AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

August 13-14, 2007

RECOMMENDATION

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.

REPORT

For decades, the American Bar Association ("ABA") has strongly opposed discrimination in employment based on race, gender, national origin and other characteristics irrelevant to individual merit. The ABA has advocated that Title VII of the Civil Rights Act of 1964 provide appropriate remedies for victims of discrimination. In particular, after the Supreme Court decided *Lorance v. AT&T Technologies, Inc.*,[1] narrowly interpreting the statute of limitations in Title VII for cases involving discriminatory seniority systems, the ABA successfully urged Congress to clarify and broaden that provision.

In May 2007, in *Ledbetter v. Goodyear Tire & Rubber Co.*,[2] the Supreme Court again adopted a restrictive interpretation of the statute of limitations in Title VII, this time as applied to claims of discrimination in pay. As it has now been construed, the statute of limitations will seriously erode the prohibition in Title VII against discrimination in wages based on improper factors, and will deny meaningful remedies to many victims. It is important that the ABA speak out, as it did in 1990, in favor of amending the statute to reflect and implement this nation's continuing commitment to equal treatment under the law.

I. DISPARITIES IN PAY BASED ON GENDER, RACE AND ETHNICITY PERSIST IN THE AMERICAN WORKFORCE

As ABA President Karen Mathis wrote recently, "America's fight against workplace discrimination in the last 50 years is an important piece of social and legislative progress. It is 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."[3] Nonetheless, disparities persist between the earnings of women and men, and between the earnings of minorities and whites. In 1979, women earned on average 63 cents for every dollar earned by men, while African-Americans earned 80 cents for every dollar paid to white workers.[4] In the first quarter of 2007, women earned 81 cents for every dollar earned by men – a narrower, but still substantial gap – and African-Americans made 79 cents for every dollar earned by whites.[5] The differential is even larger for minority women.[6] Studies suggest varying reasons for the persistent wage

[1] 490 U.S. 900 (1989).

[2] 127 S. Ct. 2162 (2007).

[3] Karen J. Mathis, *Op-Ed: Congress Needs to Make Its Intent Clear: Equal Pay for Equal Work*, June 1, 2007, available at http://www.abanet.org/abanet/media/oped/oped.cfm?releaseid=140.

[4] Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003* (2004), at 1, 30 available at http://www.bls.gov/cps/cpswom2003.pdf..

[5] Bureau of Labor Statistics, U.S. Dep't of Labor, *Usual Weekly Earnings of Wage and Salary Workers: First Quarter 2007* (April 18, 2007), at 3 tbl. 1, available at http://www.bls.gov/news.release/pdf/wkyeng.pdf.

[6] *Id.* (median usual weekly earnings in the first quarter of 2007 for white men were $783, African-American women, $540, Asian women, $743, and Hispanic women, $471).

gaps, but discrimination is prominent among them.[7] And while the improvement since 1979. at least with regard to gender, is somewhat encouraging, the most significant reductions in the wage gap occurred during the 1980s, with less progress in recent years.[8] Because salary reviews and adjustments often carry forward the prior salary as a baseline, earlier discriminatory employment decisions limit progress and continue to sow wage disparities.[9]

II. CONGRESS ENACTED TITLE VII TO PREVENT DISCRIMINATION IN EMPLOYMENT AND PROVIDE A REMEDY TO VICTIMS

A. The Language and Purposes of Title VII

In 1964, Congress adopted Title VII as part of the Civil Rights Act, declaring it an "unlawful employment practice" to "refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." [10] The Act also created the Equal Employment Opportunity Commission ("EEOC"), with a mandate to eliminate discriminatory employment practices.

The prohibitions of Title VII are broad, reflecting "a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[11] The statute seeks both to eliminate unlawful employment practices and to restore injured persons to the position they would have been in absent discrimination.[12] Title VII is thus a remedial statute, designed with the necessary flexibility to achieve these goals. To that end, it affords courts broad discretion in fashioning relief, including up to two years of back pay.[13]

B. The Requirement that Employees File Timely Claims with the EEOC

1. *Purpose of the Filing Requirement*

While protecting workers from discrimination, Congress also wished to ensure that Title VII did not disrupt business with unnecessary lawsuits or with claims no longer relevant to the workplace. Congress intended Title VII to be enforced in large measure through voluntary compliance by employers.[14] The objective was to promote conciliation rather than litigation, by

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[7] *See, e.g.*, Council of Econ. Advisors, *Explaining Trends in the Gender Wage Gap* (1998).

[8] Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N. C. L. Rev. 707, 715 (2000).

[9] *Ledbetter Hearing* (testimony of Deborah L. Brake, Professor of Law, Univ. of Pitt. at 2).

[10] 42 U.S.C. § 2000e-2(a)(1) (2000).

[11] *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

[12] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

[13] 42 U.S.C. § 2000e-5(g) (2000); *see also Albemarle Paper Co.*, 422 U.S. at 421 (discussing courts' broad discretionary powers under Title VII).

[14] *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77–78 (1984) ("[W]hen it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act.").

requiring employees to file a discrimination charge with the EEOC before bringing suit and requiring the EEOC to attempt to resolve the matter before allowing the employee to sue.[15] To promote prompt dispositions and avoid stale claims, Congress set a deadline by which the employee had to file the claim, a statute of limitations of 180 days "after the alleged unlawful employment practice occurred."[16]

2. *The Trigger for the Filing Requirement and the Supreme Court Decision in Ledbetter*

In applying this statute of limitations to claims of unequal pay, courts have confronted the question of when an "unlawful employment practice occurred" to start the 180-day clock. Did the unlawful employment occur *only* at the time of the initial discriminatory decision? Or was each subsequent paycheck reflecting the disparity also an "unlawful employment practice"? Until recently, the prevailing answer in the courts was that a plaintiff has a timely claim under Title VII for each paycheck within the 180-day statutory period reflecting a discriminatory differential.[17] The EEOC took the same view, stating in its compliance manual that "[r]epeated 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." [18]

In June 2007, however, the Supreme Court interpreted the statute differently. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court held that the statute of limitations in Title VII requires employees to file discrimination claims within 180 days after the discriminatory pay decision is made and communicated to the employee. The Court reasoned that Title VII prohibits "discrete acts" undertaken with a specific intent to discriminate, and while the initial pay decision may reflect that intent, subsequent paychecks generally do not.[19] Thus, the Court held, those paychecks are not unlawful employment practices from which the statute of limitations runs.

III. THE STATUTE OF LIMITATIONS AS INTERPRETED IN *LEDBETTER*

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[15] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998); *Shell Oil Co.*, 466 U.S. at 78.

[16] 42 U.S.C. § 2000e-5(e)(1). The deadline is 300 days if a state agency has authority in the governing jurisdiction.

[17] *See, e.g., Forsyth v. Fed'n Emp. & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) ("Any paycheck given within the statute of limitations period [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); *Shea v. Rice*, 409 F.3d 448, 455 (D.C. Cir. 2005) (finding that "an employee may recover for discriminatorily low pay received within the limitations period because each paycheck constitutes a discrete discriminatory act" (internal citations omitted)); *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1028 (7th Cir. 2003) (same); *Tademe v. St. Cloud State Univ.*, 328 F.3d 982, 989 (8th Cir. 2003); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) ("[A] discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation."); *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."); *see also Ledbetter*, 127 S. Ct. at 2184 (Ginsburg, J., dissenting) (collecting cases).

[18] 2 EEOC Compliance Manual § 2-IV-C(1)(a), p. 605:0024, and n.183 (2006).

[19] 127 S.Ct. at 2169-70.

UNDERMINES THE REMEDIAL PURPOSES OF TITLE VII

It is not the goal of the resolution before the House of Delegates nor of this report to reargue *Ledbetter*. Whether one agrees or not with the Supreme Court's reading of the statutory language, it is clear that legislative action is needed in order for Title VII to function properly. The statute of limitations as it now will be applied will engender confusion and unfairness. It will deny remedies to many victims of discrimination, encourage subterfuge by employers, precipitate unwarranted claims, and generally frustrate the purposes underlying Title VII.

A. The Statute of Limitations as Interpreted in *Ledbetter* Effectively Extinguishes the Remedies under Title VII for Many Victims of Discrimination

Discrimination in pay is different than many other types of discrimination. In particular, it is more difficult for employees to discern such discrimination than it is to spot other, more overt employment actions, such as termination or failure to hire. Moreover, disparities in pay often occur in small increments that are unlikely to prompt comment or to yield patent differences in employees' lifestyles. Based on privacy concerns or other reasons, employers generally do not publicize the pay of similarly situated employees, and employees similarly do not broadcast their income. Discriminatory pay differentials therefore can persist without the knowledge of affected employees.[20] Additionally, discrimination may occur when a company initially sets a new employee's salary, a time when the employee has little reason to suspect unequal treatment or to challenge it even if he or she is suspicious.[21] Given the impediments to uncovering disparities in pay, many employees simply will not be in a position to file an EEOC claim within 180 days after the initial discriminatory decision. So long as that decision remains the sole trigger for the statute of limitations, those employees could well have no meaningful remedy under Title VII. Uncontested differences in pay will become "a *fait accompli* beyond the province of Title VII even to repair."[22] The statute of limitations as interpreted in *Ledbetter* will thereby lock in past discrimination and insulate it from legal challenge, despite the enduring discriminatory impact on current paychecks. By thus "grandfathering in" prior improper decisions regarding pay, the 180-day filing requirement - as it has now been construed -_will impede further narrowing of the wage gaps between men and women, and between minority and white workers.

B. The Statute of Limitations as Interpreted in *Ledbetter* Encourages Subterfuge by Employers that Discriminate

Because the statute of limitations, post-*Ledbetter*, potentially extinguishes claims not filed within 180 days of the initial discriminatory pay decision, for those employers that choose

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[20] *See generally* Leonard Beirman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004) (discussing both informal expectations and formal workplace rules that discourage or prohibit employees from discussing their salaries).

[21] *See* Brake Testimony, *supra*, at 6 ("An employee is especially unlikely to be in a position to perceive and challenge pay discrimination soon after she is hired.").

[22] 127 S. Ct. at 2178 (Ginsberg, J., dissenting).

to discriminate, it provides an additional incentive to conceal such decisions. At the least, it provides a reason for some employers *not* to identify and correct disparities. If those employers that discriminate can "skate through" the first 180 days after the discriminatory decision, then they stand to reap substantial savings as future raises are calculated from the discriminatory base.[23] Further, given the premium on getting past the 180 day hurdle, some employers could well conclude that undertaking a comprehensive review of gender or racial equity in salaries would risk charges of pay discrimination that might otherwise be foreclosed by more narrowly confined, regular reviews of individual salaries. These incentives not only undermine the goal of ending discrimination in pay, but also conflict with the policy reflected in Title VII of encouraging employers to comply voluntarily with the statute.

C. The Statute of Limitations as Interpreted in *Ledbetter* Encourages Baseless Claims

Employees who risk forfeiting a claim if they do not file within 180 days of a suspected discriminatory decision have an incentive to file first and verify later. Waiting until the suspicion ripens into certainty, or even until it garners colorable factual support, could preclude prosecution of the claim altogether. The statute of limitations as it now stands encourages baseless claims.

Complaining to the employer first is often not a viable option. An employee "who opposes what she believes to be unlawful discrimination is protected from retaliation only if she had a 'reasonable belief' that the practice she opposes in fact violates Title VII."[24] Thus, an employee who complains to her employer without adequate factual and legal foundation might find herself out of a job with no legal recourse.[25] Because employees do have protection if they file a claim with the EEOC, doing so immediately, without talking to the employer, could be advantageous. Thus, the statute of limitations, as it now will be applied, could discourage informal and conciliatory approaches to correcting pay disparities. This incentive conflicts with underlying goals of Title VII of promoting conciliation and avoiding unnecessary litigation.

D. The Equal Pay Act Does Not Provide a Solution

The Equal Pay Act (EPA) provides some relief to victims of sex discrimination because it allows women to challenge discriminatory pay at any time and collect up to three years back pay for intentional discrimination. [26] But the EPA does not solve the problems created by *Ledbetter*.

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[23] The Court did not decide whether the statute might allow equitable tolling of the limitations period. 127 S. Ct. at 2186. Given the uncertainty whether such an exception to the statute of limitations survives, as well as the legal and evidentiary difficulties of invoking it even if it is available in theory, the prospect of equitable tolling will have scant impact on these pernicious incentives.

[24] Brake Testimony, *supra*, at 7; *see generally Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (adopting the "reasonable belief" standard for retaliation claims).

[25] Brake Testimony, *supra*, at 7.

[26] 29 U.S.C. § 206(d)(1) (2000).

First, it only covers discrimination against women. Pay discrimination based on race, religion, national origin, age, or disability is not covered.

Second, the EPA requires that the woman claimant be paid less than a man for doing substantially the same job. Thus, the EPA may not provide adequate relief for women in unique positions or in traditionally sex-segregated jobs.

Title VII, on the other hand, reaches all claims of intentional pay discrimination.[27] But after *Ledbetter*, Title VII may be a hollow remedy for many victims of pay discrimination, "an odd result given that Title VII was enacted one year after the Equal Pay Act and was intended to broaden the protection from sex discrimination then available under existing law."[28]

IV. CONGRESS SHOULD AMEND TITLE VII TO ACCOUNT FOR THE REALITIES OF PAY DISCRIMINATION

To ensure the continued vitality of Title VII, Congress should amend the statute to afford victims of discrimination an appropriate opportunity to file a claim with the EEOC. Congress has taken similar action in the past. In 1989, the Supreme Court held in *Lorance v. AT&T Technologies, Inc.*,[29] 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.

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."[30] The amendment made clear that the statute of limitations could run from the time an employee is injured by a seniority system.[31] The ABA supported the legislation. The report on the ABA Resolution noted that it was essential, "that the ABA speak forcefully in favor of this legislation and that it support the right against any retreat from civil rights."

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[27] Brake Testimony, *supra*, at 16.

[28] *Id.*

[29] 490 U.S. 900 (1989).

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

[31] 42 U.S.C. § 2000e-5(e)(2) (2000).

Today, the ABA must urge support of similar legislation 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. The legislation should provide that in pay discrimination cases, each such paycheck counts as a separate unlawful employment practice under Title VII. If an employee files a charge with the EEOC based on discriminatory pay, his or her charge is timely as to paychecks received in the 180-day period.

This rule 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. Title VII limits back pay to the two years prior to filing a charge with the EEOC.[32] 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."[33] Enacting a paycheck accrual rule would not likely create new problems, because for many years prior to *Ledbetter*, the EEOC and the Courts of Appeals followed just this approach.

V. RELEVANT ABA POLICIES

Aside from its support of the Civil Rights Act of 1991, which clarified the statute of limitations in Title VII applicable to seniority systems in the same manner urged here for pay discrimination, the ABA has adopted a number of relevant policies.

In 1965, the ABA adopted a policy of not discriminating against any person because of race, color, creed or national origin. In 1972, the ABA strongly condemned all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race or national origin. In 1972 and again in 1974, the ABA urged ratification of the Equal Rights Amendment to the Constitution.

In 1988, the Association recognized that the persistence of overt and subtle barriers deny women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. The ABA affirmed the fundamental principle that there is no place in the profession for barriers to the full integration and equal participation of women in all aspects of the legal profession, and the Association called upon members of the legal profession to eliminate such barriers.

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[32] 42 U.S.C. § 2000e-5(g)(1) (2000).

[33] *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 . . . .").

In 1995, the ABA endorsed legal remedies and voluntary actions that take into account as a factor race, national origin, or gender to eliminate or prevent discrimination. And in 1998, this House urged Congress to provide resources sufficient to enable the EEOC to carry out its congressionally-mandated duties to investigate, conciliate and, where appropriate, take legal action to enforce laws prohibiting discrimination in an effective, fair and efficient manner.

CONCLUSION

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. In interpreting Title VII, the Court has identified a serious hole. The result is not fair. The next step is for Congress, to fashion a law that makes its intent unmistakable.[34]

[34] Karen J. Mathis, *supra* n. 3.