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NOTES

Retroactive Seniority and Backpay Liability Under Title VII: Ford Motor Co. v. Equal Employment Opportunity Commission*

Mark Hartman†

The Supreme Court has adopted the rule that, absent special circumstances, a defendant in a Title VII action may toll backpay liability for hiring discrimination by offering a claimant the position originally denied, but without retroactive seniority rights. This rule gives employers no incentive to prevent discrimination and penalizes some victims of discrimination for striving to mitigate damages. A preferable approach is to establish a rebuttable presumption that a Title VII defendant may toll backpay liability only by offering the claimant the position originally denied, or a substantially equivalent position, with full retroactive seniority rights.

INTRODUCTION

The Supreme Court has long considered seniority rights overrid-

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Seniority rights are divisible into two broad categories: competitive rights and benefit rights. IMPACT, supra, at 106; Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 489-90 (1975). Competitive seniority rights involve the status of one employee in relation to the status of another employee when workers vie with each other for opportunities and safeguards. IMPACT, supra, at 106. Competitive seniority rights can affect not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to
ingly important in the economic system of the United States. The Court has also repeatedly held that eliminating employment discrimination through Title VII of the Civil Rights Act of 1964 is a national policy of the highest priority. According to the Court, seniority relief for victims of employment discrimination “cuts to the very heart of Title VII’s primary objective of eradicating present and future discrimination,” since seniority rights pervade the workplace and affect every job movement by an employee.

In Ford Motor Co. v. Equal Employment Opportunity Commission, the Court adopted a rule that conflicts with this objective by encouraging an employer not to offer seniority relief to a Title VII claimant. Absent special circumstances, an employer may toll backpay liability under the Court’s new rule by offering a Title VII claimant the position originally denied, but without seniority rights retroactive to the date of the alleged discrimination.

The Court’s rule has considerable practical significance. To preserve the right to backpay from the date of the alleged discrimination until the date of the final administrative or judicial decision, a rejected applicant must accept an offer of beginning employment from the Title VII defendant. This means that if the claimant has obtained a replacement job elsewhere, she must quit the job and relinquish all seniority rights which she has acquired there. She must then start at the bottom of the seniority ladder in the position originally denied. The Court’s rule can thus force her to increase the risk of layoff and of further damages before a final decision in her case. During a time of recession or in an industry with frequent layoffs, many claimants will be understandably loath to run the risk.

This Note examines an employer’s right to toll backpay liability avoid layoff, “bumping” possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff [that] recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line.

Stacy, supra, at 490. Cf. IMPACT, supra, at 106-09 (competitive seniority provisions capable of affecting layoffs, recalls, promotions, transfers, job or work assignments, shift preferences, selection of days off, opportunities for overtime work, vacation privileges, and parking privileges). Benefit seniority rights govern the enjoyment of noncompetitive entitlements and can affect vacations, pensions, severance pay, holidays, sick leave allowances, insurance and health coverage, profit-sharing eligibility, intra-range wage movements, length-of-service wage adjustments, promotions, bonuses, and penalties for wrongdoing or sustained absence from work. IMPACT, supra, at 109-14.

6. Id. at 241.
for hiring discrimination under Title VII. Part I describes the facts of Ford Motor Co. and summarizes the opinions of the district and circuit courts and the Supreme Court, Part II analyzes the Supreme Court’s opinion, and Part III suggests an alternative approach to the one adopted by the Court. This approach is to establish a rebuttable presumption that a Title VII defendant may toll backpay liability only by offering a Title VII claimant the position originally denied, or a substantially equivalent position, with full seniority rights retroactive to the date of the alleged discrimination.

I
THE CASE

A. Facts

In July 1971, Judy Gaddis and Rebecca Starr applied for jobs as “picker-packers” at the Ford Motor Company (Ford) parts warehouse in Charlotte, North Carolina. These jobs involved picking ordered parts from storage and packing them for shipment. At the time, Ford had never hired a woman as a picker-packer.

Both women had held similar jobs at a nearby General Motors (GM) warehouse for ten months, until GM laid them off. Although the women were qualified, Ford filled its vacancies for permanent picker-packers with men. Gaddis then filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Ford had discriminated against her on the basis of sex.

In January 1973, GM recalled both women to their former jobs. Six months later, a vacancy for a permanent picker-packer occurred at the Ford warehouse. Ford offered the vacant position without retroactive seniority rights first to Gaddis and then to Starr. Both refused the offer, since neither wanted to lose her accrued seniority at the GM warehouse. In 1974, GM again laid off Gaddis and Starr, both of whom later entered nursing school.\(^7\)

\(^7\) 645 F.2d 183, 185-86, 191 (4th Cir. 1981); 19 Fair Empl. Prac. Cas. (BNA) 1288, 1289-91 (W.D.N.C. 1977). The district court indicated that Gaddis and Starr also refused the 1973 offer because neither wanted to be the only woman working at the Ford warehouse. 19 Fair Empl. Prac. Cas. (BNA) at 1291. The Supreme Court recognized, but failed to examine, this second reason. See 458 U.S. at 222. Even if the 1973 offer had included full retroactive seniority rights, Gaddis and Starr might still have refused it. Had this occurred, the factors prompting Gaddis and Starr to want to avoid being the only woman working at the Ford warehouse should have been considered. A personal preference not to be the sole woman in the warehouse should count in favor of tolling Ford’s backpay liability. See Di Salvo v. Chamber of Commerce, 568 F.2d 593, 597 (8th Cir. 1978). Yet if Gaddis and Starr had discovered abusive conditions to which either would have been subject as the sole woman in the warehouse, this discovery should count against tolling Ford’s backpay liability. See infra notes 54-55 and accompanying text.
B. Decisions of the District and Circuit Courts

In July 1975, the EEOC brought an employment discrimination suit against Ford in the United States District Court for the Western District of North Carolina. Alleging that Ford had violated Title VII by refusing to hire Gaddis and Starr, the EEOC sought backpay for them, as well as injunctive relief.\(^8\)

The district court found that Ford had discriminated against both women and awarded them backpay. This award consisted of the amounts they would have earned had they been hired in 1971 minus the amounts they had actually earned or could reasonably have earned during the interim. According to the district court, the women's decision to reject Ford's offer of beginning employment in 1973 did not affect their backpay award.\(^9\)

Affirming the district court's decision, the United States Court of Appeals for the Fourth Circuit stated that Ford's 1973 offer presented Gaddis and Starr with an "intolerable choice" because they "could accept the offer only by forfeiting the seniority they had accumulated at General Motors." According to the circuit court, the 1973 offer was "incomplete and unacceptable" because it lacked retroactive seniority rights.\(^10\)

C. Opinion of the Supreme Court

The United States Supreme Court held that Ford's 1973 offer tolled its backpay liability. Justice O'Connor delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and White joined. The Court focused on the "large objectives" of Title VII: ending employment discrimination and making victims of discrimination whole.\(^11\) It adopted the rule that, absent special circumstances, the rejection by a Title VII claimant of an employer's unconditional offer of the position previously denied tolls the employer's backpay liability, even though the offer does not include retroactive seniority rights.\(^12\) In reaching this holding, the Court considered not only the objectives of Title VII, but also the burdens on innocent employees and innocent employers.\(^13\)

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\(^{8}\) The EEOC suit involved other claimants and issues that are not relevant to the Supreme Court's decision. See 19 Fair Empl. Prac. Cas. (BNA) at 1290-92.

\(^{9}\) Id. at 1292.

\(^{10}\) 645 F.2d at 192-93 (2-1 decision). Senior District Judge Walter E. Hoffman, sitting by designation, agreed with the district court's finding of discrimination, but challenged the district court's exercise of discretion in framing a remedy. He would have truncated Ford's backpay liability at several points, including the 1973 job offer. Id. at 201-09.

\(^{11}\) 458 U.S. at 228.

\(^{12}\) Id. at 241.

\(^{13}\) Id. at 239-40 & n.29.
1. Delineation of the Court's Task

To delineate its task, the Court examined the remedial provisions of Title VII. When a district court finds that an employer has intentionally discriminated, section 706(g) of Title VII provides that the district court may order the employer to refrain from further discrimination and to take appropriate affirmative action, which may include hiring of employees with or without backpay. Also, section 706(g) requires that backpay awards to victims of discrimination be reduced by amounts which they actually earned or could reasonably have earned before the judgment.\(^4\)

The Supreme Court asserted that judicial discretion must be exercised in light of the large objectives of Title VII and must be guided by meaningful standards subject to thorough appellate review. In the case of Gaddis and Starr, the Court saw itself as facing a choice between Ford's proposed rule (i.e., tolling backpay liability if the employer unconditionally offers the claimant the job previously denied, even without retroactive seniority rights) and the lower court's rule (i.e., tolling backpay liability only if an unconditional offer of the job previously denied includes retroactive seniority rights).\(^5\)

2. Ending Employment Discrimination

Title VII's primary objective, the Court observed, is to end employment discrimination, and the preferred means to attain this objective are cooperation and voluntary compliance. Thus, the Court concluded, the rules implementing Title VII should "encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace."\(^16\)

The Court contended that tolling an employer's backpay liability if the employer offers the claimant the position originally denied powerfully motivates the employer to put the claimant to work and thus quickly ends any ongoing discrimination. Although the claimant may be no more attractive than any other applicants, the Court stressed that offering the position to the claimant frees the employer from the

\(^{14}\) 42 U.S.C. § 2000e-5(g) (1976). In pertinent part, the statute reads as follows:

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 reinstatement or hiring of employees, with or without back pay. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

\(^{15}\) 458 U.S. at 226-28.

\(^{16}\) Id. at 228 (quoting Alexander v. Gardner-Denver Co., 415 U.S. at 44).
threat of liability for further backpay damages. According to the Court, the prospect of such freedom constitutes a strong incentive to hire the claimant.\footnote{Id. at 228-29.}

By contrast, asserted the Court, requiring the inclusion of retroactive seniority rights in the job offer furnishes no incentive to the employer to hire the claimant. Such a requirement makes hiring the claimant more expensive than hiring another applicant for the vacant position because of the extra cost of fringe benefits associated with seniority rights. "More important," according to the Court, "the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents." Finally, the Court suggested that granting retroactive seniority rights may often violate the provisions of a collective bargaining agreement.\footnote{Id. at 229.}

3. Making Victims of Employment Discrimination Whole

The Court maintained that "Title VII's secondary, fallback purpose is to compensate the victims for their injuries" when unlawful discrimination occurs. This aim requires their restoration to a position which they would have enjoyed but for the unlawful discrimination.\footnote{Id. at 230.}

According to the Court, the rule proposed by Ford merely embodies the statutory requirement that an unemployed or underemployed claimant mitigate damages. Although conceding that such a claimant need not go into another line of work, accept a demotion, or take a demeaning position, the Court stated that she must use reasonable diligence to find other suitable employment. According to the Court, she loses her right to backpay if she rejects a job substantially equivalent to the position originally denied. The Court thus concluded that since she would be required to accept another employer's offer of beginning employment, she must also accept the Title VII defendant's offer of the position originally denied, even though the offer does not include retroactive seniority rights.\footnote{Id. at 230-34.}

If the claimant has found a replacement job that she regards as more attractive than the position originally denied even with retroactive seniority rights, the Court asserted that the defendant's offer should also toll backpay liability because the availability of the better job terminates the ongoing ill effects of the defendant's refusal to hire her. According to the Court, if Gaddis and Starr considered their GM jobs
better than, or substantially equivalent to, the positions they would have held at Ford had Ford hired them initially, their rejection of the 1973 offer of employment should have tolled Ford's backpay liability. The Court suggested that their rejection could indicate a belief that the lingering ill effects of Ford's prior refusal to hire them had ended. Failure to toll Ford's backpay liability, the Court concluded, would provide a form of unemployment insurance to claimants and thus, absent special circumstances, would grant them something more than compensation for their injuries.21

The Court stated that the sole question of adequate compensation arises in the "narrow category of cases" in which the claimant considers her replacement job superior to the position originally denied without retroactive seniority rights, but inferior to the position originally denied with such rights. Nevertheless, the Court maintained, compensation is adequate because the claimant can accept the position offered by the defendant without retroactive seniority rights and seek full compensation at trial. The new rule, according to the Court, merely requires that the Title VII claimant decide whether to take the position offered by the defendant with the right to pursue a risky legal claim for backpay, retroactive seniority rights, and compensation for any losses resulting from lesser seniority before the court's judgment or, instead, whether to accept a more attractive job from another employer with a backpay claim limited to the damages already accrued. Rejection of the defendant's offer, the Court suggested, establishes that the claimant deems the ongoing injury caused by the defendant to have been ended by the availability of better opportunities elsewhere. Thus, the Court concluded that, absent special circumstances, tolling the employer's backpay liability if the claimant rejects the position originally denied is consistent with Title VII's policy of making discrimination victims whole.22

To explain the "special circumstances" proviso, the Court speculated about a claimant forced to move a great distance to find a replacement job. Because rejection of the position originally denied might reflect the costs of relocation more than an assessment that the replacement job was superior to the defendant's position, the Court asserted that weight could be given to such factors under exceptional circumstances. Yet the Court insisted that loss of the seniority rights acquired at a replacement job does not qualify as a special circumstance. To argue that it does "simply confuses the costs of changing from one job to another—whatever the respective advantages and disadvantages of the two jobs might be—with the difference between the

21. Id. at 234-35.
22. Id. at 236-39.
two jobs.”

4. **Burdens on Innocent Employees and Employers**

The Supreme Court asserted that the lower court’s rule onerously burdens the innocent employees of a Title VII defendant because it encourages job offers compelling innocent workers to sacrifice their seniority rights to a person who has only claimed, but not yet proven, unlawful discrimination. Such workers, the Court observed, lack a remedy against claimants who fail to establish their claims. Thus, according to the Court, bumped workers have no redress if they are wrongly relegated to the unemployment lines.

The Supreme Court also noted that the lower court’s decision unfairly burdens innocent employers. An employer who considers a claimant’s case weak or baseless may nevertheless wish to offer some relief to the claimant and toll the mounting backpay bill. Under the lower court’s decision, accomplishment of these ends requires the employer to offer the claimant retroactive seniority rights. Yet if the claimant loses at trial the Supreme Court observed that the lower court’s rule allows the employer no recourse against the claimant for the costs of the retroactive seniority rights which the claimant erroneously received.

**D. Dissenting Opinion**

Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined. The dissent criticized the Supreme Court for mischaracterizing the circuit court’s holding and for propounding a rule that hinders the attainment of Title VII’s objectives and unjustifiably limits the discretion of district courts to compensate victims of discrimination.

1. **Mischaracterization of the Circuit Court’s Holding**

According to the dissent, the Supreme Court reversed the circuit court’s narrow, unremarkable holding with a broad advisory ruling. The dissent maintained that the issue was not which of two inflexible standards should govern accrual of backpay liability in all Title VII cases, but whether the district court’s award of backpay liability to Gaddis and Starr in this case constituted an abuse of discretion. According to the dissent, the circuit court adopted no strict rule, but sim-

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23. Id. at 238 n.27.
24. Id. at 239-40.
25. Id. at 240 n.29.
26. Id. at 241-42. The dissent also criticized the Court for displaying preoccupation with claimants and third parties not before the Court and for showing indifference to the concerns of Gaddis and Starr. Id. at 255.
ply applied the flexible principles of appellate review of Title VII remedies.  

2. Frustration of Title VII’s Objectives

The dissent contended that the Court’s new rule will frustrate the objectives of Title VII. By authorizing employers to make “cheap offers” to the victims of their discrimination, this rule will hinder the objective of ending employment discrimination. Since a discriminating employer can unilaterally terminate backpay liability by extending an offer that the rejected applicant cannot reasonably accept, the dissent predicted that the Court’s rule will reduce the employer’s incentive to shun practices of dubious legality.

According to the dissent, the Court’s rule will also fail to serve the objective of making victims of employment discrimination whole. If a victim accepts the discriminating employer’s “cheap offer,” she must work at a seniority disadvantage and endure the ongoing effects of the initial discrimination, including “lesser health, life, and unemployment insurance benefits, lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs” than workers whom the employer hired after unlawfully refusing her employment. Thus, the dissent concluded that the Court’s rule will not only shield discriminating employers from liability, but also coerce bona fide Title VII claimants to accept incomplete job offers.

3. Limitation of District Court Discretion

The dissent observed that the “special circumstances” proviso of the majority will allow a district court the discretion to make victims of discrimination whole in some cases, but not in other cases where complete relief is equally justified. Such a rule, the dissent suggested, will offer no advantage. Yet given this rule, the dissent argued that the Court should have upheld the district court’s exercise of discretion, since the facts of the present case constituted special circumstances.

II

Analysis of the Supreme Court’s Opinion

A. Focus on the Objectives of Title VII

Acknowledging that the model for section 706(g) of Title VII was section 10(c) of the National Labor Relations Act (NLRA), the Court

27. Id. at 241-43.
28. Id. at 249-50.
29. Id. at 250-51.
30. Id. at 251-53.
31. Section 10(c) provides that if an employer has engaged in or is engaging in an unfair
observed that principles developed under the NLRA generally guide, but do not bind, courts in framing remedies under Title VII. Although the Court referred to a number of NLRA cases, it did not concentrate on NLRA precedents to determine an employer’s capacity to toll backpay liability under Title VII. Instead, it focused on the broad objectives of Title VII.

This focus is appropriate since NLRA cases have not considered whether an employer seeking to toll backpay liability must include retroactive seniority rights in a job offer to a rejected applicant. Although NLRA decisions may supply some guidance, they do not provide an adequate basis for determining whether such inclusion is necessary to terminate backpay liability.

labor practice, the National Labor Relations Board (NRLB) shall order the employer “to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of” the NLRA. 29 U.S.C. § 160(c) (1976). The Supreme Court has repeatedly acknowledged that § 10(c) of the NLRA served as the model for § 706(g) of Title VII. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 366 (1977); Franks v. Bowman Transp. Co., 424 U.S. at 769; Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975).

32. 458 U.S. at 226 n.8. In framing Title VII remedies, the Supreme Court has often taken guidance from NLRA precedents. See Int'l Bhd. of Teamsters v. United States, 431 U.S. at 366-67 (nonapplicant capable of being a victim of discrimination under Title VII and thus entitled to retroactive seniority rights); Franks v. Bowman Transp. Co., 424 U.S. at 768-70 (seniority relief available to a victim of discrimination under Title VII); Albemarle Paper Co. v. Moody, 422 U.S. at 420 & n.12, 421 (backpay available to a victim of discrimination under Title VII unless central statutory purposes would be frustrated).

In some situations, however, the appropriate relief under Title VII may differ from the appropriate relief under the NLRA. A claimant in an NLRA case should lower the sights of her job search after a reasonable time because of the NLRA's policy of promoting production and employment. NRLB v. Madison Courier, Inc., 472 F.2d 1307, 1320-21 (D.C. Cir. 1972). See also NRLB v. Southern Silk Mills, Inc., 242 F.2d 697, 700 (6th Cir.), cert. denied, 355 U.S. 821 (1957); NRLB v. Moss Planing Mill Co., 224 F.2d 702, 705-06 (4th Cir. 1955). Yet in deciding Title VII cases, courts have not applied the “lower sights” doctrine. One court has characterized resort to NLRA precedents as unnecessary because of the abundance of Title VII authority on mitigating damages. EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1317 n.39 (N.D. Cal. 1979). Other courts have found the “lower sights” doctrine inappropriate because the Title VII claimant had special qualifications or professional status. E.g., EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 925 (S.D.N.Y. 1976), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977); Williams v. Albemarle City Bd. of Educ., 508 F.2d 1242, 1243-44 (4th Cir. 1974).


34. NRLB and federal court decisions about the capacity of an employer to toll backpay liability under the NLRA have overwhelmingly concerned discharged employees and offers of reinstatement rather than rejected job applicants and offers of initial employment. The Supreme Court, however, has asserted that victims of discriminatory hiring deserve the same protection as victims of discriminatory discharge. Franks v. Bowman Transp. Co., 424 U.S. at 768-69.

Although the NRLB has often held that an unconditional offer of reinstatement tolls an employer’s backpay liability, the NRLB has not considered whether an offer must include retroactive seniority rights accruing after an employer’s discriminatory conduct. In various cases, the NRLB has found that offers of reinstatement to discriminatorily discharged employees need not include accrued backpay. Consolidated Freightways, 253 N.L.R.B. 988, 106 L.R.R.M. (BNA) 1076, remanded on other grounds, 669 F.2d 790 (D.C. Cir. 1981); National Screen Products Co., 147 N.L.R.B. 746, 56 L.R.R.M. (BNA) 1274 (1964); Reliance Clay Products Co., 105 N.L.R.B. 135, 32
B. Interpretation of the Objectives of Title VII

The Court identified two purposes of Title VII. The “primary objective” is ending employment discrimination, which the Court interpreted as requiring legal rules that “encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants.” If unlawful discrimination occurs, the Court asserted that “Title VII’s secondary, fallback purpose” is compensating the victims for their injuries.\(^\text{35}\)

Although Title VII’s secondary, compensatory objective is well-founded in legislative history\(^\text{36}\) and has been long recognized by the

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\(^{35}\) 458 U.S. at 228, 230.

\(^{36}\) In passing the Equal Employment Opportunity Act (EEOA) of 1972, Congress re-enacted § 706(g) of Title VII. The section-by-section analysis prepared by Senators Javits and Williams and accompanying the conference report on the EEOA reaffirmed the “make whole” purpose of Title VII:

The provisions of this subsection are intended to give the courts wide discretion exercising [sic] their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section . . . is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.
Supreme Court, the interpretation of Title VII's primary objective in *Ford Motor Co.* is misleading. That Title VII aims to eliminate discriminatory employment practices is clear; section 706(g), for example, explicitly empowers courts to enjoin employers from engaging in such practices. Ending employment discrimination, however, may mean either undertaking curative activity after discrimination has occurred or preventing discrimination from occurring in the first place. Yet in interpreting Title VII's primary objective, the Court concentrated exclusively on considerations that apply after discrimination has occurred and failed to address the deterrent objective of backpay awards under Title VII.

Several judicial decisions have stressed the deterrent objective. In 1973, the Eighth Circuit Court stated in *United States v. N.L. Industries, Inc.* that backpay awards compensate victims "and even more importantly" serve to deter employers from wrongdoing. According to the circuit court, backpay awards "provide the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate" discrimination. Consistent backpay awards, the circuit court argued, will make employers find it in their best interest to remedy their employment procedures without court intervention. Two years later, in *Albemarle Paper Co. v. Moody*, the Supreme Court asserted that Title VII's "primary objective was a prophylactic one" and suggested that backpay awards are important because they give employers "incentive to shun practices of dubious legality." The Court then quoted *N.L. Industries* with approval.

118 CONG. REC. 7168 (1972).
38. The Supreme Court did observe that district courts should grant remedies which "will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." This observation, however, occurred in a footnote to the Court's discussion of Title VII's secondary, compensatory objective. 458 U.S. at 233 n.20.
39. United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973). In support of this statement, the court cited *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1163 ("Because of the deterrent effect it has on employers and unions and the incentive it holds out to workers, backpay plays a crucial role in the remedial process.").
40. 479 F.2d at 379.
41. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18. *Albemarle Paper* was a Title VII class action to enjoin an employer and a union from discriminating against blacks and to obtain backpay. The Supreme Court held that, given a finding of unlawful discrimination, backpay
The Supreme Court again attributed to Title VII a “prophylactic” principal objective in *International Brotherhood of Teamsters v. United States*. Title VII, the Court asserted, seeks primarily “to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.” In support of this assertion, the Court once more quoted *N.L. Industries* with approval.42

Scholarly comment on Title VII has repeatedly attributed a deterrent function to backpay awards under Title VII. For example, a recent study of backpay in employment discrimination cases states that backpay compensates victims “and deters employers” from engaging in discriminatory practices. According to the study, the Supreme Court has recognized that Title VII’s goals are compensating victims of discrimination and “discouraging future acts of discrimination in employment.”43

Analogy to backpay awards under the NLRA also suggests that backpay awards under Title VII should deter illegal conduct by employers. As the circuit court stated in *NLRB v. Madison Courier, Inc.*, backpay awards under the NLRA serve a “two-fold objective.” They not only reimburse innocent employees for actual losses resulting from employers’ illegal acts, but also further “the public interest advanced should be denied only for reasons which, if applied generally, would not frustrate Title VII’s central purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The Court also held that employment tests which are discriminatory in effect, though not in intent, are permissible only if professionally acceptable methods show them to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the jobs sought by the candidates. 42. Int’l Bhd. of Teamsters v. United States, 431 U.S. at 364. *Teamsters* was a Title VII action against an employer and a union to obtain general injunctive relief and specific “make whole” relief for individual blacks and Spanish-surnamed persons, so that they could transfer to more desirable line-driver jobs without losing their competitive seniority rights. The Supreme Court held that the Government had sustained its burden of proving systematic discrimination by the employer, that retroactive seniority could be awarded as relief even though a seniority system agreement provided for no such relief, that the union had not violated Title VII, that every minority member who applied for a line-driver job after enactment of Title VII was presumptively entitled to relief, that failure to apply for a job did not necessarily bar an award of retroactive seniority, and that on remand the district court was to identify actual victims of discrimination and to balance their interests against the legitimate expectations of other innocent employees. 43. Special Project, *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 893, 905, 1039 (1982). See also W. GOULD, A PRIMER ON AMERICAN LABOR LAW 193 (1982) (“The rationale for damage awards [under Title VII] is not simply compensation, but also the fact that they have a prophylactic effect on illegal conduct and wrongdoing.”); Comment, *Back Pay for Employment Discrimination Under Title VII—Role of the Judiciary in Exercising Its Discretion*, 23 CATH. U.L. REV. 525, 531 (1974) (“back pay awards under Title VII encompass two purposes: one, compensating victims . . . ; and two, deterring present and future acts of employment discrimination”).

44. Legislative history shows that Congress intended relief under Title VII to be similar to relief under the NLRA, and the Supreme Court has often looked to NLRA precedents in framing remedies under Title VII. *See supra* notes 31-32.
by the deterrence of such illegal acts. While the need for the achievement of the private reimbursement objective is obvious, courts have generally placed greater stress on the less apparent goal of furthering public policy.\textsuperscript{45}

As a practical matter, compensation and deterrence go together. At least to the extent that employers must compensate victims, they have incentive to avoid employment discrimination. The important question is how much courts should fashion legal rules governing backpay awards in Title VII cases to deter unlawful conduct, as well as to compensate victims. The judicial decisions, scholarly commentaries, and analogy to the NLRA discussed above all indicate that courts should give substantial attention to preventing, rather than merely curing, discriminatory employment practices.

\textbf{C. Ending Employment Discrimination}

To establish that its rule will end employment discrimination, the Court contrasted the consequences of not requiring that job offers include retroactive seniority rights in order to toll backpay liability with the consequences of requiring that they do so. Both alternatives, however, present problems more complex than those the Court considered, and the difficulties of not requiring the inclusion of retroactive seniority rights seem more severe than the difficulties of requiring their inclusion.

\footnotesize{\textsuperscript{45} NLRB v. Madison Courier, Inc., 472 F.2d at 1316. Madison Courier was an action for enforcement of an NLRB order requiring that an employer make backpay awards to a group of unfair labor practice strikers. Finding that the NLRB had incorrectly interpreted and applied the mitigation doctrine and that the NLRB had inadequately explained its reasons for a supplemental decision, the circuit court refused enforcement and remanded the case to the NLRB.

The different objectives of Title VII and the NLRA may justify a stronger emphasis in NLRA cases on deterrence of illegal acts. In proscribing unlawful employment practices, Title VII seeks to eliminate discrimination and make victims of discrimination whole. See supra notes 35-37 & 39-43 and accompanying text. By contrast, the courts have indicated that the NLRA, in proscribing unfair labor practices, seeks to promote production and employment. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941); NLRB v. Madison Courier, Inc., 505 F.2d 391, 397 (1974).

Commentators have described the objectives of the NLRA in different ways. One author stresses the NLRA’s “dual concerns”: (1) “protecting trade unions and their members against antiunion discrimination” and (2) protecting “the collective bargaining process,” especially the freedom to use economic weapons. W. Gould, supra note 43, at 95. Another suggests that the NLRA “can best be understood as an effort by the Congress to create the conditions of industrial peace in interstate commerce by removing obstacles to—indeed, encouraging—the formation of labor unions as an effective voice for the individual worker.” R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining 1 (1976). According to others, the language of §1 of the NLRA suggests three specific goals: “(1) free collective bargaining; (2) free choice in the selection of bargaining representatives; and (3) freedom to engage in, or refrain from, concerted activities for the mutual aid and protection of the employees.” D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 9 (1976).}
1. Consequences of Not Requiring the Inclusion of Retroactive Seniority Rights in a Job Offer

Stressing the need for voluntary compliance with Title VII, the Court suggested that a rule which does not require an employer to include retroactive seniority rights in a job offer intended to toll backpay liability will help end discrimination in two ways. First, it will promote speedier relief for claimants than litigation will provide; and second, it will enhance the likelihood that the employer will actually offer the claimant the job originally denied.\footnote{46}{458 U.S. at 228-29.}

The Court considered only the situation \textit{after} an employer has discriminated in hiring and a rejected applicant has filed a Title VII claim. From this perspective, the Court’s position has some strength. If an offer of starting employment tolls backpay liability, the employer will have incentive to make such an offer; and if unemployed, a Title VII claimant will probably accept the offer. Acceptance also seems likely if the claimant is underemployed (i.e., if the claimant has a replacement job inferior to the position originally denied even without retroactive seniority rights).

Nevertheless, allowing a Title VII defendant to toll backpay liability by offering the position originally denied without retroactive seniority rights will not eliminate discrimination “far more quickly than could litigation proceeding at its often ponderous pace.”\footnote{47}{\textit{Id} at 228.} At most, the Court’s rule will only partly end the discrimination. An employer will have no incentive to offer retroactive seniority rights until ordered to do so; and given the “often ponderous pace” of litigation, an order is unlikely until years after the discrimination has occurred.

Also, the Court should have considered the situation \textit{before} an applicant applies for a job. The more it costs employers to toll backpay liability, the more incentive they have to examine and correct their employment practices in order to prevent discrimination in hiring. Since the Court’s rule lowers the cost of tolling backpay liability, it appears likely to induce employers to behave as Ford behaved (i.e., to continue using discriminatory hiring procedures until a victim files charges with the EEOC).\footnote{48}{It can be argued that the Court’s rule will have a negligible effect on the establishment and maintenance of personnel policies. The argument stresses that an employer seeks to achieve many objectives through personnel policies, that compliance with Title VII’s goal of ending discrimination is only one of these objectives, and that the issue of an employer’s capacity to toll backpay is of minimal significance. Ford, however, believed the issue significant enough to litigate up to the Supreme Court. Thus, the capacity to toll backpay liability without offering retroactive seniority rights appears an important consideration in Ford’s personnel policies.}
2. Consequences of Requiring the Inclusion of Retroactive Seniority Rights in a Job Offer

The Court claimed that requiring the inclusion of retroactive seniority rights in a job offer to a Title VII claimant will cause three adverse consequences. First, because of the extra costs of fringe benefits associated with seniority, such a requirement will make hiring the claimant more expensive and thus will increase the likelihood that the employer will hire another applicant. Second, inserting the claimant into the seniority ladder over the heads of employees whom the employer hired after initially rejecting the claimant will cause deterioration in morale, labor unrest, and reduced productivity. Third, in many cases, granting retroactive seniority will violate a collective bargaining agreement. Because of these adverse consequences, the Court concluded that requiring the inclusion of retroactive seniority rights in a job offer will provide employers with no incentive to hire Title VII claimants.49

The Court's prediction that employers will be less likely to make job offers to Title VII claimants if it costs them more to do so seems well-founded. Yet the Court overlooked the possibility that employers may offer Title VII claimants retroactive competitive seniority rights, but withhold retroactive benefit seniority rights until the claimants have established discrimination in administrative or judicial hearings.50 In such situations, the claimants will be no more expensive to hire than other applicants.

The second and third adverse consequences discussed by the Court can occur only if an employer hires a Title VII claimant with retroactive competitive seniority rights.51 The Court's prediction that deterioration in workforce morale, labor unrest, and reduced productivity will result from hiring a Title VII claimant with retroactive seniority rights seems most plausible in the context of a white male workforce. The Court's rule, however, may tend to lower morale and productivity among female or minority workers who perceive that discriminatory policies are going unremedied when claimants lose their right to further backpay liability by rejecting "cheap offers" of initial employment. Further, there is the more distant possibility that a corporation may suffer reduced sales if women or minority groups come to regard its employment record as bad enough to warrant a product boycott.

49. 458 U.S. at 229.
50. For a discussion of the distinction between competitive and benefit seniority rights, see supra note 1.
51. Although the Court considered it unlikely, this discussion assumes that an employer would be willing to offer a claimant retroactive seniority rights.
If a claimant prevails in a Title VII action, the employer will be no worse off for having granted her full retroactive seniority rights at the time of the job offer rather than later, pursuant to an administrative or judicial determination. The employer may even be better off, because the longer the victim must wait for full relief, the more incumbent employees may rely on their places in the seniority ladder, and the more they may resent the victim's eventual recovery of lost seniority rights.

If a claimant does not prevail in a Title VII action, the employer may incur needless workforce difficulties by granting unjustified retroactive seniority rights. It seems unfair to force an innocent employer to pay this price or else risk increased backpay liability. The consequences of imposing such a choice, however, may be less severe than the consequences of forcing victims of discrimination to bear the prolonged effects of illegal practices until they receive final relief from an administrative or judicial determination.

The Court's prediction that granting retroactive seniority rights will often violate a collective bargaining agreement requires explanation. Perhaps the Court envisioned a situation in which an employer inserts a Title VII claimant into the seniority ladder over the head of an employee whom the employer hired after initially rejecting the claimant. The displaced employee might then charge the employer with unilaterally altering the terms and conditions of employment and violating the collective bargaining agreement.

This situation raises questions that the Court failed to address. How does Title VII govern a situation in which a claimant has charged, but not yet proven, discrimination? What if the employer and claimant settle the claim, with the result that there is never an administrative or judicial determination? How should an arbitrator interpret a collective bargaining agreement when no administrative or judicial determination has been made?

Such questions indicate that requiring the inclusion of retroactive seniority rights in a job offer can pose difficulties as to whether a collective bargaining agreement has been violated and what rules an arbitrator should follow in case of a settlement. These difficulties, however, appear generic to all cases in which Title VII awards may conflict with collective bargaining agreements. Further, the difficulties seem less severe than the problems resulting from failure to require the inclusion of retroactive seniority rights.52

52. The EEOC has suggested that "employers are free to negotiate collective bargaining agreements that permit them to offer full reinstatement, including seniority rights, to individuals they believe they have discriminated against." If negotiated, such agreements might help solve problems resulting from settlements. The EEOC has argued that if employers fail to negotiate such agreements, they are in the same position as other defendants who have restricted themselves by contracts with third parties. Title VII claimants, according to the EEOC, should not bear the
D. Making Victims of Employment Discrimination Whole

The Court divided all cases into three categories to show that its rule will properly compensate victims of employment discrimination. In the first category, the victim is unemployed or underemployed; in the second category, the victim has found a replacement job that she regards as better than, or substantially equivalent to, the position originally denied even with retroactive seniority rights; and in the third category, the victim has found a replacement job that she considers superior to the position originally denied without retroactive seniority rights, but inferior to the position originally denied with retroactive seniority rights.

1. First Category

The Court first examined the category of cases in which a Title VII claimant is unemployed or underemployed. Drawing on NLRA principles, the Court asserted that such a claimant need not go into another line of work, accept a demotion, or take a demeaning position, but must accept a position substantially equivalent to the one denied to preserve the right to backpay. Requiring an unemployed or underemployed claimant to accept an offer of the position originally denied without retroactive seniority rights, the Court argued, merely embodies the statutory requirement to mitigate damages.53

The Court's argument seems generally sound. In some cases, however, ongoing discrimination may make working conditions so abusive where the claimant originally sought employment that she should be able to refuse an offer of starting employment there without violating the statutory duty to mitigate damages. When an employer persistently subjects an employee to discriminatory treatment, the employee may quit without risking reduction of damages.54 If an employer then offers the victim reemployment requiring a return to abusive conditions, the burden of employers' voluntarily having limited their own flexibility to make hiring decisions and grant retroactive seniority rights. Presumably, the employers have received concessions from their employees' unions for placing such limits on themselves. Thus, the EEOC has contended that victims of the employers' discriminatory practices should not have to pay for such benefits to the employers. Brief for Respondent at 30, Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).

The EEOC's suggestion appears to be of limited value. Although employers are free to propose provisions allowing them to grant Title VII claimants retroactive seniority rights, they seem to have little incentive for doing so. Even if they seek such provisions, unions are likely to oppose them, since seniority rights are extremely important in collective bargaining agreements. See supra notes 1-2. Thus, substantial concessions would probably be necessary to induce unions to agree to such provisions.

53. 458 U.S. at 231-34.

victim may refuse such an offer and still comply with the statutory duty to mitigate damages by seeking employment where discriminatory conditions do not exist. Application of these principles to the situation of a rejected job applicant who is unemployed or underemployed and who learns of persistently abusive conditions where she originally sought employment suggests that she should have the right to reject work in such conditions without losing the right to further backpay.

2. Second Category

In the second category of cases, a Title VII claimant has found "a more attractive job" than the defendant's. The Court maintained that the availability of "the better job" terminates the ongoing ill effects of the defendant's refusal to hire the claimant. According to the Court, if Gaddis and Starr considered their GM jobs better than, or substantially equivalent to, the positions they would have held at Ford had Ford hired them initially, their rejection of the 1973 offer could be taken to indicate a belief that later developments had extinguished the lingering ill effects of Ford's discriminatory refusal to hire them. If Gaddis and Starr thought that the Ford and GM jobs offered identical pay, identical conditions of employment, and identical risks of layoff, they would have been indifferent as to which job they had. In such a situation, the Court concluded, refusal to toll Ford's backpay liability to Gaddis and Starr would be, absent special circumstances, to grant them something more than compensation for their injuries.

The Court's argument appears essentially correct. The Court accurately observed that the ongoing ill effects of employment discrimination cease when the victim acquires a job better than, or substantially equivalent to, the position she would have held if discrimination had not occurred. Yet the Court added the proviso "absent special circumstances." What this proviso means in the context of the second category is unclear.


56. 458 U.S. at 234-35.

57. In discussing the third category of cases, the Court again qualified its conclusion with the proviso "absent special circumstances." Although it offered no standard for determining what constitutes a special circumstance, it suggested as an example that relocation costs might qualify when a victim has had to move far away to find a replacement job. Id. at 238-39 & n.27.

Yet in the second category of cases, relocation costs cannot be an issue. By definition, a replacement job in the second category is better than, or substantially equivalent to, the job at the defendant's workplace even with retroactive seniority rights. What it might cost the victim to relocate after accepting the replacement job is irrelevant, because the ongoing ill effects of the defendant's discrimination terminate when the replacement job begins.

Nevertheless, the victim should be able to recover reasonable expenses incurred in moving to
The second category may be the one in which Gaddis and Starr found themselves. As the Court noted, they may have considered their replacement jobs better than, or substantially equivalent to, the positions originally sought from Ford even with retroactive seniority rights, "since they applied at Ford only after being laid off at GM, and since after being recalled to the GM jobs they rejected Ford's offer." The Court recognized, however, that it could not infer that they so valued their GM jobs solely from their rejection of the 1973 offer.\footnote{58}

The Court's analysis of the second category apparently relies on a theory of unjust enrichment. It seems to have wavered, however, between subjective and objective criteria for determining whether to toll an employer's backpay liability. Initially, the Court described the second category as encompassing cases in which the victim has found "a more attractive job" than the one originally denied. This phrase can mean either something objective (i.e., that a reasonable person in the victim's position would find the replacement job more desirable) or something subjective (i.e., that the particular victim happens to find the replacement job more desirable). The Court later referred to the replacement job in the second category of cases as a "better job" and as a "superior or substantially equivalent" job. Both these phrases suggest that the criteria for differentiating between jobs are objective. Yet in discussing the replacement jobs that Gaddis and Starr obtained at GM, the Court suggested not that these jobs could have been better than, or substantially equivalent to, the positions they would have had at Ford even with retroactive seniority rights, but that Gaddis and Starr could have "considered," "believed," or "thought" the jobs to be so. This language indicates that the Court's test for differentiating between jobs is subjective.

\begin{itemize}
\item[a replacement job. In Stone v. D.A. & S. Oil Well Servicing, Inc., 624 F.2d 142 (10th Cir. 1980), the plaintiff left a part-time replacement job and moved to another city, where she sought work similar to the work that the defendant had discriminatorily denied her. Finding that the plaintiff exercised reasonable diligence, the court asserted, "Title VII should not be used to lock partially employed persons, fearful of losing back pay awards, into long-term unproductive geographical commitments." \textit{id.} at 144. \textit{See also} Milton v. Bell Labs., Inc., 428 F. Supp. 502, 515 (D.N.J. 1977) (compensatory damages awarded for costs incurred by a Title VII claimant in moving to a replacement job). \footnote{58} 458 U.S. at 235 n.24. Such an inference is also inconsistent with the circuit court's determination that the effects of Ford's earlier discrimination tainted the later offer and that Gaddis and Starr faced an "intolerable" choice because Ford offered no retroactive seniority rights to alleviate these effects. 645 F.2d at 191-92. Yet whether Ford's 1973 offer forced Gaddis and Starr to make an "intolerable" choice depends on whether they continued to accrue seniority rights while they were laid off from GM. If they returned to GM in January 1973 with full accrued seniority rights retroactive to the date of their original hiring, Ford's backpay liability should have ended on the date of their recall, for their jobs at GM would then have been superior to the jobs they would have had at Ford even if Ford had hired them in July 1971. Ford, however, did not raise this issue; nor did any of the courts consider it. One must thus assume that Gaddis and Starr's case belongs in the third category.}
\end{itemize}
A subjective test will create problems. Under this test, any claimant is likely to allege that she personally values her replacement job less than the position originally denied with retroactive seniority rights. Disproving the allegation can present formidable difficulties, since the claimant is in the best situation to know how she really regards her replacement job. Further, under a subjective test, claimants who have been rejected for substantially similar positions and who have obtained substantially similar replacement jobs may receive different treatment merely because they happen to value their replacement jobs differently.

The Court's analysis would have been stronger had it focused on objective criteria to assess whether a replacement job is at least substantially equivalent to the position originally denied. Such a focus, however, raises questions about what factors should be considered and how they should be weighed. Three important factors mentioned by the Court are pay, conditions of employment, and risk of layoff.

Since the remedial provisions of the NLRA served as the model for the remedial provisions of Title VII, NLRA decisions concerning what constitutes substantially equivalent employment in the context of a discriminatee's duty to mitigate damages may provide guidance. These decisions indicate that substantially equivalent employment must be consonant with the particular skills, background, and experience of the victim and must not involve conditions substantially more onerous than those of the previous position. Further, NLRA decisions have stressed that doubts should be resolved in favor of an innocent discriminatee in case of dispute about whether a position constitutes substantially equivalent employment.

Objective criteria appear easy to apply in some cases. For example, in Somers v. Aldine Independent School District, the district court found that an employer's backpay liability to an illegally terminated teacher ended when she obtained another teaching position at a greater salary than that she would have earned had she remained with the employer. Indeed, the teacher conceded this point and did not seek backpay for the period after she began teaching in her replacement position.

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59. See supra notes 31-32 and accompanying text.
60. NLRB v. Madison Courier, 472 F.2d at 1320-21. For a summary of the mitigation doctrine, see id. at 1317-20.
61. Id. at 1321. See also Leeds & Northrup Co. v. NLRB, 391 F.2d 874, 880 (3d Cir. 1968) (by resolving doubts against a party who violates the NLRA, the NLRB "can hardly be said to be effectuating policies beyond the [NLRA's] purposes").
62. Somers v. Aldine Indep. School Dist., 464 F. Supp. 900, 903 (S.D. Tex. 1979). Other courts have also tolled an employer's backpay liability when a Title VII claimant's earnings in a replacement job have exceeded the amount that the claimant would have earned in the position illegally denied. Di Salvo v. Chamber of Commerce, 568 F.2d at 598; Butta v. Anne Arundel County, 473 F. Supp. 83, 89 (D. Md. 1979). One court has even tolled an employer's backpay
In other cases, the application of objective criteria appears more difficult. What if a replacement job pays more than the job originally denied, but is more dangerous and offers greater risk of layoff? What if a replacement job pays less, but is safer and offers less risk of layoff? Such questions may pose problems, but these problems seem easier to resolve than the difficulties resulting from the use of a subjective test.

3. Third Category

According to the Court, the question of whether its rule will adequately compensate victims of discrimination arises solely in the "narrow category of cases" in which the victim regards her replacement job as more valuable than the position originally denied without retroactive seniority rights, but less valuable than the position originally denied with retroactive seniority rights. Concentrating on Gaddis and Starr, the Court observed that they could have accepted Ford's 1973 offer and retained the right to seek full compensation at trial. The choice between taking Ford's offer and remaining at GM was hard, according to the Court, only because it required them to assess their likelihood of prevailing at trial. Yet this choice, the Court asserted, did not deprive them of the right to full compensation. The Court observed that litigation is risky and that a plaintiff with a claim to compensation must consider the possibility of losing at trial. A victim like Gaddis or Starr, according to the Court, must decide whether to take the job offered by the defendant or, instead, whether to accept a more attractive job from another employer. Rejection of the defendant's job offer, the Court suggested, indicates that the victim considers the availability of better opportunities elsewhere to have ended her suffering at the hands of the defendant. Thus, the Court propounded the rule that, absent special circumstances, a victim's rejection of the job originally denied tolls the employer's backpay liability.63

Describing the third category of cases as narrow masks its significance, since this is the category in which disputes will most probably occur. If a victim of hiring discrimination is unemployed or underemployed, she is likely to accept an offer of the position originally denied even without retroactive seniority rights.64 If the victim has acquired a liability when a Title VII claimant, who would have earned $12,500 per year in the position illegally denied, obtained a replacement job paying $12,000 per year, on the ground that the difference between the two salaries was minimal. Milton v. Bell Labs., Inc., 428 F. Supp. at 515 & n.19.

63. 458 U.S. at 236-39.
64. She may, however, reject such an offer. In Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1018, 1040, 1046-47 (3d Cir.), vacated, 414 U.S. 970 (1973), two women who alleged that an employer had discriminated against them in hiring on the basis of sex rejected offers of starting employment in the positions originally denied. One claimant seems to have been underemployed, since she could have made $14,377 by working in the position originally denied and earned only
job better than, or substantially equivalent to, the position originally denied and if objective criteria are used, she is unlikely to contest the issue of whether to toll the employer's backpay liability, as in Somers. Thus, the issue appears important primarily for cases in the third category.

The Court mischaracterized what was at stake for Gaddis and Starr when Ford offered them positions without retroactive seniority rights. According to the Court, the choice they faced was difficult only because it required them to assess the possibility of winning at trial. Gaddis and Starr, however, seem to have been concerned with more than this assessment. They stood to lose seniority rights, which the Court acknowledged play "a central role in allocating benefits and burdens among employees." Had Gaddis and Starr voluntarily left their jobs at GM and accepted Ford's 1973 offer, they apparently would have lost their seniority rights at GM and would not have received the seniority that they were ultimately determined to deserve at Ford. As the dissent observed, they would have had "lesser health, life, and unemployment insurance benefits, lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment." They had to assess not only the probability of prevailing at trial, but also the likelihood of being laid off. In short, they had to confront the possibility of losing what the Court described as the work necessary to "feed a family and restore self-respect."

§6,478 by working elsewhere. The other claimant was unemployed. Both women rejected the offers on the advice of an EEOC representative.

Because of the statutory duty to mitigate damages, the claimants in Jurinko apparently should have accepted the employer's offers, and the district court cut off the employer's backpay liability as of the date of the offers. Reversing the district court's decision on damages, the circuit court initially held that the employer could have tolled backpay liability only by including full backpay and retroactive seniority rights in the offers. This holding would prevent an employer charged with hiring discrimination from stopping the accrual of backpay unless the employer gives a claimant everything the claimant could receive by prevailing in court on a charge of discrimination. Thus, the holding would require that the employer surrender any meaningful right to contest the claimant's allegations if the employer wants to toll backpay liability.


65. Id. at 239.
66. Id. at 251.
67. Id. at 221. "To people like Gaddis and Starr," the dissent observed, "the knowledge that they might someday establish their Title VII claims on the merits provides little solace for their immediate and pressing personal needs." Id. at 256.
The Court obscured the predicament that a victim like Gaddis or Starr confronts. Her decision is *not* whether to take the job offered by the defendant or to accept a more attractive job from another employer. Instead, she must choose between taking the defendant’s offer and remaining in her replacement job, which is likely to offer more security. Rejection of the defendant’s offer need not indicate that she considers the availability of better opportunities elsewhere to have ended her suffering at the hands of the defendant, but may show only that accepting an offer of starting employment will entail loss of crucial seniority rights where she has obtained a replacement job and will create a high risk of layoff where she was originally denied a position.

In examining the third category of cases, the Court used a subjective test for determining whether to toll an employer’s backpay liability under Title VII. It focused on what a Title VII victim “believes” about a replacement job and on how “Gaddis and Starr considered their GM jobs.” Although the Court wrote of a Title VII victim’s desire for “a more attractive job” and “better opportunities,” it asserted that “[w]hat makes one job better than another varies from one employee to another.” It thus suggested that the appropriate test is how an individual victim values such factors as the rate of pay, “the presence of other workers of the same sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth.”

Like its analysis of the second category of cases, the Court’s analysis of the third category would have been stronger had it focused on objective criteria. Such a focus is consistent with the prevention of unjust enrichment and avoids the difficulties of a subjective test.

The most serious problem with the Court’s analysis of the situation in which Gaddis and Starr found themselves is that it failed to consider crucial facts. Assuming that Gaddis and Starr enjoyed less seniority at GM than they would have enjoyed at Ford if Ford had hired them in 1971, Gaddis and Starr confronted an increased risk of layoff either at GM or at Ford under the 1973 offer. Tolling Ford’s backpay liability with the 1973 offer shifted the continuing risk of layoff at GM from Ford to Gaddis and Starr. Beginning employment at Ford would not have been equivalent to continued employment at GM because Gaddis and Starr would have worked at a greater seniority disadvantage. Given these circumstances, remaining at GM could reasonably have appeared to be in Gaddis and Starr’s best interest and in Ford’s best interest. By staying where seniority protection was greater, Gaddis and Starr were apparently trying to reduce the risk of layoff and thus of further damages. Paradoxically, the Court curtailed the relief available

68. *Id.* at 236-37 & n.26.
to Gaddis and Starr because they attempted to mitigate the losses resulting from Ford's initial discrimination against them.

The Court qualified its conclusion that a Title VII victim's rejection of the position originally denied tolls the defendant's backpay liability with the proviso "absent special circumstances." According to the Court, relocation costs might qualify as a special circumstance when a victim has had to move far away to find a replacement job, but loss of seniority rights would not qualify. The dissent argued that in the case of Gaddis and Starr, such loss reflected relocation costs at least as substantial as high moving expenses. The Court, however, dismissed this point as confusing the costs of changing jobs with the differences between the two jobs. Nevertheless, the Court's distinction seems irrelevant. In each case, the victim apparently took reasonable steps to reduce damages and deserves full compensation.

E. Burdens on Innocent Employees and Employers

The Court argued that requiring the inclusion of retroactive seniority rights in a job offer to a Title VII claimant unfairly burdens innocent incumbent employees and innocent employers. In discussing the burden that the circuit court's decision placed on innocent employees, the Court made two main claims. First, it asserted that because of the overriding importance of seniority rights, it should be wary of any rule prompting job offers that compel incumbent workers to sacrifice seniority rights to a person who has only claimed, but not yet proven, unlawful discrimination. Second, it maintained that, while a Title VII action is pending, an employer may have to retain the claimant and lay off an innocent employee. If the claimant subsequently fails to prove unlawful discrimination, the court asserted that the bumped worker has no redress for having been wrongly relegated to the unemployment lines.

In evaluating the Court's arguments, one should distinguish the situation in which a claimant eventually proves an employer's liability under Title VII from the situation in which a claimant does not. When an employer hires workers after discriminating against an earlier applicant and the applicant ultimately proves the employer's liability, the incumbent workers have profited from the discrimination. Such workers should receive all the benefit seniority rights actually earned, but should not continue to receive undeserved competitive seniority entitlements. Precisely because seniority rights are so important in the workplace, legal rules should discourage the perpetuation of discriminatory

69. Id. at 238 n.27.
70. Id. at 252 n.11.
71. Id. at 239 n.27.
72. Id. at 239-40.
competitive seniority rankings. Further, quickly granting retroactive seniority rights to a discrimination victim who ultimately proves the employer's liability will provide various benefits. It will make the victim whole sooner rather than later, it will soften the blow to incumbent workers by reducing the time during which they build up unjustified expectations concerning competitive seniority rights, and it will help employers by restricting the number of incumbent workers affected and thus limiting any adverse effect on employee morale.

If an employer grants retroactive seniority rights to a claimant who pursues and ultimately loses a Title VII action, incumbent workers may wrongly suffer. The worst case is that of an unfairly bumped worker.

What does not follow is the Court's conclusion that the worker lacks redress for this wrong. The bumped worker may lack a remedy from the Title VII claimant, but should have a remedy from the employer for breach of the collective bargaining agreement. By including retroactive seniority rights in the job offer to the claimant, the employer sought to ensure the tolling of backpay liability and thereby hedged against the risk of losing the Title VII action. The employer, however, should not be permitted to hedge at the expense of an innocent worker. Such permission will shift the burden for erroneously granting retroactive seniority rights to a person who has no control over hiring and is less able than the employer to bear economic hardship.

Yet even if an unfairly bumped worker does eventually obtain redress from the employer, the worker must still pay rent, buy food, and make other payments in the interim. Like a victim of hiring discrimination, an unfairly bumped worker requires employment to pay for the necessities of life and restore self-respect.73

The Court also asserted that the lower court's decision unfairly burdens an innocent employer who considers the Title VII claim weak or baseless, but nevertheless wishes to offer some relief to the claimant and toll the mounting backpay bill. If the claimant receives retroactive seniority rights and later loses at trial, the Court observed, the employer will have no recourse against the claimant for the costs of the

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73. One author has suggested using the device of "equal or dual seniority" to protect Title VII claimants and innocent incumbents. Ziskind, Retroactive Seniority: A Remedy for Hiring Discrimination, 27 Lab. L.J. 480, 489 (1976). This device would accord the same seniority rights to a claimant and to the incumbent with the competitive seniority ranking that would have belonged to the claimant if the employer had originally hired the claimant. Equal or dual seniority would require the employer to retain both so long as one was needed and to recall both at the same time. Also, the employer could be required to promote and transfer both simultaneously.

Whether an employer would be willing to incur the costs and deal with the personnel problems likely to result from equal or dual seniority is questionable. The Court predicted that an employer would be reluctant even to offer retroactive seniority rights to a Title VII claimant. See 458 U.S. at 229. Although this prediction may be ill-founded, one may doubt the willingness of an employer to endure the additional expense and complications of equal or dual seniority.
Forcing an employer to pay these costs or else risk increased backpay liability appears unfair when the claimant ultimately loses in a Title VII action. When the claimant ultimately wins, however, forcing such a choice on the employer seems fair. Since someone's interests must be sacrificed, the problem is to devise a legal rule that will pose the least severe difficulties when it is uncertain whether discrimination has occurred (i.e., after the filing of a Title VII claim and before a final administrative or judicial decision).

III
SUGGESTED APPROACH

The preceding analysis indicates that the Court's arguments are mistaken at several points. A preferable approach is to establish a rebuttable presumption that a Title VII defendant may toll backpay liability only by making a Title VII claimant a full offer (i.e., by offering the claimant the position originally denied, or a substantially equivalent position, with full competitive and benefit seniority rights retroactive to the date of the alleged discrimination).

If a Title VII claimant is in the first category of cases (i.e., if she is unemployed or underemployed), an employer should be able to end the accrual of backpay by making the claimant an offer of starting employment in the position originally denied, or a substantially equivalent position, without retroactive seniority rights. Rejection of such an offer is justified only if conditions in the employer's workplace are abusive and if the claimant makes reasonable efforts to find a replacement job. This rule protects the claimant from subjection to discriminatory treatment and yet is consistent with the statutory duty to mitigate damages.

If a Title VII claimant is in the second category of cases (i.e., if she has found a replacement job which is worth more than the position originally denied even with full retroactive seniority rights), the employer's backpay liability should cease when the claimant's employment in the replacement job begins. Acquisition of the better job ends any compensable injury caused by denial of the position originally sought. Thus, tolling the employer's backpay liability prevents unjust enrichment of the claimant.

If a Title VII claimant is in the third category of cases (i.e., if she has found a replacement job which is worth more than the position originally denied without full retroactive seniority rights, but less than the position originally denied with such rights), an employer should be able to toll backpay liability only by offering the claimant the position

74. *Id.* at 240 n.29.
originally denied with full retroactive seniority rights. This rule avoids penalizing the claimant for attempting to mitigate damages resulting from the original denial of employment. To preserve the right to full backpay, the claimant should not be forced to forego fringe benefits, to reduce her eligibility for promotion and transfer, and to increase her risk of layoff and thus of further damages.

If a plaintiff pursues a Title VII claim to final administrative or judicial determination and proves a defendant guilty of discriminatory refusal to hire, the defendant should bear the burden of proving that the plaintiff has failed to mitigate damages. This allocation of the burden of proof is consistent with Title VII and NLRA precedents. According to the district court in *EEOC v. Kallir, Philips, Ross, Inc.*, a Title VII "defendant must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct." Further, the circuit court in *NRLB v. Miami Coca-Cola Bottling Co.* stressed that even evidence "of 'incredibly low' earning" during the backpay period does not shift the burden of proof under the NLRA. "It is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period."

The suggested approach has difficulties. Injustice may result if a plaintiff does not pursue her Title VII claim to final administrative or judicial determination, because she never establishes that she has actually suffered discrimination. Also, injustice occurs if a plaintiff accepts an offer of the job originally denied with full retroactive seniority

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75. *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978); *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1363 (9th Cir. 1975); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975).


77. *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. at 925. *Kallir, Philips, Ross* was a Title VII action concerning the retaliatory discharge of an employee for filing a discrimination charge against her employer. Although the district court granted the employee backpay (including periodic salary increases and fringe benefits) minus the amounts earned during the discharge period and unemployment compensation, it refused to order reinstatement, because the position required a relationship of trust and confidence that was impossible after years of bitter litigation. The court did, however, award the plaintiff an additional year's salary to provide her with a reasonable opportunity to obtain other employment.

78. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). *Miami Coca-Cola Bottling* was an action for enforcement of a supplemental order awarding backpay to wrongly discharged employees. The circuit court held that there was sufficient evidence on the record to support the NLRB's backpay awards, but that it had been an abuse of discretion to prohibit the employer's cross-examination of one employee concerning unemployment insurance and other sources of income.
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rights, pursues her claim to final determination, and loses, because the employer pays for unwarranted benefits to the claimant. Such an innocent employer may also suffer deterioration in workforce morale and may even bump an innocent employee.

The Court's rule, however, poses more serious difficulties. It gives employers no incentive to examine hiring practices and encourages them to withhold retroactive seniority rights from all plaintiffs, including those with strong cases, until a final determination. Further, the Court's rule penalizes some victims for attempting to mitigate the losses resulting from hiring discrimination.

CONCLUSION

In *Ford Motor Co.*, the Supreme Court misinterpreted Title VII's primary objective of ending employment discrimination. Concentrating exclusively on considerations that apply after discrimination has occurred, the Court failed to address the deterrent objective of backpay awards under Title VII. Yet judicial decisions, scholarly commentaries, and analogy to the NLRA all indicate that deterring, rather than merely curing, discriminatory employment practices is fundamental to Title VII.

Further, the Court's new rule is likely to encourage employer conduct that only partly cures discrimination. The rule may induce employers to offer starting positions to Title VII claimants, but it gives employers no incentive to offer retroactive seniority rights to claimants or to examine and correct employment practices in order to prevent discrimination in hiring.

As for Title VII's secondary, compensatory objective, the Court misanalyzed the category of cases in which the issue of retroactive seniority rights seems most important. The desire for greater job security is likely to prompt rejection of an offer of starting employment by a victim who has found a replacement job superior to the position originally denied without retroactive seniority rights, but inferior to the position with retroactive seniority rights. By rejecting the offer, the victim aims to reduce the risk of layoff and thus of further damages. Paradoxically, the Court's rule curtails the relief available to the victim precisely because she has attempted to mitigate the losses resulting from the initial discrimination in hiring.

An approach preferable to the one adopted by the Court is the establishment of a rebuttable presumption that a Title VII defendant must make a full offer to a Title VII claimant in order to toll backpay liability. Such an offer should be for the position originally denied, or a substantially equivalent position, and should include full competitive and benefit seniority rights retroactive to the date of the alleged dis-
 crimination. This approach neither overcompensates a victim of discriminatory hiring practices nor penalizes the victim for attempting to mitigate damages resulting from illegal practices.