

4-11-2018

Title VII and the Collateral Source Rule: Evaluating the Not-So Equitable Remedy in *EEOC v. Consol Energy*

Virginia Calistro
Boston College Law School, virginia.calistro@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), and the [Retirement Security Law Commons](#)

Recommended Citation

Virginia Calistro, *Title VII and the Collateral Source Rule: Evaluating the Not-So Equitable Remedy in EEOC v. Consol Energy*, 59 B.C.L. Rev. E. Supp. 263 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/15>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

TITLE VII AND THE COLLATERAL SOURCE RULE: EVALUATING THE NOT-SO EQUITABLE REMEDY IN *EEOC v. CONSOL ENERGY*

Abstract: On June 12, 2017, the Fourth Circuit Court of Appeals affirmed the decision of the United States District Court for the Northern District of West Virginia to refuse an offset to a Title VII damage award by the amount of pension payments received following the plaintiff's constructive discharge. In doing so, the court adopted a new interpretation of the collateral source rule and its applicability in employment discrimination pay awards. The effect of this decision is to further compound a split of authority between multiple federal courts of appeals regarding the treatment of certain benefits in the wake of employment discrimination. This Comment argues that the Fourth Circuit's decision is inconsistent with the statutory intent of Title VII to provide equitable remedies, and advocates for an approach to fashioning pay awards that examines the totality of circumstances facing employer and employee following employment discrimination litigation.

INTRODUCTION

Every year, the U.S. Equal Employment Opportunity Commission (the "EEOC") receives nearly 90,000 claims of workplace discrimination.¹ Accordingly, the agency engages in substantial litigation to prosecute employers infringing upon the federally protected rights of American employees.² Each time the EEOC goes to trial, it has two goals: to deter the employer from engaging in future discrimination, and to correct the injuries suffered as a result of the employer's unlawful practices.³

The EEOC undertook this mission in its 2013 charge against Consol Energy, Inc. for its alleged failure to accommodate the sincerely held religious beliefs of Beverly Butcher.⁴ The litigation resulted in a victory for Butcher,

¹ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<http://perma.cc/5ZQB-Z7PP>] (Oct. 15, 2017) (reporting an average of 89,889 charges resolved by the U.S. Equal Employment Opportunity Commission ("EEOC") between the years of 2014 through 2016).

² See 42 U.S.C. § 2000e-4, -5 (2012) (charging the EEOC with preventing unlawful employment practices through the investigation and litigation of discrimination claims).

³ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, OVERVIEW, <https://www.eeoc.gov/eeoc/index.cfm> [<http://perma.cc/4USU-895X>] (identifying the vision of the EEOC as "Justice and Equality in the Workplace" and their mission to put a stop to, and remedy, unemployment discrimination).

⁴ Complaint and Jury Trial Demand at 1, 6-8, U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017) (No. 1:13CV00215), 2013 WL 5397409 (stating the nature of the action as an effort to remedy the unlawful discrimination against Beverly Butcher by Consol Energy and praying for relief in the form of a permanent injunction, compensation for emotional damages, past and future losses to income, and punitive damages).

whose award of nearly half a million dollars in damages was affirmed by the U.S. Court of Appeals for the Fourth Circuit in *U.S. Equal Employment Opportunity Commission v. Consol Energy, Inc.* in 2017.⁵ In rendering this decision, the Fourth Circuit clarified its own position regarding the incorporation of fringe benefits into an equitable damages award: that all benefits not issued directly by the employer to the employee are considered collateral and therefore cannot be offset from an award of front or back pay.⁶ This rule is similar to the position adopted by the U.S. Court of Appeals for the Third and Seventh Circuits, and at odds with the discretionary approach advocated by the U.S. Court of Appeals for the First, Second, and Fifth Circuits.⁷

This Comment argues that the Fourth Circuit erred in removing a matter of discretion from the capable determination of trial courts.⁸ This Comment further argues that the Second Circuit has adopted a rule that better fits the statutory goals of Title VII, specifically that of providing an equitable remedy to the victim of unlawful discrimination.⁹ Part I of this Comment introduces the collateral source rule, discusses the split in authority between federal courts of appeals regarding the offset of certain benefits from damage awards, and examines the factual and procedural history of *Consol Energy*.¹⁰ Part II of this Comment discusses the different approaches the Fourth Circuit has taken in categorizing fringe benefits over time.¹¹ Finally, Part III advocates for a rule affording district courts broad latitude in deciding issues of equitable relief.¹²

I. OVERVIEW OF THE COLLATERAL SOURCE RULE

Courts have adopted a number of different approaches in calculating damage awards following employment discrimination verdicts. Section A of this Part examines the remedy provision of Title VII and describes the interplay between the collateral source rule and damage awards. Section B of this part

⁵ 860 F.3d at 140, 152 (affirming the district court's award of \$434,860.74 in damages).

⁶ *Id.* at 149 (discussing the court's treatment of pension payments as a collateral source).

⁷ See *Gelof v. Papineau*, 829 F.2d 452, 455 (3d Cir. 1987) (holding that unemployment compensation payments could not be offset from back pay awards); *McDowell v. Avtex Fibers*, 740 F.2d 214, 110–11 (3d Cir. 1984), *vacated on other grounds*, 469 U.S. 1202 (1985) (concluding that it is impermissible to deduct pension plan benefits from back pay awards); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 85 (3d Cir. 1983) (rejecting the argument that deductibility questions should be left within the trial court's discretion). *But see* *Dailey v. Societe Generale*, 108 F.3d 451, 460 (2d Cir. 1997) (holding that district courts may exercise discretion in offsetting unemployment benefits from a back pay award); *Lussier v. Runyon*, 50 F.3d 1103, 1107 (1st Cir. 1995) (affirming the decision by the United States District Court for the District of Maine to offset a lump sum pension payment from a front pay award); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 210 (5th Cir. 1986) (ordering an offset for retirement plan benefits from an age discrimination damage award).

⁸ See *infra* notes 110–122 and accompanying text.

⁹ See *infra* notes 118–122 and accompanying text.

¹⁰ See *infra* notes 13–51 and accompanying text.

¹¹ See *infra* notes 55–95 and accompanying text.

¹² See *infra* notes 98–102 and accompanying text.

details the split of authority regarding the application of the collateral source rule to retirement benefits.

A. Fringe Benefits as Collateral Source Benefits

According to the U.S. Supreme Court, Title VII of the Civil Rights Act of 1964 (“Title VII”) has two primary objectives: ending unlawful discrimination in the workforce, and making victims whole who have endured unlawful discrimination.¹³ To achieve these ends, the enforcement provision of Title VII provides courts with a full suite of equitable remedies and broad discretion in fashioning damage awards, which are determined in a separate evidentiary hearing following a jury verdict.¹⁴ These evidentiary hearings feature testimony from economic experts on both sides, each attempting to quantify the monetary benefits the victim would have received but for the unlawful discrimination.¹⁵ One issue during such proceedings is whether fringe benefits should be classified as either collateral sources or interim earnings.¹⁶

Under the collateral source rule, benefits received by a plaintiff wholly independent of and collateral to the tortfeasor do not diminish the damages the plaintiff can receive.¹⁷ This ensures that tortfeasors are not able to minimize their liability simply because the victim received incidental benefits as a result of the tort.¹⁸ Generally speaking, payments that serve as additional compensation from a source other than the employer are categorized as collateral.¹⁹ This

¹³ 42 U.S.C. § 2000e (2012); *see* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (deriving the statutory aims of Title VII from the 1972 Conference Committee Report, where Congress voted against limiting the enforcement provisions of the Act).

¹⁴ *See* 42 U.S.C. § 2000e-5(g)(1) (providing for injunctive relief, including reinstatement, back pay, front pay, compensatory damages, attorneys’ fees and costs, or “any other equitable relief as the court deems appropriate”); *see, e.g., Consol Energy*, 860 F.3d at 140 (stating that an evidentiary hearing followed the jury verdict to determine an equitable remedy). In some circuits, quantification of a front pay award is a matter for the jury. *See* *Fite v. First Tenn. Prod. Credit Ass’n*, 861 F.2d 884, 893 (6th Cir. 1988); *Maxfield v. Sinclair Int’l*, 766 F.2d 788, 796 (3d Cir. 1985).

¹⁵ *See, e.g.,* Report or Affidavit of Dr. Homayoun Hajiran, MBA, Ph.D. at 5, *Consol Energy*, 860 F.3d 131 (No. 113CV00215), 2014 WL 878251 at *1734, 1739 (countering the report of Dr. Sovan Tun with reconstructed calculations of Butcher’s economic damages); Report or Affidavit of Dr. Sovan Tun, Ph.D. at 3, *Consol Energy*, 860 F.3d 131 (No. 113CV00215), 2014 WL 878251 (providing a calculation of gross pay lost after termination).

¹⁶ *See, e.g.,* Report or Affidavit of Dr. Homayoun Hajiran, *supra* note 15, at 5 (offsetting the back pay award to Butcher by the pension distributions he received following termination, indicating categorization of such payments as interim earnings).

¹⁷ DAN B. DOBBS, *LAW OF REMEDIES* § 3.8(1) 266–69 (2d ed. 1993). For example, if a plaintiff receives payments from an insurer for medical expenses, this does not reduce the amount he is able to receive from the tortfeasor. *Id.* at 267.

¹⁸ *See id.* at 267. (exploring as rationale for the rule the suggestion that the wrongdoer would be permitted a windfall if allowed credit for an unconnected benefit that reduces the plaintiff’s damages).

¹⁹ *See, e.g.,* *England v. Reinauer Transp. Cos.*, 194 F.3d 265, 273–74 (1st Cir. 1999) (stating that a recovery need not be offset by any amount of benefits received from a source that is not the tortfeasor). For example, payments received from a health insurer for medical expenses are categorized as collateral. *See, e.g., Samsel v. Allstate Ins. Co.*, 59 P.3d 281, 290 (Ariz. 2002) (“Recovery of expenses

distinction becomes less clear when an employer bears some financial responsibility for a payment received by an aggrieved employee, but the payment itself is issued by a third party.²⁰ For example, state-issued unemployment benefits funded by mandated tax contributions from the employer cannot be said to be entirely distinct from the employer's responsibilities to the employee.²¹ Thus, courts have reached different conclusions regarding the offset of non-wage compensation that is partially or entirely funded by the employer.²²

The Supreme Court considered the issue of collateral sources within the context of an employment discrimination pay award in its 1951 decision, *National Labor Relations Board v. Gullet Gin Co.*²³ The Court held that the National Labor Relations Board ("NLRB") was correct not to deduct payments from the state unemployment fund in its calculation of a back pay award, even though the unemployment payments were partially funded through employer tax contributions.²⁴ The Court concluded that the unemployment payments belonged to an independent social policy because the employer maintained a duty to make contributions independent from the employee's right to receive the benefits.²⁵ The payments were not derived from a distinct obligation to the aggrieved employee (as per a settlement agreement, for example) and were therefore determined to be collateral in nature.²⁶ Accordingly, the Court reasoned that the injured employee was not made more than whole in receiving both the pay award and unemployment compensation.²⁷

B. Applying the Collateral Source Rule to Retirement Benefits

Despite this precedent, there continues to be a clear divide among federal courts of appeal on whether employer-funded benefits should be offset from

from both medical payments coverage and other sources has long been both recognized and accepted in Arizona and elsewhere.").

²⁰ See *Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 435 (6th Cir. 1999) (engaging in a prolonged analysis to determine if a disability pension is collateral).

²¹ See *Phillips v. W. Co. of N. Am.*, 953 F.2d 923, 931 (5th Cir. 1992) (recognizing the collateral source determination as necessitating consideration of not only the source of the benefits but of their character as well).

²² Compare *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 756 (7th Cir. 1983) (affirming the order of a United States Magistrate to deduct unemployment compensation benefits from a back pay award under the Age Discrimination in Employment Act), with *Craig*, 721 F.2d at 85 (adopting a rule that unemployment benefits may never be deducted from a back pay award under Title VII).

²³ *N.L.R.B. v. Gullet Gin Co.*, 340 U.S. 361, 363 (1951).

²⁴ See *id.* at 364 (disagreeing with the defendant's argument that the payments constitute direct benefits rather than collateral payments).

²⁵ See *id.* (citing *In re Cassaretakis*, 289 N.Y. 119, 126 (1942) (creating the distinction between an employer's duty to its employees versus its duty to the State)).

²⁶ See *id.* (noting that the payments were not made to discharge the employer of liability for the tort).

²⁷ See *id.* at 365 (concluding that the employee was not overcompensated).

back and front pay awards as a matter of law.²⁸ The U.S. Court of Appeals for the Third and Seventh Circuits have both incorporated the analysis of *Gullet Gin Co.* into their determinations that benefits funded in part by the tortfeasor should be deemed collateral sources and, accordingly, remain exempt from award reductions.²⁹ By contrast, the U.S. Court of Appeals for the First, Second, and Fifth Circuits have specifically declined to issue a rule barring an offset for retirement benefits by labeling such payments as collateral source income.³⁰ In doing so, the courts have reduced damage awards arising out of successful employment discrimination litigation by the amount collected in retirement benefits following discharge.³¹

The Third and Seventh Circuits have implemented a rule against offsetting employer-funded benefits, also known as fringe benefits, from an award of back or front pay when such payments are received incidentally as a result of the wrongful discharge or involuntary retirement in employment discrimination cases.³² In *McDowell v. Avtex Fibers, Inc.*, the Third Circuit specifically considered the question of offsetting pension benefits from a back pay award in an age discrimination settlement and concluded that doing so was improper for a number of interrelated reasons.³³ First, allowing such an offset would un-

²⁸ See *Equal Emp't Opportunity Comm'n v. O'Grady*, 857 F.2d 383, 389–91 (7th Cir. 1988) (following the U.S. Court of Appeals for the Third Circuit in adopting a “flat rule forbidding the setoff of pension . . . benefits”); *McDowell*, 740 F.2d at 217–18 (holding that pension plan benefits are collateral). *But see Guthrie*, 803 F.2d at 209–10 (stating that retirement benefits coming from an employer are not collateral and should be offset from a damages award); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86–87 (2d Cir. 1983) (offsetting pension benefits from an award of back pay).

²⁹ See *O'Grady*, 857 F.2d at 389–91 (noting with approval the reasoning in *Gullet Gin* that retirement benefits belong to a state policy rather than the policy driving discrimination pay awards); *McDowell*, 740 F.2d at 217–18 (citing to *Gullet Gin* in reaching its determination that awards of back pay should not be affected by pension payments received following termination).

³⁰ See *Lussier*, 50 F.3d at 1111 (rejecting the invitation by claimants to create a bright-line rule forbidding the deduction of collateral source payments); *Guthrie*, 803 F.2d at 209–10 (holding that payments from a retirement fund are not collateral); *Hagelthorn*, 710 F.2d at 86–87 (omitting reference to the collateral source rule in affirming a decision to offset pension payments from a damages award).

³¹ See *Lussier*, 50 F.3d at 1113 (affirming a decision to reduce a front pay award by the excess compensation received in retirement benefits); *Guthrie*, 803 F.2d at 210 (ordering that a back pay award be reduced by amount of pension payments received); *Hagelthorn*, 710 F.2d at 87 (finding no error in the decision to offset a back pay award by a portion of the lump sum pension payment collected following retirement).

³² *O'Grady*, 857 F.2d at 389–91; *McDowell*, 740 F.2d at 217–18. Back pay and front pay are among the remedies explicitly authorized by the remedy provision of Title VII. 42 U.S.C. § 2000e-5(g)(1) (2012). Back pay, awarded in most employment discrimination cases, compensates individuals for the wages and other employment benefits she would have enjoyed had she not suffered unlawful discrimination. See *Moody*, 422 U.S. 405 at 421 (stating that back pay should be consistently granted in Title VII cases in order to further the statutory purposes of the Act). Front pay exists to compensate a victim of discrimination for her future lost earnings in the event that reinstatement is not possible or appropriate. See *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) (explaining the award of front pay as an alternative remedy to reinstatement).

³³ *McDowell*, 740 F.2d at 217–18.

dermine the mission to end workplace discrimination by reducing the damages owed by the defendant.³⁴ Second, as noted by *Gullet Gin Co.*, pension plans are intended to serve a larger social policy and are therefore collateral despite being funded through employer contributions.³⁵ Lastly, and most importantly in the view of the Third Circuit, allowing a deduction would provide a windfall to the discriminatory employer by significantly reducing the amount of liquidated damages the employee would be entitled to otherwise.³⁶

In 1988, the Court of Appeals for the Seventh Circuit similarly adopted a flat rule barring an offset for pension payments in *EEOC v. O'Grady*.³⁷ The court cited with approval the Third Circuit's reasoning that pension plan benefits are independent in nature because they belong to a social policy separate from that dictating payment for lost wages.³⁸ The Seventh Circuit, however, went further in articulating its sympathy for discrimination plaintiffs by acknowledging the possibility of double compensation for the claimant, and concluding that such an outcome was preferable to giving a break to the employer.³⁹ Simply put, the court stated its acceptance for occasionally providing a windfall to the victim of discrimination.⁴⁰

By contrast, the U.S. Court of Appeals for the First, Second, and Fifth Circuits have avoided adopting this rule, instead emphasizing the need to retain discretion over the offset of such benefits to ensure that pay awards are calculated equitably and in accordance with the idiosyncratic circumstances of each case.⁴¹ In 1983, the Second Circuit engaged in a lengthy analysis in *Hagelthorn v. Kennecott Corp.*, to determine whether the plaintiff received a larger pension payment from his early discharge than he would have had he

³⁴ *Id.* at 217 (reasoning that every reduction to a discrimination damage award serves to dilute the purpose of ending discrimination).

³⁵ *Id.*

³⁶ *See id.* (finding that a reduction in the amount of liquidated damages owed provides a benefit to the tortfeasor, a result which is offensive to the intention of the discrimination statute).

³⁷ *O'Grady*, 857 F.2d at 390.

³⁸ *Id.* The court identified the Third Circuit as a persuasive authority on the interplay between retirement benefits and damage awards because of the number of cases in which the Third Circuit has applied a flat rule barring offset. *Id.* The court vaguely defines the social policy backing unemployment and retirement benefits as "social betterment for the benefit of the entire state." *Id.*

³⁹ *See id.* at 391 (noting that refusing an offset for the pension benefits will allow the claimant to enjoy the benefits of both working and not working, but that such a windfall is preferable when the alternative is a "discrimination bonus" for the tortfeasor).

⁴⁰ *See id.* (acknowledging with approval that the plaintiff in question would be overcompensated by the adoption of the rule barring offset).

⁴¹ *Lussier*, 50 F.3d at 1110-11 (1st Cir. 1995); *see Guthrie*, 803 F.2d at 210 (rejecting the creation of a rule that would forbid the offset of pension plan benefits from a back pay award); *Hagelthorn*, 710 F.2d at 87 (finding that the value of pension benefits was properly offset from a back pay award because the plaintiff received a greater lump payment at the time of his discharge than he would have received had he retired as planned).

retired at normal retirement age.⁴² The court concluded that the plaintiff was better situated by receiving the payments earlier and an offset was accordingly due to avoid overcompensation.⁴³ Similarly, in *Lussier v. Runyon* in 1995, the First Circuit affirmed an offset on the basis that an unlawful discharge triggered increases to other streams of income, putting the plaintiff in a better situation financially than if he had not been discharged at all.⁴⁴ These courts thus emphasized evaluating the totality of circumstances in order to arrive at the most equitable damages award.⁴⁵

The Fifth Circuit approached the question of offsetting pension payments more generally in its 1986 decision of *Guthrie v. J.C. Penney Co.*⁴⁶ There, the Fifth Circuit distinguished between pension payments and the unemployment benefits discussed in *Gullet Gin Co.* by noting that the unemployment benefits derive from a public benefit plan with legislatively-mandated employer contributions, whereas pension payments are funded from a company's general assets.⁴⁷ Thus, the court determined these two benefits to be categorically distinct and requiring different treatment.⁴⁸

The Fourth Circuit added a new variation to this circuit split in *EEOC v. Consol Energy*.⁴⁹ There, the court relied upon a distinction between retirement benefits paid from a single-employer pension plan and retirement benefits housed in a collective fund in refusing to offset to an award of front and back pay by the amount received in pension payments.⁵⁰ The effect of this holding is to vary a discrimination damage award based on the type of pension admin-

⁴² See *Hagelthorn*, 710 F.2d at 86–87 (comparing the lump sum payment received by the plaintiff at age sixty-three with the payment that he would have received at age sixty-five and concluding that the greater life expectancy possessed at the time of his unlawful discharge resulted in a larger lump sum payment).

⁴³ *Id.* The award was reduced by the difference between the two lump sum amounts. *Id.*

⁴⁴ See *Lussier*, 50 F.3d at 1106. The plaintiff received VA benefits for a military-service related disability, which were significantly increased as the result of his discharge. *Id.*

⁴⁵ *Id.* at 1111; see *Hagelthorn*, 710 F.2d at 86–87 (evaluating the calculation of the damage award based on the specific idiosyncratic circumstances surrounding the plaintiff's discharge).

⁴⁶ See *Guthrie*, 803 F.2d at 209–10 (determining that back pay awards should in general be reduced by amounts received from a retirement fund).

⁴⁷ See *id.* (reasoning that unemployment benefits are funded by contributions the employer is statutorily obligated to make, but that pension payments are simply “not collateral”). The court does not acknowledge the possibility that employers may be under a similar legal obligation to contribute to a retirement fund. See *id.* (noting an absence of such discussion).

⁴⁸ See *id.* (refusing an offset for social security benefits while ordering that the back pay award be reduced by the total amount received in pension payments).

⁴⁹ See *Consol Energy*, 860 F.3d at 149 (adopting a rule forbidding fringe benefits to be offset from a discrimination award of front pay or back pay in the absence of two exceptions: when the payment is made directly by the employer to the employee as a form of compensation, and when the payment is made in an effort to relieve the employer of liability for the tort).

⁵⁰ See *id.* (reasoning that a deduction for the pension payments was not owed because they were issued by a commingled fund with a third-party administrator).

istration a company chooses to utilize rather than the individual circumstances in each case, thus tending towards inequitable results.⁵¹

II. COMPOUNDING THE SPLIT IN AUTHORITY

EEOC v. Consol Energy is the most recent discussion of the deductibility of retirement benefits from a discrimination damage award emerging out of the U.S. Court of Appeals for the Fourth Circuit.⁵² Section A of this Part details the factual background, procedural history, and holding of *Consol Energy*.⁵³ Section B of this Part discusses the varying ways in which the Fourth Circuit has categorized pension payments over time.⁵⁴

A. Facts and Procedural History of United States Equal Employment Opportunity Commission v. Consol Energy

In June 2012, Robinson Run Mine, a subsidiary of Consol Energy, Inc., implemented the use of a biometric hand scanner for the purposes of tracking its workers' attendance.⁵⁵ This system required all hourly employees to place a hand in the scanner upon the start and end of a shift.⁵⁶ Upon learning of this new system, Beverly Butcher, a thirty-seven-year employee of Robinson Run Mine, approached mine superintendent, Michael Smith, and human resource manager, Chris Fazio, to inform them of a religiously based objection to the new technology.⁵⁷ As an evangelical Christian, Butcher believed the scanner rendered him with the invisible "Mark of the Beast" thus dooming him to eternal damnation.⁵⁸

Smith and Fazio requested that Butcher put this concern into writing, and Butcher accordingly provided a letter detailing his belief on June 18, 2012.⁵⁹ Smith and Fazio then contacted the manufacturer of the hand scanner, who

⁵¹ See *id.* (finding that the damage award would be different if the pension plan were administered by the employer rather than a third-party). Many companies that can afford to do so will contract out the administration of pension plans to a financial institution or brokerage firm. See Holland & Hart LLP, *Wake-Up Call for Administrators of Pension Plans*, 1 IDAHO EMP'T L. LETTER, June, 1996 (recommending that companies utilize third-party administrators to decrease their risks of litigation over pension disputes).

⁵² See U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017) (holding that a pension is a collateral source and therefore should not be deducted from a pay award). The Fourth Circuit had previously discussed deducting retirement benefits in *Sloas v. CSX Transportation*, 616 F.3d 380, 389 (4th Cir. 2010).

⁵³ See *infra* notes 55–78 and accompanying text.

⁵⁴ See *infra* notes 79–95 and accompanying text.

⁵⁵ Complaint and Jury Trial Demand, *supra* note 4, at 3.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

⁵⁸ Memorandum in Support of EEOC's Motion for Partial Summary Judgment Regarding Liability at 2, *Consol Energy*, 860 F.3d 131 (No. 1: 13CV00215), 2014 WL 7715194 (noting that Butcher testified to subscribing to a biblical interpretation in which followers of the antichrist are designated with a mark on the forehead or hand, acceptance of which renders them to an eternity of suffering).

⁵⁹ *Id.* at 7.

drafted a response offering Butcher an alternative interpretation of the bible passage discussing the “Mark of the Beast” and suggested that use of the left hand eliminated the risk.⁶⁰ Butcher maintained his objection, and was then informed by Smith and Fazio that he would be expected to use the hand scanner and would be disciplined for failure to comply in accordance with the clock-in policy in place.⁶¹

Faced with the choice of being branded by the scanner or being terminated, Butcher tendered his retirement.⁶² Shortly thereafter, Butcher became aware that accommodations had been made for two of his colleagues who were physically incapable of using the hand scanner.⁶³ The EEOC brought an enforcement action against Consol Energy on September 23, 2013, in the United States District Court of West Virginia.⁶⁴ The complaint and jury trial demand alleged a violation of Title VII, which requires employers to reasonably accommodate the religious practices and sincerely held beliefs of employees to the extent that they are able to without suffering undue hardship.⁶⁵

In its complaint and jury trial demand, the EEOC alleged that Consol Energy maliciously denied religious accommodation to Butcher.⁶⁶ For relief, the EEOC sought a permanent injunction to enjoin Consol Energy from future religious discrimination, compensation for lost earnings, both endured and expected, emotional damages, and punitive damages.⁶⁷ The jury found that Title VII’s reasonable accommodation provision had been violated and awarded

⁶⁰ *Id.* at 8 (explaining that the letter interpreted a different passage from the Book of Revelation than the one Butcher cited in his objection letter, and stated that the antichrist brands only the right hand and forehead, rendering the left hand safe for scanning).

⁶¹ *Id.* at 13 (noting that Consol adopted a Hand Scanner Policy imposing escalating penalties for each missed scan, culminating in effective termination after a fourth occurrence).

⁶² *Id.*

⁶³ *Id.* at 10. Two miners with missing fingers were authorized to manually enter their employee identification numbers to record their attendance. *Id.*

⁶⁴ Complaint and Jury Trial Demand, *supra* note 4, at 1.

⁶⁵ 42 U.S.C. § 2000e-2 (2012). The anti-discrimination statute places an affirmative obligation on employers to ensure that the employee’s religious needs are met in the workplace. *Id.* For example, where there is an overlap between an employee’s work schedule and times of worship, the employer has an obligation to remedy the conflict. *See* 29 C.F.R. § 1605.2 (2018) (providing methods of alleviating a religiously-based scheduling conflict). Undue hardship is defined as “more than a *de minimis* cost.” *Id.* Complaint and Jury Trial Demand, *supra* note 4, at 1. Butcher first sought to redress his grievance through his labor union, which was forced to withdraw its complaint after finding that the labor agreement with Consol did not include a requirement to make reasonable religious accommodations. *Consol Energy*, 860 F.3d at 139.

⁶⁶ Complaint and Jury Trial Demand, *supra* note 4, at 6.

⁶⁷ *Id.* at 7–9. Title VII provides courts with discretion to issue a broad range of equitable remedies, including injunctive relief, reinstatement, back pay, front pay, compensatory damages, attorneys’ fees and costs, or “any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g)(1). “Injunction” is defined as an order prohibiting the doing of certain acts. *Injunction*, BLACK’S LAW DICTIONARY (10th ed.2014).

\$150,000 in compensatory damages.⁶⁸ The district court did not find evidence to support an award of punitive damages.⁶⁹ At an evidentiary hearing on equitable remedies, the district court awarded Butcher \$436,860.74 in front pay, back pay, and lost benefits, and ordered an injunction against Consol Energy prohibiting further violations of Title VII.⁷⁰ In doing so, the court rejected Consol's contention that the pension benefits Butcher received after retiring should be offset from the award.⁷¹

Consol Energy appealed to the U.S. Court of Appeals for the Fourth Circuit, filing three post-verdict motions, all three of which were denied in the decision rendered June 12, 2017.⁷² The first contended that judgment as a matter of law was due because there was insufficient evidence of a conflict between Butcher's religious belief and the requirement to use the hand scanner.⁷³ The court rejected this argument, citing to ample evidence that Butcher's sincerely held beliefs were in conflict with the requirement that he participate in the hand scanner program, and thus found that he necessitated reasonable accommodation.⁷⁴ Consol Energy also moved for a new trial, positing that the

⁶⁸ *Consol Energy*, 860 F.3d at 140. The reasonable accommodation provision is violated when an employee can prove that he possessed a sincerely held religious belief that stood in conflict with a job requirement, the employee made a supervisor aware of such conflict, and was subsequently disciplined for not performing the duty in conflict. *Id.*

⁶⁹ *Id.* at 136.

⁷⁰ *Id.* at 140. Back pay provides lost earnings from the time of discharge through the date of settlement. *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993). Front pay exists to compensate a victim of unlawful discrimination for her lost future earnings in the event that reinstatement is unavailable. *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991). The courts consider a number of factors in determining whether to award front pay over reinstatement, including the existence of hostility between the former employer and victim, a lack of suitable available positions, and the victim's proximity to retirement age. *Id.*

⁷¹ Report or Affidavit of Dr. Sovan Tun, Ph.D., *supra* note 15, at 3. Also disputed at the post-trial remedial hearing was Butcher's mitigation of damages, with Consol Energy arguing that Butcher did not undertake reasonable efforts to find another position within the coal industry because obtaining such employment would cause his pension payments to cease. Plaintiff EEOC's Post-Trial Brief Regarding Back Pay and Front Pay Remedies at 18, *Consol Energy*, 860 F.3d 131 (No. 1:13-cv-00215), 2015 WL 782931. The Fourth Circuit rejected this argument, finding that Butcher was reasonably diligent in accepting an alternative, lower-paying position after attending numerous job fairs in the mining industry without success. *Consol Energy*, 860 F.3d at 148–49.

⁷² *Consol Energy*, 860 F.3d at 140–41. The motions filed by Consol were as follows: (1) Judgment as a Matter of Law per Rule 50(b) of the Federal Rules of Civil Procedure, arguing that EEOC failed to satisfy its burden to establish a prima facie case of a Title VII violation; (2) Motion for a New Trial per Rule 59 of the Federal Rules of Civil Procedure, contending that the jury verdict accepted by the court was excessive; and (3) Motion to Amend per Rule 59 of the Federal Rules of Civil Procedure, disputing the award of front and back pay. *Id.*

⁷³ *Id.* at 131. Consol argued that Butcher took issue not with the particular hand scanner implemented by the mine but rather with a technological trend towards the tracking of biometric data in general. *Id.* at 132. As evidence for this proposition, Consol cites to Butcher's June 18 letter, in which he wrote, "[e]ven though this hand scanner is not giving a number or a mark, it is a device leading up to that time when it will come to fruition." *Id.* at 132.

⁷⁴ *Id.* at 142.

district court erred in rejecting the first verdict returned by the jury.⁷⁵ The court denied this motion as well, finding that the district court acted properly in clarifying the law and correcting juror confusion.⁷⁶ Finally, Consol Energy made a motion to amend Butcher's damages, arguing that it was entitled to an offset against the award for the pension benefits received by Butcher after his retirement.⁷⁷ The court also rejected this argument, holding that a pension is a collateral source and therefore should not be included in the calculation of a front or back pay award.⁷⁸

B. Competing Jurisprudence in the Fourth Circuit

In *Consol Energy*, the Fourth Circuit employed a categorical approach in order to clarify its own conflicting position on the offset of employer-funded benefits from discrimination pay awards.⁷⁹ In 1985, in *Fariss v. Lynchburg Foundry*, the Fourth Circuit affirmed an offset of the lump sum pension payment from the plaintiff's damage award following an age discrimination claim.⁸⁰ In doing so, the court examined the totality of circumstances and found the plaintiff enjoyed a significant financial gain as a result of his unlawful termination.⁸¹ The court reasoned that because the plaintiff had opted for a lump sum and forgone a survivorship option, he was only able to collect the pension because of his discharge.⁸² Had he continued working until he passed away, he would not have collected a pension at all.⁸³ Thus, the court held that because the plaintiff was placed in an economically superior position by virtue of collecting his pension earlier, it was necessary to deduct said lump sum in an effort to avoid creating a windfall.⁸⁴

⁷⁵ *Id.* at 145; Opening Brief of Appellants at 45, *Consol Energy*, 860 F.3d 131 (Nos. 16-1230(L), 16-1406), 2016 WL 2996820 (arguing that the jury initially returned a verdict that reflected an award of nominal damages).

⁷⁶ *Consol Energy*, 860 F.3d at 147 (noting that the court clarified the meaning of compensatory damages and performed a post-verdict poll of the jury to ensure that the verdict excluded all compensation for lost wages).

⁷⁷ Opening Brief of Appellants, *supra* note 75, at 53, 56 (contending both that the pension benefit was not a collateral source and that Butcher received an additional \$78,819 as a result of his discharge).

⁷⁸ *Consol Energy*, 860 F.3d at 149. Consol Energy filed petition for a writ of certiorari on September 11, 2017; petition was denied on February 20, 2018. *Consol Energy Inc. v. EEOC*, 2018 WL 942439, U.S., Feb. 20, 2018.

⁷⁹ See *Consol Energy*, 860 F.3d at 150 (distinguishing between payments made directly from employer to employee and payments that pass through a third party).

⁸⁰ 769 F.2d 958, 966 (4th Cir. 1985).

⁸¹ *Id.* at 967 (concluding that the plaintiff received \$20,000 more than he would have received had he continued working until his date of death).

⁸² *Id.* at 966.

⁸³ *Id.*

⁸⁴ *Id.* at 967 (stating that the court could not ignore the significant financial advantage enjoyed by the plaintiff as a result of his unlawful discharge in affirming the offset of a lump sum pension payment).

This decision appeared at odds with the Fourth Circuit's ruling in 2010 in *Sloas v. CSX Transportation*, where the court held that an employer was not entitled to an offset for the portion of the disability benefits the employer had funded.⁸⁵ In arriving at this conclusion, the court stated that fringe benefits are always considered collateral except when the benefit is provided as compensation for the injury in question.⁸⁶ This means that a damages award may only be reduced by the amount of payments made in an effort to relieve the employer of liability; all other fringe benefits are deemed incidental and excluded from offset consideration.⁸⁷

The Fourth Circuit acknowledged the discrepancy between *Sloas* and *Fariss* in *Consol Energy*, and resolved it in favor of the *Sloas* court's interpretation.⁸⁸ In doing so, the court reiterated the distinction between payments made directly to the employee by the employer and payments that are ordered and administered by a third party.⁸⁹ The court categorized the lump sum in *Fariss* as a direct payment because it was issued by the employer to the employee.⁹⁰ In terms of damages, this type of direct payment requires a corresponding reduction in an award of front or back pay.⁹¹ In *Consol*, by contrast, the employer pension contributions were sent to a third party fund managed and administered by Butcher's union.⁹² The court stated that this separation between the time of contribution and time of payment indicated that the pension was standard component of Butcher's compensation.⁹³ As such, the court argued that providing an

⁸⁵ See 616 F.3d at 389 (holding that the United States District Court for the District of West Virginia did not err in refusing to offset disability payments from an injured railroad worker's negligence award).

⁸⁶ See *id.* at 390 (creating a binary test distinguishing between payments that the employer has voluntarily taken to indemnify itself against possible liability, and all other benefits).

⁸⁷ See *id.* (finding that all benefits are collateral aside from those made to indemnify the employer from tort liability).

⁸⁸ See *Consol Energy*, 860 F.3d at 150 (acknowledging that, if read broadly, the holdings of *Sloas* and *Fariss* are in conflict).

⁸⁹ *Id.* at 149 (observing that *Consol Energy* made contributions to a collective fund managed by the United Mine Workers Association as per a requirement in its collective bargaining agreement).

⁹⁰ *Id.* (placing an emphasis on the fact that in *Fariss*, the payment was made directly to the employee from the employer without passing through a commingled fund).

⁹¹ See Equal Emp't Opportunity Comm'n v. O'Grady, 857 F.2d 383, 391 (7th Cir. 1988) (noting that a payment direct from the employer is not collateral, and therefore should be offset against a damages award).

⁹² *Consol Energy*, 860 F.3d at 150. Factors that other circuits have looked to in order to determine if a pension is a collateral source include the following: (1) the employee's contributions to the plan, (2) the existence of a collective bargaining agreement providing the terms of the pension, (3) whether the plan contemplates injuries sustained both at and outside of work, (4) the employee's service requirements in earning the pension, and (5) the presence of a set-off provision in the event of a tort action. See *Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 435 (6th Cir. 1999) (citing the same set of factors for evaluating whether pension benefits were collateral); *Phillips v. W. Co. of N. Am.*, 953 F.2d 923, 932 (5th Cir. 1992) (citing a list of five factors useful in determining if a payment is a fringe benefit).

⁹³ *Consol Energy*, 860 F.3d at 149–50.

offset for the pension would allow Consol to unjustly reduce its liability.⁹⁴ In other words, a reduction in the damages award for the pension payments would allow Consol to escape a portion of financial responsibility for its unlawful behavior.⁹⁵

III. REDIRECTING THE FOURTH CIRCUIT

The Fourth Circuit Court of Appeals has been inconsistent in its treatment of deductions for pension payments over time.⁹⁶ This Part examines the unresolved conflict in *EEOC v. Consol Energy*, and argues for an approach to calculating damage awards that emphasizes the principles of equity.⁹⁷

There are a number of general policy considerations underpinning the collateral source rule that have contributed to its widespread adoption.⁹⁸ Unfortunately, none of these rationales are cited by the U.S. Court of Appeals for the Fourth Circuit in its confusing and perhaps even contradictory approach to the offset of benefits funded in whole or in part by the employer.⁹⁹ Instead, the Fourth Circuit relied on arbitrary distinctions to create a policy through which two identically situated claimants may receive widely variant remedies, a result that is antagonistic to both the remedy provision of Title VII and the nature of equitable damages.¹⁰⁰

⁹⁴ See *id.* at 149 (highlighting the fact that Butcher would have been entitled to the pension regardless of the Title VII violation, unlike a payment made individually to Butcher to compensate him for injuries suffered).

⁹⁵ See *id.* (reasoning that allowing an offset for the pension payments would allow Consol to avoid its contractual obligation to provide retirement benefits to Butcher).

⁹⁶ Compare *U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 150 (4th Cir. 2017) (refusing an offset for pension payments received following constructive discharge), with *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985) (deducting the entirety of a lump sum pension payment from a damages award). See also *Sloas v. CSX Transp.*, 616 F.3d 380, 389 (4th Cir. 2010) (creating a rule that fringe benefits are always collateral and therefore not deductible from a damages award).

⁹⁷ See *infra* notes 98–122 and accompanying text.

⁹⁸ See *DOBBS*, *supra* note 17, at 267–69 (including the following as rationales for the rule: (1) in the case of benefits that come as gifts, the defendant should not be able to take credit for the gratuity of others, (2) preserving the subrogation rights of insurers, (3) in the case of insurance payments, ensuring that the plaintiff is able to receive the full benefits for which he paid through premiums, and (4) avoiding a windfall to the tortfeasor).

⁹⁹ See *Consol Energy*, 860 F.3d at 149–50 (noting that the court is silent as to the policy considerations generally associated with the collateral source rule); see also *infra* notes 82–88 and accompanying text.

¹⁰⁰ See *e.g.*, *Consol Energy*, 860 F.3d at 150 (implying that the damage award for Butcher would have been reduced had his pension payments been managed by Consol rather than a third-party); see also *Thomas W. Lee, Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 *EMORY L.J.* 325, 336–37 (1994) (identifying a lack of uniformity in damage awards within lower courts that rely on this definitional distinction). Equitable remedies are characterized by their necessary rejection of bright-line rules. See *Lussier v. Runyon*, 50 F.3d 1103, 1110 (1st Cir. 1995) (engaging in a prolonged discussion of the nature of equity and emphasizing its

It is first necessary to examine the competing stances in *Fariss v. Lynchburg County* and *EEOC v. Consol Energy* on the categorization of pension benefits.¹⁰¹ The holding in *Fariss* is clear: a fringe benefit triggered by an employee's unlawful discharge may be reduced from an award of damages if it places the employee in an economically superior position than had the discharge never occurred.¹⁰² The court arrives at this conclusion not by labeling the pension benefit interim earnings, but rather by referencing the principles of equity, conducting a holistic examination of the damage award, and concluding that offsetting the lump sum pension payment is necessary to avoid a windfall.¹⁰³

In *Consol Energy*, the Fourth Circuit states that it need not address this holding from *Fariss* because *Consol* is decided on a significantly different set of facts; namely, that the pension payment in *Fariss* came directly from the employer whereas the pension payments in *Consol* were distributed by the third-party union.¹⁰⁴ This is an artificial distinction for the purposes of determining whether the pension represents interim earnings or collateral payments.¹⁰⁵ In both cases, the sole funder of the pension payments was the employer, and the benefits arose out of a contractual employment agreement that made contributions contingent upon the length of the plaintiffs' service.¹⁰⁶ Furthermore, the plaintiff in either instance received a clear monetary advantage from collecting his pension at an earlier date.¹⁰⁷ Thus, the pension benefits were from similar sources, were similar in nature, and provided similar windfalls to the plaintiff, creating clear tension that remained unresolved in *Consol Energy*.¹⁰⁸ Despite this close resemblance of facts, *Fariss* resulted in an offset, and *Consol* did not.¹⁰⁹

hallmarks of flexibility and particularity). The remedy provision of Title VII calls for "equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (2012).

¹⁰¹ See *Consol Energy*, 860 F.3d at 149 (resolving pension payments to be a collateral source); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985) (determining pension benefit to be a fringe benefit and accordingly set off from plaintiff's losses).

¹⁰² See *Fariss*, 769 F.2d at 967 (reasoning that an equitable damages award should serve to make the victim of discrimination whole, but should not provide a windfall).

¹⁰³ See *id.* (reasoning that the plaintiff was better situated by \$20,000 as a result of his untimely discharge). The court declines to analyze whether the pension benefits are collateral in nature. See *id.* (noting silence on the categorization of the benefit).

¹⁰⁴ *Consol Energy*, 860 F.3d at 150 (declining to find tension between *Fariss* and *Consol Energy* because the pension benefits received by Butcher were not the same type as those enjoyed by the plaintiff in *Fariss*).

¹⁰⁵ See, e.g., *Equal Emp't Opportunity Comm'n v. Enter. Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 591 (2d Cir. 1976) (finding the identity of the administrator of the fund to be irrelevant where the employer is the sole source of the payments).

¹⁰⁶ *Fariss*, 769 F.2d at 962; Defendants' Post-Trial Brief Regarding Back Pay and Front Pay Remedies at 8, *Consol Energy*, 860 F.3d 131 (No. 1:13CV00215), 2015 WL 782910.

¹⁰⁷ See *Fariss*, 769 F.2d at 967 (noting that pension paid out \$20,000 to plaintiff as a result of his early discharge); Petition for a Writ of Certiorari at 17, *Consol Energy*, 860 F.3d 131 (No. 17-380), 2017 U.S. S. Ct. Briefs LEXIS 3446 (stating that Butcher received \$78,303 more than he would have had he continued working through his intended retirement date).

¹⁰⁸ See *infra* notes 117–118 and accompanying text.

¹⁰⁹ *Consol Energy*, 860 F.3d at 150; *Fariss*, 769 F.2d at 967.

The Fourth Circuit's adoption of this narrow, categorical approach to determining damage questions undermines the statutory intent of Title VII's remedy provisions.¹¹⁰ Title VII calls for equitable relief to be provided in the wake of unlawful discrimination.¹¹¹ It is necessary to conduct a thorough analysis of a situation's particularities to ensure that the victim is returned to his or her rightful position monetarily.¹¹² Imposing a rule that automatically triggers or blocks an offset on the basis of a technical distinction is adverse to the essential goal of equity in Title VII discrimination cases.¹¹³

Advocates of the bright line rule from the Fourth Circuit would likely counter that allowing the deduction of pension and other fringe benefits from award of front and back pay undermines Title VII's statutory objective of deterring discrimination in the workplace.¹¹⁴ Rendering a plaintiff more than whole, however, achieves a punitive effect on the tortfeasor, which is inconsistent with Title VII's objectives.¹¹⁵ Punitive remedies are provided for in the statute and acknowledged by the Fourth Circuit to be available only in limited circumstances.¹¹⁶ It thus exceeds the scope of the equitable remedy provision to force the employer to pay twice for the same injury.¹¹⁷

The U.S. Court of Appeals for the Second Circuit has adopted an approach for handling collateral source determination that better aligns with the nature of equitable awards.¹¹⁸ Following the court's earlier decisions disfavor-

¹¹⁰ See 42 U.S.C. § 2000e-5(g)(1) (providing that courts should provide for equitable relief). Compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (stating that all Title VII remedies should be examined in light of the goals of ending unlawful discrimination in the workforce, and making whole victims who have endured unlawful discrimination), with *Consol Energy*, 860 F.3d at 149 (adopting a binary test that considers solely the source of the benefit in rendering a collateral source designation).

¹¹¹ 42 U.S.C. § 2000e-5(g)(1).

¹¹² See *Lussier*, 50 F.3d at 1112 (encouraging courts to view pay awards in discrimination cases as part of a larger remedial endeavor, not a singular solution).

¹¹³ See *Moody*, 422 U.S. at 417–18 (describing the statutory goals of Title VII); *Lussier*, 50 F.3d at 1110 (describing the nature of equity as necessarily rejecting rigid tests in favor of discretion).

¹¹⁴ See *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 85 (3d Cir. 1983) (arguing that the preventative goal of Title VII is more effectively served by adopting firm standards against the offset of fringe benefits from back pay awards).

¹¹⁵ See *Equal Emp't Opportunity Comm'n v. O'Grady*, 857 F.2d 383, 391 (7th Cir. 1988) (describing compensation that renders a plaintiff more than whole as a "discrimination bonus").

¹¹⁶ 42 U.S.C. § 2000e-5(g)(1); *Consol Energy*, 860 F.3d at 150–51 (stating that punitive damages are available only in egregious instances of discrimination in which the employer can be shown to have acted maliciously); see also Mark C. Weber, *Accidentally on Purpose, Intent in Disability Discrimination Law*, 56 B.C.L. REV. 1417, 1439 (2015) (noting that when Title VII was originally enacted, it permitted only equitable relief; punitive remedies were not added to the statute until its expansion in 1991).

¹¹⁷ 42 U.S.C. § 2000e-5(g)(1); see *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1989) (holding that an employer is entitled to offset damages that exceed the amount the plaintiff would have received had he not been wrongfully terminated).

¹¹⁸ See *Dailey v. Societe Generale*, 108 F.3d 451, 461 (2d Cir. 1997); *Lussier*, 50 F.3d at 1110 (describing the central characteristic of equitable awards to be flexibility and discretion); *Lee*, *supra*

ing the bright line approach to the deductibility of fringe benefits, the Second Circuit acknowledged the compelling reasons why a district court might decline to offset benefits partially funded by the employer in *Dailey v. Societe Generale* in 1997.¹¹⁹ Specifically, the court noted the distasteful possibility of conferring a windfall to the wrongdoer.¹²⁰ Despite this, the court retained its position that, as the forum with the soundest understanding of the idiosyncrasies of the situation, the question of offset should remain firmly within the discretion of the district court.¹²¹ This approach ensures that victims of unlawful employment discrimination are made whole without overstepping the boundaries clearly laid out by the statutory text of Title VII.¹²²

CONCLUSION

When considering how to best correct the injustice of unlawful employment discrimination, district courts should be provided the opportunity to weigh every fact and circumstance of each individual plaintiff. The ability to examine facts and determine damages on a case-by-case basis is hampered by the adoption of a bright line rule classifying certain fringe benefits as collateral sources rather than interim earnings. By labeling a fringe benefit a collateral source, the damage award is not reduced by amounts already paid by the employer to the employee. The U.S. Court of Appeals for the Fourth Circuit erred in adopting such a categorical approach, and in doing so, came in direct conflict with its previous decisions which emphasized the need to evaluate the award in terms of equity rather than rigid rules. Moving forward, the holding in *EEOC v. Consol Energy* may result in awards that exceed the scope of the enforcement provision of Title VII and lead to widely variant damage awards for similarly situated victims of employment discrimination.

VIRGINIA CALISTRO

Preferred cite: Virginia Calistro, Comment, *Title VII and the Collateral Source Rule: Evaluating the Not-So Equitable Remedy in EEOC v. Consol Energy*, 59 B.C. L. REV. E. SUPP. 263 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/263/>.

note 100, at 346 (explaining the primary purpose of any equitable remedy as placing the employee in the position he would have enjoyed but for the unlawful discrimination suffered).

¹¹⁹ *Dailey*, 108 F.3d at 461 (observing that a wrongfully discharged employee likely suffers many non-compensable and incidental losses, and therefore the additional burden should rest with the party more capable of paying).

¹²⁰ *See id.* (noting that declining to reduce a back pay award by the amount of a fringe benefit may result in a windfall for the discriminatory employer).

¹²¹ *Id.*

¹²² 42 U.S.C. § 2000e-5(g)(1); *see Moody*, 422 U.S. at 417–18 (identifying the twin aims of Title VII to be ending unlawful discrimination in the workforce and making whole victims who have endured unlawful discrimination); *Dailey*, 108 F.3d at 461.