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STATEMENT

of the

AMERICAN BAR ASSOCIATION

submitted to the

COMMITTEE ON THE HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

for the hearing on

"The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases"

JANUARY 24, 2008

A hallmark of the American system of government is that the U.S. Supreme Court is the ultimate referee on questions of law. Even when Court decisions stir passionate differences, they must be respected and enforced. Yet it is clear that a recent Supreme Court ruling on pay discrimination cries out for a reexamination by Congress because the practical effect of the Court's ruling is to make Title VII of the 1964 Civil Rights Act almost useless in combating pay discrimination in the workplace.

Thanks to the leadership of Senator Kennedy and others, legislation was swiftly introduced to reverse the Court's ruling by clarifying that an unlawful practice occurs each time compensation is paid pursuant to a discriminatory compensation decision or other practices. We hope that today's hearing will result in prompt approval of S. 1843 and speedy passage by the Senate so that workers with legitimate claims of pay discrimination are not denied access to the courts. We appreciate the opportunity to submit our views to the Committee and request that this statement be made part of the hearing record.

In *Ledbetter v. Goodyear Tire & Rubber Co.,*[1] the pay of Lilly M. Ledbetter, initially in line with the salaries of men performing the same work, fell 15 to 40 percent behind that of male counterparts during a 20-year career at an Alabama tire plant. The trial court awarded Ledbetter back pay, compensatory damages and punitive damages after finding that the disparity was based on Ledbetter's sex, not her workplace performance. The Eleventh Circuit Court of Appeals overturned the verdict. Departing from the practice of other circuits, the Eleventh Circuit examined only the pay decisions within the 180 days prior to her filing the Equal Employment Opportunity Commission (EEOC) charge, even though that was not the period for which she alleged that intentional discriminatory conduct had occurred, and concluded that there was insufficient evidence to prove that Goodyear acted with discriminatory intent. Upon appeal, the Supreme Court likewise found for the defendant, holding that Ledbetter's case, alleging pay discrimination

1 127 S.Ct. 2162 (2007).

resulting from intentional acts of discrimination by Goodyear over the course of her career, in fact was time-barred because no discriminatory acts were alleged to have taken place within the 180-day statute of limitations period. That Ledbetter -- and other workers in similar situations who bring suits under Title VII -- may be currently suffering from discriminatory pay checks based on past acts of intentional discrimination was irrelevant to the Court's strict interpretation of the statute.

The Court specifically rejected the view of the EEOC that each unequal paycheck is a separate, distinct act of intentional discrimination, even though each paycheck carries forward the adverse effect of the discriminatory performance review. No matter how unfair the disparity resulting from past intentional discrimination, according to the Court's ruling, there is no way to recover years of lost wages unless intentional acts of discrimination are still occurring or have occurred within the six-month period preceding the filing of the EEOC complaint.

The consequences of this decision collide with 50 years of progress toward eliminating workplace discrimination and achieving the clear goal of Congress and of society to make sure that able workers doing the same work are paid equitably regardless of race, sex, or other demographic trait. It is difficult, if not impossible, for an employee to know within six months that pay bias has cheated him or her of a fair paycheck. Many companies, including Goodyear, keep pay structures secret. Early covert pay discrimination snowballs with time, as an employee's base for future pay raises keeps falling further behind. It often takes years for a discriminatory pattern to become obvious.

Members of Congress properly, resoundingly and swiftly objected to the *Ledbetter* decision, and S. 1843 and H.R. 2831, its House-passed counterpart, have made it clear that the Court's decision was based on its strict statutory interpretation, not on the original intent of Congress in passing the law.

The ABA, likewise, responded swiftly to the *Ledbetter* decision. In August 2007, the ABA House of Delegates, our 550-member policy-making body, adopted by overwhelming vote the following resolution, which mirrors the purpose of S. 1843:

> RESOLVED, That the American Bar Association urges Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving discrimination in pay, the statute of limitation runs from each paycheck reflecting an improper disparity.

The ABA supports S. 1843 because it will ensure the continued vitality of Title VII by amending the statute in accordance with our policy to assure that victims of discrimination have an appropriate opportunity to file a pay discrimination claim with the EEOC and resolve their claim in court, if necessary.

Congress has taken -- and the ABA has supported -- similar action in the past. In 1989, the Supreme Court held in *Lorance v. AT&T Technologies, Inc.*,[2] that a claim based on a discriminatory seniority system had to be filed with the EEOC within 180 days from the adoption of the system, not from the date the employee was injured by application of the system. The employer in *Lorance* had implemented a seniority system keyed to the number of years the employee was in a specific job as a "tester," rather than the number of years the employee was with the company. At the time the seniority system was adopted, most of the testers were men. When the company experienced a downturn three years later, it demoted the women testers based on their seniority in that position. The women filed a charge with the EEOC which was timely, if calculated from the date of the demotions. The Supreme Court, however, held the claim time barred under the same provision at issue in *Ledbetter* because, the Court found, the "unlawful employment practice" had occurred three years earlier when the seniority system was adopted.

[2] 490 U.S. 900 (1989).

In response, Congress passed the Civil Rights Act of 1991, amending the provision "by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[3] The amendment made clear that the statute of limitations could run from the time an employee is injured by a seniority system.[4]

S. 1843 likewise seeks to clarify that the statute of limitations for claims of discrimination in pay also runs from each injury -- that is, from each paycheck reflecting an improper disparity. It will ensure that discriminatory pay disparities will not be insulated from legal challenge, that employees need not file claims before they gain sufficient knowledge of the pay disparity, and that employers will have an incentive to discover and address discriminatory pay disparities rather than conceal them.

At the same time, this "paycheck accrual rule" will not subject employers to damage awards for many years of back pay, or to lawsuits from employees who needlessly delay filing a claim, as some opponents of S.1843 have asserted. Title VII limits back pay to the two years prior to filing a charge with the EEOC.[5] In addition, the Supreme Court and the EEOC have allowed an "employer [to] raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant."[6] There is no basis for the concern that enacting a paycheck accrual rule will open the floodgates of litigation and lead to the filing of frivolous claims, given that prior to *Ledbetter*, the EEOC and the courts of appeals routinely followed just this approach.

Opponents of a legislative fix also argue that it would encourage plaintiffs to delay filing charges and that such delays would unfairly disadvantage the employer. We do not find

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[3] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991).

[4] 42 U.S.C. § 2000e-5(e)(2) (2000).

[5] 42 U.S.C. § 2000e-5(g)(1) (2000).

[6] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002); Brief of EEOC in Support of Petition for Rehearing and Suggestion for Rehearing En Banc at 15, Ledbetter v. Goodyear Tire & Rubber Co., No. 03-15264-GG (11th Cir. date), [hereinafter EEOC Brief] ("[I]f Ledbetter unreasonably delayed challenging an earlier decision, and that delay significantly impaired Goodyear's ability to defend itself . . . Goodyear can raise a defense of Laches . . . .").

any merit in these claims either: there is no incentive for a person who thinks he is a victim of discrimination to delay and settle in the meantime for a smaller paycheck than might be his or her due; and delay in filing will disadvantage the plaintiff, if anyone, since it is the plaintiff who has to meet the burden of proof.

Title VII is the keystone of this Nation's efforts to eliminate discrimination in the workplace. It includes a statute of limitations designed to prevent old, stale claims, and thereby facilitate handling of pressing, serious claims. That is what a statute of limitations should do. But that is *all* it should do. It should not freeze prior discrimination in place. It should not extinguish claims before victims can even know they were injured. And it should not blunt this nation's principal statutory weapon against discrimination.

Enactment of S.1843 or similar legislation will rectify these unintended results by restoring Title VII to its central role in providing legal protection against workplace discrimination. We urge you to make its passage a priority for this Congress.