title VII. Indeed, these cases make clear that as courts expand their interpretation of the breadth of their equitable remedial powers, tax offsets have become more common. Both the make-whole mandate of Title VII and the broad equitable powers of courts to carry out that mandate provide the proper backdrop for analyzing the New Jersey and Washington discrimination cases, which involve the application of state anti-discrimination statutes that closely follow Title VII.

III. New Jersey Law Against Discrimination

New Jersey's Law Against Discrimination ("NJLAD")[40] provides various remedies for invidious discrimination. Courts in New Jersey have frequently cited both the legislative history and stated purpose of NJLAD to support expansive interpretations of that statute.[41] Therefore, since its enactment, the breadth and scope of NJLAD have continually expanded.[42]

A. *Legislative History*

Prior to enactment of NJLAD, New Jersey had many statutes addressing the problems of discrimination in various contexts.[43]

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heightened liability of the plaintiffs in *Meacham* was based on an award for emotional distress, not front or back pay. *Id.*

[38] *Id.*

[39] *See Ferrante*, 839 A.2d at 996-97; *see also* discussion *infra* Part IV.

[40] N.J. STAT. ANN. § 10:5-1 to -42 (West 2002) [NJLAD].

[41] *See* discussion *infra* Parts III.A-B.

[42] *Id.*

[43] Hinfey v. Matawan Reg'l Bd. of Educ., 371 A.2d 78, 81 n.7 (N.J. Super. Ct. App.

The state's original civil rights bill was passed in 1884 and progressed to cover discrimination with respect to color, race and creed in schools, workplaces and public areas.[44] The legislature enacted NJLAD in 1945.[45] By enacting NJLAD, New Jersey "codified its commitment to equality" twenty years prior to the passage of federal anti-discrimination legislation.[46]

The legislature initially designed NJLAD to guarantee civil rights and promote the general welfare of New Jersey by outlawing invidious discrimination in the workplace.[47] The legislature has maintained its dedication to this goal. For example, after the New Jersey Supreme Court held in 1989 that a plaintiff did not have a right to a jury trial under NJLAD,[48] the legislature revised the statute to prevent a recoccurrence of that type of unintended judicial interpretation.[49]

The legislature's expansion of the scope of the state's prohibition against discrimination has coincided with the state's

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Div. 1977). "New Jersey has a long history of legislation addressed to discrimination." *Id.*

[44] *Id.*

> As early as 1881 it was unlawful to exclude a child from any public school because of race. The original Civil Rights Act (Act), enacted in 1884, provided that all persons were entitled to enjoyment of places of public accommodation and amusement "subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." In 1917 the act was amended to include a comprehensive definition of places of "public accommodation, resort or amusement." In 1921 additional places were added and publication of advertisements indicating accommodations would be denied to persons because of race, color or creed was prohibited . . . . In 1945 the Legislature broadened the act to include discrimination based on national origin and ancestry.

Id. (internal citations omitted).

[45] *Id.* at n.5.

[46] Rachel M. Wrightson, *Gray Cloud Obscures The Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection,* 10 J.L. & POL'Y 635, 651 (2002).

[47] ROSEMARY ALITO, NEW JERSEY EMPLOYMENT LAW § 4-1 n.1 (2d ed. 1999) (citing N.J. STAT. ANN. §§ 10:5-2, -3, -4; Shaner v. Horizon Bancorp., 116 N.J. 433, 456 (1989); Andersen v. Exxon Co., 89 N.J. 483, 490 (1982)).

[48] *Shaner,* 116 N.J. at 446.

[49] *See* Gares v. Willingboro Twp., 90 F.3d 720, 726 n.3 (3d Cir. 1996). "[T]he legislature amended [NJLAD] . . . the next year to overrule *Shaner* and explicitly to provide for jury trials . . . ." *Id.*

power to remedy unlawful discrimination.[50] Recognizing this progression, New Jersey courts have guarded against the erosion of civil rights by broadly construing NJLAD.[51] In addition, NJLAD specifically states that such remedies as "compensatory and punitive damages" shall "be available to all persons" protected by the anti-discrimination statute.[52] Indeed, NJLAD declares "[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute."[53]

Because "the legislative history reinforces the plain, broad and inclusive language of the statute,"[54] the addition of tax offsets to the awards of aggrieved parties should be seen as a natural evolution of judicial interpretation of New Jersey's legislative

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[50] Hinfey v. Matawan Reg'l Bd. of Educ., 371 A.2d 78, 81 n.5 (N.J. Super. Ct. App. Div. 1977).

> In 1949, as a result of the legislative intention to combine existing civil rights legislation and the Law Against Discrimination, the [Division against Discrimination's] power was extended to include jurisdiction over discrimination in educational institutions and places of public accommodation based on race, creed, color, national origin or ancestry . . . . [In 1963, t]he Division's jurisdiction was further then expanded by permitting its acceptance of complaints by designated public officials as well as from individual complainants. In 1966 the Attorney General was empowered to proceed in a summary manner in the Superior Court to compel compliance with Division orders. In 1970 sex and marital status were added as proscribed bases of discrimination, and physical handicap was so included in 1972. In 1975 loan and credit agencies and real estate operators joined banking institutions as within the purview of the act.

Id. (internal citations omitted).

[51] *Id.* at 81.

> The act, whose purpose is to eradicate such invidious discrimination, is thus a cornerstone of our fundamental social and political philosophy which demands assiduous and solicitous protection from casual or unintended erosion. Indeed, the entire legislative history of this act has been one of continual enlargement of the power and jurisdiction of the Division [of Civil Rights] to enable it more readily to discharge its awesome responsibilities in the quest for a just society. The judicial construction of the act has been concomitantly liberal and to the same end.

Id.

[52] N.J. STAT. ANN. § 10:5-3 (West 2002).

[53] *Id.* § 10:5-13; *see also Gares*, 90 F.3d at 726. "[NJ]LAD is to be liberally construed so that all common law remedies, including compensatory and punitive damages, are available to persons protected by [NJLAD]." *Id.*

[54] *Id.*

goals. However, as discussed *infra*, the strained rationale of *Ferrante* indicates that the statute should be amended to explicitly include those additional remedies available under Title VII.[55]

B. *Purpose*

The purpose of NJLAD is "nothing less than the eradication of the cancer of discrimination."[56] The statute is designed to protect not only individuals, but society as a whole from discrimination.[57] In order to achieve this goal, NJLAD prohibits employment discrimination against a wide variety of statutorily protected groups.[58] However, courts have been quick to note that, in effectuating this goal, courts should not regard NJLAD as a "general civility code."[59] In other words, discrimination, not mere impoliteness, gives rise to a cause of action under NJLAD.[60] This construction is true to the text and spirit of the statute, which aims to promote civil rights, not civility.[61]

Indeed, NJLAD does not forbid all discrimination. The statute is designed to prohibit employment discrimination only

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[55] *See* discussion *infra* Part IV.

[56] Ptaszynski v. Uwaneme, 853 A.2d 288, 295 (N.J. Super. Ct. App. Div. 2004) (quoting Dale v. Boy Scouts of Am., 160 N.J. 562, 584 (1999)).

[57] Cedeno v. Montclair State Univ., 163 N.J. 473, 478 (2000) (stating that NJLAD is designed to "protect society from the vestiges of discrimination").

[58] ALITO, *supra* note 47, § 4-1.

> Except as otherwise permitted by law, [NJLAD] outlaws unlawful employment discrimination against any person by reason of age, ancestry, atypical heredity cellular or blood trait (AHCBT), liability for service in the Armed Force of the United States, color, creed, handicap, marital status, national origin, nationality, sex, genetic information, refusal to submit to genetic testing, refusal to provide genetic information, or race of that person, or of that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

Id. (citing N.J. STAT. ANN. §§ 10:5-3, -4, -4.1, -12 (West 2002)).

[59] Heitzman v. Monmouth County, 728 A.2d 297, 304 (N.J. Super. Ct. App. Div. 1999) (internal quotation marks omitted).

[60] *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)). "'Discourtesy or rudeness should not be confused with racial [or ethnic] harassment,' and 'a lack of racial [or ethnic] sensitivity does not, alone, amount to actionable harassment.'" *Id.*

[61] *See, e.g.*, Bergen Commercial Bank v. Sisler, 157 N.J. 188, 199 (1999). "[NJLAD] recognizes the opportunity to obtain employment as a civil right." *Id.*

against persons with statutorily enumerated characteristics.[62] Further, NJLAD expressly limits the classes of unlawful employment procedures.[63] However, the general rule still holds: "[a]ll persons shall have the opportunity to obtain employment."[64]

In order to effectuate this purpose, NJLAD should be read in conjunction with existing employment and civil rights laws.[65] In fact, NJLAD was "intended to supplement, rather than replace, previously existing law in the field of civil rights."[66] Moreover, NJLAD is not an exclusive remedy. An NJLAD claim does not preclude any other independent claim,[67] with the exception of common law claims that duplicate the claims authorized by NJLAD.[68]

As a remedial statute, NJLAD should also be read broadly so

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[62] ALITO, *supra* note 47, § 4-1 (citing Jones v. Coll. of Med. & Dentistry of N.J., 382 A.2d 677, 679-80 (N.J. Super. Ct. App. Div. 1977)); *see also* Floyd v. State of New Jersey, No. 89-5293, 1991 WL 143456, at *4 (D.N.J. July 16, 1991) (holding that [NJLAD] protects black persons and males, but not the distinct class composed of "black males"). The legislature "has focused upon general, rather than specific, classifications of societal groups who historically have been the objects of discrimination." ALITO, *supra* note 47, § 4-1 (citing Whately v. Leonia Bd. of Educ., 358 A.2d 826, 827 (N.J. Super. Ct. Ch. Div. 1976)).

[63] ALITO, *supra* note 47, § 4-1 (citing N.J. STAT. ANN. §§ 10:5-12(a)-(e); -5(d); -4.1). *But see id.* § 4-1 n.6 (citing Int'l Union of Auto. Aerospace & Implement Workers of Am. v. Twp. of Mahwah, 291 A.2d 847, 848 n.1 (N.J. Super. Ct. App. Div. 1972)) (suggesting without explanation that the specific acts of discrimination set forth in N.J. STAT. ANN. § 10:5-12 are not exclusive).

[64] N.J. STAT. ANN. § 10:5-4 (West 2002).

[65] *Id.* § 10:5-27:

> Nothing contained in this act shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this State relating to discrimination because of race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, disability, nationality or sex or liability for service in the Armed Forces of the United States; except that, as to practices and acts declared unlawful by section 11 of this act, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.

Id.

[66] Gray v. Serruto Builders, Inc., 265 A.2d 404, 405-06 (N.J. Super. Ct. Ch. Div. 1970).

[67] N.J. STAT. ANN. § 10:5-27.

[68] ALITO, *supra* note 47, § 4.1 n.13 (citing Shaner v. Horizon Bancorp., 116 N.J. 433, 452 (1989) (stating that NJLAD precludes common law wrongful discharge claims aimed at vindicating the same rights)).

as to attain its objectives.[69] Unquestionably, the New Jersey Legislature left little room for the courts to hold that NJLAD should be interpreted narrowly.[70] True to the legislative mandate, the New Jersey Supreme Court has repeatedly and consistently interpreted NJLAD broadly.[71] Furthermore, the New Jersey Supreme Court has held that various sections of NJLAD will not be rendered inoperative by other statutes unless such a construction is unavoidable.[72]

In light of this legislative and judicial history, it comes as little surprise that recently, in *Ferrante*, the New Jersey Supreme Court increased a plaintiff's award under NJLAD to offset the negative tax consequences created by the award.[73] Until *Ferrante*, no court in New Jersey had considered whether a successful plaintiff could recover damages resulting from increased federal tax liability due to an award of damages pursuant to NJLAD.[74] In awarding such an offset, however, the court stretched the text of NJLAD to its breaking point. This circumlocution, while honorable, indicates the statutory shortcomings of NJLAD.

IV. Ferrante v. Sciaretta

A. *Facts*

In *Ferrante*, the New Jersey Superior Court considered a post-judgment motion filed by the plaintiff, Mary Ferrante, seeking remuneration for the negative tax consequences of an award of

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[69] Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974). NJLAD "is remedial and should be read with an approach sympathetic to its objectives." *Id.*

[70] *See* N.J. STAT. ANN. § 10:5-3 (West 2002). "[NJLAD] shall be liberally construed in combination with other protections available under the laws of this State." *Id.*

[71] Gardenhire v. N.J. Mfrs. Ins. Co., 754 A.2d 1244, 1247-48 (N.J. Super. Ct. Law Div. 2000). "Courts have adhered to that legislative mandate [of NJLAD] by historically and consistently interpreting [NJLAD] 'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Id.* (quoting Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973)).

[72] Hinfey v. Matawan Reg'l Bd. of Educ., 371 A.2d 78, 81 (N.J. Super. Ct. App. Div. 1977). "Repugnancy or statutory incompatibility to found an implied repeal of legislation must be inescapable." *Id.*

[73] *Ferrante*, 839 A.2d at 998.

[74] *Id.* at 994.

economic damages granted under NJLAD.[75] The plaintiff received $340,659 in economic damages[76] in addition to $26,250 in damages for emotional distress and suffering.[77] The court also awarded the plaintiff pre-judgment interest and a sum representing counsel fees and disbursements, amounting to $75,298.16 and $895,025.77 respectively.[78]

The plaintiff filed her motion for remuneration of the negative tax consequences pursuant to NJLAD.[79] The issue before the court was whether "adverse tax consequences to a successful plaintiff in a discrimination case constitute 'such damages' under N.J.S.A. 10:5-3."[80] In other words, the issue was whether NJLAD allowed for an offset for tax consequences stemming from a damages award. This was a matter of first impression for New Jersey courts.[81]

B. *Holding and Rationale*

The court, guided by the make-whole policies of NJLAD, held that a tax offset is considered "such damages" within the meaning of the statute[82] and required the defendants to remunerate the plaintiff for the negative tax consequences of her award.[83] In support of its decision, the court noted that while NJLAD is

[75] *Id.*

[76] *Id.* This amount included an award of front and back pay. *Id.*

[77] *Id.* at 995.

[78] *Id.* These awards were made pursuant to a jury verdict for the plaintiff after a six-week trial. *Id.* at 994. The jury found that the plaintiff, Mary Ferrante, was a victim of sexual harassment by co-defendant Thomas Sciaretta while he was the Chief of the Bernardsville Police Department. *Id.* Further, the jury found that Co-defendant Borough of Bernardsville failed to take reasonable steps to prevent Sciaretta's harassment. *Id.* The jury also found that the actions of Sciaretta and the borough resulted in the constructive discharge of the plaintiff by creating a sexually hostile work environment. *Id.* The jury found that the defendants deprived Ferrante of her right to exercise free speech. *Id.*

[79] *Ferrante*, 839 A.2d at 995.

[80] *Id.* at 603. (quoting N.J. STAT. ANN. § 10:5-3 (West 2003)); *see also* N.J. STAT. ANN. § 10:5-3 (West 2002) (stating the legislature's intent to make compensatory damages available to victims of discrimination).

[81] *Ferrante*, 839 A.2d at 994.

[82] *Id.* at 995. "The term 'such damages' in [the relevant statute] refers to compensatory damages in the preceding sentence." *Id.*

[83] *Id.* at 998.

designed to eliminate discrimination in the workplace,[84] the "secondary fallback purpose" of NJLAD is to "compensate the victims for their injuries."[85] In addition, the court cited to the legislative findings that shaped NJLAD, which emphasize that compensatory and punitive damages should be available to a successful plaintiff.[86] Based on these findings, the court declared compensatory damages to be "such damages" under the statute.[87] The court looked to Black's Law Dictionary, which defines compensatory damages as being the same as actual damages.[88] Building on this definition, the court observed that "[t]he thrust of compensatory damages, as well as the underlying philosophy of [NJLAD], make it clear that the statute should not only be

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[84] *Id.* at 995 (citing Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982)); *see also supra* note 1; discussion *supra* Part III.A.

[85] *Ferrante*, 839 A.2d at 995. "The nature of compensatory damages in discrimination cases . . . include[s] money damages awarded to a plaintiff 'by way of compensation to make up for some loss that was not, originally, a money loss but one that ordinarily would be measured in money.'" *Id.* at 994 (quoting DAN B. DOBBS, REMEDIES § 3 (3d ed. 1973)).

[86] *Id.* (quoting N.J. STAT. ANN. § 10:5-3 (West 2003)):

> The Legislature finds and declares the practice of discrimination against any of its inhabitants because of . . . sex . . . are matters of concern to the Government of the state and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the state but menaces the institution and foundations of a free democratic state. . . . The Legislature further declares its opposition to such practice of discrimination when directed against any person by reason of . . . sex . . . in order that economic prosperity and general welfare of the inhabitants of the state may be protected and insured. The Legislature further finds that because of discrimination people suffer personal hardships and the state suffers grievous harm. Personal hardships include economic loss, time loss, physical and emotional stress. . . . Such harms have under the common law given rise to legal remedies, including *compensatory and punitive damages.* The Legislature intends that *such damages* be available to all persons protected by this act . . . .

Id. (emphasis added).

[87] *Id.* at 995.

[88] *Id.*

> Black's Law Dictionary defines actual damages as "the amount awarded to a complainant in compensation for his actual and real loss . . . synonymous with compensatory damages[.] . . . " Compensatory damages are defined in part as ". . . such as will simply make good or replace the loss caused by the wrong or injury . . . . The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury."

Id. (quoting BLACK'S LAW DICTIONARY 390 (6th ed. 1990)).

liberally construed but broadly applied" to make an aggrieved plaintiff whole.[89] In order to bring about this outcome, NJLAD requires a court to make available to a successful plaintiff all common law remedies, in addition to those remedies explicitly authorized by statute.[90]

In summary, the court held that a proper reading of NJLAD not only supported, but demanded a holding that under NJLAD, the defendants were required to remunerate the plaintiff for the negative tax consequences of her award.[91] The court remarked that it is consistent with the statutory goal of NJLAD to permit a plaintiff to keep the same amount of money as if she had not been constructively terminated.[92] Therefore, allowing the plaintiff to recover for the "higher taxes [s]he must pay on [her] back wages caused by getting [her] money in a lump sum" was entirely appropriate.[93]

C. *Critique of* Ferrante*'s Holding*

Instead of employing its equitable powers, the court in *Ferrante* insisted on defining the plaintiff's award as "actual damages" or "compensatory damages" even though "[t]he goal of compensatory damages is to restore the plaintiff to the *same* position [she] was in prior to the occurrence of the wrong."[94] However, the plaintiff was put in a *better* position financially than she was before the discrimination because she effectively received her award of front and back pay *tax free*.[95] The post-trial offset was based on the plaintiff's entire award and did not take into account her usual tax liability.[96] In addition, the court relied on an equitable theory of recovery while simultaneously describing that theory in legal terms, employing a rationale that clearly sounds in equitable, statutory language that is *never mentioned* in the

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[89] *Id.*

[90] *See id.*; *see also* N.J. STAT. ANN. § 10:5-13 (West 2002).

[91] *See Ferrante*, 839 A.2d at 995-96.

[92] *Id.*

[93] *Id.* at 995 (citing O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000)).

[94] Material Damage Adjustment Corp. v. Open MRI of Fairview, 799 A.2d 731, 741 (N.J. Super. Ct. Law Div. 2002) (citations omitted) (emphasis added).

[95] *See Ferrante*, 839 A.2d at 998.

[96] *See id.* at 996.

holding.[97] The court's opinion in *Ferrante* is therefore doubly flawed: it allowed for a windfall and misstated the supposed basis for that award.

D. *The Award of "Such Damages"*

The court in *Ferrante* held that a post-trial application for additional damages to offset negative tax consequences was appropriate in an NJLAD case.[98] The *Ferrante* court based its holding on the fact that negative tax consequences cannot be determined until *after a verdict*, and on its belief that a jury would have difficulty determining the value, if any, of such tax consequences.[99] In keeping with the trend of federal discrimination decisions,[100] the court required expert proof of the plaintiff's newfound tax liability, and held that a post-judgment motion is the proper vehicle for obtaining an offset.[101] The court then modified its earlier order to award damages "reflect[ing] the negative tax consequences of the verdict"[102] and instead awarded the plaintiff a $107,000 offset.[103] The court rejected the defendants' net opinion objection because they had ample opportunity to rebut the plaintiff's expert report on the negative tax impact of the award.[104]

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[97] *See supra* text accompanying notes 82-89; *see also* discussion *infra* Part VII.

[98] *Ferrante*, 839 A.2d at 996.

[99] *Id.*

> The plaintiff does not suffer [negative tax] damages at the inception of the trial, but only after the jury awards lump sum economic damages. The negative tax consequences of a jury award is [sic] not an issue that is readily subject to determination by a jury. This is true because the precise amount of the award is unknown until the verdict. *The jury would not have the expertise to project the tax liability on their award*, that is, to apply the appropriate tax rates and/or the alternate minimum tax computations. These calculations require expert analysis. *Therefore, post-trial application is the only viable procedural mechanism to consider this issue.*

Id. (emphasis added).

[100] *See* discussion *supra* Part II.

[101] *Ferrante*, 839 A.2d at 997.

[102] *Id.*

[103] *Id.* at 998.

[104] *Id.* The defendants had the plaintiff's expert report by December 10, 2000. *Id.* at 997-98. At no point did the defendants depose the plaintiff's expert, complain of any deficiency in the plaintiff's expert's response to interrogatories or document production, or identify a rebuttal expert with respect to the negative tax

E. *The Aftermath*

Clearly, a Law Division case is not binding on the courts of New Jersey.[105] However, *Ferrante* is certainly persuasive authority because it is the only published case addressing the issue of offsets under NJLAD. Since no aspect of the *Ferrante* decision was appealed, the practical effect of the decision is that New Jersey litigators could be living with this case as persuasive precedent for quite some time. Furthermore, many plaintiff's attorneys are aware of this case[106] because of a post-trial motion which resulted in an award of almost one million dollars in counsel fees.[107]

While it is common for defendants to bring post-trial motions seeking a new trial, judgment notwithstanding the jury verdict, or remittitur, the *Ferrante* holding certainly increases the chance that successful plaintiffs will apply for additur.[108] Liability for "negative tax consequences" could be especially troubling to a defendant who must pay a judgment to a plaintiff subject to a high marginal tax rate. In *Ferrante*, for example, the court awarded $107,000 to ease the tax burden of a secretary who made only $35,000 to $42,000 per year.[109]

Federal legislation may eventually preempt the court's ruling in *Ferrante*. The Civil Rights Tax Relief Act, first introduced by Congress in March 2001 and re-introduced in March 2003, intended to standardize tax offsets and eliminate the need for plaintiffs to file post-trial motions to obtain them.[110] By amending the Internal Revenue Code to exclude from gross income

consequences on the plaintiff's award. *Id.* In rejecting the defendants' objection, the court held that "a party cannot 'eschew discovery and then object to the admission of the materials that were fairly attainable through . . . depositions which logically flowed from the expert report already provided.'" *Id.* at 997 (quoting McCalla v. Harnischfeger Corp., 521 A.2d 851, 857 (N.J. Super. Ct. App. Div. 1987)).

[105] *See, e.g.*, N.J. Mfrs. Ins. Co. v. Gonsalves, 841 A.2d 512, 519 (N.J. Super. Ct. Law Div. 2003); State of New Jersey v. Rondinone, 677 A.2d 824, 828 (N.J. Super. Ct. Law Div. 1996).

[106] David H. Ganz, *Lump Sum Damages: What Happens To Employers?*, 11 NO. 10 EMP. L. STRATEGIST 1 (2004).

[107] Ferante [sic] v. Sciaretta, No. HNTL-584-02, 2003 WL 22048115 (N.J. Super. Ct. Law Div. July 17, 2003).

[108] Ganz, *supra* note 106, at 1.

[109] *Id.*

[110] H.R. 1155, 108th Cong. (2003); S. 557, 108th Cong. (2003); H.R. 840, 107th Cong. (2001); S. 917, 107th Cong. (2001).

"amounts received on account of claims based on certain unlawful discrimination and to allow income averaging for back-pay and front-pay awards received on account of such claims,"[111] the bill sought to give real meaning to the make-whole provisions of various laws against discrimination and make more certain defendants' potential liability under such statutes.[112] However, the Civil Rights Tax Relief Act did not pass after it was first introduced during the 107th Congress, nor did it pass after it was re-introduced during the 108th Congress.[113]

The proposed legislation would not have entirely excluded front and back pay from gross income.[114] However, the bill would have significantly graduated the taxes a successful plaintiff would have to pay on a discrimination award.[115] The proposed legislation would have reached *all* federal and state discrimination claims, and would have apparently preempted state law and made the court's rationale in *Ferrante* moot.[116] However, until the bill is re-

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[111] H.R. 1155, 108th Cong. (2003).

[112] Ganz, *supra* note 106, at 1:

> That bill would, among other things, allow income averaging for back and front pay awards over the number of years the award represents, and permit individuals to pay taxes at the same marginal rate that would have applied had there been no discrimination and lawsuit. The bill, which has the backing of a number of groups, including the U.S. Chamber of Commerce . . . would eliminate any adverse tax consequences of a lump sum discrimination award, and therefore, obviate the need for any enhanced damages in the post-trial phase of the case.

Id.

[113] *See supra* note 110. The bill has not yet been re-introduced during the 109th Congress. However, President Bush recently signed into a law a similar bill containing provisions that authorize deductions for awards representing attorneys' fees and court costs. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C.). While this law does not directly address the issue of offsets for front and/or back pay, *see* Polsky & Befort, *supra* note 31, at 94-96, it does address the problem described in *Porter v. USAID*, 293 F. Supp. 2d 152 (D.D.C. 2003). In *Porter*, the court refused to award the plaintiff an offset for a large award of attorneys' fees. *Id.* at 154. However, to mitigate the adverse tax consequences of the plaintiff's award, the court ordered the defendant to directly pay the plaintiff's counsel. *Id.* at 158.

[114] *See* H.R. 1155, 108th Cong. § 3 (2003).

[115] *See id.* (stating that tax liability from back and front pay awards in any given tax year would be treated as if the successful plaintiff had only received a specific portion of that award in that tax year).

[116] *See id.* § 2. The bill intended to mitigate the tax consequences of awards to plaintiffs under various federal statutes, in addition to:

> [a]ny provision of Federal, State, or local law, or common law claims

introduced and enacted into law, *Ferrante* remains persuasive authority in NJLAD cases.

V. Washington's Law Against Discrimination

The evolution of Washington's Law Against Discrimination ("WLAD")[117] resembles the evolution of its New Jersey counterpart. In both states, the legislature expanded the law's breadth and scope over time in response to increased and varied societal pressures.[118] However, the statutory language of New Jersey's and Washington's anti-discrimination laws does not correlate as neatly as their respective lineages.[119] Indeed, the remedies provided under WLAD are explicitly more expansive than those under NJLAD.[120] This textual difference led the Washington Supreme Court to award a tax offset under a different rationale than the one employed by the *Ferrante* court.[121]

A. *Legislative History*

WLAD was first enacted in 1949.[122] In the past half century, WLAD has been amended at least ten times in order to expand its reach and remedial scope.[123] A large portion of WLAD simply codifies common-law transgressions and remedies.[124] Every new right that has been incorporated into WLAD has been accompanied by language that specifically defines a violation of

> permitted under Federal, State, or local law, providing for the enforcement of civil rights or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.

Id.

[117] WASH REV. CODE ANN. §§ 49.60.010-.400 (West 2003).

[118] *See* discussion *supra* Parts III.A-B and *infra* Parts V.A-B.

[119] *Id.*

[120] *See* discussion *infra* Parts V.A-B.

[121] *Id.*

[122] Kilian v. Atkinson, 50 P.3d 638, 643 (Wash. 2002).

[123] *Id.* "[WLAD] was amended in 1957, 1969, 1973, 1974, 1977, 1979, 1984, 1993, 1995 and 1997." *Id.* at n.25.

[124] *See, e.g.*, City of Tacoma v. Franciscan Found., 972 P.2d 566, 569 (Wash. App. Div. 1999) (stating that large cities, for example, had the power to prohibit discrimination through their police powers before enactment of WLAD).

that right.[125] In sum, WLAD specifically protects six far-reaching civil rights,[126] which the legislature has occasionally broadened in response to the zeitgeist.[127] Simply put, "the legislative history of [WLAD] demonstrates a careful legislative decision to provide a broadly available *civil action remedy* for discrimination."[128]

One specific amendment, providing for aggrieved victims of discrimination "*any other appropriate remedy* authorized by this

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[125] Marquis v. City of Spokane, 922 P.2d 43, 54-55 (Wash. 1996)

> The statutory scheme as a whole and the legislative history show that when the Legislature has identified a specific right within [WLAD], it has also defined, by statute, what constitutes an unlawful violation of that right. The Legislature has *never* created a protected right in [WLAD] without simultaneously and expressly defining the statutory violation in detail. Thus, as RCW 49.60 presently exists, every right specified in [WLAD] is counterbalanced by a specific statute defining the obligation which is coextensive with that right.

Id. (Madsen, J., dissenting).

[126] WASH. REV. CODE ANN. §§ 49.60.030(1)(a)-(f) (West 2003).

> (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right. This right shall include, but not be limited to:
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> (a) The right to obtain and hold employment without discrimination;
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> (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
>
> (c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;
>
> (d) The right to engage in credit transactions without discrimination;
>
> (e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination . . . .
>
> (f) The right to engage in commerce free from any discriminatory boycotts or blacklists . . . .

Id.

[127] *See Marquis*, 922 P.2d at 55.

> The Legislature has twice added language to the six protected rights identified in [WASH. REV. CODE ANN. § 49.60.030(1)]. In 1984, the Legislature amended [WASH. REV. CODE ANN. § 49.60.030] and added to the right to be free from discrimination in insurance transactions the right to be free from discrimination in transactions involving health maintenance organizations.

Id. (Madsen, J., dissenting).

[128] Griffin v. Eller, 922 P.2d 788, 801 (Wash. 1996).

chapter or the United States Civil Rights Act of 1964 as amended,"[129] significantly affected the course of judgments in the employment discrimination context. This statutory change, which took place in 1993, was designed to incorporate into WLAD a broader range of remedies for successful plaintiffs.[130] This legislative shift is of special note, as the Washington Court of Appeals previously held that the term "actual damages," as used in the 1978 version of WLAD, was to be given its "familiar legal meaning,"[131] and the provision was never subsequently invoked by the Washington Supreme Court to justify an award of a tax offset in a WLAD case.[132]

Even after the statute was amended, Washington courts were unclear about the application of the "any other appropriate remedy" clause.[133] For example, in an action for punitive damages under WLAD, the Washington Supreme Court sitting *en banc* declared that at least two readings of the revised statute were possible.[134] Prior to *Blaney*, this ambiguity made the prospect of a

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[129] WASH. REV. CODE ANN. § 49.60.030(2).

[130] *See* Dailey v. N. Coast Life Ins. Co., 919 P.2d 589, 591 (Wash. 1996).

> The Civil Rights Act of 1964 provided private remedies for employment discrimination in Title VII, historically authorizing only equitable relief. By the Civil Rights Act of 1991, Congress amended the 1964 Act to allow greater trial costs, including expert fees. . . . The 1991 Act also amended 42 U.S.C. [§] 1981a . . . to permit compensatory and punitive damages in an action for intentional employment discrimination . . . .

Id. (internal citations omitted).

[131] Ellingson v. Spokane Mortgage Co., 573 P.2d 389, 394 (Wash. Ct. App. 1978). The court quoted the dictionary definition of actual damages: "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages. Synonymous with 'compensatory damages' and with 'general damages.'" *Id.* (quoting BLACK'S LAW DICTIONARY 467 (4th ed. 1968)).

[132] *See* Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757, 761-62 (Wash. 2004). "The issue of whether WLAD entitles plaintiffs who prevail in discrimination lawsuits to an offset for the additional federal income tax consequences is one of first impression in Washington." *Id.*

[133] *Dailey*, 919 P.2d at 591. "Ambiguities cloud the relation between 42 U.S.C. § 1981a(a)(1) and [WASH. REV. CODE ANN. § 49.60.030] to preclude characterization of their link as an express authorization for punitive damages." *Id.*

[134] *Id.*

> [T]he structure of the language in [WASH. REV. CODE ANN. § 49.60.030(2)] arguably evinces an intent to incorporate only federal remedies qualifying as "costs." While the trial court read the provision as:

successful plaintiff receiving damages for the adverse tax consequences of a WLAD award less likely.

B. *Purpose*

WLAD was enacted pursuant to the state's police power and is designed to secure civil rights for all citizens of Washington.[135] The class of persons it protects is exceedingly broad, and their civil rights are considered a matter of utmost state concern.[136] WLAD explicitly mandates that it be "construed liberally"[137] and courts have complied as they have construed WLAD to carry out legislative goals[138] and to fully effectuate the statute's purpose.[139] In fact, both the judicial and legislative branches agree that "the statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined."[140] In doing so, the judiciary has not only read WLAD broadly as a whole, but has

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> "to recover the actual damages . . . together with . . . any other remedy . . ." we might reasonably read the term "including" as restrictive: "the cost of suit including . . . any other remedy . . . ." Under the latter interpretation, punitive damages simply would fall outside the scope of the incorporation provision.

Id.

[135] WASH. REV. CODE ANN. § 49.60.010 (West 2003). "It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." *Id.*

[136] *See id.* The statute states in pertinent part:

> The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

Id.

[137] *Id.* § 49.60.020.

[138] Seven Gables Corp. v. MGM/UA Entm't Co., 721 P.2d 1, 4 (Wash. 1986). "In construing statutes, the goal is to carry out the intent of the Legislature." *Id.* (citing Bellevue Fire Fighters Local 1604 v. City of Bellevue, 675 P.2d 592 (Wash. 1984)).

[139] *Id.* "[I]t is the duty of the court in interpreting a statute to make the statute purposeful and effective." *Id.* (citing Washington Water Power Co. v. State Human Rights Comm'n, 586 P.2d 1149 (Wash. 1978)).

[140] Phillips v. City of Seattle, 766 P.2d 1099, 1102 (Wash. 1989) (citing Nucleonics Alliance v. WPPSS, 677 P.2d 108 (Wash. 1984)).

interpreted each specific provision liberally.[141] With these bulkheads in place, WLAD is well positioned to "deter and eradicate discrimination in Washington."[142]

C. *WLAD's Prohibition Against Employment Discrimination*

WLAD prohibits discrimination by an employer based on any one of a myriad of inherent characteristics of an employee, in three specific contexts.[143] A discrimination action can be based on: (1) an employer's refusal to hire the employee in question;[144] (2) an employer's discharging of the employee in question;[145] or (3) an employer's discriminatory compensation of or imposition of a discriminatory condition of employment on the employee in question.[146] In these contexts, WLAD prohibits discrimination based on age, sex, race and disability, with some qualifications.[147] A discrimination suit for refusal to hire based on disability is tempered by language that allows an employer not to hire an otherwise protected employee where the prospective employee's

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[141] *See, e.g.*, Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles, 59 P.3d 655 (Wash. 2002) (interpreting "public accommodation" clause of WLAD broadly, in accordance with legislative intent). "The legislature mandated not only a liberal interpretation of the WLAD, it also intended a liberal reading of what constitutes a 'public accommodation.' In an attempt to define 'public accommodation' the legislature provided a list of public places in general nonexclusive terms." *Id.* at 671.

[142] *Marquis*, 922 P.2d at 49 (citing Mackay v. Acorn Custom Cabinetry, Inc., 898 P.2d 284 (Wash. 1995); Burnside v. Simpson Paper Co., 864 P.2d 937 (Wash. 1994)).

[143] *See infra* notes 144-147 and accompanying text.

[144] WASH. REV. CODE ANN. § 49.60.180(1) (West 2003). "It is an unfair practice for any employer: To *refuse to hire* any person because of . . . ." *Id.* (emphasis added).

[145] *Id.* § 49.60.180(2). "It is an unfair practice for any employer: To *discharge or bar* any person from employment because of . . . . " *Id.* (emphasis added).

[146] *Id.* § 49.60.180(3). "It is an unfair practice for any employer: To discriminate against any person *in compensation or in other terms or conditions of employment* because of . . . . " *Id.* (emphasis added).

[147] *Id.* § 49.60.180(1).

> It is an unfair practice for any employer . . . [t]o refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

Id.

disability prevents performance of the job.[148] Additionally, no sex discrimination suits lie where the practical realities of an employer's business require separation of the sexes.[149] So while a broad range of classes are protected by WLAD, the legislature mandated some common-sense carve-outs to the broadly written and liberally interpreted statute.

The Washington judiciary has consistently expanded the reach of WLAD in accordance with legislative mandate. For example, courts allow a wrongful discharge suit brought by an individual claiming gender dysphoria as a disability for purposes of WLAD.[150] Further, a cause of action against an employer has been found to lie for depression exacerbated by sleep apnea.[151] Even before the recent rash of amendments to WLAD, a court in Washington recognized a cause of action brought by a plaintiff allegedly discharged because of his employer's *mistaken belief* that he was handicapped.[152] Given the breadth of claims allowed to proceed under WLAD, the courts' latitude in prescribing remedies is unsurprising. Building on the legislative groundwork, especially the equitable remedies added to the statute in 1993, the

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[148] *Id.*

[149] *Id.* § 49.60.180(3).

> It is an unfair practice for any employer . . . [t]o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

Id.

[150] Doe v. Boeing, Co., 823 P.2d 1159 (Wash. Ct. App. 1992). Gender dysphoria [transsexualism] is a "medically cognizable condition with a prescribed course of treatment," and thus a handicap under WLAD. *Id.* at 1163.

[151] *See* Martini v. Boeing Co., 945 P.2d 248 (Wash Ct. App. 1997) (stating that it is a violation of WLAD for an employer to exacerbate an employee's depression where the employer has actual or constructive knowledge of such a disability).

[152] Barnes v. Washington Natural Gas Co., 591 P.2d 461 (Wash. Ct. App. 1979). A "plaintiff claiming *not to be handicapped*" may sue under WLAD "on the grounds that he was discriminatorily discharged under the erroneous belief he suffered a handicap." *Id.* at 462 (emphasis added).

judiciary now interprets WLAD such that successful plaintiffs may collect tax offsets pursuant to the equitable remedies of Title VII authorized by WLAD.[153]

VI. Blaney v. International Association of Machinists & Aerospace Workers

A. *Facts*

In *Blaney v. International Association of Machinists & Aerospace Workers*, the plaintiff sued her union under WLAD for gender discrimination.[154] Linda Blaney had served as "steward and chief steward of her union shop."[155] In addition, she served as vice president and president of the local union.[156] She was also a delegate to the Washington State Labor Council and was active in the Washington State Machinists and the King County Labor Council.[157] The plaintiff claimed that from 1997 until 2000 the defendant union selected less qualified male business representatives.[158] Additionally, the plaintiff claimed that in 1999 the union removed her from her position as senior shop steward.[159] The jury found that the defendant had violated WLAD in the years 1998, 1999, and 2000 by hiring less qualified male representatives and by removing the plaintiff as senior shop steward.[160] Subsequently, the jury awarded Ms. Blaney $638,764.[161] She also received $237,625.38 for costs relating to the litigation.[162]

The plaintiff moved for a supplemental judgment reflecting

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[153] *Blaney*, 87 P.3d at 759.

[154] *Id.*

[155] *Id.* at n.1.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 759.

[159] *Blaney*, 87 P.3d at 759.

[160] *Id.*

[161] *Id.* at 759-60. "Ms. Blaney was awarded back pay, front pay, and compensation for emotional distress. The judgment totaled $638,764 ($112,903 for past lost wages and benefits, $450,861 for future lost wages and benefits (based on the average retirement age of 62.8), and $75,000 for pain, suffering, and emotional distress)." *Id.*

[162] *Id.* at 760. "Ms. Blaney sought and received a supplemental judgment of $237,625.38, for prejudgment interest, attorney fees, litigation expenses, costs, and expert witness fees and costs." *Id.*

the actual negative tax consequences of her award[163] following the jury's determination of damages.[164] The trial court denied the plaintiff's motion even though she presented expert testimony with respect to the negative tax consequences of her award.[165] The union appealed the damages award, and Ms. Blaney cross-appealed the trial court's denial of her motion for damages based on adverse tax consequences.[166]

B. *Holding and Rationale*

The Washington Court of Appeals reversed the trial court's denial of Ms. Blaney's motion for a supplemental judgment and held that WLAD entitled her to a tax offset.[167] Like the *Ferrante* court, the Washington Court of Appeals based its decision on the "actual damages" clause of WLAD.[168] The union appealed this decision, arguing, *inter alia*, that WLAD did not entitle the plaintiff to an "offset for the additional federal income tax consequences."[169]

The Washington Supreme Court agreed that WLAD entitled the plaintiff to an offset for the negative tax consequences of the award.[170] However, the court rejected the notion that the plaintiff's

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[163] *Id.* "Ms. Blaney . . . [was not seeking] a judgment to offset all the taxes she will incur from the $638,764 damage award . . . [but only] a judgment for the $244,753 in additional taxes she must pay above and beyond those she would have had to pay if the District had properly hired her as a business representative." *Id.*

[164] *Id.*

[165] *Blaney*, 87 P.3d at 760 n.2.

> [A] certified public accountant, testified by declaration that Ms. Blaney will incur an additional $244,753 in federal income tax consequences than she would have incurred if she had properly been given the business representative position. She will incur this greater liability because payment by lump sum places her in the highest tax bracket and triggers the Alternative Minimum Tax (AMT), which disallows portions of her attorneys fees as a miscellaneous itemized deduction.

Id. (internal citations and quotation marks omitted).

[166] *Id.* at 760.

[167] *Id.*

[168] *Id.* "The Court of Appeals characterized the offset as actual damages under WLAD, and remanded to the trial court for a calculation of the offset and determination of the amount of attorney fees and costs on appeal to be awarded to Ms. Blaney." *Id.* (citing Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 55 P.3d 1208, 1218 (Wash. Ct. App. 2002)).

[169] *Id.*

[170] *Id.* at 759. "We affirm the Court of Appeals' determination that WLAD entitles

negative tax consequences were "actual damages."[171] Instead, the court held that the plaintiff's negative tax consequences were properly characterized as "any other appropriate remedy" within the meaning of WLAD.[172] In so holding, the court drew directly from the text of WLAD, which provides a wide array of remedies for successful plaintiffs.[173] The court raised the issue of the characterization of the plaintiff's offset award *sua sponte*, as it was not specifically briefed by either party leading up to appeal.[174] The court clearly found the issue of sufficient import to raise on its own.[175]

The court found ample support in the case law for holding that "[a]n offset for the increased federal income tax consequences is not properly characterized under WLAD's provision for actual damages."[176] First, the court noted that "[a]ctual damages are 'a remedy for full compensatory damages,

Ms. Blaney to an offset for the additional federal income tax consequences . . . . " *Id.*

[171] *Blaney*, 87 P.3d at 759. "[W]e reject the Court of Appeals' characterization of the offset as actual damages, and instead characterize it as 'any other appropriate remedy authorized by . . . the United States Civil Rights Act of 1964 as amended.'" *Id.* (citing WASH. REV. CODE ANN. § 49.60.030(2)).

[172] *Id.* at 762. "An offset for additional federal income tax consequences is properly characterized under WLAD's provision for 'any other appropriate remedy.'" *Id.* (citing WASH. REV. CODE ANN. § 49.60.030(2)).

[173] *Id.* WLAD provides as follows:

> Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the *actual damages* sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or *any other appropriate remedy* authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. [§] 3601 *et seq.*).

Id. § 49.60.030(2) (West 2002) (emphasis added).

[174] *Blaney*, 87 P.3d at 762.

> Although the parties' petition and answer did not explicitly brief characterization of Ms. Blaney's requested offset as "any other appropriate remedy," we may reach this remedial provision under [the Washington Rules of Appellate Procedure] because the parties expansively defined the WLAD issue as to whether WLAD entitles Ms. Blaney to the offset. Moreover, we may reach the remedial provision under the common law exception because the provision is necessary to determine whether WLAD entitles prevailing plaintiffs to such an offset.

Id. (internal citations omitted).

[175] *See id.*

[176] *Id.* at 763-64.

excluding only nominal, exemplary or punitive damages,'[177] that are 'proximately caused by the wrongful action, resulting directly from the violation of [WLAD].'"[178] Next, the court defined proximate cause as a "cause which in a natural and continuous sequence, unbroken by a new, independent cause, produces the event, and without which that event would not have occurred."[179] Under these definitions, front and back pay are properly characterized as actual damages, but punitive damages cannot be so characterized because they did not directly result from the statutory violation.[180] The court noted that Ms. Blaney's offset award was attributable to federal law and not the underlying discrimination[181] and therefore "the additional tax liability [was] too attenuated from the unlawful discrimination to be deemed actual damages."[182] This rationale makes perfect sense: the unlawful discrimination resulted in the award whereas the tax liability from that award was due to the Internal Revenue Code.[183] Therefore, the plaintiff's tax liability did not fall within the definition of "actual damages."

C. *The Award of Damages as "Any Other Appropriate Remedy"*

Having held that the offset award was not properly characterized as "actual damages," the court found that "[a]n offset for additional federal income tax consequences is properly characterized under WLAD's provision for 'any other appropriate remedy.'"[184] The "any other appropriate remedy" clause was a relatively new addition to WLAD at the time of the case and had

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[177] *Id.* at 763.

[178] *Id.* (quoting Martini v. Boeing Co., 945 P.2d 248, 252 (Wash Ct. App. 1997)).

[179] *Id.* (quoting Bernethy v. Walt Failor's, Inc., 653 P.2d 280, 283 (Wash. 1982)).

[180] *Blaney*, 87 P.3d at 763. "In applying these definitions, this court characterized back and front pay proximately caused by unlawful discrimination as actual damages, but refused to characterize punitive damages as actual damages." *Id.* (internal citations omitted).

[181] *Id.* at 763-64. "Consistent with [case law], we refuse to characterize Ms. Blaney's requested offset for additional federal income tax consequences as actual damages because the proximate cause of the additional tax consequences is not the unlawful discrimination, but rather the additional tax liability is a direct result of the tax laws." *Id.*

[182] *Id.* at 764.

[183] *Id.*

[184] *Id.* at 762.

been fraught with ambiguity since it was added to the statute.[185] In *Blaney*, the court cleared up that ambiguity and held that the "any other appropriate remedy" clause stood as a separate and distinct WLAD remedy.[186] In coming to this conclusion, the court relied heavily on the legislative history and intent of WLAD.[187]

After finding that the "any other appropriate remedy" clause stood on its own, the court considered whether offsetting the adverse tax consequences of the plaintiff's award under WLAD was an appropriate remedy authorized by the Civil Rights Act of 1964.[188] The court answered this question in the affirmative after taking into account both the letter and intent of Title VII.[189] As discussed *supra*, the modern trend in Title VII cases has been to allow successful plaintiffs a tax offset based on an evidentiary threshold.[190] At the time of *Blaney*, the awarding of offsets to plaintiffs for adverse tax consequences was gaining momentum at the federal level.[191] Awarding offsets under Title VII served that

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[185] *Id.*; *see also supra* note 134 and accompanying text.

[186] *Blaney*, 87 P.3d at 762. "We now resolve any ambiguity by holding that the 'any other appropriate remedy' clause stands on its own as a third WLAD remedy." *Id.*

[187] *Id.* at 762-63.

> The structure of [WASH. REV. CODE ANN. § 49.60.030(2)] supports this reading of the statute; "any other appropriate remedy" relates to "together with," logically providing a *catchall remedy provision in addition to injunctive relief, actual damages, and cost of suit.* Moreover, this reading coincides with the liberal construction WLAD requires in order to effectuate its purposes of deterrence and eradication of discrimination.

Id. (emphasis added) (internal citations omitted).

[188] *Id.* at 763.

[189] *Id.* The court quoted Title VII's enforcement provision, which provides, in part:

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

42 U.S.C. § 2000e-5(g)(1) (2002) (emphasis added).

[190] *See* discussion *supra* Part II.

[191] *Blaney*, 87 P.3d at 763 (citing Sears v. Atchison, Topeka & Santa Fe Ry., Co., 749 F.2d 1451, 1456 (10th Cir. 1984)); EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998)).

statute's goals of "eradicat[ing] discrimination and 'mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination.'"[192] The court held that "[b]ecause WLAD incorporates remedies authorized by the federal civil rights act and that statute has been interpreted to provide the equitable remedy of offsetting additional federal income tax consequences of damage awards . . . WLAD allows offsets for additional federal income tax consequences."[193] Since WLAD was held to incorporate the equitable remedies of Title VII, and Title VII authorized equitable offset awards, an offset pursuant to WLAD was entirely appropriate.

D. *The Aftermath*

Unlike the *Ferrante* decision, the holding in *Blaney* came directly from the state supreme court and is therefore binding authority for every state court in Washington.[194] While there was one dissenting justice in *Blaney*, that opinion did not take issue with the appropriateness of the offset;[195] in fact, that justice explicitly agreed with the majority's award.[196] As such, the *Blaney* decision "*entitles* plaintiffs who win in discrimination lawsuits to an offset for the additional federal income tax consequences."[197] This entitlement, regardless of the reasoning, should make employers

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[192] *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

[193] *Id.*

[194] *See In re* LaChapelle, 100 P.3d 805, 808 (Wash. 2004). "[U]nder the doctrine of *stare decisis*, [once the Supreme Court has] decided an issue of state law, that interpretation is binding until [the Supreme Court] overrule[s] it." *Id.* (citations and internal quotation marks omitted). *See also* Waremart, Inc. v. Progressive Campaigns, Inc., 989 P.2d 524, 530 (Wash. 1999). "[T]he doctrine [of *stare decisis*] requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Id.* (citations and internal quotation marks omitted).

[195] *Blaney*, 87 P.3d at 764 (Sanders, J., dissenting). "I agree with the majority insofar as it holds the trial court erred by instructing the jury 'to calculate future earnings' from today until the time Ms. Blaney may reasonably be expected to retire.' But this instruction was anything but harmless." *Id.* (internal citations omitted).

[196] *Id.* at 764 n.1 (Sanders, J., dissenting). "I do not take issue with the majority's resolution of the tax offset issue." *Id.*

[197] *The WLAD and the Additional Federal Income Tax Consequences*, WASH. EMP. NEWSL. (Carney, Badley, Spellman, P.S., Seattle, Wash.), Summer 2004, at 3, http://www.carneylaw.com/resources/employmentlaw_summer2004.pdf (emphasis added).

think twice before discriminating against employees.[198]

The Washington Supreme Court did not address, and thus tacitly endorsed, the notion that a post-trial motion is the appropriate way to obtain a judgment for the amount of the plaintiff's adverse tax consequences.[199] This takes the amount of such awards out of the jury's hands and leaves it to an expert's proofs. Without the possibility of winning over a jury with respect to an offset award, defendants in discrimination cases are further pressured to settle instead of try cases on their merits.[200] Consistent with the trend in Title VII cases indicating that a defendant's liability no longer merely encompasses front and back pay, WLAD defendants now must worry about liability for the adverse tax consequences to the plaintiff.[201]

The issue of whether a successful plaintiff is entitled to an award for *all* taxes on a damages award was neither raised nor reached during the *Blaney* trial.[202] However, the prospect of liability for only those adverse tax consequences above and beyond a plaintiff's usual marginal rate is still daunting. The plaintiff in *Blaney* was awarded over $600,000 in damages, but the award for the adverse tax consequences was nearly $250,000.[203] As substantial as that award is, such sums could become even larger if lower courts hold that successful plaintiffs in discrimination cases

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[198] *See id.*

[199] *See* Douglas E. Arone, *Employer's Liability for the Tax Consequences of a Judgment*, http://www.gibbonslaw.com/publications/articlesuser2.cfm?pubid=1221 (last visited Sept. 6, 2005). "[B]ecause [a] plaintiff does not suffer the adverse tax effects until after the jury awards lump sum damages, the Court concluded that a post-trial motion is the appropriate vehicle to obtain this relief." *Id.* (citing Blaney v. Int'l Ass'n of Machinists, No. 48444-3-I, slip op. at 7-9 (Wash. Ct. App. 2002)).

[200] *See id.* "Defendants in LAD cases are often under considerable pressure to settle because of their potential liability for attorneys' fees if the plaintiff prevails at trial." *Id.*

[201] *See id.* The availability of tax offsets "represents yet another arrow in the quiver of plaintiff's [sic] in LAD cases that can be used to bring the employer to the settlement table." *Id.*

[202] *Washington Law Against Discrimination (WLAD): A Successful Plaintiff and the Tax Implications*, NEWS YOU CAN USE: EMPLOYMENT (Cairncross & Hempelmann, Seattle, Wash.), May 18, 2004, http://www.cairncross.com/news/newsdetail.php?id=135&type=practice_area (last visited Sept. 6, 2005). "Blaney did NOT seek an offset for all the taxes that she would incur as a result of the $638,764 damage award." *Id.*

[203] *Id.* "Blaney asked for a judgment for $244,753 in additional taxes that she would have to pay above and beyond those that she would have had to pay if she had been hired as the business representative." *Id.*

are entitled to an offset of all adverse tax consequences.

Since *Blaney* was decided by a court of last resort and is firmly grounded in the letter and spirit of the law, its precedential value is unquestionable. For example, in *Pham v. City of Seattle*, the Washington Court of Appeals relied on *Blaney* to award a successful plaintiff a tax offset award.[204] In so holding, the Court of Appeals found instructive both that Title VII has been interpreted to allow for a tax offset as an equitable remedy and that WLAD incorporated that remedy on the state level.[205] Again, in *Hirata v. Evergreen State Ltd. Partnership Number Five*, the Washington Court of Appeals upheld a supplemental judgment to offset the tax consequences of a WLAD award.[206] In *Hirata*, the court cited to *Blaney* in characterizing the offset award as a result of the tax laws, not the unlawful discrimination.[207]

However, as mentioned *supra*, federal law that would seemingly preempt *Blaney* has been proposed and may be enacted in the near future.[208] Again, the Civil Rights Tax Relief Act seeks to codify the make-whole provisions of discrimination statutes and simultaneously delineate a defendant employer's liability.[209] While the Civil Rights Tax Relief Act would seemingly preempt Washington law,[210] little would change with respect to the availability of offset awards in that state. In fact, the only possible difference would be that successful plaintiffs would pay taxes on their awards at their current marginal rate instead of receiving their awards effectively tax free.[211]

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[204] Pham v. City of Seattle, 103 P.3d 827, 834-35 (Wash. Ct. App. 2004).

[205] *Id.*

> The federal civil rights act has been interpreted [in *Blaney*] as providing an award for tax consequences as an equitable remedy. [WLAD] incorporates remedies authorized by federal law, and therefore an offset for additional federal income tax consequences of a discrimination award falls into the category of "any other appropriate remedy," the "catchall remedy provision" of [WASH. REV. CODE ANN. § 49.60.030(2)].

Id. (internal citations omitted).

[206] Hirata v. Evergreen State Ltd. P'ship No. Five, 103 P.3d 812, 816-17 (Wash. Ct. App. 2004).

[207] *Id.*

[208] *See* discussion *supra* Part IV.E.; *see also supra* note 112.

[209] *Hirata*, 103 P.3d at 816-17.

[210] *See* discussion *supra* Part IV.E; *see also supra* note 116 and accompanying text.

[211] *See* discussion *supra* Part IV.E; *see also supra* notes 114-115 and accompanying text.

VII. *Tax Offsets as "Actual Damages" versus "Any Other Appropriate Remedy"*

Adverse tax consequences are a problem in discrimination awards because the Internal Revenue Code only exempts from taxable income awards due to physical injury.[212] In discrimination cases, there is almost never an attendant physical injury accompanying the unlawful discrimination.[213] The plaintiffs in *Ferrante* and *Blaney* could only look for a tax offset from the presiding judge, not the Internal Revenue Code.[214] Without an award for a tax offset in *Ferrante*, the plaintiff would have lost approximately one-third of her award to the Internal Revenue Service due to a dramatic increase in her marginal tax rate.[215] Similarly, in *Blaney*, the plaintiff would have lost almost half of her award due to a marginal tax rate increase.[216]

While the *Ferrante* and *Blaney* cases reached the same ultimate conclusion, their rationales are notably different. The former case relied on a legal remedy of "actual damages"[217] while the latter case justified the offset as an exercise of the court's equitable powers pursuant to the "any other appropriate remedy" clause of the applicable statute.[218] In *Ferrante*, the court expressly declared the tax offset to be "such damages" that were available under NJLAD.[219] In so doing, the court looked not only to the legislative intent and history of NJLAD, but also to relevant case law from sister jurisdictions.[220] However, the rationale of *Blaney* is much sounder than that of *Ferrante*.

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[212] *See supra* note 7.

[213] In fact, research has revealed no published cases describing such a situation. This is unsurprising as such a situation would almost certainly lead to another cause of action, and not conform to a discrimination cause of action.

[214] *See supra* note 7.

[215] *See* Ferrante v. Sciaretta, 839 A.2d 993, 998 (N.J. Super. Ct. Law Div. 2003) (noting that plaintiff received $340,659 for front and back pay, and that the tax liability of that award was $107,000).

[216] *See* Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757, 759-60 (Wash. 2004) (stating that plaintiff received $112,903 for lost pay and $450,861 for future wages, and that the tax liability of that award was $244,753).

[217] *Ferrante*, 839 A.2d 995-96.

[218] *Blaney*, 87 P.3d at 760-62.

[219] *Ferrante*, 839 A.2d at 994-97.

[220] *Id.* at 994-96.

The *Ferrante* court primarily relied on *O'Neill*, a federal ADEA decision.[221] There, the Eastern District of Pennsylvania held that a successful plaintiff was entitled to an additional award to offset the adverse tax consequences of an award under the ADEA.[222] The court fashioned its order to reflect the tax consequences of the front and back pay award that exceeded the plaintiff's likely tax liability in the absence of the award.[223] In so holding, the District Court relied on the make-whole provisions of the ADEA.[224]

The reasoning of *O'Neill* makes sense in the context of Title VII cases because Title VII vests courts with broad discretion to fashion an equitable remedy in discrimination cases.[225] However, the rationale of *O'Neill* runs counter to *Ferrante*. *O'Neill* utilized the federal equitable remedy,[226] while *Ferrante* insisted on employing a legal remedy and labeling the plaintiff's offset as "actual damages."[227] Thus, *Ferrante*'s reliance on federal precedents such as

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[221] O'Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443 (E.D. Pa. 2000); *see also* discussion *supra* Parts II-III.

[222] *O'Neill*, 108 F. Supp. 2d at 446.

[223] *Id.* at 448.

> [T]he O'Neills' gross earnings this year would have been approximately $55,853, had Mr. O'Neill continued working at Sears . . . . Using the O'Neills' deductions of approximately $12,000 yields a tax rate of 11.96%. At that tax rate, Mr. O'Neill would owe $28,384.91 in taxes on the $237,332 he has received in front and backpay. However, because he is receiving this money all at once, together with his present salary of $24,960 and Mrs. O'Neill's salary of $11,428, his gross income this year, exclusive of compensatory and liquidated damages, will be $273,730. Using the same deductions, the tax rate jumps to 28.3%. Applying this rate to plaintiff's front and backpay recovery of $237,332 shows a tax bite of $67,164.96. This amount is $38,780.05 *more* in taxes than plaintiff would owe on this money had he received it over time as annual wages. The court will, therefore, mold the verdict to include an award of $38,780.05 for these negative tax consequences.

Id. (internal citations omitted).

[224] *Id.* at 447.

> Since the Third Circuit recognized the economic necessity of compensating for the lost "time value of money" in order to comply with the "make-whole" doctrine, we anticipate that the Third Circuit would likewise compensate the claimant for the depletion of that money due to the increased taxes to which the award is subject on account of its being received in a single tax year, rather than being spread out over time.

Id.

[225] *See* discussion *supra* note 15 and accompanying text.

[226] *O'Neill*, 108 F. Supp. 2d at 443-44.

[227] Ferrante v. Sciaretta, 839 A.2d 993, 996 (N.J. Super. Ct. Law Div. 2003).

O'Neill and *Sears* seems somewhat misplaced based on the *Ferrante* court's conclusion that the offset was properly characterized as "actual damages."[228] The *Ferrante* court's insistence on characterizing the offset as "actual damages" makes little sense since NJLAD seems to vest New Jersey courts with the same remedial powers as their federal counterparts.[229] The trend in Title VII cases is that, where appropriate, offset awards are granted pursuant to a court's exercise of its equitable powers.[230] They are *not* properly characterized as damages due to the unlawful discrimination; rather, they stem from tax liability imposed by the Internal Revenue Code.[231]

Ferrante also relied on the appellate-level *Blaney* decision.[232] *Ferrante* found instructive, and, indeed, mimicked the holding of, the Washington Court of Appeals by employing the language and reasoning of that court.[233] Both holdings placed great weight on construing the anti-discrimination law liberally, concluding that "adverse federal income tax consequences triggered by the payment of a judgment for a violation of the [statute] are *within the scope of the term 'actual damages.'*"[234] However, the Washington Supreme Court expressly disapproved of the Washington Court of Appeals' rationale for awarding a tax offset in *Blaney*.[235] Clearly, this disapproval is not binding on the New Jersey Supreme Court, but it is certainly persuasive.

The Washington Supreme Court explicitly rejected labeling the tax-offset award in *Blaney* as actual damages, instead finding the authority for such an award as "any other appropriate

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[228] *Id.*

[229] *See* N.J. STAT. ANN. § 10:5-13 (West 2002) (stating the enumerated remedies of NJLAD "are in addition to any provided by this act or any other statute").

[230] *See* discussion *supra* Part II.

[231] *Id.*

[232] *Ferrante*, 839 A.2d at 995 (citing *Blaney*, 55 P.3d at 1216-17).

[233] *Id.*

[234] *Id.* (citing *Blaney*, 55 P.3d at 1216-17) (emphasis added).

[235] *Blaney*, 87 P.3d at 759.

> We affirm the Court of Appeals' determination that WLAD entitles Ms. Blaney to an offset for the additional federal income tax consequences, but we reject the Court of Appeals' characterization of the offset as actual damages, and instead characterize it as "any other appropriate remedy authorized by . . . the United States Civil Rights Act of 1964 as amended."

Id. (internal citations omitted).

remedy."[236] Notably, however, the *Blaney* court had the advantage of the statutory text of WLAD which, unlike NJLAD, specifically incorporates federal civil rights remedies.[237]

WLAD expressly states that an aggrieved plaintiff is entitled to specific, enumerated remedies, *and* "any other appropriate remedy authorized by . . . the United States Civil Rights Act of 1964 as amended."[238] This provision draws specific attention to the fact that, as Title VII litigation evolves, so does a plaintiff's remedies under WLAD. NJLAD contains a similar provision that would allow for an award of a tax offset without characterizing such an award as part of the plaintiff's "actual damages." Indeed, NJLAD states that "[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs. *These remedies are in addition to any provided by this act or any other statute.*"[239] However, neither the plaintiff nor the court in *Ferrante* used this statutory language to invoke the broad remedies available via Title VII. Instead, the court insisted on shoehorning the offset into the category of "actual damages."[240] As such, the award was deemed to result from the discrimination, *not* the tax code.[241] This rationale was soundly dismissed in *Blaney*.[242] While the Internal Revenue Code specifically exempts damages received by a plaintiff to compensate for his or her physical injuries, the Internal Revenue Code makes no such exception for discrimination awards.[243]

Given the legislative history and purpose of NJLAD, it is logical to conclude that the New Jersey legislature intended the remedies of "any other statute" to encompass those of Title VII.[244] However, as evidenced by the characterization of the plaintiff's award in *Ferrante*, it is problematic that NJLAD does not include the same language as WLAD. While it may seem obvious that the "any other statute" provision of NJLAD should direct courts to the

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[236] *Id.*

[237] WASH. REV. CODE. ANN. § 49.60.030(2) (West 2003).

[238] *Id.*

[239] N.J. STAT. ANN. § 10:5-13 (West 2002) (emphasis added).

[240] Ferrante v. Sciaretta, 839 A.2d, 993, 995 (N.J. Super. Ct. Law Div. 2003).

[241] *See id.*

[242] Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757, 763-64 (Wash. 2004).

[243] *See supra* note 7.

[244] *See* discussion *supra* Parts III.A-B.

Title VII remedies explicitly available under WLAD, a comparison of *Ferrante* and *Blaney* does not bear this out.[245]

Amending NJLAD to specifically include Title VII remedies should work no great change on the statute itself. In fact, it should be seen as a natural explication of the remedies already provided.[246] So amending NJLAD would very likely take the decision of the characterization of an offset out of the hands of the courts, as the equitable characterization of the award would be defined by statute. As amended, NJLAD would unquestionably provide for "the equitable remedy of offsetting additional federal income tax consequences of damage awards" in discrimination cases.[247] Amending NJLAD to *explicitly* authorize tax offsets, however, would go too far. By tying the remedies of NJLAD to those of Title VII, NJLAD would remain flexible to evolve with Title VII without simultaneously creating an entirely new and distinct body of law.

Such an amendment seems well suited to a statute whose evolution has been one of constant expansion of scope and breadth.[248] Since both NJLAD and Title VII share the same goals and make-whole mandates, it follows that they should both afford the same remedies. Furthermore, since NJLAD proscribes more types of discrimination than does Title VII, the remedies of NJLAD should be at least as expansive as those under Title VII.[249]

Additionally, amending NJLAD to specifically include Title VII remedies would not be an exceptional departure from the norm. While WLAD is the only state statute to specifically incorporate Title VII remedies, several other states have incorporated expansive equitable remedies either by statute or judicial implication. For example, the Connecticut Supreme

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[245] *See* discussion *supra* Parts IV, VI.

[246] *See* discussion *supra* Part III.A.

[247] *Blaney*, 87 P.3d at 763.

[248] *See* discussion *supra* Parts III.A-B.

[249] *See* N.J. STAT. ANN. § 10:5-3 (West 2002) (prohibiting discrimination based on "the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers"); *compare with* 42 U.S.C. § 2000e-2 (2002) (prohibiting discrimination based on "race, color, religion, sex, or national origin").

Court has interpreted its human rights statute to include "broad discretion to award reinstatement, back pay or *other appropriate remedies* specifically tailored to the particular discriminatory practices at issue."[250] In so holding, the court found that Connecticut's statute was designed to "restore those wronged to their rightful *economic status* absent the effects of the unlawful discrimination."[251] Similarly, California's anti-discrimination statute affords aggrieved plaintiffs "*other appropriate equitable relief* to protect the peaceable exercise or enjoyment of the . . . rights secured."[252] The civil rights laws of Maine,[253] Rhode Island,[254] and West Virginia[255] all share this exact language in providing broad relief to aggrieved plaintiffs. While Arkansas' law is worded somewhat differently, it secures for victims of discrimination "legal and equitable relief or *other proper redress*."[256] Likewise, Ohio has its own language but still provides for "any legal or equitable relief that will effectuate the individual's rights."[257]

A common theme to all of these statutes is the possibility of broad equitable relief. However, since only New Jersey and Washington have addressed the specific issue of tax offsets in state discrimination claims, it remains to be seen how other state statutes will be interpreted. Whether or not those other states recognize an equitable remedy pursuant to Title VII is a highly relevant question for the future. In any event, *Ferrante* indicates that NJLAD should be amended to specifically allow plaintiffs the remedies afforded by Title VII. Since the language, goals, and mandate of NJLAD mirror those of Title VII, and the trend in Title VII cases is to allow for an offset award, NJLAD should expressly allow for such a remedy pursuant to Title VII.

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[250] Thames Talent, Ltd. v. Comm'n on Human Rights & Opportunities, 827 A.2d 659, 665 (Conn. 2003) (emphasis added).

[251] *Id.* (quoting Bridgeport Hosp. v. Comm'n on Human Rights & Opportunities, 653 A.2d 782 (Conn. 1995)) (emphasis added).

[252] CAL. CIV. CODE. ANN. § 52.1 (West 2004) (emphasis added).

[253] ME. REV. STAT. ANN. tit. 5, § 4681 (2004).

[254] R.I. GEN. LAWS § 42-112-2 (2003).

[255] W. VA. CODE ANN. § 5-11-20 (2003).

[256] ARK. CODE ANN. § 16-123-105 (Michie 2003) (emphasis added).

[257] OHIO REV. CODE ANN. § 4112.02 (West 2002).

VIII. Conclusion

When legislatures enact discrimination statutes to effect positive social change, judges must be wary not to expand the scope of such statutes without considering the implications of their decisions and rationales.[258] The judiciaries of both New Jersey[259] and Washington[260] have a history of generously interpreting remedial statutes designed to redress social wrongs. However, courts do not always take into account the repercussions of such well-intentioned holdings.[261] The force of *stare decisis* is often only overcome by a wild change in circumstances or argument.[262] For better or worse, the standard discrimination case is unlikely to provide either of these changes. That said, the general conclusion of *Ferrante* and *Blaney* is correct: successful plaintiffs in

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[258] *See, e.g.*, Ward Farnsworth, *To Do a Great Right, Do a Little Wrong: A User's Guide To Judicial Lawlessness*, 86 MINN. L. REV. 227, 228 (2001) (noting that sometimes the judiciary is "unable to find a satisfactory legal justification for an outcome that they wanted to reach, but nevertheless decide[s] to order the outcome because they [are] convinced it would serve the public interest").

[259] *See, e.g.*, James D. Young, *Liability for Team Physician Malpractice: A New Burden Shifting Approach*, 27 RUTGERS L. REC. 4 (2003), *available at* http://www.lawrecord.com/oldsite-pre20050412/articles/vol27/jamesnote.htm (stating that "New Jersey Courts provide one of the most liberal interpretations of the intentional tort exception to the Workers' Compensation bar"); Merric J. Polloway, *A Duty to Rescuse Within the Sexual Abuse Context: Foreseeability and Public Policy Drive the Duty Analysis of the Supreme Court of New Jersey*, 29 SETON HALL L. REV. 1581, 1600 n.98 (1999) (stating that "the nature of New Jersey courts [is] to 'allow[ ] liberal access of litigants to the courts for redress of grievances'"); Pitney, Hardin, Kipp & Szuch, LLP, *Illegal Drug Users, Need Incentive to Kick the Habit? How About Keeping Your Job?*, 10 NO. 3 N.J. EMP. L. LETTER 1 (2002) (stating that New Jersey courts consistently interpret NJLAD liberally).

[260] *See, e.g.*, Linda Louise Blackwelder Pall, *Treatment of Education Earned During the Marriage at Divorce: An Equitable Alternative for Idaho*, 26 IDAHO L. REV. 499, 519 (1989) ("Washington courts have some of the most liberal legislative directives of any community property state within which to 'do equity.'"); Shylah Miles, Note, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 632 (2001) ("Washington courts have used liberal construction to modify sexual harassment law so that inequities in the workplace are extinguished.").

[261] *See, e.g.*, Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 907 (1995) (stating that, in the relation between the means and ends of remedial race discrimination statutes, "no good deed goes unpunished").

[262] *See, e.g.*, Brian F. Havel, *Forensic Constitutional Interpretation*, 41 WM. & MARY L. REV 1247, 1275 n.135 (2000) (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)) (stating that, following *Casey*, courts "must adhere to precedent to maintain 'solidarity' with people who struggle to accept a decision with which they disagree out of respect for the rule of law"); *see also generally supra* note 194.

discrimination cases are entitled to a tax-offset award under their respective state's anti-discrimination laws. However, *Blaney* employs a much sounder rationale. The *Blaney* court repudiated the notion, adopted by the *Ferrante* court, that the adverse tax consequences resulting from an award granted pursuant to an anti-discrimination statute are "actual damages."[263] NJLAD should be amended so that another New Jersey court considering an offset issue reaches the same conclusion as *Ferrante* but based on the rationale of *Blaney*. Amending NJLAD to specifically include the remedies of Title VII would do this by directing judges to ground NJLAD offsets in equity.

Blaney and *Ferrante* also stand for the broader principle that victims of discrimination should be made whole, and guilty defendants should bear the cost. However, the problem of heightened tax liability stems from Internal Revenue Code, which permits exemption for awards due to negligence but not for awards due to intentional misconduct. Allowing recovery only for the difference between a successful plaintiff's pre- and post-award tax liability makes the plaintiff whole without requiring a defendant to subsidize the tax liability that the plaintiff would have otherwise incurred. Nonetheless, legislative action is not necessary to ensure that a plaintiff does not receive a windfall. The more prevalent motions for offsets become, the more likely it is that defendants will respond with their own expert testimony so that any offset represents only the heightened liability due to the discrimination award.[264]

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[263] Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757, 764 (Wash. 2004).

[264] *See, e.g.*, Dow v. L&M Security Sys., Inc., No. A-2293-02T3, A-2704-02T3, 2004 WL 2029763 (N.J. Super. Ct. App. Div. June 9, 2004) (upholding the denial of a plaintiff's request for a tax offset based on lack of sufficient proof of adverse tax consequences).