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Title VII Remedies: Reinstatement and the Innocent Incumbent Employee

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NOTES

Title VII Remedies: Reinstatement and the Innocent Incumbent Employee

I. INTRODUCTION

Congress enacted Title VII of the Civil Rights Act of 1964[1] twenty-five years ago. Through Title VII Congress sought to remove artificial

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (1982 & Supp. VI 1986)).

barriers that limited employment opportunities for minorities. The statute is not limited, however, to prohibiting race discrimination. Title VII directly confronts the problem of discrimination in the workplace by prohibiting employment decisions based on the race, color, religion, sex, or national origin of the employee or applicant.[2] The Act prohibits an employer from favoring one group of employees over another due to irrelevant characteristics and classifications.

Title VII litigation occupies a significant portion of the federal docket.[3] The lack of clarity in the terms of the statute and the legislative history has forced courts to define the parameters of Title VII with little direction from Congress. For example, courts first had to define the elements that constitute a violation of Title VII.[4] Section 703(a)(1) clearly contemplates intentional discrimination, or disparate treatment, as a basis for liability.[5] The language of section 703(a)(2), however, does not contain any explicit requirement of intent.[6] Thus, whether plaintiffs had to prove intentional discrimination to state a claim under Title VII remained unclear. The Supreme Court in *Griggs v. Duke Power Co.*[7] resolved the controversy by finding that a plaintiff states a claim under section 703(a)(2) by showing that a facially neutral employment practice disproportionately disqualifies a protected class from employment. Therefore, discriminatory consequences as well as motivation might invalidate an employment practice.[8]

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2. The relevant provision of Title VII is 42 U.S.C. § 2000e-2(a) (1982), which reads:

> It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of an individual's race, color, religion, sex, or national origin.

Id.

3. Individual plaintiffs filed 7661 employment discrimination suits in the twelve-month period ending March 31, 1986. C. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS A-1 (rev. ed. 1988).

4. *See* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976).

5. 42 U.S.C. § 2000e-2(a)(1) (1982). The pertinent provision states: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . ." *Id.*

6. *Id.* § 2000e-2(a)(2). The pertinent provision states: "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants . . . ." *Id.*

7. 401 U.S. 424 (1971).

8. Note, however, that the Supreme Court recently has restricted the ability of petitioners to state a Title VII claim by pleading discriminatory consequences. Lorance v. AT&T Technologies, Inc., 57 U.S.L.W. 4654 (U.S. June 12, 1989). The Court decided that discriminatory impact is not enough to make a seniority system unlawful; the plaintiff must show discriminatory intent. *Id.*

Although the question of liability is important,[9] this Note focuses primarily on the recovery stage of Title VII proceedings and the proper exercise of discretion to be used by courts when fashioning relief. In the cases and problems discussed below, the reader should assume that the plaintiff has established liability.

After finding a violation of the Act, courts are authorized to prescribe relief to alleviate the effects of unlawful discrimination.[10] Determining proper relief is a controversial issue in many Title VII cases. Although the language of the relief provision of Title VII seems to give courts wide discretion in fashioning a remedy for victims of unlawful discrimination, the Supreme Court has articulated standards for trial courts to follow when exercising that discretion.[11] A successful Title VII plaintiff is presumptively entitled to equitable relief, and a court may deny relief only for reasons that would not frustrate the objectives of Title VII.[12]

One form of equitable relief available to victorious Title VII plaintiffs is reinstatement to the position that they would have held absent the unlawful employment practice.[13] Presumptive entitlement to reinstatement for victims of wrongful discharge, or instatement to applicants wrongfully denied employment, poses unique problems not found in other forms of equitable relief. Antagonism between employer and employee is one obvious difficulty. Because some degree of antagonism is a natural consequence of any litigation, courts usually will not deny reinstatement merely because of hostility created by the discrimination suit.[14] The existence of extraordinary animosity with little or no hope of an amicable working relationship, however, will result in a denial of

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9. For a discussion of liability issues, see International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981); Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

10. *See* 42 U.S.C. § 2000e-5(g) (1982). The statute states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay, . . . or any other equitable relief as the court deems appropriate.

Id.

11. *See infra* Part IIIA.

12. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

13. *See* 42 U.S.C. § 2000e-5(g) (1982). Though this Note refers to reinstatement of employees, the discussion is equally applicable to instatement of applicants wrongfully denied employment.

14. *See, e.g.*, Taylor v. Teletype Corp., 648 F.2d 1129, 1138-39 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981).

reinstatement.[15]

A more difficult question arises when an order of immediate reinstatement results in the displacement of an incumbent employee. Should the presence of an incumbent employee limit a court's power to award immediate reinstatement to a victim of employment discrimination? An analysis of this significant issue involves a balancing of Title VII objectives and the rights of innocent third parties.

Limiting the power of courts to give relief to a victim of discrimination by displacing an incumbent employee can frustrate severely the make whole policy of Title VII. An employer can avoid reinstating an employee that it previously discriminated against by filling the position prior to the conclusion of litigation. On the other hand, allowing courts to order immediate reinstatement without considering the presence of an incumbent employee can trample the rights of innocent third parties.[16]

This Note will examine the propriety of ordering immediate reinstatement to a victim of discrimination under Title VII when that relief requires the displacement of an innocent incumbent employee. Part II presents a general discussion of Title VII. Part III examines principles articulated by the Supreme Court that govern the fashioning of Title VII remedies. Part IV analyzes three approaches taken by courts when asked to "bump" an incumbent employee in order to reinstate the prevailing Title VII plaintiff. Part V considers reinstatement practice and rules under the National Labor Relations Act for guidance in determining what effect the presence of an incumbent employee should have on courts that fashion Title VII relief. Finally, Part VI attempts to clarify the views presented in the preceding sections and to develop guiding principles for courts that consider this issue.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 prohibits employers,[17] labor organizations,[18] and employment agencies[19] from discriminating in employment decisions because of the race, color, religion, sex, or national origin of the employee. Originally, the Act afforded a remedy for employment discrimination only to employees in the private sector. The

15. *See, e.g.*, McIntosh v. Jones Truck Lines, 767 F.2d 433 (8th Cir. 1985); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

16. *See infra* Part IIIB.

17. 42 U.S.C. § 2000e-2(a) (1982). For the text of this provision, see *supra* note 2.

18. 42 U.S.C. § 2000e-2(c) (1982).

19. *Id.* § 2000e-2(b).

Equal Employment Opportunity Act of 1972[20] amended Title VII, expanding its coverage to include employees of state and local governments as well as federal government employees in the executive branch and administrative agencies. Congress intended that Title VII serve as a tool to fight against discriminatory employment practices.[21]

The history of Title VII begins with the adoption of the thirteenth, fourteenth, and fifteenth amendments following the Civil War. These amendments attempted to eliminate discrimination against black citizens.[22] Soon afterward, Congress passed the Civil Rights Act of 1870[23] and the Civil Rights Act of 1871.[24] Unfortunately, these statutes largely were unused for over one hundred years. Because Congress enacted the statutes pursuant to the fourteenth amendment, courts read a state action requirement into the statutes, which greatly limited their applicability. The level of education and economic position of blacks also prevented enforcement of their rights under the statutes.[25]

Modern attempts to provide equality in employment opportunities began with Executive Order 8802,[26] issued by President Franklin D. Roosevelt in 1941. Roosevelt's order established the Fair Employment Practices Committee (FEPC) and prohibited discrimination in the defense industry and government.[27] A number of states accordingly re-

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20. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to e-17).

21. *See* 118 CONG. REC. 7166 (1972) (statement of Sen. Harrison Williams) (stating that "[t]oday's action will represent a vital step toward the realization of equal employment opportunities"); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (noting that the language of Title VII makes plain Congress's purpose: to assure equality of employment opportunities and eliminate discriminatory practices that have fostered racially stratified job environments to the disadvantage of minority citizens).

22. *See* U.S. CONST. amend. XIII, § 1 (abolishing slavery); *id.* amend. XIV, § 1 (due process and equal protection of the law); *id.* amend XV, § 1 (right to vote).

23. 42 U.S.C. § 1981 (1982) (providing a cause of action for racial discrimination in the making or enforcement of contracts).

24. 42 U.S.C. § 1983 (1982) (providing in part a cause of action for the protections afforded by the due process and equal protection clauses of the fourteenth amendment).

25. Kothe, *Implications of Title VII of the 1964 Civil Rights Act, as Amended from the Employer's Point of View*, 1973 LAB. L. DEV. 101, 103.

26. Exec. Order No. 8802, 3 C.F.R. 957 (1941); *see* J. JONES, W. MURPHY & R. BELTON, DISCRIMINATION IN EMPLOYMENT LAW 2-3 (5th ed. 1987).

27. Exec. Order No. 8802, 3 C.F.R. 957 (1941). The order provided:

> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes, and as a prerequisite to the successful conduct of our national defense production effort, I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin. . . .

Id.

sponded with legislation aimed toward regulating employment practices.[28] Comprehensive federal legislation, however, did not follow immediately. Bills attempting to establish federal regulation of employment practices were defeated in every session of Congress after World War II.[29] Not until the 1960s did the government begin to respond to increased pressure from civil rights activists. President John F. Kennedy issued Executive Order 10,925[30] in 1961, establishing the President's Committee on Equal Employment Opportunity. Kennedy's Executive Order provided the impetus for congressional activity that culminated in Title VII of the Civil Rights Act of 1964. Though the Executive Order was directed specifically at equal opportunity in government employment,[31] the Kennedy administration clearly wanted equal opportunity for all persons in all employment opportunities.

The Civil Rights Act of 1964 contains twelve titles that confront the problem of discrimination in voting, places of accommodation, public facilities, federally secured programs, and employment.[32] With the Act, Congress intended to avert a national crisis, end the legacy of slavery and racial oppression, and invoke the power of the courts to resolve conflicts between races.[33] Title VII of the omnibus Act addresses the problem of discrimination in employment by rendering unlawful conduct that tends to deny minorities equal employment opportunity.

Congress sought to eliminate existing practices that operated to

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28. For a discussion of the effectiveness of these state agencies, see Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).

29. For an examination of early efforts to pass a federal fair employment practices law, see L. RUCHAMES, RACE, JOBS, & POLITICS, THE STORY OF THE FEPC 22-72 (1953).

30. Exec. Order No. 10,925, 3 C.F.R. 448 (1961).

31. *See id.* at 448. The Order provided:

> WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and
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> WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons . . . seeking employment with the Federal Government and on government contracts . . . .
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> . . . .
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> . . . a single government agency should be charged with responsibility for accomplishing these objectives.

Id.

32. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1982); 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000d-6 to 2000h-5 (1982 & Supp. IV 1986)).

33. *See* Chambers & Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, 49 LAW & CONTEMP. PROBS. 9, 12 (Autumn 1986). The true predecessor of Title VII was H.R. 405, 88th Cong., 1st Sess. (1963), introduced by Representative James Roosevelt. Extensive debate, compromise, and revision followed before President Lyndon Johnson signed the final version of Title VII on July 2, 1964. 110 CONG. REC. 17,783 (1964). For a discussion of the debates, see Special Project, *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 892, 902 (1982).

favor an identifiable group of white employees over other employees. Effective relief to victims of unlawful employment practices is an essential ingredient of this remedial goal. Part III discusses the courts' authority to fashion relief for victims of employment discrimination.

III. Principles Governing Title VII Remedies

Title VII authorizes a court that finds unlawful discrimination to award equitable relief, including reinstatement, to the prevailing plaintiff.[34] The statute allows a court to order any appropriate affirmative action including reinstatement.[35] The language of the statute clearly respects the trial court's discretion in decisions whether to award reinstatement or any other equitable remedy. While recognizing the broad authority of the district courts, the Supreme Court nevertheless has enunciated principles to guide courts in the exercise of this discretion.

A. Supreme Court Interpretations

The seminal case that articulates the basic principles governing the award of Title VII remedies is *Albemarle Paper Co. v. Moody*.[36] *Moody* involved challenges to a paper company's seniority system and program of employment testing. The Court addressed the issue of whether the district court acted within its discretion in denying backpay to the prevailing plaintiffs[37] and held that discretion does not mean inclination, but instead, " 'judgment . . . guided by sound legal principles.' "[38] These "sound legal principles" are the larger objectives of the Act.[39]

Specifically, the Court noted that Congress enacted Title VII to further two goals. Foremost, Congress sought to achieve equality of employment opportunities and remove barriers that provided an advantage to an identifiable group of white employees over other employees.[40] Title VII remedies, therefore, exist to deter employers from discrimi-

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34. 42 U.S.C. § 2000e-5(g) (1982). Note also that the Eighth Circuit held that the same considerations apply in a case involving a plaintiff applying for an entry level position. *See* Dickerson v. Deluxe Check Printers, 703 F.2d 276, 280 (8th Cir. 1983) (involving an action brought under the Age Discrimination in Employment Act).

35. 42 U.S.C. § 2000e-5(g) (1982). For the complete text of the provision, see *supra* note 10.

36. 422 U.S. 405 (1975). For an excellent discussion of the standards promulgated by the Court, see Belton, *Harnessing Discretionary Justice in the Employment Discrimination Cases: The* Moody *and* Franks *Standards*, 44 Ohio St. L.J. 571 (1983).

37. *Moody*, 422 U.S. at 411-12. The court of appeals reversed the district court's denial of backpay holding that backpay could only he denied in "special circumstances." *Id.* at 414. The defendants brought this case to the Supreme Court claiming that the court of appeals was in error when it reversed the district court. *Id.*

38. *Id.* at 416 (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d)).

39. *Id.* at 417.

40. *See id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

nating in the workplace and to eliminate unlawful employment practices.

In addition to the deterrence objective, the Court also found that making victims of unlawful discrimination whole for their injuries was an important goal of Title VII.[41] The legislative history of Title VII provided support for this objective.[42] The *Moody* Court found that Congress intended to give district courts discretionary power in awarding remedies, but only so that the courts could fashion the most complete relief possible.[43] The Court concluded that the district court must consider the statutory objectives of Title VII as it exercises its discretion in awarding backpay. Generally, backpay should be denied only for reasons that would not frustrate the central statutory goals of eliminating discrimination and making whole those who have suffered injuries from past discrimination.[44]

Although *Moody* involved the right of prevailing Title VII plaintiffs to receive backpay, courts have used a similar analysis to determine when a lower court may order or deny other forms of equitable relief, such as retroactive seniority[45] and reinstatement.[46] The Eleventh Circuit applied the principles of *Moody* in *Nord v. United States Steel Corp.*,[47] a case involving reinstatement. The appellate court addressed whether the district court erred in denying the prevailing plaintiff's request for reinstatement. The Eleventh Circuit recognized the wide discretion that Title VII gives district courts in fashioning remedies for victims of discrimination. The Eleventh Circuit further instructed courts exercising this discretion to attempt to make persons whole for injuries suffered from unlawful discrimination.[48] Prevailing plaintiffs

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41. *Moody*, 422 U.S. at 418.

42. *See* 118 CONG. REC. 7168 (1972) (analysis by Sen. Harrison Williams). Senator Williams stated:

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

Id.

43. *Moody*, 422 U.S. at 421.

44. *Id.*

45. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 770-71 (1976).

46. *See, e.g.*, Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986); Nord v. United States Steel Corp., 758 F.2d 1462 (11th Cir. 1985); Dickerson v. Deluxe Check Printers, 703 F.2d 276 (8th Cir. 1983).

47. 758 F.2d 1462 (11th Cir. 1985).

48. *Id.* at 1473; *see also* Garza v. Brownsville Indep. School Dist., 700 F.2d 253, 255 (5th Cir.

are presumptively entitled to equitable relief including reinstatement. Reinstatement should be denied only for reasons that will not frustrate the statutory purposes of Title VII.[49]

What set of circumstances then will justify a court's denial of immediate reinstatement to a prevailing Title VII plaintiff? The *Moody* standard provides that equitable relief should be denied only when it will not frustrate the twin statutory purposes of ending illegal discrimination in the workplace and rectifying the harm caused to the individual victim.[50] *Moody* seems to require courts to find that the statutory purposes of Title VII would not be frustrated by denying reinstatement to a victim of discrimination because of the presence of an incumbent employee. Whether denying reinstatement because of the presence of an incumbent employee actually fosters or frustrates Title VII objectives will be addressed in Part VI.

B. Protecting the Innocent Victim

Although *Moody* creates a presumption in favor of immediate reinstatement, a court is not without power to determine that reinstatement is inappropriate in a particular case. Supreme Court precedent requires that courts consider the rights of innocent third parties when fashioning remedies under Title VII.[51] Courts should balance the rights of the victim of discrimination with those of the incumbent employee when an order of reinstatement would require bumping the incumbent employee.[52] When the court determines that the interest of the victim of discrimination and the importance of furthering the goals of Title VII outweigh the incumbent employee's interest in the position, reinstatement is an appropriate remedy.

City of Los Angeles v. Manhart[53] acknowledges Title VII's concern for the effects of relief decrees on innocent employees. In *Manhart* the Court held that requiring female employees to make larger contributions to a pension fund than male employees was discrimination based on sex that violated section 703(a)(1) of Title VII.[54] Although the Court recognized that *Moody* creates a presumption in favor of retroactive relief, it concluded that the facts of *Manhart* did not warrant such re-

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1983) (stating that reinstatement or hiring preferences should be denied only in extraordinary circumstances).

49. *Nord*, 758 F.2d at 1473.

50. *See supra* text accompanying notes 36-44.

51. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 239 (1982); *see also* City of Los Angeles v. Manhart, 435 U.S. 702, 722-23 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 371-76 (1977).

52. *See Ford Motor Co.*, 458 U.S. at 239.

53. 435 U.S. 702 (1978).

54. *Id.* at 711.

lief.[55] Because Title VII relief is equitable, not legal, determining whether relief in a particular case is appropriate requires the court to consider the equitable aspects of the remedial decree. In *Manhart* allowing the successful plaintiffs to recover the excess contributions from the pension fund would have been only a minor deterrent to future violations.[56] An award of retroactive liability, however, would have decimated the pension fund. Innocent third parties, not the employer, would suffer the direct effect of a retroactive award.[57]

Manhart provides a compelling argument for refusing to reinstate a victim of discrimination if reinstatement would require the displacement of an incumbent employee. *Romasanta v. United Air Lines, Inc.*[58] demonstrates the Seventh Circuit's exercise of discretion in a case involving reinstatement of unlawfully discharged employees. In *Romasanta* plaintiff flight attendants lost positions of employment with United Air Lines due to the company's no-marriage rule.[59] The court found that the no-marriage rule violated Title VII and considered whether reinstatement of the 1400 flight attendants affected by the rule was appropriate. The court refused to order reinstatement because this remedy would have an adverse impact on incumbent employees.[60] *Manhart* and *Romasanta* indicate that *Moody* does not prevent courts from exercising some discretion in consideration of the incumbent employee when fashioning relief for victims of discrimination.

IV. Title VII and Incumbent Employee Displacement

The following discussion of recent Title VII cases and EEOC policy will demonstrate how courts treat the presence of incumbent employees when ordering relief for victims of discrimination. Courts often examine the *Moody* standards as a starting point, but equity and discretion still play large roles in the decisions. Though the decisions tend to be fact specific, some consistent principles surface. The cases fall into three broad categories: (1) courts displacing the incumbent employee to afford relief to the victim of discrimination;[61] (2) courts denying immedi-

55. *Id.* at 723.

56. *Id.* at 720-21.

57. *Id.* at 722-23.

58. 717 F.2d 1140 (7th Cir. 1983).

59. *Id.* at 1142. The airline discharged female employees who married, but continued to employ males who did likewise. *Id.*

60. *Id.* at 1151.

61. *See, e.g.*, Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986) (stating that the district court had equitable power to bump employee to vindicate rights of applicant under the Civil Rights Act of 1964); Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515 (11th Cir. 1986) (holding that a court may bump incumbent employees in order to redress breach of Title VII settlement agreement); Spagnuola v. Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983) (holding that a

ate reinstatement due to the presence of an incumbent employee;[62] and (3) courts ordering a hiring preference and front pay when the presence of an incumbent employee makes immediate reinstatement inappropriate.[63] Representative cases described in sections B, C, and D demonstrate the reasoning behind each of these views.[64]

A. *Equal Employment Opportunity Commission Remedies Policy*

On February 5, 1985, the Equal Employment Opportunity Commission (EEOC) adopted a "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination."[65] The EEOC thereby concluded that relief for victims of employment discrimination should include nondiscriminatory placement in the positions that they would have held absent the unlawful discrimination.[66] While this policy statement might not appear to condone relief beyond that already authorized by statute, the statement is revolutionary in one aspect: the EEOC recognized that nondiscriminatory placement in certain situations might result in the displacement of an incumbent employee, but stated

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court could order bumping of incumbent employee); Sebastian v. Texas Dept. of Corrections, 541 F. Supp. 970 (S.D. Tex. 1982) (stating in dicta that the incumbent must be displaced, if necessary, to reinstate plaintiff).

62. *See, e.g.*, Geller v. Markham, 635 F.2d 1027 (2d Cir.), *cert. denied*, 451 U.S. 945 (1981); Harper v. General Grocers Co., 590 F.2d 713 (8th Cir. 1979) (finding that reinstatement is inappropriate if it requires displacing an incumbent employee).

63. *See, e.g.*, Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985); Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir.), *cert. denied*, 434 U.S. 1034 (1978).

64. A fourth category represents those situations in which a defendant employer is able to place the prevailing plaintiff in the position she would have occupied but for the unlawful discrimination without displacing the incumbent employee. *See* Sebastian v. Texas Dept. of Corrections, 541 F. Supp. 970 (S.D. Tex. 1982). This type of relief is especially appropriate when the position is interchangeable with others or the employer is able to function with employees in duplicative roles. The court in *Sebastian* clearly directs that displacement of the incumbent employee is proper if a choice must be made between the incumbent employee and the prevailing plaintiff. *Id.* at 978.

65. 8 Lab. Rel. Rep. (BNA) 401:2615 (Feb. 5, 1985) [hereinafter Remedies Policy]. The Remedies Policy states:

> The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit . . . . The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.
>
> Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:
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> . . . .
>
> (3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person.

Id.

66. *Id.*

that incumbent employee displacement should not inhibit its directors from seeking this form of relief.[67]

Commentators argue forcefully that the presence of an incumbent employee should not prevent a court from ordering immediate reinstatement to victims of discrimination.[68] These scholars note that victims of discrimination possess a presumptive entitlement to reinstatement and argue that the Remedies Policy does nothing more than affirm the general principles of Title VII relief promulgated by the Supreme Court.[69] Because displacing an incumbent employee does not frustrate the central statutory purposes of Title VII, the statute mandates nondiscriminatory placement of prevailing plaintiffs.[70]

Although the Remedies Policy indicates that bumping an incumbent employee might be appropriate in some cases, it does not require EEOC directors to seek reinstatement in every case.[71] Without defining the circumstances in which reinstatement is appropriate, the EEOC recognizes that in some cases and in some jurisdictions, reinstatement will not be available when it will displace an incumbent employee.[72] The EEOC thus qualifies its strong statement and seems to accept the status quo reflected in case law.

Statements of policy by an administrative agency such as the EEOC have minimal precedential value.[73] A policy statement simply indicates the manner in which an agency intends to exercise a discretionary function such as prosecution for discrimination. Courts continue to deny immediate reinstatement to victims of employment discrimination when reinstatement requires displacement of an incumbent employee.

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67. *Id.* at 401: 2617. The Remedies Policy states: "Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, . . . even if the placement of the discriminatee results in the displacement of another of respondent's employees." *Id.*

68. *See, e.g.*, Alvarez & Lipsky, *Remedies for Individual Cases of Unlawful Employment Discrimination: A Law Enforcement Perspective*, 1987 LAB. LAW. 199.

69. *Id.* at 206.

70. *Id.* at 212-13.

71. *See supra* note 65. The Remedies Policy says only that requests for relief should include reinstatement "in appropriate circumstances." Remedies Policy, *supra* note 65, at 401:2615.

72. Remedies Policy, *supra* note 65, at 401: 2617. The Remedies Policy states: "If displacement of an incumbent employee in order to accomplish Nondiscriminatery Placement on bebalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished." *Id.*

73. *See* Pacific Gas & Elec. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (stating that "[t]he agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy"); *cf.* Skidmore v. Swift, 323 U.S. 134, 140 (1944) (stating that "the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

A look at representative cases denying and awarding reinstatement when incumbent employees are present will help define the parameters of the remedy.

B. *Incumbent Displacement:* Walters v. City of Atlanta

In *Walters v. City of Atlanta*[74] the Eleventh Circuit bumped an incumbent employee for the benefit of the prevailing plaintiff. Atlanta had established a register of applicants to fill the position of director of Atlanta's Cyclorama.[75] Applicants listed on the register were rated as "qualified," "well qualified," or "highly qualified." According to City procedure, the Commissioner of Parks, Recreation, and Cultural Affairs selected the Director based on the register and panel interviews conducted by the City.[76]

Dennis Walters, a white male, first applied for the Directorship in 1981.[77] He received a rating of "well qualified." The interview panel recommended Walters and two other applicants to the Commissioner. The Commissioner hired a black woman, Carole Pinckney, as Cyclorama director.[78] Ms. Pinckney's name was not on the register or on the list of applicants recommended by the interviewers.[79] Because of problems with Ms. Pinckney's job performance, the City again sought applicants in 1982. Walters again applied and received a rating of "well qualified." Nevertheless, the Commissioner awarded the position to a black male, David Palmer, who admittedly was less qualified than Walters.[80] The City fired Palmer for inadequate job performance on June 29, 1982. Walters reapplied and interviewed a third time for the position.

Before his third interview, Walters filed timely charges of discrimination on the basis of race with the EEOC, protesting the Commission's

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74. 803 F.2d 1135 (11th Cir. 1986).

75. *Id.* at 1140. The Cyclorama is a dioramic painting commemorating the Battle of Atlanta, on display in Atlanta's Grant Park. *Id.* at 1139. The Director supervises the exhibit and conducts tours. *Id.*

76. *Id.* at 1140.

77. *Id.* Apparently, Walters "formed a desire" to work at the Cyclorama at the age of six when he first visited the site. He then pursued a course of education aimed at preparing himself for the position. *Id.* at 1139, 1150 n.15.

78. *Id.* at 1141.

79. *Id.* The Commissioner was concerned that there were no minority candidates for the position. She also argued that knowledge of history, art, and museum expertise should be secondary to business management and financial skills. *Id.*

80. *Id.* at 1141. Palmer was rated initially as unqualified but appealed that determination and received a rating of qualified. Palmer was not only less qualified than Walters but also had a poor employment record. One week before his interview, the Georgia Department of Labor fired Palmer for misconduct. In 1981 the City Water Service terminated him due to poor performance. *Id.*

selection of Pinckney and then Palmer for the Directorship.[81] Atlanta's new Commissioner of Parks filled the vacant Directorship with Carole Mumford, a white female, while Walters's case was pending in the district court.[82] Walters amended his complaint to allege that the hiring of Mumford was in retaliation for his filing charges with the EEOC.[83]

The district court found for Walters on all counts and ordered equitable relief under Title VII, including backpay and instatement to the position of Cyclorama director.[84] The City appealed, claiming that the district court abused its discretion in ordering Walters's instatement because of the consequential displacement of Mumford, the employee holding the Directorship.[85]

The Eleventh Circuit affirmed the trial court's order instating Walters and cited four factors to support the displacement of Mumford.[86] First, the City repeatedly had discriminated against Walters. Second, instatement was necessary to deter the City from retaliating against employees or prospective employees who file charges with the EEOC. Third, the position sought was unique, and Walters could be made whole only by receiving the Directorship. Finally, Mumford was guaranteed a lateral move within the City if she were bumped.[87] The presence of these four factors justified the "extraordinary remedy" of instatement. The court warned that its decision should be construed narrowly. The court expressly did not decide whether bumping is a legitimate means of redressing unlawful discrimination in cases in which the bumped employee is not the beneficiary and the instated employee is not the victim of repeated and related discriminatory acts.[88]

In addition to these four factors, the *Walters* opinion also emphasized that the incumbent employee was on notice that Walters had a substantial claim to the Directorship.[89] Mumford was aware that Walters was seeking instatement into the position.[90] She obviously accepted

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81. Walters filed his initial charge with the EEOC on May 20, 1982, protesting the hiring of Pinckney. He received a right to sue letter on April 23, 1983. He filed a second charge on July 18, 1983, in response to the hiring of Palmer. He received a second right to sue letter in April of 1984. The district court consolidated these two claims. *Id.* at 1142.

82. *Id.* Ms. Mumford was rated as qualified in the same register that listed Walters as well qualified.

83. *Id.*

84. Walters v. City of Atlanta, 610 F. Supp. 715, 717-18 (N.D. Ga. 1985), *aff'd*, 803 F.2d 1135 (11th Cir. 1986). Walters also received punitive damages and attorney's fees under 42 U.S.C. § 1983. Walters v. City of Atlanta, 610 F. Supp. 733, 734 (N.D. Ga. 1985).

85. *Walters*, 803 F.2d at 1148.

86. *Id.* at 1150.

87. *Id.* at 1149.

88. *Id.* at 1149 & n.13.

89. *Id.* at 1149 & n.12.

90. *Id.* at 1150 & n.15. One district court has indicated that the plaintiff may get an injunc-

the position only after receiving assurances from the City that she would receive another position if Walters were instated.[91] Thus, Mumford's rights as an innocent incumbent were not trampled by the court's decision. The court also implied that Mumford had legal recourse against the City for the loss of the Directorship, notwithstanding her transfer to another position.[92] Although the Eleventh Circuit seems to endorse the view that bumping should be allowed to achieve the make whole purposes of Title VII, the decision is limited by its unique facts.

C. *No Displacement:* Wangsness v. Watertown School District

The district court in *Wangsness v. Watertown School District*[93] denied reinstatement to the prevailing plaintiff because reinstatement would have displaced an incumbent employee. The court found that the defendant school district failed to make a good faith effort to accommodate Wangsness's religious needs in violation of Title VII.[94] Wangsness requested a short leave of absence without pay so that he could attend a religious festival. The school district denied his request. When Wangsness nevertheless attended the festival, the school district discharged him. Wangsness sought reinstatement and backpay.[95]

The district court recognized that reinstatement should be denied only for reasons that, when applied generally, would not frustrate the central statutory purposes of Title VII.[96] Applying general principles of equity, the court also balanced competing interests of Wangsness and the incumbent teacher.[97] To award Wangsness reinstatement would require the displacement of a fully tenured teacher. Immediate reinstatement for Wangsness would create an inequitable result due to the legitimate expectations of the incumbent teacher.[98] *Wangsness* may be read to propose that to deny reinstatement to a victim of discrimination when reinstatement would unduly affect the rights of an innocent incumbent employee would not frustrate the statutory objectives of Title

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tion requiring the defendant to give written notification of the pending lawsuit to any person considered for the position. *See* Holland v. Dole, 591 F. Supp. 983 (M.D. Tenn. 1984). The plaintiff thus prevents the incumbent employee from being an "innocent victim" that the courts are reluctant to remove.

91. *See Walters*, 803 F.2d at 1150 n.15.

92. *Id.*

93. 541 F. Supp. 332 (D.S.D. 1982).

94. *Id.* at 339.

95. *Id.*

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

97. *Id.* (citing Harper v. General Grocers Co., 590 F.2d 713, 716 (8th Cir. 1979)).

98. *Id.*

VII.[99]

D. *Front Pay:* Shore v. Federal Express Corp.

In *Shore v. Federal Express Corp.*[100] the Sixth Circuit agreed with the *Wangsness* court that reinstatement is an inappropriate remedy when reinstatement would require the displacement of an incumbent employee.[101] Shore lost her job at Federal Express because of sexual discrimination by her supervisor.[102] The court acknowledged that victorious Title VII plaintiffs are presumptively entitled to reinstatement, but nevertheless accepted the parties' contention that reinstatement was inappropriate in this case because of the presence of an incumbent employee.[103]

Front pay, however, emerged as a new remedy in the Sixth Circuit for victims of discrimination under Title VII because of *Shore*. The court followed the growing number of circuits accepting front pay as an appropriate alternative to immediate reinstatement.[104] Front pay also is appropriate to compensate waiting plaintiffs who have been awarded a preference for hiring.

A complete discussion of the propriety of awarding front pay is beyond the scope of this Note,[105] but the rationale for the remedy is straightforward. Absent extraordinary circumstances, a prevailing plaintiff is entitled to immediate reinstatement. If reinstatement is inappropriate, back pay generally will not make the victim of discrimination whole. Front pay, though not a complete substitute for immediate reinstatement, fills the recovery gap that is created when reinstatement

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99. The seminal case denying relief when reinstatement would require bumping an incumbent employee is Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). *Patterson* dealt with seniority and the promotion rights of blacks and women who prevailed in race and sex discrimination suits. *Id.* at 262. The Fourth Circuit refused to order promotions and company-wide seniority that would require bumping white males. *Id.* at 269-70. The court found that Congress did not intend Title VII "to be used as a vehicle for displacing incumbents." *Id.* at 269.

100. 777 F.2d 1155 (6th Cir. 1985).

101. *Id.* at 1159. The presence of hostility also influenced the court's decision to deny reinstatement. *Id.*

102. *See* Shore v. Federal Express Corp., 589 F. Supp. 662, 667 (W.D. Tenn. 1984) (describing the situation as a "classic case of disparate treatment based on sex"), *aff'd in part, remanded in part*, 777 F.2d 1155 (6th Cir. 1985).

103. *Shore*, 777 F.2d at 1159 (citing Nord v. United States Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985)).

104. Front pay refers to an award of wages to an employee who has not yet been reinstated. *See, e.g.*, Thompson v. Sawyer, 678 F.2d 257, 267-68 (D.C. Cir. 1982); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980); James v. Stockham Valves & Fittings, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

105. For a discussion of front pay, see Note, *Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211 (1976).

is denied or inappropriate.[106] Front pay compensates the plaintiff for economic losses between the date of the court decree and the date the plaintiff obtains her rightful place in the work force.[107] The use of front pay especially is appropriate in cases in which the court orders placement to the next available position rather than immediate reinstatement.[108] The availability of front pay offers an alternative to immediate displacement of an incumbent employee.

V. The National Labor Relations Act

Congress enacted the National Labor Relations Act[109] (NLRA) to ensure the rights of workers to join unions and engage in collective bargaining.[110] Congress established the National Labor Relations Board (NLRB) to administer the NLRA.[111] The creation of the Board concentrated primary decision making power over the rights of workers in a single agency, and limited the federal courts to review of the Agency's decisions. The NLRA authorized the Board to issue cease and desist orders whenever the Board found unfair labor practices.[112] The Board also may award affirmative relief to victims of unfair labor practices.[113] Congress specifically patterned the relief provision of Title VII after the

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106. *See Shore*, 777 F.2d at 1158.

107. *See* Note, *supra* note 105, at 212.

108. The amount of front pay thus depends on how long it takes the employee to assume her rightful place. *See Shore*, 777 F.2d at 1159; *see also Thompson*, 678 F.2d at 293.

109. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. V 1987)). The present NLRA is actually three separate statutes: the Wagner Act of 1935 (officially titled the National Labor Relations Act, ch. 372, 49 Stat. 449), the Taft-Hartley Act of 1947 (the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136), and the Landrum-Griffin Act of 1959 (the Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-247, 73 Stat. 519 (1959)). Because the Taft-Hartley Act and the Landrum-Griffin Act were enacted as amendments to the Wagner Act, it is proper to refer to the single, combined law as the National Labor Relations Act.

110. 29 U.S.C. § 151 (1982) states:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

111. For the historical background and significance of the creation of the NLRB, see F. McCulloch & T. Bornstein, The National Labor Relations Board 11-14, 23-25 (1974).

112. 29 U.S.C. § 160(c) (1982). The elements and definition of an unfair labor practice have been the source of extensive litigation and are beyond the scope of this Note. *See id.* § 158; *see, e.g.*, Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981); International Ladies' Garment Workers' Union v. NLRB, 280 F.2d 616 (D.C. Cir. 1960), *aff'd*, 366 U.S. 731 (1961).

113. Section 10(c) of the NLRA authorizes "affirmative action including reinstatement of employees with or without back pay" upon a finding of an unfair labor practice by the NLRB. 29 U.S.C. § 160(c) (1982).

remedial provision of the NLRA.[114] The discussion below focuses on the Board's authority to award relief, especially as this authority relates to the reinstatement rights of workers under the NLRA. The goal of this discussion is to aid in the development of standards for an order of reinstatement in Title VII cases.

A. Remedies Under the NLRA

Section 10(a) of the NLRA[115] authorizes the Board to prevent the commission of unfair labor practices by fashioning appropriate relief for victims of violations of the statute.[116] The Supreme Court recognizes that the NLRB has broad discretion, comparable to the district court's power under Title VII,[117] in awarding relief.[118] This discretion, however, is limited by the language of the statute that directs the Board to effectuate the policies of the Act.[119] The Board's power to prescribe remedies also is limited in that the relief should attempt to restore the situation that would exist but for the illegal discrimination.[120] Remedial orders that do not further these two goals and that have no relationship to the injury suffered will not be enforced by the reviewing court.

Courts will uphold an order of reinstatement under the NLRA if the relief will further the goals of the Act.[121] Reinstatement becomes an

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114. *See* 110 CONG. REC. 6549 (1964) (remarks of Sen. Hubert Humphrey); *id.* at 7214 (interpretative memorandum of Title VII submitted by Sens. Joseph Clark and Clifford Case). The Supreme Court expressly recognized the origin of Title VII's relief provision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975). *See also* Ford Motor Co. v. EEOC, 458 U.S. 219, 226-29 (1982).

115. 29 U.S.C. § 160(a) (1982). Section 10(a) of the Act states that the "Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." *Id. See generally* San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957) (affirming that the NLRB has exclusive jurisdiction over labor disputes when business affects interstate commerce).

116. 29 U.S.C. § 160(c) (1982) provides:

> [T]he Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act].

Id.

117. *See supra* note 10 and accompanying text. Note that in cases involving relief decrees ordered under the NLRA, courts conduct judicial review of agency action. Title VII remedies are determined by the federal district court hearing the case.

118. *See, e.g.*, Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 215-17 (1964); NLRB v. P. Lorillard Co., 314 U.S. 512, 513 (1942). *See generally* J. HUNSICKER, J. KANE & P. WALTHER, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 6-9 (rev. ed. 1986) [hereinafter NLRB REMEDIES].

119. 29 U.S.C. § 160(c) (1982); *see* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943); Graphic Arts Int'l Union, Local 280 v. NLRB, 596 F.2d 904, 911-12 (9th Cir. 1979); *see also* NLRB REMEDIES, *supra* note 118, at 6.

120. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

121. As in Title VII cases, discussions of reinstatement in NLRA cases include cases involving instatement of employees not hired because of unfair labor practices.

issue in NLRA cases in two situations: (1) upon a discriminatory discharge, layoff, or refusal to hire;[122] or (2) upon the offer of a striking employee to return to work.[123] Reinstatement rights in each situation are slightly different. Part B will discuss reinstatement as a remedy in the case of a discriminatorily discharged employee. Part C will examine the reinstatement rights of striking employees.

B. Reinstatement for Victims of Discrimination

Reinstatement is the preferred remedy for a victim of discrimination under the NLRA.[124] The unlawfully discharged employee has an essentially automatic right to immediate reinstatement.[125] The employer must offer the employee the opportunity to return to the position that the employee would have held absent the unfair labor practice.[126] If the position is not available, the employer must offer the employee a substantially similar position.[127] The employer also must leave open the offer of reinstatement for a reasonable amount of time in order to fulfill his obligation to the employee.[128]

The right of a victim of unfair labor practices to reinstatement is not absolute. Denial of reinstatement is appropriate, however, only in a narrow set of circumstances: (1) when the discharge was for cause, (2) when the employee rejects the employer's unconditional offer of reinstatement, and (3) when changed circumstances make reinstatement an improper remedy.[129] The Board has no power to order the reinstatement of an employee discharged because of misconduct.[130] The Board

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122. *See, e.g.*, NLRB v. Apico Inns 512 F.2d 1171 (9th Cir. 1975); NLRB v. Waumbec Mills, Inc., 114 F.2d 226 (1st Cir. 1940).

123. *See, e.g.*, NLRB v. Consolidated Dress Carriers, 693 F.2d 277 (2d Cir. 1982); Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60 (2d Cir. 1979).

124. An important issue in NLRA cases is the identity of the discriminator: the employer, the union, or both. This Note focuses only on situations in which the employer committed the unfair labor practice because those instances seem to have the most direct application to Title VII.

125. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (stating that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications' he is guilty of an unfair labor practice" (quoting NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967))); Southern Tours, Inc. v. NLRB, 401 F.2d 629, 633 (5th Cir. 1968) (stating that the NLRB "can and normally does require reinstatement with backpay").

126. *See* NLRB v. Fotochrome, Inc., 343 F.2d 631, 633 (2d Cir.), *cert. denied*, 382 U.S. 833 (1965); Staffman's Org. Comm. v. United Steel Workers of Am., 399 F. Supp. 102, 105 (W.D. Mich. 1975).

127. *See, e.g.*, NLRB v. Blue Hills Cemetery, Inc., 567 F.2d 529, 530 (1st Cir. 1977); *Staffman's Org. Comm.*, 399 F. Supp. at 105.

128. *See* NLRB v. Murray Products, Inc., 584 F.2d 934, 940 (9th Cir. 1978).

129. *See* NLRB REMEDIES, *supra* note 118, at 117.

130. *See* NLRB v. Local 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953). An employer can discharge an employee as long as the discharge does not involve unfair labor practices as defined in the NLRA. *See* NLRB v. Condensor Corp. of Am., 128 F.2d 67, 75 (3d Cir. 1942). Similarly, an employee discharged for misconduct does not state a claim under Title VII. *See*

also has no authority to order an employer to make repeated offers of reinstatement. Once an employer makes an offer of reinstatement and holds the position open for a reasonable amount of time, the Board cannot force the employer to make another offer if the employee refuses the original offer.[131]

The most flexible situation in which courts allow the Board to deny reinstatement is "changed circumstances." Cases falling under this exception generally involve the elimination of the position that the employee held prior to his discharge.[132] A common theme in these cases is the argument that the position was eliminated for economic or other justifiable business reasons, and the burden to prove these reasons rests with the employer.[133] The employer's liability for the unfair labor practice, therefore, usually is limited to backpay for the period from actual discharge to the time the employee would have lost the position due to economic reasons.[134] The Board, however, has ordered some employers to offer the employee the next available position.[135]

C. *Reinstatement for Striking Employees*

Whether a striking employee has a right to immediate reinstatement depends on the reasons for the strike. An employee striking for economic reasons generally has a right to immediate reinstatement only if the position has not been filled in the interim.[136] Thus, an employer is not compelled to displace an employee currently holding a job in order to offer the position to an employee striking for economic concessions.[137] The Board requires only that the employer place the employee on a preferential hire list.

While the failure to reinstate a striking employee who is entitled to the remedy normally would constitute an unfair labor practice under the NLRA,[138] the employer can justify his failure to reinstate by show-

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973) (stating that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . unlawful activity against it").

131. *See* NLRB v. Winchester Elec., Inc., 295 F.2d 288, 292 (2d Cir. 1961).

132. *See* Walter S. Johnson Bldg. Co., 209 N.L.R.B. 428, 431 (1974).

133. *See* NLRB v. Biscayne Television Corp., 289 F.2d 338 (5th Cir. 1961). The *Biscayne* court observed that "discrimination by the Employer does not compel it to make work for these persons. Such discrimination does not require the Employer to discharge or lay off others to provide jobs for these discriminatees." *Id.* at 340.

134. *See* NLRB v. Corning Glass Works, 293 F.2d 784, 787 (1st Cir. 1961).

135. Waukesha Lime & Stone Co., 145 N.L.R.B. 973, 974 (1964), *enforced*, 343 F.2d 504 (7th Cir. 1965).

136. *See Biscayne Television*, 289 F.2d at 338.

137. *See* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938).

138. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967).

ing that a substantially equivalent position does not exist. Newly hired replacement workers[139] and changed economic circumstances both suffice as reasons for the absence of equivalent work. The Supreme Court limited this rule by deciding that economic strikers have a right to return to work "[i]f and when a job for which the striker is qualified becomes available."[140] The Court created another limitation on this right in *Laidlaw Corp. v. NLRB*.[141] A striking employee who obtains substantially equivalent employment during the strike forfeits the right to full reinstatement if the employer has obtained a permanent replacement in the meantime.[142]

Strikes initiated to protest unfair labor practices, rather than for purely economic motivations, create different reinstatement rights in the striking employees. Subject to the same limitations as discriminatees,[143] these employees are entitled to immediate reinstatement to their former positions.[144] The hiring of replacement workers does not limit this reinstatement right. The Board is authorized to require the firing of replacement workers if necessary to make room for an employee returning after a strike that protested unfair labor practices.[145]

Title VII reinstatement cases most closely resemble NLRB situations that involve employees striking to protest unfair labor practices or employees discriminated against due to unfair labor practices. It is difficult to find an analogy in Title VII cases to economic strikers attempting to return to work. Under the NLRA, workers have a presumptive right to return to the position they were denied due to discrimination, or to the position they held prior to their strike against unfair labor practices. This right is not affected by the presence of incumbent employees. The Title VII relief provision was modeled expressly after the NLRA relief provision.[146] Thus, a strong argument may be made that

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139. *See MacKay Radio*, 304 U.S. at 345-46. Recently, the Supreme Court further limited the rights of economic strikers to reinstatement. *See* Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989). The Court decided that an employer is not required to displace junior crossover employees (strikers who returned to work before the conclusion of the strike) to reinstate more senior strikers at the conclusion of the strike. *Id.* at 1230. The Court found no reason to distinguish between replacement workers hired during the strike and employees who abandoned the strike to return to work. *Id.* at 1233. *Trans World* was brought under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). Since the Court relied on RLA case law in the decision, it is unlikely that the decision will provide precedent in future NLRA cases.

140. *Fleetwood Trailer Co.*, 389 U.S. at 381.

141. 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

142. *Id.* at 1369.

143. *See supra* notes 125-31 and accompanying text.

144. NLRB v. Fotochrome, Inc., 343 F.2d 631, 633 (2d Cir.), *cert. denied*, 382 U.S. 833 (1965).

145. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).

146. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975).

Congress intended the Title VII courts to exercise the well-established remedies under the NLRA.[147] The EEOC takes this position in its Remedies Policy.

VI. Guidelines for Courts Ordering Reinstatement

The Supreme Court in *Albemarle Paper Co. v. Moody*[148] articulated standards for courts to follow when fashioning equitable relief under Title VII. Literal application of the *Moody* tenets seems to direct courts to award immediate reinstatement to a prevailing plaintiff even if reinstatement means displacing an incumbent employee. In awarding remedies for violations of Title VII, courts should attempt to further the dual statutory objectives of making victims of discrimination whole and deterring discrimination in the workplace. The surest way to make a victim of discrimination whole is to place her in the position she would have held absent the unlawful discrimination.[149] The EEOC, in its Remedies Policy, apparently agrees with this argument. The Policy, though equivocal, instructs its directors to seek immediate placement for victims of discrimination, even if the reinstatement or instatement results in the displacement of an incumbent employee.[150]

The argument that reinstatement is necessary to further the aims of Title VII rests on the theory that money damages can never substitute for actual placement in a position of employment.[151] But simply guaranteeing the prevailing plaintiff the next available position also is not enough. While waiting for the next opening, the employee loses valuable job experience. Additionally, the loss of self-esteem suffered during the period of unemployment must be considered.[152] Fair competition for jobs is essential to the American dream, that persons may advance as far as their talents and merits will carry them.[153] Though the psychological benefits of work are intangible, they also are real and must not be ignored.[154]

Immediate reinstatement also serves the second objective of Title VII—eradicating discrimination in the workplace. If reinstatement is denied because of the presence of an incumbent employee, the ability of courts to structure relief to address the problem of discrimination will

147. *See* Alvarez & Lipsky, *supra* note 68, at 206.

148. 422 U.S. 405 (1975).

149. *See* Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982); *see also* Alvarez & Lipsky, *supra* note 68.

150. *See supra* notes 65-67 and accompanying text.

151. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982) (stating that "the victims of job discrimination want jobs, not lawsuits").

152. *Id.* at 230 & nn.12-13.

153. *See* Miller v. International Paper Co., 408 F.2d 283, 294 & n.44 (5th Cir. 1969).

154. *See Allen*, 685 F.2d at 1306.

be diminished greatly. To shield itself from required reinstatement, the employer simply will fill the position with another employee. Though the employer may be liable for money damages, the goal of eliminating discrimination from the workplace is not furthered.[155]

Although the legislative history of Title VII does not address the issue, a comparison with reinstatement under the NLRA provides some guidance for Title VII reinstatement. Congress expressly modeled the relief provision of Title VII from the relief provision in the NLRA.[156] While NLRB precedent does not bind courts deciding Title VII cases, it does provide some direction for interpreting Title VII's relief provision.[157] The Supreme Court in *Moody* obviously consulted NLRB case law in determining the standards that courts should follow when awarding affirmative relief. The Court generally directs both the Board in NLRB cases[158] and the courts in Title VII cases[159] to award relief that will further the general policies of the respective Acts. Both Acts seek to make whole the victim of discrimination and to deter unlawful employment practices in the workplace. These similarities suggest that an examination of NLRB practices will help discern standards for awarding or denying reinstatement to victims of discrimination under Title VII. Discriminatees seeking reinstatement under Title VII when incumbent employees hold their positions most closely resemble employees who are discriminated against because of unfair labor practices or employees striking against unfair labor practices under the NLRA. The NLRB gives these employees essentially unrestricted rights to return to their former positions.

Precedent under the NLRA calls for presumptive entitlement to immediate reinstatement, even if reinstatement means displacing an incumbent employee.[160] This precedent, coupled with the standards articulated by *Moody*, seems to indicate that only a rare factual situation will warrant denial of reinstatement to a prevailing Title VII plaintiff. Case law under Title VII, however, does not support this conclusion. Courts regularly deny immediate reinstatement to victorious plaintiffs

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155. Similarly, immediate reinstatement would discourage cases of retaliatory discharge. The courts have an interest in having cases of employment discrimination uncovered. If an employer can discharge an employee for turning in an employer for violations of Title VII and not be required to reinstate the employee, the employee will have little incentive to complain about the violations.

156. *Moody*, 422 U.S. at 419 & n.11.

157. *See supra* note 118 and accompanying text.

158. *See supra* Part VA.

159. *See supra* Part IIIA.

160. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).

when the relief would require displacing an incumbent employee.[161] Some courts mitigate the denial of reinstatement by ordering hiring preference[162] and front pay[163] to compensate the discriminatee who must wait for the next opening.

The primary reason for this difference between theory and practice is the presence of an additional factor in Title VII cases—concern for the innocent victim.[164] Courts fashioning Title VII relief attempt to structure remedies so that the interests of innocent third parties are not trampled unduly. The *Moody* standards have not prevented courts from exercising discretion to award equitable relief. Title VII case law and legislative history abound with examples of courts refusing to order reinstatement when reinstatement would affect the interests of innocent third parties unduly.

Arguments against allowing the presence of an incumbent employee to affect a court's decision to order immediate reinstatement falter when the interests of the incumbent are considered. Any rights given to incumbents in employment contracts result in the same remedy that proponents of immediate reinstatement claim is inadequate: money damages. Likewise, the adage "people want jobs, not lawsuits" works equally well for incumbent employees displaced in order to provide relief for Title VII plaintiffs.[165]

Similarly, the claim that the incumbent employee would not hold the position if the discrimination had not occurred and, therefore, cannot have as strong an interest in the job as the victim of discrimination, does not withstand scrutiny. This argument implies that the incumbent employee is somehow part of the discrimination against the plaintiff. The incumbent employee, however, is usually an innocent third party, hired without knowledge of the unlawful employment practice that created the opening. Courts should attempt to protect the interest of this innocent victim.[166]

To determine whether the presumption of entitlement to reinstatement is overcome, courts must look carefully at the facts of each case and balance the interests of the victim of discrimination against the interests of the incumbent employee. While this determination must be made on an individual basis, certain factors provide guidelines for the

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161. *See, e.g.*, Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985); Wangsness v. Watertown School Dist., 541 F. Supp. 332 (D.S.D. 1982).

162. *See* Garza v. Brownsville Indep. School Dist., 700 F.2d 253 (5th Cir. 1983).

163. *See Shore*, 777 F.2d at 1155; Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).

164. *See supra* Part IIIB.

165. *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 & n.13 (1982).

166. Of course, a showing that the incumbent employee did have knowledge of the prior discrimination tips the scales toward allowing displacement.

court's decision.

The most important factor that courts should consider is whether the incumbent employee had knowledge or notice of the alleged discrimination.[167] Incumbent employees arguably are innocent bystanders or unwilling participants in a dispute between the employer and discriminatee. The weight of this argument diminishes significantly if the incumbent was alerted that a former employee has a discrimination suit pending against the employer and is seeking reinstatement to the incumbent's position.[168]

A related factor is the incumbent employee's knowledge of the prior discrimination. Learning about the discrimination at the time the incumbent accepts the job favors displacing the incumbent to afford relief to the discriminatee. Learning about the discrimination five years after accepting the position entitles the incumbent employee to a strong interest in keeping the job. Of course, any indication that the incumbent employee and the employer colluded to discriminate against the Title VII plaintiff eliminates any interest the incumbent employee has in not being displaced.

The court also should consider the uniqueness of the position in question. If the Title VII plaintiff cannot find substantially equivalent employment, immediate reinstatement may be justified. If the job is interchangeable and openings occur on a periodic basis, ordering a hiring preference may best serve the interests of all parties. *Walters v. City of Atlanta* provides an excellent example of this situation. The job at issue, Directorship of the Cyclorama, was unique, and the plaintiff could not be made whole with any other position. Immediate reinstatement was the only way to remedy the Title VII violation.[169]

A factor that might weigh against immediate reinstatement is the recourse available to the displaced incumbent employee. The presence of an employment contract assures the incumbent of a claim for recovery of money damages. In employment at will situations, this alternative likely is unavailable. The court also should consider the incumbent's likelihood of receiving substantially equivalent employment from the current employer or another employer. *Walters* serves as an example in which substantially equivalent employment was not possible, yet the employer had assured the incumbent a transfer to another job if the court ordered Walters instated to the Directorship.[170] Notice of the pending lawsuit coupled with the ability to move to another job

167. *See* Holland v. Dole, 591 F. Supp. 983 (M.D. Tenn. 1984).
168. *See* Walters v. City of Atlanta, 803 F.2d 1135, 1149 & n.12 (11th Cir. 1986).
169. *See supra* Part IVB.
170. *Walters*, 803 F.2d at 1149.

certainly influenced the court's decision to displace the incumbent employee in *Walters*.

In close cases, courts should examine whether adequate relief is available to the plaintiff without displacing the incumbent. The availability of front pay can play a role in this determination. If another position likely will open in a reasonable amount of time, hiring preference coupled with front pay might satisfy all parties. The use of front pay is less acceptable if another position is unlikely to become available in the foreseeable future.

One final factor to consider in close cases is whether the discriminatee and employer will be able to work together after the litigation. Though this Note gives only cursory treatment to the issue of workplace hostility, the apparent inability of the employer and discriminatee to have an amicable working relationship after the litigation might justify a court's denial of reinstatement.[171] To determine whether a working relationship is possible, the court must look beyond the antagonism created by the lawsuit.[172] The size of the company, the responsibility of the position, and the likelihood of repercussions caused by the hostility all are important factors in the decision.

VII. CONCLUSION

Title VII plaintiffs have a presumptive entitlement to immediate reinstatement similar to that accorded victims of discrimination or workers who strike against unfair labor practices under the NLRA. In NLRA cases, the Board will order reinstatement even if an incumbent employee who now holds the position will be displaced. Title VII courts, however, have not responded to the presence of an incumbent employee in the same manner as the NLRB.

An evaluation of whether to award immediate reinstatement to a victorious Title VII plaintiff should begin with *Albemarle Paper Co. v. Moody*.[173] *Moody* does not limit the broad equitable discretion that is given to courts by the relief provision of Title VII. This standard contemplates immediate reinstatement as the best means to effectuate the make whole and deterrence objectives of the Act, but the presence of an incumbent employee forces a court to undertake further analysis. Supreme Court precedent allows courts to consider the effects of Title VII relief on innocent third parties.[174]

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171. *See* EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

172. *See* McIntosh v. Jones Truck Lines, 767 F.2d 433 (8th Cir. 1985).

173. 422 U.S. 405 (1975).

174. *See supra* Part IIIB.

Though the case law is far from consistent, some general guidelines emerge. This Note concludes that a victorious Title VII plaintiff is presumptively entitled to immediate reinstatement, even if that relief requires the court to displace an incumbent employee. The court, however, does have discretion in ordering this relief. Exercising that discretion requires the court to balance the interests of the incumbent employee with those of the Title VII plaintiff. Several factors are especially important in the balancing process: (1) whether the incumbent employee had knowledge of the pending discrimination suit and the possibility of an order reinstating the discriminatee; (2) when the incumbent employee became aware of the pending lawsuit; (3) whether the position in question is unique; (4) whether the incumbent employee has the possibility of recovering damages through a lawsuit, obtaining substantially equivalent employment, or both; (5) whether front pay is available as a remedy in the jurisdiction; and (6) whether the employer and discriminatee can maintain an amicable working relationship after reinstatement. Consideration of these factors should guide a court when it must determine whether to displace an incumbent employee in order to provide relief for a victim of discrimination under Title VII.

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