

Casenote

180 Days or No Equal Pay: Limiting Employment Discrimination Suits in *Ledbetter v. Goodyear Tire & Rubber Co.*

I. INTRODUCTION

In *Ledbetter v. Goodyear Tire & Rubber Co.*,¹ a five-justice majority of the United States Supreme Court held that an employee cannot sue under Title VII of the Civil Rights Act of 1964² for pay discrimination unless the employee filed a formal complaint with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the employer’s discriminatory pay decision.³ In *Ledbetter* the Court addressed whether an employee can bring a Title VII suit alleging pay discrimination when the disparate pay was received during the statutory limitations period but was the result of an intentional discriminatory pay decision made outside of that period.⁴ The majority decided the employee could not.⁵

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1. 127 S. Ct. 2162 (2007).
 2. 42 U.S.C. §§ 2000e-2000e-17 (2000 & Supp. 2007).
 3. *Id.* § 2000e-5(e)(1), (f)(1); *Ledbetter*, 127 S. Ct. at 2177 n.11, 2177-78.
 4. *Ledbetter*, 127 S. Ct. at 2177-78.
 5. *Id.*

II. FACTUAL BACKGROUND

Lilly Ledbetter worked for Goodyear Tire and Rubber Company (“Goodyear”) in Alabama from 1979 to 1998. During most of that time, salaried employees at the plant where she worked were given or denied pay raises based on performance evaluations. As an area manager, Ledbetter’s initial salary was commensurate with other male employees.⁶ However, by the end of 1997, Ledbetter was the only woman working as an area manager and was paid \$3727 per month, while the lowest paid male made \$4286 per month and highest paid male made \$5236 per month. The past pay decisions affected the amount of Ledbetter’s pay throughout her employment, and consequently, by the end of her employment, she was earning significantly less than her male colleagues.⁷

Ledbetter submitted a questionnaire to the EEOC in March 1998 and a formal EEOC charge in July 1998. She retired early in November 1998 and then filed suit against Goodyear.⁸ Among Ledbetter’s claims were a Title VII⁹ pay discrimination claim and a claim under the Equal Pay Act of 1963 (“EPA”).¹⁰ She claimed her supervisors gave her poor evaluations because of her gender, which resulted in her pay not increasing as much as it would have if they had fairly evaluated her.¹¹

In her complaint, Ledbetter alleged multiple claims of age discrimination, sex discrimination, and retaliation in violation of Title VII, the EPA, and the Age Discrimination in Employment Act (“ADEA”).¹² Goodyear filed a motion for summary judgment, arguing that Ledbetter’s claims were time-barred because Goodyear had not committed a discriminatory act in evaluating Ledbetter during the 180 days prior to her filing her EEOC questionnaire.¹³

The United States District Court for the Northern District of Alabama granted summary judgment in favor of Goodyear on some of Ledbetter’s claims, including the Equal Pay Act, but allowed the Title VII claim to go to trial. The jury found for Ledbetter and awarded over \$3,000,000

6. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007).

7. *See id.* at 2178 (Ginsburg, J., dissenting).

8. *Id.* at 2165 (majority opinion).

9. 42 U.S.C. §§ 2000e-2000e-17 (2000 & Supp. 2007).

10. *Ledbetter*, 127 S. Ct. at 2165; 29 U.S.C. § 206(d) (2000 & Supp. 2007).

11. *Ledbetter*, 127 S. Ct. at 2165-66.

12. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1175 n.7 (11th Cir. 2005); 29 U.S.C. §§ 621-634 (2000).

13. *Ledbetter*, 421 F.3d at 1176.

in back pay, compensatory, and punitive damages. Subsequently, the trial judge reduced the award to \$360,000.¹⁴

Goodyear appealed, claiming the Title VII claim “was time barred with respect to all pay decisions made prior to September 26, 1997—that is, 180 days before the filing of [Ledbetter’s] EEOC questionnaire. And Goodyear argued that no discriminatory act relating to Ledbetter’s pay occurred after that date.”¹⁵ The United States Court of Appeals for the Eleventh Circuit reversed and held that a Title VII pay discrimination claim cannot be based on alleged discriminatory events that happened before the last pay decision affecting the employee’s pay during the EEOC charging period.¹⁶ The Eleventh Circuit also held there was insufficient evidence to show Goodyear acted with discriminatory intent in making the only two pay decisions during the filing period (denial of raises in 1997 and 1998).¹⁷

Ledbetter filed a petition for writ of certiorari in the United States Supreme Court, seeking review of all claims except the Eleventh Circuit holdings regarding the sufficiency of evidence relating to the 1997 and 1998 pay decisions. Due to a split among the Circuits over applying the limitations period in Title VII cases, the Supreme Court granted certiorari.¹⁸ In a 5-4 decision, the Court affirmed the Eleventh Circuit decision and held that the EEOC charging period is “triggered when a discrete unlawful practice” occurs.¹⁹ The majority further held that once a discriminatory act triggers the 180-day charging period, subsequent *nondiscriminatory* acts that result from the initial discriminatory act and adversely affect the employee do not cause a new violation and do not cause a new charging period to begin.²⁰

III. LEGAL BACKGROUND

Title VII²¹ prohibits discrimination based on “race, color, religion, sex, or national origin” to prevent employment discrimination and provides redress for illegal discrimination against employees.²² It applies to employers who retain “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding

14. *Id.* at 1175-76.

15. *Ledbetter*, 127 S. Ct. at 2166.

16. *Ledbetter*, 421 F.3d at 1189.

17. *Ledbetter*, 127 S. Ct. at 2166.

18. *Id.*; *Ledbetter v. Goodyear Tire & Rubber Co.*, 126 S. Ct. 2965, 2965 (2006).

19. *Ledbetter*, 127 S. Ct. at 2165, 2169.

20. *Id.* at 2169.

21. 42 U.S.C. §§ 2000e-2000e-17 (2000 & Supp. 2007).

22. *Id.* § 2000e-2(a)(2).

calendar year.”²³ The EEOC enforces Title VII.²⁴ Title VII requires an employee who wants to file a discrimination claim in a federal district court to first file a charge with the EEOC within 180 days (or 300 days if covered by a state or local anti-discrimination law)²⁵ of the unlawful employment act.²⁶ The EEOC filing requirement serves as an administrative pre-litigation filter to weed out stale claims and ensure prompt resolution of legitimate claims.²⁷ Specifically, Congress established the 180-day statute of limitations to “protect employers from the burden of defending claims arising from employment decisions that are long past.”²⁸

The following cases demonstrate the historical progression of the United States Supreme Court’s decisions related to Title VII claims that were not filed within the statutory period. As such, they provide the legal context for the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*²⁹

In 1977 the Supreme Court decided *United Airlines, Inc. v. Evans*,³⁰ in which a female flight attendant, Evans, worked for United Airlines until she was forced to resign when she married.³¹ At the time, United Airlines had a “no marriage’ rule.”³² Evans did not file a complaint with the EEOC within the required period. Subsequently, United Airlines entered into a collective-bargaining agreement with flight attendants who had filed to have their employment reinstated. Although the Court held that the forced resignations were in violation of Title VII, Evans was not reinstated because she was not a party to the suit. Though Evans was eventually rehired, she did not receive seniority credit for her prior years of service.³³

Evans argued that United Airlines’ seniority system was discriminatory because: (1) “she [was] treated less favorably than males who were hired after her termination in 1968 and prior to her re-employment in 1972,” and (2) United Airlines had committed a continuing violation of

23. *Id.* § 2000e(b).

24. *Id.* § 2000e-4.

25. The Equal Employment Opportunity Commission, Federal Laws Prohibiting Job Discrimination: Questions and Answers, <http://www.eeoc.gov/facts/qanda.html> (last visited Feb. 22, 2008).

26. 42 U.S.C. § 2000e-5(e)(1).

27. *See, e.g.*, *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

28. *Id.*

29. 127 S. Ct. 2162 (2007).

30. 431 U.S. 553 (1977).

31. *Id.* at 554.

32. *Id.* at 555.

33. *Id.* at 554-55.

Title VII because the seniority system gave present effect to a past act of discrimination.³⁴ Because of the continuing nature of the violation, she argued, her claim was timely. In contrast, United Airlines argued that the claim was time-barred and that upon re-hiring Evans was treated the same as any new employee.³⁵ The court concluded the seniority system was facially neutral because it treated males and females equally.³⁶ Therefore, the Court held that “a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.”³⁷ Thus, the Court in *Evans* rejected the continuing violation theory.³⁸

Soon after *Evans*, the Supreme Court decided *Delaware State College v. Ricks*,³⁹ in which a college professor, Ricks, sued his employer, Delaware State College, claiming discrimination based on national origin under 42 U.S.C. § 2000e-5(e) and 42 U.S.C. § 1981⁴⁰ for denial of tenure.⁴¹ After the college’s board of trustees voted to deny Ricks tenure on June 26, 1974, he filed a grievance, and the college offered Ricks a “1-year ‘terminal’ contract that would expire June 30, 1975.”⁴² Ricks signed the contract, and soon after the college informed Ricks that it had denied his grievance on September 12, 1974. The EEOC accepted Ricks’ complaint for filing on April 28, 1975.⁴³ Pursuant to Title VII, Ricks was required to file a complaint with the EEOC within 180 days after the unlawful employment practice occurred.⁴⁴ Ricks argued that the day his terminal contract expired should be used to calculate the beginning of the limitations period. He also argued there was a continuing violation because the discrimination caused the college to deny him tenure and terminate his employment.⁴⁵ The college argued that his claims were untimely.⁴⁶

34. *Id.* at 557.

35. *See id.*

36. *Id.* at 557-58.

37. *Id.* at 560.

38. *Id.*

39. 449 U.S. 250 (1980).

40. 42 U.S.C. § 1981 (2000 & Supp. 2007).

41. *Del. State Coll.*, 449 U.S. at 252, 254.

42. *Id.* at 252-53.

43. *Id.* at 253-54.

44. *Id.* at 255; *see* 42 U.S.C. § 2000e-5(e).

45. *Del. State Coll.*, 449 U.S. at 257.

46. *Id.* at 254.

The Supreme Court held that the alleged unlawful employment practice occurred on June 26, 1974, when Ricks received the letter denying him tenure, not when his contract actually terminated a year later.⁴⁷ The Court further held that

the only alleged discrimination occurred[—]and the filing limitations periods therefore commenced[—]at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later.⁴⁸

Thus, the Court in *Delaware State College* clarified which action triggers the limitations period⁴⁹ and in *Evans* rejected the continuing violation theory.⁵⁰

Later in *Bazemore v. Friday*,⁵¹ the Supreme Court unanimously held that the North Carolina Agricultural Extension Service discriminated when, after merging what had been separate white and black branches with different employee pay scales, it continued to use the prior pay scales.⁵² The Court concluded the pay scale system was facially discriminatory based upon race.⁵³ Justice Brennan's concurrence, in which all of the Justices joined, stated, "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."⁵⁴ Thus, the Court refused to strictly interpret the filing deadline.

In 1989 the Supreme Court decided *Lorance v. AT & T Technologies, Inc.*,⁵⁵ in which female employees who were hired as testers sued their employer, claiming that the seniority system, which based salary on time spent in the position, was discriminatory. AT & T Technologies utilized a seniority system based on the number of years an employee held the specific job of tester, rather than the number of years the employee had worked with the company. When AT & T Technologies adopted the

47. *Id.* at 261.

48. *Id.* at 258.

49. *See id.*

50. *Evans*, 431 U.S. at 560.

51. 478 U.S. 385 (1986) (per curiam). Notably, this case was central to Justice Ginsburg's dissent in *Ledbetter*, as she used this case to support her argument that the Court should allow *Ledbetter* to recover on her Title VII pay discrimination claim. 127 S. Ct. at 2179-80 (Ginsburg, J., dissenting).

52. *Bazemore*, 478 U.S. at 387-88 (per curiam).

53. *Id.* at 394-95 (Brennan, J., concurring).

54. *Id.* at 395-96.

55. 490 U.S. 900 (1989).

seniority system in 1979, the tester positions were held almost exclusively by men. Three years later, the company experienced a downturn and in November 1982 demoted female testers based on their lack of seniority in that position. In April 1983 the affected women filed a charge with the EEOC that would have been timely if based on the date of their demotions but untimely if calculated on the adoption of the seniority system.⁵⁶

The plaintiffs argued that a continuing violation had occurred when the company changed the seniority policy, which resulted in discrimination against female employees.⁵⁷ Citing *Evans* and *Delaware State College*, the Supreme Court explicitly rejected the continuing violation theory.⁵⁸ Instead, the Court reasoned, "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement, it is the date of that signing which governs the limitations period."⁵⁹ In addition to rejecting the continuing violation theory, the Court clarified that the limitations period begins on the date of the discriminatory act, not the date its effects are realized.⁶⁰

Congress disagreed with the holding in *Lorance* and enacted the Civil Rights Act of 1991,⁶¹ which rejected the decision by expanding employee rights to include the ability to challenge discriminatory seniority systems, obtain jury trials, and recover compensatory and punitive damages for intentional discrimination.⁶² This amendment reflects Congressional intent for the Title VII statute of limitations to run from the time the employee feels the effect of the employment discrimination, thereby liberally construing the limitations period to allow employees to recover for employment discrimination.

The most recent Supreme Court decision on this issue is *National Railroad Passenger Corp. v. Morgan*.⁶³ In *National Railroad Passenger Corp.*, a 5-4 decision, Morgan filed a charge of discrimination and retaliation with the EEOC against National Railroad Passenger Corporation.⁶⁴ Morgan claimed "that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially

56. *Id.* at 902-03; *Lorance v. AT & T Technologies, Inc.*, 1986 WL 9540, at *2 (N.D. Ill. Aug. 28, 1986).

57. *Lorance*, 490 U.S. at 902-03.

58. *Id.* at 906-07.

59. *Id.* at 911.

60. *Id.*

61. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2).

62. *Id.*; *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305-06 (N.D. Cal. 1992).

63. 536 U.S. 101 (2002).

64. *Id.* at 104.

hostile work environment throughout his employment.”⁶⁵ The EEOC issued a notice to Morgan, giving him the right to sue his employer. Some of the allegedly discriminatory acts occurred within 300 days⁶⁶ of the time that Morgan filed his EEOC charge, while others occurred prior to that period.⁶⁷

Upon hearing the case, the majority held that the employee’s hostile work environment claim was “composed of a series of separate acts that collectively constitute[d] one ‘unlawful employment practice.’”⁶⁸ The timely filing provision only required that Morgan file a charge within 180 or 300 days after the unlawful practice occurred.⁶⁹ For purposes of the statute, it did not matter that some of the acts creating the hostile work environment fell outside the statutory period.⁷⁰ As long as an action contributing to the claim occurred within the filing period, the Court could consider the entire period of the hostile environment to determine liability.⁷¹ The Court also noted that applying equitable doctrines may either limit or toll the period within which an employee must file his or her EEOC charge.⁷² Thus, the Court distinguished hostile work environment claims from other employment discrimination claims by allowing the employee to recover for the continuing violation, so long as at least one component act occurred within the limitations period.⁷³

Prior to the decision in *Ledbetter*, the Court had a thirty-year record of strictly interpreting the Title VII limitations period.⁷⁴ Most recently, the Court carved out a hostile work environment exception in *National Railroad Passenger Corp.*, which allowed an employee to recover even though he failed to file within the limitations period.⁷⁵ Optimists may have hoped that the exception was an indication that the Court would carve further exceptions to allow more flexibility for employees to

65. *Id.*

66. The Title VII 180-day filing deadline can be extended to 300 days if covered by state or local anti-discrimination laws. The Equal Employment Opportunity Comm’n, Federal Laws Prohibiting Job Discrimination: Questions and Answers, <http://www.eeoc.gov/facts/qanda.html> (last visited Feb. 22, 2008).

67. *Nat’l R.R. Passenger Corp.*, 536 U.S. at 106.

68. *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 113.

73. *Id.* at 117.

74. See, e.g., *Nat’l R.R. Passenger Corp.*, 536 U.S. 101; *Lorance*, 490 U.S. 900; *Bazemore*, 478 U.S. 385; *Del. State Coll.*, 449 U.S. 250; *Evans*, 431 U.S. 553.

75. 536 U.S. at 117.

recover, which would be in line with Title VII's broad remedial purpose. However in *Ledbetter*, the Court returned to its textualist roots.⁷⁶

IV. COURT'S RATIONALE

A. *Majority Opinion*

Justice Alito⁷⁷ wrote the opinion for the majority in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁷⁸ holding that an employment discrimination charge must be brought within 180 days of the alleged unlawful employment practice.⁷⁹ The Court clarified that the charging period is not triggered until a “discrete act or single occurrence” transpires, such as “termination, failure to promote, denial of transfer, [or] refusal to hire.”⁸⁰ The charging period runs from the date the alleged discriminatory act occurs, not from the date the employee experiences the effect of the discriminatory act.⁸¹ Thus, if the employee does not submit a timely EEOC charge, any claim is time-barred.⁸²

Ledbetter did not claim that any intentional discriminatory conduct occurred during the 180-day charging period or that Goodyear failed to communicate to her any discriminatory decisions it made before the limitations period. Ledbetter also failed to present evidence to prove Goodyear initially adopted its performance-based pay system to discriminate based on gender or that it later applied this system to her with a discriminatory intent within the charging period. Rather, Ledbetter made two arguments to support the timeliness of her Title VII claim: (1) each paycheck issued during the EEOC charging period (180-days preceding the filing of her EEOC questionnaire) was a separate act of discrimination, and (2) the 1998 decision to deny her a raise carried the earlier intentional discriminatory acts forward into the 180-day limitations period.⁸³

The Supreme Court held that accepting any of Ledbetter's arguments would require it to abandon the defining element of the disparate

76. 127 S. Ct. at 2169.

77. Notably, Republican President George W. Bush appointed Justice Samuel Anthony Alito, Jr. to the bench of the Supreme Court in 2006. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 22, 2008).

78. 127 S. Ct. 2162, 2165 (2007).

79. *Id.* at 2178.

80. *Id.* at 2169 (internal quotation marks omitted) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

81. *Id.*

82. *Id.* at 2174.

83. *Id.* at 2164-67.

treatment claim on which Title VII⁸⁴ recovery is based—discriminatory intent.⁸⁵ The majority stated that *United Airlines, Inc. v. Evans*,⁸⁶ *Delaware State College v. Ricks*,⁸⁷ *Lorance v. AT & T Technologies, Inc.*,⁸⁸ and *National Railroad Passenger Corp. v. Morgan*⁸⁹ clarified that “[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts [such as receiving each pay check] that entail adverse effects resulting from the past discrimination.”⁹⁰ The majority distinguished *Bazemore v. Friday*⁹¹ by reasoning that the plaintiffs in *Bazemore* had challenged discriminatory pay structure, whereas *Ledbetter* only challenged discriminatory pay decisions.⁹² The Court also noted that the short EEOC filing “deadline reflects Congress’[s] strong preference for the prompt resolution of employment discrimination allegations through . . . conciliation and cooperation.”⁹³ Finally, the majority reasoned that *Ledbetter*’s arguments “would distort Title VII’s ‘integrated, multistep enforcement procedure.’”⁹⁴ The Court saw no reasonable ambiguity in the statute and gave a literal interpretation to the 180-day filing deadline.⁹⁵

B. Justice Ginsburg’s Dissent

Justice Ginsburg wrote the dissenting opinion.⁹⁶ In contrast to the

84. 42 U.S.C. §§ 2000e-2000e-17 (2000 & Supp. 2007).

85. *Ledbetter*, 127 S. Ct. at 2164-67.

86. 431 U.S. 553 (1977).

87. 449 U.S. 250 (1980).

88. 490 U.S. 900 (1989).

89. 536 U.S. 101 (2002).

90. *Ledbetter*, 127 S. Ct. at 2169.

91. 478 U.S. 385 (1986) (per curiam).

92. *Ledbetter*, 127 S. Ct. at 2174. Justice Alito wrote,

Bazemore stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is ‘facially nondiscriminatory and neutrally applied.’

Id.

93. *Id.* at 2170-71.

94. *Id.* at 2170 (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977)).

95. *Id.* at 2177 n.11.

96. Notably, Justice Ruth Bader Ginsburg, the only female currently on the Supreme Court, read her dissenting opinion aloud from the bench, “a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women’s rights.” Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1, available at <http://www.washingtonpost.com>.

majority's literal approach to interpreting the Title VII filing deadline, she emphasized the reality that pay disparities occur incrementally and that comparative pay information is often hidden from employees.⁹⁷ Therefore, small initial discrepancies may not indicate the need for litigation.⁹⁸ Justice Ginsburg further emphasized that pay discrimination is usually concealed because the pay "disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision."⁹⁹

Justice Ginsburg also noted that many times employees do not suspect discrimination until an incremental pattern develops.¹⁰⁰ She referenced statistics that showed "one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy."¹⁰¹ She further noted that pay disparities are drastically different from adverse actions "such as termination, failure to promote, . . . or refusal to hire" because other acts are "fully communicated discrete acts" and are easily recognized as discriminatory.¹⁰²

In her dissent, Justice Ginsburg relied on caselaw and administrative agency support to bolster her argument.¹⁰³ First, she applied the reasoning in *Bazemore* to support the argument that Ledbetter should be able to recover for her pay discrimination claim because the pay checks resulting from that discrimination were received during the limitations period, even though the discriminatory decision to not increase her pay occurred outside the 180-day period.¹⁰⁴ Next, Justice Ginsburg applied the reasoning in *National Railroad Passenger Corp.*, likening pay discrimination to a hostile work environment and noted

com/wp-dyn/content/article/2007/05/29/AR2007052900740.html. Justice Ginsburg, appointed to the Supreme Court by Democratic President Bill Clinton, has a background as a feminist legal activist who was a pioneer during the 1970s in establishing women's rights. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 22, 2008).

97. *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 2182 n.3 (citing Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004)).

102. *Id.* at 2179 (alteration in original) (quoting *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114).

103. *See id.* at 2178-88.

104. *Id.* at 2179-80.

that in that case the Court carved an exception to the normal practice of strictly interpreting the limitations period, specifically for hostile work environment claims.¹⁰⁵ She argued that, much like a hostile work environment, pay discrimination is the result of cumulative injuries over time.¹⁰⁶ Finally, Justice Ginsburg noted that in this case the EEOC encouraged the Eleventh Circuit to allow Ledbetter to seek relief on her Title VII claim.¹⁰⁷

Additionally, Justice Ginsburg raised numerous policies to support her conclusion.¹⁰⁸ She emphasized that there are no suitable alternatives for employees who miss the filing deadline because while the EPA protects against sex discrimination, it does not protect against racial discrimination.¹⁰⁹ Justice Ginsberg argued that the majority ruling will force employees to file too soon to prevail because of a lack of available evidence, and will time-bar their claims once the pay differential is large enough to enable them to mount a viable case.¹¹⁰ Finally, Justice Ginsburg emphasized that the broad remedial purpose that underpins Title VII is protecting employees against employment discrimination.¹¹¹ She ended by urging Congress to reverse the majority decision.¹¹²

V. IMPLICATIONS

There has been a strong public reaction to the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹¹³ because its effect is to deny remedies to many victims of employment discrimination who do not file their claims within the brief limitations period.

A. *Ledbetter's* Implications for Employees

Because of the Court's strict interpretation of the filing timeframe, *Ledbetter* will make it difficult for employees to bring claims against their employers when the impact of the discrimination is subtle. In cases of blatant discrimination, 180 days is generally enough time to bring a claim. However, in cases involving subtle discrimination, such as discriminatory pay differences, the intentional discriminatory act may

105. *Id.* at 2180.

106. *Id.*

107. *Id.* at 2181.

108. *Id.* at 2181-88.

109. *Id.* at 2186.

110. *Id.* at 2186 n.9.

111. *Id.* at 2188.

112. *Id.* at 2187.

113. 127 S. Ct. 2162 (2007).

go unnoticed by the employee. In most of these cases, the pay differential initially will be negligible; however, as time passes it may become more obvious to both the employee and to a judge or jury. The strict enforcement of the statute of limitations could result in many instances of discrimination going unpunished because the Court's interpretation forces the employee to file with the EEOC so quickly that there may not be enough evidence of disparate pay to pass the EEOC filtering stage. Additionally, any claim brought will result in lower amounts of damages because the discrimination will not have amounted over the course of many years, but instead only over 180 days.

Such consequences will reduce the incentive for employees to sue their employers. Attorneys will be less inclined to bring Title VII¹¹⁴ pay discrimination lawsuits because the money damages will likely not be substantial. The main consequence is that more discrimination will go undetected and uncompensated.

As a result, female employees may resort to alternatives such as the Equal Pay Act,¹¹⁵ which does not include the 180-day requirement and does not require discriminatory intent.¹¹⁶ However, this is still a limitation because the Equal Pay Act "has additional procedural hurdles and has a low damage cap that excludes punitive damages."¹¹⁷ Further, the Equal Pay Act will not protect all employees because it does not cover discrimination based on race, color, religion, or national origin.¹¹⁸ The net impact may be that discrimination based on gender will be more closely regulated than discrimination based on the other protected classes.

The main potential benefit to employees after *Ledbetter* is that discriminatory acts will be remedied quickly. The decision in *Ledbetter* will likely require employees to closely monitor wage and promotion decisions and to act quickly when discrimination is detected. Overall, however, this single benefit seems slight compared to the potential negative consequences for employees, and thus, *Ledbetter* will likely weigh negatively against employees.

114. 42 U.S.C. §§ 2000e-2000e-17 (2000 & Supp. 2007).

115. 29 U.S.C. § 206(d) (2000 & Supp. 2007).

116. 29 U.S.C. § 255(a) (2000).

117. Linda Greenhouse, *Justices Limit Discrimination Suits over Pay*, N.Y. TIMES, May 29, 2007, at para. 17, available at <http://www.nytimes.com/2007/05/29/washington/30scotuscnd.html>.

118. See 29 U.S.C. § 206(d).

B. Ledbetter's Implications for Employers

The Court's decision in *Ledbetter* is likely to positively impact employers. In holding that the 180-day filing deadline will be strictly enforced, the Court has reduced an employer's potential liability by preventing employees from bringing stale claims.¹¹⁹ This benefits employers because employment discrimination cases are generally fact-intensive. When claims are not brought in a timely fashion, the discovery process is inhibited because employees who know relevant facts may no longer be employed or even alive. Furthermore, many relevant documents may no longer exist, and witnesses' memories fade over time. Consequently, strict enforcement of the statute of limitations is compatible with the purpose of promoting fairness to employers by not continually holding them liable for injuries they have caused.

However, this result will only encourage unscrupulous employers to refrain from *blatant* discrimination and to discriminate in subtler ways. Employees have no legal redress under Title VII if the employer makes a discriminatory pay decision and then simply maintains the discrimination (through pay checks) for more than 180 days without committing a separate discriminatory act. Thus, *Ledbetter* will ultimately weigh in favor of employers.

C. Congressional Action Resulting from the Ledbetter Decision

Congress reacted quickly to Justice Ginsburg's dissent,¹²⁰ and Representative George Miller (D-CA) and ninety-three Representatives introduced the Lilly Ledbetter Fair Pay Act of 2007,¹²¹ which has since been passed in the House of Representatives and now awaits hearing on the Senate calendar.¹²² The Lilly Ledbetter Fair Pay Act would amend Title VII of the Civil Rights Act of 1964,¹²³ the Age Discrimination in Employment Act of 1967,¹²⁴ the Americans With Disabilities Act of 1990 ("ADA"),¹²⁵ and the Rehabilitation Act of 1973¹²⁶ so that the law recognizes an unlawful discriminatory action each time an employee

119. *Ledbetter*, 127 S. Ct. at 2170-71.

120. *Id.* at 2181-88 (Ginsburg, J., dissenting).

121. H.R. 2831, 110th Cong. (2007).

122. See GovTrack.us at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831> (last visited Jan. 8, 2008).

123. 42 U.S.C. § 2000e-2.

124. 29 U.S.C. §§ 621-634 (2000).

125. 42 U.S.C. §§ 12101-12213 (2000).

126. 29 U.S.C. §§ 701-796. (2000).

is paid after an initial discriminatory compensation decision.¹²⁷ If a Democrat wins the 2008 Presidential election, and Democrats retain control of Congress, it is extremely likely that the majority's decision in *Ledbetter* will be legislatively overturned.

By the same token, it is unlikely that the Lilly Ledbetter Fair Pay Act will be enacted while President George W. Bush is in office. The Executive Office of the President of the United States issued a Statement of Administrative Policy on July 27, 2007, declaring that President Bush's administration "strongly opposes the Ledbetter Fair Pay Act of 2007 . . . [and that if] H.R. 2831 were presented to the President, his senior advisors would recommend that he veto the bill."¹²⁸ The Bush administration claims it does not support the bill because it wants to encourage timely resolution of discrimination claims.¹²⁹ The administration further argues that the bill would allow an employee to bring a discrimination claim decades after the alleged discrimination occurred, which would impede justice and undermine the prompt resolution of discrimination claims.¹³⁰ The administration emphasizes the historical and practical significance of statutes of limitations, particularly in fact-intensive cases such as employment discrimination cases.¹³¹ Moreover, the administration says the bill exceeds the scope of the *Ledbetter* ruling because it "expand[s] [the] statute of limitations to any 'other practice' that remotely affects an individual's wages, benefits, or other compensation in the future."¹³² Finally, it makes the policy argument that expanding the statute of limitations will worsen the current burden on the courts.¹³³ Thus, even if the Lilly Ledbetter Fair Pay Act of 2007 passes, with the present Presidential administration in place, it will probably not become law.

While the future of *Ledbetter's* holding is uncertain, another solution to this issue is to require businesses to disclose pay information to their employees. Senator Harkin (D- IA) introduced the Fair Pay Act of 2007 ("FPA"),¹³⁴ which would "amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on account of sex,

127. H.R. 2831.

128. Office of Mgmt. & Budget, Executive Office of the President, Statement of Administrative Policy: H.R. 2831 – Lilly Ledbetter Fair Pay Act of 2007 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf> (emphasis omitted).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. S. 1087, 110th Cong., 1st Sess. (2007).

race, or national origin, and for other purposes.”¹³⁵ The FPA contains a provision that would require companies to report earnings by race and gender in each job category.¹³⁶ This would not require businesses to report individual salaries but rather overall statistics so an employee could evaluate how he or she was being compensated in comparison to the other employees in the company.¹³⁷ This proposed bill would resolve Justice Ginsburg’s concern that most employers do not disclose pay information and have policies in place to prevent employees from discussing their pay.¹³⁸

D. Issues left unresolved by the Court in Ledbetter

To be sure, *Ledbetter* has clarified how courts should interpret the Title VII filing deadline requirement. Its holding, however, leaves open the critical question of whether the statute of limitations begins only after an employee reasonably could have known about pay discrimination and, if so, how courts should determine when the employee could have reasonably recognized the discrimination. The Court in *Ledbetter* explicitly declined to address this issue,¹³⁹ providing a loophole for plaintiffs’ lawyers to argue that the statute of limitations has tolled because the employee could not have discovered the discrimination in time. Generally, courts allow equitable tolling until a plaintiff could have discovered his or her injury.¹⁴⁰ Thus, a tolling argument may be successful. However, courts will eventually have to decide at what point the employee could have reasonably discovered the discrimination.

In conclusion, Title VII provides an essential method used to prevent and eliminate employment discrimination. The Court in *Ledbetter* has limited the broad scope of the legislation and made it more difficult for employees to bring pay discrimination claims. A statute of limitations is essential to prevent employees from bringing stale claims; however, Ginsburg argues that courts should not use it to thwart the remedial purpose of Title VII.¹⁴¹ Congress is now left with this issue, and its swift action indicates an intent to create laws that allow enough

135. *Id.*

136. *Id.* § 6(a)(2).

137. *Id.*

138. *Ledbetter*, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).

139. *Id.* at 2177 n.10 (majority opinion). The majority said, “We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because *Ledbetter* does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.” *Id.* (citation omitted) (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7 (2002)).

140. See, e.g., *Nat’l R.R. Passenger Corp.*, 536 U.S. at 113.

141. *Ledbetter*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

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flexibility to contend with the current workplace realities of pay discrimination.

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