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# Permitting Gross-Ups for Title VII Back-Pay Awards: A Gross Tax Issue

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# Permitting Gross-Ups for Title VII Back-Pay Awards: A Gross Tax Issue

*Gabrielle Domangue*[*]

## INTRODUCTION

Dion Miller is a Black man who worked as a cook for a local diner in Menomonie, Wisconsin.[1] During his year-long employment at Sparx Restaurant, Mr. Miller rose to the position of assistant kitchen manager, earning $14 per hour.[2] On October 1, 2010, when Mr. Miller arrived at work for his morning shift, a coworker told him to look at the kitchen cooler.[3] When Mr. Miller looked, he discovered a defaced one dollar bill that portrayed President Washington with a noose around his neck and a swastika on his forehead.[4] Next to the President's head was a drawing of a hooded Klu Klux Klansman, riding on horseback and donning the infamous hood marked with "KKK."[5] Placed below the bill was a picture of Gary Coleman, a famous Black child actor.[6] Mr. Miller lodged a complaint about the display, and although the kitchen manager and kitchen supervisor took responsibility for the spectacle, Sparx refused to terminate either.[7] In fact, Sparx merely gave a warning to the kitchen supervisor, who was responsible for the defaced bill, and did not discipline the kitchen manager, who was responsible for the picture of Gary Coleman, at all.[8]

Before Mr. Miller raised the complaint, his supervisors had never critiqued his abilities as a cook at Sparx.[9] After he filed his complaint, however, the two men responsible for the incident began to criticize Mr. Miller's work performance, and Sparx fired Mr. Miller on October 23, 2010.[10] On March 27, 2012, the United States Equal Employment Opportunity Commission (EEOC) filed a complaint on Mr. Miller's behalf, alleging that Sparx's parent company, North Star Hospitality Inc.

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1. EEOC v. N. Star Hosp., 777 F.3d 898, 900 (7th Cir. 2015); *see also* Brief of Plaintiff-Appellee at 3, *N. Star Hosp*., 777 F.3d 898 (No. 14-1660).
2. *See N. Star Hosp.*, 777 F.3d at 904; *see also* Brief of Plaintiff-Appellee at 3, *N. Star Hosp*., 777 F.3d 898 (No. 14-1660).
3. *N. Star Hosp*., 777 F.3d at 904.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

(Hospitality), violated Title VII by subjecting Mr. Miller to racial discrimination and terminating his employment in retaliation for opposing the harassment.[11] The district court awarded Mr. Miller $43,300.50 in back pay and an additional $6,495.00 to offset his estimated impending income-tax liability on the lump-sum back-pay award.[12] Back pay consists of the wages or salary an employee would have received but for the employer's unlawful action, such as violating Title VII.[13] The additional award to offset the negative tax consequences, such as the one the district court awarded Mr. Miller here, is called a "gross-up."[14] Hospitality subsequently appealed the district court's holding to the Seventh Circuit.[15] The Seventh Circuit affirmed the lower court's decision to permit the gross-up to offset the negative tax consequences of the lump-sum back-pay award.[16] Without the gross-up, the award Mr. Miller received in his Title VII action would not truly have made him whole.[17]

The Supreme Court has yet to rule on whether gross-ups are permitted for Title VII back-pay awards. Additionally, despite several legislative attempts to address the issue, Congress has ultimately failed to do so.[18] The Third, Seventh, Ninth, and Tenth circuits all permit federal district courts the discretion to award a gross-up for the receipt of a lump-sum back-pay award.[19] Yet the United States Court of Appeals for the District of Columbia refuses to award gross-ups.[20] In the D.C. Circuit, victims of employment discrimination bear the additional tax burden, even though it was the defendant's conduct that caused the victim to owe the additional

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11. *Id.*

12. *N. Star Hosp.*, 777 F.3d at 904.

13. *See Back Pay*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The wages or salary that an employee should have received but did not because of an employer's unlawful action in setting or paying the wages or salary.").

14. *See generally* Clemens v. CenturyLink Inc., 874 F.3d 1113, 1116 (9th Cir. 2017) (noting that some federal circuits allow lower courts the discretion to "gross up" an award to account for income tax consequences).

15. *See N. Star Hosp.*, 777 F.3d at 901.

16. *Id.* at 904.

17. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–20 (1975) (holding the purpose of Title VII is to make persons whole for injuries suffered because of unlawful employment discrimination); *see also* Sears v. Atchinson, 749 F.2d 1451, 1456 (10th Cir. 1984) (upholding a tax-component award for lump-sum back-pay awards to make victims of discrimination whole).

18. *See* H.R. Res. 2509, 113th Cong. (2013); S. Res. 1224, 113th Cong. (2013); S. Res. 1689, 110th Cong. (2007); H.R. Res. 1997, 106th Cong. (1999).

19. *See Clemens*, 874 F.3d at 1116; *N. Star Hosp.*, 777 F.3d 898; Eshelman v. Agere Sys., 554 F.3d 426 (3d Cir. 2009); *Sears*, 749 F.2d 1451.

20. *See* Dashnaw v. Peña, 12 F.3d 1112 (D.C. Cir. 1994).

amount in income taxes.[21] As the Seventh Circuit noted in Mr. Miller's case, without a tax-component award, the employee-plaintiff is not "made whole;" thus, the award fails to serve the primary purpose of Title VII's remedial scheme.[22] Without an adjustment for the tax consequences, the plaintiff continues to suffer from the discrimination endured during employment.[23]

The Supreme Court has established that the fundamental purpose of employment discrimination statutes, such as Title VII, is to make an employee whole for injuries suffered due to unlawful discrimination in the workplace.[24] Further, Congress has equipped courts with wide discretion to ensure victims receive adequate compensation.[25] The D.C. Circuit's view violates this general rule and prevents employees from becoming whole.[26] Because recent tax reform has failed to address the issue, and prior attempts at tax relief legislation have continuously failed to become law, the Supreme Court should resolve the circuit split in favor of permitting gross-ups for lump-sum back-pay awards.[27]

In addition to permitting gross-ups, the Court must determine what factors a district court should consider when deciding whether to award a gross-up. In *Eshelman v. Agere Systems*, the Third Circuit noted that there is no presumption in favor of a gross-up award to a plaintiff, and the relief required to make an employee whole varies from case to case.[28] Additionally, in *Clemens v. CenturyLink Inc.*, the Ninth Circuit noted that in circumstances where the gross-up is difficult to determine or is an insignificant amount, it would be inappropriate to award a tax adjustment.[29] The Supreme Court should adopt the *Clemens* framework and expand upon it to simplify the calculation process for lower courts and

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21. Shawn A. Johnson, *"Make Whole": The Need for Gross-Ups in Employment Discrimination Cases*, 17 HOUS. BUS. & TAX L.J. 31, 32 (2016).

22. *N. Star Hosp.*, 777 F.3d at 904; *see also Eshelman*, 554 F.3d 426; *Sears*, 749 F.2d 1451.

23. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (holding that the primary purpose of employment discrimination statutes is to make victims whole).

24. *Id.*

25. Clemens v. CenturyLink Inc., 874 F.3d 1113, 1116 (9th Cir. 2017); *see also* 42 U.S.C. § 2000e-5(g)(1).

26. *Clemens*, 874 F.3d at 1116–17.

27. *See* sources cited *supra* note 18. It should also be noted that at the time of writing, the recent election of a Democratic President and a Democratic controlled Congress may result in another legislative attempt to address the negative tax consequences of Title VII lump-sum back-pay awards.

28. Eshelman v. Agere Sys., 554 F.3d 426, 433 (3d Cir. 2009).

29. *Clemens*, 874 F.3d at 1117.

to give plaintiffs a better understanding of whether a court will award a gross-up.[30]

This Comment proceeds in four parts. Part I will provide background on Title VII, detailing federal employment discrimination statutes, the general purpose of Title VII, available remedies, and legislative attempts to address the negative tax consequences from Title VII back-pay awards. Part II will detail the current federal circuit split on whether gross-ups are permitted for Title VII actions. Next, Part III will establish that Title VII awards are subject to federal income taxation, providing an overview of the current tax system and the negative effect it has on lump-sum back-pay awards. Part IV will argue that without a gross-up, a victim of discrimination is not "made whole" and therefore still suffers from the discriminatory actions of the employer. Additionally, Part IV will conclude that Congress has equipped courts with wide discretion to ensure victims receive adequate compensation. This Part will also provide a solution by exploring what factors district courts should use to determine whether a gross-up is needed, detailing the circumstances provided in *Clemens*, and considering current factors used by district courts where gross-ups are permitted and awarded.

## I. TITLE VII LUMP-SUM BACK-PAY AWARDS: AN OVERVIEW AND AVAILABLE REMEDIES

The starting point for employment discrimination remedies is Title VII of the Civil Rights Act of 1964.[31] Congress enacted Title VII in 1964 as a pivotal piece of legislation for the prevention of employment discrimination.[32] Since the enactment of Title VII, Congress has expanded available remedies for discrimination victims, while failing to address the negative tax consequences through legislation.[33]

### *A. A Brief Overview of Title VII*

Congress enacted Title VII to accomplish "equality of employment opportunities and remove barriers that have operated in the past to

30. *Id.* (noting that in circumstances where the gross-up is difficult to calculate or is a small amount, it would be inappropriate to award a gross-up).

31. Richard Barca, *Taxing Discrimination Victims: How the Current Tax Regime is Unjust and Why a Hybrid Income Averaging and Gross Up Remedy Provides the Most Equitable Solution*, 8 RUTGERS J.L. & PUB. POL'Y 673, 677 (2011).

32. *Id.*

33. *Id.* at 680–83.

favor . . . white employees over other employees."[34] Under Title VII, it is unlawful for employers to discriminate against an individual based on a person's "race, color, religion, sex, or national origin."[35] Subsequent legislation expanded the scope of protections, including the Age Discrimination in Employment Act of 1967,[36] the Americans with Disabilities Act of 1990,[37] and the Family Medical Leave Act.[38] The most recent expansion of Title VII discrimination coverage occurred through judicial interpretation—rather than legislation—in the 2020 Supreme Court case *Bostock v. Clayton County*.[39] In *Bostock*, the Court held that discrimination against an individual for being gay or transgender is unlawful under Title VII.[40]

Title VII § 706(g) authorizes courts to enjoin employers from engaging in unlawful employment practices and also to order corrective action as appropriate.[41] These actions may include reinstating or rehiring employees, with or without back pay.[42] In 1972, Congress expanded courts' authority by modifying Title VII—adding the phrase "or any other

34. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

35. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 241, 255.

36. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602 (codified as amended at 29 U.S.C.A. § 621) (enacted to promote employment of older persons based on ability rather than age and to prevent age discrimination in the workplace).

37. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C.A. §§ 12101-12213).

38. Family Medical Leave Act of 1993, Pub. L. No. 103-3, § 2(b)(1), 107 Stat. 6, 7 (codified as amended at 29 U.S.C.A. § 2601(b)(1)) (enacted to "balance the demands of the workplace with the needs of families, to promote stability and economic security of families, and to promote national interests in preserving family integrity").

39. In a class lawsuit, three employees brought suit against prior employers on the basis of sex discrimination. Gerald Bostock was fired shortly after he began participating in a gay recreational softball league. Donald Zarda was fired days after he mentioned being gay. Aimee Stephens presented as a male when she was hired, and shortly after informing her employer she planned to live and work as a woman, she was fired from her job at a funeral home. The Supreme Court held that an employer firing an individual simply for being gay or transgender violated Title VII. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

40. *See id.*

41. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 706(g), 78 Stat. 241, 261.

42. *Id.*

equitable relief as the court deems appropriate."[43] The Civil Rights Act of 1991 further amended Title VII, providing for compensatory and, in some circumstances, punitive damage awards in cases of intentional discrimination.[44] Under the Civil Rights Act of 1991, compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses; but they do not include back pay, interest on back pay, or any other type of relief already authorized by § 706(g) of the Civil Rights Act of 1964.[45] The expansion of damages incorporated in the Civil Rights Act of 1991 indicates that Congress sought to increase the means by which courts could make victims of discrimination whole.[46]

### *B.* Albemarle Paper Co. v. Moody*: Making an Employee Whole*

In the 1975 case *Albemarle Paper Co. v. Moody*, the Supreme Court established that the fundamental purpose of employment discrimination statutes is to make an employee whole for injuries suffered as the result of unlawful discrimination in the workplace.[47] In *Albemarle*, a class of present and former paper mill employees brought suit against Albemarle Paper Co. for violating the equal employment opportunity provisions of the Civil Rights Act of 1964.[48] After several years of discovery, the plaintiffs moved to add a demand for back pay.[49] The district court found that Black employees had been placed in lower-paying job classifications and ordered Albemarle to implement a system of plant-wide seniority.[50] The lower court, however, refused to award back pay for losses suffered

43. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104–07 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)).

44. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In enacting the Civil Rights Act of 1991, Congress found that: (1) additional remedies were needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the Supreme Court decision in *Wards Cove Packing Co. v. Atonio* weakened the scope of effectiveness of federal civil rights protections; and (3) legislation was necessary to provide additional protections against unlawful discrimination in employment. *See* Civil Rights Act of 1991 § 2 (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)).

45. Civil Rights Act of 1991 § 3(A)(b)(2).

46. Tim Canney, *Tax Gross-Ups: A Practical Guide to Arguing and Calculating Awards for Adverse Tax Consequences in Discrimination Suits*, 59 CATH. U. L. REV. 1111, 1116 (2010).

47. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

48. *Id.* at 408–09.

49. *Id.* at 409.

50. *Id.*

under Albemarle's discriminatory system.[51] The Fourth Circuit reversed the lower court's holding, ruling that back pay should have been awarded.[52]

The Supreme Court granted certiorari to resolve the circuit split over the standard governing back-pay awards.[53] The Court noted that, although it is not an automatic remedy, back pay is an award that lower courts may invoke.[54] Therefore, courts have expansive discretion to help victims of discrimination.[55] More importantly, the Supreme Court held that the purpose of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination."[56] Accordingly, the Court remanded the case to the district court to determine the appropriate relief consistent with this reasoning.[57] Though the Supreme Court in *Albemarle* failed to address whether gross-ups are permitted for back-pay awards, it established that when it is not possible or reasonable for a court to reinstate employment with his or her former employer, the court may award numerous remedies to make a victim of discrimination whole.[58]

### *C. Available Remedies for Title VII Claims*

Remedies available to victims in Title VII suits include attorney's fees, front pay, and lump-sum back pay.[59] Title VII itself permits courts to award attorney's fees to successful claimants.[60] The Supreme Court in *Pollard v. E.I. du Pont de Nemours & Co*. established that front pay is an available remedy for Title VII actions.[61] Front pay is an award for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.[62] Additionally, the Court has held that courts may

51. *Id.* at 410.
52. *Id.* at 411–12
53. *Id.* at 413.
54. *Id.* at 415–16.
55. *See id.* at 421.
56. *Id.* at 419.
57. *Id.* at 436.
58. *See id.* at 405; Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).
59. *See* Barca, *supra* note 31, at 680–83.
60. *See* 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this chapter the court . . . may allow the prevailing party . . . reasonable attorney's fees.").
61. *See Pollard*, 532 U.S. at 846.
62. *Front Pay*, BLACK'S LAW DICTIONARY (11th ed. 2019).

grant an employee a lump-sum back-pay award.[63] In fact, back pay is the preferred remedy available to a victim of employment discrimination.[64] As noted in *Albemarle*, back-pay awards are integral to employment discrimination laws, and there is a strong presumption in favor of back-pay damages for victims of discrimination.[65]

Lump-sum back-pay awards, however, may cause tax problems for employees.[66] The award may push the employee into a higher tax bracket in the year of the award, resulting in more federal income tax liability than if the employer had made the payments over time, as it would have done if the employer had not engaged in discrimination.[67] Nevertheless, only four federal circuit courts have held that it is appropriate to award gross-ups for the receipt of lump-sum back-pay awards to offset the negative federal income tax consequences.[68] Without the gross-up, plaintiffs do not receive their full remedy in a Title VII action.[69] The remedy is inadequate in making the victim whole because the plaintiffs must pay the additional tax burden, which is the fault of the employer, either out of their own pocket or out of the funds used to compensate the plaintiffs for the damages suffered, thus reducing the amount of the damage award the plaintiffs truly receive.

### *D. Legislative Attempts to Address the Negative Tax Consequences for Title VII Back-Pay Awards*

In recent years, Congress has made several legislative attempts to offset the negative tax consequences of lump-sum back-pay awards.[70] The majority of Congress' proposed legislative efforts employ income averaging to counter the negative tax consequences of Title VII awards.[71] Income averaging allows taxpayers to compute taxable income by averaging the payer's current annual income with that of previous years.[72] While it is worth noting that there are several benefits to income

63. Eshelman v. Agere Sys., 554 F.3d 426, 441 (3d Cir. 2009) (first quoting Loeffler v. Frank, 486 U.S. 549, 558 (1988); and then quoting Spencer v. Wal-Mart Stores, 469 F.3d 311, 315 (3d Cir. 2006)).

64. Johnson, *supra* note 21, at 36.

65. *See* Albemarle Paper Co. v. Moody, 95 U.S. 405, 418–20 (1975).

66. *Eshelman*, 554 F.3d at 441.

67. *Id.*

68. *See generally* cases cited *supra* note 19.

69. *See generally* EEOC v. N. Star Hosp., 777 F.3d 898, 904 (7th Cir. 2015).

70. *See generally* sources cited *supra* note 18.

71. *See generally id.*

72. *Income Averaging*, BLACK'S LAW DICTIONARY (11th ed. 2019).

averaging,[73] it would not make a victim whole to the same extent that gross-ups do.[74] Further, Congress never successfully enacted the proposed legislation.[75]

The first attempt at a legislative solution to the negative tax penalty was the proposed Civil Rights Tax Fairness Act of 1999.[76] The 1999 Act recommended amendments to the Internal Revenue Code that would exclude amounts awarded to a victim of unlawful discrimination from gross income.[77] The Act also permitted income averaging for back-pay and front-pay awards received as the result of discrimination claims.[78] Congress did not enact this legislation, and a renamed version of the Act was later introduced to the House of Representatives in 2001.[79] Congress did not enact this second, renamed version of the Act either, and the bill was reintroduced a third time to both the House of Representatives and the Senate as the Civil Rights Tax Fairness Act of 2003.[80] Though Congress included portions of the Civil Rights Tax Fairness Act of 2003 in the American Jobs Creation Act of 2004, it omitted the sections of the Tax Fairness Act addressing the adverse tax consequences on pecuniary damages awarded to discrimination victims.[81]

Congress next attempted to counter the negative tax consequences through the Civil Rights Tax Relief Act of 2007.[82] This legislation sought to amend the Internal Revenue Code to allow income averaging for back-pay and front-pay awards received for Title VII discrimination claims.[83] Additionally, the Act proposed an amendment to the Internal Revenue

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73. There are several benefits associated with income averaging. First, this method "creates a sense of horizontal equity among employment discrimination plaintiffs and non-discrimination employees, placing the victims of discrimination in the same position as if the discrimination never occurred." Second, the income averaging approach may be easier to apply than the gross-up method because it does not require the courts to hear expert testimony and conduct complex calculations. *See* Barca, *supra* note 31, at 704.

74. *See* discussion *infra* Part IV.

75. *See generally* sources cited *supra* note 18. It should also be noted that at the time of writing, the recent election of a Democratic President and a Democratic controlled Congress may result in another legislative attempt to address the negative tax consequences of Title VII lump-sum back-pay awards.

76. *See* H.R. Res. 1997, 106th Cong. (1999).

77. *See id.*

78. *See id.*

79. Barca, *supra* note 31, at 697–98.

80. *Id.* at 698.

81. *Id.*

82. *See generally* S. Res. 1689, 110th Cong. (2007).

83. *See id.*

Code that would exclude gross income amounts received from unlawful discrimination claims.[84] Once again, Congress did not enact the bill.[85] Legislators reintroduced the bill in 2009 and 2011, but it ultimately failed to become law.[86]

In 2013, Congress introduced the Civil Justice Tax Fairness Act.[87] This legislation attempted to amend the Internal Revenue Code to allow: (1) amounts received by judgment or settlement for unlawful discrimination as lump sums or periodic payments to be excluded from gross income; (2) income averaging for back-pay and front-pay awards; and (3) an exemption from the alternative minimum tax for any tax benefit resulting from income averaging.[88] Once again, Congress failed to enact the law.[89] Currently, no tax legislation directly addresses the negative tax consequences of Title VII lump-sum back-pay awards, causing the federal circuit courts to inconsistently award damages to plaintiffs seeking relief for their employment discrimination claims.

## II. THE CIRCUIT SPLIT: WHETHER GROSS-UPS ARE PERMITTED FOR TITLE VII BACK-PAY AWARDS

The federal circuits are split on whether gross-ups are permitted for Title VII back-pay awards. The Third, Seventh, Ninth, and Tenth circuits grant district courts the discretion to award gross-ups for Title VII back-pay awards.[90] The D.C. Circuit, however, has explicitly rejected gross-ups of back pay to cover the negative tax liability.[91]

84. *See id.*

85. Johnson, *supra* note 21, at 57.

86. *Id.*

87. Civil Justice Tax Fairness Act of 2013, H.R. Res. 2509, 113th Cong. (2013); S. Res. 1224, 113th Cong. (2013).

88. *See* Civil Justice Tax Fairness Act of 2013, H.R. Res. 2509, 113th Cong. (2013); S. Res. 1224, 113th Cong. (2013). The alternative minimum tax applies to taxpayers with high economic income and ensures that those taxpayers pay at least a minimum amount of tax. *See Topic No. 556 Alternative Minimum Tax*, IRS (Jan. 2021), https://www.irs.gov/taxtopics/tc556 [https://perma.cc/QBP9-ZNZH].

89. Johnson, *supra* note 21, at 57.

90. *See generally* cases cited *supra* note 19.

91. *See generally* Dashnaw v. Peña, 12 F.3d 1112 (D.C. Cir. 1994); Fogg v. Gonzales, 492 F.3d 447, 449 (D.C. Cir. 2007).

### *A. The Tenth Circuit:* Sears v. Atchinson

The first federal circuit to address a tax component for Title VII back-pay awards was the Tenth Circuit in *Sears v. Atchinson*.[92] In *Sears*, plaintiffs filed a Title VII class action lawsuit against multiple railroad companies, including Atchinson, Topeka, Santa Fe Railway, and the United Transportation Union.[93] The plaintiffs alleged that these companies engaged in discriminatory policies and practices against Black employees.[94] The district court found that both Santa Fe and the United Transportation Union violated Title VII, and the court granted the plaintiffs an additional tax component in the back-pay award to counter the additional tax liability.[95] On appeal, the Tenth Circuit held that the district court did not abuse its discretion by including a gross-up in the back-pay award.[96] The Tenth Circuit granted the tax component to compensate class members for the additional tax liability arising from a lump-sum award of over seventeen years of back pay.[97] The Tenth Circuit noted that a tax component may not always be appropriate in a Title VII case, and it is up to the discretion of the trial court to award damages to discrimination victims in a way that will make them whole.[98] In the Tenth Circuit's reasoning, the court recognized that the court-ordered back-pay awards would likely place the victims in the highest income tax bracket, where they would not have been otherwise.[99] Additionally, the Tenth Circuit noted that income averaging was an insufficient solution because nearly 40% of the class members had died by the time of the suit and, thus, they would not benefit from income averaging alone.[100]

92. *See* Sears v. Atchinson, 749 F.2d 1451, 1456 (10th Cir. 1984).
93. Sears v. Atchinson, 454 F. Supp. 158, 160 (D. Kans. 1978).
94. *Id.* at 160–61.
95. *See id*.
96. *See Sears*, 749 F.2d 1451.
97. *Id.* at 1456.
98. *Id.*
99. *Id.*
100. *Id.* (noting that estates of deceased taxpayers are not eligible for income averaging under Treas. Reg. § 1.1303-1(a)).

*B. The Third Circuit:* Eshelman v. Agere Systems

The Third Circuit has followed the Tenth Circuit's decision by allowing gross-up awards for Title VII actions.[101] In *Eshelman v. Agere Systems*, Joan Eshelman brought suit against her former employer, Agere Systems, Inc., claiming Agere discriminated against her in violation of the Americans with Disabilities Act (ADA).[102] Specifically, Eshelman contended that she was terminated as a result of a disability stemming from her chemotherapy treatment for breast cancer.[103] Eshelman had worked at Agere for over 20 years and had obtained the position of supervisor of the Chief Information Office of Agere's facility in Reading, Pennsylvania.[104] At trial, the jury determined that Agere discriminated against Eshelman in violation of the ADA and the Pennsylvania Human Relations Act and awarded her $170,000 in back pay and $30,000 in compensatory damages.[105] After the jury rendered its verdict, the district court also granted Eshelman a gross-up to offset the negative tax consequences that would stem from her back-pay award.[106]

On appeal, the Third Circuit held that the district court did not abuse its discretion in awarding Eshelman additional compensation for the negative tax consequences of receiving her lump-sum back-pay award.[107] The Third Circuit reasoned that the principal purpose of employment discrimination statutes is to make persons whole "for injuries suffered on account of unlawful employment discrimination."[108] Further, the court noted that district courts maintain wide discretion to award "a just result" based on the circumstances of each case.[109] In exercising their discretion, the district courts should attempt to restore the employee to his or her economic status quo had the discrimination not occurred.[110] The Third Circuit also noted that a plaintiff is not presumptively entitled to a gross-

101. *See* Eshelman v. Agere Sys., 554 F.3d 426, 443 (3d Cir. 2009); EEOC v. N. Star Hosp., 777 F.3d 898, 904 (7th Cir. 2015); Clemens v. CenturyLink Inc., 874 F.3d 1113 (9th Cir. 2017).

102. *Eshelman*, 554 F.3d at 430.

103. *See id.* at 430–31.

104. *Id.* at 430.

105. *Id.* at 432.

106. *Id.*

107. *Id.* at 443.

108. *Eshelman*, 554 F.3d at 440 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

109. *Id.*

110. *See id.* (quoting *In re* Cont'l Airlines, 125 F.3d 120, 135 (3d Cir. 1997)).

up.[111] As such, the employee bears the burden of showing the extent of the injury she has suffered and the amount of relief needed to make her whole, as it varies from case to case.[112]

*C. The Seventh Circuit:* EEOC v. Northern Star Hospitality

The Seventh Circuit addressed the issue of tax adjustment awards in *EEOC v. Northern Star Hospitality*.[113] In *Northern Star Hospitality*, the Seventh Circuit joined the Third and Tenth circuits, affirming a tax component award for Title VII lump-sum back-pay awards.[114] The plaintiff's receipt of $43,300.50 in back pay would have bumped him into a higher tax bracket.[115] This resulting tax increase would not have occurred had Mr. Miller received the pay on a regular, scheduled basis.[116] In other words, not accounting for the negative tax consequences meant that Mr. Miller's award would be less than the amount he would have received had his employer not unlawfully terminated him.[117] The court reasoned that "without the tax component award, he will not be made whole . . . offend[ing] Title VII's remedial scheme."[118] Thus, the Seventh Circuit held that the district court did not abuse its discretion in granting the award and affirmed the judgment of the lower court.[119]

*D. The Ninth Circuit:* Clemens v. CenturyLink Inc.

Most recently, the Ninth Circuit addressed the issue of gross-ups in *Clemens v. CenturyLink Inc*.[120] Arthur Clemens Jr. sued his employer, Qwest Corporation, for race discrimination in violation of Title VII.[121] After a trial, the jury awarded Clemens over $157,000 for lost wages and benefits, over $275,000 for emotional distress, and $100,000 in punitive damages.[122] The district court also granted Clemens's motion for

111. *Id.* at 443.
112. *Id.*
113. *See* EEOC v. N. Star Hosp., 777 F.3d 898 (7th Cir. 2015).
114. *Id.* at 904.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *See id.*
120. *See generally* Clemens v. CenturyLink Inc., 874 F.3d 1113 (9th Cir. 2017).
121. *Id.* at 1115.
122. *Id.*

attorney's fees but denied his request for a gross-up.[123] In refusing to exercise its discretion to grant Clemens a gross-up, the lower court reasoned that because of the lack of guidance from the Ninth Circuit and the circuit split over the issue, the award was inappropriate.[124]

On appeal, the Ninth Circuit joined the Third, Seventh, and Tenth circuits by reversing the district court's decision to deny Clemens's request for a tax consequence adjustment.[125] The Ninth Circuit ruled that the decision to award a gross-up, and the appropriate amount, is left to the discretion of the district court.[126] The court also noted that there are situations in which a gross-up is not appropriate, such as when the amount of the gross-up is difficult to determine or would be very small.[127] Additionally, the Ninth Circuit adopted the Seventh Circuit's reasoning in *EEOC v. Northern Star Hospitality*, holding that the party seeking a gross-up bears the burden of showing an income tax disparity and proving any adjustment award needed to counter the negative tax treatment.[128] The court refused to rule on whether a gross-up was appropriate for the issue at hand and remanded the decision to the district court.[129]

### *E. The D.C. Circuit:* Dashnaw v. Peña

Conversely, the D.C. Circuit has continuously refused to permit gross-up awards in Title VII actions. First, in the 1994 case *Dashnaw v. Peña*, the D.C. Circuit refused to allow additional compensation for the negative tax consequences of Title VII awards.[130] The Federal Maritime Administration (MARAD) hired Dashnaw as an engineer in 1967.[131] He filed a complaint in 1977, alleging employment discrimination on the basis of age, national origin, religion, and race.[132] Dashnaw primarily based his claims on the ground that he was denied promotions that instead went to younger candidates.[133] Ultimately, the lower court found MARAD liable for age discrimination, but the proceedings were prolonged for multiple

123. *Id.*
124. *See id.*
125. *Id.* at 1117.
126. *Id.*
127. *Id.*
128. *Id.*; *see also* EEOC v. N. Star Hosp., 777 F.3d 898, 904 (7th Cir. 2015).
129. *Clemens*, 874 F.3d at 1117.
130. Dashnaw v. Peña, 12 F.3d 1112, 1114 (D.C. Cir. 1994)
131. *Id.*
132. *Id.*
133. *Id.*

reasons, including Dashnaw's retirement.[134] In 1992, the district court ordered that Dashnaw be reinstated and receive back pay from 1975 through the date of the order.[135] On appeal, Dashnaw contended that the district court should have granted him additional compensation to cover the higher taxes he would have to pay because he received his back pay in a lump sum, rather than as salary paid over a number of years.[136] The D.C. Circuit held that the general rule from *Albemarle*—that victims of discrimination should be made whole[137]—does not support additional compensation for negative tax consequences from lump-sum back-pay awards.[138] Further, the court noted that it knew of "no authority for such relief."[139]

Throughout the D.C. Circuit, district courts have continued to follow the *Dashnaw* ruling, refusing to recognize tax gross-ups as an available remedy.[140] Over a decade later, the D.C. Circuit reaffirmed its *Dashnaw* ruling in the 2007 case *Fogg v. Gonzales*.[141] In *Fogg*, a former United States Deputy Marshal brought an action alleging that the United States Marshals Service (USMS) had discriminated against him on the grounds of race in violation of Title VII.[142] A jury awarded Fogg $4 million in damages, which the district court reduced to the statutory maximum of $300,000.[143] The court granted Fogg's motion for equitable relief and extended his award to include back pay through the date of his dismissal.[144] On remand, a different district court judge granted Fogg the back-pay award with an additional gross-up of 14% to offset the negative tax consequences of the lump-sum award.[145] On appeal, the D.C. Circuit reversed the district court's gross-up award, finding that the district court abused its discretion and directly contradicted the *Dashnaw* holding.[146]

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134. *Id.*
135. *Id.* at 1114–15.
136. *Id.*
137. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
138. *Dashnaw*, 12 F.3d at 1116.
139. *Id.* ("We know of no authority for such relief, and appellee points to none. Given the complete lack of support in existing case law for tax gross-ups, we decline so to extend the law in this case. We therefore reject Dashnaw's request for additional compensation to cover his tax liability.").
140. Johnson, *supra* note 21, at 47.
141. *See generally* Fogg v. Gonzales, 492 F.3d 447 (D.C. Cir. 2007).
142. *Id.* at 449.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 455.

Ultimately, the appellate court reversed the district court's gross-up award on the basis of "binding precedent," reaffirming the federal circuit split.[147]

The D.C. Circuit's view goes against the primary purpose of employment discrimination statutes, which is to make persons whole for injuries suffered because of unlawful employment discrimination.[148] To resolve the circuit split, the Supreme Court should permit gross-ups in cases where back pay is awarded for employment discrimination and articulate factors for lower courts to consider when determining the amount of the gross-up. Allowing gross-up awards is the best solution to make victims of discrimination whole because it shifts the additional tax burden onto the employer instead of the victim or the public.[149] Additionally, establishing set factors would make calculating gross-ups significantly easier on the lower courts and give plaintiffs a better understanding of whether a court will award a gross-up.[150]

## III. THE EFFECT OF FEDERAL INCOME TAXATION ON TITLE VII AWARDS

The federal income tax system often causes adverse tax consequences for lump-sum back-pay awards.[151] First, Title VII awards granted to victims are subject to federal income taxation.[152] Second, the Internal Revenue Code's annual accounting system and the progressive tax structure of the federal income tax system result in a more substantial tax burden on victims than if the award had been made in payments over time.[153]

### *A. Title VII Awards Are Subject to Federal Income Taxation*

The awards granted to victims in Title VII actions are generally subject to federal income tax.[154] In *U.S. v. Burke*, the Tennessee Valley Authority (TVA) paid back pay to affected employees as part of a sex discrimination claim under Title VII.[155] The TVA withheld federal income taxes from the award and the Internal Revenue Service (IRS) denied the

147. *Fogg*, 492 F.3d at 456.
148. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
149. *See generally* Barca, *supra* note 31, at 686.
150. *Id.*
151. *Id.*
152. *See* United States v. Burke, 504 U.S. 229 (1992).
153. *See* Barca, *supra* note 31, at 686.
154. *See Burke*, 504 U.S. 229.
155. *Id.*

victims' claims for a refund of the withheld taxes.[156] The district court ruled that the settlement proceeds could not be excluded from gross income as damages received for personal injuries under 26 U.S.C. § 104(a)(2).[157] The court of appeals reversed, holding that the damage awards could be excluded from gross income for federal income tax purposes because the discrimination constituted a personal, tort-like injury to the victims.[158] The Supreme Court held that a statute such as Title VII, "whose sole remedial focus is the award of back wages," does not remedy a tort-like personal injury within the meaning of § 104(a)(2) and the applicable regulations.[159] In other words, the Supreme Court held that back-pay awards received for Title VII claims are not excludable from gross income and are therefore subject to federal income taxation.[160]

The Supreme Court reaffirmed its stance in *Commissioner v. Schleier*.[161] Erich Schleier, an employee of United Airlines, Inc., was fired when he reached the age of 60, pursuant to company policy.[162] Schleier then filed a complaint alleging that United violated the Age Discrimination in Employment Act of 1967.[163] When Schleier filed his 1986 federal income tax return, he included the back-pay award he received in his settlement with United but did not include the portion of the settlement attributed to liquidated damages.[164] The Commissioner of Internal Revenue issued a deficiency notice, asserting that Schleier should have included liquidated damages in his gross income.[165] Schleier then initiated proceedings in Tax Court, alleging that he properly excluded the liquidated damages and seeking a refund for the taxes he paid on the settlement's back-pay award.[166]

The Tax Court ruled that the entire settlement, both the back pay and liquidated damages, constituted damages received on account of personal injuries or sickness within the meaning of § 104(a)(2) of the Internal

156. *Id.*

157. *Id.*; *see also* 26 U.S.C. § 104(a)(2) ("In general . . . gross income does not include . . . the amount of any damages . . . received (whether by suit or agreement . . .) . . . on account of personal physical injuries . . . .").

158. *Burke*, 504 U.S. 229.

159. *Id.* at 241.

160. *Id.*

161. *See* Comm'r v. Schleier, 515 U.S. 323 (1995).

162. *Id.* at 325.

163. *Id.*; *see also* 29 U.S.C. §§ 621–34 (enacted by Congress to protect employees against age discrimination in the workplace).

164. *Schleier*, 515 U.S. at 327.

165. *Id.*

166. *Id.*

Revenue Code and was therefore excludable from gross income.[167] The Court of Appeals for the Fifth Circuit affirmed.[168] The Supreme Court reversed and ruled that because of the plain language of § 104(a)(2), the text of the regulation implementing § 104(a)(2), and the court's reasoning in *Burke*, awards for violating the Age Discrimination in Employment Act are not excludable from gross income, and thus, the awards are subject to federal income tax.[169]

### *B. The Internal Revenue Code and the Adverse Consequences to Lump-Sum Back-Pay Awards*

Section 61 of the Internal Revenue Code defines gross income as "all income from whatever source derived" except as otherwise provided by the tax code.[170] Under § 104(a) of the Internal Revenue Code, back-pay and front-pay awards in Title VII actions are subject to federal income tax because they are not awarded as a remedy for a physical injury.[171] The inclusion of these awards in gross income often causes harsh tax consequences for Title VII plaintiffs.[172]

The main sources of the negative tax consequences are the Internal Revenue Code's annual accounting system and the progressive tax structure of the federal income tax system.[173] First, § 441 of the Internal Revenue Code requires a taxpayer's income to be calculated based on gains received during the calendar year in question.[174] Accordingly, if an injured plaintiff receives a lump-sum back-pay award attributable to multiple years of discrimination, the entire lump sum is taxed in the year the remedy is awarded.[175]

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167. *Id.*
168. *Id.*
169. *Id.*
170. I.R.C. § 61(a).
171. *See* I.R.C. § 104(a); *see also* United States v. Burke, 504 U.S. 229 (1992); *Schleier*, 515 U.S. 323.
172. *See generally* Barca, *supra* note 31, at 685–86.
173. *Id.* at 688.
174. I.R.C. § 441; *see also* United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) (applying income taxes to back pay for the year the settlement was paid, not the years the wages should have been paid); Rev. Rul. 78-336, 1978-2 C.B. 255 (ruling that dismissed federal employees must report income for back pay in the year paid); 26 C.F.R. § 1.446-1(c)(1)(i) (2016).
175. *See* I.R.C. § 441; *see also* Barca, *supra* note 31, at 687–88.

Second, because the United States uses a progressive tax structure, the marginal tax rate[176] increases as the amount of taxable income increases.[177] As a result, victims who receive large back-pay awards are often taxed at a higher, if not the highest, marginal tax rate and have a higher net income tax liability than if they had earned the pay over a period of time rather than in a lump-sum award.[178] Thus, the victim pays more in taxes than he or she would have if the discrimination had not occurred and the wages were earned in an ordinary fashion during employment.[179]

### *C. An Illustration of the Negative Tax Effect Under the Current Income Tax System*

To fully illustrate the tax effect of lump-sum back-pay awards under the current tax law, suppose a court awards a victim of employment discrimination $200,000 in a lump-sum back-pay award in 2020. The victim is unmarried and not a head of household.[180] Prior to the lump-sum back-pay award, the employee's taxable income for the year was $45,000, placing the employee in a tax bracket with a marginal tax rate of 22%.[181] After receiving the back-pay award, however, the victim's taxable income for the year increases to $245,000, raising the employee three tax brackets and imposing a 35% marginal tax rate.[182] Thus, under the current tax system, the employee's wages and salary awarded in a back-pay award will be taxed at a higher rate than if he or she received the payment over

176. The marginal tax rate is the highest rate at which a taxpayer pays taxes. A taxpayer's effective tax rate is the percentage of the payer's total income paid in taxes. *See* JOHN A. MILLER & JEFFREY A. MAINE, THE FUNDAMENTALS OF FEDERAL TAXATION PROBLEMS AND MATERIALS 229 (5th ed. 2018); *see also Marginal Tax Rate*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In a tax scheme, the rate applicable to the last dollar of income earned by the taxpayer.").

177. The United States federal income tax system uses a progressive tax rate, meaning the rate rises with income. Currently the seven tax rates are 10%, 12%, 22%, 24%, 32%, 35%, and 37%. Each rate applies to a different segment of income known as a tax bracket. *See* MILLER & MAINE, *supra* note 176.

178. Barca, *supra* note 31, at 688.

179. *Id.*

180. Tax filing status determines, among other things, income tax rate. Status is classified as Single, Married Filing Jointly, or Head of Household. For the 2020 Tax Brackets, see Amir El-Sibaie, *2020 Tax Brackets*, THE TAX FOUNDATION (Nov. 2019), https://files.taxfoundation.org/20191114132604/2020-Tax-Brackets-PDF.pdf [https://perma.cc/3WHZ-2LUP].

181. For the 2020 Tax Brackets, see *id.*

182. *Id.*

time instead of in a lump sum.[183] The victim pays more in federal income tax, reducing the net remedy he or she received in damages for the discrimination suffered. Because the victim pays more in federal income tax than he or she would have if the discrimination had not occurred, the government profits off the discrimination at the expense of the victim, but the employee is not made whole. A tax gross-up in conjunction with a lump-sum back-pay award is the only way to fully compensate a victim of employment discrimination.

## IV. A SOLUTION: PERMITTING GROSS-UPS AND DETERMINING WHAT FACTORS DISTRICT COURTS SHOULD CONSIDER

Because legislation has continuously failed to sufficiently address the issue of gross-ups, the Supreme Court should resolve the circuit split and permit courts to award Title VII discrimination victims tax adjustment awards. Additionally, the Supreme Court should establish factors for lower courts to use in determining whether to award gross-ups and in what amount.

### *A. Judicial and Legislative Power to Allow Gross-Ups and Make Victims Whole*

An established principle of the American legal system is that injured plaintiffs should be made whole for injuries suffered.[184] In *Gurmankin v. Costanzo*, the Third Circuit recognized that adopting a "make whole" standard is necessary to restore a victim to the economic position in which he or she would have been had the discrimination not occurred.[185] Many courts, however, refuse to recognize the "make whole" doctrine in the context of the negative tax consequences from an award of lump-sum back pay.[186]

Nonetheless, Congress intended federal employment discrimination statutes to make injured plaintiffs whole, giving courts expansive discretion to award remedies to victims.[187] Additionally, in *Albemarle*, the Supreme Court stated that the principal purpose of the equitable powers that Congress granted to courts hearing discrimination actions is "to make persons whole for injuries suffered on account of unlawful employment

183. *See* Barca, *supra* note 31, at 688.
184. Johnson, *supra* note 21, at 52.
185. Gurmankin v. Costanzo, 626 F.2d 1115, 1121 (3d. Cir. 1980).
186. Johnson, *supra* note 21, at 52–53.
187. *See, e.g.*, 29 U.S.C. §§ 160(c), 216(b), 1132(a)(3)(B) (2006); 42 U.S.C. § 2000e-5(g)(1).

discrimination."[188] Thus, the considerable discretion that Title VII provides to courts to ensure adequate compensation,[189] along with the Supreme Court's ruling in *Albemarle*, indicates that courts have the authority to award gross-ups in Title VII actions.[190]

Without a gross-up, employment discrimination victims do not receive their full remedy. Employees are bumped into higher tax brackets and pay more in taxes than if they had received their salaries and wages over time instead of in a lump sum.[191] In other words, without a gross-up, an employee does not receive his or her full award in a Title VII action and is not "made whole" from the discrimination suffered during employment.[192] The gross-up method is the optimal solution to make a victim of employment discrimination whole, and the D.C. Circuit's view goes against the "make whole" principal.[193]

In *Dashnaw*, the D.C. Circuit found that there was "no authority" for gross-ups, stating that "[a]bsent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross ups' of back pay to cover tax liability."[194] But the majority of federal circuit courts have found the authority to award gross-ups.[195] Further, Congress has armed courts with wide discretion to adequately compensate victims.[196] Throughout the almost 60 years since the enactment of Title VII, Congress has continuously expanded the courts' authority, allowing courts to order corrective action where appropriate[197] or any other equitable relief the courts deem appropriate.[198] This continuous expansion of remedies indicates that Congress sought to increase the means by which courts could

188. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

189. Clemens v. CenturyLink Inc., 874 F.3d 1113, 1116 (9th Cir. 2017); 42 U.S.C. § 2000e-5(g)(1).

190. *See Albemarle Paper Co*., 422 U.S. at 418.

191. *See* Barca, *supra* note 31, at 688.

192. Johnson, *supra* note 21, at 57.

193. *See generally Clemens*, 874 F.3d at 1116.

194. Dashnaw v. Peña, 12 F.3d 1112, 1116 (D.C. Cir. 1994).

195. *See generally* Eshelman v. Agere Sys., 554 F.3d 426, 443 (3d Cir. 2009); EEOC v. N. Star Hosp., 777 F.3d 898, 904 (7th Cir. 2015); *Clemens*, 874 F.3d 1113.

196. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 706(g), 78 Stat. 241, 261; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104-07 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

197. *See generally* Civil Rights Act of 1964 § 706(g).

198. Equal Employment Opportunity Act of 1972 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)).

provide a remedy to victims of discrimination.[199] The D.C. Circuit's view goes against the general rule of making an employee whole for injuries suffered as the result of unlawful discrimination in the workplace,[200] essentially preventing employees from becoming whole in Title VII actions and discriminating against the victims for a second time.[201]

Prior failed legislative solutions also would not sufficiently make a victim whole.[202] While income averaging may significantly lighten the negative tax consequences on an employee, the remedy does not adequately make an employee whole from the discrimination suffered during employment.[203] First, under this method the victim's award is still being taxed.[204] To truly make an employee whole, some critics of income averaging contend that the victim's award should be exempt from taxable gross income all together.[205] The Supreme Court, however, has explicitly ruled that back-pay lump-sum awards are subject to federal income tax and must be included in taxable gross income, absent a legislative change.[206] Thus, to prevent victims from paying more in federal income taxes, the courts should shift the additional tax burden from the victim to the employer through a gross-up.[207]

Second, public policy disfavors income averaging.[208] Under this approach, the government will collect less tax revenue because it will tax pecuniary damages awarded for discrimination actions at a lower tax rate.[209] Consequently, the government will collect less in federal income taxes under an income averaging method.[210] Under the gross-up approach, the employer pays the additional tax burden, letting the government collect the full amount of tax revenue and shifting the additional tax burden from the employee to the employer. By shifting the tax burden to the employer through a gross-up, courts would force employers to be responsible for the full consequences of their discrimination.[211] Pushing these costs onto

199. Canney, *supra* note 46, at 1116.
200. *Clemens*, 874 F.3d at 1116.
201. *Id.*
202. *See* Barca, *supra* note 31, at 704–05.
203. *See id.*
204. *See generally* United States v. Burke, 504 U.S. 229, 241 (1992); *see also* Comm'r v. Schleier, 515 U.S. 323, 327 (1995).
205. *See* Barca, *supra* note 31, at 704.
206. *See Burke*, 504 U.S. at 241; *see also Schleier*, 515 U.S. at 327.
207. *See* Barca, *supra* note 31, at 704–05.
208. *Id.* at 705.
209. *Id.*
210. *Id.*
211. *Id.*

employers through a gross-up rather than onto the public through foregone tax revenue is a strong justification for the use of gross-ups over the income averaging method proposed by Congress.[212]

Conversely, some courts find it difficult to apply the gross-up method and calculate a victim's award.[213] Expert testimony and complex calculations are typically used to compute gross-ups, making it a costly and lengthy process to determine the award.[214] Part of the difficult calculation stems from the lack of set factors for lower courts to use when determining gross-up awards.[215] Thus, the Supreme Court must establish factors for lower courts to consider when determining whether they should award a gross-up in a particular case and the amount of the award.

### *B. Factors for District Courts to Consider in Determining Gross-Up Awards*

The Third and Ninth circuits established starting points for courts to use when determining gross-up awards in *Eshelman v. Agere Systems* and *Clemens v. CenturyLink Inc*.[216] In *Eshelman*, the Third Circuit noted that a plaintiff is not presumed to be entitled to a gross-up and the relief required to make an employee whole varies from case to case.[217] Additionally, in *Clemens*, the Ninth Circuit recognized that there will be many instances where a gross-up is not appropriate.[218] Specifically, the court noted two circumstances in which gross-ups would not be a suitable remedy.[219] First, if it would be too difficult for a court to determine the proper gross-up amount, a gross-up is likely not proper.[220] Second, the negligibility of the amount at issue may make the remedy inappropriate.[221] Thus, if the tax adjustment would be difficult to calculate or would be an insignificant amount, a gross-up is not appropriate.[222]

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212. *Id.*
213. *See id.* at 704.
214. *Id.*
215. *See* Pollard v. Dupont De Nemours, Inc., 338 F. Supp. 2d 865, 883 (W.D. Tenn. 2003).
216. *See* Eshelman v. Agere Sys., 554 F.3d 426, 443 (3d Cir. 2009).
217. *Id.*
218. Clemens v. CenturyLink Inc., 874 F.3d 1113, 1117 (9th Cir. 2017).
219. *See id.*
220. *Id.*
221. *Id.*
222. *See id.*

Additionally, courts should consider other pecuniary burdens the plaintiff will suffer as a result of adverse tax consequences.[223] In other words, not all income is taxed equally, and courts should consider both the plaintiff's income tax liability and any other liabilities under the Internal Revenue Code that plaintiffs can prove that they would not have incurred "but for" the discrimination.[224] Courts should also take into account missed deductions, tax credits, and any economic benefits the plaintiff was unable to enjoy because of the employer's discrimination.[225] For example, if a victim receives state or federal unemployment benefits, the court should consider tax consequences and other economic benefits related to unemployment assistance when calculating the gross-up award.[226] Under most unemployment programs, unemployment compensation received during the year must be included in gross income.[227] Because a Title VII victim is only receiving unemployment compensation as a result of the employer's unlawful discrimination, courts should also consider this additional compensation included in the victim's gross income when determining the award.[228]

As noted in nearly all federal circuit court cases allowing gross-ups, the plaintiff bears the burden of proving the increased tax burden with specificity.[229] To prevent abuse and mistakes, courts should require detailed accounting calculations and records in awarding gross-up awards.[230] If a victim is able to meet this burden of specificity, the burden of proving why a court should not award a gross-up should then transfer to the opposing party. Thus, the employer would then bear the burden of proving the *Clemens* factors to prevent the court from awarding a gross-up.

The general method lower courts currently employ to calculate gross-ups includes: (1) calculating the taxable income of the plaintiff the year of the award; (2) determining the taxes owed for the tax year; (3) determining the effective tax rate for that year; (4) determining the effective tax rate for the plaintiff's normal one-year salary with the discriminating

223. Canney, *supra* note 46, at 1134.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Topic No. 418 Unemployment Compensation*, IRS (Apr. 15, 2021), https://www.irs.gov/taxtopics/tc418 [https://perma.cc/F54M-DP8G].
228. *See* Canney, *supra* note 46, at 1134.
229. *See* Eshelman v. Agere Sys., 554 F.3d 426, 443 (3d Cir. 2009); Clemens v. CenturyLink Inc., 874 F.3d 1113, 1117 (9th Cir. 2017); E.E.O.C. v. N. Star Hosp., 777 F.3d 898, 904 (7th Cir. 2015).
230. Canney, *supra* note 46, at 1134.

employer; (5) determining the difference between the effective tax rates in a normal-salary year and the lump-sum-award year; and (6) multiplying the lump-sum taxable income by the difference between the effective and normal tax rates.[231]

Thus, courts should take into account all of these factors when considering and determining gross-up awards.[232] Accordingly, the Supreme Court should specify that the plaintiff bears the burden of proving with specificity the increased tax burden. If the victim is able to prove with specificity the increased tax burden, the burden should then shift to the employer to prove that the gross-up would either be too difficult to calculate or too small of an amount and thus should not be awarded. Further, the Supreme Court should also adopt the general method lower courts have implemented to calculate the gross-up amount, while additionally considering other pecuniary burdens the plaintiff will suffer as a result of adverse tax consequences.

Using the prior example, if a discrimination victim has a taxable income of $45,000 prior to the award and is granted a $200,000 back-pay lump-sum award, the victim is then pushed from a 22% tax bracket into a 35% tax bracket, with taxable income for the year of $245,000. The $200,000 will be taxed at a disproportionately higher rate than if the $200,000 had been earned over time during employment as normal salary and wages. To prove that a gross-up is required to counter the negative tax consequences, the victim will bear the burden of showing with specificity the increased tax burden.[233] Here, the victim's income tax liability will increase from $5,689.78 to $60,545[234] in the year of the award. Thus, the gross-up would likely not be too difficult to calculate and would be a fairly significant amount, satisfying the *Clemons* factors.[235] The court should consider whether the victim received unemployment compensation as a result of the discrimination and whether that compensation was included in the victim's gross income.[236] The court should then employ the general method of the lower courts and calculate a gross-up for the victim.[237] Only with this gross-up will the victim be "made whole" from the discrimination.

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231. *Id.* at 1135–36.

232. *See generally id.*

233. *See Eshelman*, 554 F.3d at 443; *Clemens*, 874 F.3d at 1117; *N. Star Hosp.*, 777 F.3d at 904.

234. The victim's income tax liability was calculated using the 2020 tax brackets. *See* El-Sibaie, *supra* note 180.

235. *See Clemens*, 874 F.3d at 1117.

236. Canney, *supra* note 46, at 1134.

237. *Id.*

Establishing a set of factors for the lower courts to use would create more consistency in the lower courts and, as a result, give plaintiffs a better understanding of whether a court will award a gross-up in their case.[238] Additionally, setting factors would make calculating gross-ups significantly easier on the lower courts by narrowing the considerations used in the calculation, determining circumstances where gross-ups would be inappropriate, and ensuring a general method for courts to use in calculating gross-ups.

## CONCLUSION

The Seventh Circuit's decision in *EEOC v. Northern Star Hospitality* correctly permitted a gross-up to offset the negative tax consequences of Mr. Miller's lump-sum back-pay award.[239] Without a gross-up, Mr. Miller would not have received his full award and would not have been made whole from the discrimination he suffered at Sparx.[240] The Third, Ninth, and Tenth circuits have also correctly permitted gross-up awards.[241] The D.C. Circuit's view goes against the fundamental purpose of employment discrimination statutes and prevents victims from being made whole as though the discrimination did not occur.[242]

Both Congress and the Supreme Court have provided courts with the discretion and tools to permit gross-ups.[243] Without an adjustment for the negative tax consequences caused by lump-sum back-pay awards, victims of employment discrimination are not made whole. Further, Congress has failed to enact legislation offering a viable solution.[244] Thus, the Supreme Court should resolve the circuit split and permit gross-ups for lump-sum back-pay awards while also establishing factors for lower courts to consider in deciding and calculating gross-up awards.

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238. *Id.*

239. *See generally* EEOC v. N. Star Hosp., 777 F.3d 898 (7th Cir. 2015).

240. *See generally id.* at 904.

241. *See generally* Eshelman v. Agere Sys., 554 F.3d 426 (3d Cir. 2009); *N. Star Hosp.*, 777 F.3d 898; Clemens v. CenturyLink Inc., 874 F.3d 1113, 1117 (9th Cir. 2017); Sears v. Atchinson, 749 F.2d 1451 (10th Cir. 1984).

242. *See Clemens*, 874 F.3d at 1116–17.

243. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 241, 255; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104–07 (codified as amended at 42 U.S.C. § 2000e-5(g) (2000)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

244. *See* sources cited *supra* note 18.