Back Pay for Employment Discrimination Under Title VII – Role of the Judiciary in Exercising Its Discretion

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COMMENTS

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In January 1973, American Telephone & Telegraph (AT&T) agreed to a settlement in a sex discrimination suit that involved fifteen million dollars in back pay awards to incumbent employees. In October 1973, a district court judge in Michigan found Detroit-Edison guilty of engaging in racially discriminatory employment practices and ordered the company to grant back pay not only to current employees and applicants who had not been hired, but also to individuals who had never applied for work because of the company's reputation for racial discrimination. Once this class of discriminatees is properly delineated, the amount of money involved will probably run into the millions of dollars.

Such back pay awards are authorized by section 706(g) of Title VII of the Civil Rights Act of 1964, 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 . . . or any other equitable relief as the court deems appropriate.

As illustrated by the AT&T settlement and the Detroit-Edison case, sec-

tion 706(g) allows the courts to remedy employment discrimination in a way that can have a tremendous financial impact on employers and unions found guilty of discriminating on the basis of race, color, sex, religion or national origin. Of vital concern to such employers and unions is an understanding of the factors influencing a judge’s decision in awarding back pay.

This Comment will attempt to explain how the discretion to deny a back pay award\(^4\) is becoming severely limited. Effectively what has evolved is a presumption that back pay is to be awarded in most cases whenever there has been a discriminatory impact because of unlawful employment practices. An analysis of this trend first requires an investigation of two areas that have influenced this development toward a mandatory award: one, the nature and purpose of back pay relief; and two the easing of the requirement that a court first find an intent to discriminate on the part of the guilty party before it can consider a back pay award. This paper will then explore the various other factors affecting the court’s discretion in awarding back pay in Title VII suits.

**History of Back Pay Under Title VII**

Although the fair employment provisions of the Civil Rights Act of 1964 underwent numerous changes before its enactment on July 2, 1964,\(^5\) a relief provision, including back pay, was incorporated from the very beginning.\(^6\) Since that time back pay awards in Title VII cases have become entrenched in the case law, and despite the business and labor communities grave concern about the impact of back pay,\(^7\) there were no reported attempts to eliminate the back pay provisions from Title VII when it was amended in 1972.

However, section 706(g) was amended in 1972 in an attempt to limit the liability under back pay awards so that “[b]ack pay shall not accrue from a date more than two years prior to the filing of a charge with the Commission.”\(^8\) This amendment reflected concern over the enormous financial liability that back pay places on employers and unions, especially with the growth of class action suits under Title VII.\(^9\)

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\(^4\) Section 706(g) states that “the court may . . . order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay . . .” (emphasis added).

\(^5\) 110 Cong. Rec. 17,783 (1964).


\(^7\) This was expressed in part by the opposition to congressional proposals to strengthen the EEOC. See N.Y. Times, Sept. 17, 1971, at 1, col. 6; Wall Street Journal, Feb. 4, 1972, at 10, col. 2; The Washington Post, Feb. 15, 1972 at A2, col. 7.

\(^8\) 42 U.S.C. § 2000e-5(g) as amended by Pub. L. No. 92-261 (1972). There was previously no such statutory limitation.

As long as back pay was awarded in private actions only to those individuals who had filed a charge of unfair employment practice with the Equal Employment Opportunity Commission, the amount of money involved was necessarily limited. The potential liability of employers for large amounts of back pay did not become apparent until the courts began to allow private plaintiffs to sue on behalf of individuals who had not filed charges and to recover back pay for the members of the class.

A similar development in the growth of multiple recoveries for back pay occurred in suits brought by the Justice Department. Originally the Justice Department did not, as a general rule, seek back pay in its pattern or practice suits under section 707(a), but normally only requested injunctive relief. In 1971 the Department reversed its earlier policy of not seeking back pay awards and began to sue for back pay on behalf of discriminatees. Initially there was a question whether back pay relief was appro-


11. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) was the first case to deal extensively with the question of whether intervening plaintiffs who had not filed a charge with the EEOC should be allowed to recover back pay. The Seventh Circuit reasoned that, since the case of Oatis v. Crown-Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968) had established the right of class action for injunctive relief, there was no justification for not treating a suit as a class action for purposes of back pay. Moreover, the court felt that requiring each employee to file a charge with the EEOC and then join in the suit would have “a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted.” 416 F.2d at 720. The court stated that “a suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic,” and went on to hold that the “... suit may properly be treated as a class action under Title VII as to all forms of relief to which any and all members of the class may be entitled. ...” Id. at 719-20. The Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969) then held that a discharged black employee could maintain a class action on behalf of all black employees discriminated against on the basis that the class was not limited to only those discharged black employees. In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), the Seventh Circuit again gave its approval to extending relief beyond the named plaintiff. Since these decisions the authority for class actions has been generally well established. See Moody v. Albermarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Diz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 930 (1971), modified, 348 F. Supp. 1083 (S.D. Fla. 1972).


13. Id.
appropriate in pattern or practice suits brought by the Attorney General, but a recent decision has affirmatively settled that such relief is available. This expansion of the application of back pay awards to include Justice Department suits increases the potential financial impact on guilty parties.

Although back pay awards are now generally considered appropriate in class action suits, there still exist unresolved problems in how the class action is to be treated and who may be included. The most far reaching decision to date, concerning who may be entitled to back pay relief, is United States v. Detroit Edison Co., in which the court included not only those black citizens whom the defendant had refused to hire or had discharged from employment, but also included those blacks who attended a vocational school in the Detroit area and took courses in mathematics, science or similar courses and who would have applied to Detroit-Edison but for the defendant's discriminatory hiring policy. Obviously, such a classification of potential class members "of those who would have applied" involves difficult problems of proof of standing. Whether such a wide ranging classification will be upheld by other courts remains to be determined. Yet, the case serves as an indication that not only have the courts accepted the propriety of back pay in class actions, but they also are becoming more liberal in their determinations of the qualified members of such a class.

The eight year history of back pay awards under Title VII demonstrates that the courts have fully embraced the concept of such relief as an appropriate remedy of employment discrimination, but questions remain as to whether, when and how the remedy is applied.

Nature and Purpose of Back Pay

The nature and purpose of the award for back pay must be considered ultimately in light of the fundamental obligation of courts in Title VII cases to render decrees which will effectuate the broad policies of the statute.

14. United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). On remand, the district court ordered the Georgia Power Co. to pay $2.1 million to black workers for back wages, back and future pension benefits, travel and living expenses, and employment bonuses. The award, which included almost $1.8 million for back pay alone, was supposedly the largest ever as the result of a full court trial. Washington Post, Feb. 1, 1974, at A1, col. 3.


17. Id. at 121.

18. This has been the understanding in cases considering other civil rights acts where it has been held that such acts reflect "a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes." Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir.), cert. denied, 368 U.S. 921 (1961).
The avowed purpose of Title VII is to eliminate discrimination in employment because of race, color, religion, sex or national origin.\(^{19}\) Section 706(g) of the Act gives courts the means for eliminating employment discrimination by affording them the opportunity to enjoin unlawful employment practices and to "order such affirmative action as may be appropriate..."\(^{20}\)

In light of this grant of authority, the courts have viewed back pay as a method of compensating the victims of discrimination for their economic losses resulting from the unlawful treatment.\(^{21}\) It has been described as remunerative in nature, not punitive, "not a penalty imposed as a sanction for moral turpitude," but equitable—"intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination."\(^{22}\) At least one court has said that back pay is equivalent to the equitable remedy of restitution.\(^{23}\) Thus, the courts have stressed the compensatory nature of the award.\(^{24}\)

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\(^{22}\) Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971). See also United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973) which states, "It is properly viewed as an integral part of the whole of relief which seeks not to punish the respondent but to compensate the victim of discrimination."

\(^{23}\) Rogers v. Loether, 467 F.2d 1110, 1121 (7th Cir. 1972).

\(^{24}\) The compensatory character of back pay awards naturally involves the granting of monetary damages which are traditionally designated as legal remedies. However, the courts have described the remedy of back pay in Title VII cases as equitable in nature. This divergence in definitions raises the problem of whether back pay claims under Title VII may be tried by a jury. If the claim constitutes an action for damages cognizable at law, then a jury trial should be appropriate. However, Congress did not intend to provide a right to jury trials in enforcement litigation under Title VII. (110 Cong. Rec. 7255 (1964) (see remarks of Senators Ervin and Case); 110 Cong. Rec. 6549 (remarks of Senator Humphrey)). Furthermore, there is authority for the proposition that there is no constitutional right to jury trials in Title VII back pay cases. Thus, back pay awards in Title VII cases, though compensatory in nature, are best characterized as equitable rather than a legal remedy. For an extensive discussion of this problem see Comment, The Right to Jury Trial Under Title VII of the Civil Rights of 1964, 37 U. Chi. L. Rev. 167, 170-180 (1969); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights of 1964, 84 Harv. L. Rev. 1109, 1265-66 (1971). See also Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969). See also note 108 infra.
Such a view is in accord with congressional intentions as to the nature of the relief provision. According to congressional testimony, the back pay provision of Title VII was modeled after section 10(c) of the National Labor Relations Act. Cases decided under that Act have held that a back pay order is designed to make the victims whole for losses resulting from unfair labor practices. Thus Title VII decisions comport with that intent. Furthermore, Congress indicated its approval of viewing back pay as a compensatory measure when it ratified and approved that purpose in reenacting section 706(g) of the Act as a part of the Equal Employment Opportunity Act of 1972.

Although the courts and Congress have stressed the compensatory nature of back pay, the deterrent effect of the award is equally important. The Supreme Court has declared in a voting rights case that the court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." An analogy to back pay decisions under Title VII seems appropriate because such awards in employment discrimination cases may well be regarded as an incentive to prohibit future acts of discrimination by the unions or the employers. Furthermore, such awards put other employers on notice as to the financial consequences involved in allowing unlawful employment practices to exist.

Most courts have spoken only of eradicating or terminating discriminatory practices, but the Eighth Circuit, in United States v. N.L. Industries, Inc., addressed itself to the issue of back pay acting as a deterrent. The court characterized back pay as a catalyst causing employers and unions to ex-
amine their employment practices to eliminate vestiges of discrimination. Furthermore, the court explained that awarding back pay consistently would induce employers and unions to remedy their employment procedures without court intervention. Whether other courts will also begin to view back pay as a deterrent is yet to be seen.

Essentially, back pay awards under Title VII encompass two purposes: one, compensating victims of discrimination for the losses they have incurred because of unlawful employment practices; and two, deterring present and future acts of employment discrimination.

What Constitutes an “Intentional” Violation of Title VII

The language of section 706(g) of Title VII indicates that an intentional violation must occur before a remedy may be granted. However, sections 703 and 704 which define unfair employment practices do not refer to intent. Thus, a strict reading of the three sections would indicate that an unlawful employment practice without the requisite intent would not entitle a complainant to relief. Hence, if intent should be defined as specific intent to discriminate, the effect of the Act would be severely limited to a few cases of blatant, overt discrimination. This interpretation would leave untouched all those instances in which practices adopted without a specific discriminatory intent, accomplish discriminatory ends. Thus it is necessary to explore what the words “intentionally engaging in” mean when determining whether the courts may remedy employment discrimination.

A study of the legislative history sheds some light upon the congressional interpretation of the intent standard in section 706(g). The original House bill in its remedy section 707(e) did not mention intent, it merely stated “engaging in” an unlawful employment practice. Early in the Senate debate on the House bill, Senator Dirksen offered ten amendments to Title VII, one of which inserted the word “willfully” before “engaging in,” this, according to Senator Dirksen, was meant to make clear that an accidental, inadvertent, or unintentional violation should not subject an employer to the provisions of the title. Dirksen submitted explanatory material with this sec-

31. 42 U.S.C. § 2000e-5(g) states in relevant part: “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . .” (emphasis added).
33. H.R. 1752 introduced by the Chairman of the House Judiciary Committee, Congressman Cellar (D., N.Y.) on June 20, 1963.
34. LEGISLATIVE HISTORY OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 3268.
tion defining "willfully" as including the idea of consciousness or knowledge, signifying an act done knowingly, permissively, or deliberately. However, this version was not enacted and the Senate substitute amendment to the House bill contained the word "intentionally" instead of "willfully." Senator Humphrey, when explaining that the amendment required a showing of intentional violation, characterized it as a clarifying change, which did not involve any substantive change in the section, but only made it clear that accidental discrimination would not violate the Act. Thus, this authority indicates that intentional acts resulting in discrimination would violate the title, and that a specific intent to discriminate is not required.

The cases that have interpreted the intent requirement of section 706(g) have seemingly adopted the congressional principle that no specific intent to discriminate be found and have given a broad interpretation to the section that focuses upon the effects of the employment practices. Some of the earliest cases dealt with fairly overt instances of discrimination in which minority groups were excluded from work plans. In Banks v. Lockheed-Georgia Company, the court held that the union had intended the natural consequences of its acts. Then in Local 53, Heat & Frost Insulators v. Vogler the Fifth Circuit found the union had intentionally limited its membership by its pursuit of certain policies that served no trade related purpose and although the policies were neutral on their face, the effect was to deny membership to minority groups in a discriminatory manner. Thus, at an early time the courts placed an emphasis upon effect rather than intent, which complies with the established common law doctrine that an individual intends the natural and probable consequences of his actions.

The Fifth Circuit, in the landmark case of Local 189, United Papermakers

35. Id.
36. Id. at 3006.
37. For a thorough analysis of the legislative history leading to the conclusion that no specific intent to discriminate is needed, see Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1674-75 (1969). See also, for the proposition that Senator Dirksen's amendment does not greatly narrow the coverage of section 706 (g), Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 69 Col. L. Rev. 691, 713 (1968).
38. 46 F.R.D. 442 (N.D. Ga. 1968) Black employees were denied equal benefits from participation in Buck of the Month Club and excluded from membership in the committee governing the Club.
39. 407 F.2d 1047 (5th Cir. 1969). Union admitted to membership only those individuals who had worked four years as apprentices and only accepted as apprentices sons or close relatives of its members.
40. See, e.g., Dunlap v. United States, 70 F.2d 35, 37 (7th Cir.), cert. denied, 292 U.S. 653 (1934).
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v. United States,\textsuperscript{41} declared that the present system of departmental seniority perpetuated the past system which had been based on racial motivations and served no business necessity. The Fifth Circuit set forth the language that the other circuits have adopted as the standard for defining "intentionally engaged in": "the statute, read literally requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."\textsuperscript{42} In Jones \textit{v. Lee Way Motor Freight},\textsuperscript{43} the Tenth Circuit further defined the standard by declaring that even though a company did not adopt a policy with the intention of discriminating, when the practice was followed \textit{deliberately}, not accidentally, the company was intentionally engaging in unlawful employment practices. This standard of deliberate as opposed to an accidental practice was not followed originally by the Sixth Circuit in Dewey \textit{v. Reynolds Metals Company}\textsuperscript{44} which construed intentionally to mean willfully and knowingly. The court declared there was no substantial evidence to uphold a finding of intentional violation in that it found the collective bargaining agreement was not discriminatory nor was its impact discriminatory. Such a decision, though defining intent differently, does not in effect depart from the intent standard, since the court ultimately looked at an impact test which is in accordance with the decisions that consider the consequences of the practice to determine whether there was intent.

Although cloaked in words of "deliberate" and "not accidental," a known-consequence test developed as the standard for intent. This development was most clearly seen in the case of Gregory \textit{v. Litton Systems}\textsuperscript{45} in which the court found that a policy of not hiring applicants with an arrest record was unlawful because it had the \textit{foreseeable effect} of denying blacks equal employment opportunities. Furthermore, the court declared that good faith was no defense and that intent need not be shown as long as the discrimina-

\textsuperscript{41} 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).
\textsuperscript{42} Id. at 996. Kober \textit{v. Westinghouse Electric Corp.,} 480 F.2d 240, 245 (3d Cir. 1973); Schaeffer \textit{v. San Diego Yellow Cabs, Inc.,} 462 F.2d 1002, 1006 (9th Cir. 1972); Rowe \textit{v. General Motors Corp.,} 457 F.2d 348, 359-60 (5th Cir. 1972); Rosenfeld \textit{v. Southern Pacific Co.,} 444 F.2d 1219, 1227 (9th Cir. 1971); Sprogis \textit{v. United Air Lines, Inc.,} 444 F.2d 1221, 1227 (9th Cir.), \textit{cert. denied,} 404 U.S. 991 (1971); Robinson \textit{v. Lorillard Corp.,} 444 F.2d 1219, 1227 (4th Cir. 1971); Jones \textit{v. Lee Way Motor Freight, Inc.,} 431 F.2d 1245, 250 (10th Cir.), \textit{cert. denied,} 401 U.S. 954 (1970).
\textsuperscript{43} 431 F.2d 245, 250 (10th Cir. 1970). The company began, for business reasons, a no-transfer policy between two categories of drivers. The two groups had originally been segregated along racial lines so that the policy continued the effects of past discrimination and the court found there was no valid business justification for the policy.
tion is not accidental or inadvertent.\textsuperscript{46} This foreseeable or known-consequences standard received the greatest impetus in the Supreme Court's decision in \textit{Griggs v. Duke Power Co.},\textsuperscript{47} in which the Court looked not at the subjective motivation of the employer, but at the consequences of the employment practice:

\ldots but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability.

\ldots But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.\textsuperscript{48}

This foreseeable consequences test, which overshadows subjective motivation, continues to be followed, but a question remains as to what role intent does play. The Fourth Circuit, while reiterating the idea that the existence of a discriminatory intent need not be proved, also stated that actual intent or motive is relevant in determining whether rights assured by Title VII have been infringed.\textsuperscript{49} According to the court, in some instances the reasons for taking a particular action may determine whether the action is unlawfully discriminatory, but a business purpose reason would not negate the illegality of an unlawful practice.\textsuperscript{50} However, the court failed to specify the allowable reasons and it is questionable whether any such reasons need be given weight when a court basically looks toward the consequences of the employment practice when determining intent. In contrast, two other circuits, the Fifth and the Eighth, have held that intent is not controlling and is immaterial when the consequences of the practice result in discrimination.\textsuperscript{51} Other courts have adopted this latter reasoning when the defendant utilizes employment practices which conform with state protective statutes such as weight lifting or number of hours worked restrictions for women, but which

\begin{footnotes}
\footnotetext{46. Id.}
\footnotetext{47. 401 U.S. 424 (1971).}
\footnotetext{48. Id. at 431-32 (emphasis in original).}
\footnotetext{49. Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir. 1971).}
\footnotetext{50. Id. at 798. The court continued on to set out the working standard for the business necessity test:}
\begin{quote}
[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish it equally well with a lesser differential racial impact.
\end{quote}
\footnotetext{51. United States v. N.L. Industries, 479 F.2d 354, 361 (8th Cir. 1973), \textit{rehearing denied}, 479 F.2d 354, 382 (8th Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972).}
\end{footnotes}
in fact have a discriminatory impact. In these cases the courts have generally defined such practices as intentional violations, since they are engaged in deliberately rather than accidentally and have a discriminatory effect.\textsuperscript{52} It would appear that contrary to the Fourth Circuit's statement that intent is not immaterial, courts, by defining "intentionally engaging in" as encompassing practices which are deliberate, have moved to a foreseeable consequences standard that eliminates the necessity of proving intent. Such a standard raises the question of whether the test of intent is so expansive that any employment practice which has discriminatory effects thereby imputes intent to the employer. The weight of the decisions noted above would seem to indicate that this test is the standard today.\textsuperscript{53}

If the intent standard has become so diluted that it is no longer an important element in deciding whether a remedy is appropriate under section 706(g), the courts must indicate what factors they will consider in awarding back pay in Title VII cases.

\textit{Role of Court's Discretion in Awarding Back Pay}

The exercise of discretion in granting an award presents one of the thorniest problems in back pay cases under Title VII.\textsuperscript{54} Presently, the courts have not adopted a uniform standard of discretion to be used in these cases.


53. Such a standard comports with the common law rule that a man is held to intend the foreseeable consequences of his conduct and furthermore parallels the treatment of intent under the National Labor Relations Act. The language of the Act does not refer to intent, but the Supreme Court has declared that intent is a necessary element of proof of section 8(a)(3) violations. \textit{See NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).} However, the Court has also held that specific evidence of such subjective intent is "not an indispensable element of proof of violation." \textit{Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 44 (1954).} "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference." Teamsters Local 357 v. NLRB, 365 U.S. 667, 675 (1961). Thus, it would appear that the intent requirement has become so diluted that it is no longer an obstacle to a plaintiff's case.

54. Section 706(g) of Title VII grants court discretion to reinstate or hire employees "with or without" back pay. \textit{See note 4 supra} and accompanying text.
The Fourth Circuit, in *Moody v. Albermarle Paper Co.*[^55] has moved toward a mandatory standard for awarding back pay by creating a rebuttable presumption in favor of such an award; the court stated that "a plaintiff . . . who is successful in obtaining an injunction under Title VII should ordinarily be awarded back pay unless special circumstances would render such an award unjust."[^66] In *United States v. N. L. Industries, Inc.*,[^57] the Eighth Circuit has stated that back pay should ordinarily be awarded once a court has found an unlawful employment practice. The Seventh Circuit has articulated a policy preferring the awarding of back pay in order to satisfy the remedial purpose of Title VII. As the court stated in *Bowe v. Colgate-Palmolive Co.*,[^58] "[T]his grant of authority [section 706(g)] should be broadly read and applied so as to effectively terminate the practice and make its victims whole."[^59] Other circuits, however, have neither created a

[^55]: 474 F.2d 134 (4th Cir. 1973). *Moody* was heard in the Fourth Circuit by a three judge panel consisting of two senior circuit judges, Boreman and Bryan, and circuit judge Craven. On the issue of back pay, Judges Bryan and Craven voted to reverse the district court's refusal to award back pay, with Judge Boreman dissenting, and back pay was granted to the black employees. The four *Albermarle* defendants and the Union defendant petitioned for a rehearing en banc. On the rehearing vote senior circuit judges Boreman and Bryan each voted for it. Though a majority of the judges in regular active service did not vote for an en banc rehearing, the votes of Boreman and Bryan were counted, thereby providing a majority of the counted votes in favor of rehearing en banc. On that basis, a rehearing was ordered on June 25, 1973 and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. However, before the Fourth Circuit reached a decision on the merits of the *Moody* case, the judges of the Fourth Circuit, pursuant to the provisions of 28 U.S.C. § 1254(3), certified the following question to the Supreme Court of the United States:

Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard en banc?

According to Rule 35 "a majority of the circuit judges who are in regular active service may order that an appeal . . . be . . . reheard by the court of appeals en banc." In the Fourth Circuit the custom has been to count the votes of senior circuit judges who were members of the initial hearing panel when the court was polled on the question of en banc rehearing. This was thought reasonable, according to Chief Judge Haynsworth, since the voting senior circuit judge would be a member of the en banc court if rehearing were granted. In earlier cases the vote of the senior circuit judge or judges had not been crucial. However, in the *Moody* case according to Chief Judge Haynsworth, if the en banc court reaches the merits, the tentative vote is that it will modify the panel decision with respect to the back pay award. Thus, in this case whether the senior circuit judges may vote is crucial and necessitates a close examination of the statute and the rule.

Accordingly, on January 14, 1974 the United States Supreme Court granted the parties leave and invited them to file briefs by February 13, 1974 in response to the question certified by the Fourth Circuit. At the time of publication of this Comment a decision has not been handed down by the Supreme Court.

[^56]: *Id.* at 142.
[^57]: 479 F.2d 354, 380 (8th Cir. 1973).
[^58]: 416 F.2d 711 (7th Cir. 1969).
[^59]: *Id.* at 721.
presumption in favor of, nor a preference for awarding back pay, leaving to the trial courts greater leeway in their use of discretion. The legislative history of the 1972 amendments to Title VII offers little guidance in resolving this issue. Senator Williams, in a section-by-section analysis of the Title VII amendments declared that “[t]he provisions of this subsection [section 706(g)] are to give the courts wide discretion in exercising their equitable powers . . . .” Whereas, the Conference Report for these amendments stated:

Section 706(g) . . . requires that persons aggrieved by the consequences and effects of unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the discrimination. Therefore, since neither the courts nor Congress has determined the proper scope of discretion to be exercised by the courts in making a determination as to back pay awards, one must analyze what factors the courts consider in deciding this question.

Once a court has found a violation of Title VII and that the violation encompasses the requisite intent, then several categories of situations may affect its decision as to the back pay award.

Assertion of Good Faith as a Defense—State Protective Laws

As noted earlier, employers instituting certain employment practices had relief by means of female “protective” laws in maintaining the challenged practices. Under the interpretive guidelines published by the Equal Employment Opportunity Commission (EEOC), which were in effect from 1965 through August 1969, such state protective laws were considered consistent with Title VII. Since reliance upon a published EEOC guideline is expressly made a defense to a back pay claim by section 713(b) of Title VII, it would appear mandatory in these instances of discrimination, occurring prior to August 1969, that the defendant should not be held liable for back pay claims. However, difficult decisions have arisen since 1969 when the EEOC reversed its earlier position and declared that state protec-

60. See, e.g., United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); Kober v. Westinghouse Electric Corp., 480 F.2d 240, 244 (3d Cir. 1973); Manning v. International Union, 466 F.2d 812, 815-16 (6th Cir. 1972); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006-1008 (9th Cir. 1972). However, see note 116, infra for the latest Fifth Circuit opinion holding that employees are presumptively entitled to back pay when they have suffered discrimination.
61. 117 Cong. Rec. 3462 (1972) (emphasis added).
63. See text, accompanying notes 49-53 supra.
64. 30 Fed. Reg. 14927 (Dec. 2, 1965), 29 C.F.R. 1604.1(b) and (c).
tive laws are not a defense to an unlawful employment practice. Employers are thus left with no defense to their actions according to the EEOC, and, under the supremacy clause of the Constitution, the state laws are pre-empted by the federal law of Title VII. Consequently, in these situations the 1970 amendment has put employers on notice that employment practices in accord with state protective laws may be violative of federal laws, even though there has not been prior judicial determination as to their validity. However, in situations where such state statutes have not yet been declared invalid by the courts, employers are caught in a dilemma—they face the possibility of defending claims under Title VII if they continue such practices or they face suits under state laws if they abandon the practices. Yet, in the latter instances, the employers would have a defense to claims arising under state laws based on the supremacy clause and therefore should adhere to federal standards.

Where courts have found a violation of the Act and have rejected reliance on state statutes as a defense, they have split in deciding whether to award back pay. The Ninth Circuit, in *Rosenfeld v. Southern Pacific Co.*, declared that state protective laws are no defense to an alleged violation of Title VII, but in *Schaeffer v. San Diego Yellow Cabs, Inc.* the same court held that to determine if back pay relief is appropriate in such cases, "a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness." Thus, rather than draw any hard and fast rule concerning the defense of good faith reliance on a state statute, the court required balancing the merits of the plaintiff’s claim and public policy against the hardship of a good faith employer. Accordingly, in *Schaeffer* the court denied back pay to the plaintiff for the period in which the state statutes were considered valid by the EEOC, but granted back pay for the period thereafter when the respondent had notice of the change in the EEOC guidelines and of the Ninth Circuit’s opinion in *Rosenfeld*. However, the courts in the Third, Fifth and Sixth Circuits have completely denied back pay relief in these types of cases, preferring to decide that in light of all the circumstances of each case an employer’s good faith reliance on state statutes was sufficient justification for such a denial.

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68. 444 F.2d 1219 (9th Cir. 1971).
69. 462 F.2d 1002 (9th Cir. 1972).
70. *Id.* at 1006.
71. *Id.*
72. Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973); LeBlanc
The courts, in those situations, denied back pay because it was more equitable not to penalize the employer caught in a conflict between state and federal laws than to compensate the innocent victims of the discrimination. Whether this result is truly equitable in all situations is open to question, for the employee discriminated against has no recourse in this type of situation. She must stay relegated to a lower position and suffer the economic hardships until such statutes are abolished, and even then she is not compensated for the losses she has suffered. Such a result seems inconsistent with the purposes of section 706(g), which is not to punish employers, but to restore victims of discrimination to their rightful economic position.73 Furthermore, some employers (i.e., those with large scale operations and extensive financial resources) in these situations do have an alternative—they could take affirmative action to have these protective laws declared invalid.74 Hence, an award of back pay in state protective law cases involving a financially sound employer could serve as an incentive to employers to get these laws changed and to restructure their discriminatory employment practices. Such an incentive comports with the second purpose of back pay awards: to act as a deterrent to present and future acts of employment discrimination.75 Moreover, in most instances, requiring employers to bear the financial loss, rather than the innocent victim of the discrimination, places the financial cost of discrimination on that party most capable of bearing the cost.

State protective laws cases thus represent a situation in which courts should exercise their discretion by weighing carefully the hardships on the employer against the losses suffered by the employee. However, in exercising this discretion, courts must bear in mind the necessity to award back pay liberally, consistent with the purposes of the statute.76

Assertion of Lack of Bad Faith

A juxtaposition of the good faith defense arguments is a defense based on an alleged absence of bad faith motivation. Only the Eighth Circuit, in United States v. St. Louis-San Francisco Railway Co.,77 has justified the denial

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73. See cases cited note 21 supra.
75. See text accompanying notes 25-30 supra.
77. 464 F.2d 301, 311 (8th Cir. 1972). The court, sitting en banc, in a seniority
of back pay awards on such grounds. However, subsequently the Eighth Circuit rejected the rationale of that decision in United States v. N.L. Industries, Inc.\(^7\)\(^8\) and adopted the position that back pay is compensation to the victims for monetary loss and ordinarily should be awarded when an unlawful practice has been found and enjoined.\(^7\)\(^9\) Such reasoning has received strong approval in the Fourth Circuit where it has explicitly rejected arguments that the absence of bad faith motivation allows a court discretion to deny back pay. First stated in Robinson v. Lorillard Corp.\(^8\)\(^0\) and later affirmed in Moody v. Albermarle Paper Co.,\(^8\)\(^1\) the court declared that the answer to the argument that back pay should not be awarded in the absence of a specific intent to discriminate is that “back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however, benevolent the motives for its imposition.”\(^8\)\(^2\)

Accordingly, these courts adopt the proposition that they do not abuse their discretion in awarding back pay in cases where a defense of good faith or lack of bad faith motivation is pleaded. Such defenses should be rejected, for if intent has become immaterial in most situations,\(^8\)\(^3\) then the controlling consideration, absent special circumstances, should be that of the purposes of the remedy to compensate the victims of discrimination for the losses they have suffered. Despite a good faith motive or lack of bad faith, it is the employer and/or the labor union which has violated the law while the victim is innocent, and as between the two, the economic loss should fall on the wrongdoer. Such a policy is in accord with decisions under the National Labor Relations Act\(^8\)\(^4\) and the Fair Labor Standards Act\(^8\)\(^5\) which have held that as between the innocent victim and the good faith wrongdoer, pub-

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78. 479 F.2d 354 (8th Cir. 1973).
79. Id. at 378-80 (departmental seniority system held in violation of Title VII).
80. 444 F.2d 791 (4th Cir. 1971).
81. 474 F.2d 134, 141 (4th Cir. 1973).
82. 444 F.2d at 804 (emphasis added).
83. See text accompanying notes 31-53 supra.
85. Schultz v. Mistletoe Express Service, Inc., 434 F.2d 1267, 1272 (10th Cir. 1970); Wirtz v. Malthor, Inc., 391 F.2d 1, 3 (9th Cir. 1968).
lic policy and the purposes of the act require an award to the victim.\textsuperscript{86} Good faith or absence of bad faith does not excuse a violation of the Act since there is still the presumption of an intentional violation whenever a discriminatory impact occurs.

Mitigation and Computation of Damages

Section 706(g) provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."\textsuperscript{87} Thus, the issue of mitigation of damages primarily affects only the court's discretion in awarding back pay to the extent of the amount of the damages awarded.\textsuperscript{88} Generally, in Title VII cases the burden is on the defendant to prove the amounts earnable with reasonable diligence.\textsuperscript{89} The court's discretion in the ultimate decision of whether to award back pay at all is influenced by the mitigation of damages issue only when the court has determined that the plaintiff has inexcusably failed to mitigate his damages or when the court feels the plaintiff has mitigated his damages.\textsuperscript{90} Both of these situations appear to allow a court to deny back pay without abusing its discretion.

Mitigation of damages in regard to amounts earned with reasonable diligence are only part of the larger problem of computing the amount of back pay awards. Some courts have attempted to justify the refusal to award back pay on the grounds that the problems of proof are too difficult or that the record is too speculative as to financial loss to be able to compute amounts due.\textsuperscript{91} Refusals based on such grounds are open to question, especially in light of the long line of NLRB cases which have wrestled with the problems of proof of damages in back pay cases and which can serve as guides to

\begin{footnotesize}
\begin{enumerate}
\item See EEOC brief for rehearing en banc in Moody v. Albermarle Paper Co., 474 F.2d 134 (4th Cir. 1973).
\end{enumerate}
\end{footnotesize}
Title VII cases. Rather than simply dismissing back pay claims on such grounds, a court should appoint a special master to consider the problems of proof and to compute the damages; then challenges to the amounts of the awards could be raised on appeal. A denial of back pay in these situations, without first either attempting to delineate standards themselves or appointing special masters to do so, should constitute an abuse of the court's discretion.

Other Factors

Numerous other factors also affect a court's discretion in awarding back pay relief. Some of these relate to the question of whether the person seeking back pay is actually an applicant for the position in cases concerning discharge or refusal to hire, or whether such a person is qualified for the position.

In a leading case, *Lea v. Cone Mills Corp.* the Fourth Circuit, while finding that the employer unlawfully refused to hire the plaintiffs, denied back pay to the claimants on the ground that they had not actually applied for the jobs to work, but to test the defendant's employment practices. Such a refusal based on the restricted facts of that case appears justifiable since there was no economic loss falling on an innocent victim. However, in different fact patterns the courts have held that the fact that the plaintiff is no longer an applicant will not operate as a bar to preclude relief, since he has suffered an economic loss due to the discriminatory practices of the employer. Thus, unless a situation exists such as in *Lea*, the courts appear willing to allow recovery to those individuals who are no longer applicants, but who at one time had either been discriminatorily discharged or unlawfully refused employment.

A new inroad into this area has been signaled by *United States v. Detroit Edison* in which the court awarded back pay to those individuals who had never applied because of the defendant's reputation. However, a significant factor in that case was the judge's finding that the defendant's be-

92. For a lengthy analysis of the problems encountered by courts in computing the amounts of back pay awards in Title VII cases and a comparison to NLRB standards, see G. Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 Rutgers L. Rev. 741, 760-771 (1973).


94. 438 F.2d 86, 87 (4th Cir. 1971).


Employment Discrimination behavior had been "so extremely unreasonable and violative of the law" that he inferred the company had acted with malice.\textsuperscript{97} Such a finding may well justify the extremes of his award, but may be far less applicable in most other discrimination cases.

The express language in section 706(g), which limits back pay only to those discriminatorily treated because of race, color, sex,\textsuperscript{98} would seem to deny recovery of back pay to nonqualified applicants. Accordingly, in \textit{United States v. Georgia Power Co.},\textsuperscript{99} the court limited recovery to those wages "properly owing to plaintiffs" indicating the applicants must have been qualified for positions sought in order to receive back pay. Such limitations were also followed in \textit{Diaz v. Pan American World Airways},\textsuperscript{100} in which recovery was restricted to only those who "would have been hired at time of initial application, except for their sex."\textsuperscript{101} Since the purpose of back pay has been to restore the individual to the economic position he would have been in if not for the fact of discrimination,\textsuperscript{102} limiting back pay to only those qualified would be justifiable, since a nonqualified person has not been injured solely because of unlawful treatment. However, the facts in these situations must be closely examined, for if it can be demonstrated that other nonqualified employees, who were not members of a class discriminated against, have been hired, then such facts may well compel the award of back pay.

\textit{Discretion Circumscribed}

It appears from the above discussion that the courts, in determining the extent of the discretion they may exercise, have been concerned with balancing certain factors in order to fashion relief according to the circumstances of the case. Such an approach has its meritorious aspects and, as \textit{Georgia Power} indicates, there is a strong argument for not automatically granting back pay, but rather weighing issues as to "limitations and laches . . . factors of economic reality . . . [and] the physical and fiscal limitations of the court to prop-

\footnotesize{\begin{itemize}
    \item \textsuperscript{97} \textit{Id.} at 643.
    \item \textsuperscript{98} 42 U.S.C. § 2000e-5(g) (1970) which provides in relevant part that no back pay can be awarded to anyone who was:
        \[\text{[r]efused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000(e)-3(a) of this title.}\]
    \item \textsuperscript{99} Such determinations are made on a case-by-case basis.
    \item \textsuperscript{100} 346 F.2d 906, 922 (5th Cir. 1973).
    \item \textsuperscript{101} \textit{Id.} at 1309.
    \item \textsuperscript{102} Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir. 1971).
\end{itemize}}
erly grant and supervise relief."\textsuperscript{103} However, such a weighing may be more pertinent to the issue of the amount of back pay to award rather than to the issue of what limits exist on the court’s discretion to award back pay at all. A balancing test limited primarily to those factors enumerated in \textit{Georgia Power} should not become an end in itself, for every decision must ultimately encompass the nature and purpose of Title VII and the back pay relief in particular. This is essentially the argument of \textit{Bowe v. Colgate-Palmolive Co.},\textsuperscript{104} \textit{Robinson v. Lorillard Corp.}\textsuperscript{105} and \textit{Moody v. Albemarle Paper Co.}\textsuperscript{106}

As the Fifth Circuit has forcefully stated, the courts have an affirmative duty to make sure that the Act works—there is a mandate from Congress that the United States will no longer tolerate discrimination.\textsuperscript{107} As noted earlier, the courts have envisioned the remedy of back pay under Title VII as serving two purposes: compensation and deterrence.\textsuperscript{108} The discretion exercised by the courts in awarding back pay must be controlled by both purposes; in order to serve fully these purposes and the purpose of Title VII, the back pay remedy should be mandatory where discrimination has been found absent special circumstances. Such special circumstances would include the cases of state protective law violations, where the employer has been caught in a conflict of laws. But, as noted previously, the discretion to deny back pay in these instances may well become more circumscribed.\textsuperscript{109} Other such special circumstances would be cases where there was no bona fide applicant or where the only reason for not hiring was that the applicant was not qualified for the position.

Such an approach limits the court’s exercise of discretion, for what is established is a rebuttable presumption that back pay is mandatory absent spe-

\textsuperscript{103} United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir. 1973).

\textsuperscript{104} 416 F.2d 711 (7th Cir. 1969).

\textsuperscript{105} 444 F.2d 791 (4th Cir. 1971).

\textsuperscript{106} 474 F.2d 134 (4th Cir. 1973).

\textsuperscript{107} Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

\textsuperscript{108} It might be argued that awarding back pay as a method of deterrence becomes, in effect, a punitive award and the Act does not specifically authorize punitive damages. However, such an argument fails to distinguish between the nature of compensatory and punitive damages. Punitive damages are not awarded as a means of compensation, but as a means of punishment and are awarded in addition to compensatory damages. ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." \textit{Restatement (Second) of Torts} § 908 (1957). "Damages . . . assessed by way of punishment to the wrongdoer or example to others and not as the money equivalent of harm done." \textit{Restatement (Second) of Contracts}, § 342a) (1973). An award granted as compensatory in nature, may also have the corollary effect of deterrence. This does not mean, though, that it necessarily becomes punitive in nature. Thus, whenever an individual has suffered a loss because of discriminatory treatment he is entitled to relief, and that relief can be characterized as compensatory and deterrent in nature, but not punitive.

\textsuperscript{109} See text accompanying notes 75-78 \textit{supra}.
Employment Discrimination
cial circumstances. In this way, the burden of proof is on the party claiming
the special circumstances rather than on the plaintiff. Furthermore, such a
standard places the burden of loss on the wrongdoer rather than on the inno-
cent victim. This appears especially justifiable in those instances in which an
incumbent employee has either been discharged or treated discriminator-
ily, for the employer has profited by having the use of the wages the em-
ployee lost because of such treatment. However, the propriety of such a
result is more difficult to perceive in those cases involving an applicant.
There the employer has not benefited financially from the discrimination
even though the employee has suffered financially or possibly psychologically.
This problem is resolved by the realization that the award serves not
to punish the employer, but to compensate the victim. The controlling con-
sideration is not the employer's losses. In these situations the financial
award to an individual may not be properly considered back pay, but rather
“other equitable relief the court deems appropriate.” However viewed,
the relief should be mandatory.

Since section 706(g) is modeled on the relief provisions of the National
Labor Relations Act, the question arises whether a mandatory standard of
back pay limiting the court's discretion comports with the National Labor
Relations Board standards. In the case of Phelps Dodge Corp. v. NLRB, the
Supreme Court stated that “[t]he remedy of back pay, it must be remem-
bered, is entrusted to the Board's discretion; it is not mechanically compelled
by the Act.” However, as the EEOC has effectively pointed out:

... The Court [in Phelps Dodge] nevertheless emphasized that
‘making workers whole is part of the vindication of the public
policy which the Board enforces’ (313 U.S. 197, 198) and that
there must be a 'restoration of the situation, as nearly as possible,
to that which would have obtained but for the discrimination.'
313 U.S. 194. Implicit in Phelps-Dodge, therefore, is the basic
assumption that the Board's discretion is circumscribed and that
its failure to give back pay can be justified only in special cir-
cumstances.

111. Section 706(g) authorizes the “court to order such affirmative action as may
be appropriate, which may include . . . reinstatement or hiring of employees . . . or
any other equitable relief as the court deems appropriate.”
112. 313 U.S. 177 (1941).
113. Id. at 198.
114. EEOC brief for rehearing en banc, Moody v. Albemarle Paper Co., 474 F.2d
134 (4th Cir. 1973). Limitations on a court's authority to deny back pay exists
the statute authorizes back pay when a violation of the Act has occurred. (§ 216(b)).
In F.L.S.A. cases a judge's discretion in denying back pay is severely restricted for the
courts have determined that the purposes of the Act can only be fulfilled when the
employee is compensated for his losses. See Wirtz v. Malthor, 391 F.2d 1, 3 (9th Cir.
The above quotation demonstrates that although the statutory language of section 706(g) grants the courts discretion in awarding back pay, the exercise of that discretion has become severely circumscribed and the courts are moving toward a standard that back pay is mandatory absent special circumstances. Such an evolution is discernible from the fact that within the past few years most courts have awarded back pay remedies except for those types of special circumstances outlined above.\[116^\]

Conclusion

The history of back pay awards under Title VII indicates that although the philosophy and standards governing them are still in the embryonic stage, several noteworthy trends are developing. First, the courts view the purpose of back pay relief as encompassing not only compensation, but also deterrence. Second, although the intent to discriminate is a statutory prerequisite to a back pay award, the courts have effectively diluted this requirement to a foreseeable consequences test that finds intent in those instances where there has been a discriminatory impact. Third, by limiting the intent standard to a very broad test, the court’s exercise of discretion in awarding back pay relief is so limited that relief is becoming mandatory absent a few special circumstances.\[116^\]

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115. Two notable exceptions involve United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir.), rehearing denied, 479 F.2d 382 (8th Cir. 1973), and Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), aff’d by equally divided court, 402 U.S. 689 (1971) (where an impact of discriminatory treatment was not found).

116. Just prior to publication of this Comment the Fifth Circuit handed down a decision affirming this proposition, namely that employees who have suffered discrimination are presumptively entitled to back pay to restore them to their rightful economic place; difficulties of computation do not defeat the right to recover such pay; and an employer’s good faith defenses do not bar back pay. Johnson v. Goodyear Tire and Rubber Co., 7 EPD ¶ 9233, No. 73-1712 (5th Cir., March 27, 1974).