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A New Standard to Govern the Discretionary Back Pay Remedy under Title VII of the Civil Rights Act of 1964: Albemarle Paper Co. v. Moody

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A NEW STANDARD TO GOVERN THE DISCRETIONARY BACK PAY REMEDY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: *ALBEMARLE PAPER CO. v. MOODY*

Once it has been established that an employer has intentionally engaged in an unlawful employment practice under Title VII of the Civil Rights Act of 1964,[1] the trial court has the discretion to award the aggrieved employee the back pay he has been denied as a result of the employer's unlawful employment practice.[2] Recent circuit court opinions, reviewing the appropriateness of back pay awards on the trial court level, have failed to reach an agreement as to the standard that should govern the decision to grant or deny back pay.[3] The Supreme Court in *Albemarle Paper Co. v. Moody*[4] has established a new standard, settling this conflict among circuits.

The initial action in *Albemarle*, was a class action brought by present and former black employees of the Albemarle Paper Company, against their employer and union, seeking injunctive relief against "any policy, practice, custom or usage" at the Albemarle Paper Company plant violative of Title VII of the Civil Rights Act of 1964.[5] Although the trial court found the employer and union had in fact engaged in an unlawful employment practice under Title VII, the employees' request

1. 42 U.S.C. § 2000e-2(a) (1970), prohibits discrimination in private employment on the basis of race, color, religion, sex or national origin.

2. 42 U.S.C. § 2000e-5(g) (Supp. IV, 1974) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

3. *See* cases cited notes 11 & 12 *supra*. The Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), also decided the issue of the showing required of an employer to establish job relatedness in preemployment testing. *Id.* at 425. The testing issue is completely severable from the back pay issue and will not be discussed in this note.

4. 422 U.S. 405 (1975).

5. Moody v. Albemarle Paper Co., 4 BNA FEP CAS. 561 (E.D.N.C. 1971).

for back pay was denied.[6] The court stated two grounds for its denial of back pay: (1) the lack of any evidence of bad faith noncompliance with Title VII by the employer, and (2) the fact that plaintiffs' did not file their claim for back pay until nearly five years after the institution of the original action.[7] The court, focusing upon the equitable nature of the back pay remedy, reasoned the defendants would be "substantially prejudiced" if back pay were awarded at this late date, since if they had known back pay was involved, they might have exercised "unusual zeal" in having the case decided at an earlier date.[8]

On appeal, the Fourth Circuit reversed, holding that back pay could not be denied merely because the employer had not acted in bad faith.[9] The court of appeals also held that back pay could properly be requested after the initial complaint is filed.[10]

Prior to the Supreme Court decision in *Albemarle*, the various circuits had failed to agree on any one standard. An examination of the different standards adopted reveals a basic disagreement among the circuits as to the scope of the trial judge's discretion to award or deny back pay. While a few of the standards adopted recognized a very broad discretion in the trial judge,[11] others severely limited the circumstances under which back pay could be denied the successful plaintiff.[12]

The Fourth, Fifth and Sixth Circuits, prior to the Court's decision in *Albemarle*, adopted a standard[13] derived from the Supreme Court's decision in *Newman v. Piggie Park Enterprises, Inc.*[14] *Newman*, however, dealt with the discretionary attorneys' fees award under Title II of

6. *Id.* at 572. The trial court found Albemarle's job seniority program to be unlawfully discriminatory under Title VII of the Civil Rights Act of 1964.

7. 4 BNA FEP CAS. at 570.

8. *Id.*

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

10. *Id.* at 141-42.

11. *See* Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir. 1973) (the trial court in exercising its discretion to award back pay should consider "factors of economic reality (*i.e.*, the relative expense of accurate determination of individual rights vis-a-vis the amounts involved) and, most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief."); Shaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972) (trial court in deciding to award back pay "must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness."

12. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 253 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975).

13. Cases cited note 12 *supra.*

14. 390 U.S. 400 (1968).

the Civil Rights Act of 1964.[15] There the Court held the parameters of discretion of the trial judge are "necessarily narrowed" by the purposes for which Congress enacted the discretionary attorneys' fees remedy.[16] The Court reasoned that Congress provided the attorneys' fees provision in order to encourage plaintiffs acting as "private attorneys general" to bring injunctive actions under Title II.[17] Injunctive actions would not be encouraged however, and the purpose of the remedy would not be accomplished unless the plaintiff was reasonably assured that if successful, he would be awarded attorneys' fees. Hence, the standard adopted by the Court in *Newman* incorporates a preference in favor of awarding attorneys' fees; that is, attorneys' fees should ordinarily be awarded to the successful plaintiff in all but *special circumstances.*[18] The Fourth, Fifth and Sixth Circuits applied the *Newman* standard by analogy to the discretionary back pay remedy under Title VII and held that back pay should *ordinarily* be awarded in all but *special circumstances.*[19]

The specific thrust of the *Newman* standard goes to the encouragement of injunctive actions under Title II, thereby vindicating the public's interest in the elimination of housing discrimination in public accommodations.[20] This standard is directly in point with the discretionary attorneys' fees provision under Title VII of the Civil Rights Act of 1964.[21] The public's interest in the elimination of discriminatory employment practices can also be furthered by encouraging injunctive actions under Title VII through regular awards of attorneys' fees. The Supreme Court in *Albemarle*, while recognizing the applicability of the *Newman* standard to the Title VII discretionary attorneys' fees provision, expressly rejected the applicability of this standard to the back pay provision, opting instead to establish a new standard specifically applicable to the back pay remedy.[22]

THE NEW STANDARD

The specific thrust of the *Newman* standard goes to the encourfrom the dual statutory objectives of Title VII. The Court articulated the new standard as follows:

15. 42 U.S.C. § 2000(a)(3)(b) (1970).
16. 390 U.S. at 402.
17. *Id.*
18. *Id.*
19. Cases cited note 12 *supra.*
20. 422 U.S. at 415.
21. 42 U.S.C. § 2000e-5(k) (1970).
22. 422 U.S. at 415.

> [G]iven a finding of unlawful discrimination, backpay 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.[23]

The dual statutory objectives of Title VII incorporated into the new standard are (1) the elimination of discriminatory employment practices, and (2) the compensation of victims of unlawful discrimination. The standard directs the trial judge to award back pay when, in his opinion, the award will further the statutory objectives of Title VII incorporated into the new standard. Thus an understanding of when back pay should or should not be awarded can only be achieved through an analysis of the role back pay plays in the accomplishment of these statutory objectives.

The Supreme Court stated in *Griggs v. Duke Power Co.*[24] that the primary objective of Title VII is the elimination of obstacles that have operated in the past to deny certain classes of employees equal employment opportunities.[25] This objective of Title VII incorporated into the new standard can be furthered through the routine award of back pay to the successful plaintiff.[26] The potential liability of an employer against whom a back pay judgment has been rendered is great.[27] Hence, as the Court noted in *Albemarle*, the "reasonably certain prospect" of a back pay penalty can act as an inducement to the employer or union to reevaluate their employment policies in light of the mandates of Title VII, thereby facilitating the elimination of discriminatory employment practices.[28] Significantly, the employer would be induced to eliminate questionably legal employment practices without the necessity of the initiation of a lawsuit against him. In this regard, the Eighth Circuit in *United States v. N.L. Industries, Inc.*[29] observed: "If backpay is consistently awarded, companies . . . will certainly find it in their best interest to remedy employment procedures without court intervention . . . ."[30] Thus the new standard indicates that back pay should

23. *Id.* at 421 (footnote omitted).
24. 401 U.S. 424 (1971).
25. *Id.* at 429.
26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).
27. *See* N.Y. Times, Jan. 19, 1973 § 1, at 1, col. 1. A.T.&T. in settlement of an action brought for employment discrimination under Title VII and the Equal Pay Act, agreed to pay fifteen million dollars in back pay to the aggrieved employees. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970).
28. 422 U.S. at 417-18.
29. 479 F.2d 354 (8th Cir. 1973).
30. *Id.* at 379.

be routinely awarded since this would greatly facilitate the elimination of discriminatory employment practices, a basic objective of Title VII.

The second statutory objective of Title VII which is to govern the decision to award or deny back pay is directed at compensating the victims of unlawful discrimination.[31] An examination of the legislative history of Title VII conclusively reveals the back pay provision of Title VII was patterned after a similar provision of the National Labor Relations Act (NLRA).[32] Both back pay remedies are discretionary; that is, both sections 10(c) of the NLRA and section 5(g) of Title VII statutorily authorize the granting of relief with or without pack pay. The case law under the NLRA back pay provision establishes that the primary purpose of the remedy is to compensate the victim of an unfair labor practice, rather than to punish the employer.[33] Since Congress patterned the Title VII back pay remedy after the NLRA back pay provision, the Court in *Albemarle* concluded it was the intention of Congress that the Title VII remedy be similarly construed.[34]

Section 5(g) of Title VII expressly conditions the back pay award upon a finding that the employer has intentionally engaged in an unlawfully discriminatory employment practice.[35] The Fifth Circuit in *Kober v. Westinghouse Electric Corp.*[36] after a review of the relevant decisions of the other circuits concluded: "Intentional unfair employment practices are those engaged in deliberately and not accidentally. No wilfullness on the part the employer need be shown to establish a violation of section 706(g)."[37]

It is well established that a specific intent to discriminate on the part of the employer need not be shown to justify a back pay recovery.[38]

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31. 422 U.S. at 418. *See* 118 CONG. REC. 7168 (1972) (Conference Committee Report by Senator Williams).

32. 29 U.S.C. § 160(c) (1970). The drafters of Title VII expressly stated that they were using the NLRA as a model. 110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey). The predecessor of Title VII was H.R. 405, 88th Cong., 1st Sess. (1963). H.R. 405 provided for an Equal Employment Opportunity Commission modeled after the National Labor Relations Board.

33. Under the NLRA, upon finding an unfair labor practice, back pay is routinely awarded even though the employer acted in good faith. *See* American Machinery Corp. v. NLRB, 424 F.2d 1321 (5th Cir. 1970); Laidlaw v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *But see In re* McKesson & Robbins, Inc., 19 N.L.R.B. 778 (1940) (refused to award back pay upon a finding of good faith on the part of the employer).

34. 422 U.S. at 422.

35. *See* note 2 *supra.*

36. 480 F.2d 240 (3d Cir. 1973).

37. *Id.* at 246.

38. *See, e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973);

An employer has intentionally engaged in an unlawful employment practice for which back pay may be awarded if he has implemented the discriminatory practice *deliberately* and not *accidentally*.[39]

The Court in *Albemarle* emphasized Title VII's concern with the consequences of employment discrimination and the lack of significance under Title VII of the motivation or intent to discriminate on the part of the employer:

> Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the *consequences* of employment practices, and not simply the motivation."[40]

Since the intent of the employer is of no real significance, it is unlikely that a good faith defense or a showing that the employer did not specifically intend to discriminate will be successful. It is clearly the purpose of the award, as the new standard indicates, to compensate the victims of unlawful discrimination.[41] It is not the purpose of the award to punish the employer for moral turpitude. Thus a trial court, exercising its discretion as guided by the new standard, would be furthering the objectives of Title VII by awarding back pay even when the employer had engaged in the unlawful employment practice in good faith. The Court in *Albemarle* specifically rejected the good faith defense asserted by the employer in that case.[42]

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1006, 1007 (1971, 1972). The Fourth Circuit stated in *Robinson*:

> [I]t is agreed that back pay should not be awarded in the absence of a specific intent to discriminate. . . . The principal answer . . . is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice.

Id. at 804.

39. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251 (5th Cir. 1974); Shaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1227 (9th Cir. 1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir. 1971), *petition for cert. dismissed*, 404 U.S. 1006, 1007 (1971, 1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Local 189, United Papermakers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

40. 422 U.S. at 422, *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (emphasis in original).

41. Cases cited note 38 *supra*.

42. The employer's good faith defense was based on the fact that judicial decisions had only recently elucidated the discriminatory impact of seniority systems such as the one that had been implemented for a considerable period of time by the Albemarle Company. Furthermore, as early as 1968, the Albemarle Company had attempted to recruit black employees into one of its departments and to eliminate strict segregation through a departmental merger.

CONCLUSION

Although the back pay award is essentially compensatory rather than punitive in nature, there is little doubt that from the employer's standpoint the award is a penalty.[43] Thus, where the employer is in good faith and free from wilful wrongdoing, the courts are faced with the dilemma of penalizing one of two innocent parties. If they elect to exonerate the good faith employer and not award back pay, they are penalizing the innocent employee who has lost his wages as a result of unlawful discrimination.

Courts faced with this problem in the past, while noting that the good faith employer may have equities in his favor, have justifiably emphasized the compensatory nature of the Title VII back pay remedy and awarded the employee back pay.[44] The Fifth Circuit in *Pettway v. American Cast Iron Pipe Co.*[45] reasoned that as between the good faith employer and the aggrieved employee, it is fairer to award back pay since the employer may be better financially able to bear the loss.[46]

There are a number of decisions under Title VII, where the good faith of the employer has led the court to deny the aggrieved employee back pay.[47] The employer's defense in these cases was his good faith reliance upon state female protective legislation, which restricted the hours a female could be required to work or the weight a female employee could be required to lift. Reliance by the employer upon these statutes in formulating his employment policies resulted in a sexually discriminatory employment practice under Title VII. The

43. *See* Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741, 745 (1973) [hereinafter cited as Davidson].

44. *See, e.g.*, Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969). *But see* United States v. St. Louis S.F. Ry., 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 1116 (1973) (back pay denied aggrieved employee because the employer was acting in good faith).

45. 494 F.2d 211 (5th Cir. 1974). *See also* Davidson, *supra* note 43, at 745.

46. 494 F.2d at 252 n.120.

47. *See, e.g.* Kober v. Westinghouse Elec. Corp., 840 F.2d 240 (3d Cir. 1973); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); Leblanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972).

Title VII expressly provides an employer with a good faith defense for all actions taken in good faith reliance upon a published guideline of the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-12(b) (1970). Commentators have viewed this provision as an indiciation that Congress intended for the good faith defense to play a very narrow role under Title VII. *See* Davidson, *supra* note 43, at 746.

Justice Blackmun, concurring in *Albemarle*, suggests that good faith reliance upon a state's female protective labor statute should provide the employer with a valid defense under Title VII. 422 U.S. at 448 (Blackmun, J., concurring).

courts in these instances found the equities in favor of the innocent employers who had justifiably relied upon a state statute to exceed those of the aggrieved employees and therefore denied the employees' request for back pay.[48]

The *Albemarle* decision may be read to eliminate this dilemma. The Court has placed the burden upon the employer to presently reevaluate his employment practices or face a reasonably certain back pay penalty.[49] If an employment practice is subsequently found to be unlawfully discriminatory, it must be presumed that the employer neglected to consider the foreseeable consequences of his conduct. Hence, although the employer may have acted in good faith in the sense that he did not intend the discriminatory consequences of his employment practices, his equities can never rise as high as those of the aggrieved employee and he should bear the loss.[50]

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48. *See* cases cited note 48 *supra.*

49. *See* notes 27-30 *supra* and accompanying text.

50. The Court in *Albemarle* remanded on the issue of the "substantial prejudice" that allegedly resulted to the defendants as a result of the inconsistent demands for back pay made by the plaintiffs. Back pay would be denied upon a finding by the district court that the defendants were in fact prejudiced. 422 U.S. at 424.