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Civil Rights-Standards for Equitable Relief After a Finding of Employment Discrimination Are Based On Aims Of Title VII

Civil Rights—STANDARDS FOR EQUITABLE RELIEF AFTER A FINDING OF EMPLOYMENT DISCRIMINATION ARE BASED ON AIMS OF TITLE VII—*Albemarle Paper Co. v. Moody*, 95 S. Ct. 2362 (1975).

Title VII of the Civil Rights Act of 1964 grants the federal courts jurisdiction in employment discrimination matters and sanctions orders of affirmative relief where equitable.[1] This relief, usually in the form of back pay and injunctions,[2] may be awarded upon a finding of intentional,[3] discriminatory[4] labor practices. Being equitable remedies, however, the courts have given numerous and conflicting interpretations as to when such affirmative relief should be awarded or denied.[5] The prior history of *Albemarle Paper Co. v. Moody*[6] typifies the inconsistencies in this area. The case was a class action under Title VII by former and present employees of Albemarle Paper Company.[7] The class, after following the designated administrative

1. Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.* (1974). The source of the congressional power exercised in Title VII is the commerce clause. U.S. CONST. art. I, § 8. Under this clause, Congress may regulate not only racial discrimination but any discrimination that affects interstate commerce. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); H.R. REP. No. 914, 88th Cong., 2d Sess. (1964). *See also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Comment, *Enforcement of Fair Employment Under The Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965).

2. 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 backpay (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. Backpay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* 42 U.S.C.A. § 2000e-5(g) (1974) (additions from 1972 amendment italicized).

3. From the beginning "intentional" has been construed to mean not accidental. *See* 110 CONG. REC. 12723-24 (1964) (remarks of Senator Humphrey); Comment, *Backpay for Employment Discrimination Under Title VII—Role of the Judiciary in Exercising its Discretion*, 23 CATHOLIC U.L. REV. 525, 531-35 (1974). The courts have almost unanimously concurred in this definition. *See, e.g.*, Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); United Papermakers, Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *Contra*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970).

4. An employment practice is racially discriminatory when grounded on the basis of race or color as opposed to job qualifications. 110 CONG. REC. 7247 (1964) (remarks of Senator Case).

5. *Compare* Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974), *with* Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973).

6. 95 S. Ct. 2362 (1975).

7. The plant employees' labor union, Halifax Local No. 425, was a co-petitioner.

procedures,[8] filed for an injunction against Albemarle's alleged unlawful employment practices. Backpay was not requested until after several years of discovery and motions. The allegations attacked the company's seniority system and its requirement of a high school diploma and passing of two tests for entry into the skilled production lines.[9]

The District Court for the Eastern District of North Carolina ordered (1) that seniority be computed on a plant-wide basis as opposed to an individual line basis to prevent blacks from being "locked in" to inferior jobs,[10] (2) that the high school diploma requirement be dropped for lack of relevance to job performance, and (3) that the testing not be enjoined for it had been related to job performance by an expert's validation. Backpay was refused because the company had shown no bad faith[11] and the demand for backpay five years after the institution of the suit had substantially prejudiced the defendants.[12] On appeal the Fourth Circuit Court of Appeals[13] affirmed the order to implement a plant-wide seniority system and abolish the high school diploma requirement. The court reversed the remainder of the district court decree and ordered an injunction against the use of Albemarle's employment tests and awarded backpay.[14]

In *Albemarle Paper Co. v. Moody*[15] the Supreme Court attempted to end

8. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

9. The allegations stated that until 1964, blacks were restricted to the lower skilled and lower paying job lines. In 1964, transfers by blacks to other lines were allowed, but kept to a minimum by the testing requirement (based on national norms without regard to the needs of the specific job) and the high school diploma requirement (admitted by Albemarle to be no indication of the quality of workers). In 1968, a seniority system was established which computed seniority on the basis of the time spent on the individual line as opposed to the whole plant. The former black-only lines were tacked to the bottom of the white lines thereby "locking in" blacks at the bottom of each line. Four months before the trial in the district court, Albemarle engaged an expert to "validate" its testing procedure by making it more predictive of job performance. 95 S. Ct. at 2367-68, 2375-78.

10. *See* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

11. 95 S. Ct. at 2368. This finding was premised on the company's recent adjustments aimed at alleviating present discrimination on its own initiative. Moreover, the state of the law as to the legality of its practices was so unsettled that the company had no basis to evaluate its own program.

12. Albemarle claimed that if it had known from the beginning that backpay was being requested by the plaintiffs, it would have sought an earlier determination of its rights by the district court. *Id.*

13. Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973).

14. The testing was enjoined on the ground that Albemarle had not shown that the tests were job-related. Backpay was awarded because there was no circumstance present that compelled its denial. *Id.* at 140, 142.

15. 95 S. Ct. 2362. The decision as to the applicable law regarding backpay was unanimous. Justice Blackmun concurred but criticized some of the decision's dicta on backpay and

the use of conflicting standards in the areas of backpay awards and employment testing.[16] In establishing its own standard to be employed in the awarding of backpay, the Court specifically rejected the Fourth Circuit's rule that backpay must be awarded unless special circumstances compel its denial.[17] Also rejected was the district court's reasoning that the good faith of an employer requires the denial of backpay. Backpay is aimed at remedying the consequences of the discriminatory actions and preventing future violations rather than punishing the offending employer for bad faith.[18] Albemarle insisted that the awarding of backpay was within the sound discretion of the district court and should be based solely on equitable standards. While agreeing that the district courts may balance equitable considerations in ordering backpay awards,[19] the Supreme Court stressed that this discretion must be exercised in accordance with the basic statutory intent and purpose of Title VII.[20]

The intent of Congress in Title VII was to foster prompt dismantling of all barriers to equality and to make the injured parties whole.[21] In

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dissented as to the applicable standards for test validation. Chief Justice Burger concurred in the finding of the law applicable to backpay but disagreed with its application by the Court. He also dissented as to the decision on testing.

16. *See* note 17 *infra*, for examples of conflicts on backpay; note 29 *infra*, on problem areas in test evaluation.

17. 95 S. Ct. at 2370. The Fourth Circuit's decision was based on an analogy to the awarding of attorneys' fees under Title VII where such fees are awarded to a successful plaintiff unless special circumstances exist. 474 F.2d at 141-42. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973). The "special circumstances" test of the Fourth Circuit was only one of several tests used by the lower courts in deciding if backpay should be awarded. *See* Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

18. 95 S. Ct. at 2374. By disavowing the idea that backpay may be ordered as a punishment for violators of Title VII, the Court avoided an argument by the employer that his seventh amendment right to trial by jury had been violated. *See* note 23 *infra*.

19. [T]he 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 backpay . . . . 42 U.S.C.A. § 2000e-5(g) (1974) (emphasis added).

20. Under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (1970), *as amended*, 29 U.S.C.A. § 201 *et seq.* (Cum. Supp., 1975), district courts have had discretion in the awarding of backpay as they do in Title VII cases, but "the statutory purposes . . . [have left] little room for the exercise of discretion not to order reimbursement." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 296 (1960).

21. The source of these two standards is the congressional debate over the 1972 amendment to Title VII.

> [T]he Act is intended to make the victims of unlawful discrimination whole, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also requires that persons aggrieved by the conse-

Albemarle, the awarding of backpay was found by the Court to be instrumental in implementing both congressional desires. The employer having the knowledge that backpay may not be awarded and facing only the possibility of an injunction would have little incentive to promptly examine his employment policies to ensure their fairness.[22] However, knowledge that backpay would normally be awarded in such a situation may spur the dismantling of marginal practices. Moreover, in the majority of instances, the major effect of the past discrimination is an economic injury causing backpay to be the likely remedy to make the injured parties economically whole.[23] Therefore, although backpay is an equitable remedy and not mandatory as would be a normal award for damages, because of its statutory mandate it should only be denied "for reasons which, if applied generally, would not frustrate the central statutory purposes . . . [of Title VII]."[24] This standard does not deny district courts their right to do equity, yet it seems to create an implied presumption that backpay is due after a finding of discrimination.[25] What is accomplished at the minimum is that the

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quences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 CONG. REC. 7168 (1972) (remarks of Senator Williams).

22. 95 S. Ct. at 2371.

23. Most courts say the awarding of backpay is compensatory; it restores the injured party to the position he would have been in but for the discrimination. *See* 23 CATHOLIC U.L. REV., *supra* note 3, at 528-31. The supreme Court's use of backpay is more expansive. It acts as a deterrent as well as a reimbursement. 95 S. Ct. at 2371-72. This concept has been in the background of many decisions but was not openly espoused until United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

Although there is little in the legislative history of Title VII to support their views, several writers have searched for means to have greater monetary judgments awarded to the injured party. This could be done, it is suggested, by giving compensatory damages in a tort action for mental distress. *See* Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491 (1968); 20 WAYNE L. REV. 1337 (1974). In applicable situations the action might include a request for punitive damages. *See* Richards, *Compensatory and Punitive Damages in Employment Discrimination Cases*, 27 ARK. L. REV. 603 (1973). Under the National Labor Relations Act, 29 U.S.C. § 160(c) (1970), backpay is acknowledged to be partly punitive in nature. If any one of these proposals for additional damages is adopted, the seventh amendment's guarantee of trial by jury might alter significantly the procedure presently used in Title VII cases. 95 S. Ct. at 2385 (Rehnquist, J., concurring).

24. 95 S. Ct. at 2373.

25. The provision for backpay in Title VII was modeled after the backpay provision in the National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970). That provision declares it a public policy to award backpay in order to make injured workers whole. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). As a result, the awarding of backpay in N.L.R.A. cases becomes a matter of course. *See* NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965). The Court assumed that Congress was aware of this practice when the backpay provision was inserted in Title VII. Based on this assumption, the Court implicitly concluded that when discrimination is found in Title VII cases, backpay should be presumptively awarded. 95 S. Ct. at 2372-73.

employer bears the heavy burden of showing that the aims of Title VII will not be frustrated by the denial of backpay.

Albemarle's claim of substantial prejudice by the belated request for backpay was remanded for further consideration in light of the new standard. A denial of backpay for this reason seems very unlikely. Albemarle will have to show more than severe prejudice[26] since the new standard directs the court's scrutiny to the effect a denial of backpay will have on Title VII's purposes rather than the special circumstances of the employer. Albemarle must convince the court that a denial of backpay for this reason will not frustrate the aims of Title VII in addition to rebutting the usual presumption that the employer should bear the loss arising from his discriminatory practices.[27]

On the issue of the employment tests used by Albemarle,[28] the Court again found it desirable to set a standard under which each district court could retain its discretion in granting affirmative relief (*i.e.*, enjoining use of the tests) while adhering to a common set of guidelines. The Court had taken the first step in achieving such a result in *Griggs v. Duke Power Co.*,[29] where the "business necessity" rule was established. Under this rule, if the employer's tests are shown to be rationally related to valid business objectives, the tests will be upheld as consistent with the statutory purposes of Title VII.[30] In *Albemarle*, the Court stated that whether a particular em-

26. Justice Marshall in his concurrence felt it would take very unusual circumstances for backpay to be denied to a class. He felt the prejudice claim in *Albemarle* was probably not sufficiently serious or unusual to deny backpay because evidence for determination of lost wages was such that the computation would be simple. 95 S. Ct. at 2384.

27. *Id.* at 2375. This presumption is applied in all equity cases and is difficult for the offending party to overcome. *See* Comment, *Equal Employment Opportunity: The Back Pay Remedy Under Title VII*, 1974 U. ILL. L.F. 379.

28. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. 42 U.S.C.A. § 2000e-2(h) (1974).

29. 401 U.S. 424 (1971). This case also involved the use of tests to evaluate employees as well as a high school diploma requirement. These were struck down as not demonstrably related to job performance because no proper validation study had been performed. But a conflict arose as to whether any standards for such a study were adopted by the Court. *See* Note, *Constitutional Law—Equal Protection—Employment Tests*, 21 DEPAUL L. REV. 580 (1971) (asserting that a standard, in the form of guidelines set down by the EEOC, had been adopted). *Contra*, Comment, *The Georgia Power Case: Another Federal Agency Comes of Age, or, "My God! Our Employer-Client's Testing Practices Are Being Challenged by the EEOC?!,"* 57 MARQ. L. REV. 515 (1974). In United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), the court adopted these guidelines as its measure of job-relatedness apparently in deference to the *Griggs* decision.

30. 401 U.S. at 431.

ployment test is a "business necessity" must be decided by reference to the EEOC's guidelines for employers.[31] Although these guidelines are not administrative "regulations" issued pursuant to formal procedures established by Congress,[32] they are "[t]he administrative interpretation[s] of the Act by the enforcing agency [and are therefore] entitled to great deference."[33] These guidelines reflect the aims of Title VII more than other available standards.[34] The lower courts in searching for a standard by which employment tests could be judged often had the aims of Title VII in mind but the standards used varied.[35] Under this new standard, material defects were found in Albemarle's attempt to show that its tests were job-related.[36] The question whether an injunction against the continued use of the tests should now be granted was remanded to the district court.[37]

It seems clear that the EEOC guidelines after *Albemarle* must be used as the standard for establishing the business necessity of employment tests. However, non-compliance with the standard is not fatal provided the employer can show that the continued use of the tests will not frustrate the aims of Title VII. Clearly the wise employer will attempt to protect himself by following the guidelines. This is no easy task for an employer due to the difficulty of understanding and the practical problems in apply-

31. Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1975).

32. Formal procedures involve public comment and scrutiny so as to prevent proposed guidelines from being arbitrary. Chief Justice Burger and Justice Blackmun noted in their dissents concerning the testing that since these were only guidelines and had not been scrutinized, to require slavish adherence would be an error. 95 S. Ct. 2388, 2390.

33. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

34. Comments within the EEOC's guidelines (29 C.F.R. § 1607. 1(a) (1975)) explicitly state that the guidelines are to help create job tests that promote efficiency and end employment discrimination. They accomplish both these goals by insuring that the tests will be job-related, thus constituting a "business necessity." *See* 57 MARQ. L. REV. 515, *supra* note 29, for a strong criticism of these guidelines.

35. *Compare* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), *with* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

36. The tests employed were found not to be sufficiently correlated to predict adequately job performance. *See* 29 C.F.R. § 1607.4(c) (1975). The correlation method itself was too subjective to be free from at least unconscious bias. *Id.* § 1607.5(b)(3)-(4). The employees who took the tests were from the upper sections of their lines, and no factors were considered to determine if the results from these tests would adequately predict what skills lower level jobs would require. *Id.* § 1607.4(c)(1). Finally, out of 125 employees who took the tests, only four were black while the population which would take the tests to be hired or transferred was heavily black. *Id.* § 1607.5(b)(5).

37. The Court noted that in 29 C.F.R. § 1607.9 (1975), continued use of tests not fully validated is allowable pending further validation. 95 S. Ct. at 2380. It also appeared from the evidence that Albemarle may have sufficiently changed its testing procedure by the time of the decision so that it would now be acceptable. These considerations are to be weighed by the district court in light of the new standard on remand. 95 S. Ct. 2380.

ing the guidelines.[38] Therefore, in future cases it will be particularly important for courts to seriously consider the employer's showing that his noncompliance does not defeat the purposes of Title VII.

T.A.L.

38. *See* notes 29 & 32 *supra*.