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CIVIL RIGHTS—The Clock Starts Ticking: Title VII Pay Discrimination Claims; *Ledbetter v. Goodyear Tire & Rubber, Co.*, 431 F.3d 1169 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162

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CASE NOTE

CIVIL RIGHTS—The Clock Starts Ticking: Title VII Pay Discrimination Claims. *Ledbetter v. Goodyear Tire & Rubber, Co.*, 127 S. Ct. 2162 (2007).

*Jennifer F. Kemp**

INTRODUCTION

Goodyear Tire and Rubber Company (Goodyear) employed Lilly Ledbetter as a non-union area manager in a Gadsden, Alabama tire-production plant for nineteen years.¹ After years of suspecting Goodyear paid her less than men in her department, an anonymous note appeared in her mailbox relating the salaries of three of her male counterparts.² The note prompted an investigation.³ Ledbetter learned that although she started at the same wage as men in her position, her current salary fell below every other male supervisor in her department, even those hired well after her.⁴ At times, her pay even dipped below what Goodyear set as the minimum pay level for the area-manager position.⁵

Ledbetter filed a questionnaire with the Equal Employment Opportunity Commission (EEOC) in March 1998 and a formal EEOC charge in July 1998.⁶ Following her early retirement from Goodyear and the EEOC's issuance of a right to sue letter, Ledbetter filed suit.⁷ Ledbetter presented evidence at trial that Goodyear paid her less money than any other male supervisor at the Gadsden location, solely because of her gender.⁸ The jury awarded her \$3.8 million in back pay and punitive damages.⁹ The trial court, however, reduced the judgment based

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¹ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007) [hereinafter *Ledbetter II*].

² *Impact of Ledbetter v. Goodyear on the Effective Enforcement of Civil Rights Laws: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) available at <http://ledworkforce.house.gov/hearings/fc061207.shtml> [hereinafter *Hearings*] (testimony of Lilly Ledbetter).

³ See *id.*

⁴ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1174 (11th Cir. 2005) [hereinafter *Ledbetter I*].

⁵ *Ledbetter II*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting). By the end of 1997 Ledbetter earned \$3,727 per month, less than all other area managers in her section. *Ledbetter I*, 421 F.3d at 1174. The lowest paid male area manager made roughly 15% more than Ledbetter; the highest paid made roughly 40% more. *Id.*

⁶ *Ledbetter I*, 421 F.3d at 1175.

⁷ See *Ledbetter II*, 127 S. Ct. at 2165.

⁸ *Ledbetter I*, 421 F.3d at 1175.

⁹ *Id.* at 1176. The jury awarded \$223,776 in back pay, \$4,662 for mental anguish, and \$3,285,979 in punitive damages. *Id.*

on Title VII damage limits.¹⁰ Ledbetter's ultimate trial court judgment amounted to \$360,000.¹¹

Goodyear appealed the judgment, arguing that time barred Ledbetter's claim because according to Title VII "unlawful employment practices" must occur within 180-days of the EEOC claim, and none of the allegedly discriminatory pay decisions occurred within that limitations period.¹² Although two performance reviews had taken place during the 180-day charging period, Ledbetter presented no evidence proving discriminatory intent behind those decisions.¹³ Ledbetter instead argued that each paycheck issued, reflecting a lower wage than other similarly situated employees, constituted a new violation, and created a new 180-day charging period.¹⁴ The United States Court of Appeals for the Eleventh Circuit declined to follow this "paycheck accrual rule" set forth by Ledbetter and originally articulated by the Supreme Court in *Bazemore v. Friday*.¹⁵ The Eleventh

¹⁰ *Id.* Title VII limits compensatory and punitive damages to \$300,000 in actions against employers with more than 500 employees. Civil Rights Act of 1964, 42 U.S.C. § 1981a(b)(3)(D) (2006). Additionally, because back pay may accrue no more than two years prior to the date a charge is filed with the Commission, the court awarded only \$60,000 in back pay. 42 U.S.C. § 2000(e)-5(g)(1) (2006).

¹¹ *Ledbetter I*, 421 F.3d at 1176.

¹² *See id.* Title VII requires filing of a discrimination charge with the EEOC within 180-days of the "unlawful employment practice," or if the complainant files the charge with a state or local agency with authority to grant or seek relief from such practices, within 300 days of the "unlawful employment practice." 42 U.S.C. § 2000(e)-5(e)(1). Lilly Ledbetter lived and worked in Alabama, where there is no state or local agency with the authority to grant relief, therefore the author will assume a 180-day charging period for the purposes of this case note. *See Ledbetter I*, 421 F.3d at 1178. Both Goodyear and Ledbetter agreed the filing period started 180-days before the March filing. *Id.*

¹³ *Ledbetter I*, 421 F.3d at 1186-87.

¹⁴ *Id.* at 1181.

¹⁵ *See Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986). The EEOC and the majority of circuit courts, including the Eleventh Circuit, applied the paycheck accrual rule until the *Ledbetter* decision. *See* 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, n. 183 (2006) (providing that "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period"); *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001) ("[I]n a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995), *abrogated on other grounds by* *Madison v. IBP, Inc.*, 330 F.3d 1051 (8th Cir. 2003) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge."); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 349 (4th Cir. 1994) ("[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages."); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993) ("Contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect . . . When the claim is one for discriminatory wages the violation exists every single day the employee works."); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir. 1986) ("[T]he policy of paying lower wages to female employees on each payday constitutes a continuing violation.") (internal quotation marks omitted); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received.").

Circuit reasoned that because Goodyear had a system for periodically reviewing and re-establishing employee salaries, Ledbetter could only recover if she could prove that a discriminatory decision affecting her pay occurred within the 180-day charging period.¹⁶

Ledbetter appealed to the United States Supreme Court, which upheld the Eleventh Circuit ruling and agreed that the statute of limitations barred Ledbetter's claim.¹⁷ The Court reasoned that each paycheck issued merely carried on the "effects" of an unlawful employment act, but did not constitute an unlawful employment act in and of itself.¹⁸ According to the Court, Ledbetter could challenge only the two performance reviews occurring during the 180-day statute of limitations period, and no evidence proved those decisions "unlawful."¹⁹ The Court's decision nullified both the back pay and punitive damages awarded by the jury.²⁰ The *Ledbetter* decision ultimately sends the message to victims of discriminatory pay that unless challenged within six months, pay decisions contaminated by discrimination "become grandfathered . . . beyond the province of Title VII ever to repair."²¹

This note discusses the repercussions of *Ledbetter* for pay discrimination cases in the future.²² It argues that Congress should pass legislation to correct the harsh and inequitable results of the *Ledbetter* decision.²³ Congress must act to ensure that Title VII continues to render broad relief to victims of discrimination.²⁴ This note argues the Supreme Court ruling ignores the realities of pay discrimination in the workplace.²⁵ Moreover, the analysis discusses current Congressional action proposing an amendment to Title VII establishing the receipt of discriminatory paychecks as separate employment acts.²⁶ Finally, the analysis argues that further Congressional action lengthening the 180-day filing period is necessary to ensure claims like Ledbetter's are fairly brought before the court.²⁷

¹⁶ See *Ledbetter I*, 421 F.3d at 1182-83.

¹⁷ See *Ledbetter II*, 127 S. Ct. at 2165.

¹⁸ *Id.* at 2169.

¹⁹ *Id.*

²⁰ See *id.* at 2165.

²¹ *Id.* at 2178 (Ginsburg, J., dissenting).

²² See *infra* notes 221-237, 287-303 and accompanying text for a discussion of how the *Ledbetter* applies and its economic repercussions.

²³ See *infra* notes 268-285 and accompanying text for suggestions of adopting a paycheck accrual rule and lengthening the filing period.

²⁴ See *infra* notes 268-285 and accompanying text.

²⁵ See *infra* notes 185-204 and accompanying text for a discussion of how discrimination is perceived.

²⁶ See *infra* notes 268-277 and accompanying text for a discussion of the Ledbetter Fair Pay Act.

²⁷ See *infra* notes 278-285 and accompanying text.

BACKGROUND

History of Title VII

The Civil Rights Act of 1964 grew out of the legacy of slavery and racial prejudice in the United States.²⁸ The evolution of Title VII began during World War II when it became necessary for the country to utilize minority workers.²⁹ At the height of the war effort in 1942, Franklin Roosevelt issued an executive order to protect minorities in defense and government industries from discrimination because of race, creed, color, or national origin.³⁰ President Roosevelt also established the Committee on Fair Employment Practices (FEPC) to monitor the order.³¹ Although not included in President Roosevelt's protections, women also joined the influx of minorities in the workplace with the government using the iconic "Rosie the Riveter" as inspiration for women to fill traditionally male jobs.³² When the war ended, however, the civil rights movement waned.³³ The government encouraged women to relinquish their jobs to the returning troops saying they "owed it to the boys."³⁴ Congress abolished the FEPC in 1946 and racial discrimination pervaded the workplace once again.³⁵

Public support for civil-rights gained significant momentum by 1963, and President Kennedy determined the time was ripe to propose major civil-rights legislation.³⁶ President Kennedy's death in November 1963 threatened to stall the

²⁸ John J. Donohue III, *Historical Background*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 2, 3 (John J. Donohue III ed., 1997).

²⁹ *Id.*

³⁰ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

³¹ Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943).

³² 1 KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 1.4 (1994). For a detailed discussion of Title VII's drafting and legislative history see Francis J. Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1965).

³³ SPRIGGS, *supra* note 32, at § 1.4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Norbert Schlei, *Foreword* to 1 BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, at vii, vii (2d ed. 1983). In May of 1963, the national press covered the campaign against segregation in Birmingham, Alabama. *Id.* For the first time "[t]he people of the United States saw on their television screens night after night . . . the seemingly senseless use . . . of police dogs, fire hoses and other indiscriminating weapons against apparently well-behaved demonstrators, many of them children, protesting discrimination." *Id.* Other major civil-rights protests occurred in 1963, including The March on Washington for Jobs and Freedom, where Martin Luther King, Jr. delivered his "I Have a Dream" speech. See Pre 1965: Events Leading to the Creation of EEOC, <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Nov. 10, 2007).

Civil Rights Act, but President Lyndon Johnson took up the cause.³⁷ Congress passed the Act in 1964 making it illegal, among other things, to discriminate in voting (Title I), public accommodations (Title II), and access to public facilities (Title III) because of color, race, creed, or sex.³⁸

Title VII, one of the most controversial sections of the Act, made it illegal to pay a different wage to employees based on their color, creed, race, or sex.³⁹ The statute provides protection from both disparate treatment and disparate impact, and aims to compensate wronged employees, remedy past unfair treatment and stop future workplace discrimination.⁴⁰ The statute set out to accomplish these goals by providing injunctive relief along with monetary compensation to wronged employees.⁴¹

President Johnson later reflected: “In the Civil Rights Act of 1964, we affirmed through law that *men* equal under God are also equal when they seek a job, when they go to get a meal in a restaurant, or when they seek lodging for the night in any State in the Union.”⁴² Today, more than forty years after the passage

³⁷ See Pre 1965: Events Leading to the Creation of EEOC, <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Nov. 10, 2007). Following President Kennedy’s death, President Johnson stated “[n]o eulogy could more eloquently honor President Kennedy’s memory than the earliest possible passage of the civil rights bill for which he fought so long.” *Id.*

³⁸ See Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et. seq. (2006). Congress added sex as a protected class the day it passed the Act. Claudia Golden, *Understanding the Gender Gap: An Economic History of American Women*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 326, 332 (John J. Donohue III ed., 1997). Enemies of the bill expected that adding sex as a protected class would stall the legislation. *Id.* The opposition believed persons supporting protection for African-Americans would not be as eager to extend protection to women. SPRIGGS, *supra* note 32, at § 1.8. The plan to stall passage of the Civil Rights Act of 1964 backfired, and the House passed the amendment without holding a hearing or considering testimonials respecting the inclusion of sex as a protected class. John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 380, 381 (John J. Donohue III ed., 1997). The Senate, likewise, made no objection and women quickly found themselves under Title VII protections. *Id.*

³⁹ See Schlei, *supra* note 36, at viii. Prior to Title VII, only the National Labor Relations Act (NLRA) and the Railway Labor Act provided relief from employment discrimination, but not on the bases of race, creed, color or sex. *Id.* The NLRA served as a template for Title VII’s remedial provisions. *Id.*

⁴⁰ See 42 U.S.C. § 2000e-2(a)(1) (proscribing disparate treatment); § 2000e-2(a)(2) (proscribing disparate impact); See also *Teamsters v. United States*, 431 U.S. 324, 348 (1977) (explaining the primary purpose of Title VII is to assure equality of employment and elimination of discrimination); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (“It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”).

⁴¹ See *Albermarle*, 422 U.S. at 417-18 (explaining that injunctive relief together with the prospect of a back pay award prompts employers to eliminate discriminatory practices).

⁴² JOHN T. WOOLLEY & GERHARD PETERS, *Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Act*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=28799/> (last visited Nov. 18, 2007) (emphasis added). Although the Act included women under its umbrella of protection, President Johnson tellingly referred to men as the beneficiaries of the new law. See *id.*

of the Act, women still earn less than men in almost every profession, at every age and for every hour worked.⁴³ The outlook is particularly stark in Wyoming where the female-male earnings ratio ranks as the worst in the nation.⁴⁴ Women in Wyoming earn lower than national average wages and men earn higher than average pay.⁴⁵

The Equal Employment Opportunity Commission and Title VII Amendments

The Civil Rights Act of 1964 created the EEOC to enforce Title VII's workplace discrimination measures.⁴⁶ By providing an agency that attempts to obtain a remedy before a party resorts to litigation, the EEOC promotes voluntary compliance with employment discrimination law.⁴⁷ As a compromise to getting the bill passed, the EEOC did not originally have enforcement powers.⁴⁸ As a result, many civil rights activists viewed the EEOC as a "toothless tiger."⁴⁹ In 1971 Congress held hearings on proposed amendments to Title VII finding workplace discrimination as widespread as ever, despite the best efforts of the EEOC.⁵⁰ Accordingly, Congress passed the Equal Opportunity Employment Act (EOEA) of 1972 to provide the Commission with the authority to litigate discriminatory

⁴³ Daniel H. Weinberg, U.S. DEP'T OF COMMERCE, CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 7 (2004).

⁴⁴ HEIDI HARTMANN, OLGA SOROKINA & ERICA WILLIAMS, INST. FOR WOMEN'S POLICY RESEARCH, BRIEFING PAPER R334, THE BEST AND THE WORST STATE ECONOMIES FOR WOMEN 9 (2006), http://www.iwpr.org/pdf/R334_BWStateEconomies2006.pdf. In 2006 women in Wyoming made 60.7% of what men earned. *Id.*

⁴⁵ ANN M. ALEXANDER ET AL., WYO. COUNSEL FOR WOMEN'S ISSUES, STATE OF WYO., A STUDY OF THE DISPARITY IN WAGES AND BENEFITS BETWEEN MEN AND WOMEN IN WYOMING 5 (2003), http://www.wyomingwomenscouncil.org/_pop-up_content/wage_disparity_intro.pdf. Although no agreement exists as to the cause of the gender wage gap, most scholars believe wage discrimination contributes to the disparity. See Michael Selmi, *Family Leave & the Gender Wage Gap*, 78 N.C. L. REV. 707, 715 (2000).

⁴⁶ See Pre 1965: Events Leading to the Creation of EEOC, <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Nov. 10, 2007).

⁴⁷ See *Miller v. Int'l. Tel. & Telegraph, Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (explaining tolling applies for one year while the EEOC attempts to obtain voluntary compliance); *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) (describing Congress's intent to encourage employers to voluntarily comply with Title VII).

⁴⁸ See Pre 1965: Events Leading to the Creation of EEOC, <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Nov. 10, 2007).

⁴⁹ See 1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public, <http://www.eeoc.gov/abouteeoc/35th/1965-71/index.html> (last visited Nov. 10, 2007).

⁵⁰ See The 1970s: The "Toothless Tiger" Gets Its Teeth—A New Era of Enforcement, <http://www.eeoc.gov/abouteeoc/35th/1970s/index.html> (last visited Nov. 10, 2007).

claims.⁵¹ The EOEAA also expanded Title VII protections to employees of most educational institutions and federal, state and local governments.⁵²

The next major change to Title VII did not occur until 1991.⁵³ In July of 1989, in a series of limiting decisions dubbed the “July 1989 Massacre,” the United States Supreme Court severely reduced Title VII’s powers.⁵⁴ In response Congress passed the Civil Rights Act of 1991.⁵⁵

With the 1991 amendment Congress overturned several cases including *Lorance v. AT&T Technologies*, a Title VII case dealing with seniority systems.⁵⁶ In *Lorance*, the Supreme Court ruled employees could not challenge facially neutral seniority systems that had discriminatory effects outside the 180-day EEOC filing period.⁵⁷ The 1991 amendment added language to Title VII allowing challenges to discriminatory seniority systems both when adopted by the company and when employees feel the discriminatory effects of the system.⁵⁸

⁵¹ 42 U.S.C. § 2000e-5(a)-(g) (2006) (giving the Commission the power to bring a suit on behalf of employees suffering discrimination).

⁵² *Id.* at § 2000e-16 (protecting employees of the federal government and governmental agencies from workplace discrimination).

⁵³ Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

⁵⁴ *See* *Wards Cove Paving Co. v. Atonio*, 490 U.S. 642, 653 (1989) (holding racial imbalance in one segment of the workplace did not evidence disparate impact); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 (1989) (holding a defendant could avoid liability by showing he would have made the same decision in the absence of discrimination); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 177 (1989) (holding the conditions of an employee benefit plan are exempt from the Age Discrimination in Employment Act if they are not used to discriminate in other non-fringe-benefit aspects); *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989) (holding that 42 U.S.C. § 1981, which gives persons of all races the same rights when entering into private contracts, does not apply to racial harassment relating to conditions of employment after contract formation); *Lorance v. AT&T Technologies*, 490 U.S. 900, 909 (1989) (holding the Title VII statute of limitations begins at the adoption of a seniority system, not when its effects are felt); *Martin v. Wilks*, 490 U.S. 755, 769 (1989) (reversing the trial court’s dismissal of white firefighters’ reverse discrimination claims on res judicata grounds). All preceding cases *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

⁵⁵ Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. (2006).

⁵⁶ *See* Civil Rights Act of 1991, § 112, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)) (making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system).

⁵⁷ *Lorance*, 490 U.S. at 906, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

⁵⁸ *See* 42 U.S.C. § 2000e-5(e)(2) (2006) (making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system).

Title VII Procedural Requirements

Title VII does not pave a wide and easy road leading to an economic windfall for those victimized by workplace discrimination.⁵⁹ If a complainant does not meet Title VII's procedural requirements, he or she cannot bring an otherwise legitimate claim.⁶⁰ For instance, an employee must file a claim with the EEOC before suing an employer.⁶¹ Once investigated, the EEOC may choose to file suit on behalf of the complainant.⁶² If it does not, the EEOC issues a "right to sue" letter to the complainant within 90 days.⁶³ Upon receiving the right to sue letter, the complainant can sue the employer in a civil court.⁶⁴ Requiring a complainant to exhaust his or her administrative remedies in this way allows the EEOC to encourage willing resolution through negotiation.⁶⁵

Additionally, a statute of limitations applies to Title VII cases.⁶⁶ Urging employees to take quick action protects the balance of interests between Title VII protected groups and their employers.⁶⁷ Imposing time limits on bringing certain claims embodies a general notion that failing to notify a party of a pending claim against them is fundamentally unfair.⁶⁸ The relatively short limitations period of

⁵⁹ See *Ledbetter II*, 127 S. Ct. at 2166 (explaining the procedural requirements of Title VII).

⁶⁰ See, e.g., *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) ("A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within . . . 180 . . . days of the date of the act or lose the ability to recover for it."); *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980) (holding the statute of limitations barred complainant's claim because he did not challenge denial of tenure, but instead challenged actual termination occurring a year later); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) (holding no claim existed alleging current discrimination where prior unchallenged termination affected current seniority level).

⁶¹ 42 U.S.C. § 2000(e)-5(e)(1) (2006).

⁶² 42 U.S.C. § 2000e-5(f)(1) (2006).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Miller*, 755 F.2d at 26 ("The purpose of the notice provision, which is to encourage settlement of discrimination disputes through conciliation and voluntary compliance, would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.").

⁶⁶ 42 U.S.C. § 2000(e)-5(e)(1) (2006) (requiring filing of a discrimination charge with the EEOC within 180 days of the "unlawful employment practice," or if the complainant files the charge with a state or local agency with authority to grant or seek relief from such practices, within 300 days of the "unlawful employment practice"). *Id.* Lilly Ledbetter lived and worked in Alabama, where there is no state or local agency with the authority to grant relief, therefore the author will assume a 180-day charging period for the purposes of this article. See *Ledbetter I*, 421 F.3d at 1178.

⁶⁷ See *Ledbetter II*, 127 S. Ct. at 2170.

⁶⁸ *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'") (quoting *R.R. Tel. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).

180-days reflects Congress's preference for the quick resolution of employment discrimination claims through voluntary resolution and negotiation.⁶⁹

Even with this congressional preference, courts have applied broad, flexible interpretations to many Title VII procedural limitations in the past.⁷⁰ Courts have generally been lenient when interpreting Title VII procedural requirements because lay-people, rather than trained attorneys, usually initiate proceedings.⁷¹ In *Love v. Pullman*, a black "porter-in-charge" alleged that those in his position performed substantially the same work as conductors, most of whom were white, for less pay.⁷² At trial the dispute centered on whether statutory requirements barred Love's claim since he did not file a second formal charge with the EEOC once the state commission formally discharged his claim.⁷³ The United States Supreme Court refused to require Love to file a second formal complaint, reasoning that the procedure followed fully complied with the intent and purposes of Title VII.⁷⁴ Concerned with the ability of employees to challenge discriminatory acts, the Supreme Court has also held that statutes of limitation "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes."⁷⁵

Despite the Court's flexible interpretation of Title VII's procedural requirements, failure to file a claim within 180-days of the unlawful employment

⁶⁹ See *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.").

⁷⁰ Jeffery M. Fisher, Note, *In the Wake of Lorraine v. AT&T Technologies, Inc.: Interpreting Title VII's Statute of Limitations for Facially Neutral Seniority Systems*, 1990 U. ILL. L. REV. 711, 712-13 (1990) (discussing Title VII policies of exposing discrimination, allowing laymen to vindicate their rights and eliminating inequity).

⁷¹ See *Egelson v. State Univ. Coll.*, 535 F.2d 752, 754 (2d Cir. 1976)

Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act.

See also *Love v. Pullman*, 404 U.S. 522, 526-27 (1972) (describing actions which create additional procedural technicalities and nothing else as "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process").

⁷² *Love*, 404 U.S. at 523. Love first filed a charge with the Colorado Civil Rights Commission, but the claim was terminated without a satisfactory conclusion. *Id.* Love then filed a "letter of inquiry" with the EEOC, and the EEOC orally informed the Colorado Commission that it had received the complaint. *Id.* at 524. The Colorado Commission waived the option to take further action and the EEOC filed suit on Love's behalf. *Id.*

⁷³ *Id.* at 524.

⁷⁴ *Id.* at 526-27.

⁷⁵ *Ricks*, 449 U.S. at 262 n.16.

practice has proven fatal to many employment discrimination claims.⁷⁶ Most Title VII discrimination claims hinge on two questions: 1) What is the unlawful employment practice complained of? and 2) Did the employee file a claim with the EEOC within 180-days of that act?⁷⁷

Cases Defining an “Unlawful Employment Practice”

After the passage of Title VII the Court struggled to define what constituted an “unlawful employment practice” and when those practices occurred.⁷⁸ Starting with *United Airlines v. Evans* the Court made it clear that an unlawful employment practice occurred on the date of communication, and other later effects of that decision or act could not be challenged outside the 180-day filing period.⁷⁹ Several subsequent cases followed the *Evans* Court in refusing to recognize the effects of a discriminatory act as actionable.⁸⁰

Starting with *United Airlines v. Evans*, the Supreme Court began to identify the specific employment acts at issue to determine when the Title VII filing period started to run.⁸¹ In 1968, United Airlines (United) forced Carolyn Evans to resign because it refused to employ married flight attendants.⁸² Despite her termination, Evans failed to file an EEOC charge within the requisite filing period.⁸³ United later rehired Evans, but calculated her seniority level using her new hire date, rather than her original hire date.⁸⁴ Evans sued United alleging that the company’s refusal to give her credit for prior service gave current effect to past illegal acts and carried on the effects of unlawful discrimination.⁸⁵ While the Supreme Court agreed that the airline’s actions continued to impact her pay, it determined no present violation existed.⁸⁶ United was free to treat the past act as lawful once the time for Evans to dispute the act had expired.⁸⁷ She could not sue based on

⁷⁶ See *Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance*, 490 U.S. at 912, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

⁷⁷ *Ledbetter II*, 127 S. Ct. 2179.

⁷⁸ See *infra* notes 79-131 and accompanying text.

⁷⁹ See *Evans*, 431 U.S. at 558.

⁸⁰ *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance*, 490 U.S. at 912, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

⁸¹ *Evans*, 431 U.S. at 558.

⁸² *Id.* at 554.

⁸³ *Id.* at 554-55. At the time of Evans’s suit the statute allowed 90 days from the unlawful employment act to file a claim. *Id.* at 558.

⁸⁴ *Id.* at 555.

⁸⁵ *Id.* at 557.

⁸⁶ *Evans*, 431 U.S. at 558.

⁸⁷ *Id.*

the effects of a previous unlawful act.⁸⁸ Evans could object to her termination immediately following its occurrence, but she could not attack effects of the termination later.⁸⁹

The Supreme Court considered the firing of an employee for discriminatory reasons again in *Delaware State College v. Ricks*, and reached a similar conclusion.⁹⁰ In *Ricks*, Delaware State College denied tenure to a black Liberian professor.⁹¹ The college did not terminate Ricks immediately, but gave him a final one-year contract.⁹² The Court held that the EEOC charging period ran from “the time the tenure decision was made and communicated,” not from the time of his actual termination.⁹³

The Court again held the effects of a discriminatory act not independently actionable in *Lorance v. AT&T Technologies, Inc.*⁹⁴ In *Lorance*, the dispute arose out of AT&T’s changes to seniority systems under a collective bargaining agreement.⁹⁵ Before the collective bargaining agreement, AT&T based its seniority simply on the number of years an employee worked for the company in any position.⁹⁶ The new agreement based seniority on the time an employee spent in the “tester” position alone, rather than time the employee spent with the company overall.⁹⁷ Female testers did not feel the full effect of this change until several years later when AT&T made lay-off decisions.⁹⁸ At that point, AT&T laid-off many female testers, who had long service records with the company, but did not work as testers during their entire tenure.⁹⁹ On the other hand, AT&T retained many men who had more seniority in the tester position, but less seniority than the female testers

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Ricks*, 449 U.S. at 254.

⁹¹ *Id.* at 252.

⁹² *Ricks*, 449 U.S. at 252-53. Ricks neglected to file an EEOC charge alleging a discriminatory tenure decision until just before the one-year contract expired. *Id.* at 252. Ricks argued that the EEOC filing period ran from the date of his actual termination, not from the decision to deny tenure. *Id.* The Supreme Court disagreed and stated that the decision to deny tenure constituted the actual unlawful employment act even though actual termination, one of the effects of the decision, did not occur until later. *Id.* at 253.

⁹³ *Id.* at 258.

⁹⁴ *Lorance*, 490 U.S. at 912, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

⁹⁵ *Id.* at 901-02.

⁹⁶ *Id.*

⁹⁷ *Id.* Male employees traditionally filled the highly skilled position of “tester.” *Id.* at 902-03.

⁹⁸ *Id.* at 902.

⁹⁹ *Lorance*, 490 U.S. at 902-03, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

overall.¹⁰⁰ When the female employees filed charges with the EEOC, the Supreme Court held that time barred the suits because the discrete act of adopting the new seniority system occurred more than 180-days before the women filed their EEOC charges.¹⁰¹ Their firing was merely an effect of the discrete action and therefore not actionable on its own.¹⁰²

In a recent decision, *National Railroad Passenger Corp. v. Morgan*, the Supreme Court differentiated between discrete acts of discrimination and acts that make up a pattern or practice of discrimination in the workplace.¹⁰³ *Morgan*, a black employee, sued Amtrak alleging that the company had wrongfully suspended him, denied training, falsely accused him of threatening a manager and subjected him to a hostile work environment.¹⁰⁴ In its decision, the *Morgan* Court separated discriminatory acts into two categories.¹⁰⁵ First, an act could consist of a series of events, none of which represent a claim on their own, but together amount to an “unlawful employment practice.”¹⁰⁶ For these types of actions a complainant could reach outside of the 180-day filing period to prove discriminatory intent as long as at least one of the acts occurred within the 180-day period.¹⁰⁷ Second, an act could be a distinct, one-time occurrence such as a hiring, firing, or promotion.¹⁰⁸ A complainant could challenge these acts independently, and must file a claim within 180-days of the occurrence of this type of act.¹⁰⁹ In *Morgan*’s case, the Court held the complainant could only challenge the discrete discriminatory acts occurring within the filing period.¹¹⁰ Time barred an individual claim for all other discrete, easily identifiable acts, but they could serve as evidence to support *Morgan*’s hostile work environment claim.¹¹¹

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 906.

¹⁰² *Id.* The Civil Rights Act of 1991 supersedes the *Lorance* decision by making an intentionally discriminatory seniority system unlawful, even if neutral on its face, when the system is adopted, when an individual becomes subject to the system, or when an individual is injured by application of the system. Civil Rights Act of 1991, § 112, 105 Stat. 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)).

¹⁰³ *Morgan*, 536 U.S. at 105.

¹⁰⁴ *Id.* at 115.

¹⁰⁵ *Id.* at 111-15.

¹⁰⁶ *Id.* at 115-16.

¹⁰⁷ *Id.* A hostile work environment is an example of such an employment practice. *See id.* at 105.

¹⁰⁸ *Morgan*, 536 U.S. at 111-13.

¹⁰⁹ *Id.* at 111-13. The Court stressed the need to identify the exact employment practice at issue to determine which category to apply. *Id.* at 110-11.

¹¹⁰ *Id.* at 114.

¹¹¹ *Id.* at 115. As for *Morgan*’s claim, the Court held evidence from outside the filing period can help determine liability, as long as at least one act contributing to the claim occurred within the specified period. *Id.* at 117. The Court ultimately remanded the case for a determination of Amtrak’s liability. *Id.* at 122.

These four cases clearly illustrate that an employee must challenge a discrete discriminatory act within the prescribed filing period.¹¹² None of these cases, however, dealt with Lilly Ledbetter's problem, that of discriminatory paychecks.¹¹³

The "Paycheck Accrual Rule"

Before *Ledbetter v. Goodyear*, the only Supreme Court decision dealing with discriminatory paychecks was *Bazemore v. Friday*.¹¹⁴ In that case, African-American employees of the North Carolina Agricultural Extension Service (the Extension Service), a federal agency, brought suit against the United States.¹¹⁵ The Extension Service historically separated its employees into a "white branch" and a "negro branch," with the "negro branch" receiving less pay.¹¹⁶ In 1965, the Extension Service merged the two branches, but did not adjust the wages to compensate for the previous differences.¹¹⁷ Since the Civil Rights Act of 1964 did not extend its protections to federal government employees, the Extension Service did not violate federal law by allowing the disparities to continue.¹¹⁸ When the 1972 amendment to Title VII made discrimination by the federal government actionable, African-American employees of the Extension Service filed suit.¹¹⁹

The Supreme Court found the merging of the two branches in 1965 did not eliminate the difference in salaries.¹²⁰ The Court reasoned while the discriminatory pay scale was not unlawful at the time of the merging in 1965, it perpetuated discrimination by the Extension Service from 1972 onward.¹²¹ While the African American employees could not recover back pay for the time that Title VII did not prohibit such discriminatory pay scales, they could recover for post-1972 disparate pay.¹²² The practice of keeping two pay scales would have been a violation of Title VII had the statute applied to the Extension Service in 1964; therefore, once the Extension Service came under Title VII protections, the dual pay scale system

¹¹² See *supra*, notes 78-111 and accompanying text.

¹¹³ See *Ledbetter II*, 127 S. Ct. at 2172 (explaining Ledbetter's argument that her case is not governed by the *Evans*, *Ricks*, *Lorance*, and *Morgan* line of cases, but rather by *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*) a case dealing specifically with disparate pay).

¹¹⁴ See *Bazemore*, 478 U.S. at 394 (Brennan, J., concurring). Justice Brennan wrote a concurrence which all other members of the Court joined. *Id.* at 389.

¹¹⁵ *Id.* at 391 (Brennan, J., concurring).

¹¹⁶ *Id.* at 390 (Brennan, J., concurring).

¹¹⁷ *Id.* at 390-91 (Brennan, J., concurring).

¹¹⁸ See Spriggs, *supra* note 32, at § 1.8.

¹¹⁹ *Bazemore*, 478 U.S. at 390 (Brennan, J., concurring).

¹²⁰ *Id.* at 395 (Brennan, J., concurring).

¹²¹ *Id.* (Brennan, J., concurring).

¹²² *Id.* (Brennan, J., concurring).

became unlawful.¹²³ To the degree the Extension Service issued discriminatory paychecks under that system, it owed employees compensatory back pay.¹²⁴

The Extension Service hired new employees at equal salaries after the 1965 merger; however, some of these employees alleged discriminatory pay stemming from individual pay decisions, not from the two-branch system.¹²⁵ The Court concluded that the Extension Service had an obligation to remedy any racially motivated pay disparities present after 1972, whether stemming from a facially discriminatory pay scale or from individual discriminatory decisions.¹²⁶ The Court maintained that each time the Extension Service paid a black man less than a similarly situated white man it violated Title VII, regardless of whether the Extension Service acted legally when discriminating in the first instance.¹²⁷

Since the 1985 *Bazemore* opinion, the majority of circuits followed Justice Brennan's "paycheck accrual rule."¹²⁸ This rule states that each paycheck constitutes a separate employment practice and with each issuance of a paycheck a separate filing period begins to run, during which the employee has 180-days to challenge the discriminatory paycheck.¹²⁹ The EEOC, too, interpreted the Act as allowing employees to challenge disparate pay each time an employer issues a paycheck.¹³⁰ It is against the background of these five cases that Lilly Ledbetter brought her discriminatory pay claim against Goodyear.

¹²³ *Id.* (Brennan, J., concurring).

¹²⁴ *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring).

¹²⁵ *Id.* at 397 n.8 (noting these "two distinct types of salary claims") (Brennan, J., concurring).

¹²⁶ *Id.* (Brennan, J., concurring).

¹²⁷ *Id.* at 395-96 (Brennan, J., concurring) ("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.").

¹²⁸ See, e.g., *Cardenas*, 269 F.3d at 258 (Third Circuit holding that "in a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation"); *Ashley*, 66 F.3d at 168, *abrogated on other grounds by* *Madison v. IBP, Inc.*, 330 F.3d 1051 (8th Cir. 2003) (Eighth Circuit holding that "Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge"); *Brinkley-Obu*, 36 F.3d at 346 (Fourth Circuit holding that "paychecks are to be considered continuing violations of the law when they evidence discriminatory wages"); *Calloway*, 986 F.2d at 446 (Eleventh Circuit holding that "contrary to Partners' assertions, Calloway's wage claim is not a single violation with a continuing effect . . . When the claim is one for discriminatory wages the violation exists every single day the employee works"); *Gibbs*, 785 F.2d at 1400 (Ninth Circuit holding that "the policy of paying lower wages . . . on each payday constitutes a continuing violation") (internal quotation marks omitted); *Hall*, 669 F.2d at 398 (Sixth Circuit holding the "the discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received.").

¹²⁹ See *Bazemore*, 478 U.S. at 395-96 (Brennan, J., concurring).

¹³⁰ 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, n.183 (2006) ("[R]epeated occurrences of the same discriminatory employment action, such as a discriminatory paycheck, can be challenged as long as one discriminatory act occurred within the charge filing period.").

PRINCIPAL CASE

At the end of her nineteen year career, Lilly Ledbetter learned Goodyear consistently paid her less than her male counterparts.¹³¹ After confirming this information, Ledbetter filed an EEOC questionnaire alleging sex discrimination.¹³² Title VII of the Civil Rights Act requires that a complainant file such a charge within 180-days of the unlawful employment practice.¹³³ At trial, Ledbetter alleged that each discriminatory paycheck Goodyear issued constituted an unlawful employment act and that she received several paychecks in the 180-days before filing her EEOC charge.¹³⁴ The trial court agreed, and awarded Ledbetter a back pay and punitive damages award.¹³⁵ Goodyear appealed, arguing paychecks constituted merely a discriminatory effect and could not be challenged on their own.¹³⁶ The United States Court of Appeals for the Eleventh Circuit agreed with Goodyear and reversed the trial court's decision.¹³⁷ Ledbetter appealed to the United States Supreme Court.¹³⁸

The Majority Opinion

The majority agreed with the Eleventh Circuit ruling that Ledbetter's paychecks simply represented effects of past discriminatory decisions.¹³⁹ According to the Supreme Court, the actual pay-setting decisions constituted the discriminatory act.¹⁴⁰ Two pay-setting decisions occurred within 180-days of Ledbetter's EEOC claim; however, no evidence supported discriminatory intent behind those two acts.¹⁴¹ As a result Ledbetter could not prevail on her discriminatory pay claim.¹⁴²

The Effects of Discrete Acts Are Not Actionable

The *Ledbetter* Court relied on the *Evans*, *Ricks*, *Lorance* and *Morgan* series of Title VII decisions to support the holding that the time for filing a charge with

¹³¹ *Ledbetter I*, 421 F.3d at 1174.

¹³² *Ledbetter II*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting).

¹³³ 42 U.S.C. § 2000(e)-5(e)(1) (2006).

¹³⁴ *Ledbetter I*, 421 F.3d at 1181.

¹³⁵ *Id.* at 1175-76.

¹³⁶ *Id.* at 1181.

¹³⁷ *Id.* at 1181-84.

¹³⁸ *See Ledbetter II*, 127 S. Ct. at 2165.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2167.

¹⁴¹ *See id.* at 2166.

¹⁴² *See id.* at 2172.

the EEOC begins when the “unlawful employment practice” occurs.¹⁴³ Ledbetter urged the Court to view each issuance of a paycheck paying her less than similarly situated males as the exact employment practice at issue.¹⁴⁴ The Court rejected this argument stating a paycheck represents merely an effect of a specific employment practice and is not actionable on its own.¹⁴⁵

The Court viewed Ledbetter’s depressed paychecks as merely effects of past unlawful pay setting decisions.¹⁴⁶ Because Ledbetter did not challenge the actual pay decisions within 180-days, the discriminatory decision to pay her less than her male counterparts was “an unfortunate event in history which ha[d] no present legal consequences.”¹⁴⁷

Applying *Delaware State College v. Ricks*, the Court reasoned Ledbetter could have disputed the decisions to pay her less than her male counterparts, but not the paychecks implementing those decisions.¹⁴⁸ Because Ledbetter failed to identify any specific discriminatory act persisted until, or took place at the time of, her resignation, time barred her Title VII claim.¹⁴⁹

The *Ledbetter* Court relied on the same analysis that instructed its decision in *Lorance v. AT&T Technologies, Inc.*¹⁵⁰ The *Lorance* Court saw the termination of female employees as an effect of adopting a facially neutral seniority system.¹⁵¹ As in *Evans* and *Ricks*, the *Lorance* Court held that the time to challenge a discriminatory act started at the moment of the alleged discrimination, not when employees felt the effects of that discrimination.¹⁵² Like the female AT&T employees, suffering termination more than 180-days after adoption of a discriminatory seniority

¹⁴³ See *Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 254; *Morgan*, 536 U.S. at 110; *Lorance*, 490 U.S. at 912, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

¹⁴⁴ *Ledbetter II*, 127 S. Ct. at 2167.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Ledbetter II*, 127 S. Ct. at 2168 (quoting *United Airlines v. Evans*, 431 U.S. 553, 558 (1977)). The Court went on to state “[i]t would be difficult to speak to the point more directly” than the *Evans* decision. *Ledbetter II*, 127 S. Ct. at 2168.

¹⁴⁸ See *Ledbetter II*, 127 S. Ct. at 2168. *Ricks* challenged his actual termination, which occurred more than 180-days after the College’s denial of tenure. *Ricks*, 449 U.S. at 254. The Court denied his claim because he failed to name an employment act that “continued until, or occurred at the time of, the actual termination of his employment.” *Id.* at 257.

¹⁴⁹ See *Ledbetter II*, 127 S. Ct. at 2168.

¹⁵⁰ *Id.*; *Lorance*, 490 U.S. at 912, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq. The female AT&T employees did not challenge the new seniority system within the specified filing period, nor did they allege the company adopted a facially discriminatory system or applied the system in a discriminatory way. *Id.* at 907-08.

¹⁵¹ *Lorance*. 409 U.S. at 907-08.

¹⁵² *Id.* at 912.

system, Ledbetter could not challenge the paychecks issued more than 180-days after the decisions to pay her less.¹⁵³

Finally, the Court referenced *National Railroad Passenger Corp. v. Morgan* to define the phrase “employment practice” as one that generally refers to “a discrete act or single ‘occurrence’” that takes place at a particular point in time.¹⁵⁴ Termination, failure to promote, denial of transfer, and refusal to hire qualify as such discrete acts.¹⁵⁵ The Court used *Morgan* to support its decision that the acts Ledbetter complained of must occur within the 180-day charge filing period.¹⁵⁶

The *Evans*, *Ricks*, *Lorance* and *Morgan* line of cases led the Court to decide that a new infraction, with a fresh filing period, does not occur when non-discriminatory actions carry out past discriminatory acts.¹⁵⁷ For example, the issuance of a depressed paycheck is not a new violation simply because it gives effect to a past discriminatory decision.¹⁵⁸ Since Ledbetter argued that Goodyear’s issuance of depressed paychecks gave present effect to discriminatory acts outside the 180-day filing period, but made no claim that intentionally discriminatory conduct occurred within the filing period, she could not maintain her claim.¹⁵⁹

The “Paycheck Accrual Rule” Does Not Apply

The *Ledbetter* Court declined to follow *Bazemore v. Friday* while not specifically overruling it.¹⁶⁰ The Court explained that Ledbetter interpreted Justice Brennan’s decision in *Bazemore* too broadly.¹⁶¹ According to the Court, the “paycheck accrual rule” applied only to situations involving facially discriminatory wage practices.¹⁶² Because Ledbetter did not prove, or even assert, a facially discriminatory pay system, the Court held *Bazemore* did not apply to her case.¹⁶³ Since Goodyear’s pay system did not assign some employees to a lower scale based on their gender, Goodyear did not engage in intentional discrimination each time it delivered a depressed paycheck.¹⁶⁴ Ledbetter’s paychecks were merely an *effect* of

¹⁵³ See *Ledbetter II*, 127 S. Ct. at 2168.

¹⁵⁴ *Id.* at 2169 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-11 (2002)).

¹⁵⁵ *Ledbetter II*, 127 S. Ct. at 2169.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Ledbetter II*, 127 S. Ct. at 2169.

¹⁵⁹ *Id.* (“Ledbetter should have filed an EEOC charge within 180-days after each allegedly discriminatory pay decision was made and communicated to her.”).

¹⁶⁰ *Id.* at 2167, 2173-74.

¹⁶¹ *Id.* at 2173.

¹⁶² *Id.*

¹⁶³ *Ledbetter II*, 127 S. Ct. at 2174.

¹⁶⁴ *Id.* at 2173.

the discriminatory pay raise decisions by her supervisors.¹⁶⁵ The Court determined the paychecks do not stand alone; Ledbetter could dispute only the pay decisions themselves.¹⁶⁶ Because Goodyear made the individual decisions to pay Ledbetter a lower wage based on her gender before the 180-day charging period, the statute of limitations barred review of these decisions under Title VII.¹⁶⁷

The Dissent

The dissenting opinion, written by Justice Ginsburg and joined by Justices Souter, Breyer and Stevens, argued that pay disparities have a closer kinship to situations where the cumulative effect of discriminatory behavior comprises the “unlawful employment practice,” like hostile work environment claims.¹⁶⁸ In contrast to the hiring or firing of an employee, pay discrimination does not generally appear as a fully communicated, discrete act.¹⁶⁹ Pay disparities often occur in small increments which are either not actionable on their own, or not worth the time, hassle, or prospect of retaliation.¹⁷⁰ Only when these small disparities compound over time, does an employee realize her situation and find it worthwhile to complain.¹⁷¹

The *Ledbetter* dissent explained that pay disparities differ from the termination and failure to promote actions of *Evans*, *Ricks* and *Morgan*.¹⁷² Employees can easily identify terminations, promotions and demotions as potentially discriminatory practices.¹⁷³ An employer communicates these types of “discrete acts” directly to the employee and such decisions become common knowledge among other employees.¹⁷⁴ An employee must challenge these decisions within 180-days and the effects of these decisions are not actionable on their own.¹⁷⁵

¹⁶⁵ *Id.* at 2169.

¹⁶⁶ *Id.* at 2174.

¹⁶⁷ *Id.* Two pay setting decisions did occur during the 180-day charging period. *Id.* at 2166. Ledbetter did not present evidence showing these decisions as discriminatory, but rather argued that the decisions were actionable because they gave effect to previous unlawful decisions. *Id.* at 2167. The Court summarily rejected this argument as challenging an effect of an employment practice, not an actual act. *Id.*

¹⁶⁸ *Ledbetter II*, 127 S. Ct. at 2178-79 (Ginsburg J., dissenting).

¹⁶⁹ *Id.* at 2179 (Ginsburg, J., dissenting).

¹⁷⁰ *Id.* (Ginsburg, J., dissenting).

¹⁷¹ *Id.* at 2179 (Ginsburg, J., dissenting). Goodyear’s pay system based pay raises on a percentage of the employee’s current salary; therefore each of Ledbetter’s pay decisions reaffirmed her unlawfully low base salary. *Id.* (Ginsburg, J., dissenting).

¹⁷² *Id.* at 2182 (Ginsburg, J., dissenting).

¹⁷³ *Ledbetter II*, 127 S. Ct. at 2182. (Ginsburg, J., dissenting).

¹⁷⁴ *Id.* at 2181. (Ginsburg, J., dissenting).

¹⁷⁵ *Id.* at 2169.

The dissent argued challenges to discriminatory pay, however, are different and deserve individual treatment.¹⁷⁶ A discriminatory pay decision often appears as good news, perhaps as a raise.¹⁷⁷ Employers frequently refuse to disseminate salary information and employees often keep their earnings confidential.¹⁷⁸ Once an employee suspects discrimination the discrepancy may seem too small to dispute or the employer's intent too ambiguous to prove.¹⁷⁹ Like a hostile work environment, where many events make up one discriminatory employment practice, each paycheck Goodyear issued aggravated Lilly Ledbetter's injury.¹⁸⁰

ANALYSIS

This analysis section begins by exploring the Court's decision in light of the realities of the workplace.¹⁸¹ Next, it discusses the Court's misapplication of *United Airlines v. Evans* and subsequent cases centering on discrete employment acts.¹⁸² Third, the analysis discusses the effect of the *Ledbetter* decision on bringing claims in the future.¹⁸³ Finally, the analysis argues that Congress must declare the receipt of each paycheck an actionable employment practice and lengthen the 180-day filing period.¹⁸⁴

The Court's Decision Ignores the Realities of Pay Discrimination

The Court's ruling plainly ignores the realities of the workplace.¹⁸⁵ Employees do not identify pay disparities immediately.¹⁸⁶ Employers frequently encourage

¹⁷⁶ *Id.* at 2179 (Ginsburg, J., dissenting).

¹⁷⁷ *Id.* (Ginsburg, J., dissenting).

¹⁷⁸ *Ledbetter II*, 127 S. Ct. at 2181-82 (Ginsburg, J., dissenting).

¹⁷⁹ *Id.* at 2182 (Ginsburg, J., dissenting).

¹⁸⁰ *Id.* at 2181 (Ginsburg, J., dissenting).

¹⁸¹ *See infra* notes 185-204 and accompanying text for a discussion of obstacles in perceiving and reporting discrimination in the workplace.

¹⁸² *See infra* notes 205-220 and accompanying text.

¹⁸³ *See infra* notes 221-237 and accompanying text for a discussion of a discovery rule and equitable tolling.

¹⁸⁴ *See infra* notes 268-285 and accompanying text. At the outset, it is important to observe that this note references female employees because *Ledbetter*'s case dealt with gender discrimination. However, the Supreme Court's "cramped" reading of Title VII in *Ledbetter* affects the ability of other protected classes to maintain similar actions. *Ledbetter II*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting). The Court's decision arguably impacts women less than those experiencing discrimination because of race, creed, color or national origin. *Id.* at 2186 (Ginsburg, J., dissenting). No specific legislation, such as the Equal Pay Act, protects these other classes from disparate pay. *Id.* (Ginsburg, J., dissenting).

¹⁸⁵ *Ledbetter II*, 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting).

¹⁸⁶ *Id.* at 2179 (Ginsburg, J., dissenting).

workers not to discuss salaries with other employees.¹⁸⁷ Even if an employer does not discourage discussing pay, social etiquette often keeps workers from sharing salaries with one another.¹⁸⁸ Because of this, those suffering from wage discrimination often only learn of the disparity when a colleague informs them or by some other accident.¹⁸⁹ When a company fires, demotes or refuses to promote an employee, she can seek explanation from the employer.¹⁹⁰ Pay discrimination, however, rarely comes with an explanation, comparative information or other recognizable sign of prejudice.¹⁹¹

The *Ledbetter* Court also disregarded how victims perceive and react to real-life discrimination.¹⁹² Those who suffer disparate treatment often do not immediately identify discrimination as the cause.¹⁹³ Even if an employee recognizes discrimination for what it is, this does not mean she will immediately file an EEOC charge.¹⁹⁴ Employees often fear retaliation, whether legal or illegal, from their employers.¹⁹⁵ Complaining employees may worry about a reputation as a troublemaker or “squeaky wheel.”¹⁹⁶ Unwillingness to disrupt the workplace or to compromise her own position may lead an employee to tolerate a pay disparity even after she has learned of her employer’s discrimination.¹⁹⁷

¹⁸⁷ See Leonard Bierman, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004) (explaining one-third of United States private employers have adopted specific pay secrecy policies even though such policies directly conflict with the law).

¹⁸⁸ See Abby Ellin, *Want To Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, § 3, at 9.

¹⁸⁹ See, e.g., *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (describing a situation where complainant did not know what other employees earned until a printout of employee salaries appeared on her desk, showing that her starting wage was lower than that of her co-workers).

¹⁹⁰ Brief for Nat’l Partn. Women & Fams. as Amici Curiae Supporting Petitioner-Appellant at 13, *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2570985. [hereinafter Brief for Nat’l Partn. Women & Fams.].

¹⁹¹ *Id.*

¹⁹² See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25 (2005) (discussing psychological and social forces working to stifle claims of discrimination).

¹⁹³ *Id.* at 27 (describing subjects of a research experiment who consistently blamed poor test results on themselves even when told their evaluator was biased against their social group).

¹⁹⁴ *Id.* at 37 (discussing the social costs, such as retaliation, of reporting perceived discrimination).

¹⁹⁵ *Id.* at 20. Title VII makes it illegal to fire an employee because he or she files an EEOC claim. 42 U.S.C. § 2000e-3(a) (2006). *But see* *Clark County School District v. Breeden*, 532 U.S. 268, 271 (holding Title VII protections against retaliation only apply if the employee holds a reasonable belief of discrimination).

¹⁹⁶ See Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 819 (2006) (finding that regardless of their gender, subjects of a research experiment regarded a fellow test-taker as more of a “complainant” if he or she blamed failure on discrimination by the grader rather than their own skills).

¹⁹⁷ Brief for Nat’l Partn. Women & Fams. *supra* note 190, at 13.

Although *Ledbetter* involved an employee with a long work history, the Court's opinion places a special burden on new employees.¹⁹⁸ Inexperienced employees lack knowledge of the particular workplace and established relationships with co-workers which foster the ability to recognize discrimination.¹⁹⁹ Terminated new employees face special risks because they lack an established employment record to demonstrate their firings resulted from discrimination rather than poor job performance.²⁰⁰

The Court's decision is not in line with workplace realities.²⁰¹ It takes time and well established relationships for employees to learn of pay disparities.²⁰² The Court's decision that any perceived discrimination must be challenged within 180-days of the pay-setting decision does not allow enough time for discovery of the disparities.²⁰³ Even if an employee does discover the disparity, he or she may hesitate to report it because of real social and professional costs.²⁰⁴

Ledbetter's Case is Not Controlled by United Airlines v. Evans

The Court mistakenly emphasized the *Evans*, *Ricks*, *Lorance*, and *Morgan* line of cases.²⁰⁵ These cases stand for the principle that discrete discriminatory acts must be challenged within 180-days of their occurrence.²⁰⁶ *Ledbetter*, however, challenged her disparate pay.²⁰⁷ She did not challenge the effect of a clearly communicated decision such as termination or tenure denial.²⁰⁸ Her case turns on whether a discriminatory paycheck constitutes a present violation of Title VII.²⁰⁹ Nothing in *Evans*, *Ricks*, *Lorance*, or *Morgan* speaks to the issue of paychecks at all.²¹⁰

¹⁹⁸ *Id.* at 15.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *supra* notes 185-204 and accompanying text.

²⁰² See *supra* note 199 and accompanying text.

²⁰³ See *supra* notes 192-197 and accompanying text.

²⁰⁴ See *supra* notes 195-200 and accompanying text.

²⁰⁵ Reply Brief of Petitioner-Appellant at 16, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2610990.

²⁰⁶ See *supra* notes 78-130 and accompanying text.

²⁰⁷ *Ledbetter II*, 127 S. Ct. at 2167.

²⁰⁸ Reply Brief of Petitioner-Appellant, *supra* note 205, at 16.

²⁰⁹ *Ledbetter II*, 127 S. Ct. 2167.

²¹⁰ Reply Brief of Petitioner-Appellant, *supra* note 205, at 3. While *Evans* alleged that she received less pay, she did not allege that United decided to pay her less because of her sex, but instead that United's unlawful act affected her seniority level. *Id.* *Ledbetter*, on the other hand brought an ordinary disparate pay claim, alleging Goodyear decided to pay her less based on gender. *Id.*

Bazemore v. Friday is the only United States Supreme Court case addressing whether pay discrimination occurs with the pay decision alone, or each time the employer issues a paycheck.²¹¹ The *Ledbetter* Court reasoned that *Bazemore* only applies to facially discriminatory pay systems.²¹² However, the *Bazemore* decision, itself, made no such distinction.²¹³

Only a slight difference exists between a facially discriminatory pay system and individual acts of discrimination.²¹⁴ A facially discriminatory system victimizes with each application because it treats similarly situated employees differently.²¹⁵ An individual discriminatory pay decision likewise treats similarly situated workers differently by paying one employee less than others doing the same work.²¹⁶

Further undermining its case, the *Ledbetter* Court supported its decision with *Lorance v. AT&T Technologies*, which Congress overruled in 1991.²¹⁷ *Lorance* dealt with a “facially non-discriminatory and neutrally applied” seniority system.²¹⁸ The *Ledbetter* Court also interpreted Goodyear’s pay system as facially non-discriminatory and neutrally applied.²¹⁹ Nevertheless, as Congress made clear by overturning *Lorance*, a facially non-discriminatory and neutrally applied system does not reside outside the sphere of Title VII protections.²²⁰

When Does the Clock Start Ticking?

The *Ledbetter* Court left several unanswered questions regarding how the Title VII limitations period now applies.²²¹ Most troubling, the Court made no

²¹¹ *Id.*

²¹² *Ledbetter II*, 127 S. Ct. at 2174.

²¹³ *Bazemore*, 478 U.S. at 397 n.8 (noting “two distinct types of salary claims,” those stemming from the Extension Service’s facially discriminatory pay system existing before 1965 (a facially discriminatory practice) and individual decisions discriminating against black employees hired after 1965 at equal starting pay (a facially neutral practice)).

²¹⁴ See Reply Brief of Petitioner-Appellant, *supra* note 205, at 9.

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ *Ledbetter II*, 127 S. Ct. at 2183 (Ginsburg, J., dissenting) (“The Court’s extensive reliance on *Lorance* . . . is perplexing for that decision is no longer effective.”). *Id.* Congress superseded the *Lorance* decision with the Civil Rights Act of 1991, making discriminatory seniority systems actionable when implemented or when employees feel the impacts of the system. Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

²¹⁸ *Lorance*, 490 U.S. at 911, *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

²¹⁹ See *Ledbetter II*, 127 S. Ct. 2174.

²²⁰ See Civil Rights Act of 1991, 42 U.S.C. § 1981 et. seq.

²²¹ Deborah Brake & Joanna Grossman, *Reviving Title VII’s Protection Against Pay Discrimination In the Wake of the Supreme Court’s Harsh Decision: A Call for Congressional Action*, FINDLAW, July 10, 2007, http://writ.news.findlaw.com/commentary/20070710_brake.html (last visited Nov. 13, 2007). [hereinafter Brake & Grossman].

clear statement defining what kind of information an employee must know in order to start the 180-day limitation “clock.”²²² It stated only that the employee must file a claim 180 days from when the employer made and communicated the discriminatory pay decision.²²³ Read strictly, the employee must file an EEOC claim within 180 days of every pay decision made, even if she does not discover or suspect discrimination during that 180-day period.²²⁴ “If so, then Title VII pay claims have just been relegated to the dustbin of civil rights history.”²²⁵

Discovery Rule

Perhaps the majority meant the clock starts ticking when an employee discovers the employer’s discriminatory intent.²²⁶ Instead of providing guidance as to what the employee must know and when, the Court simply stated it has never specified whether a discovery rule applies to Title VII.²²⁷ A discovery rule stops the limitations period from starting until the employee discovers (or reasonably should have discovered) the facts establishing a claim.²²⁸ If a court decides to apply a discovery rule, there exists no clear rule on how much an employee must know to trigger the filing period.²²⁹ The clock may start to tick when an employee learns she received less pay than her male counterparts, or simply that she received a lower raise than her colleagues.²³⁰ But even more specific pay information will often not alert an employee to a potential claim without other circumstances pointing to underlying discrimination.²³¹ Instead of fashioning a bright-line rule, the Court has left it to the lower federal courts to decide how to apply a discovery rule, if at all.²³²

Equitable Tolling

If the lower courts decide against applying a discovery rule, equitable tolling may operate to delay the start of the filing period until the complainant discovers

²²² *Id.*

²²³ *Ledbetter II*, 127 S. Ct. at 2169.

²²⁴ Brake & Grossman, *supra* note 221.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Ledbetter II*, 127 S. Ct. at 2177 n.10 (stating that the Court declined to address whether a discovery rule applied to Title VII in *Morgan*, and declining to do so in this case).

²²⁸ See *Nelson v. Krusen*, 678 S.W.2d 918, 920 (Tex. 1984) (holding that the statute of limitations to bring a wrongful birth suit did not begin to run until the parents of a sick child knew of, or through diligence and care should have known of, their child’s illness).

²²⁹ Brake & Grossman, *supra* note 221.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

she has been a victim of disparate pay.²³³ Equitable tolling functions to stop the statute of limitations from running when the accrual date for a claim has already passed.²³⁴ While the Supreme Court has held that equitable tolling applies to Title VII cases, it has limited application to extraordinary circumstances, such as active concealment by an employer.²³⁵ Tolling may also apply to practices where an employee can show a reasonably prudent person could not possibly have discovered the discriminatory intent behind the act until after the filing period expired.²³⁶ While equitable tolling should certainly apply in such drastic situations, active concealment and practical impossibility are not the classic reasons why victims do not recognize pay discrimination.²³⁷

Protection from Stale Claims

The Court argued that limiting challenges to discrete pay decisions, rather than allowing each paycheck to stand alone as a discrete act “protect[s] employers from the burden of defending claims arising from employment decisions that are long past.”²³⁸ But, as the dissent pointed out, Goodyear inflicted increasing damage with each paycheck issued; the employment decision was not long past.²³⁹ An employee cannot begin the process of recovery when the pay decision occurs because there is nothing to recover until the employee receives the paycheck.²⁴⁰

²³³ *Id.*

²³⁴ *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). The doctrines of equitable tolling and the discovery rule are similar because they both require the plaintiff to exercise due diligence in discovering an injury. *Id.* at 1390. The difference lies in the type of knowledge the plaintiff must acquire. *Id.* The discovery rule focuses on a plaintiff’s knowledge of an actual injury. *Id.* Equitable tolling, however, focuses on a plaintiff’s knowledge of the facts that support a cause of action. *Id.* Additionally, equitable tolling serves to stop the statute of limitations from running once a cause of action has accrued, where the discovery rule functions to start the statute of limitations when the plaintiff learns of the cause of action. *See id.* at 1385, 1390.

²³⁵ *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 201 (4th Cir. 1990) (stating that equitable tolling only applies when an employer has “wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action” (quoting *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (holding that equitable tolling applies to Title VII cases).

²³⁶ *Miller*, 755 F.2d at 24 (suggesting “[a]n extraordinary circumstance permitting tolling of the time bar on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory”) (internal quotation marks omitted).

²³⁷ *See Brake & Grossman*, *supra* note 221. *See also, supra* notes 185-220 and accompanying text for a discussion of the classic reasons employees do not recognize discrimination.

²³⁸ *Ledbetter II*, 127 S. Ct. at 2170 (quoting *Ricks v. Del. State. Coll.*, 449 U.S. at 250, 256-57 (1979)).

²³⁹ *Id.* at 2185-86 (Ginsburg, J., dissenting) (“As she alleged, and as the jury found, Goodyear continued to treat Ledbetter differently because of sex each pay period, with mounting harm.”).

²⁴⁰ *See* Brief for Nat’l Partn. Women & Fams, *supra* note 190, at 9.

Goodyear supervisors had access to pay information and refused to remedy Ledbetter's disparate pay situation even though she obviously earned less money than every other man in her position.²⁴¹ Just as the Extension Service in *Bazemore* had a duty to repair discriminatory pay disparities, Goodyear had an obligation to ensure that Ledbetter's pay decisions and paychecks did not carry forward salary disparities based on gender.²⁴²

Allowing employees to challenge discrimination that began before the charging period and continue into it will not "leave employers defenseless" against unfair or harmful delay.²⁴³ The defense of laches will protect the employer when delay prejudices a party.²⁴⁴ This provision will effectively eliminate stale claims.²⁴⁵ The courts can also employ waiver, estoppel and equitable tolling, allowing the ability to correct discrimination and give an employer adequate notice of a claim.²⁴⁶ Additionally, although the majority of lower circuit courts applied the paycheck accrual rule for twenty years, Goodyear presented no evidence that the rule had inundated employers with an unreasonable number of stale pay claims.²⁴⁷

Congressional Intent in Title VII's Back Pay Provision and Civil Rights Act Amendments

The Court's holding in *Ledbetter* does not promote Title VII's goals of preventing discrimination and compensating victims.²⁴⁸ The Court abandoned the broad and equitable approach of its previous Title VII decisions, establishing evenhanded administration of the law as its first priority.²⁴⁹

The *Ledbetter* Court refused to adopt a "special rule" for pay discrimination cases.²⁵⁰ Title VII's back pay provision, however, indicates that Congress intended

²⁴¹ See Reply Brief of Petitioner-Appellant, *supra* note 205, at 20.

²⁴² See *Bazemore*, 478 U.S. at 397.

²⁴³ See Hearings, *supra* note 2, at 10 (testimony of Prof. Deborah Brake). It is the employee, not the employer, who suffers when a suit is delayed. *Id.* The plaintiff carries the burden of proof and evidence of intentional discrimination is harder to discover as time passes. *Id.*

²⁴⁴ *Morgan*, 536 U.S. at 121 (explaining the defense of laches can block suit from a complainant "if [an employee] unreasonably delays in filing and as a result harms the defendant").

²⁴⁵ *Ledbetter II*, 127 S. Ct. at 2186 (Ginsburg, J., dissenting).

²⁴⁶ *Zipes*, 455 U.S. at 398 (holding application of waiver, estoppel and equitable tolling allows the Court "to honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer").

²⁴⁷ Reply Brief of Petitioner-Appellant, *supra* note 205, at 16.

²⁴⁸ See *Albermarle*, 422 U.S. at 418 (describing the purpose of Title VII to make employees whole for unlawful discrimination).

²⁴⁹ *Ledbetter II*, 127 S. Ct. at 2171-72. ("Ultimately, 'experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" (quoting *Mohasco Corp. v. Silver*, 477 U.S. 807, 826 (1980)).

²⁵⁰ *Ledbetter II*, 127 S. Ct. at 2176.

to treat disparate pay cases differently than other types of discrimination claims.²⁵¹ Thus, the Court's refusal to allow challenges of pay discrimination that began before, and continued into, the 180-day charging period renders the statute's back pay provision virtually meaningless.²⁵²

Title VII states "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."²⁵³ In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court established back pay awards arising out of termination and failure to promote actions only reach back to the date of the "discrete act."²⁵⁴ This discrete act must take place within the 180-day EEOC charging period.²⁵⁵ Therefore, a court could never award two-years of back pay in these situations.²⁵⁶

Perhaps hostile work environment claims can take advantage of the two-year back pay provision, even if claims concerning discrete acts cannot.²⁵⁷ For hostile environment claims, a complainant can reach back to occurrences before the 180-day filing period to establish discriminatory intent as long as at least one of those occurrences occurred within the 180-days.²⁵⁸ Even if an employee reaches back further than 180-days to prove discriminatory intent, however, the Supreme Court decided the back pay remedy does not apply to hostile environment claims.²⁵⁹

The last common type of Title VII claim is disparate pay.²⁶⁰ Since the back pay provision does not apply to other types of claims, Congress must have foreseen challenges to pay discrimination cases that began before, and continued into, the 180-day filing period.²⁶¹ Congress intended the two-year back pay provision to

²⁵¹ *Id.* at 2184 (Ginsburg, J., dissenting).

²⁵² See Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

²⁵³ 42 U.S.C. § 2000e-5(g)(1) (2006).

²⁵⁴ See *Morgan*, 536 U.S. at 114. For example, if an employee was unlawfully terminated and filed an EEOC claim exactly 180 days later, they could only be awarded back pay for 180 days worth of work. See *id.* A complainant could never reach the Title VII limit of two-year's back pay with this type of claim. See *id.*

²⁵⁵ 42 U.S.C. § 2000(e)-5(e)(1).

²⁵⁶ See Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

²⁵⁷ *Id.*

²⁵⁸ See *Morgan*, 536 U.S. at 114.

²⁵⁹ See *Penn. St. Police v. Suders*, 542 U.S. 129, 147 (2004) (holding that back pay is available for hostile environment claims only when there has been a "constructive discharge," which is treated as a termination).

²⁶⁰ See Brief for Nat'l Partn. Women & Fams., *supra* note 190, at 25.

²⁶¹ See *Morgan*, 536 U.S. at 119 ("If Congress intended to limit liability to conduct occurring in the period which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of back pay.").

apply directly to these cases, allowing an employee to recover what they should have been paid absent discrimination.²⁶²

Congressional intent becomes even clearer when examining the legislative history of the Civil Rights Act of 1991.²⁶³ At the time of the amendment, most circuits decided pay discrimination cases in accordance with “paycheck accrual rule” articulated in *Bazemore v. Friday*.²⁶⁴ If Congress disagreed with the Court’s ruling in *Bazemore*, or how the circuits and the EEOC applied the “paycheck accrual rule,” it certainly had the power and opportunity to clarify Title VII as it relates to pay discrimination when amending the statute.²⁶⁵ Instead, the Senate Report stated:

Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . . , for example, . . . the Supreme Court properly held that each application of th[e] racially motivated salary structure, i.e., each new paycheck constituted a distinct violation of Title VII.²⁶⁶

Title VII’s back pay provision and Congress’s refusal to amend the application of *Bazemore v. Friday* by the federal circuit courts and the EEOC prove that pay discrimination cases should be decided differently than other employment discrimination claims.²⁶⁷

²⁶² See Brief for Nat’l Partn. Women & Fams, *supra* note 190, at 25.

²⁶³ See S. REP. NO. 101-315, at 54 (1990). The Civil Rights Act of 1990 was the forerunner to the 1991 Act.

²⁶⁴ See, e.g., EEOC v. Penton Indus. Publ’g Co., 851 F.2d 835, 838 (6th Cir. 1988) (“The Supreme Court has recognized the existence of a ‘continuing violation’ [in *Bazemore*, where] there was a current and continuing differential between the wages earned by black workers and those earned by white workers.”); *Berry v. Bd. of Supv. of LSU*, 715 F.2d 971, 980 (5th Cir. 1983) (“We also observe that there are a number of decisions in which salary discrimination has been found to constitute a continuing violation of Title VII, usually on the rationale that each discriminatory paycheck violates the Act.”); *Bartelt v. Berlitz Sch. of Languages of Am.*, 698 F.2d 1003, 1004-05, n.1 (9th Cir. 1983) (rejecting the argument that a disparate pay claim accrued upon making of pay decision); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 743 (8th Cir. 1980) (“The practice of applying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues.”).

²⁶⁵ *Ledbetter II*, 127 S. Ct. at 2183 (Ginsburg, J., dissenting).

²⁶⁶ S. REP. NO. 101-315, at 54 (1990).

²⁶⁷ See Brief for Nat’l Partn. Women & Fams., *supra* note 190, at 25.

Congress Should Reinstate the “Paycheck Accrual Rule”

Justice Ginsburg ended the dissenting opinion by imploring Congress to act, as it did in 1991, to “correct this Court’s parsimonious reading of Title VII.”²⁶⁸ Congress was listening.²⁶⁹ The chairman of the House Education and Labor Committee introduced the Ledbetter Fair Pay Act of 2007 (the Ledbetter Act), on June 22, 2007.²⁷⁰ The Ledbetter Act will negate the Court’s ruling and restore the paycheck accrual rule introduced in *Bazemore v. Friday*.²⁷¹

The United States House of Representatives passed the Ledbetter Act on July 30, 2007 with a vote of 215–187, largely along party lines.²⁷² The Senate then placed the bill on its calendar.²⁷³ If the Ledbetter Act passes the Senate, President Bush’s advisors have recommended a veto.²⁷⁴

The President’s advisors cite concerns that adoption of the paycheck accrual rule will impede justice and negate incentives to promptly resolve alleged discrimination claims.²⁷⁵ The advisors also criticize the bill as essentially eliminating the statute of limitations periods for claims such as promotion and termination, which an employee can currently challenge only within 180-days communication.²⁷⁶ Such

²⁶⁸ *Ledbetter II*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

²⁶⁹ H.R. 2831, 110th Cong. § 3 (2007).

²⁷⁰ *Id.*

²⁷¹ *Id.* The Ledbetter Act proposes the following provision to Title VII:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, *including each time wages, benefits, or other compensation is paid*, resulting in whole or in part from such a decision or other practice.

Id. (emphasis added). The Ledbetter Act also proposes addition of this language to the Age Discrimination Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. *Id.*

²⁷² National Organization for Women, <http://www.capwiz.com/now/vote.xc/?votenum=768&chamber=H&congress=1101&voteid=10130076&state=US> (last visited on Nov. 18, 2007).

²⁷³ *Id.*

²⁷⁴ Statement of Administration Policy—H.R. 2831 Lilly Ledbetter Fair Pay Act of 2007, July 27, 2007.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

[E]xtending the expanded statute of limitations to any ‘other practice’ that remotely affects an individual’s wages, benefits or other compensation in the future . . . could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionable only when they occur.

arguments overreact to the language of the bill. The Ledbetter Act does not overrule *United Airlines, Inc. v. Evans* and its progeny—those cases squarely stand for a claimant’s inability to challenge a discrete act, such as hiring or firing, outside the limitations period.²⁷⁷

Congress Should Also Lengthen the 180-day Filing Period

Congress has taken one essential step toward remedying the harsh consequences of *Ledbetter*, but it should go further.²⁷⁸ The root of the problem exists with the unusually short statute of limitations.²⁷⁹ The Civil Rights Act of 1964 originally provided for a 90-day statute of limitations.²⁸⁰ The amendments of 1972 lengthened the filing period to the now current 180-days to bring it into line with the National Labor Relations Act, which served as a template for Title VII.²⁸¹ The Civil Rights Act of 1991 proposed an extension of the statute of limitations to two years, but Congress challenged the provision and eventually removed it from the amendment.²⁸² Congress must realize that an employee needs more time to realize the discrimination, gather information to file a complaint and find representation.²⁸³ Statutes of limitations for many civil actions allow a year or more to bring a claim.²⁸⁴ No persuasive reason exists why someone who slips on a wet floor should have more time to assert her rights than an employee who experiences pay discrimination.²⁸⁵

Impact of Ledbetter v. Goodyear

If the Ledbetter Act fails, both employers and employees will feel adverse effects.²⁸⁶ Because employees encounter difficulty recognizing a disparate pay

²⁷⁷ *Evans*, 122 U.S. at 558 (describing Evans’s termination as “merely an unfortunate event in history which has no present legal consequences”); *Ricks*, 449 U.S. at 259 (holding termination decision must be challenged within the filing period even if last day of employment did not occur until a year later); *Morgan*, 536 U.S. at 114 (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. . . Morgan can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period.”).

²⁷⁸ Brake & Grossman, *supra* note 221.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Brake & Grossman, *supra* note 221.

²⁸⁴ See WYO. STAT. ANN. § 1-3-105 (iv) (2006) (allowing four years to bring an action for trespass upon real property; injury to rights not arising on contract; and relief on the ground of fraud). See also WYO. STAT. ANN. § 1-3-105 (v) (allowing one year to bring an action for libel; slander; malicious prosecution; false imprisonment; and assault or battery (not including sexual assault)).

²⁸⁵ Brake & Grossman, *supra* note 221.

²⁸⁶ Hearings, *supra* note 2, at 3 (testimony of Prof. Deborah Brake).

claim and the filing period ends quickly, time will bar most legitimate claims.²⁸⁷ If an employee cannot challenge her paycheck as discriminatory, illegal acts by employers will be legitimized once the 180-day filing period expires.²⁸⁸ Workers' base salaries often inform pension and social security payments; therefore, unchallenged pay discrimination will continue to affect workers well after they no longer work for an employer.²⁸⁹

The *Ledbetter* decision also exacerbates the gender-wage gap.²⁹⁰ This effect is particularly bleak for Wyoming, where the high gender-wage gap already discourages women from settling in the state.²⁹¹ The Ledbetter Act will undo the damage of the decision, helping to reduce the wage gap and benefit both employers and employees.²⁹² Employee turnover would likely decrease, resulting in lower training and recruiting costs.²⁹³ The number of welfare and medical benefits would also likely decline, benefiting state and federal governments as well.²⁹⁴

The *Ledbetter* Court insisted on protecting defendants from stale claims.²⁹⁵ Many who support the decision view it as a victory for employers.²⁹⁶ Employers, however, are not served well by the impacts of the judgment.²⁹⁷ The ruling creates incentives for employees to file EEOC claims early and often to preserve any potential challenges.²⁹⁸ The decision also encourages employees who fear retaliation to file their claims without first informing their employers.²⁹⁹ Employees now must frequently investigate the wages of other employees, so as not to sit on their rights.³⁰⁰ Such results do not promote a friendly workplace or

²⁸⁷ *Id.*

²⁸⁸ *Ledbetter II*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

²⁸⁹ Hearings, *supra* note 2, at 4 (testimony of Lilly Ledbetter).

²⁹⁰ Hearings, *supra* note 2, at 4 (testimony of Prof. Deborah Brake).

²⁹¹ See Dona Playton & Stacey Obrecht, *High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYO. L. REV. 295, 302 (2007) (discussing the impact of the recent oil and gas boom on women in Wyoming).

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.*

²⁹⁵ *Ledbetter II*, 127 S. Ct. at 2171.

²⁹⁶ *See* Hearings, *supra* note 2, at 1 (testimony of Neal D. Mollen on behalf of the U.S. Chamber of Commerce) ("The *Ledbetter* decision emphatically endorsed methods of voluntary cooperation and conciliation.").

²⁹⁷ *See* Hearings, *supra* note 2, at 13 (testimony of Prof. Deborah Brake).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

trusting environment.³⁰¹ These consequences do not advance the Title VII goal of voluntary conciliation.³⁰²

CONCLUSION

The Supreme Court's decision in *Ledbetter v. Goodyear*, starts the "clock" of statutory limitations far too soon for most reasonable employees to learn of discriminatory pay decisions.³⁰³ According to the Court, once an employer informs an employee of each pay decision, even a raise, she must "rock the boat" by immediately investigating colleagues' finances and filing a claim with the EEOC.³⁰⁴ This interpretation does not eliminate discrimination.³⁰⁵ In fact, rather than relying on Title VII's protections, those in a protected class must now choose between hyper-vigilance and losing the chance to ever remedy pay discrimination.³⁰⁶

In the past, the circuit courts and the EEOC followed the "paycheck accrual rule" articulated in *Bazemore v. Friday*, allowing employees to challenge each paycheck as an independent employment act.³⁰⁷ When Congress set out to restore the power of Title VII in 1991, it could easily have disagreed with this interpretation and clarified its position on the "paycheck accrual rule."³⁰⁸ It did not.³⁰⁹ Still, the *Ledbetter* Court chose even-handed administration over restoring victims of discrimination.³¹⁰ The Court emphasized that because Goodyear implemented a facially non-discriminatory pay system, the company did not discriminate with each paycheck it issued.³¹¹ The Court legitimized Goodyear's bias simply because the company was wise enough not to discriminate overtly.³¹²

Congress has taken the right step in introducing the Ledbetter Fair Pay Act, but discovery and tolling issues remain.³¹³ Also the presidential veto threat could jeopardize the protections Congress has struggled to provide for decades.³¹⁴ It

³⁰¹ *Id.*

³⁰² See *Miller*, 755 F.2d at 20.

³⁰³ See *supra* notes 185-204 and accompanying text.

³⁰⁴ Brief of Petitioner-Appellant at 25, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074), 2006 WL 2610990.

³⁰⁵ See *supra* notes 286-302 and accompanying text.

³⁰⁶ See *supra* note 300 and accompanying text.

³⁰⁷ See *supra* notes 114-130 and accompanying text.

³⁰⁸ See *supra* notes 263-267 and accompanying text.

³⁰⁹ See *supra* note 266 and accompanying text.

³¹⁰ See *supra* note 249 and accompanying text.

³¹¹ See *supra* notes 161-167 and accompanying text.

³¹² See *supra* notes 161-167 and accompanying text.

³¹³ See *supra* notes 226-237, 268-272 and accompanying text.

³¹⁴ See *supra* notes 274-277 and accompanying text.

remains the duty of Congress to push zealously for legislation ensuring victims of disparate pay receive compensation and to deter future discrimination by employers.³¹⁵

³¹⁵ See *supra* notes 286-302 and accompanying text.