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I. INTRODUCTION

When employees bring suit against their employers for violations of law, they generally seek an order for backpay.[1] By grant of Congress, federal courts hold the power to make this equitable remedy under various employment and civil rights statutes.[2] Backpay is not an automatic component of an employment plaintiff's award, but it is commonly viewed as the most effective way to place a plaintiff in the same position she would have been absent her employer's illegal action.[3] In other words, courts use backpay awards to "make the [employment] plaintiff whole" for the injury suffered.[4]

Recognizing that the amount of withheld wages or benefits is, at times, insufficient to fully compensate a plaintiff who suffered an illegal employment action, courts sometimes award additional monetary amounts to employment plaintiffs, including attorney's fees and "prejudgment interest" awards.[5] Attorney's fees, if not

1. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 419, 421 (1964) ("The 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, '[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. . . . [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate [Title VII's] central statutory purposes . . . .'" (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941))); Franks v. Bowman Transp. Co., 424 U.S. 747, 774 n.34 (1976); Armco Emps. Indep. Fed'n, Inc. v. AK Steel Corp., 149 F. App'x. 347 (6th Cir. 2005).

2. *See, e.g.*, 29 U.S.C. § 160(c) (2006) ("If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]."); 29 U.S.C. § 216(b) (2006) ("Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."); 29 U.S.C. § 1132(a)(3)(B) (2006) ("A civil action may be brought by a participant, beneficiary, or fiduciary to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."); 42 U.S.C. § 2000e-5(g)(1) (2006) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include . . . any other equitable relief as the court deems appropriate."); Frazen v. Ellis Corp., 543 F.3d 420, 425 (7th Cir. 2008); Colwell v. Rite Aid Corp., No. 3:07cv502, 2010 U.S. Dist. LEXIS 78496, at *4 (M.D. Pa. Aug. 4, 2010).

3. *Colwell*, 2010 U.S. Dist. LEXIS 78496, at *4–5; *see* Gurmankin v. Costanzo, 626 F.2d 1115, 1121 (3d Cir. 1980) ("The necessity of adopting a standard of relief which would restore the victim as fully as possible to the economic position in which s/he would have been in the absence of the employment discrimination has been recognized by this court which has, in numerous cases, adopted the 'make whole' standard.").

4. *See, e.g.*, Hurley v. Racetrac Petroleum, 146 F. App'x. 365, 368 (11th Cir. 2005) (quoting Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1338 (11th Cir. 1999)).

5. Courts also award postjudgment interest. *See, e.g.*, Reed v. Mineta, 438 F.3d 1063, 1067 (10th Cir. 2006) ("Prejudgment interest, as the term suggests, accrues for the period *before* entry of judgment. Interest after entry of judgment is addressed through postjudgment interest, which accrues on the

included in a judgment against an employer, can significantly reduce a plaintiff's make-whole backpay remedy by requiring a plaintiff to pay her attorney with her hard-earned, unpaid compensation made available by the court's award; Congress remedied this situation by providing courts with the discretion under most federal employment statutes to require a violating employer to pay a plaintiff's attorney fees.[6] Because of the protracted nature of litigation, the need to take into account the time-value of money, and the lost investment power of delayed compensation, courts also typically provide awards of prejudgment interest—a percentage-based backpay-award increase—on backpay claims to ensure full compensation for the plaintiff's loss.[7]

Since 1984, a separate and equally necessary supplement to a plaintiff's make-whole backpay remedy has emerged in the courts, designed to offset a plaintiff's increased tax liability caused by her award's lump-sum distribution.[8] Its late appearance in civil rights and employment litigation is due to various historical factors explored in Part II. While courts tend to use differing nomenclature for this remedy, this note will refer to it as an "increased tax liability award" (ITLA).[9]

Unlike tort awards for personal injuries, backpay awards made to successful employment plaintiffs constitute taxable income.[10] Because backpay is normally awarded in one lump sum,[11] the entire award amount is subject to taxation as gross income in the awarded year.[12] This presents at least two potential problems for successful employment plaintiffs.[13] First, a plaintiff may have obtained a better job

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amount of a damage award, including prejudgment interest, from the date judgment was entered to the date of payment.").

6. 42 U.S.C. § 1988 (2006); Hensley v. Eckerhart, 461 U.S. 424, 429–33 (1983). Attorney's fees, unlike prejudgment interest, are treated as an award independent of plaintiff's compensation for her injury. *See* Sinyard v. Comm'r of Internal Revenue, 268 F.3d 756, 759 (9th Cir. 2001).

7. *See* Addie v. Kjaer, No. 2004-135, 2009 U.S. Dist. LEXIS 72137, at *3 (D.V.I. Aug. 14, 2009) ("As a general rule, prejudgment interest is to be awarded when . . . the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of the money which was legally due.").

8. *See* Sears v. Atchison, Topeka & Santa Fe Ry. Co., 749 F.2d 1451, 1456 (10th Cir. 1984).

9. *See* Eshelman v. Agere Sys., Inc., 554 F.3d 426 (3d Cir. 2009) (describing the increased tax burden as a "negative tax consequence"); Dashnaw v. Pena, 12 F.3d 1112, 1116 (D.C. Cir. 1996) (describing ITLAs as "gross-ups" of backpay to cover tax liability).

10. United States v. Burke, 504 U.S. 229, 242 (1992).

11. One argument against ITLAs is that instead of making one or two lump-sum distributions, a court should distribute the backpay award in a way that avoids increasing a plaintiff's tax burden. However, this argument, if given effect, further deprives the plaintiff of her earned compensation, potentially for long additional periods and without the plaintiff's acquiescence (as opposed to a trust, for example). This would force a plaintiff to choose between waiting for a longer period to receive the full award, or receiving a smaller award in one lump sum because of the increased tax liability it creates. This is no choice at all, and cuts against the make-whole nature of the award. Thus, the argument is unavailing, and courts should act to ensure plaintiffs receive their due compensation as soon as possible.

12. *See Burke*, 504 U.S. at 242.

13. This note does not focus on issues that may arise through the application of the Alternative Minimum Tax (AMT); however, successful plaintiffs might also be subject to increased tax liabilities as a result of

with a higher salary between the date of the illegal employment action and the date that the judgment is finally rendered in her favor. If that plaintiff's new salary places her in a higher tax bracket, the lump sum backpay award will be taxed at a higher rate than if the pay had been received when earned, thus reducing the plaintiff's make-whole remedy through increased taxation.[14] Second, a plaintiff's lump-sum award, by itself, can place her in a higher tax bracket for the taxable year in which the award was made. In this circumstance, it is not just the backpay award that is taxed at a higher rate; it is the plaintiff's entire earnings for the tax year in which the lump-sum judgment is received, resulting in a potentially greater tax liability increase than in the first instance.[15]

To remedy both situations, a court should, pursuant to the applicable damages provisions of employment statutes, provide an award to offset the increased tax liability incurred by virtue of receiving the backpay in one lump sum. In light of *Eshelman v. Agere Systems, Inc.*, a Third Circuit case which held that ITLAs are available for claims under the Americans with Disabilities Act (ADA), this note calls for greater acceptance of ITLAs in the employment discrimination context, and steps further to advocate for the award's applicability in other non-discrimination employment claims.[16] Part II explains why the issue of ITLAs has become more pressing in recent years due to Congress's failed experiment with income averaging—the taxation of income over a period of years rather than a single year. Part III analyzes favorable case law on this issue and confronts court decisions that have refused to make ITLAs, focusing on how the *Eshelman* decision has undercut prior negative case law; it also describes how courts should treat uncertainties in future-tax-burden calculations, and dispels constitutional concerns of impermissible additur. Part IV discusses precedent that supports the expansion of this award from employment discrimination cases to other employment statutes that provide backpay or monetary employment-benefit awards. Part V offers concluding remarks.

AMT application as well. *See* Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 Iowa L. Rev. 67, 78–91 (2004).

14. In 2010, the most extreme example would be a plaintiff who jumped from the lowest tax bracket, 10%, to the highest tax bracket, 35%, in the time between the illegal employment action and the receipt of the final judgment. *See U.S. Federal Income Tax Rates History: Income Years 1913–2010*, Tax Foundation, at 1 (Sept. 9, 2011) [hereinafter *Federal Income Tax Rates History*], http://www.taxfoundation.org/publications/show/151.html#fed_individual_rate_history-20100923.

15. *See* Polsky & Befort, *supra* note 13, at 74–76 (demonstrating that a plaintiff making $40,000 per year who should have made $65,000 per year but for ten years of discrimination, and who received a judgment of backpay and frontpay of $350,000, incurs an increased tax liability of $23,522 through the lump-sum disbursement); *see also* Barry Ben-Zion, *Neutralizing the Adverse Tax Consequences of a Lump-Sum Award in Employment Cases*, 13 J. Forensic Econ. 233 (2000) (providing an excellent explanation and examination of both the existence of this inequity and the proper way to calculate an award).

16. 554 F.3d 426, 440 (3d. Cir. 2009).

II. CONGRESS'S EXPERIMENT WITH INCOME AVERAGING: HOW THE ADVANCEMENT AND SUBSEQUENT REPEAL OF INCOME AVERAGING CREATED THE NEED FOR ITLAs

The tax inequity problem with backpay awards emerged because of a series of tax policy decisions, culminating with the elimination of income averaging from the Internal Revenue Code. Income averaging—the use of multiple years' income, rather than a single year's income, to determine an individual's tax burden—is an idea that began gaining traction in the United States during the 1930s as the country dealt with the Great Depression.[17] Generally speaking, government tax systems work on an annual basis: a government will tax a taxpayer's annual income at a specified rate.[18] While this makes sense for salaried and hourly employees, it makes less sense for those who do not receive income at regular, annual rates. A frequently cited example is that of a novelist.[19] Novelist *A* works for three years writing and editing her masterpiece, receiving no income during that time. The novel is published in the fourth year, and *A* receives a significant amount of income from the novel's sale, enough to place *A* in the highest tax bracket. Under the annual system, *A* is taxed in year four for wealth that was created over the span of four years. The result is that the government taxes a salaried employee who makes the same amount as *A* over that four-year span at a lesser rate (assuming the employee's salary places her in a lower tax bracket than *A*) because of the way that employee's income was distributed over the span of years.[20]

Some economists have argued that a tax system can remedy this horizontal inequity[21] through the use of income averaging: instead of taxing an individual

17. *See* Comm'r v. Sanford & Brooks Co., 282 U.S. 359 (1931); William Vickrey, *Averaging of Income for Income-Tax Purposes*, 47 J. Pol. Econ. 379 (1939).

18. Org. for Econ. Cooperation & Dev., Ctr. for Tax Policy Admin., *OECD Tax Database*, OECD, www.oecd.org/ctp/taxdatabase (last visited Oct. 16, 2011).

19. *See* Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 Duke L.J. 509, 552–57; *see also* S. Rep. No. 76-648, at 7 (1939), *reprinted in* 105 Internal Revenue Acts of the United States 1909–1950: Legislative Histories, Laws, and Administrative Documents (Bernard D. Reams, Jr. ed., 1979) [hereinafter Legislative Histories].

20. To place numbers in this example, say that *A* made $400,000 in year four. Employee *B* receives $100,000 per year. Using tax data during the years 2007–2010, *A* must pay $117,644 in federal taxes over the four-year span (nothing paid in 2007–2009, and taxes paid on $400,000 in 2010), while employee *B* pays $87,518 (four-year total of taxes paid on *B*'s annual salary). Thus, while *A* and *B* received the same amount of income from 2007–2010, *A* must pay $30,126 more in taxes. *Federal Tax Brackets*, Moneychimp, http://www.moneychimp.com/features/tax_brackets.htm (last visited Nov. 13, 2010) (online tax calculator).

21. Horizontal equity in a tax system exists where two similarly situated taxpayers are taxed the same way. *See* Schmalbeck, *supra* note 19, at 546 ("The fairness of a tax system involves two quite distinct elements. First, the system should avoid making arbitrary distinctions among more or less equally situated individuals; the system should not burden some individuals significantly more than others on the basis of trivial differences in economic status. Second, the system should distribute the overall burden fairly, but not necessarily evenly, among groups of taxpayers whose receipt of governmental benefits, and ability to bear tax burdens, may differ widely. The two concepts are generally referred to as horizontal equity and vertical equity, respectively." (footnotes omitted)). For an example of horizontal inequity, see *supra* note 20 and accompanying text.

annually, income averaging would allow an individual to determine her appropriate tax rate by averaging her income over a period of years and pay taxes at the rate applicable to her average annual income.[22] Professor Schmalbeck provides a relatively straightforward explanation using tax data from 1984:

> A taxpayer who has for several years earned a salary of $10,000 will note a dramatic increase in her marginal tax rate if she wins $100,000 in a lottery. Much of that income will be taxed at rates as high as forty-five percent.[23] But if the taxpayer is allowed to divide the extra amount into five $20,000 slices, and to compute her tax as though one slice had been received in each of the five most recent tax years, then the lottery winnings will be taxed at the substantially lower rates that apply to incremental incomes between her $10,000 normal income and a hypothetical $30,000 income.[24]

Congress passed a limited income averaging provision as part of the Revenue Act of 1939, providing averaging for compensation "received[] for personal services" completed over a period of five years or more when 95% of that compensation was paid upon the completion of those services.[25] Congress intended this provision to alleviate the horizontal inequity faced by "writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking."[26] The Revenue Act of 1942 modified and broadened § 107 after Congress found the "personal services" requirement unduly limiting.[27] The 1942 bill changed the performance period of personal services from five years to thirty-six months, lowered the amount required to be paid at completion of the personal service to 80% of the total compensation, and included a new provision to cover compensation obtained from "artistic work or inventions."[28]

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22. *See* Vickrey, *supra* note 17.

23. Professor Schmalbeck uses tax data from 1984, the year this material was published.

24. Schmalbeck, *supra* note 19, at 513.

25. Revenue Act of 1939 § 220, Pub. L. No. 76-155 (originally codified as 26 U.S.C. § 107 (1939)) (recodified and incorporated in 1954 into I.R.C. §§ 1301, 1302, 1303, 1307(a)-(b)). "[T]he bill provide[d] that with respect to compensation for personal services rendered by an individual over a period of 5 or more years and which is paid only on the completion of such services the tax attributable to such compensation shall not be more than the tax attributable to such compensation shall not be more than the aggregate of taxes which would have been paid had the income been received in equal portions in each of the years in the period." S. Rep. No. 76-648 (1939), *reprinted in* 105 Legislative Histories, *supra* note 19, at 7.

26. S. Rep. No. 76-648 (1939), *reprinted in* 105 Legislative Histories, *supra* note 19, at 7.

27. Revenue Act of 1942 § 139, Pub. L. No. 77-753 (originally codified as 26 U.S.C. § 107(a)–(c) (1942)); H.R. Rep. No. 77-2333 (1942), *reprinted in* 108 Legislative Histories, *supra* note 19, at 91 ("Under the existing law, authors, composers, inventors, and other individuals who work on artistic, literary, or musical compositions or inventions over an extended period of time and receive the bulk of their compensation for such work in one taxable year are in many instances excluded from the benefits of section 107 because their work, or their patent or copyright covering such work, does not consist of or involve the rendering of personal services.").

28. *See* Revenue Act of 1942 § 139, Pub. L. No. 77-753, 56 Stat. 798, 837 (1942) (originally codified as 26 U.S.C. § 107(a)–(c) (1942), incorporated in 1954 into I.R.C. §§ 1301, 1302, 1307(a)).

The next year, Congress passed the Revenue Act of 1943, which again amended § 107 to include § 107(d), a provision granting backpay recipients the ability to income average when the recipient received a lump-sum amount greater than 15% of her gross income for the tax year in which the lump sum was received.[29] The provision ensured that employment plaintiffs, if able to come under the section, would not pay a greater tax on the backpay award than if their compensation was received when earned.[30]

The 1943 Act provided a broad definition of backpay:

> Remuneration, including wages, salaries, retirement pay, and other similar compensation, which is received or accrued during the taxable year by an employee for services performed before the taxable year for his employer and which would have been paid before the taxable year except for the intervention of . . . (ii) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings.[31]

The bill's legislative history explains that Congress intended the new provision to provide employment plaintiffs who received backpay under the National Labor Relations Act and the Fair Labor Standards Act, at the time both relatively new statutes themselves,[32] with a mechanism to avoid "a greater income tax than if [the backpay] had been received in the years from which it [arose]."[33] Thus, beginning in 1943, most employment plaintiffs were able to avoid any increased tax liability that resulted from actions to recover unpaid wages or benefits through use of § 107(d).

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29. Revenue Act of 1943 § 119, Pub. L. 78-235, 58 Stat. 21, 39 (1944) (originally codified as 26 U.S.C. 107(d) (1944), incorporated in 1954 into I.R.C. § 1303). Congress passed this legislation despite a presidential veto. *See* H.R. REP. No. 78-443 (1944), *reprinted in* 110 Legislative Histories, *supra* note 19, at 1; Joseph J. Thorndike, *Wartime Tax Legislation and the Politics of Policymaking*, TaxAnalysts (Oct. 21, 2001), http://www.taxhistory.org/thp/readings.nsf/0/f9cb12c7ca3ccf9185256e22007840e7?OpenDocument.

30. H.R. REP. No. 78-443 (1944), *reprinted in* 110 Legislative Histories, *supra* note 19, at 23 ("If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per centum of the gross income of the individual of such year, *the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable*, as determined under regulations prescribed by the Commissioner with the approval of the Secretary." (emphasis added)).

31. Revenue Act of 1943 § 119, *reprinted in* 110 Legislative Histories, *supra* note 19, at 23.

32. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006); National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006).

33. H.R. Rep. No. 78-443 (1944), *reprinted in* 110 Legislative Histories, *supra* note 19, at 48 ("As a result of an alleged unfair labor practice of his employer under the National Labor Relations Act [or] an alleged violation of section 6 or 7 of the Fair Labor Standards Act of 1938 . . . , an individual taxpayer may receive during the taxable year back pay which is in part attributable to one or more prior years. In this event the back pay may be subject to a greater income tax than if it had been received in the years from which it arises. . . . Under the new section, the tax on such back pay is limited to the aggregate of the taxes which would be attributable to that pay if the portions of the pay attributable to prior years were included in gross income for those years according to the amount arising from each such year for which payment is made.").

In 1954, Congress passed the Internal Revenue Code of 1954, legislation that replaced the Internal Revenue Code of 1939 and in many ways revamped the tax system.[34] At that time, the House Committee on Ways and Means ("Committee") debated the inclusion of a broader income averaging provision that could be used by any taxpayer.[35] The farming lobby, organized labor, the U.S. Chamber of Commerce, and the American Bar Association, among others, worked in a concerted effort to support such legislation.[36] Statements made to the Committee focused on similar themes: the particular tax difficulties of industries that do not operate on an annual cycle,[37] the need to provide economic incentive for projects and contracts that will continue beyond a single year,[38] and the heightened importance of income averaging in a highly progressive taxation scheme for taxpayers with irregular or fluctuating income.[39]

In the end, the Internal Revenue Code of 1954 did not include a general income averaging provision, and Congress settled for re-codifying the existing income averaging measures.[40] But only ten years later, Congress gave effect to the arguments made in 1954 by passing the Revenue Act of 1964, legislation which replaced the previous income averaging provisions with a new scheme allowing the general population to income average over a five-year period.[41]

The legislative history of the 1964 bill gives three reasons for extending income averaging to the general population. First, the prior provisions were "limited to a relatively small proportion of the situations where averaging is needed. Thus, while they presumably cover[ed] inventors and writers, they d[id] not provide for actors, athletes, and in most cases d[id] not provide for attorneys, architects, and others."[42]

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34. I.R.C. (Supp. II 1954); *see* Steven A. Bank, *The Rise and Fall of Post-World War II Corporate Tax Reform*, 73 Law & Contemp. Probs. 207, 208 (2010) ("It was not until 1954, though, as part of a comprehensive revamp of the Internal Revenue Code, that Congress enacted limited, and ultimately short-lived, dividend tax relief."); s*ee generally* James John Jurinski, Tax Reform: A Reference Handbook 96–99 (2000) (providing a brief history of U.S. tax law).

35. *See* 3 Legislative Histories, *supra* note 19.

36. *Id.*

37. *See, e.g.*, *id.* at 278 ("The application of sharply progressive surtax rates under the Federal income-tax law, it is generally recognized, is inequitable in respect to individuals with irregular and fluctuating income.").

38. *See, e.g.*, *id.* at 248–51.

39. *See, e.g.*, *id.* at 298. In 1954, the U.S. marginal tax rate was 20–91%, and the tax system employed twenty-four brackets. *Federal Income Tax Rates History*, *supra* note 14, at 56.

40. I.R.C. §§ 1301–1304 (Supp. II 1954).

41. I.R.C. §§ 1301–1305 (1964); *see* Schmalbeck, *supra* note 19, at 510 ("In 1964, however, after prolonged debate among tax analysts, and in response to President Kennedy's request, Congress enacted, in the Revenue Act of 1964, general income averaging provisions that applied to any eligible electing taxpayer whose current year's income was sufficiently greater—as defined by the statute—than his average income over the preceding four years." (footnotes omitted)).

42. S. Rep. No. 88-830, at 127 (1964) ("The absence of any general averaging device has worked particular hardships on professions or types of work where incomes tend to fluctuate. This is true, for example, in

Second, the prior provisions were "unduly complicated in practice because of the requirement that the prior years' incomes and taxes must be recomputed as if the income had actually been received in those prior years."[43] Third, both the House and Senate reports state that "income averaging should be designed to treat everyone as nearly equally for tax purposes as possible."[44]

Absent from the legislative history is any discussion of the legislation's effect on employment plaintiffs, despite the fact that the new scheme rolled back their ability to make themselves whole through the tax system. While the 1964 bill provided taxpayers generally with the ability to income average, it effectively limited employee plaintiffs who received lump-sum backpay awards to averaging their income over a five-year period rather than over the entire period for which backpay was awarded.[45] When plaintiffs brought this inequity to the attention of courts, they refused to order employers that violated employment statutes to pay for plaintiffs' increased tax liability on backpay awards, reasoning that the general income averaging provisions in effect were sufficient, if not perfect, to mitigate any losses incurred by plaintiffs.[46]

In the early 1980s, academics began to question the wisdom of income averaging.[47] Professor Schmalbeck analyzed the provisions in a 1984 article, explaining that while the Internal Revenue Code provided a well-defined income-averaging scheme, as evidenced by the lack of litigation over it, onerous eligibility calculations likely led to intimidation of and mistakes by taxpayers attempting to use the provisions.[48] He posited that, as a result, "the tax return preparation industry . . . . may be the principle beneficiary of the averaging provisions."[49] Schmalbeck went on to find that the provisions not only did little to encourage economic growth[50] and resulted in a sizable

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the cases of authors, professional artists, actors, and athletes as well as farmers, fishermen, attorneys, architects, and others.").

43. *Id.*

44. *Id.*

45. *Compare* I.R.C. § 1303 (Supp. II 1954), *with* I.R.C. §§ 1301–1305 (1964). *See also* Sears v. Atchison, Topeka & Santa Fe Ry. Co., 749 F.2d 1451 (10th Cir. 1984) (holding that the district court did not abuse its discretion when it included a tax component in its judgment to compensate class members for their additional tax liability as a result of receiving seventeen years of back pay in one lump sum).

46. *See* Blim v. W. Elec. Co., 731 F.2d 1473, 1480 (10th Cir. 1984) ("The back pay will be paid in a single year, reported in that year, and taxed at the rates then in effect. However, the tax laws contain five-year averaging provisions that will eliminate nearly all of any penalty that would otherwise result from receipt of a lump sum payment." (citations omitted)); Hendrickson Bros., Inc., 272 N.L.R.B. 438 (1985), *enforced*, 762 F.2d 990 (2d Cir. 1985). *But see Sears*, 749 F.2d at 1456 (discussed *infra* Part III.B).

47. Schmalbeck, *supra* note 19; *see* Henry J. Aaron, *How to Make the President's Good Tax Reform Plan Even Better*, 3 The Brookings Rev. 3, 8 (1985); Edward Yorio, *The President's Tax Proposals: A Step in the Right Direction*, 53 Fordham L. Rev. 1255, 1267 (1985).

48. Schmalbeck, *supra* note 19, at 531–32.

49. *Id.* at 532.

50. *Id.* at 535 ("Averaging has little impact on capital formation, and the revenue impact, although appreciable in absolute terms, has never amounted to as much as .2% of the gross national product.").

amount of lost revenue,[51] but, more fundamentally, the scheme also failed to serve its primary purpose: to alleviate horizontal inequity within the progressive tax system.[52]

In addition to scholarly critiques, changes to tax policy in the 1980s made general income averaging provisions less necessary for most taxpayers. When President Ronald Reagan took office, he slashed the marginal tax rate from 14–70% in 1981 to 12–50% in 1982.[53] In his 1985 State of the Union address, President Reagan called for a bipartisan reform of the Internal Revenue Code to promote "fairness, simplicity, and growth, making this economy the engine of our dreams and America the investment capital of the world."[54] That reform took shape in the Tax Reform Act of 1986. Among other things, the bill reduced the marginal tax rate to 11–38.5% in 1987 and 15–28% in 1988.[55] Additionally, the bill reduced the number of tax brackets from sixteen in 1986 to five in 1987 and four in 1988.[56] A reduction of the marginal tax rate, coupled with the reduction in number of tax brackets, made general income averaging provisions less necessary to create horizontal equity for those with fluctuating incomes because the actions reduced the potential amount of loss (through lower rates) and reduced the potential to receive inequitable treatment (by increasing the size of each tax bracket).[57]

In response to these changes, the 1986 legislation also repealed the general income averaging provisions, removing the ability for taxpayers to average their income over any period of years.[58] The legislative history explained that because the bill created

> wider brackets with fewer rates and a flatter rate structure, . . . there is no longer sufficient justification to retain [income averaging] in light of its complexity. . . . [F]luctuations in annual income will not change the taxpayer's

51. *Id.* at 511 ("More than six and a half million returns filed for the 1981 tax year included an election to apply income averaging, resulting in an aggregate savings to the electing taxpayers of nearly four billion dollars." (footnote omitted)).

52. *Id.* at 557–61, 564 ("The argument above suggests that outright repeal of the income averaging provisions would save considerable tax revenue, improve the vertical equity of the tax system, and put the horizontal equity of the tax system on a sounder footing by consistently using an annual rather than a multiyear standard of measurement. Because immediate and complete repeal is a somewhat radical suggestion, it may be worthwhile to explore some alternative ideas for legislative initiatives that are somewhat more modest.").

53. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172; *see Federal Income Tax History*, *supra* note 14.

54. President Ronald Wilson Reagan, President of the United States, State of the Union Address (Feb. 6, 1985), http://millercenter.org/scripps/archive/speeches/detail/5681.

55. Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085; *see Federal Income Tax History*, *supra* note 14.

56. *See Federal Income Tax History*, *supra* note 14.

57. *See* Polsky & Befort, *supra* note 13, at 77–78 ("That Act significantly flattened the tax rate structure, reducing the top rate from 50% to 28%. Because of the flattening of rates, the Act substantially reduced the potential adverse consequences caused by bunching.").

58. Tax Reform Act of 1986 § 141, Pub. L. 99-514, 100 Stat. 2085.

> marginal tax rate as frequently, and in many cases will not change it as much, as under present law.[59]

The House Report further explained that the "complexities of income averaging under present law derive both from the arithmetical calculations that it requires and also from the rules governing eligibility."[60] By citing reasons similar to those used to expand income averaging twenty-two years earlier, i.e., the simplification of the tax law, Congress ended its experiment with income averaging.

Again, Congress did not focus on the effect its actions would have on employment plaintiffs. The legislative history does not once mention backpay awards. In its effort to simplify the Internal Revenue Code, Congress cut with a sword rather than a scalpel; the end result left employment plaintiffs to seek the help of the courts to protect themselves from the unintended, inequitable impact of the tax system on lump-sum backpay awards.

III. APPEALLING TO THE COURTS: THE REASONS AND POLICIES UNDERLYING THE CURRENT CIRCUIT SPLIT OVER ITLAS

A. Backpay Awards Constitute Taxable Income Under the Internal Revenue Code

The Internal Revenue Service (IRS) currently considers backpay awards to be taxable "gross income" under the Internal Revenue Code, a view well supported by U.S. Supreme Court precedent.[61] Most recently, in *Commissioner v. Schleier*, a plaintiff

59. H.R. Rep. No. 99-426 (1985).

60. *Id.* If you find this explanation is too sparse for your taste, you are not alone. Polsky & Befort, *supra* note 13, at 78 n.46. My high school U.S. history professor, Father Jeffery Harrison, explained to me that when conducting a historical analysis, it is imperative to ask the question "*Cui bono?*", which translates from the Latin as, "Who benefits?" That inquiry may shed light on some of the unarticulated motivations behind this repeal. In 1969, Congress again amended 26 U.S.C. §§ 1301 *et seq*. with the Revenue Act of 1969. Pub. L. No. 91-172 § 311, 83 Stat. 564. That amendment allowed the inclusion for averaging purposes of long-term capital gains, gifts, and income received through wagers. Anthony J. Cataldo II & Arline A. Savage, U.S. Individual Federal Income Taxation: Historical, Contemporary, and Prospective Policy Issues 252 (2001). This liberalization led to a spike in the use of income averaging, from approximately 600,000 taxpayers in 1969 to approximately one million in 1970. *Id.* The alterations of the 1969 bill made the provisions less about horizontal equity and more about providing tax breaks for the wealthy, particularly those who "struck it rich" through investments or received sizable gifts from family. In this context, income averaging could be seen as an idea twisted around upon itself; initially meant to make the system more equitable, in the end it provided a tax break for more sophisticated, wealthy taxpayers. Perhaps Congress, in its zeal to end this seeming "tax break," overlooked the reasoning behind the 1943 bill and focused only on what the primary use of income averaging had become when enacting its repeal.

61. *See* United States v. Burke, 504 U.S. 229 (1992) (holding backpay awarded under Title VII constitutes gross income); Soc. Sec. Bd. v. Nierotko, 327 U.S. 358 (1946) (holding backpay awarded under National Labor Relations Act constitutes gross income); Tim Canney, Comment, *Tax Gross-Ups: A Practical Guide to Arguing and Calculating Awards for Adverse Tax Consequences in Discrimination Suits*, 59 Cath. U.L. Rev. 1111, 1120 (2010). Backpay is a term of art that encompasses more than past wages owed. Such an award includes any type of compensation that is illegally withheld, including bonuses, vacation pay, pension benefits, health care benefits, and regular wages. 5-142 Labor and Employment Law § 142.04 (Matthew Bender 2011).

brought a successful claim for backpay and liquidated damages under the Age Discrimination in Employment Act (ADEA).[62] On appeal, the plaintiff claimed that the IRS acted improperly by considering his ADEA backpay award as taxable gross income under 26 U.S.C. § 61.[63] While that section defines "gross income" as "all income from whatever source derived,"[64] the plaintiff pointed to an exception to that definition found in 26 U.S.C. § 104(a)(2).[65] Section 104(a)(2) states that "gross income does not include . . . the amount of damages received . . . on account of personal injury or sickness."[66] The Supreme Court held that the phrase "on account of personal injury or sickness" does not include turning sixty years old (plaintiff argued that the adverse employment action occurred because he turned sixty, something that if proven is considered an illegal act under the ADEA[67]) or more generally "being laid off on account of his age."[68] The Court explained that, even if the illegal employment action caused some psychological injury, the backpay award was not made "on account of" that injury; instead, it was made to make the plaintiff whole for his loss of income.[69] Thus, the Court once again made clear that backpay awards are considered gross income and therefore taxable under the Internal Revenue Code. In response, Congress codified the *Schleier* decision by passing the Small Business Job Protection Act of 1996, which amended § 104(a)(2) to apply only to "physical injuries."[70] Because backpay is awarded to compensate an employee for lost work rather than actual physical injury, the Act precludes any hope for employee plaintiffs to avoid the taxation of backpay awards, absent Congressional action that reverses current law.[71]

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62. 515 U.S. 323 (1995).

63. *Id.* at 324–28.

64. 26 U.S.C. § 61 (2006).

65. *Schleier*, 515 U.S. at 328–29.

66. 26 U.S.C. § 104(a)(2) (2006).

67. *Schleier*, 515 U.S. at 324.

68. *Id.* at 330.

69. *Id.* at 330–31. In the words of the Court, "§ 104(a)(2) does not permit the exclusion of respondent's back wages because the recovery of back wages was not 'on account of' any personal injury and because no personal injury affected the amount of back wages recovered." *Id.*

70. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a)–(c), 110 Stat. 1755. Some scholars view this statutory and judicial line of precedent as the appropriate forum for attacking the taxation of employment backpay awards. For arguments in this vein, see, for example, John F. Fatino, *The Tax Treatment of Verdicts and Settlements Following the Adoption of the Jobs Creation Act of 2004: Paradise for Employment Lawyers?*, 27 N. Ill. U. L. Rev. 1 (2006).

71. An important consequence of this line of cases and legislation is that, because all backpay awards are taxable, an ITLA must take into account the tax amount the plaintiff would have paid if no illegal act occurred. Thus, the total tax liability is too great an award. Instead, the award must be calculated by subtracting the award's total tax liability from the amount that would have been paid without any illegal action, resulting in the plaintiff's *additional* tax liability.

B. Courts Develop Theories Supporting ITLAs in Response to the Elimination of Income Averaging

In 1984, the U.S. Court of Appeals for the Tenth Circuit became the first circuit to recognize the availability of an ITLA. In *Sears v. Atchison, Topeka & Santa Fe Railway Co.*, the court affirmed an ITLA, holding that such awards are within a trial court's discretion in determining an equitable remedy under Title VII.[72] In this class action lawsuit, the trial court ordered the defendants to pay *seventeen* years of backpay to the plaintiffs and an award to offset the increased tax liability that would result from its lump-sum payment.[73] The court of appeals, in affirming the ITLA, noted that "the trial court has wide discretion in fashioning remedies to make victims of discrimination whole,"[74] and held that it was enough to demonstrate that plaintiffs would "likely" be placed in the highest tax bracket as a result of the award.[75] It reasoned that the particularly long period of litigation created unique problems in this instance because income averaging provisions only provided for the averaging of the past three years income,[76] and thus would not allow plaintiffs to mitigate their increased tax liability.[77]

The *Sears* court grasped the need for an ITLA *before* Congress repealed the Internal Revenue Code's income averaging provisions. It recognized that it would be unfair for the aging train-porter plaintiffs in *Sears* to receive a fraction of their earned income because their effort to receive that income resulted in protracted litigation.[78] Now that the limited relief from income averaging is unavailable, the *Sears* court's analysis is even more persuasive than it was in 1984.[79]

Most recently, the U.S. Court of Appeals for the Third Circuit in *Eshelman v. Agere Systems, Inc.* affirmed an ITLA in an ADA case.[80] The court of appeals explained that the "chief remedial purpose of employment discrimination statutes . . . is 'to make persons whole for injuries suffered on account of unlawful employment

72. 749 F.2d 1451, 1456–57 (10th Cir. 1984).

73. *Id.* at 1456.

74. *Id.*

75. *Id.* One can only imagine the difficulties present in determining the tax liability of an entire plaintiff class over a seventeen-year period.

76. *Id.* Legislation in 1984 changed the period over which income may be averaged under 26 U.S.C. § 302(c) to three years. Tax Reform Act of 1984, Pub. L. No. 98-369, § 173(a), 98 Stat. 494, 703 (codified at I.R.C. § 1302(c)(2)).

77. *Sears*, 749 F.2d at 1456.

78. *Id.*

79. *See, e.g.*, Eshelman v. Agere Sys. Inc., 554 F.3d 426, 440 (2009) ("District courts are granted wide discretion to 'locate a just result' regarding the parameters of the relief granted in the circumstances of each case." (quoting Langnes v. Green, 282 U.S. 531, 541 (1931) (citation omitted))).

80. *Id.* at 430. In the interim, other federal and state courts have upheld ITLAs. *See* Arneson v. Sullivan, 958 F. Supp. 443, 446 (E.D. Mo. 1996); Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 87 P.3d 757, 763 (Wash. 2004); Ferrante v. Sciaretta, 839 A.2d 993, 996 (N.J. Super. Ct. Law Div. 2003).

discrimination,'"[81] and that "Congress armed the courts with broad equitable powers to effectuate this 'make whole' remedy."[82] Based on that reasoning, it held that a district court possesses the discretion to make ITLAs on employment discrimination claims; to hold otherwise would prevent courts from "restor[ing] the employee to the economic status quo that would exist but for the employer's conduct," something that a make-whole remedy necessitates.[83]

The court buttressed this holding by analogizing ITLAs to prejudgment interest awards—awards meant "to compensate a plaintiff for the loss of the use of money that the plaintiff otherwise would have earned had he not been unjustly discharged."[84] The court reasoned that ITLAs,

> as with prejudgment interest, represent[] a recognition that the harm to a prevailing employee's pecuniary interest may be broader in scope than just a loss of back pay. Accordingly, either or both types of equitable relief may be necessary to achieve complete restoration of the prevailing employee's economic status quo and to assure "the most complete relief possible."[85]

The court then considered the supporting evidence for this award, which included "an affidavit from an economic expert who calculated the amount of tax-effect damages based upon the back pay award, the applicable tax rates, and Eshelman's income tax returns for the appropriate years."[86] The defendant failed to dispute the accuracy of this evidence.[87] The court warned that a plaintiff is not presumptively entitled to this type of award; plaintiffs bear the burden of persuasion and courts retain their ability to "locate a just result" depending on the circumstances of each individual case.[88] Because the defendant did not dispute the evidence, it is unclear whether the court would have found for the plaintiff if the defendant challenged, for instance, the plaintiff's projected income or the accuracy of the projected applicable tax rates.[89]

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

82. *Id.*

83. *Id.* at 440–43 (quoting In re Continental Airlines, 125 F.3d 120, 135 (3d Cir. 1997)).

84. *Id.* at 442 (quoting Booker v. Taylor Milk Co., 64 F.3d 860, 868 (3d Cir. 1995)); *see also* Arco Pipeline Co. v. SS Trade Star, 693 F.2d 280, 281 (3d Cir. 1982) ("The purpose of prejudgment interest is to reimburse the claimant for the loss of the use of its investment of its funds from the time of the loss until judgment is entered.").

85. *Id.* at 442 (quoting Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC., 478 U.S. 421, 465 (1986)).

86. *Id.* at 442.

87. *Id.* at 443.

88. *Id.*

89. *Id.* Political concerns might factor into this determination, but ultimately should not control a court's decision unless an extreme situation presents itself. *See infra* Part III.C. For example, if an award is announced by the court in 2012 but not collected until 2013, and the winner of the 2012 presidential election promises immediate tax hikes as her first act in office, it becomes difficult to estimate a plaintiff's projected tax burden. However, as demonstrated in Part III.C, *infra*, such fears are overblown due to the way in which tax policy is normally enacted. In *Argue v. David Davis Enterprises*, a Third

Eshelman has received positive treatment in the district courts since it was decided.[90] It provides a clear line of reasoning as to why ITLAs are available to employment discrimination plaintiffs, one that courts can easily adopt and apply to other types of employment law claims. *Eshelman* could—and as this note argues, should—be applied to any employment claim where (1) the statute provides for broad, equitable make-whole relief, (2) the statute supports prejudgment interest awards made to augment backpay awards, and (3) a plaintiff makes an evidentiary showing that the award is required for her to obtain "a just result."[91]

C. The Split on ITLAs: Why Negative Increased Tax Liability Precedent Is Outdated and Unavailing

Courts that refuse to make ITLAs generally point to three reasons for doing so: (1) the lack of precedent for such awards; (2) the lack of certainty behind the plaintiff's actual increased tax liability due to the potential for change in political and personal circumstances; and (3) the plaintiff's failure to provide accurate calculations to the court.[92]

The U.S. Court of Appeals for the D.C. Circuit articulated the first concern in *Dashnaw v. Pena*, where the court denied the plaintiff's motion for an ITLA relating to his ADEA backpay award.[93] Basing its decision on the dearth of authority supporting such an award at the time of decision—the plaintiff did not cite any precedential support and the court likewise failed to find support—the court ruled 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 backpay to cover tax liability."[94]

The U.S. Court of Appeals for the D.C. Circuit reaffirmed *Dashnaw* in *Fogg v. Gonzales*, a Title VII case.[95] In *Fogg*, the defendant appealed a lower court ruling

Circuit district court applied *Eshelman* in an ADEA case and rejected plaintiff's claim for an ITLA, finding the plaintiff's calculations insufficient because they: (1) took into account the entire award rather than only the backpay award alone and (2) calculated plaintiff's tax burden using tax bracket information from 2007 when the trial had taken place in 2008 and the earliest the plaintiff would have received the lump sum was 2009. 2009 U.S. Dist. LEXIS 32585, at *76–78 (E.D. Pa. March 20, 2009). History has demonstrated the *Argue* court's fears as overblown; tax brackets remained unchanged from 2007–2010. *Federal Income Tax Rates History*, *supra* note 14. Thus, the evidentiary requirement is something that courts will closely scrutinize in the Third Circuit. *See* Ellis v. Ethicon, Inc., No. 05-726 (FLW), 2009 U.S. Dist. LEXIS 106620, at *73 (D.N.J. Nov. 19, 2009) ("However, before assessing the amount of the award, Plaintiff must provide the Court with additional financial analysis and evidence with regard to her tax burden for the relevant years in order to avoid speculation.").

90. *See infra* notes 99–102 and accompanying text.

91. *Eshelman*, 544 F.3d at 443.

92. For an earlier examination of arguments against tax liability awards, see Polsky & Befort, *supra* note 13, at 93–98.

93. 12 F.3d 1112, 1116 (D.C. Cir. 1994).

94. *Id.* Notably, the court dispensed with plaintiff's arguments using only five sentences. *Id.*

95. 492 F.3d 447, 456 (D.C. Cir. 2007).

that the plaintiff was entitled to an ITLA based on the protracted nature of the litigation.[96] The lower court ignored *Dashnaw* and instead cited to *Sears* for the proposition that such awards are sometimes available.[97] The court of appeals reversed the lower court, finding *Dashnaw* controlling.[98] Despite important differences between the two cases that seem to answer and distinguish the qualms of the *Dashnaw* court—namely that the plaintiff in *Fogg* pointed to the Tenth Circuit *Sears* decision to support his argument (in contrast to the *Dashnaw* plaintiff's inability to point to supporting precedent), the *Fogg* litigation took place over a lengthier time span, and the *Fogg* jury awarded a much larger backpay amount than in *Dashnaw*—the appellate court held that, because *Danshaw* was binding precedent, it could not make an ITLA.[99] The court distinguished the plaintiff's arguments by pointing out that the *Dashnaw* court's reasoning rested on a lack of applicable precedent rather than the length of litigation or the size of the award.[100] This leads to a curious situation in the D.C. Circuit. According to *Fogg*, because the plaintiff in *Dashnaw* failed to support his motion for an ITLA with precedent, D.C. Circuit courts cannot make ITLAs, even in the face of new information and subsequent persuasive authority. *Stare decisis* should not cage a court in outdated reasoning;[101] perhaps after *Eshelman*, the D.C. Circuit will find opportunity to update its case law.

Since the Third Circuit penned the *Eshelman* decision, concerns over a lack of precedent for ITLAs should be sufficiently alleviated. The *Eshelman* court provided a clear line of reasoning to support ITLAs, one that can easily be adopted by other circuits.[102] For instance, the District Court for the Western District of Arkansas in *Powell v. North Arkansas College* adopted the *Eshelman* decision wholesale when making an award for the plaintiff's increased tax liability.[103] In *Morgenstern v. County of Nassau*, the District Court for the Northern District of New York declined to make an ITLA in a § 1983 case; yet in doing so, the court did not preclude the availability of such awards in the future and specifically stated that "there is precedent

96. *Id.* at 454–55.

97. Fogg v. Gonzales, 407 F. Supp. 2d 79, 91 (D.D.C. 2005).

98. *Fogg,* 492 F.3d at 456.

99. *Id.* at 455–56.

100. *Id.* at 456.

101. *See* Agostini v. Felton, 521 U.S. 203 (1997) ("Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law."); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 394–95 (1977) (Marshall, J., dissenting) ("Accordingly, '[a] substantial departure from precedent can only be justified . . . in the light of experience with the application of the rule to be abandoned *or in the light of an altered historic environment*.'" (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 629, 634–35 (1974) (Stewart, J., dissenting) (emphasis added))).

102. Morgenstern v. Cty. of Nassau, No. CV-04-58 (ARL), 2009 U.S. Dist. LEXIS 116602, at *17–18 (E.D.N.Y. Dec. 15, 2009); Powell v. N. Ark. Coll., No. 08-3042, 2009 U.S. Dist. LEXIS 59826, at *4–7 (W.D. Ark. July 1, 2009).

103. *Powell*, 2009 U.S. Dist. LEXIS 59826, at *7 ("The Court adopts the reasoning of *Eshelman*, and will allow the parties to present evidence on this issue at the evidentiary hearing.").

for such an award"—a far cry from *Dashnaw*'s analysis.[104] A telling comparison to *Morgenstern* can be made with another Second Circuit district court case decided before *Eshelman*. In *Meacham v. Knolls Atomic Power Laboratory*, the court refused to provide the plaintiff with an ITLA, reasoning in part that "[p]laintiffs rely on the only case which research reveals has awarded such an adjustment," and the cited "case acknowledged that it stood alone . . . [and] has yet to be followed by any other court."[105] The shift in reasoning between *Meacham*, which relies mainly on the lack of precedential support for ITLAs, and *Morgenstern*, which acknowledged *Eshelman* as sufficient precedent and did not view the award as absolutely unavailable under § 1983, demonstrates how *Eshelman* may—and should—create an erosion of judicial reliance on *Dashnaw* and its reasoning.

Eshelman explicitly refuted *Dashnaw*, and thus implicitly refuted its progeny (including *Fogg*) as well.[106] Since *Eshelman* was decided, the D.C. Circuit has not revisited this issue, nor has any court cited *Dashnaw* or *Fogg* favorably on this point. Based on the foregoing, *Eshelman* has answered the qualms of the *Dashnaw* court, and courts should no longer look to *Dashnaw* or its progeny as persuasive authority on this matter.

The U.S. District Court for the Eastern District of Pennsylvania's decision in *Argue v. David Davis Enterprises*, decided in March 2009, makes an important point in its analysis that goes to the heart of the second and third reasons why courts decline to make ITLAs: courts should not make awards based on pure estimation and should require support by tax calculations, prepared by an expert, that are as accurate as possible before providing a plaintiff with an ITLA.[107] In *Argue*, plaintiff submitted calculations to demonstrate that his backpay award would cause an increased tax liability.[108] However, the calculations were based on tax information from 2007, rather than 2008 (the year the trial occurred) or 2009 (the earliest plaintiff could have received the award).[109] Worse, the plaintiff made estimations that ignored available tax data, including data already submitted to the court.[110] Based on these inaccuracies in the record, the court held that the plaintiff failed to meet his burden to demonstrate that his lump-sum award would cause an increased tax liability.

104. *Morgenstern*, 2009 U.S. Dist. LEXIS 116602, at *17–18.

105. 185 F. Supp. 2d 193, 238 (N.D.N.Y. 2002). In this case, a jury awarded backpay to a class of eighteen plaintiffs based on an illegal termination theory under the ADEA. *Id.* at 203.

106. Eshelman v. Agere Sys., Inc., 554 F.3d 426, 441 n.8 (3d Cir. 2009). Courts that have cited *Dashnaw* favorably on this point include: Pollard v. E.I. Dupont De Nemours, Inc., 338 F. Supp. 2d 865, 883 (W.D. Tenn. 2003) (holding that "[s]uch an award would contradict the literature and case law on this topic" and that the plaintiff's calculations were unreliable); Best v. Shell Oil Co., 4 F. Supp. 2d 770, 776 (N.D. Ill. 1998) (holding that plaintiff's failure to cite any supporting precedent, coupled with defendant's reliance on *Danshaw*, required the court to refuse plaintiff's request for an ITLA).

107. No. 02-9521, 2009 U.S. Dist. LEXIS 32585 (E.D. Pa. March 20, 2009); *see* Ben-Zion, *supra* note 15 (detailing how experts should calculate ITLAs).

108. *Argue*, 2009 U.S. Dist. LEXIS 32585, at *74.

109. *Id.* at *74–78.

110. *Id.*

The evidentiary requirement makes sense; because of the wide margins between tax brackets in current U.S. tax law, it is wrong to assume that a plaintiff requires an ITLA to be made whole.[111] Thus, the *Argue* court was correct to require better, more up-to-date information. Yet, courts should not balk at *all* uncertainties in tax burden calculations and projections. A court should not expect or require a plaintiff to demonstrate her tax liability with absolute certainty for a tax year that has not yet ended. Instead, the court should require only that the plaintiff provide the most up-to-date tax information reasonably available. Such a demonstration might include evidence of receiving the same salary over a period of years to support the use of that salary level as "projected income" when determining a plaintiff's tax liability for a year not yet completed.

Also, courts should not hesitate to apply current tax bracket information to an award to be received in the following year. The *Argue* court suggested that political considerations could make the application of current tax bracket information in calculations of future tax burdens problematic.[112] However, the percentages that the federal government uses to tax individuals are not altered casually; they are normally adjusted only after public debate and legislation.[113] Additionally, tax rates do not normally change the day after a bill is passed and signed into law; there will almost always be an adjustment period before the law becomes enforceable, giving courts and plaintiffs advance notice that calculations using current tax bracket information could be incorrect.[114] Thus, courts should accept calculations even though they are based on future estimations of tax liability, so long as they are based on the most up-to-date, reasonably available information.

While it is important to ensure plaintiffs do not receive a windfall, it is also significant that the defendant's illegal actions produced the plaintiff's increased tax liability. The consequences of uncertainty in tax rates should fall on the party that broke the law: the employer.[115] In narrow cases, or in cases where a court's analysis

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111. *Federal Income Tax Rates History*, *supra* note 14 (Bracket 1: $0–$8,375; Bracket 2: over $8,375–$34,000; Bracket 3: over $34,000–$82,400; Bracket 4: over $82,400–$171,850; Bracket 5: over $171,850–$373,650; Bracket 6: over $373,650).

112. *Argue*, 2009 U.S. Dist. LEXIS 32585, at *77 ("Of course, it is now 2009 and, to say the least, the question of federal income tax rates is in its own state of flux and speculation.").

113. *See, e.g.*, Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19 (codified in scattered sections of 26 U.S.C.); Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified in scattered sections of 26 U.S.C.); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified in scattered sections of 26 U.S.C.). The end of 2010 is a unique example where this was *not* the case. Because the Bush tax cuts were passed with an expiration date rather than as a permanent change in tax policy, a shift in tax policy would have occurred in 2011 if no legislative action was taken. Because in this situation a change to tax burdens would occur through passive action by Congress, rather than the normal requirement of active legislation, courts must be wary in making these awards in 2010. A plaintiff might overcome this unfortunate political situation by demonstrating her tax liability under both the current regime and the one that would occur if the Bush tax cuts expired *in toto*.

114. *See supra* note 112.

115. *See* Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1101 (3d Cir. 1995) (citing Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984)); Loesch v. City of Philadelphia, No. 05-cv-0578,

must draw on estimations of future events, deference should be granted to the plaintiff, the victim of the employer's illegal actions, and uncertainty should weigh against the illegal actor.[116] The *Sears* decision supports this deferential analysis; it described a plaintiff's burden in demonstrating an increased tax liability as requiring a showing that "[t]he court-ordered back pay awards *will likely* place the living members of the class in the highest income tax bracket on much of the back pay they now receive."[117] Because the *Sears* litigation involved a large class of plaintiffs, the court did not require individuals to demonstrate their increased tax liability on an individualized basis; the court instead rested on the general economic circumstances of the plaintiffs.[118] A similar deference should be granted to plaintiffs in individual employment cases.[119] It should be noted that such deference does not cut against *Eshelman*'s warning that courts should not presume the applicability of ITLAs in every case[120]—it merely supplements that command by cautioning against over-stringent examination in cases where a plaintiff has provided the best evidence that

2008 U.S. Dist. LEXIS 48757 (E.D. Pa. June 25, 2008) ("Since it has been already determined that the wages in question were lost as a result of Defendant's unlawful actions, the Defendant 'is not entitled to complain that [the damages] cannot be measure with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.'" (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931))).

116. *See supra* note 114 and accompanying text.

117. Sears v. Atchison, Topeka & Santa Fe Ry., Co., 749 F.2d 1451, 1456 (10th Cir. 1984) (emphasis added).

118. *Id.*

119. *See generally* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's . . . violation. But our willingness also rests on the principle . . . that it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." (quoting Hetzel v. Balt. & Ohio R.R. Co., 169 U.S. 26, 39 (1898)); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts"); Samaritan Inns v. Dist. of Columbia, 114 F.3d 1227 (D.D.C. 1997) ("[W]hile a plaintiff seeking to recover lost profits must ordinarily prove the fact of injury with reasonable certainty, proof of the amount of damages may be based on a reasonable estimate. Although a court will not permit a plaintiff to recover damages based on 'mere speculation or guess,' the fact that an estimate is uncertain or inexact will not defeat recovery, once the fact of injury is shown." (citations omitted) (quoting Wood v. Day, 859 F.2d 1490, 1493 (D.C. Cir. 1988))); Restatement (Second) of Torts, cmt. A (1979) ("There is, however, no general requirement that the injured person should prove with like definiteness the extent of harm that he has suffered as a result of the tortfeasor's conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. *It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered*. Particularly is this true in situations where there cannot be any real equivalence between the harm and compensation in money, as in case of emotional disturbance, *or where the harm is of such a nature as necessarily to prevent anything approximating accuracy of proof, as when anticipated profits of a business have been prevented*." (emphasis added)).

120. Eshelman v. Agere Sys., Inc. 554 F.3d 426, 443 (3d Cir. 2009).

could be reasonably obtained. This comports with the *Argue* court's main contention as well—that the plaintiff did not use the most up-to-date information reasonably available (namely, already completed tax returns) to make the necessary calculations for the award.[121]

As the *Eshelman* opinion notes, it is helpful to analogize the long-accepted award for prejudgment interest.[122] Prejudgment interest is a make-whole award[123] meant "to reimburse the claimant for the loss of the use of its investment or its funds from the time of the loss until judgment is entered."[124] Yet these awards are premised on an assumption: the plaintiff would have made successful investments if she had received her wages or benefits in a timely manner.[125] If one views the success of 401(k) accounts as indicative of the investing ability of most employees, this assumption is far from a safe one.[126] As stated by the Third Circuit, "[t]he risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim."[127] Applying this maxim, the possibility that a plaintiff might not be made whole for an employer's illegal action without an ITLA is a sufficient basis for courts to make such awards, so long as the plaintiff provides fact-based, evidentiary support for that possibility; because employers should bear the risk of uncertainties outside of the plaintiff's direct control, courts should treat a plaintiff's tax calculations, and any projections used in them, with a lenient standard.[128]

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121. *See supra* notes 105–09 and accompanying text.

122. *Eshelman*, 554 F.3d at 442.

123. 22 Am. Jur. 2d *Damages* § 462 (2010).

124. Arco Pipeline Co. v. SS Trade Star, 693 F.2d 280, 281 (3d Cir. 1982).

125. The award could also be viewed as receipt of monies accumulated by the employer through use of the withheld wages. This viewpoint leads to an equally poignant assumption: that the employer did in fact invest those amounts wisely.

126. *See, e.g.*, Ross Eisenbrey, Vice-President, Econ. Pol'y Inst., Address to the National Press Club: Why We Need Retirement USA (March 10, 2009), *available at* http://www.epi.org/publications/entry/why_we_need_retirement_usa/; Eirik Cheverud, *Reforming the U.S. Retirement System in the Wake of the Great Recession* (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914892. It may be true that prejudgment interest awards require courts to accept greater uncertainties than awards of ITLAs. Courts do not require plaintiffs to demonstrate prior prudent investment decisions when determining an appropriate interest rate for prejudgment interest. Because plaintiffs must provide some evidentiary support for their projected tax burden, a court has better reason to believe that the lifelong trend of an employee's remuneration and taxation will continue on stable course than a plaintiff's investment of wages and benefits would return at ten percent (while this number is a hypothetical one, it is within the average range for such awards). Thus, as in instances of prejudgment interest awards, courts should not require complete certainty and accuracy in calculations of a plaintiff's tax burden.

127. Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984).

128. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, *it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if*

In sum, courts should treat plaintiffs' tax calculations and the projections on which they are based with deference; it should be sufficient that the plaintiff make a reasonable effort to provide the court with up-to-date information and calculations that reflect actual tax liability.[129] The possibility of error in calculations that meet this standard should constitute part of the risk taken by the employer when it violates state and federal employment law.[130]

D. Seventh Amendment Concerns Regarding ITLAs Do Not Withstand Scrutiny When Viewed in Light of Prejudgment Interest Precedent

In an outlier case, *Kelley v. City of Albuquerque*, the U.S. District Court for the District of New Mexico held that an ITLA would violate the Seventh Amendment as a form of unconstitutional additur when made by a court to increase a jury's verdict.[131] While in this instance the plaintiff did not offer a "deal" as compared to

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the case, which he alone is responsible for making, were otherwise. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." (emphasis added) (citations omitted)); *see also* cases and secondary source cited *supra* note 118.

129. This requirement is purely technical; the calculations should focus on a plaintiff's *additional* tax liability. For guidance, see Ben-Zion, *supra* note 15, providing a detailed account of calculating actual tax liability.

130. Indeed, common practice in settlement agreements tends to show an acceptance of this fact by employers. ITLAs are a common element of settlement agreements in employment cases. EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998) ("[A] district court, in the exercise of its discretion, may include a tax component in a lump sum back pay award to compensate prevailing Title VII plaintiffs. This accords with a prevailing practice in the settlement of Title VII suits which commonly include an amount to offset the plaintiff/taxpayer's increased liability." (citation omitted)). Their acceptance in settlement negotiations by employers lends to the argument that ITLAs are a necessary and fair component to making the plaintiff whole for unlawful employment actions.

131. No. CIV 03-507 JB/ACT, 2006 U.S. Dist. LEXIS 28785 (D.N.M. March 31, 2006). Additur is defined as "[a] trial court's order, issued [usually] with the defendant's consent, that increases the damages awarded by the jury to avoid a new trial on grounds of inadequate damages. The term may also refer to the increase itself, the procedure, or the court's power to make the order." *Id.* at *7 (citing Black's Law Dictionary 15 (3d Pocket Ed., 2006)). The U.S. Supreme Court held in *Dimick v. Schiedt* that the practice of additur by federal courts violated the Seventh Amendment right to a trial and verdict by jury. 293 U.S. 474 (1935). Such motions should not be confused with the similar motion for judgment notwithstanding the verdict. *See* Irene Deaville Sann, *Remitturs (and Additurs) in Federal Courts: An Evaluation with Suggested Alternatives*, 38 Case W. Res. L. Rev. 157, 157–64 (1987–88) ("The motion for a judgment notwithstanding the verdict is based on the losing party's contention that no 'reasonable jury' could have found for the verdict winner on the strength of the evidence adduced at trial; thus, as a matter of law, the verdict should be reversed through entry of a judgment favorable to the original loser. Grounds for the new trial motion might include . . . excessiveness of the jury verdict. . . . If the trial judge agrees that the jury verdict is excessive, he may order a whole new trial or a partial new trial limited to damage assessment issues. Trial judges also utilize an alternative method for dealing with some excessive verdicts—the trial judge calculates the amount of the verdict which he regards as excessive and then orders a conditional new trial (on some or all issues), to be held if the plaintiff refuses to give up (remit) the amount of the jury verdict deemed by the trial judge to be excessive. This procedural device is called a remittitur. If the plaintiff refuses to remit, the case is submitted to a new jury without further action by the trial court. . . . This conditional new trial device—remittitur—has been employed by state as well as federal trial courts (and, in some circumstances, appellate courts) for

more traditional instances of additur (e.g., an additional award instead of a motion for a new trial on the grounds of inadequate damages), the court explained that Tenth Circuit precedent does not require a court-ordered award increase be accompanied by a motion for a new trial in order for the additional award to violate the Seventh Amendment; instead, a court's "bald addition" to the award would, in itself, constitute impermissible additur.[132]

The court reinforced its constitutional argument by finding in the alternative that the plaintiff's motion did not meet the requirements of Federal Rule of Civil Procedure 59(e) ("Rule 59(e)"), the rule that allows parties to make a "motion to alter or amend a judgment."[133] In the Tenth Circuit, Rule 59(e) motions will not be granted except "to correct manifest errors of law, to present newly discovered evidence, or to contest inconsistencies in a jury's verdict."[134] The *Kelley* court held that none of these three situations applied to the facts at bar.[135]

While intriguing, the *Kelley* court's constitutional argument is simply wrong. Because *Kelley* is the only case to challenge the constitutionality of court-imposed ITLAs made as an alteration of a jury verdict, it is instructive to view the constitutionality of analogous prejudgment interest awards in this context. In *Osternick v. Ernst & Whinney*, the Supreme Court made clear that additional judge-made awards for prejudgment interest are a permissible court-mandated alteration of a jury verdict by placing such awards under the rubric of Rule 59(e), thereby eliminating any room for a Seventh Amendment attack.[136] The Court reasoned that a post-trial prejudgment interest award is properly viewed as permissible under Rule 59(e) because "prejudgment interest 'is an element of [plaintiff's] complete compensation'" and does not "'rais[e] issues wholly collateral to the judgment in the

more than one hundred years, and the use of remittitur has increased continuously to the present day. While the related conditional new trial device of additur—grant of plaintiff's motion for a new trial conditioned on the defendant's refusal to increase the jury verdict by the amount the trial judge deems necessary to cure an inadequate verdict—is employed by some state courts, federal courts are prohibited from using additur because the Supreme Court has ruled that the procedure violates the seventh amendment of the Constitution.").

132. *Kelley*, 2006 U.S. Dist. LEXIS 28785, at *8–9.

133. *Id.* at 19–21; Fed. R. Civ. P. 59(e).

134. *Kelley*, 2006 U.S. Dist. LEXIS 28785, at *20.

135. *Id.*

136. 489 U.S. at 175 (1989); *see also* Webco Indus. v. Thermatool Corp., 278 F.3d 1120, 1134 (10th Cir. 2002) ("We are likewise not persuaded by Thermatool's contention that if the award of prejudgment interest is a substantive matter, it would constitute an impermissible additur to include it subsequent to the jury's award of damages. Thermatool appears to assert that prejudgment interest in a diversity case must be presented to the jury and cannot be the subject of a post-trial motion. The law, however, is to the contrary. As the Supreme Court made clear in a case involving a jury, 'a postjudgment motion for discretionary prejudgment interest constitutes a motion to alter or amend the judgment under Rule 59(e).' These cases and those to which they cite leave no room for the argument that granting such a motion would result in impermissible additur." (citations omitted) (quoting *Osternick*, 489 U.S. at 175).

main cause of action,' nor does it require an inquiry wholly 'separate from the decision on the merits.'"[137]

The *Osternick* case is easily applied to ITLAs. The tax award is clearly part of a plaintiff's "complete compensation" because without it, a plaintiff would effectively receive less compensation than if no illegal act had occurred.[138] The issues raised by a motion for such an award are not beyond the plaintiff's cause of action; the requested damages flow directly from the facts and judgment of the case. As such, courts should treat ITLAs under the same analysis of prejudgment interest awards and, pursuant to *Osternick*, should be considered permissible under the Seventh Amendment.

Because ITLAs meet the requirements of Rule 59(e) as applied in *Osternick*, the *Kelley* court also erred by holding that Rule 59(e) did not support such awards. As noted above, the Tenth Circuit requires, in addition to the requirements of *Osternick*, that a court should only grant a Rule 59(e) motion "to correct manifest errors of law, to present newly discovered evidence, or to contest inconsistencies in a jury's verdict."[139] According to the Tenth Circuit in *Macsenti v. Becker*, an award of prejudgment interest is meant to correct a manifest error of law "because prejudgment interest is considered part of the plaintiff's compensation and is thus part of the merits of the trial court's judgment," bringing the award squarely within Rule 59(e).[140] The *Kelley* court acknowledged as much in its ruling on a separate plaintiff motion for prejudgment interest.[141] The failure to include an award to offset a plaintiff's increased tax liability also represents a manifest error of law because it is properly "considered part of the plaintiff's compensation and is thus part of the merits of the trial court's judgment," based on the fact that plaintiffs with increased tax burdens will not receive their full, duly earned compensation without an ITLA.[142]

IV. COURTS SHOULD EXPAND ITLAS BEYOND THE ANTI-DISCRIMINATION CONTEXT TO ALL EMPLOYMENT AWARDS

This section intends to provide plaintiffs and courts with precedential support for the expansion of ITLAs beyond the employment discrimination context. The *Eshelman* decision provided excellent reasoning for why this type of award is within a trial court's discretion, but qualified its analysis as applying only to "discrimination

137. *Osternick*, 489 U.S. at 175 (quoting West Virginia v. United States, 479 U.S. 305, 310, & n.2 (1987)).

138. *Id.* This idea cuts to the heart of the arguments surrounding ITLAs: When do we measure the plaintiff's remedy? When it departs the hands of the employer or when it is received by the hands of the plaintiff? By the very nature of a "make-whole" remedy, the answer must be the latter. The heart of the concern in backpay cases is with placing the plaintiff in a situation mirroring what would have occurred without any illegal activity, as opposed to the mere extraction of withheld compensation.

139. *Kelley*, 2006 U.S. Dist. LEXIS 28785, at *20.

140. 237 F.3d 1223, 1245 (10th Cir. 2001); *see* Loughridge v. Chiles Power Supply Co., 431 F.3d 1268, 1274–75 (10th Cir. 2005); Capstick v. Allstate Ins. Co., 998 F.2d 810, 812–13 (10th Cir. 1993).

141. Kelley v. City of Albuquerque, No. CIV-03-507 JB/ACT, 2006 U.S. Dist. LEXIS 28782, at *3–6 (D.N.M. April 12, 2006).

142. *Id.* at *4.

cases."[143] Other scholarship on this issue has also cabined itself to the anti-discrimination context.[144] As explained in Part III.C, the *Morgenstern* court discussed ITLAs in a § 1983 case, a civil rights statute often used in the employment context that provides a cause of action against those who deprive someone of their constitutional rights under the color of the law—a claim distinct, albeit in many ways similar, from those under anti-discrimination statutes.[145] This part will demonstrate that by using the criteria of *Eshelman*—statutory authority for equitable remedies and analogies to prejudgment interest awards[146]—ITLAs should be available in a wide variety of employment claims. To demonstrate this point, this Part focuses on five federal statutes: 42 U.S.C. § 1981; 42 U.S.C. § 1983; the Fair Labor Standards Act; the National Labor Relations Act; and the Employee Retirement Income Security Act.

A. Civil Rights Claims under Sections 1981 and 1983

Employees can enforce workplace rights through claims under 42 U.S.C. §§ 1981 and 1983 against an offending employer, two causes of action that include broad

143. Eshelman v. Agere Sys., Inc., 554 F.3d 426, 442–43 (3d Cir. 2009) ("Having determined that a district court may award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create . . . [w]e hasten to add that . . . we do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences above the amount to which she would otherwise be entitled.").

144. *See* Polsky & Befort, *supra* note 13 (entire article, with the exception of one footnote, note 259); Canney, *supra* note 60; Geoffrey D. Mueller, *The Federal Income Tax Consequences of States' Laws Against Discrimination: Why* Blaney *Was Right and Why New Jersey's Law Against Discrimination Should Be Amended*, 29 Seton Hall Legis. J. 603 (2005) (discussing the applicability of ITLAs under New Jersey State discrimination laws); Laura Spitz, *I Think, Therefore I Am; I Feel, Therefore I Am Taxed: Descartes, Tort Reform, and the Civil Rights Tax Relief Act*, 35 N.M. L. Rev. 429 (2005); J. Hardin Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 Md. L. Rev. 298 (1986). *But see* Ben-Zion, *supra* note 15 (contemplating the use of ITLAs in all employment claims when examining mathematical and economic aspects of the award).

145. *See generally* Douglas S. Miller, *Off Duty, Off the Wall, But Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 Akron L. Rev. 325 (1997) (examining various models used to determine what actions are considered to be under the color of state law for section 1983 analysis).

146. When presenting this paper to a group of practitioners and colleagues at New York Law School, one audience member seized upon a seemingly important distinction between ITLAs and prejudgment interest awards. If not awarded to a plaintiff, the former benefits a third party, namely the federal government (and potentially applicable state and municipal governments as well), while the latter benefits the employer. Thus, while it makes sense to charge an employer for the benefit of using withheld wages, it would seem unfair to require an employer to pay for the actions that are beyond its control, such as the extraction of taxes. However, this argument sides too heavily with the illegal actor. As demonstrated in Part III.C, an illegal actor must be charged not just with the amount withheld, but for all of the effects of its actions; this result is necessitated by the make-whole remedy included in employment statutes. Under that theory, it does not matter who receives the benefit of the employee's loss; it only requires that the employer place the plaintiff in a situation mirroring that which would have occurred without any illegal act.

equitable remedies and support prejudgment interest remedies.[147] Sovereign immunity, a defense most pertinent to § 1983 claims (which are mainly brought against government actors) but applicable as a general rule as well, will prevent any ITLA against the federal government unless the applicable statute contains a Congressional waiver.[148] However, state governments do not enjoy similar protection, and are thus vulnerable to ITLAs.[149]

1. Section 1983

The *Morgenstern* decision discussed in Part III.C, in which a Second Circuit district court declined to make an ITLA, characterized whether front pay is available under § 1983 in the following way: "In determining whether an award of front pay is appropriate, 'the court must attempt to make the plaintiff whole, while avoiding granting plaintiff a windfall.'"[150] In *Simon v. City of Youngstown*, the U.S. Court of Appeals for the Sixth Circuit explained that "[i]n order to receive damages under Title VII or 42 U.S.C. § 1983, the principles of common law torts are ordinarily used. Back-pay awards are usually the make-whole remedy used to redress any economic harm suffered."[151] According to the U.S. Court of Appeals for the Second

147. 42 U.S.C. § 1981 (2006) ("(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."); 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."); *see* David W. Lee, 2009 Handbook of Section 1983 Litigation (2009); Susan Potter Norton, Employment Litigation 38 (2004).

148. Arneson v. Callahan, 128 F.3d 1243, 1246 (8th Cir. 1997).

149. States will not find cover under the cloak of sovereign immunity; claims of Eleventh Amendment sovereign immunity are superseded by the Fourteenth Amendment. *See* Powell v. N. Ark. Coll., No. 08-3042, 2009 U.S. Dist. LEXIS 59826, at *4–7 (W.D. Ark. July 1, 2009).

150. Morgenstern v. Cty. of Nassau, No. CV 04-58 (ARL), 2009 U.S. Dist. LEXIS 116602, at *14–15 (E.D.N.Y. Dec. 15, 2009) (quoting Wylucki v. Barberio, No. 99-CV-1036Sr, 2001 U.S. Dist. LEXIS 21134, at *17 (W.D.N.Y. Aug. 24, 2001)).

151. 73 F.3d 68, 74 (6th Cir. 1995); *see, e.g.*, Squires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995) ("This action arises under § 1983, whose purpose . . . is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. In 1871, in fashioning § 1983—as, in 1991, it was to do in revising (with a view to strengthening) Title VII—Congress authorized courts to deploy both legal and equitable remedies. Under Title VII, the statute's make-whole purpose is shown by the very fact that Congress took care to arm the courts with full equitable powers. The same is true under § 1983: the make-whole goal does not differ when the basis of the underlying right is the Constitution rather than a statute such as Title VII. Because of

Circuit in *Gierlinger v. Gleason*, "it is ordinarily an abuse of discretion *not* to include pre-judgment interest" on backpay claims under § 1983, demonstrating a strong presumption in favor of prejudgment interest awards in this context.[152] Based on these well-founded principles—that § 1983 awards are subject to the same make-whole remedies of Title VII and support prejudgment interest awards—courts should apply *Eshelman* in instances where backpay is provided to a plaintiff under § 1983.

2. Section 1981

Section 1981 supplies plaintiffs with a cause of action in certain situations of intentional discrimination, one of which involves rights arising from a contractual relationship. Thus, it sometimes provides a cause of action in the employment context, including claims for backpay.[153] In *Barbour v. Merrill*, the U.S. Court of Appeals for the D.C. Circuit "evaluate[d] Barbour's claims in light of the principle that under section 1981, as under Title VII, a district court has wide discretion to award equitable relief. The district court should fashion this relief so as to provide a victim of employment discrimination the most complete make-whole relief possible."[154] The court went on to hold that, based on this reasoning, § 1981 supports prejudgment interest awards for backpay claims.[155] In an effort to provide the "most complete" relief possible, courts should adopt *Eshelman* in their § 1981 analysis as well. *Barbour* analogized Title VII awards to § 1981 awards, something that lends to an adoption of *Eshelman*'s ruling. Because a plaintiff does not receive complete, make-whole relief when forced to pay more taxes than if her civil rights had not been violated, ITLAs are essential when § 1981 backpay awards create an additional tax burden.

Thus, because both § 1981 and § 1983 provide make-whole remedies and support prejudgment interest awards, courts should adopt *Eshelman* when analyzing available damages in employment cases under §§ 1981 and 1983.

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA)[156] includes a grant of broad equitable powers through FLSA §§ 16(b) and 17.[157] The first provides a remedy for retaliatory

this consonance of the underlying policy considerations, the framework of analysis governing reinstatement in Title VII actions also governs in § 1983 actions implicating First Amendment concerns; that is, a denial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with the legislative goals of providing plaintiffs make-whole relief and deterring employers from unconstitutional conduct." (citations omitted) (internal quotations omitted)); Gurmankin v. Costanzo, 626 F.2d 1115, 1121 (3d Cir. 1980).

152. 160 F.3d 858, 873–74 (2d Cir. 1998).

153. *See supra* note 141 and accompanying text.

154. 48 F.3d 1270, 1278 (D.C. Cir. 1995) (citations omitted).

155. *Id.*

156. 29 U.S.C. §§ 201–219d (2006).

157. 29 U.S.C. § 216(b) (2006) ("Any employer who violates the provisions of section [215(a)(3) of this title] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section

acts taken by an employer as a result of an employee's attempt to enforce her FLSA rights; the second provides an employee with a remedy for violations of maximum-hour and minimum-wage regulations. Both support prejudgment interest awards as well (although § 16(b) limits prejudgment interest awards to instances where liquidated damages are not awarded alongside a backpay award), thus meeting the two *Eshelman* requirements needed to support ITLAs.

1. Section 17

In *Brock v. Casey Truck Sales, Inc.*, the U.S. Court of Appeals for the Second Circuit explained that FLSA § 17 provides courts with "broad equitable powers" in fashioning FLSA remedies:

> The purposes of a restitutionary injunction under section 17 are to make whole employees who have unlawfully been deprived of wages and to eliminate the competitive advantage enjoyed by employers who have illegally underpaid their workers. In addition to enjoining future violations of the Act, relief will ordinarily include a damage award consisting of reimbursement for loss of wages, and prejudgment interest, as well as reinstatement of the discharged employee under appropriate circumstances.[158]

Other courts have held similarly.[159] Thus, the broad equitable powers granted to courts under § 17, when coupled with the presumption in favor of awarding prejudgment interest to backpay recipients, support ITLAs for FLSA retaliation claims.[160]

[215(a)(3) of this title], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."); 29 U.S.C. § 217 (2006) ("The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter.").

158. 839 F.2d 872, 879 (2d Cir. 1988) (citations omitted).

159. *See, e.g.*, Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960) ("[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." (citations omitted)); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 58 (2d Cir. 1984); Donovan v. Brown Equip. & Serv. Tools, Inc., 666 F.2d 148 (5th Cir. 1982); Hodgson v. Am. Can Co., 440 F.2d 916, 922 (8th Cir. 1971).

160. These arguments find equal force under 29 U.S.C. § 216(b), which applies to instances of retaliation under FLSA (with the exceptions noted in note 165 regarding liquidated damages). *See, e.g.*, Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729 (7th Cir. 1998) (upholding prejudgment interest award under §216(b)); Biggs v. Wilson, 1 F.3d 1537 (affirming award of prejudgment interest under § 216(b)); Caldman v. California, 852 F. Supp. 898 (E.D. Cal. 1994) (providing prejudgment interest under § 216(b)). *But see* Peters v. Shreveport, 818 F.2d 1148, 1168–69 (5th Cir. 1987) (explaining that while Fifth Circuit precedent inexplicably makes a distinction between §§ 216 and 217—that prejudgment interest is available under § 217 but not § 216—and is alone in that distinction, it is bound by precedent to enforce its case law).

2. Section 16(b)

In *Pignataro v. Port Authority*, the U.S. Court of Appeals for the Third Circuit explained the policy behind providing prejudgment interest on § 16(b) claims, stating,

> [I]n the absence of an explicit congressional directive, the awarding of prejudgment interest under federal law is committed to the trial court's discretion" and should be awarded based on considerations of fairness. . . . Prejudgment interest attempts to compensate for the delay in receiving the wages as well as offset the reduction in the value of the delayed payments caused by inflation.[161]

In the same way, ITLAs provide plaintiffs with the most "fair" compensation in that without such an award, a plaintiff is unduly deprived of her earned compensation because of a separate actor's illegal conduct. Just as prejudgment interest accounts for changed circumstances due to inflation, ITLAs also address the plaintiff's circumstances as altered by employer's illegal action, i.e., by minimizing the plaintiff's increased tax burden. Courts have regularly viewed § 16(b) as providing a make-whole remedy, thus meeting the *Eshelman* standard for supporting ITLAs.[162]

Yet a difficulty arises when liquidated damages are also awarded pursuant to § 16(b), which allows a court to provide a plaintiff with liquidated damages equal to the amount of unpaid wages owed.[163] Such an award is mandatory unless the court finds that the employer acted in good faith and reasonably believed its conduct was legal.[164] In those instances, the court may award liquidated damages at its discretion. In *Brooklyn Savings Bank v. O'Neil*, the Supreme Court explained that

> Section 16(b) authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the Act. Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment.[165]

The Court continued, stating that "[a]llowance of interest on minimum wages and liquidated damages recoverable under Section 16(b) tends to produce the undesirable result of allowing interest on interest. . . . Congress, by enumerating the sums recoverable in an action under § 16(b), meant to preclude recovery of interest on minimum wages and liquidated damages."[166]

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161. 593 F.3d 265, 273–74 (3d Cir. 2010) (quoting Brock v. Richardson, 812 F.2d 121, 126 (3d Cir. 1987)).

162. *See, e.g.*, Snapp v. Unlimited Concepts, Inc., 208 F.3d 928 (11th Cir. 2000).

163. 29 U.S.C. § 216(b) (2006).

164. *Id.* § 260.

165. 324 U.S. 697, 715 (1945).

166. *Id.* at 715–16.

While circuits courts remain split as to whether *Brooklyn Savings* applies to the ADEA,[167] a statute that incorporates the FLSA's damages provisions, courts have not read that ambiguity into the essential *Brooklyn Savings* holding. Thus, when a plaintiff receives an award under § 16(b) that includes liquidated damages, she may not receive an additional award for prejudgment interest.

Yet this precedent does not put the possibility of an ITLA under § 16(b) to rest. If the Supreme Court's explanation in *Brooklyn Savings* of liquidated damages is limited to compensation for the time-value of money, the Court limited the purpose of liquidated damages so much as to exclude ITLAs. When this limitation is coupled with the more general make-whole remedy intended by § 16(b), an argument exists that the specific replacement of prejudgment interest awards with liquidated damages does not preclude other equitable, make-whole remedies. As such, *Brooklyn Savings* might be distinguished by limiting the liquidated damages provision of § 16(b) to providing for prejudgment interest only, thus paving the way for ITLAs on § 16(b) claims—even when prejudgment interest is barred by a liquidated damages award. Yet this argument is by no means a certain win; *Brooklyn Savings* described § 16(b)'s "liquidated damages as compensation for delay in payment of sums due under the Act." Because a plaintiff's increased tax liability is at base cause by the delay of wage payment, a court might just as easily find ITLAs are not appropriate when a plaintiff is awarded liquidated damages under § 16(b).

C. The National Labor Relations Act

While the NLRA could be considered the first federal anti-discrimination statute (for instance, it provides for retaliation claims based upon engagement in union activity), it is generally treated differently than other anti-discrimination statutes due to its unique administrative structure and distinct line of Board-developed precedent.[168] However, because Title VII modeled its damages provisions after those in the NLRA, the application of *Eshelman*'s reasoning is relatively simple.[169]

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167. As noted in *Uphoff v. Elegant Bath, Ltd.*, there is currently a circuit split as to whether prejudgment interest is available when a court provides liquidated damages under the ADEA. 176 F.3d 399, 406 (7th Cir. 1999); *see* Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982). The First, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits hold that prejudgment interest is not available when a court provides liquidated damages; the Second, Third, Ninth, and Eleventh Circuits provide prejudgment interest without concern to the presence of liquidated damages. *See Uphoff*, 176 F.3d. at 406; Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995).

168. *See* William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers*, 96 W. Va. L. Rev. 685 (1994) ("Workplace fairness reform also will bring the NLRA into line with all other federal and state anti-discrimination statutes, as well as a substantial body of caselaw establishing exceptions for individual employees in many states to employment at will. . . . No principled basis exists for differentiating the rights of economic strikers from those enjoyed by employees under other anti-discrimination statutes and judicially-created exceptions to employment at will. Discrimination is discrimination, and the NLRA should be elevated to a status of equal dignity with other statutes and common law doctrines.")

169. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1964) ("The 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision

In 2000, the National Labor Relations Board (NLRB or "Board") Office of General Counsel issued a policy memorandum directing all NLRB regional directors, officers-in-charge, and resident officers to "seek a 'tax component' to a backpay award obligating respondents to reimburse discriminatees for extra federal and state income taxes that would result from a lump-sum backpay award."[170] Prior Board decisions did not apply such remedies because of income averaging provisions present in the Internal Revenue Code.[171] However, the memorandum noted that such provisions no longer existed, rendering the reasoning in those decisions moot.[172] It then explained that the Board had the authority to make such awards under § 10(c) of the NLRA:

> The Board's authority to reinstate the *status quo ante* derives from its broad Congressional mandate under Section 10(c) of the Act to determine the proper scope of its remedial orders, particularly with respect to affirmative relief. . . . [B]y its plain meaning, Section 10(c) is a grant of authority to the Board to devise remedies for various unfair labor practices, so long as such remedies "effectuate the policies of the Act."[173]

This memorandum was signed by then-General Counsel Leonard R. Page, a union-side labor lawyer who was appointed by a Democratic president.[174] Within seven months of the memorandum's publication, Page stepped down and a Republican nominee took his place as General Counsel.[175] It can be inferred that the change in leadership resulted in a change in priorities; no such awards were made after April 2001.[176]

In *Hotel Employees & Restaurant Employees International Union, Local 26* ("*Local 26*"), the Board declined to reach the argument for an ITLA in an adjudicative action

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of the National Labor Relations Act. Under that Act, '[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.' . . . [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate [Title VII's] central statutory purposes." (quoting quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941)).

170. National Labor Relations Board, General Counsel Memorandum, *Reimbursement for Excess Federal and State Income Taxes which Discriminatees Owe as a Result of Receiving a Lump-sum Backpay Award*, 2000 NLRB GCM LEXIS 70, at *9 (Sept. 22, 2000) [hereinafter NLRB Memorandum].

171. *See* Hendrickson Bros., Inc., 272 N.L.R.B. 438 (1985), *enforced* 762 F.2d 990 (2d Cir. 1985); Laborers Int'l Union Local 282 (Austin Co.), 271 N.L.R.B. 878 (1984).

172. *See* NLRB Memorandum, *supra* note 168, at *3.

173. *Id.* at *4–5.

174. *General Counsels Since 1935*, National Labor Relations Board, http://www.nlrb.gov/who-we-are/general-counsel/general-counsels-1935 (last visited Oct. 16, 2011); *Union Lawyer to Take Over at NLRB*, Braun Consulting Group, http://www.braunconsulting.com/bcg/nlrbnom.html (last visited Oct. 16, 2011).

175. *See General Counsels Since 1935*, *supra* note 173.

176. *See, e.g.*, *National Labor Relations Board*, N.Y. TIMES, Sept. 5, 2011, *available at* http://topics.nytimes.com/topics/reference/timestopics/organizations/n/national_labor_relations_board/index.html?8qa&scp=1-spot&sq=NLRB+&st=nyt.

because neither the general counsel nor the charging party sought the remedy.[177] Member Liebman, in dissent, explained that the General Counsel originally sought such a remedy, only to later withdraw the request.[178] She argued that the Board should not have granted the withdrawal request because the General Counsel did not adequately explain its reasons for doing so; and pointed out that the Board may consider damages *sua sponte*.[179] In support of ITLAs, Liebman explained:

> A make-whole remedy for victims of unlawful discrimination should place the employee in the same position she would have been in had the unlawful discrimination not occurred. "The underlying policy of Section 10(c) of the [National Labor Relations] Act . . . is 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" Tax compensation is therefore both an appropriate and necessary method for making whole victims of unlawful discrimination.[180]

She continued, stating that given the notorious "weakness of the Board's remedies," such an award was necessary in order to further the NLRA's "effectiveness in protecting employees who exercise their rights."[181]

Thus, there exist strong arguments that the Board does hold the power to make ITLAs under § 10(c) of the Act; however, the Board has avoided seeking this remedy since announcing its availability in 2000. Recent changes in Board membership have likely provided Liebman with a majority on this issue, increasing the likelihood that the Board will begin making this award in the near future.[182]

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177. 344 N.L.R.B. 567, 567 (2005).

178. *Id.*

179. *Id.*

180. *Id.* at 568 (citations omitted) (quoting Trustees of Boston Univ., 224 N.L.R.B. 1385 (1976), *enforced* 548 F.2d 391 (1st Cir. 1977)).

181. *Id.* at 568.

182. Indeed, the new general counsel appointed by President Obama recently wrote a new memorandum renewing the call for the inclusion of ITLAs in cases brought by the General Counsel's office. *See* Memorandum from Lafe E. Solomon to All Regional Directors, Officers-in-Charge, and Resident Officers, *Changes in the Methods Used to Calculate Backpay in Light of* Kentucky River Medical Center *and to Better Effectuate the Remedial Purposes of the Act*, GC 11-08 (March 11, 2011),), http://www.laborrelationstoday.com/uploads/file/GC_11-08_Changes_to_the_Methods_Used_to_Calculate_Backpay_doc[1].pdf ("Regions should seek a tax component in all future cases to reimburse discriminatees for the excess federal and state income taxes owed as a result of receiving a lump-sum backpay award covering more than one year of backpay. Therefore, Regions should plead the following remedy requesting this tax component in all future complaints in cases where a monetary award is available. " (footnote omitted)); *see also* Steven Greenhouse, *Deadlock Is Ending on the Labor Board*, N.Y. Times, April 1, 2010, at B1 ("Because of President Obama's recess appointments of two union lawyers to the National Labor Relations Board, business groups are warning that the panel will kick quickly into a pro-union gear after 26 months of near paralysis, when just two of its five seats were filled.").

D. Employee Retirement Income Security Act

Employee Retirement Income Security Act (ERISA)[183] claims present unique situations because of the statute's internal complexity, its well-defined scope of remedies, and the variety of claims and awards that it supports. A close examination of ERISA case law reveals that § 503(a)(3), the provision providing "other equitable relief" for violations of the statute, precludes ITLAs in many cases, including claims of discrimination and retaliation under ERISA § 510.[184] However, courts might still make ITLAs under § 502(a)(1)(B) when a court orders a plan to pay funds owed to a participant.

In *Variety Corp. v. Howe*, the U.S. Supreme Court held that when a plan administrator or employer violates its fiduciary duties to an ERISA plan, broad equitable remedies are available to plan participants under ERISA § 502(a)(3).[185] The Court explained that § 502(a)(3) is a "catchall" provision that "[acts] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy."[186] However, the Court limited that expansive view in *Great-West Life & Annuity Insurance Co. v. Knudson*, restricting § 502(a)(3) to provide only "those categories of relief that were *typically* available in equity."[187] The Court explained that "[a]lmost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting for the defendant's breach of legal duty."[188] Because money damages constitute legal, rather than equitable, relief, they are unavailable under § 502(a)(3).[189] In a footnote, the Court observed that while backpay is a type of restitution, no case law directly states that "*since* it is restitutionary, it is *therefore* equitable. . . . Congress 'treated [backpay] as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief."[190] Thus, the Court distinguished statutes that specifically include monetary damages as parcel to an equitable remedy from

183. 29 U.S.C. §§ 1001–1461 (2006).

184. ERISA § 502(a)(3) (2006) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.").

185. 516 U.S. 489, 489 (1996).

186. *Id.* at 512.

187. 534 U.S. 204, 210 (2002). While this author would strenuously argue that *Great-West* was poorly decided, such an argument is beyond the scope of this note. Instead, this note hopes to identify ways to obtain favorable judgments using the case law available. For excellent critiques of *Great-West*, see John H. Langbein, *What ERISA Means By 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens, and Great West*, 103 Colum. L. Rev. 1317 (2003), and Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 Loy. L.A. L. Rev. 1063 (2003).

188. *Great-West*, 534 U.S. at 210 (quoting Bowen v. Mass., 487 U.S. 879, 918–19 (1988) (Scalia, J., dissenting)).

189. *See id.*

190. *Id.* at 218 n.4.

those that do not.[191] Under the latter situation (exemplified by § 502(a)(3)), the majority's dicta seemed to state that restitutionary, "free standing claim[s] for money damages" do not constitute equitable remedies under ERISA.[192]

After *Great-West*, it is clear that ERISA does not support the same make-whole remedies found in other employment statutes.[193] There is an emerging consensus in the circuits that prejudgment interest is sometimes still available under § 502(a)(3) for claims of disgorgement (considered a traditionally equitable remedy under *Great-West*[194]), in that the remedy intends to provide the plaintiff with any profit made from the investment of illegally withheld plan funds.[195] However, it is not clear that this theory is applicable to all claims under § 502(a)(3), and some courts have even questioned whether, after *Great-West*, the provision supports the basic remedy of backpay in ERISA § 510 actions.[196] Unlike most arguments relating to prejudgment

191. *Compare* 42 U.S.C. § 2000e-5(g)(1) (2006) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." (emphasis added)), *with* ERISA § 502(a)(3)(B) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."). The court differentiated the two provisions by stating that with Title VII, Congress specifically added backpay to the traditional equitable remedy of reinstatement; because the term "backpay" was not specifically included in ERISA § 502, the phrase "equitable" only encompassed reinstatement.

192. *Great-West*, 534 U.S. at 218 n.4.

193. *See* Amschwand v. Spherion Corp., 505 F.3d 342, 343 (5th Cir. 2007) ("This appeal addresses whether, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), 'other appropriate equitable relief' permits recovery of extra contractual, or 'make-whole' damages in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty. Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson* . . . we must deny relief.").

194. *Id.*

195. *See* Parke v. First Reliance Std. Life Ins. Co., 368 F.3d 999, 1006–09 (8th Cir. 2004) (prejudgment interest remains available under disgorgement theory); Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193, 196 (3d Cir. 2004) (same); Moore v. CapitalCare, Inc., 461 F.3d 1, 12–13 (D.C. Cir. 2006) (same); Dobson v. Hartford Fin. Servs., 196 F. Supp. 2d 152, 173 (D. Conn. 2002) (same); Carson v. Tex. Based Furniture Movers Plan, 36 Employee Benefits Cas. (BNA) 1259 (N.D. Tex. 2005).

196. *See* Millsap v. McDonnell Douglas Corp., 368 F.3d 1246 (10th Cir. 2004) (backpay is not a remedy for ERISA § 510 claim for discriminatory discharge); Calhoon v. Trans World Airlines, Inc., 400 F.3d 593, 598 (8th Cir. 2005) ("We agree with the conclusion that Great-West 'appears to foreclose Strom's 'make-whole' remedial scheme.'" (quoting De Pace v. Matsushita Elec. Corp. of Am., 257 F. Supp. 2d 543, 563 (E.D.N.Y. 2003)); Lance v. Ford Motor Co., 47 Employee Benefits Cas. (BNA) 1584 (E.D. Mich. 2009) (same). *But see Millsap*, 368 F.3d at 52–55 (Lucero, J. dissenting) ("Consistent with the purposes of ERISA and contrary to the majority's result, our previous cases that have considered the nature of back pay in other employment contexts have held that back pay is, in fact, equitable. Similarly, it is undisputed that an injunction ordering an employee's return to work—reinstatement—is equitable relief under ERISA § 502(a)(3), and that as a general rule, back pay is considered an equitable remedy when it is intertwined with injunctive relief or made an integral part of an overall equitable remedy. In the context of § 510 violations, ERISA § 502(a)(3) authorizes what has been termed in other statutory

interest, the disgorgement theory does not support ITLAs because a third party—for our purposes the taxing government—receives the benefit of the employer's illegal act in the form of increased tax revenues, as opposed to the employer holding that additional tax amount for its own gain. The result is that, while the employer created the employee's increased tax burden, it does not stand in possession of that sum, as the sum is only created upon the taxation of the plaintiff. Thus, it is impossible for the increased tax liability to be a separate, distinguishable sum of money that might be set aside in a constructive trust and then disgorged by a court as legal relief.

However, strong arguments exist for court-made ITLAs under ERISA § 502(a)(1)(B). Section 502(a)(1)(B) is more specific than § 502(a)(3),[197] stating that: "A civil action may be brought by a participant or beneficiary . . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[198] In *Skretvedt v. E.I. Dupont De Nemours*, the U.S. Court of Appeals for the Third Circuit explained that prejudgment interest is properly considered "part of his or her award of delayed ERISA benefits," and therefore are available in cases that come under § 502(a)(1)(B).[199]

In a footnote, the *Skretvedt* court analyzed the plaintiff's motion for an ITLA as additional equitable relief under § 502(a)(3)(B).[200] The court held that it did not constitute "additional equitable relief" under *Great-West* because it was "an ordinary claim for money damages as compensation for losses suffered."[201] The *Skretvedt* court ignored the possibility that the award, like the prejudgment interest award, might be available under § 502(a)(1)(B). The ITLA is a necessary "part of his or her award of delayed ERISA benefits" because without the increase, a plaintiff will not receive a portion of the benefits she would have received if the benefits were provided in a timely, legal manner.[202] Thus, while § 502(a)(3) precludes ERISA plaintiffs from obtaining ITLAs, courts can, and should, make such awards under § 502(a)(1)(B). Because the *Eshelman* court has since explained that an ITLA is a part of a plaintiff's complete backpay remedy, the Third Circuit should revisit *Skretvedt* and analyze the award as a part of the benefits owed to the plaintiff under § 502(a)(1)(B).[203]

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contexts as the 'conventional remedy' of reinstatement with back pay. This equitable remedy is consistent with labor-protective legislation dating back to the New Deal, and is consistent with ERISA's primary purposes." (citations omitted)). Because an ITLA is part of a plaintiff's complete backpay compensation, it would constitute part of the backpay award advocated as available under the dissent in *Millsap*.

197. *See* ERISA § 502(a)(3)(B) (2006) (referring to "other appropriate equitable relief").

198. 29 U.S.C. § 1132(a)(1)(B) (2006).

199. 372 F.3d 193, 207–08 (3d Cir. 2004) ("We now make explicit that an ERISA plaintiff who prevails under § 502(a)(1)(B) in seeking an award of benefits may request prejudgment interest under that section as part of his or her benefits award." (citations omitted)).

200. *Id.* at 204 n.15.

201. *Id.*

202. *Id.* at 207.

203. This argument applies with equal force to backpay awards under § 510 as advocated for in the dissent of *Millsap*. Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1261–66 (Lucero, J. dissenting).

In sum, after *Eshelman*, courts should provide ERISA plaintiffs with ITLAs for § 502(a)(1)(B) claims because, like prejudgment interest awards, ITLAs are necessary for certain plaintiffs "to recover benefits due to him under the terms of the plan";[204] without it, the plaintiff would receive an amount less than what the plan owed her absent ERISA violations. Because the plan committed the illegal action, the plan should suffer all of the consequences needed to place the plan participant in a situation equal to that where no illegal action occurred. However, due to *Great-West*, § 502(a)(3) currently precludes plaintiffs from obtaining relief for their increased tax liability, a situation that will likely continue until the Court clarifies its reasoning or Congress amends ERISA to address the *Great-West* decision.

E. Additional Employment Claims

In addition to applying ITLAs under the foregoing five federal statutes, whistleblower statutes are also similar to anti-discrimination statutes, in that they protect certain employees who provide information about their employer's illegal actions from retaliation. Because these statutes are often narrowly tailored to specific industries, they are not analyzed in this section. However, because they are normally modeled after other anti-discrimination statutes, such as Title VII,[205] *Eshelman* can be applied wholesale as demonstrated by the discussion of §§ 1981 and 1983 above—with the exception of suits against the federal government (barring, of course, a situation where Congress waived its sovereign immunity). Many state statutes also provide make-whole remedies for employees who are subjected to illegal treatment under state employment law; the arguments presented above apply with equal force to those statutes, anti-discrimination or otherwise.[206]

V. CONCLUSION

In 1943, Congress recognized the need for income averaging in situations where an employee receives backpay through court order, and it provided those plaintiffs with relief by statute. Congress expanded those provisions in 1964 as part of an experiment in tax law, hoping to create greater horizontal equity within the tax system. However, the system in practice was ineffective and intimidated taxpayers. As part of a simplification of the tax code, Congress ended its income averaging experiment in 1986, inadvertently closing off any ability for employee plaintiffs to mitigate their increased tax liability resulting from the receipt of backpay in one lump sum.

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204. ERISA § 502(a)(1)(B) (2006).

205. *See* Robert Johnson, Comment, *Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation After* Burlington Northern v. White, 42 U. Rich. L. Rev. 1337, 1351 (2008) ("Whistleblower retaliation protections are largely modeled after Title VII's retaliation provision.").

206. Indeed some state courts have addressed this issue. *See* Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 87 P.3d 757 (Wash. 2004) (providing ITLAs under Washington's Law Against Discrimination); Ferrante v. Sciaretta, 839 A.2d 993 (N.J. Super. Ct. Law Div. 2003) (providing ITLAs under the New Jersey Law Against Discrimination).

Slowly, courts began to address this inequitable feature of current tax law through additional awards to offset that increased tax liability. In 2009, the *Eshelman* court made a definitive ruling on the issue, providing other courts with a clear line of reasoning as to *why* such awards are permissible under employment discrimination statutes. That ruling failed to explain *when* courts should provide plaintiffs with ITLAs and unnecessarily cabined its reasoning to anti-discrimination statutes. This note argues that ITLAs should be made by courts when a plaintiff provides accurate calculations of her projected increased tax liability using the most recent information reasonably obtainable.[207] A warning for plaintiffs: the award must be calculated in a manner that determines the plaintiff's additional liability, as opposed to total liability. Thus, it will be necessary to determine what taxes would have been owed if the plaintiff had received the backpay in normal course of business (*x*), what additional taxes must be paid as a result of the lump sum award (*y*) (calculated by adding the backpay award to current projected income and multiplying that by the appropriate tax percentages, and then subtracting the amount that plaintiff would have paid in taxes if no backpay was received), and then to subtract *y* from *x*. The result will be plaintiff's *increased* tax liability.[208]

After analyzing the applicability of ITLAs when backpay is awarded under five different federal statutes, I conclude that the award is available in most instances. Courts should continue to expand the use of this award to all anti-discrimination statutes and, beyond that, to all applicable employment statutes. In terms of fairness, it only makes sense to provide plaintiffs with this type of award. A plaintiff's increased tax liability comes as a direct result of her employer's actions; once an employer is found to have made an impermissible employment action, it is the duty of the court and employer to ensure that the plaintiff is placed in a position equal to where she would have been absent the illegal conduct.[209] Employment statutes, when regulating wages and benefits, are best viewed as anti-theft statutes; indeed, the withholding of money or benefits owed to employees is no more than clever, nuanced robbery. If someone were to steal a car, the fair response upon a finding of guilt would be the replacement of *that* car, as it was before the theft, along with any additional costs

207. The term "accurate" in this context refers to whether the calculations, if all of the information used is correct, would result in a determination of "actual" tax liability.

208. In a simple example that assumes tax burdens remain static over the next ten years, beginning in 2010: Employee *A* makes minimum wage, $7.25 per hour, working forty hours a week. 29 U.S.C. § 206(a)(1). After bringing a successful FLSA claim against her employer for minimum-wage violations, *A* is retaliated against over the next ten years. She brings an FLSA retaliation claim and receives a $100,000 backpay award. If no retaliation had occurred, she would have received $25,080 per year (about $12 per hour). *X* would equal $15,000 in unpaid taxes (calculated by subtracting the taxes owed on $25,080 from the taxes owed on $15,080 (full time minimum wage salary), multiplied by 10). *Y* would equal $24,089 (calculated by subtracting the taxes owed on $15,080 from the taxes owed on $115,080). Thus, *A* would incur an federal increased tax liability of $9089 ($Y - X$). A useful tool on the Internet to quickly determine an individual's tax burden can be found at *Federal Tax Brackets*, Moneychimp, *supra* note 20. For examples and explanations on how to make increased tax liability calculations in more complicated settings, see Ben-Zion, *supra* note 15.

209. *See supra* note 3 and accompanying text.

incurred through the illegal act, such as tow charges and the like. In the case where an employee receives a lump sum that creates an increased tax liability, the employee receives a damaged car that requires costly repair before it is operational; hardly a make-whole remedy. Courts already universally apply prejudgment interest awards in situations of backpay, acknowledging that an award of backpay alone is not consistent with a make-whole remedy. The case is the same when a plaintiff is subjected to higher taxation as a result of succeeding in an employment claim. Courts must act upon that reality by expanding the application of ITLAs to all employment claims.