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After Albemarle: Class-Wide Recovery of Back Pay under Title VII

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AFTER *ALBEMARLE*: CLASS-WIDE RECOVERY OF BACK PAY UNDER TITLE VII

I. Introduction

Title VII of the Civil Rights Act of 1964[1] provides administrative and judicial remedies for victims of discrimination in employment. Employers, engaged in "an industry affecting commerce" and having fifteen or more employees who work at least twenty weeks out of the year, are subject to the statute's strictures.[2] Unions are also subject to the statute if they have fifteen or more members, operate an office or hiring hall, and represent employees.[3]

One remedy available under Title VII is an award of back pay from the date of the alleged violation.[4] Back pay may be defined as court-awarded compensation for the loss of earnings resulting from a discriminatory employment practice.[5] Modeled after similar provisions in the National Labor Relations Act,[6] the back pay provision of Title VII, like the entirety of the statute, has a two-fold purpose. First, it provides employers with incentive to comply with the stat-

1. 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-17 (Supp. III, 1973).

2. *Id.* § 2000e(b) (Supp. III, 1973).

3. *Id.* § 2000e(e)(1970), *as amended*, (Supp. III, 1973). State & local governments and their agencies also fall within the realm of Title VII. *Id.* § 2000e(a)(Supp. III, 1973).

4. *Id.* § 2000e-5(g) (Supp. III, 1973). A variety of remedies are available for the victim of employment discrimination, among which Title VII is but one. As one commentator has noted, a single claim of employment discrimination based upon race may be pursued under at least eight possible theories of relief in six possible forums. Beard, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469 (1972). As an example, following the Supreme Court's holding in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), could be applied as a means of reaching private discrimination in the sale of real estate, several courts have applied the 1866 Act to the realm of employment discrimination. *See, e.g.*, Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 483-84 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). *See also* Gardner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 455-62 (1971). In Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972) it became apparent that the 1866 Civil Rights Act had certain advantages over Title VII as a vehicle for employment discrimination suits. Significantly, the court held that, in a suit under § 1981, there was no necessity to exhaust Title VII's administrative remedies. *Id.* at 1046. *See also* Young v. ITT Co., 438 F.2d 757 (3d Cir. 1971).

5. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.9 (1975).

6. 29 U.S.C. § 160(c)(1970). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975).

ute. Second, by furnishing the victim of discrimination with compensation for wages lost as a result of the violation, it makes the plaintiff whole.[7]

Initially intended as an instrument of compensation, the back pay award has become a formidable weapon in the hands of employee plaintiffs. This metamorphosis has been hastened by recent case law developments. The purpose of this Note is to review these developments, and to determine whether this increase in the award's potency is desirable.

II. The End of the Good Faith Defense

In *Albemarle Paper Co. v. Moody*[8] present and former black employees brought suit against defendants' employer and union under Title VII. At issue was the Albemarle plant's seniority system,[9] which, it was alleged, had the effect of relegating black employees to lower-paying and less-skilled jobs than their white co-workers. The system was the product of a collective bargaining agreement between the company and the union.

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7. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). *See also* United States v. N.L. Industries, Inc., 479 F.2d 354, 378-79 (8th Cir. 1973). In calculating the back pay award, the court will resolve all doubts against the employer. The claim need not be presented with unrealistic exactitude. A number of approaches of computation have been used. One method frequently used is the averaging of the pay scales of the most desirable jobs from which the claimant was excluded. Another is the computation of wages earned by a group of employees not injured by discrimination. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-63 (5th Cir. 1974).

The ingredients of back pay also encompass more than straight salary. Interest, overtime shift differentials, and fringe benefits are among the items included in the awards. Adjustments to the retired employee's pension are also included. *Id.*

An award of attorney's fees is also within the court's discretion. Several factors will be considered in determining the size of such fees: the amount of time and labor expended in the action's prosecution, the novelty and difficulty of the questions at issue, the skill needed to perform the service properly, the preclusion of other employment by the attorney due to the acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or similarly restrictive circumstances, the undesirability of the case, if any, the nature and length of the professional relationship with the client, awards in similar cases, experience and reputation of counsel, and the amount involved. It has been noted that the courts do not have a mandate to make counsel rich at the employer's expense. Johnson v. Georgia Highway Express, 488 F.2d 714, 716-19 (5th Cir. 1974).

Needless to say, these class actions can result in extremely large awards. For example, the settlement in one celebrated case amounted to $38,000,000. EEOC v. ATT Co., 365 F. Supp. 1105 (E.D. Pa. 1973), *modified*, 506 F.2d 735 (3d Cir. 1974).

8. 422 U.S. 405 (1975).

9. *Id.* at 408-09.

The plaintiffs had commenced suit in 1966, after having obtained the requisite right-to-sue notice from the Equal Employment Opportunity Commission.[10] In the early stages of this class suit, they had assured the court that they would not seek monetary damages. In 1970, however, after four years of discovery, plaintiffs amended their complaint to include a request for back pay.[11]

In 1971, the District Court for the Eastern District of North Carolina found that the seniority system in effect at Albemarle operated in a discriminatory manner violative of Title VII. In so ruling, however, the court refused to grant plaintiffs an award of back pay.[12] The court attached much significance to the four year hiatus that had passed prior to the amendment of the complaint, and concluded that the effect of this delay was to work substantial prejudice on the defendants. The court reasoned that the defendants would have exercised greater zeal in their conduct of the suit had they only been aware of the pending back pay claim.[13]

Of greater import in the court's denial of the award, however, was its finding that there was no evidence of bad faith non-compliance with the Act on the part of the defendants.[14] It was this holding that was later reversed by the Court of Appeals for the Fifth Circuit.[15]

In resolving several other related issues, the court of appeals held that if discrimination were, in fact, found, then the award of back pay could only be denied for reasons that would not frustrate the purposes of Title VII.[16] The anti-discrimination mandate of the Act, along with the compensatory nature of the back pay award, compels the making of the award in all but exceptional circumstances.[17]

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10. *Id.*

11. *Id.*

12. Moody v. Albemarle Paper Co., 474 F.2d 134, 137 (4th Cir. 1973), *aff'd*, 422 U.S. 405 (1975).

13. *Id.* at 140.

14. *Id.*

15. *Id.* at 142.

16. *Id.*

17. *Id.* The court of appeals took a similarly expansive view with regard to the award of attorneys' fees, analogizing the instant case to Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), in which the Supreme Court held that when plaintiffs were successful in obtaining injunctions under Title VII, attorneys' fees should be awarded in all but exceptional circumstances. The Court based its ruling upon the strong Congressional policy, expressed in Title VII, of eliminating discriminatory employment practices. *Id.* at 402. The court of appeals in *Albemarle* also relied upon this anti-discrimination policy in awarding back pay. 474 F.2d at 142.

Clearly, the district court and the court of appeals were in conflict over the degree of latitude to be afforded the trial judge in awarding back pay. This issue has, in fact, long been unsettled. In *Kober v. Westinghouse Electric Co., Inc.*[18] the court felt it proper to exercise its discretion to deny the award after a finding of discrimination.[19] Here the denial was based upon the fact that an employer had refused to allow his female employee to work hours in excess of those allowed by his state's protecive laws. In so doing, he was caught between the Scylla of Title VII and the Charybdis of state sanctions. His good faith was illustrated by the fact that, upon repeal of the state stautue, he immediately promoted the employee to a position necessitating the extra hours.[20]

A contrary view was taken in *Head v. Timken Roller Bearing Co.*,[21] where it was alleged that the employer operated a racially discriminatory transfer system. The court ruled that since the relief provided in Title VII was compensatory, rather than punitive, the finding of discrimination mandated a back pay award absent exceptional circumstances.[22]

The Supreme Court settled this brewing dispute when it ruled, in *Albemarle*, that the award should be nearly automatic and follow hard upon a finding of discrimination.[23] Justice Stewart, writing for the majority, observed that, under the National Labor Relations Act, awards of back pay were made as a matter of course.[24] He further noted the power a back pay award possessed as an incentive to employers to comply with the provisions of Title VII, and concluded that increasing the certainty of the remedy would best effec-

18. 480 F.2d 240 (3d Cir. 1973).

19. *Id.* at 246-50.

20. Similar cases have addressed the plight of the employer faced with discriminatory, but nonetheless binding, state protective laws. In LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972), the court of appeals affirmed the district court's denial of back pay to female employees who had allegedly been deprived of employment opportunities. Here the defendant had relied on state strictures that limited the number of hours women could work. The court ruled that a denial of back pay was not an abuse of discretion by the district court. *Id.* at 1229. A like result was reached in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), where the denial of back pay was upheld on the rationale that state statutes, like their federal counterparts, are entitled to a presumption of constitutionality. *Id.* at 254.

21. 486 F.2d 870 (6th Cir. 1973).

22. *Id.* at 876.

23. 422 U.S. at 421.

24. *Id.* at 420; *see* text accompanying note 6 *supra*.

tuate the statute.[25]

Albemarle also pointed out that, during the passage of the Equal Employment Opportunity Act of 1972,[26] the Congress considered and rejected certain bills which would have limited the power of the judiciary to award back pay.[27] The opinion stated that this was indicative of the congressional intent that the courts should have full power to grant the most equitable relief possible.[28]

The effect of the *Albemarle* decision will most likely be seen in large, automatic awards of back pay. The Supreme Court has held that the absence of bad faith under Title VII does not serve to weigh the scales of equity in favor of the employer.[29] This holding effectively mandates literal strict liability.

It should be noted that it is not only the employer who is exposed in these situations, but also the union. The union is, as has been observed, liable under Title VII.[30] As a result of *Albemarle*, the good faith defense will little avail defendant unions in future litigation. The union's liability is often triggered through its approval of the collective bargaining agreement.[31] The agreement may incorporate discriminatory labor practices, *i.e.*, a seniority system, or a promotion scheme, or it may simply operate to preserve a statistical disparity between white and minority workers. In any event, the union is facing the same burden as the employer.

In *Myers v. Gilman Paper Corp.*,[32] a pre-*Albemarle* case, plaintiffs established the existence of discriminatory elements in a collective bargaining agreement between defendants employer and union. The union contended it had exhibited good faith and a willingness to comply with Title VII. In the course of collective bargaining sessions, the union had submitted several suggestions designed to con-

25. 422 U.S. at 417-18.

26. 42 U.S.C. § 2000e-16 (Supp. III, 1973).

27. 422 U.S. at 420-21.

28. *Id.*

29. *Id.* at 422.

30. *See* text accompanying note 3 *supra*.

31. Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 61 (5th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3319 (U.S. Nov. 14, 1975); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1379 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381-82 (5th Cir. 1974). Mere participation in the collective bargaining agreement seems to be enough to make the union liable. Local 189, Papermakers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The union also has an affirmative duty to protest an employer's discriminatory practice. *See* LAB. REL. REP., F.E.P. MANUAL 421:801.

32. 392 F. Supp. 413 (S.D. Ga. 1975).

form the present agreement to the requirements of Title VII. Upon the employer's rejection of these suggested additions, the union went out on strike.[33]

On these facts, it is quite arguable that the union had, in fact, exhibited good faith. Nevertheless, it was held liable under Title VII.[34] While this case is on appeal, it seems apparent that the subsequent *Albemarle* decision has obviated the good faith argument.

A recent case may illustrate the inevitability of the back pay award in the post-*Albemarle* period. In *United States v. United States Steel Corp.*[35] a seniority system was once again under attack. This mammoth suit resulted in a district court award to 61 members of three separate classes.[36] In doing so, however, the court refrained from awarding back pay to the plaintiffs. It based its decision upon several factors, not the least of which was the absence of bad faith on the part of the employer. The court noted the company's bona fide attempts to comply with the law and the absence of any unjust enrichment on their part.[37] Further, by granting wide-ranging injunctive relief, the court had provided a "counterweight" for the denial of back pay.[38]

The district court's decision was rendered in the pre-*Albemarle* environment, where a court might use a degree of discretion in determining whether or not to award back pay. It should be noted, however, that the Fifth Circuit had always described the court's freedom in these situations as "narrow."[39] In fact, the only situation in which the exercise of discretion by Fifth Circuit courts had been approved was that in which an employer was faced with a state statute that required violation of Title VII.[40] Accordingly, it might be of little surprise that the court of appeals vacated the district

33. *Id.* at 420. By "union" the court was referring to the United Paperworkers International Union and its locals. These were not the only defendants in this case. *Id.*

34. *Id.* at 421. The court noted that, under Title VII, "[a]ll that need be shown is that, prior to the effective date of the Act, the Company engaged in racial discrimination, and that, after the effective date of the Act, the previous discriminatory policies were carried forward by the racially neutral practices of the Unions." *Id.* at 423. It should be observed that in a situation such as this, the recalcitrant employer can force the union into liability. Thus, the interests of the employer and the union are clearly divergent here.

35. 371 F. Supp. 1045 (N.D. Ala. 1973), *vacated* 520 F.2d 1043 (5th Cir. 1975).

36. 520 F.2d 1043 (5th Cir. 1975).

37. 371 F. Supp. at 1062.

38. 520 F.2d at 1053.

39. *Id.* at 1060 n.1.

40. *Id.*

court's judgment on the issue of back pay, citing *Albemarle*. In so doing, the court observed that despite its circuit's historically restrictive view of the amount of discretion exercisable in such cases, a slight inconsistency might exist between the law in its jurisdiction and *Albemarle*.[42] The court said at the same time, however, that on this set of facts the award of back pay would be granted in any event.[43] It is submitted that any variance between the Fifth Circuit's rule and the law after *Albemarle* is very slight, indeed.

Other courts have followed *Albemarle* even more closely. In *Hairston v. McLean Trucking Co.*[44] the Court of Appeals for the Fourth Circuit ruled that back pay was to be awarded to black plaintiffs who had successfully challenged the defendant's discriminatory hiring and seniority policies. The court held that *Albemarle* mandated a disregard of the good faith defense.[45] In *Russell v. American Tobacco Co.*,[46] a union local argued that a back pay award should not be lodged against them on the grounds that the union was a non-profit making organization. The Court of Appeals for the Fourth Circuit, in affirming the district court's award of back pay, pointed to *Albemarle's* observation that the purpose of such an award is not only compensatory, but was designed as a deterrent to unfair labor practices of both employers and unions.[47]

These cases illustrate the effect the *Albemarle* decision is already having in the employment law field. Time will tell whether the elimination of the good faith defense is in fact operating as an effective deterrent.

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41. *Id.* at 1060.

42. *Id.* at 1060 n.1.

43. *Id.*

44. LAB. REL. REP., F.E.P. CAS. (11) 91 (4th Cir. 1975); *accord*, United Transportation Union Local No. 974 v. Norfolk & W. Ry. Co., No. 74-1788 (4th Cir., Sept. 22, 1975). In *United Transportation* the district court had denied back pay following the court of appeals' finding of discrimination in Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344 (4th Cir.), *cert. denied*, 412 U.S. 993 (1973). In the instant case, the court of appeals relied upon *Albemarle* in awarding back pay. At issue were back pay awards for discrimination found to exist in the railroad's mostly black Barney Yard and the mostly white CT Yard. In denying back pay, the district court had noted: (1) that the rate of pay for each classification at the Barney and CT Yards was identical; (2) in 1968, the unions had rejected the railroad's offer to combine the two yards; (3) that the two yards were separate and distinct; and (4)the slower rate of promotion at the Barney Yard resulted from objective employment needs and personal choice on the part of the employees. These reasons were of no avail in the court of appeals.

45. LAB. REL. REP., F.E.P. CAS. (11) at 94-95.

46. LAB. REL. REP., F.E.P. CAS. (11) 395 (4th Cir. 1975).

47. *Id.* at 402.

III. After *Albemarle*: Unanswered Questions and Unsolved Problems

Despite *Albemarle*, certain aspects of the class action for back pay still seem obscure. A federal class action may be brought pursuant to either Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3).[48] Federal Rule 23(b)(2) is primarily intended to reach situations where final relief is of a declaratory or injunctive nature, rather than cases in which the appropriate relief is monetary damages.[49] Although no like restriction is found in Rule 23(b)(3),[50] Rule 23(c)(2)[51]

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48. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) was the first case to indicate that the class action for back pay had to comply with the applicable federal rules. *Id.* at 499. Rule 23 sets out the showing that must be made before a class action may be certified.

49. FED. R. CIV. P. 23(b) provides:

> **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . .
>
> . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

50. FED. R. CIV. P. 23(b)(3) provides:

> **Class Actions Maintainable.** An action may be maintained as a class action if . . .
>
> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .

51. FED. R. CIV. P. 23(c)(2) requires, in (b)(3) class actions, "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The rule goes on to spell out the exact items that this notice must contain. It has been pointed out that this notice may be supplemented in a 23(b)(3) class suit through the use of the discretionary notice authorized in Rule 23(d)(2). 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55 (2d ed. 1975). In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court held that 23(c)(2) left "no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." *Id.* at 175. At the same time, however, the Court observed that this decision addressed only class actions maintained under 23(b)(3), noting that "[b]y its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)." *Id.* at 177 n.14. Some courts have held that notice is required for the (b)(2) class suit, *see, e.g.*, Lopez v. Wyman, 329 F. Supp. 483 (W.D.N.Y. 1971); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971), but such a result is not indicated by the language of Rule 23(c)(2). 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786 (1972). *But see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Query whether *Mullane*'s holding that minimum due process standards must be met in all types of actions mandates notice in (b)(2) suits? *See* Ward & Elliot, *The Contents & Mechanics of Rule 23 Notice*, 10 B.C. IND. & COM. L. REV. 557, 559-561 (1969).

mandates very strict notice requirements for a (b)(3) class action. These notice requirements are costly, and can prove extremely onerous to plaintiffs suing because of job discrimination. Thus, the issue of under which portion of Rule 23 the class suit will be brought is of paramount importance.[52]

The early cases under Title VII that sought money damages and were brought pursuant to Rule 23(b)(2) often met with failure. For example, the District Court for the District of Louisiana held, in *Baham v. Southern Bell Telephone & Telegraph Co.*,[53] that such an award was not recoverable under 23(b)(2).[54] The court observed that the procedure under Rule 23(b)(2) was simply not designed to allow the court to examine the particular circumstances affecting the individual members of the class.[55] A similar result was reached in *Gutierrez v. Quinn & Co., Inc.*,[56] where the court allowed a suit under Title VII to proceed as a class action only as it pertained to the granting of injunctive relief. The determination of the relief to be accorded for "past effects of . . . discrimination" would be confined to the single plaintiff.[57]

These decisions operate to discourage the maintenance of class suits for back pay under Title VII. Plaintiffs, once denied monetary recovery under Rule 23(b)(2), were exceedingly unlikely to regroup in order to pursue their cause under the stiffer requirements of Rule 23(b)(3). This result would appear to be inapposite to the public policy, as embodied in Title VII,[58] of encouraging effective opposition to discriminatory employment practices.

The trend of recent case law, in encouraging these suits whenever possible, is more in line with the aforementioned policy. In *Paddison v. Fidelity Bank*,[59] the District Court for the Eastern District of Pennsylvania indicated that merely labeling back pay as equitable relief in order to fit a suit under Rule 23(b)(2) would present various

52. "Overemphasis of the notice requirement may spell doom for the class action." 3B J. MOORE, *supra* note 51, ¶ 23.55, at 23-1157 to 23-1158. This problem seems to have been recognized by Justice Douglas. Eisen v. Carlisle & Jacquelin, 417 U.S. at 186 (Douglas, J., dissenting).

53. 55 F.R.D. 478 (D. La. 1972).

54. *Id.* at 480-81.

55. *Id.* at 481.

56. 55 F.R.D. 395 (D.N.M. 1972).

57. *Id.* at 396.

58. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

59. 60 F.R.D. 695 (E.D. Pa. 1973).

problems. Faced with such a fiction the court would be "on the horns of an intolerable dilemma . . . ."[60] It must either designate a broad class, thus complicating the issue of damages, or designate a narrow class, a method that might foreclose some discriminated classes from obtaining relief.[61] The final alternative open to the court would be denial of certification "under (b)(2) for what are really (b)(3) reasons."[62] The court went on to say that while monetary awards could properly be styled equitable relief for some purposes and therefore warrant a 23(b)(2) suit, awards of back pay were more properly in the province of a suit under Rule 23(b)(3).[63] In this case, however, a satisfactory result was nevertheless reached. The court allowed trial on the merits, and then granted injunctive relief, reserving determination of damages until after the plaintiffs had obtained certification under Rule 23(b)(3).[64]

In *Wetzel v. Liberty Mutual Insurance Co.*,[65] the Court of Appeals for the Third Circuit met the 23(b)(2)/23(b)(3) issue head-on. The court held that Rule 23(b)(2) did not, in fact, apply only to applications for injunctive relief.[66] In so holding, the court declared that the test to be applied would revolve about the conduct of the defendant. If the defendant had acted on grounds generally applicable to the whole class, and which would support injunctive relief, then the class action for back pay would be allowed under Rule 23(b)(2).[67]

The effect of the *Wetzel* decision was seen in *Rhodes v. Weinberger*,[68] in which the District Court for the Eastern District of

60. *Id.* at 698.

61. *Id.*

62. *Id.*

63. *Id.*

64. This approach is considered a bifurcated class action trial. If the existence of discriminatory employment practices can be proven, the second stage of such a trial is reached, in which determination of the validity of each individual back pay claim is made. *See* Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 797 (1974). This procedure has been validated in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974). The bifurcated trial approach has been cited as conforming with the *Albemarle* decision. United States v. United States Steel Corp., 520 F.2d 1043 1053-54 (5th Cir.), *cert. denied*, 421 U.S. 1011 (1975).

65. 508 F.2d 239 (3d Cir. 1975).

66. *Id.* at 248.

67. *Id.* at 250-53; *accord*, Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969).

68. LAB. REL. REP., F.E.P. CAS. (11) 120 (E.D. Pa. 1975).

Pennsylvania reversed field, holding that, after *Wetzel*, both retroactive pay benefits and equitable remedies were proper in a 23(b)(2) suit.[69]

The decision in *Albemarle*, a suit brought under 23(b)(2), seems to have capped this movement away from restrictive interpretation of Rule 23(b)(2). Yet in so doing the decision makes no overt mention of the 23(b)(2)/23(b)(3) issue. By not treating back pay as damages, the class action under Rule 23(b)(2) becomes permissible, thereby facilitating its wider use in future suits.[70] However, in permitting plaintiffs to commence and maintain actions without meeting a notice requirement of the type required under Rule 23(b)(3), the Court may have raised several other troublesome due process problems.

For example, situations may arise in which members of a class win a money judgment on behalf of unnamed plaintiffs who may never even learn of the judgment. Significantly, the plaintiffs may lose the suit, thereby precluding other member of the class from action. If the class is defined too broadly, the dangers of wide-ranging res judicata effect are very real.[71] On the other hand, if the class is drawn too narrowly, the purposes behind the class action will be frustrated, the end result being a tiresome and duplicative multiplicity of suits.

The Fifth Circuit seems to have found a reasonable solution to these difficulties. In *Bing v. Roadway Express Inc.*,[72] the court of appeals approved discretionary notice under the authority of Rule 23(d)(2).[73] This Rule allows appropriate court discretion in setting up procedures in each case tailored to ensure protection of class members and the fair conduct of the trial, with notice being given to some or all of the members of the class.[74] In *Bing*, the adoption

69. *Id.* at 121-22.

70. *See* text accompanying note 52 *supra*.

71. In a 23(b)(3) class action, the class members are given the opportunity to opt out of the suit. No such opportunity exists under (b)(2). 3B J. MOORE, *supra* note 51, ¶ 23.60 (2d ed. 1975).

72. 485 F.2d 441 (5th Cir. 1973).

73. *Id.* at 448.

74. FED. R. CIV. P. 23(d) provides:

> **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in

of this procedure permitted the suit to proceed under Rule 23 (b)(2),[75] despite the presence of a demand for back pay as well as equitable relief. The court had granted broad injunctive relief, but was also faced with a claim for back pay by black employees of the defendant who had been denied positions as drivers. In order to determine which members of the class were entitled to individual relief, the district court had ordered the defendant to promulgate notice of the suit to all black employees, asking those who were interested in and qualified for the position to so inform the court.[76] Nine individuals responded. This procedure was approved by the court of appeals.[77] The use of Rule 23(d)(2) in this manner allows the plaintiff to proceed with the suit without having to bear the cost of notifying all members of the class. Most of the cost is thus avoided.

The *Bing* decision also hit upon a satisfactory solution for the res judicata problem created by a lack of notice. The court cited Rule 23(c)(3), which provides that an action brought under Rule 23(b)(2) shall describe those persons whom the court finds to be members of the class, as controlling in this situation.[78] This rule has the effect of binding both the defendant employer and the plaintiff employees, without sacrificing the rights of any unnamed potential plaintiffs. The use of the rule permits a fine balance between the due process rights of all the class members, the intent of the Federal Rules of Civil Procedure, and the public policy encouraging effective anti-discrimination suits.[79] It would thus seem that *Bing* might be a harbinger of things to come in this area. Unfortunately, procedural confusion still exists,[80] and it is said that the watershed *Albemarle*

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the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .

75. 485 F.2d at 447.

76. The text of the notice is reproduced in the opinion of the court. *Id.* at 444 n.3. The court observed that a similar procedure had been used in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 520 (E.D. Va. 1968). 485 F.2d at 448.

77. 485 F.2d at 448.

78. *Id.* at 447. FED. R. CIV. P. 23(c)(3) provides:

The judgment in an action maintained as a class action under the subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class . . . .

79. Rosen v. Public Service Electric & Gas Co., 477 F.2d 90, 96 n. 11 (3d Cir. 1973). *See* C. WRIGHT, FEDERAL COURTS, 314 (1970).

80. *See, e.g.*, Marshall v. Electric Hose & Rubber Co., LAB. REL. REP., F.E.P. CAS. (11)

decision sheds so little light upon a solution.

In many ways the most significant issue left unsettled after *Albemarle* is the defendant's right (or lack of same) to a jury trial in a Title VII suit demanding back pay. Traditionally, federal courts have not recognized such a right under Title VII.[81] The reasons behind these holdings may be traced back to the basic equitable nature of the relief being sought. These reasons are well-described in *Johnson v. Georgia Highway Express, Inc.*,[82] where the court of appeals reversed a district court's order granting defendant's motion for a jury trial.[83] In so ruling, the court of appeals observed that the demand for back pay was not in the nature of damages, but rather an integral part of the statutory equitable remedy.[84] Whether or not to grant such an award was a question for the judge, rather than one for the jury.

Although the weight of authority appears to be moving away from characterization of back pay as damages, there is no clear-cut indication that this approach will be followed for all purposes.

Dissenting in part in the *Albemarle* decision, Justice Rehnquist pointed to a troublesome after-effect of the Court's ruling that back pay must follow a finding of discrimination:[85]

> [P]recisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question . . . of whether either party may demand a jury trial under the Seventh Amendment becomes critical.

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753 (D. Del. 1975), in which back pay was classified as equitable relief for the purpose of a (b)(2) class action. However, where the plaintiffs sought actual and punitive damages, the court required certification under Rule 23(b)(3). *Id.* at 757. Of equal interest is Polston v. Metropolitan Life Insurance Co., LAB. REL. REP., F.E.P. CAS. (11) 371 (W.D. Ky. 1974), wherein a sex discrimination suit was classified as being primarily a (b)(3) proceeding, insofar as plaintiff sought monetary relief on four different claims and injunctive relief on only one claim. *Id.* at 374. In PIVA v. Xerox Corp., LAB. REL. REP., F.E.P. CAS. (11) 1259 (N.D. Cal. 1975), plaintiff was permitted to bring suit under Rule 23(b)(2), even though the individual back pay claims presented problems of manageability. The court, citing *Paddison*, ordered a bifurcated proceeding. *Id.* at 1268.

81. *See, e.g.*, Loo v. Gerarge, 374 F. Supp. 1138 (D. Hawaii 1974); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974); Hayes v. Seaboard Coast Line R.R. Co., 46 F.R.D. 49 (S.D. Ga. 1969).

82. 417 F.2d 1122 (5th Cir. 1969).

83. *Id.* at 1125.

84. *Id.*

85. 422 U.S. at 442.

He argued that if the award does follow hard upon a finding of discrimination, the flexibility usually associated with equitable remedies would be lost. This makes the back pay relief resemble damages for a tort of discrimination, in which case the defendant would be entitled to a jury trial as a matter of right. As the issue was not raised by either party in this suit, its resolution must await another day.

Conclusion

The elimination of the good faith defense through *Albemarle* has smoothed plaintiffs' path to relief considerably. Establishment of a prima facie case of discrimination has always been easier under Title VII than under the Constitution.[86] *Albemarle* makes this the sole hurdle plaintiffs must leap on the road to a sizable award. Proof of mitigating good faith on the part of the employer or union will be irrelevant except in the most extreme circumstances. Further, the expense of maintaining a sizable class suit has also been reduced through decisions liberalizing practice under Rule 23(b)(2). Since it will now be easier for the plaintiffs to assemble a truly massive class, awards may well approach crushing dimensions.

These recent developments pose a twofold threat. First, with the gun of an awesome recovery pointed squarely at the employer's head, he will be forced into settlement of claims that may actually lack merit. Second, the union, whose liability can be triggered so easily, stands in a most delicate position. Frequent recoveries against union locals could drain the international union's treasury, a result hardly intended by Title VII. During passage of Title VII, opponents claimed that the Civil Rights Act of 1964 would destroy the union seniority system. To counteract these charges, the Act's proponents introduced a statement of additional views declaring that management and union freedoms were to be left undisturbed to the fullest extent possible.[87] The present plight of the unions refutes these sentiments. As potentially catastrophic as back pay

86. *See* Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), in which a class suit challenged the validity of the Georgia bar exam. The attempt was made to apply Title VII methods of test validation, *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971), to a due process and equal protection challenge. The court of appeals refused to apply the *Griggs* standards. 517 F.2d at 1096-97.

87. SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 2150 (Comm. Print 1972).

awards may be to private employers, they may be even more destructive to unions.

If there is truth in the ancient maxim that a society may be judged by its laws, then this society has taken very strong steps to eradicate discriminatory employment practices. Unfortunately, it appears that, on occasion, through the operation of these same laws, the right-minded employer or union will end up paying the price of these policies.

B. Martin Druyan