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THE DEDUCTION OF UNEMPLOYMENT COMPENSATION FROM BACK-PAY AWARDS UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[1] The Title applies to employers,[2] employment agencies,[3] and labor organizations.[4] If conciliatory efforts by the Equal Employment Opportunity Commission fail, victims may bring suit in federal court.[5] In the event that the defendant is found guilty of a discriminatory employment practice in violation of Title VII, the court may order appropriate affirmative relief, including reinstatement and back pay.[6] In the interim between the wrongful discharge and the subsequent judgment awarding back pay, plaintiff-employees often collect unemployment insurance benefits.[7] Federal courts disagree over whether these benefits should be deducted from back-pay awards.

In Title VII cases, courts approach state unemployment insurance benefits in three ways. First, some courts deduct benefits from the back

1. 42 U.S.C. §§ 2000e-17 (1976).

2. *Id.* § 2000e-2(a). For the purposes of the Act, "employer" includes any person employing fifteen or more individuals engaged in an industry affecting interstate commerce. For specific definitions and exemptions, see *id.* § 2000e(b).

3. *Id.* § 2000e-2(b).

4. *Id.* § 2000e-2(c).

5. *Id.* § 2000e-5(f). The Commission has a certain period to file a civil action on behalf of the employee. After receiving notice of the expiration of this period, the employee has 90 days to bring suit in his own behalf against the alleged discriminator.

6. *Id.* § 2000e-5(g). Either the employer, employment agency, or labor union responsible for the unlawful employment practice issues the back pay. *Id.* The Act limits back-pay liability to the two years prior to the filing of the charge with the Commission. *Id.*

7. Congress enacted the national system of unemployment insurance during the Great Depression. The program is partially funded by the federal government but is administered by the individual states. A payroll tax assessed against employers provides the major source of funding for unemployment benefits. The federal government initially imposes the tax, but an employer may offset up to 90% of the tax by contributing to an approved state unemployment insurance fund. Each state has its own set of guidelines, supplementing the general federal requirements. Normally, an employer's contribution will be credited to a separate state fund account.

When an unemployed claimant files for benefits, his past employment within a recent base period (usually one year) determines his eligibility and level of payments. The weekly payments, which usually continue up to 26 weeks, generally approximate half of the claimant's weekly earnings, assuming full-time work during the base period. An "experience rating," which measures the employer's propensity for creating unemployment in the state, determines the rate of tax paid by each employer. *See* NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOY-

pay owed to the plaintiff.[8] This approach relieves the defendant of the portion of the damages collected by the plaintiff in unemployment benefits. Second, some courts disregard unemployment benefits in the computation of back pay.[9] This approach allows the employee to retain the full amount of back pay, as well as any benefits received in the interim. Third, some courts require that the employer or employee reimburse the state unemployment insurance fund as a condition of the award.[10] This approach leaves the plaintiff in the same position as if the court had deducted the benefits from the back-pay award, but does not relieve the defendant (employer, employment agency, or union) of liability.

This Note argues that federal courts should not deduct unemployment insurance benefits from Title VII back-pay awards. Part I reviews the legislative history and purposes behind the remedial provisions of Title VII. Part I also presents the arguments that courts have advanced regarding the deduction of unemployment benefits from Title VII back-pay awards. Part II assesses these arguments in light of analogous common law doctrine and the legislative objectives of Title VII, and advances arguments not yet considered by the courts. Finally, Part II concludes that federal courts should resolve this division of authority by not deducting unemployment benefits from Title VII back-pay awards.

I. CONFLICTING INTERPRETATIONS OF TITLE VII REMEDIAL PROVISIONS

Courts finding Title VII violations 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 back pay . . . or any other equitable relief as the court deems appropriate."[11] Title VII also provides that back-pay awards should not include "[i]nterim earnings or amounts earnable with reasonable diligence" by the plaintiff.[12] This provision does not affect unemployment benefits because

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MENT COMPENSATION: FINAL REPORT 8-19 (1980) (federal legislative history and description of the present program) [hereinafter cited as NATIONAL COMM'N]. *See also* Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976); Social Security Act, 42 U.S.C. §§ 501-504 (1976). These two acts establish specific federal requirements and provisions.

8. *See infra* notes 24-30 and accompanying text.

9. *See infra* notes 31-43 and accompanying text.

10. *See, e.g.*, EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1318-19 (N.D. Cal. 1979) (ordering plaintiff to repay benefits to the state unemployment insurance fund following successful Title VII action), *aff'd on other grounds*, 676 F.2d 1272 (9th Cir. 1982). *See also* Mazurak, *Effects of Unemployment Compensation Proceedings on Related Labor Litigation*, 64 MARQ. L. REV. 133, 170 (1980) (arguing that courts should order reimbursement of state funds).

11. 42 U.S.C. § 2000e-5(g) (1976).

12. *Id.*

they do not constitute earnings; the employee does not perform any services in exchange for them.[13] Thus, the language of Title VII does not explicitly resolve the question of whether courts should deduct unemployment benefits from back-pay awards.

Legislative history provides some guidance in interpreting the Act's remedial language. Congress enacted Title VII as part of the Civil Rights Act of 1964, thirteen years after the Supreme Court upheld the National Labor Relations Board's (NLRB) policy of refusing to deduct unemployment benefits from its back-pay awards.[14] Statements made in Congress upon the introduction of the bill indicate that the framers of Title VII intended the relief provided to resemble that available under the National Labor Relations Act (NLRA).[15] This implicit endorsement of the NLRB's established practice suggests that Congress anticipated the application of a similar policy to Title VII cases. Moreover, had Congress advocated the deduction of unemployment benefits from back-pay awards, it could have inserted an explicit provision to that effect.[16] Although Congress added the section providing that back-pay awards should not include interim earnings or amounts earnable through reasonable diligence, it did not add a similar provision mandating the deduction of unemployment benefits.[17] Thus, the early legislative history suggests that Congress did not intend courts to deduct unemployment benefits from back-pay awards issued under Title VII.

The Supreme Court has taken an expansive view toward employee remedies under the Civil Rights Act and its 1972 amendments. In amending the Act,[18] Congress intended to fashion the most complete relief possible.[19]

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13. *See* Marshall Field & Co. v. NLRB, 318 U.S. 253 (1943). The decisions under Title VII support this interpretation. If unemployment benefits constituted "interim earnings" under the Act, such benefits would be deductible from back pay awards. Nonetheless, even courts which deduct unemployment benefits have not relied upon this argument. *See infra* notes 24-30 and accompanying text.

14. *See* NLRB v. Gullett Gin Co., 340 U.S. 361 (1951).

15. *See* 110 CONG. REC. 6549 (1964) (Senator Humphrey, in his introductory remarks explaining the basic provisions of Title VII, said, "This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices . . . ."). *See also* 110 CONG. REC. 7214 (1964) (remarks of Senator Clark, reading a memorandum into the record which was in accord with the statements of Senator Humphrey).

The NLRA protects the rights of the workers to associate or refuse to associate with a labor organization and seeks to encourage collective bargaining. 29 U.S.C. §§ 151, 157 (1976). For these purposes, Congress created the National Labor Relations Board to adjudicate disputes and to issue appropriate remedial orders. *Id.* § 153.

16. The NLRA provides for relief without any of the explicit limitations or required deductions provided under Title VII. *Id.* § 160(c).

17. *See* 42 U.S.C. § 2000e-5(g) (1976).

18. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (1972).

19. Senator Williams explained that:

> The provisions of this subsection [2000e-5(g)] are intended to give the courts 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

In *Albemarle Paper Co. v. Moody*,[20] the Supreme Court identified the dual purposes of this relief: to deter discriminatory employment practices and to make the employee whole.[21] Although the court in *Albemarle* did not comment upon deductions from back-pay awards, it concluded that Congress had modeled the back-pay provisions of Title VII on the corresponding provisions of the NLRA,[22] and that courts should deny back pay in Title VII cases only for reasons that would not frustrate the purposes of the Act.[23] Thus, *Albemarle's* interpretation of the language and legislative history of Title VII suggests that Congress intended a broad application of remedial measures.

Nonetheless, a majority of federal courts have departed from established tort doctrine and have ordered such deductions. For example, in *EEOC v. Enterprise Association Steamfitters Local 638*,[24] the plaintiff claimed a union violated Title VII by discriminating on the basis of union membership and related employment. Although conceding that the weight of common law authority denies deduction from tort damages of amounts received from collateral sources,[25] the Second Circuit chose to deduct unemployment benefits from the back-pay award.[26] The court justified this deviation from established tort principles on the basis that neither deterrence nor retribution warranted the employee's enjoyment of a double recovery.[27] The court emphasized that it was "not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole."[28] Most circuit courts[29]

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relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7168 (1972).

20. 422 U.S. 405 (1975).

21. *Id.* at 417-18.

22. *Id.* at 419.

23. *Id.* at 421.

24. 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

25. For Title VII plaintiffs, collateral losses are those costs of sudden unemployment not recovered through a subsequent grant of back pay. These may include consequential financial difficulties, and emotional pain and suffering. *See infra* notes 45-46 and accompanying text.

26. *Steamfitters*, 542 F.2d at 591.

27. *Id.* at 592.

28. *Id.*

29. *See* Merriweather v. Hercules, Inc., 631 F.2d 1161 (5th Cir. 1980); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), *modified on other grounds*, 434 U.S. 136 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). With the exception of *Steamfitters* and *Merriweather,* circuit courts have not explained in detail the decision to deduct unemployment benefits. The Eleventh Circuit, though feeling itself bound by the prior decision of the Fifth Circuit affirming the trial court's discretion, has strongly criticized the deduction. Brown v. A.J.

and district courts[30] ruling on the issue have similarly chosen to deduct unemployment benefits from Title VII back-pay awards.

Recently, however, at least one federal court has cited analogous NLRA precedent to challenge the trend toward deducting unemployment benefits from Title VII back-pay awards. In *Kauffman v. Sidereal Corp.*,[31] the defendant had discharged the plaintiff in retaliation for filing a complaint under Title VII.[32] The court refused to reduce the award by the amount of unemployment compensation received, observing that the Supreme Court — interpreting the NLRA — had specifically rejected much of the rationale underlying *Steamfitters*.[33]

Cases decided by the Supreme Court under the NLRA upheld the NLRB's discretion to refuse to deduct unemployment benefits from back-pay awards. In *NLRB v. Gullett Gin Co.*,[34] the Supreme Court decision cited in *Kauffman*, the Court held that the NLRB did not abuse its discretion in refusing to deduct unemployment benefits from back pay. *Gullett* did not establish a general prohibition against the deduction of unemployment compensation from back-pay awards, but held only that the NLRB had not abused its discretion in refusing to order such a deduction. In dicta, however, the Court asserted that failure to deduct unemployment benefits did not make the employee more than whole and that, because collateral losses did not increase damages under the NLRA, collateral benefits should not reduce the back-pay award.[35] The Court also noted that the state makes the direct payments to the recipients, and that the state issues these payments to mitigate the effects of unemployment and not to discharge the liability of the employer.[36] Although the issue in *Gullett* concerned abuse of discretion before the adoption of Title VII, the *Gullett* rationale has proven influential in federal court decisions refusing to deduct unemployment benefits from Title VII back-pay awards.[37]

Gerrard Mfg., 695 F.2d 1290 (11th Cir.), *reh'g granted*, 31 Fair Empl. Prac. Cas. (BNA) 1163 (Apr. 11, 1983).

30. *See, e.g.*, Marshall v. Communications Workers of America, 26 Fair Empl. Prac. Cas. (BNA) 1017 (D.D.C. Sept. 24, 1979); Kyriazi v. Western Elec. Co., 476 F. Supp. 335 (D.N.J. 1979); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); Diaz v. Pan American World Airways, 346 F. Supp. 1301 (S.D. Fla.), *modified on other grounds*, 348 F. Supp. 1083 (S.D. Fla. 1972).

31. 695 F.2d 343 (9th Cir. 1982) (per curiam).

32. Title VII prohibits employers from discriminating against any individual for opposing an illegal employment practice or initiating Title VII proceedings. 42 U.S.C. § 2000e-3(a) (1976).

33. *Kauffman*, 695 F.2d at 346.

34. 340 U.S. 361 (1951).

35. *Id.* at 364.

36. *Id.*

37. *See infra* note 43. The Supreme Court's position seemed quite clear to some commentators. *See, e.g.*, Youngdahl, *Deducting Unemployment Compensation from Back Pay: Erosion of a Rational Policy*, 28 LAB. L.J. 587, 591 (1977) (expressing astonishment that the majority lower court view does not follow *Gullett* in Title VII cases).

The court in *Kauffman* also relied on *Albemarle*,[38] and indicated that because Congress had modeled the back-pay provisions of Title VII on the corresponding provision of the NLRA, identical procedures should be followed.[39] Furthermore, *Kauffman* noted that Title VII specifically provides for a deduction in back-pay awards for failure to show due diligence in seeking alternative employment.[40] Thus, the nondeduction of benefits would not operate as a disincentive to seek employment, because the plaintiff would be penalized for lack of due diligence.[41] Finally, the court emphasized that the state unemployment insurance agency could require reimbursement of the benefits if it so desired.[42] Unfortunately, few federal courts have adopted the *Kauffman* rationale.[43]

II. TOWARD A CONSISTENT INTERPRETATION: THE CASE AGAINST DEDUCTION

The underlying purposes of Title VII — to provide adequate compensation to the victims of employment discrimination and to deter discriminatory employment practices[44] — mandate that unemployment benefits should not be deducted from Title VII back-pay awards.

38. *Albemarle*, 422 U.S. 405 (1975).

39. *Kauffman*, 695 F.2d at 347.

40. *Id.* at 346; 42 U.S.C. § 2000e-5(g) (1976).

41. *Kauffman*, 695 F.2d at 347.

42. *Id.*

43. Only two other circuits have explicitly refused to deduct unemployment benefits in Title VII cases. Rasimas v. Michigan Dep't of Mental Health, No. 80-1735-6 (6th Cir. July 28, 1983) (available Aug. 15, 1983, on LEXIS, Genfed library, Cir. file); EEOC v. Ford Motor Co., 645 F.2d 183 (4th Cir. 1981) (2-1 decision), *rev'd on other grounds*, 102 S. Ct. 3057 (1982); *cf.* Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977) (citing *Gullett* in holding that the lower court did not abuse its discretion in refusing to deduct unemployment compensation from a back-pay award under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1976)); EEOC v. Sandia Corp., 639 F.2d 600, 624 (10th Cir. 1980) (citing *Gullett* and *Marshall* in refusing to deduct unemployment benefits from back pay under the ADEA). *But cf.* Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) (no abuse of discretion in district court's deduction of unemployment benefits from back pay awarded under the ADEA). For a discussion advocating the deduction of unemployment benefits from back-pay awards under the ADEA, see Note, *Set-Offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113 (1981).

Several lower federal courts have used the *Kauffman* approach in Title VII cases. *See, e.g.*, EEOC v. Riss Int'l Corp., 28 Empl. Prac. Dec. (CCH) ¶ 32,641 (W.D. Mo. 1982); Pedreya v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979); Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095 (D. Md. 1977), *modified on other grounds*, 654 F.2d 951 (4th Cir. 1981); Macey v. World Airways, 13 Empl. Prac. Dec. (CCH) ¶ 11,581 (N.D. Cal. 1977); Inda v. United Airlines, 405 F. Supp. 426 (N.D. Cal. 1975), *modified on other grounds*, 565 F.2d 554 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971).

44. Albemarle Paper Co. v. Moody, 412 U.S. 405, 417-18 (1975). In discussing these statutory purposes, the Supreme Court held that back pay should be denied only for reasons that would not frustrate the purposes of Title VII. *Id.* at 421. This requirement implies that the employee must receive *full* back pay unless the reasons for making deductions would not circumvent the

A. Providing Adequate Compensation to the Victim

Unemployment compensation is not a sufficient remedy for the effects of unemployment. Generally, unemployment benefits replace less than half of the recipient's former income.[45] Although the claimant may be forced to live on a substantially reduced income, financial demands such as rent payments, automobile payments, and interest on other long-term purchases will continue at existing levels. The claimant may default on these payments, suffering the attendant financial and psychological consequences.[46]

Title VII does not allow the claimant to be compensated for these losses. Its remedial provisions do not allow for general tort damages or legal remedies, but only for equitable remedies.[47] Although tort and contract damages might not accomodate some of the consequential economic losses,[48] common law principles would sustain compensation for verifiable emotional damages. Conversely, Title VII specifically provides only for injunctive relief, reinstatement, back pay, and "other

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purposes of the Act. Otherwise, the courts could violate the spirit of the *Albemarle* rule by reducing the back-pay award to a negligible amount.

45. *See* NATIONAL COMM'N, *supra* note 7, at 15-16. Nationally, the average benefit replaces approximately 40% of the weekly wage of those workers covered by unemployment insurance. P. MARTIN, LABOR DISPLACEMENT AND PUBLIC POLICY 43 (1983). To the extent that unemployment benefits are not taxable, the percentage replacement of earnings is slightly higher. *Id.* at 44.

46. *See generally* J. HAYES & P. NUTMAN, UNDERSTANDING THE UNEMPLOYED 64-82 (1981) (pointing to evidence of deterioration in physical and mental health as a result of unemployment); Schlozman & Verba, *The New Unemployment: Does It Hurt?*, 26 PUB. POL'Y 333 (1978) (survey indicating unemployed suffer economically and psychologically even if they receive unemployment benefits); Friedman, *The Grim Face of Unemployment,* Detroit Free Press, Mar. 13, 1983, at 1B, col. 1 (Toledo's unemployed persons losing dignity, homes, personal property, and health).

47. Title VII permits the court to require reinstatement, back pay, "or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976). Back pay, the only monetary relief explicitly available under Title VII, operates as an equitable remedy. Title VII does not provide for legal remedies, which would compensate the plaintiff for foreseeable financial damages and pain and suffering, as well as back pay. *See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1259 (1971) [hereinafter cited as *Developments*]; *see also* Note, Kyriazi v. Western Electric Co.: *Damages for Sexual Harassment — Title VII and State Tort Law,* 10 CAP. U.L. REV. 657 (1981) (noting the limitations of equitable remedies under Title VII); Comment, *Employment Discrimination Litigation: The Availability of Damages,* 44 UMKC L. REV. 497 (1976) (arguing that, although courts generally view damage awards as legal rather than equitable remedies, courts should construe Title VII as allowing full damages). *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.1, 2.6 (1973) (outlining distinctions between legal and equitable remedies).

48. *See Developments, supra* note 47, at 1260 n.351 (noting that remoteness might bar recovery under either a contract theory of consequential damages or a tort theory of foreseeability); *cf.* St. Clair v. Local 515, Int'l Bhd. of Teamsters, 422 F.2d 128 (6th Cir. 1969) (rejecting consequential damages based on loss of a mortgage in an NLRA wrongful discharge case, and holding that Title VII's limitation of monetary damages reflected the desire to award consequential damages only when specifically contemplated by contract).

equitable relief" when appropriate.[49] Affirmative relief under Title VII will therefore not make the victims of employment discrimination completely whole. Thus, since Title VII does not allow recovery for all losses stemming from sudden unemployment, courts should not deduct unemployment benefits to prevent excess recovery.[50] To allow such a deduction would prevent the adequate compensation of the victim and frustrate one of the underlying purposes of Title VII. Indeed, even conceding that nondeduction may overcompensate some claimants, courts should err on the side of overcompensation in order to effectuate this legislative purpose.[51]

Courts have often relied upon the analogous "collateral source doctrine" to support the nondeduction of unemployment insurance benefits from back-pay awards. Under this widely accepted doctrine,[52] the plaintiff in a personal injury case may recover full damages from the tortfeasor despite reimbursement from a collateral source.[53] Courts usually consider independent or plaintiff-funded sources of recovery as collateral sources. For example, payments received from a private plaintiff-funded health and accident insurance policy would not be deductible from the damage award. The doctrine also applies to social security payments, unemployment benefits, sick leave, and pensions.[54] Conversely, the doctrine does not apply when the defendant himself

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49. 42 U.S.C. § 2000e-5(g) (1976).

50. *See* NLRB v. Gullett Gin Co., 340 U.S. 361, 364 (1951); *cf.* EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979), *aff'd on other grounds,* 676 F.2d 1272, 1319 (9th Cir. 1982) (recognizing that "the collateral source doctrine evolved in part as recognition of uncompensated collateral losses suffered by discharged employees and . . . that [the employee] no doubt suffered such damage," but still ordering the plaintiff to reimburse the state fund).

51. Nevertheless, in awarding back pay under Title VII, some courts have made an effort to ensure that victims are not made more than whole. *See* Merriweather v. Hercules, Inc., 631 F.2d 1161, 1168 (5th Cir. 1980) (deduction for unemployment benefits "avoids any possibility of a double payment to a plaintiff"); EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 592 (2d Cir. 1976) (discerning no reason of deterrence or retribution for allowing the employee a "double recovery"), *cert. denied,* 430 U.S. 911 (1977). *But see* EEOC v. Riss Int'l Corp., 28 Empl. Prac. Dec. (CCH) ¶ 32,641 (W.D. Mo. 1982) (acknowledging *Steamfitters'* concern with possible double recovery by plaintiff, but noting that the employer would enjoy an equivalent windfall if unemployment benefits offset the back-pay award). Still, if anyone should benefit from a "windfall," it should be the wronged employee and not the discriminating employer. *See generally* Special Project, *Back Pay in Employment Discrimination Cases,* 35 VAND. L. REV. 893, 1013 (1982).

52. *See generally* D. DOBBS, *supra* note 47, § 8.10.

53. *See, e.g.,* Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962) (refusing to reduce employee's damage award by unemployment and disability payments received from the state); United States v. Price, 288 F.2d 448 (4th Cir. 1961) (rejecting government's claim that benefits received under the Civil Service Retirement Act should be deducted from a personal injury award under the Federal Tort Claims Act); Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis. 2d 231, 201 N.W.2d 745 (1972) (applying collateral source rule and refusing offset for gratuitous medical services provided by the state).

54. D. DOBBS, *supra* note 47, § 8.10, at 582.

has reimbursed the plaintiff or has provided funds for such purposes.[55] For example, courts would not apply the doctrine to payments received from a joint tortfeasor in settlement of potential tort liability for a given injury. Rather, a court would offset these payments against any subsequent recovery for the same injury, regardless of whether the plaintiff had obtained a judgment against the same tortfeasor who made the payment.[56]

Nonetheless, courts which deduct unemployment benefits from back-pay awards assert that such benefits issue from a direct, rather than a collateral source.[57] These courts note that a payroll tax, paid directly to the state by individual employers, funds the state unemployment programs.[58] Thus, unemployment benefits represent direct payments from the employer to the employee for the specific purpose of mitigating the effects of unemployment.

This theory, however, suffers from two significant flaws. First, the employer alone does not bear the financial burden of supporting the state unemployment insurance fund. Although only three states require that employees contribute directly to the fund,[59] such non-wage benefits clearly represent a labor cost to the employer and an insurance cost to employees. To pay the premiums for the unemployment insurance, the employee must forego higher current wages.[60] Furthermore, in the absence of a uniform state or federal requirement, employees might not choose to reduce current wages in exchange for income security to the extent they do under the present system.[61]

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55. *See, e.g.*, Yarrington v. Thornburg, 58 Del. 152, 205 A.2d 1 (1964) (tortfeasor entitled to reduction of damages for payments made to plaintiff through an insurance policy funded by the tortfeasor).

56. *See, e.g.*, Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9th Cir. 1972) (holding that where full compensation had been received from one tortfeasor, plaintiff not allowed to recover same amount from another defendant).

57. *See, e.g.*, EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 591-92 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

58. *Id.*

59. The states are Alabama, Alaska, and New Jersey. Alabama charges employees only when the state fund dips below a minimum level. UNITED STATES UNEMPLOYMENT INSURANCE SERVICE, DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAW § 205.04 (1982) [hereinafter cited as COMPARISON].

60. Wage theorists recognize that provisions for income security are not clearly distinguishable from wages. *See* J. BACKMAN, WAGE DETERMINATION: AN ANALYSIS OF WAGE CRITERIA 92 (1959) ("[U]nions have recognized that they could not always obtain both wage increases and nonwage benefits and that a choice must sometimes be made between the two alternatives . . . ."); *see also* L. BURGESS, WAGE AND SALARY ADMINISTRATION IN A DYNAMIC ECONOMY 130 (1968) (workers seek to protect themselves against the hazards of unemployment through fringe benefits).

61. Employees value a dollar of current income more than they value a dollar of income security. This is demonstrated by the early inability of state legislatures to enact unemployment insurance laws absent a uniform national system. Such laws would have placed employers in those states at a competitive disadvantage with employers in states not requiring contribution to an unemployment insurance fund. *See* NATIONAL COMM'N, *supra* note 7, at 8. If, however, employees equally valued income security and current income, they would have been willing to

Second, viewing employers as the direct source of unemployment benefits proves troublesome because states do not issue such payments with the purpose of discharging the liability of the employer. Rather, such programs seek to mitigate the effects of mass unemployment. Moreover, the employer does not perform any significant function in the administration of these programs, lacking even the authority to determine whether benefits should be extended to a particular claimant. The state, under state-administered programs, pays the unemployment benefits directly to the employee.[62]

In addition, several cases in the law of contracts support the nondeduction of unemployment benefits from damages in wrongful-discharge suits.[63] These cases have refused to allow employers the offset, on the basis that states establish unemployment funds for the social purpose of mitigating the effects of unemployment, not to diminish the damages of defendants. This analogous rationale buttresses the argument against the deduction of unemployment benefits under Title VII.

B. Deterring Discrimination

Title VII seeks not only to provide adequate compensation to the victims of employment discrimination, but also to deter discriminatory employment practices.[64] Deduction of unemployment benefits from back-pay awards may frustrate the deterrent goals of Title VII, because there is no assurance that the defendant will repay the amount deducted to the state fund. This danger derives from the effects of state experience-rating systems upon an employer's motivation to repay. Under such systems, the state generally assigns a rating to each employer which reflects the employer's propensity toward creating unemployment in the state.[65] The state determines the level of the payroll tax charged to the employer based on this experience rating. Thus, if the

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accept a decrease in wages in exchange for income security, and net labor costs for employers would have remained unaffected. *Cf.* Note, *supra* note 47, at 669-70 (arguing that, if employers did not contribute to the unemployment insurance fund, the employee would demand higher wages to shelter against unemployment).

62. *See supra* note 7.

63. *See, e.g.*, Monroe v. Oakland Unified School Dist., 114 Cal. App. 3d 804, 170 Cal. Rptr. 867 (1981) (refusing deduction for unemployment benefits in action for breach of employment contract); Billetter v. Posell, 94 Cal. App. 2d 858, 211 P.2d 621 (1949) (unemployment benefits not deductible from employer's damage liability in wrongful discharge in violation of one-year contract); *accord* Century Papers, Inc. v. Perrino, 551 S.W.2d 507, 511 (Tex. Civ. App. 1977) (holding that unemployment benefits are not deductible from damages for breach of employment contract); Sporn v. Celebrity, Inc., 129 N.J. Super. 449, 324 A.2d 71 (1974) (refusing to mitigate damages for a wrongdoer by deducting unemployment benefits). *Cf.* Pennington v. Whiting Tubular Products, 370 Mich. 590, 600-01, 122 N.W.2d 692 (1963) (suggesting, in dicta, that unemployment benefits need not be deducted from potential award on remand).

64. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

65. *See* NATIONAL COMM'N, *supra* note 7, at 18.

benefit disbursement, due to circumstances, has little effect upon the employer's experience rating, the employer will have no incentive to repay the fund. For example, non-employer Title VII defendants, such as employment agencies and unions, do not contribute to state unemployment insurance funds on behalf of their clients and members. Thus, their discriminatory employment practices do not increase their liability to the state fund. The deduction of unemployment benefits from the back-pay liability of these defendants simply results in a transfer of state funds to cover their losses.

The decision of the Second Circuit in *Steamfitters*[66] presents a classic example of this situation. *Steamfitters* involved a defendant labor union with no experience rating with respect to the plaintiffs. The deduction of unemployment benefits reduced the liability of the union, thereby indemnifying the wrongdoer with state unemployment insurance payments.

Nonetheless, proponents of the deduction of unemployment benefits argue that failure to deduct imposes too harsh a penalty on employers. Since most states base payroll tax rates on the individual employer's role in creating unemployment, failure to deduct benefit payments from back-pay awards may constitute a double penalty on the defendant.

Still, the failure to deduct benefit payments does not necessarily impose such a double penalty on employers. Although the failure to deduct unemployment benefits renders the employer liable for both the back pay and a worse experience rating, experience rating methods vary significantly from state to state, and many factual circumstances affect these ratings. The most common methods of experience rating reflect the benefit disbursements charged to individual employers.[67] Under these methods, any discriminatory discharge resulting in a benefit disbursement will adversely affect the employer's experience rating. Some states, however, measure the experience rating by the periodic decline in the employer's payroll.[68] In these states, the discriminatory substitution of one employee for another would probably not affect the employer's experience rating.[69]

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66. EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

67. Thirty-two states use the reserve-ratio formula. Benefit disbursements charged to the employer are subtracted from the employer's payroll contribution for the year. The balance is then divided by the amount of the employer's annual payroll. This ratio represents the employer's experience rating. The employer can lower the tax charged to him by creating less unemployment in the state, and thereby raising this ratio. Under this method any payment of benefits charged to a given employer will adversely affect his experience rating. COMPARISON, *supra* note 59, §§ 220.01-.04.

68. *Id.* § 220.04. Alaska, Washington, Utah, and Montana use this method. The payroll variation method measures experience rating by the quarterly decline in the employer's payroll as a percentage of the total payroll. *Id.*

69. Since these states do not directly charge benefit payments to employer accounts, such

The effects of benefit payments on an individual employer's experience rating also vary according to circumstances. For example, many states reduce a wrongfully-discharging employer's experience rating if that employer is only one of several during the claimant's base period.[70] Furthermore, if the employer already pays the maximum tax rate,[71] an additional benefit claim will not affect his experience rating. Finally, a discriminatory refusal to hire cannot affect the employer-defendant's experience rating, because the state cannot charge the benefits to that employer.[72]

C. *Protecting State Interests*

Arguably, in order to preserve the solvency and integrity of state programs, federal courts should deduct unemployment insurance benefits from back-pay awards. The nondeduction of such benefits increases the likelihood of overcompensation and imposes a burden upon a state agency. Therefore, courts might perceive the uniform deduction of unemployment insurance benefits as protecting the financial interests of the state.

If the refusal to deduct is not unfair to the employers, however, it is certainly not unfair to the states. Courts in Title VII proceedings should not be overly concerned with the protection of state interests. Courts can conscientiously defer to state agencies in matters of the fiscal integrity of state programs, because all states have their own mechanisms for recovering benefit overpayments.[73] States have developed expertise in such matters by engaging in the daily task of dealing with unemployment and its effects. Although courts could simply order victorious plaintiffs to repay benefits to their respective state

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payments have little effect upon the discharging employer's experience rating. If the employer immediately replaces the employee, the discharge will not affect the rating. Montana modifies the formula by refusing to allow a reduced tax rate for employers whose benefit disbursements exceed contributions over the previous three-year period. *Id.* Even with this modification, however, discriminatory discharges will have little impact upon an employer's rating.

70. Most states charge claims to employers in proportion to the amount of time the claimant actually spends during the base period working for the particular employer. *See* NATIONAL COMM'N, *supra* note 7, at 19. The employers during the base period will share liability; the last employer will not necessarily suffer the worst experience rating effects.

71. Federal law requires the employers with the poorest experience rating in each state to pay the maximum tax. Once an employer reaches this plateau, additional benefit payments cannot force his contribution any higher. *Id.*

72. *See, e.g.*, Diaz v. Pan American World Airways, 346 F. Supp. 1301 (S.D. Fla.) (ordering back-pay award because of employer's refusal to hire male cabin attendant), *modified on other grounds*, 348 F. Supp. 1083 (S.D. Fla. 1972). Title VII prohibits employers from refusing to hire, or from discharging an employee for discriminatory reasons. 42 U.S.C. § 2000e-2(a) (1976).

73. *See* COMPARISON, *supra* note 59, § 455.01.

unemployment insurance funds,[74] such an order would frustrate the compensatory purposes of Title VII. Consequently, courts should subordinate the interests of the state to the interests of the victims of employment discrimination.[75]

Furthermore, not recovering benefits from Title VII, plaintiffs may not infringe on any significant state interest. For example, if the claimant did not cause the overpayment, some states merely deduct the overpaid amount from that individual's future claims.[76] Other states permit the agency to waive recovery if the claimant did not cause the overpayment and the recovery would offend equity and good conscience, and would defeat the purposes of the program.[77] These states may provide specific administrative criteria for waiver of restitution, and might not require restitution in many cases.[78] For the federal court to require automatic restitution denies the claimant any consideration under these criteria. Moreover, some states limit the possibility of restitution to a particular statutory period running from the time of the original payment of benefits.[79] Considering the often protracted nature of Title

74. *See* EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291 (N.D. Cal. 1979), *aff'd on other grounds,* 676 F.2d 1272 (9th Cir. 1982); *see also* Mazurak, *supra* note 10, at 170 (arguing for forced reimbursement).

75. Courts should not fashion back-pay awards in such a way as to frustrate the purposes of Title VII. *See supra* note 44. *Cf.* NLRB v. Gullett Gin Co., 340 U.S. 361, 365 (1951) (holding that validity of NLRA back-pay orders should not depend upon the provisions of individual state unemployment insurance laws).

76. *See* COMPARISON, *supra* note 59, § 455.01.

77. *See, e.g.*, MASS. ANN. LAWS ch. 151A, § 69(c) (Michie/Law. Co-op. 1976); *cf.* MICH. COMP. LAWS ANN. § 421.62(a) (Supp. 1983).

78. Pursuant to the waiver provisions of the Michigan statute, for example, the Michigan Employment Security Commission has developed several criteria for the approval of waiver. These criteria approve waiver in the following situations: 1) benefits were properly paid to a recipient of pension or social security payments, but were made improper by subsequent amendments; 2) the Commission miscalculated or overpaid the benefit amount, though proper information was received, and the claimant has no reason to know of the overpayment; 3) wage information provided in good faith later proved to be erroneous; 4) extended benefits were made improper by retroactive amendments. MICHIGAN EMPLOYMENT SECURITY COMM'N, MANUAL, part V, § 7931(A). The manual also notes that new areas of waiver may evolve through the administrative process. *Id.* A claimant may file a request for a waiver on his own initiative. *Id.* § 7931(D).

On appeal, the Michigan Employment Security Board of Review applies the administrative criteria, or simply waives restitution on the basis of the statute. *See, e.g., In re* Toro Hayes, Appeal Docket No. B82-06076-83576 (Employment Sec. Bd. of Review, Nov. 3, 1982) (since error was due to Commission miscalculation, Board applies Commission criteria to waive restitution); *In re* Robert Aeder, Appeal Docket No. B81-17419-R01-82010 (Employment Sec. Bd. of Review, Oct. 8, 1982) (where claimant was required to repay due to previous administrative decision that he was *not* disqualified, the Board reversed and waived restitution without regard to the administrative criteria); *In re* Robert Shine, Appeal Docket No. TRA81-20475-81250 (Employment Sec. Bd. of Review, Oct 8, 1982) (where claimant questioned overpayments but payments continued, the Board required waiver without reference to specific administrative criteria) (all unpublished opinions of the Michigan Employment Security Commission).

79. *See, e.g.*, MICH. COMP. LAWS ANN. § 421.62(a) (1979) (limiting recovery to three years after date of improperly paid benefits); *see also In re* Ezekiel W. Gadberry, Appeal Docket No. B81-12218-80138) (Employment Sec. Bd. of Review, June 14, 1982) (no recovery allowed after five years had expired).

VII proceedings,[80] the period between the granting of benefits and the award of back pay may often exceed this statutory limitation period.

Although states may wish to recover such benefits,[81] requiring the deduction of unemployment benefits from back pay awarded under Title VII might threaten even this state interest. For example, many unemployment insurance statutes do not have procedures for recovering benefits from persons to whom those payments were not originally made.[82] Through the deduction of unemployment benefits, the court would essentially indemnify the wrongdoer. At best, this constitutes a questionable use of state funds.

Finally, some states ignore court deductions from back-pay awards, recovering the benefits from the employee anyway.[83] In these cases, the plaintiff is assessed twice for the same benefits and receives grossly inadequate compensation. At least one state court, citing this inequitable result, has admonished arbitrators — and presumably courts — to remember this state practice when fashioning back-pay orders.[84]

CONCLUSION

Congress designed Title VII to provide an effective remedy for employment discrimination. Although the legislative history does not explicitly indicate whether unemployment benefits were supposed to be deducted from back-pay awards, the analogous section of the NLRA does not require a deduction. If back-pay awards are to serve the dual

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80. *See* EEOC v. Ford Motor Co., 102 S. Ct. 3057, 3064 (1982).

81. *See, e.g.*, MD. ANN. CODE art. 95A, § 17(d) (Supp. 1982); MASS. ANN. LAWS. ch. 151A, § 69(a) (Michie/Law. Co-op. Supp. 1982); MICH. COMP. LAWS ANN. § 421.62 (1979); TENN. CODE ANN. § 50-1325 (1977).

82. Usually, state laws specifically provide for the recovery of benefits from claimants. *See supra* note 81. Conceivably, states might recover from third parties on a theory of unjust enrichment, despite the absence of a statutory provision. *See, e.g.*, State v. Rucker, 211 Md. 153, 126 A.2d 846 (1956) (state recovered from an employer on an unjust enrichment theory after the arbitrator had already deducted unemployment benefits from the back-pay award). State recoupment is not assured, however, in the absence of a statutory provision. *See, e.g.*, Hill v. Review Bd. of Ind. Employment Sec. Div., 124 Ind. App. 83, 112 N.E.2d 218 (1953) (denying recovery for retroactive holiday payments made to the claimant after reinstatement, due to lack of statutory provision); Waters v. State, 220 Md. 337, 152 A.2d 811 (1959) (noting Maryland statute's lack of provision for recoupment from the claimant after back-pay award). The Maryland legislature reacted to *Waters* by amending the statute to allow the recoupment of benefits from the claimant after a back-pay award. *See* Katsianos v. Maryland Employment Sec. Admin., 42 Md. App. 688, 402 A.2d 144 (1979).

83. *See, e.g.*, Meyers v. Director of Div. of Employment Sec., 341 Mass. 79, 167 N.E.2d 160 (1960); Griggs v. Sands, 526 S.W.2d 441 (Tenn. 1975); Texas Employment Comm'n v. Busby, 457 S.W.2d 170 (Tex. Civ. App. 1970). Both *Griggs* and *Meyers* cited *Gullett* in holding that the state could protect its interest by recovering from the claimant-employee.

84. *Griggs*, 526 S.W.2d 441, 449 (Tenn. 1975) ("[A]rbitrators should take into account, in making back pay awards, the impact of unemployment compensation benefits previously paid, and the effect of reimbursement which may be called for.").

purposes of compensating discriminatory unemployment and deterring future discrimination, the effect of unemployment benefits should not be considered. The combination of back pay and unemployment compensation does not overcompensate the employee for the debilitating losses of unemployment, and the state's unemployment assistance program should not indemnify discriminatory practices. Furthermore, a policy of nondeduction leaves the states free to seek out instances of overcompensation and correct them. Only by awarding back pay without regard to unemployment benefits can the legitimate interests of the employee, the employer, and the state be protected.

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