POLLARD V. E.I. DUPONT: A REEXAMINATION OF DISPARATE TREATMENT REMEDIES

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I. INTRODUCTION

On June 4, 2001, the Supreme Court of the United States in *Pollard v. E.I. DuPont de Nemours & Co.* held that the statutory limits on compensatory damages imposed by the Civil Rights Act of 1991 do not apply to the traditional Title VII remedies of front pay and back pay.[1] There had previously been some confusion whether front pay remedies for intentional discrimination were subject to the limits established by the 1991 act.[2] This confusion arose when the United States Court of Appeals for the Sixth Circuit ruled that front pay was a variant of compensatory damages.[3] The Supreme Court has now made it clear that these caps pertain only to awards of punitive and compensatory damages.

The purpose of this article is two-fold. First, the authors will discuss the forms of relief currently available for Title VII violations. In doing so, a distinction will be made between those remedies available for disparate treatment and disparate impact forms of unlawful discrimination. Second, an analysis of the *Pollard* decision is provided and an assessment of its impact on future court-ordered remedies.

II. TRADITIONAL REMEDIES UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 covers unlawful discrimination involving employment. Specifically, Title VII makes it an unlawful practice to:

> (1) fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

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[1] 532 U.S. 843 (2001).
[2] Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 500 (7th Cir 2000); Dobrich v. General Dynamics Corp., 106 F.Supp. 2d. 386, 396 (D.C. Conn. 2000).
[3] Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997).

> privileges of employment, because of such individual=s race, color, religion, sex, or national origin; or
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[4]

Under Title VII, two basic theories of unlawful discrimination have emerged. It is important to understand these distinctions inasmuch as they affect the magnitude of the remedies available to the aggrieved party. Specifically, employer liability varies depending upon whether the discrimination in question is determined to be disparate treatment or disparate impact.

A. DISPARATE TREATMENT

Disparate treatment results from employers or their representatives treating individuals in the workplace differently because of their membership in a protected class (i.e., their race, color, religion, sex, or national origin). As a consequence, there are different standards for applicants or employees based on an individual's protected class status. It is intentional in nature and is characterized by imposing different standards on different people.

As an example of a blatant use of different standards, assume that a senior partner refuses to promote women to line management positions because he believes that women are only passive leaders at best. As a direct outcome of this personal bias, no female applicant for a supervisory position is ever seriously considered for a leadership position. In effect, any female candidate for promotion is automatically eliminated from consideration because of her sex, and her relevant job qualifications are entirely ignored. The sole criterion for the applicant's rejection is her sex.

The same would hold true if an employer believed that people of Italian ancestry were lacking in analytical ability. Any candidate with an Italian surname, or an Italian sounding surname would be automatically disqualified strictly based upon his or her national origin. Disparate treatment results in the applicant's qualifications becoming completely irrelevant in the decision-making process.

The integral attribute of disparate treatment is that it is characterized as deliberate or intentional in nature. In essence, the unlawful employment decision is based on the personal prejudices of the decision-maker, rather than on the individual applicant's knowledge, skill, or ability to perform the duties of the job in question. In effect, the decision maker knowingly discriminates against the individual solely because of that individual's membership in a protected class.

B. DISPARATE IMPACT

[4] 42 U.S.C. § 2000e-2(a) (2000).

Disparate impact is a child of the courts, having originated from the *Griggs v. Duke Power Co*.[5] decision. Unlike disparate treatment, disparate impact can be unintentional. As will be shown shortly, this is a very important distinction. Disparate impact is often characterized as imposing the same standards on all applicants, but with different outcomes for different protected groups. Fundamentally, an employer could be found in violation of Title VII, when a facially neutral employment practice has the effect of disadvantageously affecting a disproportionate number of protected group members, and the practice cannot be shown to be related to the job in question. To successfully establish a prime facie case of disparate impact, the complaining party must identify specific practices as being responsible for any alleged disparities.[6] The simplest means of establishing this is to demonstrate that the employment practice in question creates a manifest statistical imbalance. The evaluation invariably focuses on the degree of statistical disparity between the proportion of protected employees compared to non-protected workers in regard to the given employment benefit or promotion.[7] It should further be noted that there is no single method to demonstrate statistical imbalances. Federal courts have accepted a number of different methods to demonstrate employment practices as disparate impact.[8] These methods for establishing disparate impact are beyond the scope of this paper, but are covered in greater detail in the EEOC's Uniform Guidelines for Employee Selection.[9]

Making a distinction between the forms of discrimination is germane to this discussion because the only remedies available for disparate impact are the so-called "traditional" Title VII forms of relief.[10] However, victims of disparate treatment may further be entitled to punitive and compensatory damages in addition to tradition Title VII remedies.

C. TRADITIONAL TITLE VII REMEDIES

Congress, through its enactment of Title VII, allows federal courts to provide remedies for rectifying the effects of unlawful discrimination. In the technically legal sense, a remedy is the means by which a court either prevents the violation of a legal right, or compensates a party for the violation of that right.[11] Remedies can take the form of reinstatement, back pay, front pay, attorney's fees, declaratory relief, and injunctive relief [12] (see Figure 1). The extent of the award is usually a function of the magnitude of the offense and the nature of the employer's conduct in any given case.

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[5] 401 U.S. 424 (1971).

[6] Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1367 (5th Cir. 1992).

[7] Smith v. Texaco, Inc., 2001 U.S. App. LEXIS 18919 (5th Cir. 2001).

[8] 29 C.F.R. § 1607.4 D; Hazelwood School District v. United States, 433 U.S. 299, 309, n. 14 (1986); Castaneda v. Partida, 430 U.S. 482 (1976); EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988); Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038 (1982).

[9] 29 C.F.R. Part 1607 (2000).

[10] 42 U.S.C. § 1981b(1) (2000).

[11] BLACK'S LAW DICTIONARY 1294 (6th ed. 1990).

[12] 42 U.S.C. § 2000e-5(g).

Figure 1
Remedies Under Disparate Treatment

- Reinstatement
- Back Pay
- Front Pay
- Seniority Awards
- Attorneys' Fees
- Court Costs
- Expert Witness Fees
- Injunctive Relief
- Compensatory Damages
- Punitive Damages
- Other Actions That Will Make An Individual "Whole"

Source: The U.S. Equal Employment Opportunity Commission (July 27, 2001). Federal Laws Prohibiting Job Discrimination Questions And Answers. http://www.eeoc.gov/facts/qanda.html

Should a complaining party prevail in his or her unlawful discrimination suit, that party can expect, at a minimum, declaratory relief. In essence, the court simply declares that the employer was in the wrong -- he or she violated the law. The aggrieved party may further expect injunctive relief. The court enjoins, or requires, the employer to abstain and desist his or her unlawful actions. In short, the employer is being ordered to immediately stop violating Title VII. If the employer continues to engage in discrimination after being enjoined not to do so, he or she would not only violate Title VII, but would also be in contempt of court.

For cases in which the employee has suffered the job loss culminating from the employer's discriminatory actions, the court may further require the employer to reinstate the complaining party. In these instances, the employer is directed to return the employee to the same job from which he or she was terminated. If the unlawful action was one in which the employee was denied a promotion, the employer could be compelled to promote the employee as part of the reinstatement. Similarly, had the unlawful discrimination involved a job applicant who was denied employment, the court could order that applicant to be hired.

1. BACK PAY

Another traditional remedy is back pay, which entitles the complaining party to all wages (plus interest) that accrue from the time the discrimination first occurred, not to exceed two years.[13] To demonstrate how this award is imposed, assume a complaining party had been wrongfully terminated on January 1, 2001, and immediately files a charge on January 2, 2001. Assume that the employee is extremely lucky and the case is tried and concluded by August 29, 2002. Further assume that the court's remedies were reinstatement and back pay. Because there is a current vacancy, the employer reinstates the complaining party on September 1, 2002. The complaining party would also be entitled to 20 months of back pay, plus interest, to compensate him or her for the period January 1, 2001, to September 1, 2002, the period during which the complaining party was wrongfully unemployed. Under such circumstances the aggrieved employee may have to wait for a new position to be created or for an existing one to become vacant.

2. FRONT PAY

Title VII does not even mentioned front pay, per se, as remedy, but it is implied as "any other equitable relief as the court deems appropriate."[14] Some may argue that front pay is actually a variation of back pay or, more specifically, that it is a mutation of back pay. This point was noted in the Supreme Court's *Pollard* decision, "...back pay awards (now called front pay awards under Title VII) made for the period between the judgment date and the reinstatement date..."[15]

Front pay serves as a form of equitable relief when circumstances preclude the complaining party from being immediately reinstated. Because the Civil Rights Act does not require that an employee be fired (nor that a new position be created) to produce a vacancy for an aggrieved employee, the aggrieved employee may have to wait for a vacancy to naturally occur before receiving placement. This does not necessarily mean that after winning the case, the complaining party will be left without compensation for an unspecified period of time. Front pay can be used under such circumstances to preclude the employee from suffering the effects of the employer's unlawful discrimination. Consequently, the complaining party could be awarded pay and benefits until he or she is reinstated.[16] This means that the complaining party would be compensated from the date that the company initially discriminated against him or her through the time he or she is finally officially employed by the company. Paying wages and benefits to an individual who is not actually working creates a tremendous incentive to get that individual into the company's workforce to receive some form of return from the employee's pay.

Additionally, the EEOC, in its decision *Finlay v. United States Postal Service*,[17] identified three circumstances under which front pay may be awarded in lieu of reinstatement: (1) where no position is available; (2) where a subsequent working relationship between the parties would be

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[13] 42 U.S.C. § 2000e-5(g)(1).
[14] *Id.*
[15] *Pollard*, 532 U.S. at 844.
[16] U.S. EEOC, THEORIES OF DISCRIMINATION, p. A-2.
[17] EEOC Appeal No. 01942985 (Apr. 29, 1997).

antagonistic; or (3) where the employer has a record of long-term resistance to discrimination efforts.

3. Attorney's Fees and Court Costs

In many cases, especially those involving intentional discrimination, the employer can be compelled to pay the attorneys' fees for the employee.[18] Federal courts, at their discretion, may allow the employee to be reimbursed for reasonable attorneys' and expert's fees.[19]

In some instances, courts have ordered employees to pay for their employer's attorneys' fees and court costs when it has been shown that the complaining party's allegations were false and knowingly groundless.[20] In theory, employees who make false claims about discrimination by employers are susceptible to the same penalties as employers who make false claims of not discriminating against employees.

D. Compensatory and Punitive Damages

By 1991, the traditional remedies where not considered to be sufficient deterrents to more egregious patterns of discrimination. To create a greater disincentive, compensatory or punitive damages were authorized in instances where the employer's conduct has been judged to be particularly reprehensible. To be eligible for punitive and/or compensatory damages the complaining party must establish that the employer engaged in its discriminatory practices "with malice or with reckless indifference to the federally protected rights of [the complaining party]."[21] To accomplish this end, the complaining party must show that the employer was aware of the obligation not to discriminate against the complaining party and engaged in the discriminating action anyway. Since disparate treatment is, by definition, intentional discrimination (knowingly discriminating against any employee or applicant because of the individual's race, color, religion, or national origin), there is an inherent risk of meeting this standard and incurring compensatory or punitive damages.

It must be noted that compensatory and punitive damages are restricted only to cases involving disparate treatment, hence intentional, discrimination. Under the damage provisions of the 1991 Act:

> In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent. Furthermore, government agencies or their political

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[18] 42 U.S.C. § 1988.
[19] *Id*.. § 2000e-5(k).
[20] Kahre-Richardes Foun. v. Baldwinsville, 953 F.Supp. 39 (N.D. N.Y. 1997); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1980).
[21] 42 U.S.C. § 1981(b).

> subdivisions are excluded from compensatory and punitive damages even in instances involving disparate treatment.[22]

Compensatory damages, as the name implies, are imposed by a court to "compensate" the complaining party for monetary and nonmonetary harm suffered as a result of the employer's discriminatory actions.[23] For example, if an employee as a result of a wrongful termination, not only loses his or her paycheck, but also loses his or her house or other possessions when his or her stream of income ceases. Among the damages that the court can award is money to compensate the employee for such losses. The intent of compensatory awards is to return the employee to the condition in which he or she was before the harm occurred. Generally, an employer is required to compensate the employee for any lost principal on property resulting from employer's unlawful action. Under certain instances, monetary awards may also be imposed for nonmonetary harm resulting from the intentional infliction of emotional distress.

A complaining party may further be entitled to punitive damages. Unlike compensatory damages, punitive awards are not intended to compensate the complaining party for any harm the complaining party suffered, rather, as the name implies, punitive damages are imposed to deter the employer from continuing the discrimination. The purpose is punishment, not compensation. Punitive damages are imposed as a painful reminder to an employer of the consequences of blatantly violating Title VII. The rationale behind imposing punitive damages under Title VII is to discourage employers from knowingly violating the act in the future.[24]

Whenever compensatory and/or punitive damages are imposed, they are collectively limited by a ceiling, or cap, established by the Civil Rights Act of 1991. These ceilings (maximum amount that the court may impose) are based on the number of workers an employer employs in four predetermined ranges (see Table 1, *supra).* Furthermore, these ceilings stipulate the maximum monetary awards that federal judges may impose for compensatory and punitive damages for each aggrieved party.

If several employees are filing intentional discrimination complaints, there will be a multiplier effect if they prevail in the trial. As an illustration,[25] assume that a federal court has found that a company that employs 100 workers has intentionally violated Title VII by sexually harassing two female employees. Based on the evidence, the judge has decided that the employer's actions not only violated Title VII, but were also knowingly callous enough to justify compensatory and punitive damages. That judge may award any amount up to $50,000 in damages to each of the two employees. The judge further has the discretion to award different amounts to each party (i.e., $50,000 to one worker and $25,000 to the other, or any other combination). The judge is not required to impose the maximum award, nor is he or she required to give all complaining parties the same amount. Considering all the caps on damages, the maximum penalty that the employer could face is $100,000 if the judge determined that both employees could be entitled individually to the maximum penalty of $50,000 each. If, however, the employer employed 210 workers, then the

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[22] *Id*. § 1981a(a)(1).
[23] U.S. EEOC, THEORIES OF DISCRIMINATION, p. A-5.
[24] 137 Cong. Rec. H 9527 (daily ed. Nov. 11, 1991).
[25] ROBERT K. ROBINSON, GERLAYN M. FRANKLIN & ROBERT F. WAYLAND, THE REGULATORY ENVIRONMENT OF HUMAN RESOURCE MANAGEMENT (2002).

highest potential penalty would be elevated to $200,000 because the aggrieved employees could be awarded individually up to $100,000 each. Taking it to its highest cap, had the employer employed 550 workers, he or she could be facing a potential $600,000 in compensatory and punitive damages.

Regarding compensatory and punitive damages, there is one peculiar artifact contained in the Civil Rights Act of 1991. It is a provision that when a jury is requested to hear a Title VII case, the court is required not to inform the jury of the limitations of the compensatory and punitive damages.[26] Because of this quirk, juries often award substantial damage awards, which judges must later reduce to conform to the maximum limits shown in Table 1. Readers are frequently confronted with newspaper headlines reporting multimillion dollar compensatory or punitive damages awarded by juries. For example, an Iowa jury awarded a female employee of UPS $500,000 in compensatory damages and $80.7 million in punitive damages.[27] Such awards are often misleading for if the charge (as it was in this case) was exclusively a Title VII violation, the maximum amount that can be awarded by a court is $300,000.[28]

Table 1
Maximum Awards for Compensatory and Punitive Damages

Size of Employer's Work Force	Maximum Combined Punitive and Compensatory Damages per Complaining Party
15-200	$50,000
201-300	$100,000
301-500	$200,000
>500	$300,000
Source: 29 U.S.C. § 1981a.	

[26] 42 U.S.C. § 1981(c)(2).
[27] *Jury awards woman $80.7 million in suit against UPS*, CNN Interactive (Feb. 12, 1998), *available at* http://127.0.01:15841/v1?catid=14680067&md5=6d78095c230438740574133b49121c92.
[28] 42 U.S.C. § 1981(b)(3)(D).

III. POLLARD V. E.I. DUPONT DE NEMOURS

Until recently, there was some confusion as to how the ceiling was implemented in light of front pay awards. The Supreme Court resolved this issue in *Pollard v. E.I. DuPont de Nemours.*[29] However to understand the issue before that court, it is necessary to follow the development of the Pollard case from its inception.

Initially, the complaining party alleged that she was sexually harassed by being subjected to a hostile work environment. Following a successful jury trial, the employee was awarded $107,364 in back pay (to include accrued lost benefits), $252,997 in attorney's fees and court costs, and $300,000 in compensatory damages for a total of $660,361.[30] However, the employee's demand for front pay was excluded because a previous Sixth Circuit decision, *Hudson v. Reno*, had concluded that, "front pay is subject to the caps on future pecuniary losses as provided in § 1981a(b)(3) because front pay is a 'future pecuniary loss.'"[31] Essentially, the Reno court concluded that any award of compensatory damages includes front pay. Since the complaining party had already received the maximum compensatory damages permitted under the Civil Rights Act of 1991, there was no more room for "additional" front pay. Pollard's attorneys argued that front pay was a traditional Title VII remedy and, therefore, not subject to the cap on compensatory awards.

On appeal, the United States Court of Appeals for the Sixth Circuit declined to overturn the District Court's decision[32]. Though the Sixth Circuit panel agreed with Pollard that public policy concerns weigh in favor of excluding front pay from the $300,000 statutory cap on compensatory damages, the panel stated that it was constrained by the previous panel decision in *Hudson v. Reno*,[33] which had explicitly declared that front pay was included in the cap. In fact, the Sixth Circuit panel readily noted that other federal circuits had concluded that front pay was not part of a compensatory damage award and, therefore, excluded from the statutory cap.[34] However, because one panel of the circuit may not overturn the decision of another panel of the circuit (this can only be achieved through an en banc hearing of the matter), the Sixth Circuit had no alternative but to let the District Court's decision stand.[35]

The Supreme Court was bound by no such constraint and in an unanimous decision, the Supreme Court unequivocally reversed the Sixth Circuit's ruling.[36] Because front pay has been a remedy that has traditionally been available under Title VII, it is not subject to the statutory limitations imposed by the Civil Rights Act of 1991. Front pay, quite succinctly is separate and

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[29] 532 U.S. 843 (2001).
[30] Pollard v. E.I. DuPont de Nemours, Inc. 16 F.Supp.2d 913, 924 (W.D. Tenn 1998), *aff'd*, 213 F.3d 933 (6th Cir. 2000), *rev'd & remanded*, 532 U.S. 843 (2001).
[31] 130 F.3d 1193, 1204 (6th Cir. 1997).
[32] Pollard v. E.I. DuPont de Nemours Co., 213 F.3d 933, 946 (6th Cir. 2000), *rev'd & remanded* 532 U.S. 843 (2001).
[33] 130 F.3d 1193.
[34] Martini v. Federal Nat'l Mortgage Ass'n, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999); Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 556 (10th Cir. 1999); Kramer v. Logan County School District No. R-1, 157 F.3d 620, 625-26 (8th Cir. 1998).
[35] *Pollard*, 213 F.3d at 946.
[36] *Pollard*, 532 U.S. at 854.

distinct from compensatory damages. The limitations placed on compensatory damages do not apply to front pay. The Supreme Court noted particularly that compensatory damages awarded under §1981a shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.[37] Front pay is clearly an "other type of relief under section 706(g)."[38]

IV. CONCLUSION

The Supreme Court's ruling will have its greatest impact on the states comprising the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee), which, until June 4, 2001, would have capped front pay and compensatory damages at $300,000 (or less depending on the size of the employer). At least five other circuits, the Seventh (Illinois, Indiana, and Wisconsin),[39] the Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota),[40] the Tenth (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming),[41] the Eleventh (Alabama, Florida, and Georgia),[42] and the District of Columbia,[43] had previously rejected the premise that front pay and compensatory damages were inexorably linked. As a result of *Pollard*, it is certain that no traditional Title VII remedy has a statutory limit, nor is front pay to be included in any form under compensatory or punitive damage award.

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[37] 42 U.S.C. § 1981a(b)(2).
[38] *Pollard*, 532 U.S. at 848.
[39] Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 499-500 (7th Cir. 2000).
[40] Kramer v. Logan County School Dist, R-1, 157 F.3d 620, 625-626 (8th Cir. 2000).
[41] Gohhardt v. National R.R. Passenger Corp., 191 F.3d 1148, 1153-1154 (10th Cir. 1999).
[42] EEOC v. W&O, Inc., 213 F.3d 600, 619, n.10 (11th Cir. 2000).
[43] Martini v. Federal Nat'l Mortgage Ass'n, 178 F.3d 1336, 1348-1349 (D.C. Cir. 1999).