INFLATING GOODYEAR'S BOTTOM LINE: PAYING WOMEN LESS AND GETTING AWAY WITH IT

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I. INTRODUCTION

Women today earn less per dollar than men, while their salaries constitute a greater proportion of families' income.[1] To make matters worse, women who are discriminated against in the work place often do not know that pay disparities exist between them and their male counterparts when the pay-setting decisions are made. Thus, the implications of *Ledbetter v. Goodyear Tire & Rubber Co.*,[2] which held that a claim for discrimination must be filed within 180 days of the pay-setting decision, will be unfavorable to women and other employees who find out that they are being paid less as a result of discrimination only after the Equal Employment Opportunity Commission (EEOC) charge-filing deadline has elapsed.[3] Before an aggrieved party may bring forth a civil action in Federal District Court under Title VII of the Civil Rights Act of 1964, she "must have first met the requirements of that Act by giving the Equal Employment Opportunity Commission the opportunity to conciliate the unlawful employment practice alleged to have occurred."[4]

On May 29, 2007, in *Ledbetter v. Goodyear Tire*, the U.S. Supreme Court greatly limited employee' rights and undermined the statutory protections afforded by Title VII of the Civil Rights Act of 1964 (Title VII) by giving employers yet another leg up on employees. Under the majority's holding in *Ledbetter*, an employee is barred from asserting claims of employment discrimination based on management's pay-setting decisions that occurred outside of the limitations period, even if the employee did not or could not have known about the discriminatory pay decision within the appropriate time limit.[5] Accordingly, an individual wishing to

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[1] *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Education and Labor*, 110th Cong. 1 (2007) [hereinafter *Justice Denied?: Hearing Before the H. Comm. on Education and Labor*] (statement of Lilly Ledbetter, plaintiff in *Ledbetter v. Goodyear Tire*).

[2] Ledbetter v. Goodyear Tire and Rubber Co., 127 S.Ct. 2162 (2007).

[3] The EEOC is a federal agency tasked with ending employment discrimination in the United States. The EEOC's mandate is specified under Title VII of the Civil Rights Act of 1964.

[4] 5 A.L.R. Fed. 334 (1970).

[5] *Ledbetter*, 127 S. Ct. at 2162.

bring suit under Title VII must first file a charge with the EEOC within 180 days[6] of when the alleged unlawful employment practice occurred, including discriminatory salary decisions where the employee has no notice.[7]

Although this case directly harmed Lilly Ledbetter, the precise effects of the *Ledbetter* decision remain unclear. The decision may lead to detrimental results for women because, as Justice Ginsburg noted in her dissent[8], "[p]ay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time."[9] The majority's opinion severely limits the remedies available to future victims of gender discrimination because employers will be absolved of liability in the vast majority of discriminatory pay decisions. An employee is left remediless if the employee does not challenge particular pay raises within the charge-filing period.[10] Thus, by waiting to file a charge with the EEOC, Ledbetter "lost her opportunity to seek relief for any discriminatory paychecks she received between 1979 and late 1997."[11] According to the majority, "the EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[12] The majority asserts that treating pay discrimination as a discrete act, limited to each specific pay-setting decision is necessary to protect employers, and places excessive emphasis on protecting employers "from the burden of defending claims arising from employment decisions that are long past."[13]

The dissent argues that pay discrimination claims are more akin to claims of hostile work environment.[14] Unlike a discrete act of discrimination such as termination or failure to promote, which are distinct and identifiable events, a hostile work environment claim comprises a succession of harassing acts that "cannot be said to occur on any particular day" but rather "occurs over a series of days or perhaps years . . . ."[15] Thus, provided that an act contributing to the claim

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[6] In this instance the charging period is 180 days. However, the charging period is 300 days for an act over which a state or local agency has jurisdiction.

[7] *Ledbetter*, 127 S. Ct. at 2163.

[8] Justice Ginsburg read her dissent from the bench.

[9] *Ledbetter*, 127 S. Ct. at 2178-79.

[10] *Id.* at 2186.

[11] *Id.*

[12] *Id.* at 2169.

[13] *Id.* at 2169 (quoting Delaware State College Et Al v. Ricks,,449 U.S., 250, 256-57, (1980)). In contrast, the jury found differently at trial, asserting that Goodyear continued to treat Ledbetter differently because of her gender with each pay check, creating a snow-ball effect that only served to accentuate the discrimination.

[14] *Ledbetter*, 127 S. Ct. at 2180.

[15] National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 115 (2002).

occurs within the filing period, the entire time period of the hostile environment may be considered by a court.[16]

In this Note, I argue that while employees know immediately when they are fired, refused employment, or denied a promotional transfer, secrecy and confidentiality in the workplace make it difficult for employees to know about compensation discrimination. Therefore, a claim for compensation discrimination is more similar to a hostile work environment claim than a discrete discriminatory act because it is often the cumulative result of on-going discrimination.[17]

The plaintiff in *Ledbetter v. Goodyear Tire Co.*, Lilly Ledbetter, worked as a supervisor at a Goodyear Tire and Rubber plant in Gadsden, Alabama from 1979 until her retirement in November of 1998.[18] For the majority of Ledbetter's years of service, her position was largely held by men.[19] Although Ledbetter was initially earning the same as her male colleagues, over time, her salary began to slip compared to males in the same position who had equal or less seniority than Ledbetter.[20] Toward the end of Ledbetter's almost twenty years of service to Goodyear, she learned that she was the lowest-paid supervisor out of a group of sixteen supervisors at the facility, despite having more experience than several of her male counterparts.[21] Ledbetter received an anonymous letter in her mailbox suggesting she was the lowest paid supervisor at Goodyear due to her sex.[22] Ledbetter submitted a questionnaire to the EEOC in March 1998 and filed a formal EEOC charge in July of that year.[23] Ledbetter's charge claimed sex discrimination. Following Ledbetter's retirement in November 1998, she filed a lawsuit in the United States District Court asserting pay discrimination claims against Goodyear Tire & Rubber under Title VII and the Equal Pay Act of 1964.[24]

At trial, the jury found that Goodyear Tire & Rubber discriminated against Ledbetter based on her gender, and not because of her work quality, awarding her $3.8 million in back pay and punitive damages.[25] Goodyear appealed Ledbetter's jury award to the Eleventh Circuit Court of Appeals, successfully arguing that Ledbetter's pay discrimination claim was time barred with respect to all discriminatory decisions made prior to the 180 days before she filed her EEOC questionnaire, further arguing that Ledbetter did not assert any claim based on pay

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16 *Id.* at 117.

17 *See* discussion *supra* note 15 of National Railroad v. Morgan.

18 *Ledbetter*, 127 S. Ct. at 2178.

19 *Id.* at 2178.

20 *Id.*

21 *Id.* Ledbetter discovered that she was being paid approximately 20-25% lower than her male colleagues.

22 *Justice Denied?: Hearing Before the H. Comm. on Education and Labor* (statement of Lilly Ledbetter, plaintiff in, *Ledbetter v. Goodyear Tire*), *supra* note 1.

23 *Ledbetter*, 127 S. Ct. at 2163.

24 *Id.*

25 *See id.*

discrimination during the charging period.[26] The United States Court of Appeals for the Eleventh Circuit reversed,[27] holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred outside of the EEOC charging period, and concluding that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions during that period—denials of raises for Ledbetter in 1997 and 1998. In a sharply divided 5-4 decision, the Supreme Court affirmed the decision of the Court of Appeals and ruled against Ledbetter, holding that her complaints were untimely and that she could not qualify for a remedy.

Chief Justice Roberts and Justices Alito, Kennedy, Scalia and Thomas joined in the majority opinion. Writing for the majority, Justice Alito held Ledbetter's argument unsound because it would "shift [the employer's] intent from one act [the act that consummated the discriminatory employment practice] to a later act that was not performed with bias or discriminatory motive,"[28] thereby imposing liability absent the requisite intent.

The majority's holding is unreasonable because it would require Ledbetter to file an EEOC charge within 180 days after each time she received a pay check, even if she did not know what her male counterparts were being paid and even if she had no way to prove the decision was discriminatory.[29] Despite the fact that Ledbetter's employer had a policy in place forbidding employees from discussing their salaries with each other,[30] the majority in *Ledbetter v. Goodyear Tire* unreasonably imposed the 180 day EEOC charge filing period requirement on Ledbetter, ultimately holding her claim of pay discrimination to be untimely. Consequently, under the majority's interpretation of Title VII, once 180 days have elapsed after the receipt of each pay check, the employee is rendered remediless.

The majority disregards the workplace reality that co-workers do not ask each other what they earn, especially when there is a company policy in place prohibiting such discussion. As a result of the majority's harsh interpretation of the rule, Goodyear is allowed to treat Ledbetter as a "second class citizen."[31] Ledbetter's pension and Social Security benefits for the rest of her life will be based on what she earned under the discriminatory salary. Once 180 days passed after the allegedly discriminatory pay decision was made, Ledbetter was out of luck.

The majority's decision severely limits victims of pay discrimination to successfully sue under Title VII. Pay discrimination is a hidden discrimination that

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[26] *Id.*

[27] *Id.* at 2162.

[28] *Id.* at 2170.

[29] *Ledbetter,* 127 S. Ct. at 2163.

[30] *Justice Denied?: Hearing Before the H. Comm. on Education and Labor,* (statement of Robert Andrews, U.S. Rep., Dist. N.J.), *supra* note 1.

[31] *Justice Denied?: Hearing Before the H. Comm. on Education and Labor,* (statement of Lilly Ledbetter, plaintiff in *Ledbetter v. Goodyear Tire*), *supra* note 1.

is particularly dangerous due to the silence surrounding salary information in the United States.[32] However, just because the employees do not know about the discrimination does not mean it is not happening. Every time an employee receives a lower paycheck due to discrimination, the harm is ongoing, and therefore, the remedy should also be ongoing. The rule in *Ledbetter* places an unreasonable burden on employees to file charges at the drop of a hat with the EEOC for fear of losing their right to sue and provides further incentives for employers to not disclose salary information to their employees.

I develop my analysis in four sections. In the first section, I survey and highlight the case law establishing the legislative backdrop behind Ledbetter's case and the past judicial treatment of the principle of ongoing discriminatory acts. This case law articulates the themes that informed the courts' discussions of the filing requirement. I will discuss the present effects of past discrimination as well as the cases on "pattern and practice" showing that employers can discriminate over time. In the second section, I will assess the legislation introduced on June 22, 2007 in immediate response to the *Ledbetter* decision, H.R. 2831, "The Lilly Ledbetter Fair Pay Act." The Bill was put forth by the U.S. House of Representatives Committee on Education and Labor, passed the House on July 31, 2007, and is currently pending in the Senate.[33] Shortly after the Supreme Court decision in *Ledbetter*, the House reacted with proposed legislation in an attempt to rectify the negative effects of the decision, as was suggested by Justices Ginsburg, Stevens, Souter, and Breyer in the Dissent.[34] I will analyze whether the proposed legislation is a better solution. I will also assess how the Bill can be improved and what areas of concern the Bill has failed to address.

The third section of this Note presents the core of my analysis: a discussion of what activities qualify as unlawful employment practices with respect to pay discrimination and when that unlawful employment practice has occurred. One possible unlawful employment practice that has been identified by the majority is the pay-setting decision.[35] Under the "pay-setting" approach, each particular salary-setting decision is discrete from prior and subsequent decisions, and thus, a complaint must be filed within 180 days of the paycheck's issuing.[36] Another approach considers both the pay-setting decision, as well as the actual payment of a discriminatory wage as the unlawful employment practices.[37] Under this standard, the payment of wages based on sexual discrimination qualifies as an unlawful employment practice. Nevertheless, prior decisions, outside of the 180 day charge-

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[32] *See Justice Denied?: Hearing Before the H. Comm. on Education and Labor*, (statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights), *supra* note 1.

[33] H.R. 2831, 110th Cong. (2007). Hearings were last held on Sep. 23, 2008 by the Committee on the Judiciary.

[34] *Ledbetter*, 127 S. Ct. 2178-87.

[35] *Ledbetter*, 127 S. Ct. at 2179.

[36] *Id.*

[37] Bazemore v. Friday, 478 U.S. 385 (1986).

filing period, are not themselves actionable, but are relevant in determining the lawfulness of the conduct within the period.[38]

I argue that the majority's adoption of the first approach ignores the "realities of the workplace"[39] because pay disparities are not overtly communicated to employees. Thus, penalizing Ledbetter for not complaining to the EEOC earlier is unreasonably harsh toward female employees who seek redress for pay discrimination based on their sex since they do not know of the pay disparity at issue during the charge-filing period. I will then defend the second approach, which considers pay-setting decisions as well as the actual payment of a discriminatory salary unlawful practices, because this approach reflects employer discrimination more accurately and realistically.

In the final section of this Note, I revisit the case law and legislative proposals in light of my analysis. The need to have firm procedural requirements in place for filing a complaint with the EEOC for both administrative efficiency of the law as well as the need to avoid leaving an employer liable indefinitely, leads me to defend the *Ledbetter* decision in theory, but not in practice. Although Congress is in the process of drafting legislation, the law as it currently stands under *Ledbetter* limits a female employee's ability to seek a remedy in a pay discrimination case when she does not know of the pay discrimination that is occurring until after the 180 days charging period has elapsed. This is a gross injustice to working women who are discriminated against over time and who cannot, or do not, know of the discrimination during the charging period because it occurs over time.

II. LEGISLATIVE BACKGROUND

A. Present Effects of Past Discrimination

In this section, I review highlights of the case law establishing and implementing the principles of pay discrimination, discrete acts, hostile work environment, and charging period limitations. While this case overview is not exhaustive, a good starting place is *International Union of Electrical Workers, Local 790 v. Robbins & Meyers*.[40] In this case, the Supreme Court raised the question of what constitutes a discriminatory act.[41] The Court held that the discriminatory act which triggered the charging period was the discharge of the employee and not the end date of the arbitration proceedings that resulted from the discharge. This case highlights the difficulty facing Courts in determining which occurrence should be deemed "the relevant statutory 'occurrence'" [42] for the

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[38] *Ledbetter*, 127 S. Ct. at 2179.

[39] *Id.*

[40] Int'l Union of Electrical Workers, Local 790 v. Robbins & Meyers, 429 U.S. 229 (1976).

[41] *Id.* at 229.

[42] *Id.* at 234.

purpose of filing a discriminatory employment practices charge with the EEOC. In *Electrical Workers*, a grievance arbitration procedure based on a collective bargaining agreement did not constitute an "occurrence" for triggering the running of the statutory limitations period, where such intention was contrary to understanding of the parties themselves.[43] Where an employee was discharged in *Electrical Workers*, Ledbetter's case differs in that Ledbetter was not discharged, rather she was receiving lower pay increases than her male counterparts based on discriminatory evaluations over time.[44] The majority, however, rejects the suggestion that "an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period."[45] Thus, according to the majority, Ledbetter's claim was untimely.

B. Pattern—or—Practice Doctrine

Precedent suggests that the unlawful practice which triggers the statute of limitations period is the actual, current payment of wages "infected"[46] by gender-based discrimination—occurring each time a woman receives a lesser paycheck than a male in a similar position.[47] After Title VII was extended to public employees in 1972, African-American service employees who had originally been segregated into white branches and African-American branches, brought suit against their employer in *Bazemore v. Friday*, claiming pay disparities attributable to a discriminatory pay scale which persisted after the branches merged.[48] The Supreme Court held that the employers committed an unlawful employment practice each time they applied the racially motivated pay structure—meaning each time an African-American employee received a paycheck for less than similarly situated white employees.[49]

Justice Brennan, joined by the entire court, concurring in part, concluded that each paycheck constituted a distinct violation of Title VII because it was issued pursuant to a discriminatory salary structure.[50] The majority in *Ledbetter* distinguished *Bazemore* and argued that it would not help Ledbetter because it involved the intentional carrying forward of a discriminatory pay system after the enactment of Title VII, whereas *Ledbetter* involved the commission of a discrete discriminatory act with continuing adverse results.[51] However, the majority in *Ledbetter* prematurely dismissed *Bazemore* because Ledbetter's claim was not

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[43] *Id.* at 229.
[44] *Ledbetter*, 127 S. Ct. at 2163.
[45] *Id.* at 2172.
[46] *Id.* at 2179.
[47] *Id.* at 2179.
[48] *Bazemore*, 478 U.S. at 395.
[49] *Id.*
[50] *Id.*
[51] *Ledbetter*, 127 S. Ct. at 2174.

based on a discriminatory pay system, but on a pay raise system. Ledbetter's claim, much like the African-American employees in *Bazemore*, was based on the cumulative effect of the discriminatory evaluations she received, which led to her receiving a lower salary than the men. The majority in *Ledbetter* insisted that because each of Ledbetter's paychecks constituted a separate and distinct violation of Title VII, each was independently identifiable, thus requiring a timely EEOC charge be filed with respect to each alleged violation.[52] The Dissent's approach however is more in tune with the realities of the work place, recognizing that Ledbetter was "subjected to a series of discriminatory pay decisions over a period of time," and that "she did not realize for some time that she had been victimized."[53]

The majority reaches its decision by arguing the effects of Ledbetter's argument *ad absurdum*, suggesting that under the Dissent's approach, if a single discriminatory pay decision made twenty years ago continued to affect an employee's pay today, the dissent would presumably hold that the employee could file a timely EEOC charge today. And the dissent would presumably allow this even if the employee had full knowledge of all the circumstances relating to the twenty-year-old decision at the time it was made.[54]

This argument is unreasonable and does not follow from the Dissent's logic or the facts of the case. Here, the discrimination Ledbetter complained of was not a single discriminatory pay decision made twenty years ago, affecting the employee today, rather, it was a series of on-going discriminatory pay decisions made without Ledbetter's knowledge. According to the Dissent, "[i]t is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain."[55] Moreover, Ledbetter should not be precluded from later challenging the then "current and continuing payment of a wage depressed on account of her sex" simply because she gave her employer the benefit of the doubt during her employment.[56] The holding in *Ledbetter* will create a hypersensitive work environment and work force, which may lead to employees filing premature charges with the EEOC after each pay period simply to preserve a potential cause of action for fear of losing their ability to sue an employer later for discrimination, which might not have occurred yet.

C. Continuing Violations Doctrine

The continuing violations doctrine provides that certain serial violations and systematic violations constitute continuing violations that allow relief for untimely

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[52] *Id.* at 2175.

[53] *Id.*

[54] *Ledbetter*, 127 S. Ct. at 2179.

[55] *Id.* at 2179.

[56] *Id.*

events.[57] In *United Air Lines, Inc. v. Evans,*[58] United Air Lines maintained a policy prohibiting female employees from getting married.[59] Evans, a female flight attendant who married during her employment with the airline was forced to resign, while male flight attendants were allowed to get married and keep their jobs.[60] Although this was clearly a discriminatory act, Evans did not file a charge with the EEOC.[61] Four years later, the airline abandoned the no-marriage policy and Evans was rehired as a new employee.[62] Upon reinstatement, the stewardess requested seniority credit dating back to her original start of employment date.[63] It was only when United Air Lines denied her seniority request for her prior years of service that she alleged that the airline's former no-marriage policy was unlawful and should not be a basis for denying her seniority credit based on her prior years of service.[64]

After United Air Lines denied Evans' request for her seniority credits, the flight attendant filed an EEOC charge claiming that the denial of seniority was discriminatory because it was currently "perpetuating the effect of past discrimination."[65] However, the Supreme Court disagreed, holding that "current effects alone cannot breathe life into prior, uncharged discrimination . . . [since] such effects in themselves have no present legal consequences."[66] The *Evans* court, much like the court in *Delaware State College*, emphasized that the focus should not be on "mere continuity" of a violation, but on "whether any present violation existed."[67] Accordingly, although United Airlines' seniority system does give present effect to past discrimination, because the stewardess did not file a charge of discrimination in the past for the discriminatory no-marriage rule, "United was entitled to treat that past act as lawful."[68] Consequently, the majority holds, there is no present violation, and thus, no discriminatory act occurred during the charging period.

Although the Court held that Evans' discharge was discriminatory, it also found that United Airlines' policy denying seniority to former employees who were rehired was not discriminatory.[69] While two justices dissented in *United Airlines v.*

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[57] United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

[58] *Id.*

[59] *Id.* at 554.

[60] *Id.*

[61] *Id.* at 555.

[62] *Evans*, 431 U.S. at 555.

[63] *Id.* at 556.

[64] *Id.* at 554-557.

[65] *Id.* at 556.

[66] *Ledbetter*, 127 S. Ct. at 2164 (internal quotations omitted); *See also Evans*, 431 U.S. at 558 (arguing that it should not matter that no present violation exists because United's seniority system has a continuing negative effect on her pay and benefits).

[67] *Evans*, 431 U.S. at 557-58.

[68] *Id.* at 557.

[69] *Id.* at 558-559.

Evans,[70] the Dissent did not object to the majority's conclusion that the stewardess' cause of action accrued, if at all, at the time her seniority was recomputed after she was rehired.[71] However, the Justices' dissent highlights that although she failed to file a charge with the EEOC within 180 days after her seniority was determined, Title VII recognizes that "certain violations, once commenced, are continuing in nature."[72] The dissenting justices further pointed out that the violation which led to the stewardess' treatment as a new employee, even though she was wrongfully forced to resign, is "continuing to this day."[73] Thus, the majority's reliance on *Evans* is misleading because *Evans*, unlike *Ledbetter*, involved "a single, immediately identifiable act of discrimination, a constructive discharge."[74]

In *Delaware State College v. Ricks*,[75] Ricks, an African-American professor was denied tenure by his college. The college's policy was to allow junior faculty members who were not granted tenure to stay employed for one year under a "terminal contract."[76] Consequently, after notifying Ricks that his tenure had been denied, the college employed the professor for another year, and then discharged him.[77] Similar to the facts in *Evans*, when Delaware State College denied Ricks tenure, he did not file a charge until one year later, when his contract came to an end.[78]

Much like *Evans*, no repetitive, cumulative discriminatory employment practice was at issue in *Ricks*.[79] Ricks experienced a "single immediately identifiable act of discrimination,"[80]—a denial of tenure. Thus, if Ricks' claim accrued on the date he was denied tenure, then his charge with the EEOC is untimely. However, if his claim accrued on the date his employment was terminated, then his claim is timely. The majority, led by Justice Powell, held that the denial of tenure was the discriminatory act, not the subsequent termination. Thus, the charging period began on the date his tenure was denied,[81] and therefore his charge was untimely.[82] This is consistent with the Court's prior decision in *Electrical Workers*, in which the discriminatory act was the discharge, not the

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70 Justice Marshall was joined by Justice Brennan in the dissent.

71 *Evans*, 431 U.S. at 561.

72 *Id.*

73 *Id.* at 562.

74 *Id.* at 554.

75 Delaware State College v. Ricks, 449 U.S. 250 (1980).

76 *Id.* at 253.

77 *Id.*

78 *Id.* at 257.

79 *Ledbetter*, 127 S. Ct. at 2182.

80 *Id.*

81 The Supreme Court in *Delaware State College v. Ricks*, agreed with the District Court's determination that Ricks' essential allegation was that he had been illegally denied tenure. The Court of Appeals for the Third Circuit agreed with Ricks, preferring a rule focusing on the last day of employment, which would provide a "bright line guide both for the courts and for the victims of discrimination." *Ricks*, 449 U.S. at 256.

82 *Ricks*, 449 U.S. at 255.

subsequent arbitration.[83] Here, the actual discharge was the present effect of past discrimination. Because the discriminatory act was never charged, its later consequences—the actual discharge—were irrelevant.

In *Lorance v. AT&T Technologies Inc.*,[84] the Company's seniority structure was based primarily on total length of employment. Although the majority in *Ledbetter* relies heavily on *Lorance*, in the 1991 Civil Rights Act, Congress superseded the holding in *Lorance*.[85] However, in 1979, the company adopted a new labor contract, which included a new basis for seniority for only one position in the plant, the job of tester; thereafter, the seniority of testers was based on the length of time at that job alone. After excluding women in the past, the position of tester became available to women, and some women transferred into it from other positions within the company. Thus, the new seniority system placed female employees who only recently qualified for a tester position to the bottom of the seniority list.[86] In 1982, during a recession, some female employees were demoted; however, these employees may not have been demoted if the seniority structure had not changed in 1979. These women filed EEOC charges alleging that the seniority system adopted in 1979 intentionally disadvantaged women.[87] The Supreme Court held that the charge was untimely because the discriminatory act was the adoption of the new structure for testers in 1979 and not the application of the structure to the women in 1982.[88] Thus, the female employees should have filed a charge in 1979 when the seniority structure was implemented and not in 1983 when the women were demoted due to the effects of the new seniority system.

In *National Railroad Passenger Corp. v. Morgan*, an African-American former employee brought suit against the railroad for racial discrimination and retaliation under Title VII.[89] In *Morgan,* under the "Discrete Act Theory," the Supreme Court explained that the statutory term "employment practice" generally refers to "a discrete act or single 'occurrence'" that takes place at a particular point in time.[90] Accordingly, a discrete act of discrimination is an act that in itself "constitutes a separate actionable 'unlawful employment practice.'"[91] A charge is only timely if filed to cover discrete acts that occurred within the appropriate time limitation.[92] Adopting a similar view to *Bazemore, Morgan* contends that the term unlawful employment practice refers to ongoing continuing violations. A charge alleging a hostile work environment claim, however, will not be time barred so

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[83] *Electrical Workers*, 429 U.S. at 231.

[84] Lorance v. AT&T Technologies Inc., 490 U.S. 900 (1989).

[85] Civil Rights Act of 1991, Pub. L. No. 166, § 112, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)(2008)).

[86] *Id.*

[87] *Id.* at 905.

[88] *Id.* at 906.

[89] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

[90] *Id.* at 111.

[91] *Id.* at 114.

[92] *Id.* at 113.

long as all acts which constitute the claim are part of the same unlawful employment practice, and at least one act falls within the time period.[93] On the other hand, a hostile work environment is typically comprised of a series of separate acts that collectively constitute one "unlawful employment practice," for purposes of the charge filing requirement of Title VII.[94]

Ledbetter's claim is similar to Morgan's. At trial, "Ledbetter's evidence demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular."[95] A substantial amount of evidence was presented at Ledbetter's trial, including testimony from her former supervisor, who "admitted to the jury that Ledbetter's pay, during a particular one-year period, fell below Goodyear's minimum threshold for her position."[96] Furthermore, the jury was also informed that Ledbetter was a top performing award winning employee, and that one of her evaluators was openly biased against women.[97] One former employee testified that she was being paid less than the men she supervised.[98] Thus, much like the case in *Morgan*, Ledbetter's experience is akin to a hostile work environment and yet Ledbetter cannot seek any relief under Title VII. "Each and every pay decision she did not immediately challenge wiped the slate clean."[99]

III. *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*

Title VII's primary purpose is to promote "'equality of employment opportunities and remove' [discriminatory practices and devices] . . . . It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."[100] Under the majority's holding, Ledbetter cannot attain relief for the cumulative effect of a number of decisions that, together, set Ledbetter's salary far below every male colleague.[101] The majority condones the employer's discriminatory behavior by treating it as lawful and by placing a heavy burden on the employee to come forward each time she receives a pay check. Ultimately, Ledbetter was unable to recover for any of her lost wages. The majority's holding whittles away at the protections intended by Title VII.

Ledbetter's pay disparity case differs from other adverse actions—such as termination, failure to promote, denial of transfer, or refusal to hire—because such adverse actions, unlike pay disparities, involve fully communicated discrete acts,

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93 *Id.* at 117.

94 42 U.S.C. § 2000e-5(e)(1)(2008).

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

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

101 *Ledbetter*, 127 S. Ct. at 2178.

"easy to identify" as discriminatory.[102] Justice Ginsburg notes the significant difference, explaining that, "it is only when the [pay] disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain."[103] Thus, Justice Ginsburg stated that, "[Ledbetter's] initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex."[104]

Lilly Ledbetter was employed as a supervisor at Goodyear Tire and Rubber's Plant in Gadsden, Alabama, from 1979 through 1998, when she retired.[105] Ledbetter's position as an area manager was one largely occupied by men. "By the end of 1997, [she] was the only woman working as an area manager."[106] Although initially Ledbetter's salary was comparable to her male colleagues, over time, Ledbetter's pay slipped in relation to the males' pay.[107] During Ledbetter's time at Goodyear, the company relied on performance evaluations from supervisors when determining whether to give pay raises.[108] Ledbetter argued that her supervisor gave her poor evaluations because of her sex, resulting in a significantly lower salary than any of her male counterparts.[109] Consequently, Ledbetter argues, Goodyear did not give her a pay raise as they would have had her supervisors given her a fair evaluation. Although Ledbetter felt that she received the poor performance evaluations due to sex discrimination, she did not file any charges at that time because "[s]mall initial discrepancies may not be seen as meet [sic] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves."[110] As Ledbetter was approaching retirement, she received an anonymous note suggesting she was being paid less than her male counterparts.[111] Prior to that date, Ledbetter was not aware of any pay disparity between her and her male colleagues because she and her co-workers did not discuss their salaries with each other nor were their salaries made public.[112]

First, Ledbetter argued that the theory of present effects of past discrimination applied: namely, that discriminatory decisions in the past effected the decisions made during the charging period. She argued that each paycheck was

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[102] *Morgan*, 536 U.S. at 114.

[103] *Ledbetter*, 127 S. Ct. at 2179.

[104] *Id.*

[105] *Id.* at 2178.

[106] *Id.*

[107] *Id.*

[108] *Ledbetter*, 127 S. Ct. at 2162.

[109] *Id.* at 2178. Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid received $5,236 per month.

[110] *Id.* at 2179.

[111] *Justice Denied?: Hearing Before the H. Comm. on Education and Labor*, (2007) (statement of Lilly Ledbetter), *supra* note 1.

[112] *Id.*

a new violation and triggered a new charging period.[113] Justice Alito, speaking for the majority, rejected this notion and followed the "discrete act" theory, reasoning that a pay-setting decision is a "discrete act" and, therefore, the 180-day period for filing a charge with the EEOC begins when that decision happens—for example, the decision to grant or deny a raise—rather than at the time of the issuance of each paycheck during the limitations period.[114] Ledbetter proposed that the Court liken intentionally discriminatory seniority systems like the one found in *Lorance,* to intentionally discriminatory pay settings, such as the one found here. Ledbetter maintained that employees should be able to seek relief when they are subject to the discriminatory system, or when the discriminatory system is adversely applied to the employee. The Court rejected Ledbetter's assertion that the amendment overruling *Lorance* only applied to seniority systems, and thus, does not affect the discrete-act theory.

Second, Ledbetter argued under *Evans*, *Rick*, *Lorance* and *Morgan* that the theory of continuing violations applied, asserting that paychecks she received during the charging period and her 1998 raise denial each violated Title VII, and thus triggered a new EEOC charging period.[115] The majority rejected Ledbetter's argument, as it did in *Evans*, stating that the *effects* of the prior uncharged discrimination have "no present legal consequence."[116]

Employers often discriminate over time, as evidenced in case law by the pattern and practice cases.[117] Claims of pay discrimination should receive the same procedural charge-filing treatment under Title VII as hostile work environment claims for determining liability because, much like a hostile work environment claim, a pay discrimination claim is also "based on the cumulative effect of individual acts" which by, "[its] very nature involves repeated conduct."[118] What happened to Lilly Ledbetter did not happen overnight—it was not a one day unlawful employment practice or violation—it occurred over her years working at Goodyear. Salary increases are merit-based, reflecting each employee's performance, evaluated on an annual basis. To limit the EEOC charging period governing "discrete acts" within the last 180 days—when most U.S. businesses make decisions regarding salary increases on an annual basis—is inadequate.[119]

Pay discrimination, unlike a termination or promotion, is often hidden from the discriminatee and other employees, thus making it close to impossible to come forward with EEOC charges. Justice Ginsburg, emphasizing this point, stated in

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[113] *Id.* at 2169.

[114] *Ledbetter*, 127 S. Ct. at 2165.

[115] *Id.* at 2169.

[116] *Id.*

[117] *See generally* Shaub v. Newton Wall Co., 153 Fed. App. 461 (10th Cir. 2005).

[118] *Ledbetter*, 127 S.Ct. at 2180.

[119] Memorandum from Marcus L. Stevenson, Procurement Executive, USAID for All Contracting Officers and Negotiators (1998) (on file with USAID).

the *Ledbetter* dissent that "[e]mployers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials."[120] Under the majority's approach, a woman in Ledbetter's position who finds out that her pay is lower than all of her male colleagues, may only obtain relief if she files a charge with the EEOC either prematurely—before she knows she is being paid less than her male counterparts—or often. To preserve her right to sue, she may file an EEOC charge with each paycheck she receives.

The majority's holding is dangerous because it thwarts pay discrimination victims who are informed of the discriminatory pay disparity after they have missed their opportunities to file an EEOC charging deadline within 180 days of the violation. Ultimately, the majority crassly places too much weight on the "strict adherence to the procedural requirements specified by the legislature," in order to "best guarantee evenhanded administration of the law."[121] The majority rejects the notion that "an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period."[122]

The practical impact of the *Ledbetter* decision is that it will allow employers to pay their employees disparate amounts based on their gender so long as the employer is able to keep their intentions hidden for the first 180 days after they issue a paycheck. Furthermore, employers who do not already have a policy in place requiring employees to keep salaries confidential, will implement such a rule to shield themselves from discrimination claims.[123] Employees will have to file a charge with the EEOC immediately if they think they might be paid less than a colleague in a similar position.

IV. H.R. 2831: THE LILLY LEDBETTER FAIR PAY ACT OF 2007

A. House Bill to Reverse Ledbetter

In an attempt to rectify the harsh results from the *Ledbetter* decision and to restore worker's rights when bringing forth pay discrimination claims, the House of Representatives passed H.R. 2831, "The Lilly Ledbetter Fair Pay Act" on July 31, 2007.[124] The Lilly Ledbetter Fair Pay Act seeks to amend section 706(e) of the Civil Rights Act of 1964,[125] by adding the following:

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[120] *Ledbetter*, 127 S. Ct. at 2179.

[121] *Id.* at 2171 (citing Mohasco Corp. v. Silver 447 U.S. 807, 826 (1980)).

[122] *Id.* at 2172.

[123] *See* Marrero-Gutierrez v. Molina, 491 F.3d 1 (1st Cir. P.R. 2007) (finding statute of limitations period for plaintiff's claim began to accrue at the first discrete act of discrimination, and rejecting the argument that the date should be when the plaintiff learned of the discriminatory motives) (citing *Ledbetter*, 127 S.Ct. 2162).

[124] The Bill was introduced on June 22, 2007.

[125] 42 U.S.C. §2000e-5(e)(2008).

> (3)(A) 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 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.
> (B) In addition to any relief authorized . . . liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.[126]

The Honorable George Miller [D-CA], Chairman of the Committee on Education and Labor of the House of Representatives introduced the bill, which has passed in the House and is currently pending in the Senate.[127] The bill seeks to amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973 with regard to wage discrimination.[128] The Democrats in the House recognized that the majority in *Ledbetter* ignores the realities of wage discrimination in the work force. Because wage discrimination is not easily visible and palpable to the employee at the precise moment it occurs, the Lilly Ledbetter Fair Pay Act would clarify that every paycheck, which is paid pursuant to a discriminatory compensation decision, constitutes a violation under the Acts. This is a different approach than the majority suggested in *Ledbetter*, which was to base the charge-filing period on the date the employer decided to pay the employee less—regardless of whether or not the employee was aware of the discriminatory pay decision.

However, the bill leaves much to be desired, and thus is not likely to be adopted. H.R. 2831 reinstates the "paycheck accrual rule," rejected by the majority in *Ledbetter*. The paycheck accrual theory would permit victims of discrimination to file claims of discriminatory pay decisions years after those decisions are made. This bill would allow victims of discriminatory pay decisions to challenge pay decisions each time they are subject to such decisions or are harmed by them. The bill is unlikely to pass in Congress because it would essentially eliminate the statute of limitations in Title VII of the Civil Rights Act of 1964 and other anti-discrimination laws.

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126 H.R. 2831, 110th Cong. (2007).
127 *Id.*
128 *Id.*

Under the paycheck accrual rule, any paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period.[129] However, based on an estimate by the Congressional Budget Office (CBO), H.R. 2831 would not lead to a flood of litigation. The CBO does not expect a significant rise in the number of filings with the EEOC as a result of this bill. Because there are a number of factors influencing the filing of a pay discrimination claim, CBO estimates that H.R. 2831 would not significantly increase costs to the EEOC or to the federal courts over the 2008-2012 period.

Yet, this amendment is too broad to pass the Congress and is likely to cause more problems than solutions in the workplace. The Lilly Ledbetter Fair Pay Act goes above and beyond rectifying the problem in *Ledbetter*. The impact of the Court's decision will be felt by many more individuals beyond Lilly Ledbetter; similarly, this bill is likely to have far broader implications than merely overturning *Ledbetter v. Goodyear Tire & Rubber*. By applying the paycheck accrual method too broadly, employers may be on the hook for decades. This could lead to even more employer discrimination prior to hiring. If employers know that they are liable to employees indefinitely, they may not hire as many employees, or they will simply not hire women for fear that they might bring a claim in the distant future.

Furthermore, the Lilly Ledbetter Fair Pay Act likely expands Title VII's reach too far. The language of the bill states that anyone "[a]ffected by application of a discriminatory compensation decision or other practice"[130] can bring a claim. This expansion of Title VII is unlikely to pass because it would lead to the possibility of employees' family members bringing suit as well.

This Note argues that the amendments to the antidiscrimination Acts must be narrower, so that it has a stronger chance to be enacted into law and to make a difference in working people's lives, particularly women, who continue to face wage discrimination.

B. Senate Bill S.1843, The Fair Pay Restoration Act of 2007: A Companion Bill to H.R. 2831

On July 20, 2007, a companion bill was introduced in the Senate. The Senate bill was sponsored by Senator Edward Kennedy of Massachusetts and co-sponsored by twenty-one other Senators. This bill also seeks to reverse *Ledbetter* and states:

> [A]n 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

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[129] *See* Forsyth v. Fed'n. Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005).

[130] *Ledbetter*, 127 S.Ct. at 2181.

> practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[131]

Hearings were held on this bill on January 24, 2008. This bill explicitly acknowledges that, in the real workplace, workers do not know the salaries of their coworkers. However, much like the House bill, this is unlikely to pass if not narrowed substantially to avoid a seemingly open-ended statute of limitations.

V. CONCLUSION

Employers do not spontaneously decide to discriminate against employees. Employees often do not know that a decision to discriminate against them was made, let alone when that decision was made. Lilly Ledbetter did not realize she was being discriminated against for a long time, but this does not mean that she and other female employees are not affected by gender discrimination at work. The majority's opinion in *Ledbetter* encourages discriminatory behavior because it gives employers the impression that they can continue discriminating against employees as long as the employees do not know about it. The majority in *Ledbetter* appears unsympathetic to the tremendous advances that women have made in the workplace and the purpose behind the enactment of the Civil Rights Act of 1964.[132] The *Ledbetter* decision and the subsequent proposed legislative amendments are significant because they highlight the fact that pay discrimination based on gender is not a problem of the past. Despite the progress that women have made in the workforce, the gender wage gap will persist so long as rulings like *Ledbetter* continue to institutionalize such discrimination.

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[131] Fair Pay Restoration Act of 2007, S.1843, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.1843.

[132] 42 U.S.C. §2000 (2008).