DAN FINGERMAN

Writing Sample

This writing sample is my portion of my team's moot court brief, written during the spring semester of 2001 at Boston University School of Law.

QUESTION PRESENTED

Did the First Circuit err when it declined to adopt a per se rule against deducting unemployment compensation from Title VII back pay awards after finding that Rhode Hampshire's unemployment compensation is a direct, rather than a collateral, benefit?

STATEMENT OF THE FACTS

W Enterprises, Inc. ("W") owns and manages restaurants in the Woonchester, Rhode Hampshire area. [R. 2] George and Laura Shrub (the "Shrubs") own W and oversee all aspects of corporate management, including personnel decisions. Id.

In late 1995, W expanded its business by opening the Sauce Pan nightclub in Woonchester. Id. Within three months, the Sauce Pan closed due to lack of business. Id. at 2-3. Determined to expand, in January 1996 the Shrubs opened Tomatoes Restaurant on the site of their bankrupt nightclub. Id. at 3.

The Shrubs designed Tomatoes as a family restaurant and crafted its décor to make customers feel as if they were in Italy. For example, a reproduction of Botticelli's "Venus Rising," featuring "Venus" wearing a Tomatoes uniform, hung prominently. Id. Everything else in the restaurant, from background music to the pasta, reinforces the Italian motif. Id.

The restaurant lost money during its first six months because it attracted fewer diners than similar local restaurants. Id. at 3-4. Desperate to avoid losing their investment in Tomatoes, the Shrubs asked James Garvil ("Garvil"), a public relations consultant, to redesign Tomatoes' theme. Id. at 4.

Relying on extensive market research, Garvil concluded that heterosexual men would eagerly patronize an eating establishment with a sexually suggestive motif. Id. Garvil designed a new costume for Tomatoes' female front room staff that maximized their sex appeal: high-heeled wooden sandals, red Lycra halter tops that accentuate breast size, and short black skirts. Id. The Shrubs adopted Garvil's costume and logo recommendations in June 1996 but retained Tomatoes' original Italian décor to avoid extensive remodeling costs. Id. at 5-6.

Garvil also redesigned Tomatoes' employee handbook (the "Handbook"), which outlined Tomatoes' reincarnation as an erotic entertainment business and instructed the front room staff in behavior that would maximize their sex appeal "to enhance the pleasure of the customer's dining experience." Id. at 4. For example, the Handbook requires front room staff to address one another as "signorina." Id. at 5. The Handbook also recommends the use of bust enhancing undergarments and make-up to enhance the already sexually provocative costume. Id.

Tomatoes' popularity skyrocketed with its new, sexually charged theme. Id. In November 1998 the Shrubs shut down their struggling restaurant Salsa Pomodoro to prevent any further drain on Tomatoes' continuing success. Id. at 6. W laid off the Salsa Pomodoro staff but offered female front room staff comparable positions at Tomatoes. Id. Salsa Pomodoro's male

front room staff were not offered positions at the new restaurant.

Mr. Alfred Gore ("Respondent") is among the staff laid off from Salsa Pomodoro. Id. at 7. After Respondent was not offered a part in Tomatoes' front room cast, he collected unemployment benefits totaling $15,000 over eight months. Id. In January 1999 Respondent filed a gender discrimination complaint against W with the Equal Employment Opportunity Commission ("EEOC"). Id. Respondent received a right to sue letter from the EEOC in July 1999 and commenced the Title VII action underlying this appeal. Id. at 7-8.

I. THE CIRCUIT COURT DID NOT ERR IN RULING THAT THE DISTRICT COURT HAD THE LEGITIMATE DISCRETION TO DEDUCT RESPONDENT'S UNEMPLOYMENT BENEFITS FROM HIS BACK PAY AWARD.

A. This Court should reject a per se rule against the deduction of unemployment benefits from Title VII back pay awards because it would violate both the letter and spirit of Title VII.

The First Circuit has held in this case that the District Court was within its discretion when it deducted Respondent's state unemployment benefit income from his back pay award. This Court should affirm that ruling. A few Circuits have wrongly adopted a per se rule that back pay awards may never be reduced by the amount of the plaintiff's unemployment benefits. See e.g., Dailey v. Societe Generale, 108 F.3d 451, 460-61 (2d Cir. 1997), N.L.R.B. v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955). This per se rule might achieve just results in some cases, but it double-compensates some plaintiffs while inflicting terrible hardships on twice-paying defendants such as W Enterprises.

The legislative history of Title VII shows that Congress intended to make back pay a standard remedy where employment discrimination is proven. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Accordingly, "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating

discrimination throughout the economy and making persons whole for injuries suffered through past discriminations." Id. at 419.

Congress modeled the remedy provisions in Title VII upon those in the National Labor Relations Act (N.L.R.A.), Albemarle, 422 U.S. 405, and the Age Discrimination in Employment Act (A.D.E.A.). Kauffman v. Sidereal Corp., 695 F.2d 343 (9th Cir. 1982). In N.L.R.B. v. Gullet Gin Co., 340 U.S. 361, 364 (1951), the Supreme Court held that the National Labor Relations Board (N.L.R.B.) "had the power to [refuse] to deduct the unemployment compensation from back pay" under the N.L.R.A. This Court has also held that a U.S. District Court has similar discretion to deny deduction of unemployment compensation in Title VII cases. Albemarle, 422 U.S. 405; [R. 16] (characterizing Albemarle).

Several Circuits have mistakenly relied on this partially articulated parallel and applied an unwarranted per se rule against deducting unemployment benefits from back pay awards in all cases arising under these statutes. See e.g., Kauffman, 695 F.2d at 346-47. Refusing to deduct unemployment benefits from a back pay award in some cases may "effectuate the policies of the Act," Gullet Gin, 340 U.S. at 364, but the discretion to deny deduction implies a reciprocal discretion to order deduction when justice requires in other cases, such as this one. As the First Circuit wrote in this matter, "Gullet Gin does not support a per se approach. Rather, the decision supports [the] position

that deductibility of unemployment benefits under Title VII should be left to the discretion of the trial courts." [R. 17]

Although Congress modeled Title VII's remedies on those in the A.D.E.A., it did not intend them to work identically: Title VII puts less emphasis on back pay. Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1113 (8th Cir. 1994). While adopting under a per se rule prohibiting deduction in A.D.E.A. actions, the Eighth Circuit recognized the feebler standing of such a rule in Title VII actions: "Although the goal of [both] statutes is to eliminate discrimination in the workplace, backpay is discretionary under Title VII, while it is mandatory under the A.D.E.A. – and thus a more fundamental part of the remedial scheme." Id.

Several Circuits "have held that [state unemployment] payments are deductible [because] the back pay award is not punitive in nature, but equitable [and] designed to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." Thurber v. Jack Reilly's, Inc., 512 F. Supp. 238 (D.Mass 1981) (citations omitted). The blunt per se rule that Respondent urges would fail to recognize the nuances of individual cases and overcompensate greedy plaintiffs and transform the compensatory back pay award into the punitive measure that Congress sought to avoid.

The fifty States' rich variety of unemployment benefit systems is one major source of the Circuits' disagreement. Examining Colorado's benefit system in Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988), the Tenth Circuit adopted a per se rule against deductibility for Colorado plaintiffs. Under Colorado law "[a]n individual who has . . . a [back] pay award . . . shall immediately repay to the [state] such amounts as will reimburse [it] for all benefit payments made for the period during which he drew benefits." Colo. Rev. Stat. § 8-73-110(2). Deduction of Colorado benefits would clearly fail to compensate Colorado plaintiffs adequately under Title VII, since they would still have to repay the State, after the deduction. Cooper, 836 F.2d at 1555. However, the Cooper court still recognized the need for District Court discretion in many cases. Id. ("The decision whether to offset unemployment compensation is within the trial court's discretion.").

Where a plaintiff retains his unemployment benefits after receiving his back pay award, "there is no compelling reason for providing the injured party with double recovery for his lost employment." E.E.O.C. v. Enterprise Association Steamfitters Local 638, 542 F.2d 579, 592 (2d Cir. 1976) ("Steamfitters"). Rhode Hampshire's unemployment benefit statute does not require reimbursement of benefit money from plaintiffs who recover back pay. [R. 16] Clearly, the per se rule urged by Respondent does

not fit even his own Title VII case. District Courts must retain the ability to compensate plaintiffs for their injuries – not the injuries of unrelated plaintiffs 2,000 miles away, in states with stingy social welfare systems.

B. Unemployment compensation payments disbursed by the State of Rhode Hampshire are a direct benefit under the traditional "collateral source rule" of tort law and should therefore reduce a plaintiff's back pay award in a Title VII action.

A general principle of tort law, the "collateral source rule," provides that collateral benefits to an injured party do not offset the damages paid by the tortfeasor. Restatement (Second) of Torts § 920A(2) (1979). Direct benefits, however, do mitigate damages and reduce the award. See Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 82 (3d Cir. 1983). Congress embraced this general rule in Title VII's remedy provision. 42 U.S.C. § 2000e-5(g)(1) ("Interim earnings or amounts earnable with reasonable diligence . . . shall operate to reduce the back pay otherwise allowable."). Unfortunately, neither the statute nor its legislative history specifies whether state unemployment benefits shall be deemed collateral or direct. Kauffman, 695 F.2d at 346. This question divides the Circuits, so this Court must issue a clear ruling in the interest of consistency. Dailey, 108 F.3d at 460.

This Court has found that some state unemployment benefit systems provide collateral benefits because employers do not pay directly into the fund from which the state pays benefits. Gullet Gin, 340 U.S. 361. Such systems rely on state tax revenue. Id. Even while finding that benefits received under such systems are collateral, the Ninth Circuit doubted "whether the collateral source rule would be equally applicable to unemployment compensation benefits funded directly by the plaintiff's employer." Kauffman, 695 F.2d 343, footnote 2.

This Court has not yet considered this question. Rhode Hampshire employers pay directly into their state's fund without intermediary taxation. See R.H. Gen. Laws ch. 52 § 99-8 (1998); [R. 15-16]. Employers contribute to the fund in sums based directly on their number of current employees. Id. The system could only be more direct if individual employers handed checks to individual employees. The state merely shields parties who may have become obnoxious to one another after their working relationship has ended on sour terms, relieving them from the awkward reunions that individual check delivery would require. As a direct benefit to former employees, compensation paid from this fund must reduce Title VII back pay awards. Circuits that have considered this precise question have found such benefits to be direct and concluded that they should reduce Title VII back pay awards. See e.g., Gaworski, 17 F.3d 1104; Dailey, 108

F.3d 451; Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1429 (7th Cir. 1986). As the States' unemployment policies vary so widely, a rule requiring deduction of benefits, "rather than being clearly analogous to the collateral source rule of tort law, is . . . an extension beyond that rule." Crosby v. New England Telephone and Telegraph Co., 324 F. Supp. 487, 489 (D. Mass. 1985).

This court must establish that unemployment benefit systems that operate like Rhode Hampshire's provide direct benefits to Title VII plaintiffs. Otherwise, the Circuits will continue to dispense inconsistent rulings. Congress could not have intended Title VII to apply unevenly due to accidents of geography. Any other rule would impose a fiction upon our economy that would undermine Congress's noble goal of eradicating discrimination.

C. A per se rule violates Congress's intent and imposes unjust results in disputes arising under different unemployment benefit systems.

Rhode Hampshire employers pay into the State's unemployment compensation fund based on their number of current employees, R.H. Gen. Laws ch. 52 § 99-8 (1998), so they already account for this cost in their business modeling. Before hiring any new worker, they have already internalized the cost of unemployment benefits that he might receive in the event that he cannot find work after leaving the firm. By allowing District Courts to

deduct such unemployment benefits from back pay awards, this Court will give life Congress's will as expressed in Title VII. Denying deduction of unemployment benefits in all situations will force employers to pay this cost twice: once during the employee's tenure and again after the employee leaves the firm. Double compensation to the employee comes at the sole expense of the employer, since the benefit bureaucracy rests entirely on their direct contributions. [R. 16]. Congress never intended this punitive result. Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971) ("The back pay award is not punitive in nature, but equitable."); Steamfitters, 542 F.2d at 591.

Some companies might absorb this double payment. For instance, IBM's legal defense team would earn much more than the $15,000 at issue in this case in the time it has taken to litigate this deduction. W Enterprises, however, has the shallow pockets of a "mom & pop shop." George and Laura Shrub have teetered on the verge of bankruptcy for years. [R. 2-4] The record recounts the Shrubs' string of failed business ventures such as the Sauce Pan nightclub and Salsa Pomadoro. Id. The Shrubs' surviving business has only recently achieved tenuous solvency: Tomatoes was on the verge of bankruptcy before James Garvil saved it. Id. The most recent portion of the factual record, which details Tomatoes' recent success, was established at the peak of the American economic expansion of the 1990s.

Tomatoes' growth at the end of this living narrative will not continue at the same pace as the national economy contracts into painful recession.

If District Courts do not have the discretion to deduct unemployment benefits from back pay awards, citizens of different States will receive different standards of protection under the law. The Circuits will continue to apply conflicting rules, dispensing justice in some cases and injustice in others, unless this Court articulates the just and equitable rule that a trial court should analyze the state compensation system facing it. The Supreme Court cannot permit such an easily predictable and preventable injustice. With their discretion established, all District Courts can finally serve the ends of justice.

The Second Circuit has articulated a fair standard for deduction of benefits in Steamfitters, 542 F.2d at 591-2. That standard "can be summarized as follows: 1) Where the contributions to the fund from which the benefits derive are made solely by the defendant, the collateral source rule does not apply; 2) The plaintiff would otherwise receive a double recovery; and 3) The defendant would otherwise in effect be subjected to punitive damages." Kauffman 695 F.2d at 346.

This standard embodies common sense. It leaves the well-established collateral source rule intact while allowing District Courts to fine-tune back pay relief to reflect the real

situations they face – not the fictitious estimates of damages derived from demonstrably inaccurate assumptions of uniformity in the patchwork of state social welfare rules. Moreover, this rule allows the relief of full back pay to remain the standard in Title VII cases. It will only affect cases such as this one, wherein the unemployment benefits derive so directly from the employer that double recovery and punitive damages threaten to undermine the rights that Congress established in Title VII. A different rule will reward greedy plaintiffs for their avarice, at an expense that imposes an intolerable hardship on small employers like George and Laura Shrub.

Justice and good conscience require this Court to adopt such a socially beneficial rule with this case and hold that Respondent's unemployment benefits should be deducted from his back pay award.