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Front Pay--Prophylactic Relief Under Title VII of the Civil Rights Act of 1964

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NOTES

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I. INTRODUCTION

The enactment of Title VII of the Civil Rights Act of 1964,[1] prohibiting discrimination on the basis of race, color, religion, sex, or national origin, vested in all Americans the right to compete equally for the jobs available in the economy, thus restoring vitality to "the ethic which permeates the American dream . . . that a person may advance as far as his talents and his merits will carry him."[2] The early litigation under Title VII focused primarily on procedural problems[3] and the establishment of substantive violations.[4] Recently, however, the litigation has progressed into what has been termed "the recovery stage,"[5] and the size of the monetary awards granted has caused this issue to make front page headlines.[6]

The remedial provision of Title VII is section 706(g) which provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may . . . 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.[7]

When fashioning relief pursuant to section 706(g) courts have attempted to fabricate an award that would make the victim whole by providing complete relief from injury actually suffered. As punitive damages and compensation for pain and suffering generally have been assumed to be without the scope of Title VII,[8] the tradi-

1. 42 U.S.C. § 2000e (1970), *as amended*, (Supp. III, 1975).

2. Miller v. International Paper Co., 408 F.2d 283, 294 (5th Cir. 1969).

3. *See, e.g.*, McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) (in which the Court established the order and allocation of proof).

4. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (in which the Court defined the perimeters surrounding testing as a prerequisite to employment and promotion).

5. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1380 (5th Cir. 1974).

6. A.T. & T.'s agreement to pay $15 million in a settlement was reported in N.Y. Times, Jan. 19, 1973, § 1, at 1, col. 1, cited in Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741 n.3 (1973) [hereinafter cited as Davidson]. More recently, in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), the settlement order included $30,940,000 in back pay.

7. 42 U.S.C. § 2000e(5)(g) (1970), *as amended*, (Supp. III 1975).

8. *See* note 92 *infra*.

tional elements of Title VII relief have been limited to an award of back pay coupled with such other affirmative relief required to enable the victims of discrimination to attain their rightful places. Unfortunately, however, these remedies have not accomplished the "make-whole" purpose of section 706(g). Because the back pay award usually is limited by the date of the court decree ordering that all victims be compensated for past injuries, and because promotion to the rightful place may not occur until some time after the court's decree, there is a period of time, running from the date of the decree until the actual attainment of the rightful place, during which the plaintiff goes uncompensated.

Recognizing that the traditional rightful place-back pay approach has been inadequate to compensate fully the victims of discrimination, some courts have attempted to fashion relief that would operate prospectively to compensate the victim for damages incurred subsequent to the date of judgment. This award for future injury constitutes the conceptual basis of front pay.

This note will attempt to analyze the front pay award as it must exist within the general framework of section 706(g). After first defining the nature of the front pay award, this note will examine the interrelationship between back pay and the rightful place theory that creates the need for prospective relief. Next, the award shall be analyzed in light of both the legislative history of section 706(g) and the National Labor Relations Act, from which section 706(g) is copied. Finally, the cases that have addressed the issue shall be analyzed and the problems that will arise in the computation of front pay shall be explored.

II. FRONT PAY DEFINED

While the complexities that give rise to the need for front pay award will be discussed later in greater detail, a definition of front pay at this juncture should prevent unnecessary confusion.

Front pay simply is an affirmative order designed to compensate the plaintiff for economic losses that have not occurred as of the date of the court decree, but that may occur as the plaintiff works towards his or her rightful place. Although different methods of implementing front pay have been attempted, the simplest method consists of "wage circling."[9] Once the violation has been established and the plaintiff's rightful place determined, the court

9. The other method by which front pay has been awarded consists of a lump sum override payment. *See* notes 75-84 *infra* and the accompanying text for the method of computing this override.

orders the defendant to pay the plaintiff the higher wage concomitant with plaintiff's rightful position until such time as the plaintiff ceases to be injured by the previous discrimination. The articulation of the award might take the following form:

> The defendant shall continue to pay the plaintiff at the top salary level of position Y, [plaintiff's rightful place] until such time as the plaintiff assumes his rightful place, is justifiahly terminated or terminates his employment with defendant, or receives a bona fide job offer for a job at his rightful place that he refuses to take.

Thus a female employee, denied a promotion to a job which was labelled a "man's job" in violation of the Act and which paid one dollar per hour more than her current job, would receive that higher wage for all hours worked subsequent to the court's decree but prior to elimination of the effects of the discrimination.

Two methods for terminating the front pay award could be implemented once the plaintiff has attained the rightful place. Either the defendant could be required to secure advance court approval, or the defendant could terminate the award without court participation; if, however, the plaintiff complained to the court that the termination was unfair, the burden would be on the defendant to justify this conduct. The second alternative seems preferable because it provides the defendant with the necessary flexibility and minimizes unnecessary court intrusion, while placing the burden on the defendant to show just cause in the event of a conflict. There may be instances, however, when the first alternative may be required; for example, when the defendant's past conduct reflects egregious discrimination that would mandate very close court supervision. Furthermore, as a front pay award is an affirmative order, the court entering the decree would have to retain jurisdiction to ensure compliance with its terms.

III. Nature and Purposes of Remedies Provided by Title VII

The legislative history of Title VII, consisting mainly of debates, speeches, and memoranda by the Act's proponents and opponents as reported in the Congressional Record,[10] is particularly sketchy and is not the kind of specific statutory background upon which courts like to rely.[11] The courts have, however, found guidance in two terms of legislative history. First, it is clear that the remedial provisions of Title VII were modelled after section 10(c) of

10. Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 457 (1965).
11. *Id.* at 457-58.

the National Labor Relations Act (NLRA).[12] Several courts have relied on decisions decided under section 10(c) when faced with problems of interpretation under section 706(g)[13] and the General Counsel of the Equal Employment Opportunity Commission (EEOC) has further stated[14] that the EEOC would seek guidance in the decisions of the National Labor Relations Board (NLRB).[15] Secondly, the legislative history indicates that the tenor of section 706(g) suggests that the victim should be "made whole." A section-by-section analysis accompanying the Conference Committee Report on the 1972 amendments[16] stated in part:

> The provisions of this subsection are intended to give the courts the wide discretion 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 victim of unlawful discrimination whole*, and that the attainment of this objective . . . requires that persons aggrieved by the consequences . . . be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.[17]

Thus these elements of legislative history, combined with the actual text of section 706(g), indicate that Title VII relief is equitable and desigued to restore a plaintiff to the position that would have been attained absent the unlawful discrimination, while providing compensation for earnings lost due to the discrimination. Little else can be gleaned from the legislative history, and the courts themselves have been called on to structure the actual elements of the award without the benefit of concise congressional commands. In their attempts to make victims whole, the courts have concentrated on awards of back pay and other affirmative relief that would promote plaintiffs to their rightful places.

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12. 29 U.S.C. § 160(c) (1970). The intention to model back pay under Title VII after § 10(c) is clearly set forth in an Interpretative Memorandum on Title VII reproduced in EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3039, 3044 (1964), and 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey).

13. Examples of references being made to cases decided under § 10(c) can be found in several circuit court opinions, *e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252 (5th Cir. 1974); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972). *Cf.* Davidson, *supra* note 6 at 742.

14. EEOC General Counsel Opinion Letter, July 20, 1966, cited in Davidson, *supra* note 6, at 743 n.16.

15. The National Labor Relations Board is an administrative tribunal charged with the duty of interpreting the NLRA. 29 U.S.C.A. § 151 (1973).

16. The Civil Rights Act of 1964 was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13. The only basic change that was made in § 706(a) was the inclusion of a two year statute of limitations. "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

17. 118 CONG. REC. 7168 (1972) (emphasis added).

IV. The Defect in the Traditional Relief Awards

The defect in traditional remedial awards provided under Title VII lies not so much in an inherent problem with any of the individual items, but rather in their interface. To appreciate the need for prospective front pay relief, it is necessary to understand the operation of these traditional remedies so that their limitations can be recognized fully.

A. Back Pay

The back pay award generally is viewed as a form of restitution and frequently is articulated as the difference between wages that the plaintiff actually earned and the amount that would have been earned absent the effects of the unlawful discrimination.[18] The higher rate used to calculate the wages lost is determined by utilizing a nondiscriminatory promotion system to trace the hypothetical progress of an employee through the various job openings that occurred in the defendant's operation.[19] Once this hypothetical rightful place position is ascertained, the plaintiff's wage rate for the purpose of the back pay computation is the highest rate paid in that job category.[20]

The back pay award is, however, limited in time. It will not be awarded for damage inflicted prior to July 2, 1965[21] or two years prior to the filing of a grievance with the EEOC,[22] whichever is later.

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

19. This hypothetical tracing is extremely difficult in class actions where there may be upwards of one thousand members, *e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), and district courts often appoint special masters to help them in this task, *e.g.*, United States v. Masonry Contractors Ass'n, Inc., 497 F.2d 871 (6th Cir. 1974). One of the many problems involving hypothetical tracing involves a situation in which the opening occured prior to July 2, 1965, yet has not occured since. The issue that has been litigated is whether this pre-Act discrimination is compensable after July 2, 1965. *See* Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973), in which the court granted relief starting July 2, 1965, although the first post-Act opening did not occur until April 11, 1966, the employee having qualified on April 11, 1964. To the same effect is Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975).

20. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258-63 (5th Cir. 1974). In Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969) the court, discussing back pay, stated:

> [A]ll those who were discriminatorially laid off [shall] be compensated at the highest rate of pay for such jobs as they would have bid on/and would have qualified for if a non-discriminatory seniority scheme would have been in existence.

21. This is the effective date of Title VII. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974).

22. This two-year limitation was added by the Equal Opportunity Act of 1972. *See* note 14 *supra*. *But see* Marquez v. Ford Motor Co., 440 F.2d 1157, 1163 (8th Cir. 1971) (no back pay should antedate the filing of the complaint).

Also, it rarely is extended past the date of the court's decree implementing the final order.[23] Herein lies part of the problem with the traditional relief award. As the back pay is limited to the date of the court decree, the plaintiff will continue to incur economic loss unless the effects of discrimination also end on that day.

B. The Rightful Place Theory

If the victims of discrimination truly are going to be "made whole," they should be entitled not only to wages wrongfully retained but also to relief that will enable them to attain their proper jobs.[24] In an attempt to perform this latter function the courts have developed what has been labelled the "rightful place theory."

Unlike the broad reinstatement powers provided by the NLRA,[25] the power vested by Title VII is more restricted. It is now generally accepted that courts may not order immediate promotion if to do so would require that an incumbent employee be "bumped" from the job, nor may they order that an employee be allowed to "jump jobs" within a valid line of progression.[26] The first court to address the problem of constructing a method of ensuring plaintiffs are awarded jobs commensurate with their just expectations recognized these restrictions but went on to note that job-related relief could not be ignored.[27] This philosophy was adopted by the Fifth

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23. EEOC v. Detroit Edison Co., 515 F.2d 301, 316 (6th Cir. 1975) *petition for cert. filed*, 44 U.S.L.W. 3150 (U.S. Sept. 23, 1975) (No. 393); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379 (5th Cir. 1974); Hester v. Southern Ry. Co., 349 F. Supp. 812 (N.D. Ga. 1972) (end day complaint filed); Francis v. American Tel. & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972); Doe v. Osteopathic Hosp., Inc. 333 F. Supp. 1357 (D. Kan. 1971) (date of trial); Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971).

24. Litigation under Title VII often involves discrimination in promotions rather than discrimination in firing. Thus what is sought is not the employee's old job but rather the job denied because of some statutory violation. The most common forms of discrimination have been defective seniority systems and testing provisions of the type outlined in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

25. If an employee is discharged as a result of an unfair labor practice of the employer, then the NLRB, or the enforcing court, can order immediate reinstatement even if this means bumping the employee who assumed the discriminatee's job. *See* 3 CCH LAB. L. REP. ¶ 4725, at 9706 (1972).

26. *E.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971). Legislative history is in accord with this position. Discussing the effect the Civil Rights Act would have on existing seniority systems, the Clark-Case Memorandum stated an employer would not:

> be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future job vacancies, or, once Negroes are hired give them special seniority rights at the expense of white workers hired earlier.

BNA, THE CIVIL RIGHTS ACT OF 1964 329 (1964).

27. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968) (in which the

Circuit in *United Papermakers Local 189 v. United States*,[28] and the "rightful place" doctrine developed in that case is now widely accepted as the proper promotion remedy.[29]

In *Local 189*, the court found that due to the bias of the seniority system, which perpetuated the effects of past discrimination, black employees had lost, and would continue to lose, promotions that they otherwise would have obtained. Three theories for rectifying the problem were offered to the court: "status quo," "rightful place," and "freedom now."[30] The two extreme theories, "status quo" and "freedom now," were rejected. The court felt that status quo, requiring that defendant merely cease any overt discrimination was insufficient because it did not help incumbent employees who were victims of discrimination. Freedom now, on the other hand, was rejected because it was too drastic, requiring that discriminatees immediately be given the jobs to which they were entitled even though this would entail both "bumping" and "jumping." Although the court rejected the argument that the existing seniority system was required by "business necessity,"[31] it nevertheless was mindful that a new system could not be instituted at the expense of safety and efficiency.[32] The court adopted the rightful place theory, requiring that discriminatees be allowed to bid for an opening on the basis of merit, and stating:

> A "rightful place" theory stands between a complete purge of "but for" effects [and] maintenance of the status quo. The Act should be construed to prohibit

court stated: "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.").

28. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

29. *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. St. Louis-S.F. Ry. Co., 464 F.2d 301 (8th Cir. 1972); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

30. For a detailed discussion of these three theories see Throp, *Racial Discrimination and Seniority*, 23 LAB. L.J. 398, 402-03 (1972). For the origin of the rightful place theory see Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1163, 1164 (1971) [hereinafter cited as Note].

31. The "business necessity" doctrine provides a defendant with a Title VII defense. The burden of proof is on the defendant, who must show sufficiently compelling business necessity to overcome the discriminatory impact. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) *cert. dismissed*, 404 U.S. 1006 (1971). The necessity connotes an "irresistible demand" and not mere "management convenience." United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971). Finally, there must be a showing that there is no acceptable alternative to the discriminatory business practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 246 (5th Cir. 1974).

32. The court in footnote 6 reiterates the district court findings detailing the positions that were susceptible to a bidding system using seniority as the sole criterion and those that would require some prior on-the-job training. By requiring the employee to proceed through the valid lines of progression, it was assumed that safety and efficiency would be maintained. 416 F.2d at 990.

> the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. While incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.[33]

Thus, a discriminatee eventually will be permitted to bid on a job that would have been awarded absent discrimination once the opening exists and the victim has received any necessary training. While the rationale of the "rightful place" theory is sound, it often delays the time when the employee is made whole by attaining that rightful place.

C. *The Problem*

Many of the cases litigated under Title VII have involved discriminatory failures to promote,[34] and it is in this context that the remedy will involve back pay and other rightful place relief.[35] Unfortunately, the limitation of back pay to those injuries suffered previous to adjudication, and the requirement that plaintiffs wait for an opening to occur in their rightful job level, create a gap in relief during which time the victim of discrimination continues to suffer economic harm but is not made whole for these injuries. Assume, for example, that an orthodox Jew is denied a promotion in January 1973 because of religious discrimination, and that he is awarded a judgment in January 1975, with the court ordering back pay and restoration to his rightful place. The back pay would compensate him for the damages incurred between 1973 and 1975, and if an opening in the higher job level exists on the date of the decree implementing the order, the victim is made whole. If, however, no

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33. *Id.* at 988 (emphasis in original).

34. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Norman v. Missouri Pac. R.R., 497 F.2d 594 (8th Cir. 1974); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); United States v. St. Louis-S.F. Ry. Co., 464 F.2d 301 (8th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); United Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). While the front pay award would be appropriate in other contexts, this note shall focus on situations in which promotions have been improperly denied.

35. *See* text accompanying note 33 *supra*.

opening occurs until January 1976, then he has suffered one year of noncompensated economic loss. He has not been restored to the economic position he would have attained absent discrimination.[36] Theoretically, this hypothetical plaintiff could sue for additional back pay; as liability already has been established, the plaintiff probably would need to show only the extent of the additional injury. This is, however, undesirable because it requires unnecessary litigation and expense.[37] The other possible alternative would have been to delay the original suit until plaintiff had a better chance of immediate promotion. Had the order been issued in January 1976, the plaintiff could have recovered three years back pay. A practice of delaying suits based on Title VII so as to maximize the back pay award, however, violates a seemingly desirable purpose of eliminating racial, sexual, religious, and national origin discrimination as quickly as possible.[38]

Front pay should be a method of ensuring that each victim of discrimination is made whole to the fullest extent possible without delay, without expense, and without protracted and needless litigation. The remainder of this note shall analyze the nature of this award, the cases that have discussed it, and computation problems that will arise.

IV. Supporting Authority for Awards of Front Pay

Front pay, if implemented through wage circling, is little more than an extension of back pay beyond the date of the court's order providing the Title VII remedy. It expressly recognizes that additional damage will be inflicted before the incidents of discrimination are eradicated completely. This extension of the back pay award is neither prohibited by back pay concepts as set forth in Title VII,[39] back pay as limited by the NLRA under section 10(c),[40] or back pay as defined by the Supreme Court in *Albemarle Paper Co. v. Moody*.[41]

36. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971); "[The back pay award is] intended to restore the recipients to their *rightful economic status* absent the effects of unlawful discrimination." [Emphasis added].

37. The dire consequences of requiring the back pay be recomputed as reinstatement is denied are exemplified by a series of cases styled NLRB v. J.H. Rutter-Rex Mfg. Co., discussed in text accompanying notes 50-59 *infra*.

38. *Cf.* 42 U.S.C. §§ 2000e-5(f)(1)-(4) (1970), *as amended*, (Supp. III, 1975).

39. *See* text accompanying note 7 *supra*.

40. *See* notes 12-15 *supra* and accompanying text.

41. 422 U.S. 405 (1975).

A. *Front Pay Under the NLRA*

Due to the NLRB's extensive reinstatement powers[42] and the relative infrequency with which it is faced with discriminatory promotions, the NLRB rarely has been called on to remedy a situation in which front pay would be appropriate. One line of cases, however, has suggested that if an NLRB order results in a delayed reinstatement, the back pay award should extend to the date of reinstatement.

One early case suggesting that the defendant must pay the cost of any delay in reinstatement is *Universal Food Service*.[43] In response to defendant's illegal refusal to bargain, the employees went on strike, and their later request for reinstatement was denied. The NLRB ordered reinstatement with back pay accruing to each employee until the date of reinstatement.[44] Defendant requested that the back pay be terminated sooner, alleging that the exigencies of ordinary office and personnel procedures had prevented it from an earlier reinstatement. Rejecting this argument, the Board stated:

> [We perceive] no reason for departing from the Board's usual rule . . . that any loss arising out of Respondent's delay in reinstating the strikers should be borne by Respondent, whose unfair labor practice caused the strike. . . .[45]

Thus, it is the Board's policy to make the statutory violator pay for all the damage rather than penalize the innocent employee.

In a similar vein is *Hollywood Brands, Inc.*,[46] in which an individual was denied promotion to the position of cook because the foreman wanted "no union nigger" working for him.[47] The Board found that the discriminatee had been denied not only the desired position but also adequate training opportunity. The back pay ordered extended from the date of the act of discrimination until the employee "is given a nondiscriminatory opportunity to qualify for the job."[48] Presumably this would include a training period.[49]

Although not persuasive authority for front pay relief under Title VII, these cases do indicate that the NLRB perceives the back

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42. *See* note 25 *supra* and accompanying text.
43. 104 N.L.R.B. 1 (1953).
44. *Id.* at 3.
45. *Id.* at 16.
46. 169 N.L.R.B. 691 (1968).
47. *Id.* at 695.
48. *Id.* at 691.
49. Similarly, in Mooney Aircraft, Inc., 164 N.L.R.B. 1102 (1967), the Board traced an employee's hypothetical promotions and paid him back pay based on the difference between the higher wage rate he should have received and the wage he actually received from the time he was incorrectly reinstated and the time that he quit.

pay award as a complete remedy only if it continues until reinstatement. The celebrated case of *NLRB v. J.H. Rutter-Rex Manufacturing Co.*[50] is another example of this philosophy. More importantly, however, the decision illustrates the problems that can arise when the plaintiff or the court is limited to retrospective awards only. A 1953 attempt to organize 600 employees was opposed by defendant, whose counter-activity was found in 1956 to violate the NLRA.[51] In 1957 the Board's order requiring immediate reinstatement was enforced.[52] Following this court decree defendant requested that the Board notify it of any failures to comply with the order.[53] In 1960 the Board investigated defendant's reinstatement program, and in 1961 a back pay specification was filed alleging that the company had failed to reinstate 207 strikers and as of that date owed $342,000. The Board eventually awarded $160,000, denying the back pay to thirty-five claimants,[54] and the company appealed. The Fifth Circuit reversed,[55] holding that the company should not be penalized for the Board's four year delay from defendant's request of notification of violations to the Board's determination that reinstatement was required. On appeal the Supreme Court reversed, stating that while the Board's delay was deplorable, it was the company's delay in providing reinstatement that had caused both parties to suffer. The Court reasoned that equity would be better served by placing the economic burden on the company rather than on innocent employees.[56] Thus by 1969 the victims had been compensated through 1961, but the matter was not yet finished. Following the entry of the first back pay order, the Regional Director commenced preparation of the second computation for back pay extending beyond 1961. In 1971 the Board issued its order granting back pay to thirty-three claimants who were not reinstated until after 1961, the final claimant having been reinstated in May 1970.[57] Again the company claimed prejudice due to delay; this time, however, the Fifth Circuit enforced the back pay order,[58] noting that it was fortunate that this second back pay hearing was held after May 1970, as it obviated the need for a third hearing.[59] Thus, it was not until

50. 396 U.S. 258 (1969).
51. NLRB v. J.H. Rutter-Rex Mfg. Co., 229 F.2d 816 (5th Cir. 1956).
52. NLRB v. J.H. Rutter-Rex Mfg. Co., 245 F.2d 594 (5th Cir. 1957).
53. J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356 (5th Cir. 1968).
54. 158 N.L.R.B. 1414 (1966).
55. 399 F.2d at 365.
56. 396 U.S. at 265.
57. 194 N.L.R.B. 19 (1971).
58. J.H. Rutter-Rex Mfg. Co. v. NLRB, 473 F.2d 223 (5th Cir. 1973).
59. *Id.* at 228.

this final decision in 1973 that the victims received their compensation, the award having been litigated twice before the Fifth Circuit and once before the Supreme Court.

Back pay under the NLRA makes the victim whole because it extends until reinstatement. It would appear, however, that the policy of awarding it only retrospectively causes unnecessary expenditures of administrative time and expense, requires needless litigation, and reduces the incentive to reinstate injured employees. Although history is only poorly reconstructed, had front pay been awarded in *Rutter-Rex* the defendant would have had a greater incentive to reinstate the employees, avoiding a heavy back pay assessment.[60] Furthermore, front pay would have eliminated the need for the protracted litigation.

Back pay under section 10(c) serves as a guide for cases under Title VII. The above cases, however, should be followed only to the extent that their policy conforms to Title VII. To the extent that *Rutter-Rex* caused delay and expensive litigation, the method by which this relief was awarded should be rejected for a simpler, prospective approach.

B. Front Pay After Moody

Section 706(g) specifically states that the courts may award equitable relief "with or without back pay."[61] As a result of this permissive language, splits developed among the federal courts concerning the discretionary nature of the back pay award.[62] The Supreme Court in *Albemarle Paper Co. v. Moody*[63] resolved that issue and included several broad comments on both the particular nature of the back pay award, and remedies under Title VII in general. For this reason *Moody* takes on special relevance in a discussion of prospective monetary relief.

In *Moody*, defendants[64] were found to have violated the Act because the collective bargaining agreement locked minority employees into lower paying jobs, thus perpetuating the effects of past

60. Here the defendant may have delayed in the hopes that as each employee's financial situation deteriorated they would look for other jobs. As the acceptance by the employee of a substantially equivalent job cuts off his or her right to back pay this decreases the amount the defendant must pay. Furthermore, by stalling, defendant may well not have to rehire any of these "undesirable" employees.

61. *See* text accompanying note 7 *supra*.

62. For example, *compare* Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973) *with* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

63. 422 U.S. 405 (1975).

64. Defendants in this case were the employer, its successors in interest, and the union local.

discrimination.[65] The district court held, however, that because defendant had exhibited no bad faith noncompliance with the Act, no back pay would be awarded. The Fourth Circuit reversed, ruling that back pay should not be denied merely because bad faith was not shown and concluding that back pay should always be awarded "unless special circumstances would render such an award unjust."[66] The Supreme Court agreed with the circuit court's decision, but chose to develop its own standard. The Court ruled that an award of back pay necessarily follows a finding of unlawful discrimination and should be denied:

> only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[67]

In its opinion the Court draws support for its holding from similar cases decided under the other titles, from the legislative history of Title VII, and from cases expounding the general equity power of the federal courts.[68] The basis of the Court's opinion, however, rests most strongly on two policy statements. First, the Court notes that while injunctive relief serves a legitimate purpose it is the reasonably certain prospect of a back pay award that provides the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices,[69] and to endeavor to eliminate discrimination. Second, and most importantly, the Court emphasizes the "make-whole" nature of the front pay award. Acknowledging the make-whole purpose of back pay under section 10(c) of the NLRA and the historic purpose of equity, to "secur[e] complete justice,"[70] the Court states:

> Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate

65. Prior to 1968 defendant had maintained a policy of strictly segregating the plant's departmental lines of progression, reserving the better-paying, skilled jobs for white employees. In 1968 a new system was introduced under a collective-bargaining agreement whereby former Negro lines of progression were tacked on to the bottom of the white lines. Only "white seniority" was used for promotions, lay offs, etc., and black transferees with several years plant seniority were treated as if they bad just commenced employment, their seniority dating from the time they were allowed to join tbe white line.

66. Moody v. Alhemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973).

67. 422 U.S. at 421.

68. The Court cites *inter alia* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969) (noting the make-whole purpose of NLRA § 160c) and Bell v. Hood, 327 U.S. 678 (1946) (noting courts should adjust their remedies to grant necessary relief when federal rights are invaded). 422 U.S. at 418-19.

69. 422 U.S. at 418, citing United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

70. 422 U.S. at 418, citing Brown v. Swann, 35 U.S. [10 Pet.] 497, 503 (1836).

the discriminatory effects of past as well as bar like discrimination in the future."[71]

Moody is not a radical departure from the precedent developed by the lower courts; many decisions, and several commentators, previously had articulated both the catalytic[72] and restorative[73] purposes of back pay. Broadly read, *Moody* stands for the proposition that relief provided by § 706(g) is designed to make all innocent victims of discrimination whole, and that only if the statutory purpose of the Act would be thwarted by any such a make-whole award should complete relief be denied.[74]

Given the strong language of *Moody* and the realization that front pay implemented through wage circling is merely an extension of back pay designed to make victims whole, prohibition of front pay constitutes a prospective denial of back pay. Denying back pay is permitted only in rare circumstances; therefore front pay should be denied only when back pay also is inappropriate.

V. THE "FRONT PAY" CASES

A few courts have ordered that the back pay award be continued until the plaintiff actually achieves his or her rightful place.[75] Only a few cases, however, have specifically examined the possibility of awarding some form of prospective monetary relief. An examination of these cases follows.

A. *United States v. United States Steel Corp.*

Prospective relief first was awarded under Title VII by the district court in *United States v. United States Steel Corp.*[76] In addi-

71. 422 U.S. at 418, quoting Louisiana v. United States, 380 U.S. 145, 154 (1965).

72. *E.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969); Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 449 (1971); Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243 (1972).

73. *E.g.*, United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); United States v. Wood Lathers Local No. 46, 328 F. Supp. 429, 443 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir. 1973); Moroze, *Back Pay Awards: A Remedy Under Executive Order 11246*, 22 BUFFALO L. REV. 439 (1973); Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495 (1966).

74. Both Chief Justice Burger and Justice Rehnquist, in separate opinions, seem to imply that they would not award back pay if the employer's conduct was mandated by state statute, using the example of state female protection laws.

75. Johnson v. Ryder Truck Lines, Inc., 10 E.P.D. § 10535 (W.D.N.C. 1975); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (E.D. Tex. 1974) ("period of entitlement ends on the date the employee will in all probability reach his 'rightful place' "). Subsequent to the completion of this Note the Fourth Circuit approved an award of front pay in Patterson v. American Tobacco Co., No. 75-1259 (4th Cir., Feb. 23, 1976). The court suggested that this supplemental award be either paid immediately based on a present estimate of future damages, awarded through periodic back pay installments, or paid according to an alternate method the court or counsel may devise. Slip Op. 24-25.

76. 371 F. Supp. 1045 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975).

tion to the traditional remedies of rightful place reinstatement and back pay, the court granted plaintiffs what it termed an "override."[77] To determine the amount of this override[78] the court first calculated back pay by matching all openings that had occurred since July 2, 1965[79] with each individual plaintiff's seniority as computed in a nondiscriminatory manner:[80] the rightful place wage rate so established was then used as the basis for awarding back pay.[81] The aggregate back pay awarded was approximately $300,000, representing damage inflicted by eight years of actionable discrimination. Next, the court estimated the time required for the plaintiff class to reach the rightful place—arriving at a figure of four years. Using these figures the court assumed that as $300,000 damage had been inflicted in eight years, $150,000 damage could reasonably be expected to be inflicted in the four years in which plaintiffs would be striving toward their rightful places. Thus, each plaintiff was given an override equaling fifty percent of his back pay award as additional compensation. This override was not denied to individuals who had refused promotions in the past,[82] but was denied to one employee who had retired[83] and one who stipulated in writing he would refuse all future offers of promotion.[84] In one instance the court delayed payment of the override as the plaintiff was seriously ill and it was questionable whether he ever would return to work. There was no report of any finding by the court that all the other employees were going to continue to work for the defendant for at least four years. Furthermore, the court did not specify what would happen in the event that an employee should quit prior to working the full four years.

While laudable in its recoguition that plaintiffs were certain to suffer future economic loss, *United States Steel* unfortunately provides for a lump sum award rather than wage circling.[85] The flaw

77. Sixty-one individuals were awarded the override.

78. The method of calculating the override is not spelled out in either the district court decision or the actual order. The description of the court's action is based on a Memorandum from Barry L. Goldstein to Jack Greenberg, William Robinson, Morris J. Butler, and Oscar W. Adams (counsel for plaintiffs), dated August 9, 1973, describing the action taken by Judge Pointer, who issued a mere informal pronouncement. (Copy available through *Vanderbilt Law Review*) [hereinafter cited as Memorandum].

79. This position was also adopted by Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973), and Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975).

80. Plant seniority was used in this computation of seniority. Memorandum, *supra* note 78, at 2.

81. *Id.* at 3.

82. *Id.* at 7.

83. *Id.* at 5.

84. *Id.*

85. Lump sum awards have been granted in back pay orders. For a discussion of this

inherent in this form of the front pay award is readily apparent—it is impossible to estimate in advance how long it will take any individual or class of individuals to reach their rightful places; further, the court, even if it guesses correctly, has no assurance that each of the recipients will continue to work until that right place is achieved. The court in *United States Steel* had to make such determinations in deciding who was eligible. Presumably any employee who quit or otherwise did not continue to strive toward the rightful place could be required to refund the excess, but this procedure would only lead to even more litigation. Similarly, if the court's estimate is too low it would require plaintiffs to return to court for additional compensation. A major principle underlying any award of damages is that the plaintiff must establish the amount with reasonable certainty, requiring that the plaintiff produce some relevant data from which the amount reasonably can be calculated.[86] Without such evidence (and it is difficult to conceive of present evidence that could convince a court that an employee would continue working in the future) the damages will be denied as speculative and conjectural. The award in *United States Steel* is susceptible to such an attack.

In addition to its speculative nature, the override concept also arguably thwarts a purpose of Title VII: to serve as encouragement for each employer not only to remove artificial barriers but also to aid minorities in working to attain their rightful place. Because the override requires the employer to pay today damages that will not mature fully for four years, it eliminates much of the incentive to move the employees along at a faster rate. Similarly, as each employee is assured the rightful place wage for four years, the employee will be less anxious to begin necessary training courses and to assume the new responsibilities.[87]

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practice see note 87 *infra*.

86. D. DOBBS, LAW OF REMEDIES § 3.3, at 150-51 (1973).

87. One commentator addressing the issue of class awards of back pay has also expressed disfavor of lump sum awards:

> But even assuming that an arbitrary amendment of damages could be fashioned intelligently, any lump sum payment to a group or class of employees is undesirable because it rewards the indolent as well as the ambitious.

Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L.J. 1, 38 (1967) [hereinafted cited as Gould].

The practice of granting lump sum awards of back pay while subject to this attack is, however, less unreasonable than granting such relief as prospective damages. In a back pay context at least the time frame within which the award must be calculated is known, while front pay by its nature renders the determination of duration of the effects of discrimination to one of pure conjecture.

B. *Cross v. Board of Education*

Another case to address the method of implementing front pay, *Cross v. Board of Education*,[88] adopted wage circling and illustrates the benefits of this method as opposed to the override method applied in *United States Steel*. The *Cross* court, after establishing discrimination on the part of defendant in failing to promote plaintiff to the position of head football coach, ordered defendant to promote plaintiff to the higher position that was discriminatorily denied him, or in the alternate, to "compensate plaintiff [as long as he remained employed by defendant] at a salary equal to that which he would receive if he were so promoted . . . ."[89]

By awarding plaintiff the wage rate improperly denied him until such time as he is promoted, the court fully compensated plaintiff without the necessity of resorting to approximations and assumptions implicit in an override. Furthermore, this award provides an incentive to both the employer and the employee. The goal of Title VII is to ensure that individuals attain their rightful places. The employer can minimize its damage by offering this position as quickly as possible while the employee will be motivated to accept the position as presumably the award will be terminated once the promotion to the higher position is offered. *Cross* thus illustrates the implementation of front pay in its ideal form. This decision, rather than *United States Steel*, should serve as the guide for future front pay orders. Unfortunately, while correct in its implementation, the court in *Cross* does not discuss the nature of front pay and conditions under which it should be ordered and thus provides little guidance in that respect.

C. *White v. Carolina Paperboard Co.*

The most recent case in which front pay expressly was awarded was *White v. Carolina Paperboard Co.*[90] While citing *United States Steel*, the court did not directly propose a method of computation, but did find that plaintiffs would have to be compensated for their post-trial injury because they would not immediately assume their rightful places. The court stated that propsective relief was essential, noting the historical pattern of discrimination by defendant, the limited number of vacancies in the better paying jobs, and the limitations of the plaintiff class.[91] Unfortunately, the opinion deals

88. 395 F. Supp. 531 (E.D. Ark. 1975).

89. *Id.*

90. 10 E.P.D. ¶ 10,470, at 6013 (W.D.N.C. 1975). This is the only case to date that has used the expression front pay.

91. *Id.* at 6019.

only briefly with the subject of front pay and its reference to defendant's egregious conduct may cause problems. The court does not indicate whether it is premising the front pay award on a finding of bad faith or whether defendant's misconduct merely is being noted as the statutory violation which, under *Moody*, would precipitate a make-whole remedy. Front pay should not be viewed as punishment,[92] but merely as an additional weapon in the make-whole arsenal. As a make-whole remedy, front pay, like back pay, should not be premised on defendant's state of mind and should not be denied unless such denial, applied generally, "would not frustrate the central statutory purpose of eradicating discrimination . . . ."[93]

D. Sabala v. Western Gillette, Inc.

The only circuit court to address the issue of prospective monetary relief affirmed a district court decision denying front pay. In *Sabala v. Western Gillette, Inc.*,[94] a panel of three judges for the Fifth Circuit found that defendant had discriminated against three Mexican-Americans by denying them better paying road jobs.[95] Plaintiffs requested, *inter alia*, that the district court award limiting back pay to the date of its first order be extended to include that period extending beyond the decree date in which plaintiffs would still not have attained their rightful places. Affirming that portion of the district court's order denying front pay, the court stressed that because back pay is an equitable remedy, it can be molded to fit the needs presented by the facts, noting:

> Although logic may suggest that these two dates should coincide [termination of back pay and the offer or promotion], we do not think that result is required as a matter of law.[96]

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92. Punitive damages are not available under Title VII. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3150 (U.S. Sept. 23, 1975) (No. 393); Howard v. Merchantile Commerce Trust Co., 10 F.E.P. Cas. 158 (E.D. Mo. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973), *appeal dismissed*, 497 F.2d 180 (9th Cir. 1974). Damages for compensating for pain and suffering are also not available. Divan v. Sperry Rand Corp., 10 F.E.P. Cas. 730 (D. Utah 1975). *Cf.* Richards, *Compensatory and Punitive Damages in Employment Discrimination Cases*, 27 ARK. L. REV. 603 (1973); Note, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 325 (1974).

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

94. 516 F.2d 1251 (5th Cir. 1975).

95. This practice, common in the trucking industry, has been the basis of several other Title VII lawsuits. *E.g.*, Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974); Herrera v. Yellow Freight Sys., Inc., 505 F.2d 66 (5th Cir. 1974); Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3319 (U.S. Nov. 25, 1975) (No. 718).

96. 516 F.2d at 1266.

Echoing the need to balance the equities involved, the court noted that the award of front pay might somehow "interfere with the company's legitimate business decisions."[97] Finding no abuse of discretion by the trial court, the opinion nonetheless closed by noting that it would retain jurisdiction and therefore could reevaluate the back pay order in light of defendant's subsequent conduct. Thus the court recognized the potential of future injury that would require judicial intervention and a grant of additional compensation.

Courts long have recognized that reconciliation of past discrimination with present expectations would never be easy[98] and have exercised discretion in tailoring their decrees to provide minimal interference with a defendant's legitimate business operation, such as the proscription against jumping through valid lines of progression and the defense of a compelling business necessity.[99] No such legitimate interests are thwarted by an award of front pay. Consisting only of an economic detriment to the defendant, the front pay award in no way interferes with valid job progression or plant safety and efficiency.[100] Moreover, the defendant, not the plaintiff, violated the law; therefore in situations in which plaintiff continues to suffer injury, such as while waiting for a job opening on a level where none exists, equity would dictate that the original malfeasor, not the innocent victim, should bear the injury. As *Moody* indicates, once a violation is found, the plaintiff must be *rendered whole*. If the defendant can show no reason why back pay should be denied, then front pay must follow as a matter of course.

The approach taken by the *Sabala* court, if adopted in a large class action situation, would also run the risk of creating the problems demonstrated by *Rutter-Rex*.[101] Just as it is logical for the award of monetary relief to continue until the economic loss ends, so is it illogical to require pointless litigation with the attendant expense and burden on the courts when the problem can be more simply resolved on the front end.

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97. *Id.* The district court does not indicate the business interest being protected nor does the Fifth Circuit explain the basis of its concern.

98. The court in *United Papermakers Local 189 v. United States* stated:

> In this case we deal with one of the most perplexing issues troubling the courts under Title VII: how to reconcile equal employment opportunity *today* with seniority expectations hased on *yesterday's* built in racial discrimination.

416 F.2d 980, 982-83 (5th Cir. 1969).

99. For a discussion of what constitutes a "business necessity," see note 31 *supra*.

100. To the same effect is Note, *supra* note 30, at 1164, which states: "When legitimate business necessity bars an employee from moving into the slot he would have had without discrimination, he can at least be paid the salary for that higher position."

101. *See* notes 50-59 *supra* and accompanying text.

VI. Calculation of the Front Pay Award

A. *Wage Circling*

As noted earlier, wage circling is preferable to the payment of a lump sum award because it ensures that only those damages actually incurred are compensated, while providing appropriate incentives for both the employer and employee to eliminate the effects of discrimination as soon as possible.[102]

This approach is not novel, as courts have frequently provided a remedy known as rate retention or "red circling,"[103] a process very similar to wage circling. Red circling generally is ordered in situations in which defendants have broken down their employment structures into segregated departments or lines, with the minority line consisting of more menial, lower-paying jobs. If the line of progression in the preferred job line is valid, one job building on the next, a minority worker transferring into the preferred line would have to start at the bottom. If prior to transfer, however, the victim was in the top job in the minority line the transfer probably would involve a cut in pay. Red circling consists of circling the higher minority-line wage on the defendant's books and continuing to pay the employee this wage as he or she progresses through the preferred line until that same wage level is reached or the employee otherwise becomes ineligible.[104]

This remedy is similar to front pay because it creates a situation in which people on the same job level will be earning different wages until the rightful place is attained or the employee quits, refuses a promotion, or otherwise stops working.[105] Red circling differs from front pay, however, in that red circling prevents a pay reduction while front pay elevates the employee to a higher wage rate—in the former situation the employee is in his rightful place but in the wrong line or progression, while in the latter he is below his rightful place.[106]

Red circling has been criticized as reverse discrimination be-

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102. *See* notes 60 and 87 *supra*.

103. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 375-76 (5th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

104. The employee loses the circled wage as he or she quits, retires, or otherwise fails to progress up the line. The wage is circled in red so that the accountants will remember and continue to pay the variance. Red circling also generally involves a seniority carry over so that the transferee will not be the first person laid off after his transfer.

105. United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971). A transferee shall lose his privilege of rate retention if he refuses a promotion in his new unit or department.

106. *See generally* Gould, note 87 *supra*, at 43-44.

cause the members of the protected class are paid more money than other employees on the same job level;[107] front pay is subject to the same attack as it also creates a situation where there are multiple pay rates for the same job level. Courts, however, generally have taken the position that rate retention is merely another portion of the make-whole remedy.[108] Similarly, when properly computed, front pay is merely preventative relief to ensure that no further damage is done to the employees while they strive towards their rightful place.

B. Front Pay in Class Actions

Actions brought under Title VII are by their very nature class actions since the underlying basis of the cause of action is class-wide discrimination on the basis of forbidden classifications—race, sex, religion or national origin.[109] The claim is a dual one: (1) that a specific promotion or job was denied, and (2) that this was due to class-wide discrimination.[110] While the back pay award can be viewed as relief to the individual, the injunctive relief also can be viewed as a class award prohibiting discrimination in the future.[111] An early problem extensively litigated under Title VII was whether unnamed members of the plaintiff class would be entitled to monetary relief. It is now generally established that each member of the class will be entitled to monetary damages,[112] but the issues of how these are to be computed and who should bear the burden of proof has yet to be firmly established.[113] If front pay is to be

107. United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 994 (N.D.N.Y. 1970), *rev'd*, 446 F.2d 652 (2d Cir. 1971).

108. *E.g.*, cases cited note 103 *supra*.

109. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

110. Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5th Cir. 1968). *See also* Hill, *The New Judicial Perception of Employment Discrimination Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243 (1972).

111. 400 F.2d at 33. In Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), the court awarded plaintiff attorney's fees although it denied back pay, finding that while the past discriminatory practice of not hiring females had been remedied, thus benefiting the class, plaintiff was not seriously seeking employment.

112. Four circuit courts have specifically granted back pay to class members. EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court indicated that whether a particular member of plaintiff class could be awarded back pay, and if so how much, were issues not resolved by its review. In footnote 8, however, tbe Court states that individuals who have not filed charges with the EEOC (a prerequisite for the named plaintiff) still could recover back pay. The issue thus seems foreclosed altbough never expressly decided.

113. *See* Barnard, *Title VII Class Actions: The "Recovery Stage,"* 16 WM. & MARY L.

awarded in the manner suggested—wage circling—then individual determinations of rightful place must be made. As the back pay award is premised on the same calculation, the guidelines established therein can be used in a front pay determination. Where the class already has established a prima facie case of employment discrimination, the primary issue becomes the proof necessary to establish plaintiff's individual entitlement to prospective monetary relief.

It generally is recognized that the class victory creates a presumption that each class member is entitled to back pay;[114] as the court noted in *Pettway v. American Cast Iron Pipe Co.*,[115] however, this does not per se entitle the employee to the particularized award without some individual clarification. This individual burden of proof is lightened by the class victory,[116] as all ambiguities are resolved against the defendant.[117] As the Fifth Circuit stated in *Pettway*:

> [T]he *maximum* burden that could be placed on the individual claimant in this case is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay.[118]

To meet this burden, the individual is entitled to use the defendant's records.[119] Once this burden is met, the duty to rebut the evidence falls on the defendant, who will be limited to challenging the individual's qualifications.[120]

Tracing a hypothetical promotion history is a complex process, and the results reached may differ from that which actually would

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REV. 507 (1975); Edwards, *Procedural Problems of Class Actions Under Title VII of the Civil Rights Act of 1964* (unpublished note available through *Vanderbilt Law Review*).

114. *E.g.*, cases cited note 112 *supra*.

115. 494 F.2d 211 (5th Cir. 1974).

116. *Id.* at 259.

117. The Court in Johnson v. Goodyear Tire & Rubber Co., stated: "It is the employer who created the discriminatory situation. . . . It is, therefore appropriate to require the employer to show that its invidious limitations on free mobility were not the cause of the discriminatee's current position. . . ." 491 F.2d 1364, 1380 (5th Cir. 1974).

118. 494 F.2d at 259-60. The EEOC takes a more expansive view computing the back pay award on the "averaging" basis. CCH, EEOC COMPLIANCE MANUAL ¶ 902.6 (1975). This approach has been criticized, Gould, note 87 *supra* and Mott, note 125 *infra*.

119. Albemarle Paper Corp. v. Moody, 422 U.S. 405, 440 (1975) (Marshall, J., concurring).

120. As the court stated in *Baxter v. Savannah Sugar Ref. Corp.*: "[T]he employer must demonstrate by clear and convincing evidence that any particular employee would have never been advanced because of that individual's particular lack of qualifications. . . ." 495 F.2d at 445.

have occurred.[121] The courts consistently have held, however, that unrealistic exactitude is not required.[122] Further, they have noted that although the task is very complex, the difficulty of ascertainment should not be confused with the right of recovery:[123]

> [M]any equitable considerations will enter into any resolution of entitlement, but onerous and speculative limitations should not be utilized as a bar to restorative process.[124]

Thus the court seemed committed to compute back pay on an individual basis using a hypothetical tracing to establish the rate that would be paid at an employee's rightful place.[125]

While seniority systems are not destroyed easily and the rightful place often is difficult to ascertain,[126] the rightful place theory should be used as the appropriate wage to circle for front pay to the extent that it is used for back pay computations. In the event that two equally qualified men would have bid on the position,[127] the amount owing could be placed in "escrow"[128] and the entire amount given to that employee who eventually qualifies. Like back pay, front pay should never be denied in a class action under the rationale that the computation is difficult.[129]

VII. CONCLUSION

Title VII clearly vests in all Americans the right to compete for meaningful employment to the fullest extent of their abilities. Where a vested right exists, concomitant remedy for a violation of

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121. *E.g.*, cases cited note 112 *supra*.

122. *Id.*

123. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (1974).

124. 491 F.2d at 1380.

125. For an analysis of the back pay award from a defendant's perspective see Mott, *Harnessing Class Back Pay Relief Under Title VII: A Return to the Theory of Compensation*, 4 CLASS ACTION REV. 169 (April 1975). Mr. Mott particularly disagrees with those formulas of calculating back pay that eliminate the individualized approach, for example, the EEOC approach discussed in note 118 *supra*.

126. A survey of collective bargaining agreements indicates that in connection with promotions seniority is the sole factor in only 2% and determinative in merely 31%. Gould, note 87 *supra*, at 3. This will force the court in many instances to make some determination of merit, inserting a considerable element of speculation.

127. For example, two men hired on exactly the same day may have competed for one opening on the basis of straight seniority absent the effects of discrimination.

128. This account need not be a traditional escrow but could simply be carried as an entry on the defendant's books until such time as one of the employees was paid the account.

129. Insofar as the rightful place is determined for back pay calculations, it should be used for front pay. If for some reason the rightful place was not calculated in determining back pay, for example, if a lump sum payment of back pay were decreed, the rightful place determination should nevertheless be computed so that front pay could be properly implemented through wage circling.

that right must exist. Chief Justice Marshall, commenting on the fabric of our society, once wrote:

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appreciation if the laws furnish no remedy for the violation of a vested right.[130]

The remedies created under Title VII were designed to ensure that the victims of discrimination would be made whole. Although in some instances the rightful place theory denies the victim that rightful job, or at least delays its attainment, the logic behind the policy is sound. There exists, however, no reason for denying the innocent victim a rightful wage. To do so continues the effects of past discrimination each day that the rightful job is denied. Limiting back pay to the date of the court decree unnecessarily extends effects of discrimination into the future.

Courts only recently have commenced grappling with the issue of front pay, and the decisions to date unfortunately offer very little guidance. *Cross*, while commendable in its wage circling approach, is too brief to provide any deeper appreciation of the policies underlying front pay. *United States Steel* and *White*, while also acknowledging the need for prospective relief, have developed nuances that, if followed, will cause unnecessary complications and may run afoul of the general purpose of Title VII remedies. Finally, *Sabala*, while recognizing the potential need for future monetary relief, arguably is contrary to the Supreme Court's decision in *Moody* in that it gives the district court broad discretion; in any event *Sabala* seems to lead towards the morass so evident in *Rutter-Rex*. As the only cases dealing with the issue of front pay, these decisions cannot be ignored. Given the limitations previously examined, however, courts and counsel should not feel unreasonably constrained by the results obtained therein.

Front pay deserves recognition as an appropriate Title VII remedy because it not only eliminates the future effects of discrimination but also serves to provide an incentive for both employer and employee to eliminate the evil that is discrimination. Front pay implemented through wage circling compensates the plaintiff for only those damages incurred, and further provides the only logical point for terminating the monetary award. As this note has attempted to demonstrate, front pay through wage circling is theoretically defensible, and there exists no reasons for denying it as a required make-whole remedy.

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130. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).