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## Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial when Only Back Pay is Sought Under the Americans with Disabilities Act

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**Asserting the Seventh Amendment:  
An Argument for the Right to a Jury Trial  
When Only Back Pay Is Sought Under the  
Americans with Disabilities Act**

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## I. INTRODUCTION

Juries usually decide whether a defendant's conduct in a tort suit conforms to the standard required by law.<sup>1</sup> The jury provides a source of community values when it decides the reasonableness of a party's conduct.<sup>2</sup> The jury performs an important role in this regard on issues invoking community values, where judges and juries most frequently come to different conclusions.<sup>3</sup>

The Americans with Disabilities Act ("ADA") creates a right to sue for disability-based discrimination and to recover damages similar to those in a tort suit.<sup>4</sup> Among other issues, a jury may decide if an employer made reasonable accommodations for a disabled employee.<sup>5</sup>

1. See RESTATEMENT (SECOND) OF TORTS § 328C(b) (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 236-38 (5th ed. 1984).

2. See RESTATEMENT (SECOND) OF TORTS § 328C(b) cmt. b (1965); KEETON ET AL., *supra* note 1, § 37, at 237 (stating that an issue can only be removed from the jury when "the conduct of the individual clearly has or has not conformed to what the community requires"); see also *Chauffers, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 583 (1990) (Stevens, J., concurring in part and concurring in the judgment) (stating that the jury is selected for the common understanding that it represents the community); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116 (1924) (noting that the institution, the jury, is rooted in "the public's desire to have its conduct judged by the layman ('the man on the street')").

3. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 163-67 (1966).

4. Americans with Disabilities Act, 42 U.S.C. § 12110-12213 (1994 & Supp. II 1996). ADA employment discrimination claims are processed under the same procedures as those applied to claims alleging violations of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 12117(a) (1994); see also ROBERT L. BURGDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 507 (1995). The Equal Employment Opportunity Commission ("EEOC") enforces ADA employment provisions. See 42 U.S.C. § 12116; see also BURGDORF, *supra*, at 507-08. The administrative enforcement process begins when a person alleging discrimination files a charge in writing and under oath with the EEOC. See 42 U.S.C. §§ 2000e-5(a)-(b); see also BURGDORF, *supra*, at 508. The EEOC notifies the employer of the nature of the claim and conducts an investigation. See 42 U.S.C. § 2000e-5(b); see also BURGDORF, *supra*, at 508.

After the investigation, if the EEOC finds that the charge has merit, it attempts to eliminate the unlawful practice through informal methods. See 42 U.S.C. § 2000e-5(b); see also BURGDORF, *supra*, at 508. If the informal process fails to produce a satisfactory conciliation in the opinion of the EEOC, the Commission may bring an action against the employer in federal court. See 42 U.S.C. § 2000e-5(f)(1); see also BURGDORF, *supra*, at 508.

On the other hand, if the EEOC believes that there is no reasonable cause to believe the charge is valid, it notifies the parties of this finding. See 42 U.S.C. § 2000e-5(b); see also BURGDORF, *supra*, at 508. If on this basis, or some other, the EEOC declines to sue the employer, the EEOC issues a right-to-sue letter to the complainant. See 42 U.S.C. § 2000e-5(f)(1); see also BURGDORF, *supra*, at 517. At this point, the aggrieved person may bring suit in federal court.

5. See 42 U.S.C. § 12111(a) (defining reasonable accommodation); H.R. REP. NO. 101-485(II), at 62 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 344 ("the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case"). Whether an employee is protected by the ADA requires a specific inquiry by a fact finder into the job's essential functions and whether "the individual is qualified [to perform those functions] at the time of the job action." *Id.* at 55. Whether an accommodation creates an undue hardship on an employer such that the employer need not make the

When reasonable accommodations are not made, the presumption is that an employer has discriminated against the adversely affected employee.<sup>6</sup> By determining whether an employer has made a reasonable accommodation, juries ensure that society's conception of reasonableness shapes employers' compliance with the ADA.<sup>7</sup> Furthermore, the right to have a jury determine the liabilities of parties in all legal claims has been cemented in the Seventh Amendment.<sup>8</sup> This Note argues that the right to a jury trial plays an important role in ADA litigation, and that it should be provided even where back pay is the only remedy sought. This rule not only makes sound policy, but the Seventh Amendment requires it.

When the ADA was enacted in 1990, the remedies available were the same as those listed in Title VII of the Civil Rights Act of 1964.<sup>9</sup> Congress intended that the remedies for discrimination on the basis of race and sex prohibited by the Civil Rights Act of 1964 would be the same as those for discrimination on the basis of disability, even if Title VII was amended.<sup>10</sup> These remedies included enjoining an employer from engaging in unlawful conduct, ordering the reinstatement or hiring of employees, awarding back pay,<sup>11</sup> "or any other equi-

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reasonable accommodation is a case-by-case determination. *See id.* at 64. An accommodation might be considered an undue hardship because it is "unduly costly, extensive, substantial, [or] disruptive." *Id.* at 67. "[W]hether a reasonable accommodation constitutes an 'undue hardship' . . . depend[s] on the facts of a particular situation and turns on the nature and cost of the accommodation in relation to the employer's resources and operations." *Id.* Fact-based inquiries such as what constitutes a job's essential functions and an undue burden are the kinds of issues juries generally decide. *See KEETON ET AL., supra* note 1, § 37, at 235 & n.3 (stating that juries decide questions of fact).

6. *See* 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination, in part, as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

7. Presumably, employers will alter their behavior to avoid liability for not making reasonable accommodations. Thus, the ADA's definition of "reasonable accommodation" will shape employers' future behavior.

8. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend VII. As explained in Part III, the Supreme Court has defined a right to a jury trial in suits that were traditionally brought in a court of law and denied the right to a jury trial in suits traditionally brought in a court of equity. *See infra* Part III.

9. *See* 42 U.S.C. § 12117; *see also* 42 U.S.C. § 2000e-5(g)-(k) (providing for injunctions, reinstatement or hiring of employees, backpay, or any other equitable relief the court deems appropriate as remedies for violations of Title VII).

10. *See* H.R. REP. No. 101-485(III), at 48-49 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 471-72. In fact, the House Judiciary Committee rejected an amendment that would have kept the remedies under the ADA the same even if the Title VII remedies provision was amended. *See id.*

11. Back pay is monetary compensation for the tangible economic loss caused by unlawful employment discrimination. *See* ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW § 9.3, at 305 (1992); *see also infra* notes 198-205 and accompanying text.

table relief as the court deems appropriate."<sup>12</sup> Neither the ADA nor Title VII addressed the right to a jury trial.

In the Civil Rights Act of 1991, Congress broadened the remedies available for intentional discrimination to include compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, . . . nonpecuniary losses" and punitive damages.<sup>13</sup> When these remedies are sought under the Civil Rights Act of 1991, Congress has expressly given either party the right to demand a jury trial.<sup>14</sup> Back pay, however, is specifically excluded from this list of compensatory remedies,<sup>15</sup> and therefore a claim for back pay does not necessarily provide a right to a jury trial under the 1991 Civil Rights Act.

The Supreme Court has not decided whether a party has a right to a jury trial in an ADA or Title VII claim where back pay damages, but no other compensatory or punitive damages, are sought.<sup>16</sup> Several courts of appeals have denied a jury trial in Title VII cases where the plaintiff seeks only back pay.<sup>17</sup> No court of

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12. 42 U.S.C. § 2000e-5(g) (1994).

13. 42 U.S.C. § 1981a(b)(3) (1994).

14. See 42 U.S.C. § 1981a(c).

15. See 42 U.S.C. § 1981a(b)(2). For clarity this Note will continue to refer to back pay as not included in the compensatory damages mentioned in the Civil Rights Act of 1991.

16. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-53 n.4 (1994) ("We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial."); *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 572 (1990) (assuming, but not holding that a Title VII plaintiff does not have a right to a jury trial); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 549 n.1 (1990) (stating that "under Fourth Circuit precedent, a plaintiff does not have a right to a jury trial on a Title VII claim").

Arguably, the Supreme Court has decided back pay under Title VII is an equitable claim, and therefore, no Seventh Amendment right to a jury trial attaches. The Supreme Court, however, has never explicitly decided whether a party is entitled to a jury trial under Title VII when only back pay is sought. In dicta, the Court has stated that its previous decisions show that back pay under Title VII is equitable. In *Curtis v. Loether*, 415 U.S. 189, 190 (1974), the issue was whether parties may demand a jury trial for a claim under the fair housing provision of the Civil Rights Act of 1968. The Court noted that "[i]n Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy," but the Court did not express a view on the jury trial question. *Id.* at 197. The *Curtis* Court was simply comparing the statutory language authorizing back pay under Title VII, that the courts of appeals have held to be an equitable remedy, with fair housing remedies that plainly authorize "actual and punitive damages." *Id.* It made no holding regarding the right to a jury trial under Title VII. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), the Court looked to *Curtis* for the proposition that back pay discretion is equitable in nature. It then stated that although a court's discretion to award back pay is equitable in nature, it is not unfettered. See *id.* The Court did not address whether back pay is equitable under a Seventh Amendment analysis, or the right to a jury trial. In more recent cases, the Court has read *Moody* as labeling back pay under Title VII an equitable remedy. See, e.g., *Terry*, 494 U.S. at 571-72. It has not held, however, that back pay under Title VII is an equitable remedy, thus denying the right to a jury trial.

17. See *Sullivan v. School Bd.*, 773 F.2d 1182, 1187 (11th Cir. 1985) (explaining that back pay is an equitable claim under Title VII or § 1983); *Williams v. Owens-Illinois, Inc.*, 665 F.2d

appeals, however, has expressly decided whether a right to a jury trial exists in ADA claims seeking only back pay.

Under the ADA, two district courts have denied a jury trial on a claim solely for back pay.<sup>18</sup> In doing so, one court noted that back pay under the ADA and Title VII is an open question, but it inferred from the 1991 Civil Rights Act's exclusion of back pay from compensatory damages that Congress intended to exclude a right to a jury trial.<sup>19</sup> The second district court did not put to the jury the question of whether back pay should be awarded, even though the jury found the defendant liable for compensatory damages, because, according to the court, back pay was at the discretion of the judge.<sup>20</sup> In addition, another district court has interpreted the express provision of the right to a jury trial in claims for compensatory and punitive damages to mean that Congress's silence on the right to a jury trial under Title II of the ADA (public employer discrimination) indicates that no right to a jury trial exists where only back pay is sought.<sup>21</sup>

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918, 929 (9th Cir. 1982) (characterizing back pay as "either equitable or . . . a legal remedy incidental to an equitable cause of action"); *Harmon v. May Broad. Co.*, 583 F.2d 410, 411 (8th Cir. 1978) ("An award of back pay under Title VII for discriminatory employment practices is an integral part of the equitable remedy of reinstatement and is not comparable to damages in a common law action for breach of employment contract."); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975) (finding that back pay is an integral part of an equitable remedy); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975) ("Back pay in Title VII cases is considered a form of restitution, not an award of damages. Since restitution is an equitable remedy a jury is not required for the award of back pay."); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971) (stating that back pay is equitable since it is intended to restore recipients to their rightful economic status); *Harkless v. Sweeny Indep. Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970) (noting that back pay is an "integral part of the equitable remedy of injunctive reinstatement"); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (describing back pay as an "integral part of the statutory equitable remedy").

18. See *Dutton v. Johnson County Bd. of County Comm'rs*, 868 F. Supp. 1260, 1264 (D. Kan. 1994) (allowing jury to decide liability, but not back pay award); *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596, 605-06 (D. Me. 1994) (allowing a jury trial on liability and damages, but reserving for the court the decisions on back pay and reinstatement).

19. See *Braverman*, 859 F. Supp. at 606 ("Whether a plaintiff who seeks backpay under either the ADA or Title VII is entitled to a jury trial is an open question.").

20. See *Dutton*, 868 F. Supp. at 1263-64.

21. See *Outlaw v. City of Dothan*, No. CV-92-A-1219-S, 1993 WL 735802, at \*7 (M.D. Ala. April 27, 1993) (stating that on motion to strike jury trial demand, court found no language granting right to a jury trial in Title II ADA cases but "[t]he fact that Congress expressly stated that Title I of the ADA does allow for a trial by jury is evidence that their silence on Title II can be interpreted to mean that they did not intend to extend the right to a jury trial to Title II plaintiffs"). Another district court, however, denied a defendant's motion to strike a jury trial in a Rehabilitation Act and Title II ADA employment discrimination case because under both Acts the plaintiff sought the full spectrum of equitable and legal remedies. See *Hernandez v. City of Hartford*, 959 F. Supp. 125, 134 (D. Conn. 1997).

Courts are divided on whether the right to a jury trial exists when back pay is sought under other employment discrimination statutes. The Rehabilitation Act of 1973, which provides public employees the same protection from disability discrimination that the ADA provides to private employees,<sup>22</sup> has been interpreted by at least one court to require a jury trial.<sup>23</sup> In *Waldrop v. Southern Co. Services, Inc.*, the Eleventh Circuit Court of Appeals held that a jury trial was necessary because the plaintiff sought back pay and liquidated damages but not the "compensatory or punitive damages" provided in the Civil Rights Act of 1991.<sup>24</sup> By analogy, the right to a jury trial should also apply to claims only for back pay under the ADA.

In § 1981 and § 1983 violations, the courts of appeals have disagreed about the right to a jury trial, and have focused primarily on whether the relief sought is legal or equitable.<sup>25</sup> The Third, Fifth, Sixth, and Tenth Circuits have denied the right to a jury trial when only back pay is sought.<sup>26</sup> The First, Eighth and Eleventh Circuits, however, have provided a right to a jury trial under the same

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22. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-7976 (1994 & Supp. II. 1996); *see also* H.R. REP. No. 101-485(II), at 62, *reprinted in* 1990 U.S.C.C.A.N. 267, 344 (explaining that the duty to make reasonable accommodations "has been included as a form of non-discrimination on the basis of disability for almost fifteen years under section 501 and section 504 of the Rehabilitation Act of 1973"); *id.* at 67, *reprinted in* 1990 U.S.C.C.A.N. at 349 (noting that undue hardship "is derived from and should be applied consistently with . . . regulations implementing section 501 and 504 of the Rehabilitation Act of 1973"); *see also* *School Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987) (adopting language almost identical to the ADA).

23. *See Waldrop v. Southern Co. Servs., Inc.*, 24 F.3d 152, 159 (11th Cir. 1994) (treating plaintiff's claim for back pay as compensatory damages and thus requiring a jury trial).

24. *Id.* at 154, 159. The district court found that the plaintiff had failed to specify the compensatory damages under a pretrial order and therefore waived his right to these damages. *See id.* at 155. *But see* *Rivera Flores v. Puerto Rico Tel. Co.*, 776 F. Supp. 61, 71 (D.P.R. 1991) (finding no right to a jury under the Rehabilitation Act because courts have consistently denied a right to a jury trial under Title VII).

25. Section 1981 lawsuits prohibit "discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). Section 1983 lawsuits can be used to redress a violation of any citizen's civil rights. More specifically, § 1983 prohibits employment discrimination based on one's race, religion, or sex that is not rationally related to a legitimate state interest. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 230 (4th ed. 1998).

26. *See* *Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1994) (characterizing back pay under § 1983 as equitable relief); *Moore v. Sun Oil Co.*, 636 F.2d 154, 156 (6th Cir. 1980) (holding, in § 1981 action, that back pay is equitable relief and thus parties have no right to a jury trial); *Bertot v. School Dist. No. 1*, 613 F.2d 245, 250 (10th Cir. 1979) (indicating that back pay is equitable relief under § 1983); *Hildebrand v. Board of Trustees of Mich. State Univ.*, 607 F.2d 705, 708 (6th Cir. 1979) (finding that no right to a jury trial exists for back pay); *Lynch v. Pan American World Airways, Inc.*, 475 F.2d 764, 765 (5th Cir. 1973) (holding that a complaint under § 1981 was essentially equitable despite plaintiff's request for back pay).

circumstances.<sup>27</sup> Under the Age Discrimination in Employment Act ("ADEA"), the Fourth Circuit Court of Appeals held that parties had a right to a jury trial, reasoning that a claim for back pay was legal in nature.<sup>28</sup> The Supreme Court affirmed the right to a jury trial, but on the ground that Congress intended to provide for such a right.<sup>29</sup>

If courts continue to follow the trend set by the district courts of granting a jury trial if an ADA plaintiff seeks compensatory or punitive damages,<sup>30</sup> but denying a jury trial when only back pay is sought, the right to a jury trial under the ADA will depend on the type of damages requested. This does not make sound policy, and the denial of a jury trial on a legal claim violates the Seventh Amendment.

If the right to a jury trial depends on the type of damages sought, a plaintiff may want to avoid a jury trial by not seeking compensatory or punitive damages. A plaintiff may limit the damages requested to injunctive relief and back pay to deprive the defendant of a jury trial.<sup>31</sup> These strategic pleadings, however, are contrary to the policy of the modern Federal Rules of Civil Procedure, which attempt to avoid strategic pleading by making the procedure simple and straightforward.<sup>32</sup>

On the other hand, a plaintiff who wants a jury trial may be denied that right even if the plaintiff alleges the full spectrum of damages available under the ADA. Normally, a plaintiff seeking compensatory and punitive damages on any claim of intentional dis-

27. See *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 n.4 (11th Cir. 1990) (finding right to jury trial on § 1981 claim); *Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 441 (1st Cir. 1989) (stating that "back pay as a factor in compensatory damages" must be submitted to the jury); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983) (explaining that damages under § 1981 are by their nature legal and provide a right to jury trial); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1142 (8th Cir. 1981) (concluding that back pay determinations "are inherently in the nature of legal damages and require a jury trial"). The Seventh Circuit has not even considered equitable versus legal relief. See, e.g., *Webb v. City of Chester*, 813 F.2d 824, 836 (7th Cir. 1987) (reviewing jury award for excessiveness, but not questioning plaintiff's right to jury trial and award); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983) (finding that evidence supports jury damages award, but not questioning right to have jury determine the award); *Nekolny v. Painter*, 653 F.2d 1164, 1166, 1172 (7th Cir. 1981) (assessing damages award, not right to have jury make award).

28. See *Pons v. Lorillard*, 549 F.2d 950, 954 (4th Cir. 1977), *aff'd*, 434 U.S. 575 (1978).

29. See *Lorillard v. Pons*, 434 U.S. 575, 585 (1978).

30. Parties alleging compensatory and punitive damages have a right to a jury trial under the Civil Rights Act of 1991. 42 U.S.C. § 1981a(c) (1994).

31. For an example of how a basic ADA complaint could be pleaded to avoid a jury trial, see *FEDERAL PROCEDURAL FORMS* § 45:292, at 423-26 (Mike Cole ed., 1998).

32. See *FED. R. CIV. P.* 8(a); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) ("Litigation is the pursuit of practical ends, not a game of chess.").



crimination under the ADA has a right to a jury trial.<sup>33</sup> If the discriminatory act occurs after an employer's good faith attempt to accommodate an employee, however, the good faith attempt provides an affirmative defense to the compensatory and punitive damages claims.<sup>34</sup> If the judge dismisses these compensatory and punitive damages, then the right to a jury trial is lost. The plaintiff is left with only injunctive relief and back pay, and no express statutory right to a jury trial.

This arbitrary nature of gaining the right to a jury trial runs counter to the Seventh Amendment. The Seventh Amendment guarantees a right to a jury trial in any civil legal action.<sup>35</sup> The Supreme Court has outlined only limited exceptions to this rule. Primarily, the Court has ruled that some claims are equitable rather than legal in nature, and are therefore exempt from the Seventh Amendment.<sup>36</sup> If discrimination under the ADA involves a contested legal right, then absent a principled exception, the parties should have a right to a jury trial under the Seventh Amendment.<sup>37</sup>

Normally when the right to a jury trial is at issue, the Court first looks to see if Congress provided the right to a jury trial.<sup>38</sup> If the Court does not find that Congress provided an express right, it then decides if a constitutionally protected Seventh Amendment right to a jury trial exists.<sup>39</sup> If the Court determines that Congress has created a legal right, a jury trial is required under the Seventh Amendment, regardless of whether an express right exists.<sup>40</sup> Instead of determining whether back pay under Title VII and the ADA is a legal or equitable claim under the Seventh Amendment, however, the Supreme Court has only looked to see if Congress considers back pay a legal or equitable remedy in Title VII's text.<sup>41</sup>

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33. See 42 U.S.C. § 1981a(c).

34. See 42 U.S.C. § 1981a(a)(3).

35. U.S. CONST. amend. VII; see also *supra* note 8 and accompanying text.

36. See *infra* Part III.A.

37. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (stating that the Seventh Amendment requires a jury trial in "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized").

38. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 585 (1978) (holding that Congress intended to provide a right to a jury trial from an interpretation of the language of the ADEA).

39. See, e.g., *Tull v. United States*, 481 U.S. 412, 417-27 (1987) (analyzing first whether Congress intended to provide a right to a jury trial, then whether a Seventh Amendment right existed); cf. *Lorillard*, 434 U.S. at 577 ("Because we find the statutory issue dispositive, we need not address the constitutional issue.").

40. See *Parsons*, 28 U.S. (3 Pet.) at 448.

41. The closest the Supreme Court has come to determining whether a right to a jury trial for back pay under Title VII exists was in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), where the Court noted that a court's discretion to award back pay generally is equitable,

This Note argues that Congress has not expressed an intent regarding a right to a jury trial for back pay under the ADA. Further, it argues that even if Congress had denied the right to a jury trial under the ADA, parties are entitled to a jury trial under the Seventh Amendment.

Part II demonstrates that Congress has never considered whether a claim for back pay under the ADA is a legal or equitable claim, or whether back pay should include a right to a jury trial. Thus, finding a Seventh Amendment right to a jury trial under the ADA does not contradict Congress's intent. This section also compares the ADA with analogous provisions in the ADEA, in which the Supreme Court found that Congress intended to provide a right to a jury trial on back pay claims.

Part III of this Note explores how the Supreme Court has determined if a right to a jury trial exists under the Seventh Amendment. Specifically, Part III lays out the Court's two-part test: (1) the historical characterization of the claim as either legal or equitable in nature; and (2) the type of relief sought. This section also explains the exceptions to the general rule under this test that actions involving monetary damages are legal in character. The Court has deemed actions for restitution, legal relief that is incidental to an equitable claim, and remedies left to the discretion of judges to be equitable actions.<sup>42</sup>

Part IV applies the two-part test to back pay under the ADA, and argues that it is properly seen as a legal claim. The conclusion suggests that Congress should amend the remedies available under the ADA to include a right to a jury trial, or, in the alternative, that the Supreme Court should declare that such a right exists for back pay claims.

## II. CONGRESS HAS EXPRESSED NO INTENT REGARDING THE RIGHT TO A JURY TRIAL UNDER THE ADA

Courts that have denied the right to a jury trial under the ADA have based their decision on Congress's intent not to provide a right to a jury trial when only back pay is sought.<sup>43</sup> These courts have

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but avoided discussing whether back pay awards under Title VII specifically constituted equitable relief.

42. See *infra* Part III.B.

43. See *supra* notes 16-21 and accompanying text.

noted two pieces of evidence for this proposition: (1) back pay is listed with equitable remedies available under Title VII; and (2) the Civil Rights Act of 1991 does not provide a right to a jury trial on back pay.<sup>44</sup>

*A. Statutory Text Does Not Indicate that Congress Intended  
Back Pay to be an Equitable Remedy*

The remedies available under the ADA are the same as those listed in Title VII.<sup>45</sup> Therefore, a brief analysis of the text of Title VII is important. Courts, including the Supreme Court, that have held that back pay under Title VII is an equitable claim have looked to its statutory language for support.<sup>46</sup> For example, in *Curtis v. Loether* the Court compared the text of Title VII, which the courts of appeals have held not to require a jury trial, with the text of Title VIII of the Civil Rights Act of 1968.<sup>47</sup> The Court used the contrast in statutory language to hold that a right to a jury trial attached to Title VIII.<sup>48</sup> The Court also distinguished back pay and the right to a jury trial for a violation of the Labor Management Relations Act ("LMRA") from back pay under Title VII, and held that the right to a jury trial attached to the LMRA.<sup>49</sup>

Title VII provides for "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief."<sup>50</sup> The phrase "[a]ny other equitable relief" implies that at least one equitable remedy precedes this quotation. Otherwise, it would not be sensible to include the word "other." The word "other" does not require, however, that all the remedies mentioned before it are equitable. Reinstatement and hiring of employees, which are traditionally equitable remedies, could be the other equitable relief mentioned in the statute. Thus, the language from Title VII does not conclusively indicate whether or not back pay should be considered equitable.

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44. See *supra* notes 16-21 and accompanying text; cf. *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (noting that Title VII lists back pay with other equitable relief).

45. See 42 U.S.C. § 12117(a) (1994).

46. See, e.g., *Curtis*, 415 U.S. at 197 (citing 42 U.S.C. § 2000e-5(g) (1994)).

47. See *id.* Thus, an argument can be made that when Congress enacted the ADA, it presumably knew the courts of appeals generally regarded Title VII as an equitable claim with no right to a jury trial, and that it intended the ADA lawsuits to be treated the same.

48. See *id.* at 198.

49. See *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571-72 (1990) (noting that Congress specifically designated back pay under Title VII as equitable relief).

50. 42 U.S.C. § 2000e-5(g)(1) (1994).

In *Lorillard v. Pons*, the Supreme Court held that in claims for lost wages under the ADEA, Congress intended to provide a right to a jury trial.<sup>51</sup> The Court based its decision in part on language in the ADEA allowing individuals to bring actions for “legal or equitable relief,” including compelled employment, reinstatement, promotion and back pay.<sup>52</sup> The Court noted that judgments compelling employment, reinstatement and promotion are equitable relief, and that legal relief must therefore refer to back pay.<sup>53</sup>

While the ADEA provides “legal or equitable remedies,” no similar provision exists in the ADA or the Civil Rights Act of 1964.<sup>54</sup> The absence of text stating that only equitable relief is available buttresses the contention that Congress did not even consider whether ADA back pay relief is equitable or legal.<sup>55</sup>

Further, *Lorillard* adds weight to the possibility that if Congress had considered the right to a jury trial under the ADA it would have provided for it. If Congress was willing to authorize a jury trial on claims for back pay in age discrimination cases, it is not unreasonable to think that Congress might also consider the right to a jury trial in disability discrimination cases. Unless a difference exists between age discrimination and disability discrimination, perhaps Congress should include a jury trial on issues of back pay under the ADA as well for the purpose of uniformity.

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51. *Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978). This Note assumes that lost wages are the same as back pay under the ADEA. Although the statute does not use the words “back pay,” the ADEA provides for “[a]mounts owing to a person as a result of a violation of this chapter.” 29 U.S.C. § 626(b) (1994).

52. 29 U.S.C. § 626(b); *Lorillard*, 434 U.S. at 583.

53. See *Lorillard*, 434 U.S. at 583 n.11.

54. 42 U.S.C. § 2000e-5. The heading for section 706(g) of the Civil Right Act of 1964 lists: “Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.” 42 U.S.C. § 2000e-5. Although “legal relief” is not specifically mentioned, the separate label for the accrual of back pay in addition to the heading for equitable relief could be read as an acknowledgement by Congress that back pay does not fit under the equitable relief category. Another reading is that the headings offer a preview of the text of the statute in the order that it will be addressed. Accrual and reduction of back pay are mentioned separately because provisions on these topics follow the general provision of equitable relief that includes back pay.

55. Congress has amended the ADEA to include a right to “trial by jury of any issue of fact in any action for recovery of amounts owing as a result of a violation of [the Act], regardless of whether equitable relief is sought by any party in such action.” 29 U.S.C. § 626(c)(2). Back pay may be sought under the ADEA as a remedy for discrimination. The enforcement provisions of the ADEA are modeled after the Fair Labor Standards Act (“FLSA”) rather than Title VII of the Civil Rights Act of 1964. See 29 U.S.C. § 626(b); *Lorillard*, 434 U.S. at 580.

*B. Back Pay Was Not Considered in the Civil Rights Act of 1991*

Plaintiffs have had the right to back pay and reinstatement since the ADA was adopted in 1990.<sup>56</sup> The Civil Rights Act of 1991 created additional compensatory and punitive damages and a right to a jury trial when a plaintiff seeks these remedies under Title VII and the ADA.<sup>57</sup> The Act also provided an affirmative defense of a "good faith" attempt to accommodate, but applied this defense only to claims for compensatory or punitive damages.<sup>58</sup> Congress mentioned back pay in the 1991 Act only to note that it does not count as compensatory damages,<sup>59</sup> possibly to exclude back pay from the affirmative defense.<sup>60</sup>

One would not expect back pay to be mentioned in the 1991 Act since, as the House Committee on Education and Labor Report stated, the Act's purpose was to strengthen the remedial scheme available to victims of discrimination.<sup>61</sup> The Act was concerned with creating new remedies, not adjusting those currently available. Since the Act did not state that an ADA claim solely for back pay would entitle parties to a jury trial, or that a jury trial was not required when only back pay is sought, Congress expressed no intent regarding a right to a jury trial for back pay in the Civil Rights Act of 1991.

This finding is supported by legislative history, which indicates that Congress considered only whether it was constitutional to provide additional compensatory and punitive remedies without a right to a jury trial.<sup>62</sup> The House Committee on Education and Labor rejected an amendment that would have eliminated the right to a jury trial, because it might have violated the Seventh Amendment.<sup>63</sup> In this discussion, however, no legislative history indicates that Congress considered the constitutionality of whether back pay under the ADA could be awarded without a right to a jury trial.

In sum, Congress did not express an intent regarding the provision of the right to a jury trial for back pay in the ADA, its remedies provided in Title VII, or the Civil Rights Act of 1991. This finding challenges the district courts' rationale for denying a right to a

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56. See 42 U.S.C. § 12117(a) (1994) (adopting the remedies set forth in the Civil Rights Act, including reinstatement and back pay, as the ADA's remedies); see also 42 U.S.C. § 2000(e)-5(g).

57. See 42 U.S.C. § 1981a(b)(3) (1994).

58. 42 U.S.C. § 1981a(a)(3).

59. See 42 U.S.C. § 1981a(b)(2).

60. See 42 U.S.C. § 1981a(a)(3).

61. See H.R. REP. NO. 102-40(I), at 64 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602.

62. See *id.* at 72, reprinted in 1991 U.S.C.C.A.N. at 610.

63. See *id.* at 101-03, reprinted in 1991 U.S.C.C.A.N. at 639-41.

jury trial for back pay under the ADA. Although a finding that Congress did not intend to provide a jury trial could be challenged under the Seventh Amendment, the Supreme Court has indicated an aversion to making decisions on constitutional grounds.<sup>64</sup> While the Court must consider a Seventh Amendment constitutional challenge to a statute, it is probably reluctant to find a Seventh Amendment right to a jury trial when the issue can be resolved by deferring to Congress's intent not to provide such a right and finding no constitutional problem. In fact, the Court has stated in dicta that the text of Title VII indicates that back pay is an equitable claim.<sup>65</sup> Despite its earlier statement that back pay is equitable, the Supreme Court, reviewing a Title VII or ADA case on the right to a jury trial under the analysis that follows, would have to hold that back pay is actually a legal claim to which the right to a jury trial attaches.

### III. THE RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT

The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>66</sup> The phrase “Suits at common law” refers to suits in which legal rights are to be determined, not to suits in which only equitable rights are recognized and administered.<sup>67</sup> For Seventh Amendment purposes, all claims must be characterized as either legal or equitable.<sup>68</sup>

By the Amendment's plain language, suits at common law that existed in 1791 must provide a right to a jury trial. In a case decided in 1830, the Supreme Court recognized that the Seventh Amendment went beyond “common law” suits to include suits brought under a fed-

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64. According to the *Ashwander* doctrine, the Supreme Court avoids deciding a case on constitutional grounds when statutory interpretation is sufficient to decide the case. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

65. See *supra* notes 16, 45-50 and accompanying text.

66. U.S. CONST. amend VII.

67. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

68. See *id.* (stating that “common law” meant suits in which legal, as opposed to equitable rights were vindicated). The American colonial judicial system, modeled after the English system, was divided into two main jurisdictions—courts of law and courts of equity or chancery. See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 649 (4th ed. 1996). In courts of law, a jury trial was available on most causes of action. See *id.* In equity, however, a judge sat without a jury. See *id.* To bring a claim in a court of equity the plaintiff had to show that the typical legal remedy of money damages was inadequate. See *id.* Admiralty suits are a third type of claim, see *id.*, but they are not relevant to this analysis.

eral statute.<sup>69</sup> In other cases prior to the adoption of the Federal Rules of Civil Procedure in 1938, federal courts applied a strictly historical test to determine if an action was more similar to a legal or equitable action in eighteenth century England, and regarded legal claims as generally requiring the right to a jury trial.<sup>70</sup> A major exception applied when both legal and equitable claims were brought together in a court of law. In this case, if the legal claim was considered incidental to the equitable relief that the plaintiff sought, the right to a jury trial was denied.<sup>71</sup>

The Supreme Court has expressed a strong preference for preserving the right to a jury trial,<sup>72</sup> based on the historical importance and continued relevance of this right: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."<sup>73</sup> The Court has also recognized that, as a practical matter, the Seventh Amendment is in part based on the assumption that a group consensus provides greater assurances of fairness than a single judge's decision.<sup>74</sup> The Court's recognition of the historical and

69. See *Parsons*, 28 U.S. (3 Pet.) at 447; see also *Curtis v. Loether*, 415 U.S. 189, 193 (1974) ("Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time.").

70. See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656-60 (1935) (discussing when the right to a jury trial triggers); *Dimick v. Schiedt*, 293 U.S. 474, 476-79 (1935) (applying historical test to establish Seventh Amendment right to jury trial in negligence action).

71. See 5 JAMES W. MOORE ET AL, *MOORE'S FEDERAL PRACTICE* ¶ 38.19[2] (3d ed. 1997); see also *Scott v. Neely*, 140 U.S. 106, 109-10 (1891) (explaining that right to jury trial attaches in a legal action); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (discussing the relation of both legal and equitable claims to the right to a jury trial).

72. See, e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990) (jury trial right can only be lost "under the most imperative circumstances").

73. *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). Even the Declaration of Independence mentioned the loss of the jury trial under British rule as one of the "abuses and usurpations . . . design[ed] to reduce them under absolute despotism." *Troy v. City of Hampton*, 756 F.2d 1000, 1004 (4th Cir. 1985) (Ervin, J., dissenting) (quoting THE DECLARATION OF INDEPENDENCE paras. 2, 21 (U.S. 1776)).

Additionally, Justice Black wrote that Alexander Hamilton had "divided the citizens of his time between those who thought that a jury trial was a 'valuable safeguard to liberty' and those who thought it was 'the very palladium of free government.'" *Galloway v. United States*, 319 U.S. 372, 397-98 (1943) (Black, J., concurring and dissenting) (citation omitted). For an excellent discussion of the historical foundation of the Seventh Amendment, see Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1005-30 (1992).

74. See *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) ("[T]welve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

continuing importance of the right to a jury trial might suggest an inclination to characterize actions in a way that protects this right.

As noted above, Seventh Amendment protection has been extended to statutory actions created by Congress.<sup>75</sup> Statutory actions require a two-part test to decide which claims are legal and which are equitable.<sup>76</sup>

#### A. *The Seventh Amendment Two-Part Test*

To determine if an action involves legal rights, the Court has adopted a two-part test that examines the nature of the action and the remedy sought. First, the Court compares the statutory action in question to eighteenth century actions brought in England to determine if the claim is analogous to a claim brought in a court of law or a court of equity.<sup>77</sup> The Court then determines whether the remedy is legal or equitable.<sup>78</sup> The latter part of this test has been given greater weight by the Court.<sup>79</sup>

##### 1. Nature of the Action

The Supreme Court has discounted the importance of finding an eighteenth century British analog because it requires an “extensive and possibly abstruse historical inquiry.”<sup>80</sup> In a concurring opinion Justice Brennan called for the abandonment of this part of the test altogether, suggesting courts rely solely on the second part of the test.<sup>81</sup> Brennan noted that judges are ill suited to “root through the tangle of [historical] sources” needed to find analogous causes of action.<sup>82</sup> Thus, while the Court has not abandoned the historical inquiry, it carries less weight in comparison to the Court’s analysis of the nature of the

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75. See, e.g., *Tull v. United States*, 481 U.S. 412, 417 (1987) (stating that a jury trial analysis applies to causes of action created by judicial enactment).

76. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 194-97 (1974) (explaining statutory actions and the different types of possible claims).

77. See *Tull*, 481 U.S. at 417 (“First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of courts of law and equity.”).

78. See *id.* at 417-18 (“Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”).

79. See *id.* at 421 (stating that “characterizing the relief sought is [m]ore important than finding a precisely analogous common-law cause of action”) (quoting *Curtis*, 415 U.S. at 196) (brackets in original).

80. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970); see also *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 574 (1990) (Brennan, J., concurring) (noting that the historical test should be simplified).

81. See *Terry*, 494 U.S. at 574 (Brennan, J., concurring).

82. See *id.* at 576.



remedy.<sup>83</sup> The holdings of the Court on whether certain claims are legal or equitable in nature because of their similarity to an eighteenth-century analog do, however, provide some general guidance.

Prior to the merger of courts of law and equity, courts of equity had jurisdiction over matters where land or an intangible other than money was in dispute.<sup>84</sup> In *Granfinanciera, S.A. v. Nordberg*, a Chapter 11 bankruptcy trustee brought a fraudulent conveyance action to void monetary transfers.<sup>85</sup> The Court noted that both courts of law and equity had jurisdiction over fraudulent conveyance actions, but where only the fraudulent transfer of cash was disputed, a court of law generally had exclusive jurisdiction.<sup>86</sup> Accordingly, the Court held that the claim was a legal one and a right to a jury trial attached.<sup>87</sup>

In *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, the Court focused on the relationship between the parties in the action to determine whether the claim was legal or equitable.<sup>88</sup> Here, union members alleged that their union had violated its duty of fair representation when it failed to pursue their grievances for the employer's breach of the collective-bargaining agreement.<sup>89</sup> The employees had to prove two issues: (1) that the employer breached the collective-bargaining agreement; and (2) that the union breached its duty of fair representation.<sup>90</sup>

The Court found that the breach of a duty of fair representation was similar to a trust beneficiary's action against a trustee for breach of fiduciary duty (an action within the jurisdiction of courts of

83. See *id.* at 575; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *Tull*, 481 U.S. at 421; *Curtis*, 415 U.S. at 196.

84. See *Granfinanciera*, 492 U.S. at 44 (citing 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 98, at 183-84 (rev. ed. 1940)). In the nineteenth century, common law and Chancery procedures were increasingly attacked for their complexity. See YEAZELL, *supra* note 68, at 389-90. Courts of law, in particular, were criticized for their pleading requirements, which involved the selection of a proper writ to serve as a cause of action. See *id.* at 390. The judicial system on the state and federal level was reformed through simplified pleadings and the merger of courts of law and equity. See *id.*

85. See *Granfinanciera*, 492 U.S. at 36. A fraudulent conveyance is a "conveyance or transfer of property, the object of which is to defraud a creditor, or hinder or delay him, or to put such property beyond his reach." BLACK'S LAW DICTIONARY 662 (6th ed. 1990).

86. See *Granfinanciera*, 492 U.S. at 43-44.

87. See *id.*

88. *Terry*, 494 U.S. at 568 (stating that the nature of an action is largely controlled by the nature of the relationship between the parties).

89. See *id.* at 562. The employer, however, was not a party to the action on appeal because it had filed for bankruptcy and the action against it was voluntarily dismissed. See *id.* at 563.

90. See *id.* at 568.

equity).<sup>91</sup> Nevertheless, the Court found that the “ ‘nature of the *issue* to be tried rather than the character of the overall action’ ” was critical to the Seventh Amendment analysis.<sup>92</sup> While the breach of the union’s duty of fair representation was equitable, the issue of whether the employer breached the collective-bargaining agreement was similar to a breach of contract claim—a legal claim.<sup>93</sup> Thus both legal and equitable issues were part of the action, and the right to a jury trial therefore attached on issues relevant to the legal claim.<sup>94</sup>

A private citizen’s statutory action for damages is similar to a tort suit because it creates a new legal duty and authorizes courts to compensate plaintiffs injured by its wrongful breach.<sup>95</sup> Since a tort suit is actionable in a court of law, the analogous statutory tort is a legal claim.<sup>96</sup> Following this reasoning, the Court held in *Curtis v. Loether* that a defendant had a right to a jury trial for violations of the fair housing provisions of the Civil Rights Act of 1968.<sup>97</sup> The Court found that the claim was a “damages action” to enforce legal rights, and that parties had a right to a jury trial.<sup>98</sup>

Similar to a damages action, a lawsuit to enforce civil penalties is legal in nature.<sup>99</sup> In *Tull v. United States*, the Court described civil penalties as similar to an action in debt within the jurisdiction of eighteenth century courts of law.<sup>100</sup> The Court found merit in the argument that the civil penalties were analogous to a public nuisance action only available in courts of equity.<sup>101</sup> The Court did not, however, decide which type of action was the closer analog to civil

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91. *See id.* at 567. The Court distinguished this from a malpractice action, which is a legal claim, because of the relationship between a union and its members. The Court found that a duty of fair representation was akin to a fiduciary duty rather than the duty a professional owes to a client (the breach of which would result in malpractice). *See id.* at 568-69.

92. *Id.* at 569 (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

93. *See id.* at 569-70.

94. *See id.* at 570.

95. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 195 (1974); *see also Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 98 (1991) (holding that a damages action for failure to refer union member to jobs is a legal claim to which the Seventh Amendment applies).

96. *See Curtis*, 415 U.S. at 195. In the discrimination context, the court noted that “[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress.” *Id.* at 196 n.10.

97. *See id.* at 189-90. That statute allowed for actual and punitive damages of not more than \$1,000.

98. *Id.* at 195.

99. *See, e.g., Tull v. United States*, 481 U.S. 412, 413 (1987) (holding that equity courts may not enforce civil penalties and that petitioner had a right to a jury trial on petitioner’s legal claim).

100. *Id.* at 418.

101. *See id.* at 420.

penalties.<sup>102</sup> The Court held that the right to a jury trial should be provided because the action had an historic legal analog, not because the legal analogy was better than the equity analogy.<sup>103</sup> The defendant thus had a right to a jury trial.<sup>104</sup>

## 2. Type of Relief Sought

The more important part of the inquiry into whether a claim is legal or equitable is the characterization of the relief sought.<sup>105</sup> Generally, a legal claim is one that provides compensatory and punitive monetary damages.<sup>106</sup> In *Curtis*, the Court stated that actual and punitive damages are the traditional form of relief available in courts of law.<sup>107</sup> The *Granfinanciera* Court also relied on the importance of monetary relief in finding a right to a jury trial.<sup>108</sup> The Court noted that an equity court would not have jurisdiction over a claim for money damages when a like amount could be recovered in a court of law.<sup>109</sup> The *Tull* Court also noted that a civil monetary penalty could only be enforced in a court of law.<sup>110</sup>

### B. Exceptions to the Two-Part Seventh Amendment Test

The Supreme Court has outlined three exceptions to the general rule that monetary remedies are legal claims: (1) restitutionary awards;<sup>111</sup> (2) money awards incidental to equitable relief;<sup>112</sup> and (3) discretionary money awards.<sup>113</sup>

102. *See id.* Instead, the Court relied on the second part of the test—the character of the relief sought. *See id.* at 421.

103. *See id.* at 420.

104. *See id.* at 427.

105. *See id.* at 421.

106. *See id.* at 423 n.7 (stating that a civil penalty is similar to punitive damages, which are only available in a court of law); *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (explaining that the relief sought—actual and punitive damages—constitutes a traditional legal claim).

107. *See Curtis*, 415 U.S. at 196. The Court, however, “[did] not go so far as to say that any award of monetary relief must necessarily be ‘legal’ relief.” *Id.*; *see also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (noting that “[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose”).

108. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 47-49 (1989).

109. *See id.* at 47-48.

110. *See Tull*, 481 U.S. at 422.

111. *See, e.g., Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *Tull*, 481 U.S. at 423-24; *Curtis*, 415 U.S. at 197.

112. *See, e.g., Tull* 481 U.S. at 424-25; *Curtis*, 415 U.S. at 197.

113. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring); *see also Curtis*, 415 U.S. at 197.

### 1. Restitutionary Awards

Restitutionary awards, though monetary in nature, have been considered equitable. The *Tull* Court defined restitution as “restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.”<sup>114</sup> The Court stated that actions intended to restore the status quo were historically available in equity courts, while suits that punish through retribution and deterrence were available in courts of law.<sup>115</sup> In holding that civil penalties under the Clean Water Act<sup>116</sup> are legal actions, the Court found that civil penalties do not only serve a restitutionary purpose.<sup>117</sup> Rather, Congress included these remedies to punish and deter culpable individuals. The *Tull* Court rejected the argument that civil penalties under the statute are an equitable remedy aimed at the disgorgement of improper profits.<sup>118</sup> Since the purpose of the civil penalty went beyond the mere restoration of the status quo, the Court stated that the relief provided by the civil penalty was a legal one to which the right to a jury trial attached.<sup>119</sup>

The *Terry* Court relied on similar reasoning when it held that the back pay available under the LMRA was not restitutionary.<sup>120</sup> The back pay that employees sought from their union consisted of wages and benefits they would have received had their employer acted properly; it was not money wrongfully withheld.<sup>121</sup> Thus the relief was not restitutionary, and it was therefore not an equitable remedy.<sup>122</sup> The money damages at issue in the action were analogous

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114. *Tull*, 481 U.S. at 424 (quoting *Porter v. Warner Holding, Co.*, 328 U.S. 395, 402 (1946)).

115. *See Tull*, 481 U.S. at 422 (“Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.”).

116. 33 U.S.C. §§ 1251-1387 (1994).

117. *See Tull*, 481 U.S. at 422-23. (stating that the authorization of punishment to further goals of retribution and deterrence indicates a legal rather than an equitable claim) (citing remarks of Senator Muskie, 123 CONG. REC. 39,191 (1977), who made reference to the Environmental Protection Agency’s memorandum that outlined the Clean Water Act’s enforcement policy).

118. *See Tull*, 481 U.S. at 424.

119. *See id.* at 424-25; *see also* *Ross v. Bernhard*, 396 U.S. 531, 535-36 (1970) (finding treble-damages remedy to be a penalty and therefore constituting legal relief).

120. *See Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570-73 (1990).

121. *See id.* at 571.

122. *See id.* at 572-73. The Court rejected the argument that National Labor Relations Act (“NLRA”) action for back pay should be considered equitable because under Title VII, which was modeled after the NLRA, back pay had been characterized as equitable. *See id.* at 571-73. The Court noted that Congress had described Title VII relief as equitable but had not made a similar

to those traditionally sought in courts of law, entitling litigants the right to a jury trial.<sup>123</sup>

## 2. Money Damages Incidental to Equitable Relief

A monetary award "incidental to or intertwined with injunctive relief" may be characterized as equitable.<sup>124</sup> This rule is based on the historical fact that courts in equity could provide monetary awards that were incidental to an award of injunctive relief.<sup>125</sup> The Court considers this factor when deciding if a claim requires a right to a jury trial.<sup>126</sup>

For example, in *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court held that an order requiring reinstatement and back pay under the National Labor Relations Act does not require a jury trial.<sup>127</sup> The Court stated that the Seventh Amendment does not apply to "cases where recovery of money damages is an incident to equitable relief."<sup>128</sup> In this case, back pay was incidental to reinstatement.

In *Curtis*, however, the Court rejected the argument that since back pay under Title VII had been deemed incidental to equitable relief, money damages available under another civil rights law (Title VIII of the Civil Rights Act of 1968) must also be considered incidental to the statute's equitable remedies.<sup>129</sup> The *Curtis* Court noted that under Title VII "the courts of appeals had characterized backpay as an integral part of an equitable remedy" because back pay is mentioned along with forms of equitable relief available under the statute.<sup>130</sup> In contrast, Title VIII contains a plain authorization of

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statement about an NLRA duty of fair representation claim. *See id.* at 572. The Court also reasoned that although Title VII back pay was modeled after NLRA provisions concerning unfair labor practices, Title VII was not comparable to an NLRA remedy for the breach of the duty of fair representation. *See id.* at 573. Unfair labor practice provisions promoted the public interest in a federal labor policy while the duty of fair representation concerned the rights of individual employees. *See id.*

123. *See id.* at 573-74.

124. *Id.* at 571 (quoting *Tull*, 481 U.S. at 424).

125. *See Tull*, 481 U.S. at 424.

126. *See Curtis v. Loether*, 415 U.S. 189, 197-98 (1974).

127. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

128. *Id.* at 48. The Court also stated that the Seventh Amendment does not apply to statutory actions, but only common law actions. *See id.* Such a statement is at odds with the Court's more recent decisions, where the Court has inquired into whether a statutory-based claim is legal or equitable to determine if a Seventh Amendment right to a jury trial exists. *See, e.g., Terry*, 494 U.S. at 570-73; *Tull*, 481 U.S. at 418-25; *Curtis*, 415 U.S. at 194-95.

129. *Curtis*, 415 U.S. at 196-98.

130. *Id.* at 197.

actual and punitive damages.<sup>131</sup> Thus, it held that damages under Title VIII were not incidental to the equitable relief provided in the statute.

In *Terry*, the Court held that the "incidental" exception did not apply, because the plaintiff had only money damages available to him.<sup>132</sup> There, however, the employee had originally sought injunctive relief in his complaint against both the union and the employer until the employer declared bankruptcy, and the claim for reinstatement was dismissed.<sup>133</sup> Since the employee could have maintained a claim for reinstatement, lost wages under the LMRA arguably are incidental to the potential injunctive relief provided.<sup>134</sup>

The Court appears to have resolved this uncertainty in *Wooddell v. International Brotherhood of Electrical Workers, Local 71*.<sup>135</sup> In *Wooddell*, an employee sought injunctive relief and lost wages for violations of the Labor-Management Reporting and Disclosure Act.<sup>136</sup> The Court held that the plaintiff was entitled to a jury trial. The Court also held that his lost wages could not be treated as incidental to an order of reinstatement, because the damages sought were to pay for jobs to which the union failed to refer to him.<sup>137</sup> As a result, the wages were not considered incidental to reinstatement. Rather the *reinstatement* was considered *incidental* to the *wages*.<sup>138</sup>

In *Tull*, the Court held that civil penalties, as a form of legal relief under the Clean Water Act, could not be deemed incidental to equitable relief available under the statute.<sup>139</sup> The Court supported its decision on four grounds. First, a court of equity historically could not enforce civil penalties, so civil penalties could not be awarded incidental to equitable relief.<sup>140</sup> Second, the Government's purpose in bringing the suit was to recover civil penalties rather than to enforce equi-

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131. *See id.* *Curtis* also noted that the courts of appeals in Title VII cases relied on the fact that the decision to award back pay is committed to the trial judge. In contrast, the judge has no discretion in Title VIII cases. *See id.*

132. *Terry*, 494 U.S. at 571.

133. *See id.* at 562-63.

134. This situation is analogous to Title VII claims in which an employee seeks back pay but not injunctive relief.

135. *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991).

136. 29 U.S.C. §§ 401-531 (1994); *Wooddell*, 502 U.S. at 96.

137. *See id.* at 97-98. The Court also noted that the defendant union had conceded that *Terry* controlled the case. *See id.* at 98.

138. *See id.*

139. *See Tull v. United States*, 481 U.S. 412, 424-25 (1987).

140. *See id.* at 424.

table remedies available under the statute.<sup>141</sup> Third, a potential penalty of \$22 million could not be considered incidental compared with the equitable relief sought.<sup>142</sup> Fourth, equitable remedies and civil penalties are authorized in separate subsections of the Clean Water Act.<sup>143</sup>

Since the government in *Tull* could have sought civil penalties independent of the equitable claim, the right to a jury trial "cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought."<sup>144</sup> Taken at its face, the point that legal claims cannot be characterized as incidental to the equitable relief sought could eliminate the "incidental" exception altogether.<sup>145</sup> A line of Supreme Court precedent supports this point. In *Beacon Theaters, Inc. v. Westover*, the plaintiff sought declaratory judgment on an anti-trust provision, and the defendant brought a counterclaim and cross-claim for legal damages under the antitrust laws.<sup>146</sup> The Court held that a decision on the equitable claim would not preclude a jury trial on issues common to both the equitable and legal claims.<sup>147</sup> The Court stated that it would only allow the Seventh Amendment right to be precluded in limited circumstances that the Court, at that time, could not anticipate.<sup>148</sup>

Then, in *Dairy Queen, Inc. v. Wood*, the Court explicitly stated that no rule exists whereby characterizing a legal issue as incidental to an equitable one will deprive the parties of the right to a jury trial.<sup>149</sup> The Court based this finding on the intent behind the modern Federal Rules of Civil Procedure not to infringe on the right to a jury trial.<sup>150</sup> It noted that prior to the merger of courts of law and equity, when a complaint alleged both equitable and legal claims, the equity court could not take jurisdiction over the legal claim because this would deny the right to a jury trial.<sup>151</sup> When the modern rules were

141. *See id.* The government was not able to pursue equitable remedies since the defendant had already sold most of the properties at issue. *See id.*

142. *See id.* at 424-25.

143. *See id.* at 425.

144. *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974)).

145. In fact, some commentators think that this exception should be eliminated. *See* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 527-28 (1975).

146. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 503-04 (1959).

147. *See id.* at 506.

148. *See id.* at 510-11 (stating that only under the most imperative circumstances can the right to a jury trial involving legal issues be lost through earlier determination of equitable claims).

149. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962).

150. *See id.* at 471-72; *see also supra* notes 32, 84 and accompanying text.

151. *See Dairy Queen*, 369 U.S. at 471-72 (citing *Scott v. Neely*, 140 U.S. 106 (1891)).

adopted in 1938, this policy did not change.<sup>152</sup> Even though Rule 18(a) allows the joinder of legal and equitable claims in a single action, Rule 38(a) affirms that the Seventh Amendment right is preserved under the new rules.<sup>153</sup> In a footnote, the Court stated that the Seventh Amendment protects the right to a jury trial even "if the equitable cause clearly outweighs the legal cause so that the basic issue of the case taken as a whole is equitable."<sup>154</sup>

This holding was reaffirmed in *Ross v. Bernhard*.<sup>155</sup> *Ross* was a shareholder derivative suit that first relied on the equitable right to sue on the corporation's behalf, and secondly, on legal claims for breach of a brokerage contract and negligence by the directors.<sup>156</sup> The equitable issue had to be tried before the legal issues could be adjudicated, but this did not change the character of the action into a solely equitable proceeding.<sup>157</sup> Thus the right to a jury trial on legal issues attached.<sup>158</sup>

Most recently, the Court held that a case may need to be relitigated in order to preserve a plaintiff's right to a jury trial. In *Lytle v. Household Manufacturing, Inc.*, a case alleging a discriminatory discharge under both violations of Title VII and § 1981, the district court dismissed the § 1981 claim and held a bench trial on the Title VII claim, deciding in favor of the defendant.<sup>159</sup> On appeal, the court of appeals held that the dismissal of the § 1981 claim was erroneous because a separate remedy was available to the plaintiff.<sup>160</sup> The court of appeals, however, denied the plaintiff's right to a jury trial on the § 1981 claim in the interest of preserving limited judicial resources.<sup>161</sup> The Supreme Court reversed this decision, holding that "concern about judicial economy, to the extent that it supports [defendant's] position, remains an insufficient basis for departing from our

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152. *See id.*

153. *See id.*; *see also* FED R. CIV. P. 18, 38.

154. *Dairy Queen*, 369 U.S. at 473 n.8 (quoting *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961)).

155. *Ross v. Bernhard*, 396 U.S. 531 (1970).

156. *See id.* at 538.

157. *See id.* at 538-39 (noting that "legal claims are not magically converted into equitable issues by their presentation to a court of equity").

158. *See id.* at 539. Prior to the merger of courts of law and equity, a shareholder derivative suit was only available in a court of equity because a shareholder was without standing to sue in a court of law. *See id.* The holding in *Ross* suggests that even where an action would historically be considered equitable, the existence of any legal claim is sufficient to guarantee the right to a jury trial.

159. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 548-49 (1990).

160. *See id.* at 549.

161. *See id.*



longstanding commitment to preserving a litigant's right to a jury trial."<sup>162</sup>

Although this line of cases appears to reject the rule that a jury trial can be denied where a legal claim is incidental to an equitable claim, the Court continued to mention the exception in *Curtis*, *Tull*, and *Terry* as a relevant consideration. The Court, however, has found other reasons for denying the exception's effectiveness in these cases.<sup>163</sup> Perhaps the Court supports the erosion of the incidental exception, but continues to mention it in deference to its historical significance in Seventh Amendment jurisprudence.<sup>164</sup> Regardless, *Dairy Queen* has not been overruled. A legal claim thus requires the right to a jury trial. That right apparently cannot be lost by deeming it incidental to an equitable claim in the same lawsuit.

Another reading of these cases is that while a legal claim (determined by its nature and remedy) may not be ruled incidental to an equitable claim, a simple award of money damages may be considered incidental to an equitable claim. Under this reasoning, a right to a jury trial is still preserved for all legal claims. The outcome of the analysis, however, depends on the Court's approach to the analysis. If the Court first finds that the claim in question is legal (because of its nature), then the right to a jury trial attaches regardless of whether it is being sought along with a separate equitable claim, as the Court stated in *Dairy Queen*.<sup>165</sup> If the Court first finds an equitable claim at the heart of the action, however, the Court may consider the money damages incidental to the equitable claim and deny the right to a jury trial. Since the outcome depends on the methodology applied, the exception does not objectively indicate whether a claim is legal or equitable. Rather, the exception can be manipulated to support a predetermined outcome.

### 3. Discretionary Money Awards

When the trial court has discretion to award back pay or other monetary awards, the award is generally recognized as an equitable remedy.<sup>166</sup> For example, in *Mitchell v. Robert DeMario Jewelry, Inc.*, the Court stated that trial courts could award lost wages at their

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162. *Id.* at 553-54.

163. *See supra* notes 124-43 and accompanying text.

164. *See supra* notes 66-71 and accompanying text.

165. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962) (stating that the right to a jury trial is not lost because petitioner seeks redress of both legal and equitable claims).

166. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

discretion to serve the purposes of the Fair Labor Standards Act ("FLSA").<sup>167</sup> *Mitchell* allowed courts to exercise equitable jurisdiction when enjoining violations of the minimum wage and overtime pay provisions of the Act.<sup>168</sup> The issue in *Mitchell* was whether a district court could also order the reimbursement for lost wages resulting from the unlawful discharge of employees under the FLSA.<sup>169</sup> The Court held that a trial court may exercise its equitable powers to enforce compliance with the Act and give whatever relief may be necessary under the circumstances.<sup>170</sup> The Court noted that reimbursement of lost wages was necessary to protect employees who filed complaints under the statute and had been wrongfully discharged.<sup>171</sup>

In *Albermarle Paper Co. v. Moody*, the Supreme Court considered the limits of a district court's discretionary application of equitable remedies.<sup>172</sup> The Court held that the trial court's discretion to award back pay following violations of Title VII was equitable in nature.<sup>173</sup> Since back pay was bestowed on the district courts "as part of a complex legislative design directed at an historic evil of national proportions,"<sup>174</sup> courts were to use this discretion "in light of the large objectives of the Act."<sup>175</sup> Thus, the Court held that courts had the power to award back pay under Title VII to correct the wrongs of discrimination, but limited this discretion to achieve the goals of the statute.<sup>176</sup>

In his concurrence in *Moody*, Justice Rehnquist noted how defining equitable actions based on whether a court has broad discretion effected the right to a jury trial.<sup>177</sup> When a court has

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167. *Mitchell v. Robert DeMario Jewlery, Inc.*, 361 U.S. 288, 292 (1960) (holding that courts have the "historic power of equity" to award lost wages under the FLSA). The FLSA provides for "payment to employees of unpaid minimum wages or unpaid overtime compensation" but not lost wages from an unlawful discharge. 29 U.S.C. § 217 (1994).

168. *See Mitchell*, 361 U.S. at 294.

169. *See id.* at 289. The employees had been discharged for filing a lawsuit seeking unpaid compensation. *See id.* at 290. The issue of a right to a jury trial was not at issue in this case.

170. *See id.* at 291 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946), to justify the implied power to order reimbursement).

171. *See id.* at 292. Without the prospect of reimbursement, an employee would not take the risk of filing a grievance against their employer and losing his or her job. *See id.*

172. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

173. *See id.* In other words, the discretionary use of these remedies was to be guided by equity. As equity is used here, it refers to principles that achieve "fairness, justness, and right dealing" through the law. BLACK'S LAW DICTIONARY 540 (6th ed. 1990).

174. *Moody*, 422 U.S. at 416.

175. *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944)).

176. *See id.* at 417 (stating that when judges are given equitable discretion the principled application of standards consistent with those purposes is required).

177. *Id.* at 443 (Rehnquist, J., concurring).

discretion as to whether to award back pay, this discretion causes the claim to be classified as equitable, and the right to a jury trial does not attach.<sup>178</sup> If the Court were to require that district courts award back pay as a matter of course upon a finding of discrimination, however, back pay would lose its equitable character and would be subject to a right to a jury trial. Justice Rehnquist characterized a district court's discretion as somewhat limited by *Moody* because a court could only deny back pay for reasons that, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination.<sup>179</sup> As a result of this case, courts may not condition back pay on a showing of bad faith, or withhold back pay where a plaintiff does not request back pay until years after filing the complaint.<sup>180</sup> The more restricted the discretion to award back pay, the more back pay begins to resemble a legal rather than an equitable claim for which parties could demand a jury trial.

Despite his concern about a potential Seventh Amendment conflict if awards of back pay followed as a matter of course, Justice Rehnquist concurred in this decision.<sup>181</sup> He did so because he thought the Court's opinion still granted broad latitude to district courts in Title VII cases to decide whether to provide back pay relief.<sup>182</sup> He believed granting courts discretion was based on sound policy, and he also noted the need to expeditiously dispose of large Title VII class actions where determining the amount of back pay lost by a particular claimant is difficult.<sup>183</sup>

*Tull*, however, is difficult to fit into the doctrine that discretionary remedies determine if a claim is an equitable claim. The *Tull* Court ruled that while a defendant had a right to a jury trial to decide the issue of liability, this right did not extend to the decision as to the amount of civil penalties.<sup>184</sup> The "highly discretionary calculations" of

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178. *See id.*

179. *Id.* at 421. "The courts of appeals must maintain a consistent and principled application of the backpay provision." *Id.*

180. *See id.* at 442-43 (Rehnquist, J., concurring).

181. *See id.* at 441-44.

182. *See id.* at 443-44 (stating that broad latitude was not only consistent with the statute but was supported by policy considerations favoring expeditious disposition of numerous claims).

183. *See id.* at 444-45 (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941)). Title VII was modeled after the remedies available in the NLRA. *See id.* Thus the policy reasons supporting the NLRA's discretionary remedies discussed in *Phelps Dodge* should also support Title VII's discretionary remedies.

184. *Tull v. United States*, 481 U.S. 413, 425-27 (1987). "The assessment of civil penalties thus cannot be said to involve the 'substance of a common-law right to a trial by jury,' nor a 'fundamental element of a jury trial.'" *Id.* at 426 (quoting *Colgrove v. Battin*, 413 U.S. 149, 156-57 (1973)). Therefore, requiring judges to determine the amount of civil penalties does not

civil penalties were assigned to the trial judge.<sup>185</sup> The Court speculated that the framers of the Constitution were concerned with the abolishment of the civil jury in common law suits, and found no evidence to show that they meant to extend the right to a jury trial to the remedy phase.<sup>186</sup> Here the Court was willing to place the discretionary calculation of the remedy in the hands of the trial judge because the calculation of the remedy is not a "fundamental element of a jury trial."<sup>187</sup>

Thus, in *Tull* the Court decided that civil penalties are legal claims entitling defendants a right to a jury trial, but the discretionary nature of the remedy was irrelevant to deciding the nature of the claim. If the Court had applied the *Moody* reasoning that discretionary remedies make the claim equitable, the Court would have had to weigh evidence of the discretionary nature of the remedy as indicia that the action was equitable, and thus concluded that the defendant was not entitled to a jury trial. Instead, the Court in *Tull* excluded the discretionary nature of the remedy from its analysis of whether the claims were legal or equitable.<sup>188</sup> After deciding that the claims were legal, the Court considered whether the right to a jury trial also attached to calculation of the remedy. The same methodology could be used in other claims that require the discretionary calculation of damages where a court does not want to define a claim as equitable. The Court then ruled the calculation to be distinct from the claim itself.

The logic behind the discretionary remedy exception has also been challenged.<sup>189</sup> Although equitable remedies are applied at the discretion of the judge in a court of equity,<sup>190</sup> not all discretionary remedies are equitable. For example, a jury usually has complete discretion over the award of punitive damages.<sup>191</sup> The judge may also

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infringe on the right to a jury trial. *See id.* at 426-27. *But see* *Dimick v. Schiedt*, 293 U.S. 474, 476-77 (1935) (Seventh Amendment prohibits the use of additur); *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 525 (1829) (jury must determine the amount of compensation for improvements to real estate).

185. *Tull*, 481 U.S. at 427. The *Tull* Court noted that such calculations were traditionally performed by judges, citing to Rehnquist's concurrence in *Moody* for this proposition. *See id.* (citing *Moody*, 422 U.S. at 443-45 (Rehnquist, J., concurring)).

186. *See id.* at 426 n.9.

187. *Tull*, 481 U.S. at 426.

188. *Id.* at 426-27.

189. *See* *Redish*, *supra* note 145, at 529.

190. *See* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 23, at 49 (2d ed. 1948) ("Equitable relief cannot be demanded . . . but is granted in the discretion of the court").

191. *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 84 (1935).

exercise discretion on a legal claim where a jury is present by granting summary judgment, directing a verdict, or ordering a new trial.<sup>192</sup> Thus, the discretionary nature of a remedy is not determinative as to its legal or equitable nature. Instead, the discretionary nature of the remedy is merely evidence making it more likely that a claim is equitable.

#### IV. BACK PAY UNDER THE ADA IS A LEGAL CLAIM

A claim for back pay under the ADA has the characteristics of a legal claim and not an equitable claim. It meets both parts of the test established in the Supreme Court's decisions on the right to a jury trial in a civil proceeding,<sup>193</sup> because back pay under the ADA is both a claim for the enforcement of a legal right and a request for legal relief.

##### *A. Back Pay under the ADA Is a Request for Enforcement of a Legal Right*

In *Curtis*, the Court noted that Title VII creates a damages action that "sounds basically in tort."<sup>194</sup> Like Title VII, the ADA creates a legal duty between employers and employees.<sup>195</sup> Employers may not discriminate against disabled employees or applicants.<sup>196</sup> If employers discriminate, they are liable for damages that the employee suffers.<sup>197</sup> One of these damages is back pay.

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192. See FED. R. CIV. P. 50 (inadequate as a matter of law), 56 (summary judgment), 59 (new trial).

193. See *supra* notes 77-79 and accompanying text.

194. *Curtis v. Loether*, 415 U.S. 189, 195 (1974); see also *DeLeo v. Stamford*, 919 F. Supp. 70, 76 (D. Conn. 1995) (noting that actions under the Rehabilitation Act for a public employer's discrimination of a disabled individual "are comparable to actions brought before courts of law in 18th-century England—namely, an action in tort to redress discrimination and an action for breach of an employment contract") (citations omitted).

195. 42 U.S.C. § 12112(a) (1994) provides: "No covered entity shall discriminate against a qualified individual with a disability . . ." Under the Act, "[t]he term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2). A qualified individual with a disability includes an individual with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

196. The ADA protects almost all aspects of employment, including "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

197. See 42 U.S.C. § 12117. "[A]ny person alleging discrimination on the basis of disability in violation of any provision of this chapter" may seek the remedies provided in the Civil Rights Act of 1964. *Id.* The Civil Rights Act of 1964 provides:

Back pay is one of the most important forms of relief available in the ADA.<sup>198</sup> It is an integral part of make-whole relief provided to plaintiffs.<sup>199</sup> As a practical matter, back pay accumulates from the date of the refusal to hire,<sup>200</sup> unlawful discharge<sup>201</sup> or denial of promotion.<sup>202</sup> Back pay not only includes salary, but includes other forms of monetary compensation typically provided to employees over a given period as well.<sup>203</sup> A victim of discrimination may also resign because of the discriminatory conduct.<sup>204</sup> If reinstatement is not possible, front pay may also be necessary to account for the time the employee takes to find a new job.<sup>205</sup>

Alternatively, a claim under the ADA has also been construed as a breach of contract claim.<sup>206</sup> A district court judge has stated that

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If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include . . . back pay (payable by the employer, employment agency, of labor organization, as the case may be, responsible for the unlawful practice) . . .

42 U.S.C. § 2000e-5(g)(1) (1994).

198. See BELTON, *supra* note 11, § 9.1, at 302 (referring to all employment discrimination laws).

199. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Front pay has also been accepted by the courts as necessary to make victims of discrimination whole. See BELTON, *supra* note 11, § 10.1, at 346.

200. See, e.g., *Anderson v. Bessemer City*, 470 U.S. 564, 571 (1985) (noting that district court awarded plaintiff \$30,000, accruing from the date she was not hired because of her gender).

201. See, e.g., *Delaware State College v. Ricks*, 449 U.S. 250, 262 (1980) (plaintiff's back pay began to accrue on June 26, 1974—the date the district court determined that the college made its official position not to grant plaintiff tenure).

202. See, e.g., *United States v. Burke*, 504 U.S. 229, 239 (1992) (stating that an employee wrongfully denied a promotion may recover the difference between appropriate pay and actual pay); *Edwards v. School Bd.*, 658 F.2d 951, 956 (4th Cir. 1981) (assuming that back pay is calculated from date of discharge). The back pay period is the time for which back pay is computed. See BELTON, *supra* note 11, § 9.23, at 324-25. In general, the back pay period commences on the date of the occurrence of the unlawful act of discrimination in cases involving a discrete act of discrimination. See *id.* § 9.24, at 325. Discrimination may not involve a discrete act, but instead may be a continuing violation of discrimination law. Such violations take the form of different work assignments or pay scales based on a prohibited classification (e.g., being disabled). For continuing violations the calculation of back pay is unclear. See *id.* § 9.25, at 326.

203. See *id.* § 9.34, at 337 (back pay includes “raises, loss of overtime pay, merit increases cost of living adjustments, bonuses, vacation pay, shift differential, sales commissions, tips, annual leave, fringe benefits, automobile allowance, and salary supplements”) (citations omitted); see also *id.* § 9.35, at 338-40 (discussing fringe benefits).

204. See *id.* § 9.26, at 331. If based on constructive discharge, the resignation will not terminate the employer's liability for back pay. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 472-73 (D.C. Cir. 1987), *aff'd in part, rev'd in part on other grounds*, 490 U.S. 228 (1989).

205. See BELTON, *supra* note 11, § 10.1, at 346.

206. See *Ochoa v. American Oil Co.*, 338 F. Supp. 914, 919 (S.D. Tex. 1972). The district court, however, held that it was bound by the court of appeals decision that back pay under Title VII does not require a right to a jury trial. See *id.* at 923.

back pay under Title VII "finds its historical counterpart in the common law action for breach of contract by wrongful discharge, which was . . . tried to a jury."<sup>207</sup> The judge noted that Congress could have provided a solely equitable remedy or confined the remedy to an administrative proceeding.<sup>208</sup> Instead, Congress provided an action where a wronged employee could recover lost wages.<sup>209</sup> The ADA, having its remedies based in Title VII, similarly could be construed to provide wronged employees the right to sue for wrongful discharge under a breach of contract theory.

As the Court noted in *Terry*, the nature of the issue to be tried determines whether the claim is legal or equitable. In *Terry*, the issue was whether the employer breached the collective-bargaining agreement. Similarly, in ADA lawsuits, the issue to be tried can be couched as either a tort or breach of contract claim. *Curtis* provides even more direct support. Like the legal duty created by the Fair Housing provisions of the Civil Rights Act of 1968, the ADA creates a legal duty binding employers to provide reasonable accommodations and provides aggrieved employees with the right to sue for back pay damages they suffer.

### B. Back Pay Is a Legal Remedy

Courts have held that actions for money damages are generally legal remedies.<sup>210</sup> Back pay by its very nature is an action for money damages.<sup>211</sup> It is a request for compensatory damages to make the plaintiff whole for an unlawful act of employment discrimination.<sup>212</sup> It is therefore generally considered to be legal relief.<sup>213</sup> Only if one of the Court-recognized exceptions applies<sup>214</sup> will the remedy be deemed equitable.

#### 1. Back Pay Is Not Restitutionary

A claim under the ADA for back pay is not restitutionary relief. Restitution is required when a defendant has been unjustly enriched

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207. *Id.* at 919.

208. *See id.*

209. *See id.*

210. *See supra* notes 105-10 and accompanying text.

211. *See supra* notes 200-05 and accompanying text.

212. *See* *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 569 (1990).

213. *See id.*; *Curtis v. Loether*, 415 U.S. 189, 196 (1974); *see also supra* notes 105-10 and accompanying text.

214. *See supra* notes 124-65 and accompanying text.

without providing the plaintiff adequate compensation.<sup>215</sup> When a disabled applicant is not hired or an employee is either discharged or forced to resign, the employer does not receive a benefit.<sup>216</sup> The employer cannot receive a benefit from the absence of an employee's performance at work.<sup>217</sup> The employee is not seeking compensation for work already performed. Instead, an employee is seeking damages for the infliction of a legal wrong.<sup>218</sup> With back pay, employees receive compensation for wages they would have earned if they had been employed and also fringe benefits.<sup>219</sup> Like the back pay for a violation of the LMRA at issue in *Terry*, back pay under the ADA is not restitutionary. Back pay is not wrongfully withheld wages; rather, it is damages for an employer's breach of a duty it owed to an employee.

## 2. Back Pay Is Not Legal Relief Incidental to an Equitable Claim

Back pay under the ADA is susceptible to the challenge that it is incidental to an equitable claim because the statute provides that the equitable remedies are available "with or without backpay."<sup>220</sup> This language implies that back pay merely supplements the equitable remedies under the ADA. As explained in Part III.B.2, the incidental exception may not even be constitutional in light of *Dairy Queen*. Where a court deems an ADA back pay claim to be a legal claim in its own right, then the incidental issue is not relevant

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215. See RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 1, at 12-15 (1937); see also *id.*, introductory note, § 149, at 595-96:

Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit.

216. An employer might discriminate in the provision of benefits or some other term of employment. In this situation an employer would be unjustly enriched and the appropriate remedy might be restitution.

217. Only in the most perverse sense, where an employee is seen as destructive to the productivity of the work place, can the employer be said to benefit from that employee's discharge.

218. CORBIN ON CONTRACTS states:

The remedy of restitution differs from the remedy in damages in that in awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed, while in enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and then tend to put the injured party in as good a position as that occupied by him before the contract was made.

5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1107, at 573 (1964); cf. Redish, *supra* note 145, at 528.

219. See 42 U.S.C. § 2000e-5(g)(1) (1994); see also BELTON, *supra* note 11, §§ 9.34-9.35, at 337-40.

220. 42 U.S.C. 2000e-5(g)(1); *Curtis v. Loether*, 425 U.S. 189, 197 (1974).



because a jury trial is required where both equitable and legal claims exist in the same action.<sup>221</sup>

Even if the incidental exception is constitutionally valid, it should not apply to back pay. Back pay is not incidental to the equitable remedies available under the ADA because it may be the only money damages plaintiffs receive,<sup>222</sup> and is a significant remedy because it replaces their entire income over a period of time.<sup>223</sup>

When an employee is awarded both reinstatement and back pay, back pay often is the only remedy of use to the employee. A study under the National Labor Relations Act of 229 employees that were granted reinstatement showed that 114 of the employees refused the remedy because they feared company backlash.<sup>224</sup> Eighty-six percent of those reinstated left their positions within one year, and a majority of these employees cited unfair treatment as their reason for leaving.<sup>225</sup> Disputes under the ADA are also likely to create animosity in the work environment that makes employees uncomfortable in returning to work. A strong argument can then be made that back pay is more important than the injunctive relief available to a plaintiff under the ADA.<sup>226</sup> In *Wooddell*, lost wages were not incidental to reinstatement sought under the Labor-Management Reporting and Disclosure Act.<sup>227</sup> Similarly, the back pay available to aggrieved employees under the ADA is too significant to be considered incidental to reinstatement and the other equitable remedies available under the Act.

Back pay is too significant to be considered incidental to an equitable claim. It is an important remedy for those discriminated against and often may be the only remedy available to them.

### 3. Back Pay Is Not Significantly Discretionary

Although the discretionary nature of a remedy is evidence of whether a claim is equitable or legal, as explained in Part III.B.3, back pay under the ADA is not significantly discretionary to warrant

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221. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962).

222. See *supra* notes 31-34 and accompanying text.

223. See *supra* note 203 and accompanying text.

224. See Matthew F. Davis, Comment, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury under Title VII*, 38 U. KAN. L. REV. 1003, 1018 (1990) (citing Warren H. Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357, 359 (1981)).

225. See Davis, *supra* note 224, at 1019; Chaney, *supra* note 224, at 360 tbls.4, 5.

226. Back pay is also an important damage available to plaintiffs, because, unlike other compensatory damages, it is not subject to the defense of good faith effort to accommodate. See 42 U.S.C. § 1981a(a)(3) (1994).

227. *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 93-94 (1991).

deeming it an equitable remedy. In his concurrence in *Moody*, Justice Rehnquist suggested that the chief reason for permitting broad discretion in awarding back pay in Title VII cases was to deal effectively with class actions.<sup>228</sup> In ADA employment discrimination actions, however, this policy rationale makes less sense. Employees have had difficulty maintaining class action lawsuits under the ADA.<sup>229</sup> This difficulty stems from the individualized and fact-specific nature of ADA claims.<sup>230</sup> Thus, in ADA employment cases where class actions are unlikely, a judge probably has even less discretion than in Title VII cases to deny an award of back pay following a finding of wrongdoing.<sup>231</sup> As a result, back pay follows almost as a matter of course. In this situation, back pay is more like a legal remedy than an equitable one.

Furthermore, denying back pay would almost certainly mean that an ADA plaintiff receives no monetary damages, because damages created by the Civil Rights Act of 1991 are not likely to be useful to ADA plaintiffs.<sup>232</sup> The House Committee on Education and Labor's Report on the Civil Rights Act of 1991 indicates that the drafters of this Act were mainly concerned with making victims of race and sex discrimination whole<sup>233</sup> and deterring discriminatory behavior.<sup>234</sup> The Committee recounted the testimony of two victims of sexual harassment who suffered significant amounts of uncompensated damages, but cited no testimony from victims of disability-based discrimination.<sup>235</sup>

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228. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 444-45 (1975) (Rehnquist, J., concurring).

229. *See, e.g., Davoll v. Webb*, 160 F.R.D. 142, 146 (D. Colo. 1995) (holding that a class consisting of injured police officers is essentially undefined since class membership does not correspond to disability definition under the ADA); *Lintemuth v. Saturn Corp.*, No. 1-93-0211, 1994 WL 761231 (M.D. Tenn. Oct. 31, 1994) (recommending against class certification for failure to meet typicality requirement of FED. R. CIV. P. 23).

230. *See supra* note 5 and accompanying text.

231. *See supra* notes 172-83 and accompanying text.

232. *See Waldrop v. Southern Co. Servs., Inc.*, 24 F.3d 152, 154-55 (11th Cir. 1994) (finding in Rehabilitation Act case that plaintiff was unable to specify compensatory damages other than lost wages required in pretrial order, probably because they were not significant). The Court noted that it would not be sensible to have the jury calculate compensatory damages but not back pay because back pay may constitute the major item of compensatory damages. *See id.* at 159 n.12.

233. H.R. REP. NO. 102-40(I), at 64 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602-03.

234. *See id.* at 69-70, reprinted in 1991 U.S.C.C.A.N. at 607-08 (back pay alone insufficient to deter discrimination).

235. *See id.* at 66-67, reprinted in 1991 U.S.C.C.A.N. at 604-05. The committee noted that not all compensatory damages result from harassment. *See id.* at 68, reprinted in 1991 U.S.C.O.A.N. at 606. It pointed out that race, sex and religious discrimination could irreparably harm one's professional career. *See id.*

The Committee's emphasis on uncompensated damages from race and sex discrimination, rather than disability discrimination, is probably due to the fact that disability discrimination lacks the invidious character of race-based and gender-based discrimination that causes mental and emotional suffering. Discrimination against disabled persons often occurs because of "generalized fears about the safety of the applicant or higher rates of absenteeism."<sup>236</sup> In contrast, race-based and gender-based discrimination are often motivated by a dislike or intolerance of the person discriminated against, arguably leaving the victim more susceptible to mental and emotional suffering.<sup>237</sup> A discharge resulting from failure to accommodate where an economically justified ground may exist seems less likely to cause the same mental and emotional damages that occur from race and sex discrimination. Thus back pay will likely be the only form of relief available to an ADA plaintiff. Under such circumstances, the Supreme Court probably would be even less willing to give trial courts discretion in deciding not to award back pay and leave a plaintiff with no monetary relief.

#### V. CONCLUSION

The ADA, its enforcement provisions in Title VII, and the Civil Rights Act of 1991 do not express Congress's intentions about whether a right to a jury trial should exist when only back pay is sought under the ADA. Further, the remedies under the ADA provided in Title VII do not establish that Congress considered back pay to be an equitable remedy. The Civil Rights Act of 1991 also fails to address whether back pay is equitable. Since no express congressional intent exists, if courts decide that a Seventh Amendment right to a jury trial exists, they are not acting contrary to the intent of Congress. The courts are not invalidating an act of Congress. Rather, they are filling in an uncertainty in the statute.

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236. H.R. REP. NO. 101-485(II), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 340.

237. *See* H.R. REP. NO. 102-40(I), at 66-67, *reprinted in* 1991 U.S.C.C.A.N. at 604-05. As evidence of the lack of economic justification for race discrimination, Title VII does not allow race to be used as a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e) (1994). Title VII provides:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to normal operation of that particular business . . .

*Id.*

Under the Supreme Court's Seventh Amendment analysis, a claim for ADA back pay is a legal claim. The ADA provides an enforceable legal right that is similar to a tort or breach of contract action. Back pay as a form of monetary damages is generally considered to be legal relief. Back pay under the ADA does not fall into any of the three exceptions that the Court has defined to characterize monetary relief as equitable. First, back pay is not restitutionary, since the employers are not unjustly enriched by discrimination. Second, even if the incidental exception is still viable after *Dairy Queen*, back pay is probably more important than the equitable relief available to ADA plaintiffs. Third, back pay is not significantly discretionary. Courts have little reason to deny back pay under the ADA where class actions are unlikely. Since back pay is likely to be the only type of damages available, the cost of denying back pay is high. Therefore, under the Seventh Amendment, back pay is a legal claim that entitles litigants the right to a jury trial.

Where a party is denied the right to a jury trial on an ADA back pay claim, the courts could declare that the Seventh Amendment is violated and require a jury trial. Alternatively, Congress might decide that sound policy dictates providing a right to a jury trial in all ADA claims. The right to a jury trial would no longer depend on the type of damages sought. A jury trial would provide the community's, rather than a judge's, sense of which plaintiffs are qualified to perform the essential functions of a job, what constitutes a reasonable accommodation, and what qualifies as an undue hardship on an employer.

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