

Women's Employment Rights

Timing Is Key in Wage Discrimination Claims

By Stephanie B. Goldberg

I Imagine: Fresh out of law school, you take a job at a branch of a large law firm. The company hires four other lawyers at the same time, all of whom are men. One night after work, the five of you go out for drinks and one of your coworkers says, "I can't believe how hard we're working for \$90,000 a year." You're taken aback because you were hired at the same time for \$85,000. What explains the salary differential? You immediately suspect sex discrimination, but you have no proof. You ask other coworkers about their situation, but they clam up. What should you do?

(A) Go to your employer and request an explanation for the difference in pay, telling him that it smacks of sex discrimination.

(B) Take this information to the Equal Employment Opportunity Commission (EEOC) and request an investigation.

(C) Forget the whole thing and go back to work. It's only \$5,000, and good jobs are difficult to find.

In a tight job market, most women will choose C because A and B require them to put their jobs on the line on the basis of inadequate information. However, a recent 5–4 U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2007 U.S. LEXIS 6295 (2007), forces them to act sooner rather than later. Many experts believe that *Ledbetter* tips the balance dangerously in favor of management by forcing employees to either complain prematurely or hold their peace, so to speak, while what began as a small wage gap grows larger and larger.

Our hypothetical lawyers, for example, start \$5,000 apart because of intentional discrimination. If the woman and even one of the men both receive 5 percent merit raises, the man will make \$94,500 in his second year of employment while the woman

won't exceed that amount until her fourth year with the firm. There is nothing to suggest *ongoing* discrimination—because both lawyers are receiving equivalent percentage raises—and, yet, the woman can never catch up.

That was the plaintiff's dilemma in *Ledbetter*. Lilly Ledbetter, a factory supervisor who worked at a Goodyear plant in Gadsden, Alabama, for 19 years, ultimately had wages lower than any of her male colleagues even though she received numerous raises along with an award for being "employee of the year." Seemingly her fate was sealed early in her career by a supervisor who told her point blank that women didn't belong in the company. He depressed her wages so drastically that she was still feeling the disparate effects nearly two decades later.

The majority in *Ledbetter*—Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas—would apply the law of "tough luck" in circumstances like these. The opinion tackles the issue of what ought to trigger the statute of limitations in lawsuits alleging pay discrimination under Title VII of the Civil Rights Act of 1964. Previously, issuing a paycheck that reflects the effects of past discrimination was sufficient for commencing a claim under the continuing violation theory. That theory was rejected by the U.S. Supreme Court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), in favor of using the occurrence of a single discrete act by the employer to begin the period for filing an EEOC charge. *Morgan* created an exception for hostile environment cases, recognizing that these claims look at the relationship between multiple actions. The Court deciding *Ledbetter* was asked to create another exception for Title VII disparate-treatment pay cases but declined to do so. The *Ledbetter* decision holds that the clock can

only begin ticking with an intentional act of discrimination by management—the failure to hire or promote, the denial of a promotion, or a discriminatory salary offer.

Once this occurs, employees have from 180 to 300 days, depending on state law, to file a claim with the EEOC. If they don't bring up the pay disparity within that time frame, the company is under no obligation to adjust it later, say some plaintiffs' lawyers. But the consequences of acting promptly can be equally severe. "The Supreme Court doesn't understand that you can't complain to the EEOC without being ready to lose your job," notes Philadelphia employment lawyer Alice Ballard. "You're immediately off the fast track. It's a stupid thing to do."

Justice Ruth Bader Ginsburg, who authored the dissent, was so alarmed by *Ledbetter* that she gave a short speech denouncing it when the majority announced the opinion on May 29. Ginsburg stressed that pay discrimination cases should be treated differently from other adverse action cases, observing that pay inequity claims are very difficult actions to bring because disparities are often incremental and employers may "keep under wraps" the pay differentials maintained among supervisors. "Small initial discrepancies may not be seen as [suitable] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves," noted the dissent.

Distinguishing Precedents

Adopting a stricter standard in pay inequity claims means that many pending cases will now be dismissed. Civil rights activists view this as a huge change in employment law. "Every federal circuit except the 11th has accepted the 'paycheck' or accrual rule," says Jocelyn Samuels, vice president for education and employment at the National Women's Law Center. As it happens, the U.S. Court of Appeals for the 11th

Circuit vacated Ledbetter's jury award, upholding Goodyear's statute of limitations defense.

Yet Justice Alito appears to minimize the effect of the decision, characterizing the case as one that asked the Court to "apply established precedent in a slightly different context." As critics point out, *Ledbetter* relies on a string of Supreme Court cases that upheld statute of limitations' defenses but, significantly, do not involve disparate-treatment pay claims: *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

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Ricks held that a plaintiff's cause of action for discrimination began with his denial of tenure and not with his dismissal one year later, and *Evans* involved a flight attendant who had been fired from the airline in 1968 for being married and was rehired in 1972. In the latter, the Court held that her claim was time-barred because she had not complained about the company's discriminatory policy at the time of the firing. In *Lorance*, a group of female electrical workers were foreclosed from contesting discriminatory conditions in 1983 that were the result of a collective bargaining agreement that was signed in 1979.

Why advocate the application of a different standard for pay cases?

Because discussing salaries is a cultural taboo, according to Ballard. “It’s not that the employer hides the information; it’s that we don’t talk about it. A lot of women think they’re underpaid, but they don’t really know for sure.” Ballard contends that it’s impossible to investigate these claims without putting one’s job on the line.

Nor was the *Ledbetter* majority swayed by *Bazemore v. Friday*, 478 U.S. 385 (1986), a pay discrimination case to which the Court applied the accrual rule. *Bazemore* was distinguishable, Alito wrote, because

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it dealt with intentional discrimination repeated with each paycheck—a two-tier compensation system that punished all African American employees. The majority opinion held that although Ledbetter alleged past discrimination by Goodyear that reduced the amount of later paychecks, she did not timely file EEOC charges relating to her employer’s discriminatory pay decisions in the past, so she therefore could not maintain a current suit based on that past discrimination.

Collective Response

Almost immediately after the decision was announced, a coalition of approximately 25 groups in the civil rights community sprang into action to spur the Democratic majority in Congress to introduce corrective legislation. The coalition includes the AFL–CIO, Mexican American Legal Defense and Educational

Fund, the NAACP Legal Defense and Educational Fund, the National Organization for Women, the Lawyers’ Committee for Civil Rights Under Law, the National Partnership for Women & Families, the National Women’s Law Center, and others.

Heeding their call, Rep. George Miller (D–CA), chair of the House Committee on Education and Labor, convened a hearing on June 12 to discuss the need for remedial legislation. The witnesses included representatives of the U.S. Chamber of Commerce, the Leadership Conference on Civil Rights, and Ledbetter herself. She explained how it took more than 15 years to confirm her suspicions of discriminatory pay.

“I only started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three male managers were getting paid. . . . After I filed my EEOC complaint and then filed a lawsuit, I was finally able to get the whole picture on my pay compared to the men’s,” Ledbetter reported. Raises were awarded on a percentage basis, and even when she received what seemed like a large raise, “it amounted to a smaller dollar raise than [what] the men were getting.” Ledbetter was making \$44,724 a year when she retired from the company after 19 years, while the lowest-paid male in a comparable job was earning \$51,432 annually.

Julie Fernandes, senior policy analyst and special counsel for another coalition member, Washington, D.C.–based Leadership Conference on Civil Rights, believes that a legislative override can put the brakes on what she views as a runaway Supreme Court that has displayed “utter disregard for precedent.”

“We hope that by quickly overturning the decision, it sends the message to the Supreme Court that Congress makes the laws and courts interpret them,” Fernandes says.

“Their role is not to decide the best policy outcome but to discern what Congress intended.”

Corrective Legislation Proposed

On June 22, Miller introduced the Lilly Ledbetter Fair Pay Act, HR 2831. It would allow EEOC claims to be filed within 180 days of the issuing of a discriminatory paycheck and would extend this protection to the Americans with Disabilities Act and the Age Discrimination in Employment Act of 1967. On June 27, the Committee voted to approve the legislation by a vote of 25–20, “strictly along party lines,” says Samuels of the National Women’s Law Center.

Meanwhile, the House Judiciary Committee has been attempting to remedy another aspect of Lilly Ledbetter’s case. Although a jury awarded her in excess of \$3 million at trial, the statutory limits on Title VII damages meant that her award was reduced to \$300,000. Rep. Jerrold Nadler (D–NY) convened a hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on June 28 to discuss the impact of damages caps on Ledbetter.

Fernandes believes that some version of HR 2831 can be passed by both Houses by fall 2007. Senators Hillary Rodham Clinton, Edward Kennedy, Barack Obama, and Dick Durbin are working on parallel legislation in the Senate but have not yet, as of this writing, introduced a bill. Nevertheless, Fernandes is hopeful. “We think we can get a bill on President Bush’s desk to sign by November,” she says.

Possible Outcomes

What if the unthinkable happens and the corrective legislation does not pass?

Plaintiffs’ lawyers will continue to choose state court over federal court for employment lawsuits. According to Boston at-

torney David Belfort, most lawyers won't even bring pendent federal claims for fear that defense lawyers will attempt to remove the case to federal court. Belfort's client, pharmacist Cynthia Haddad, recently won a \$2 million award in her discrimination suit against Wal-Mart. She was able to prove that Wal-Mart gave her the responsibilities of a manager, a job largely occupied by men, but not commensurate pay. What would have happened if Belfort faced a 180-day window that was tied to a discriminatory act? "It would have definitely restricted the evidence we put on," he says.

Expect the large class action suit alleging sex discrimination by Wal-Mart to barrel through.

"Our case alleges a pattern and practice of discrimination, so we're not affected by the *Ledbetter* ruling," says cocounsel for the class action, Joseph M. Sellers of Boston. "Tying the statute of limitations to a single act is inconsistent with pattern and

practice lawsuits, which typically involve thousands of plaintiffs over an extended period of time."

Employees will get more aggressive about pursuing suspicions of discriminatory pay.

Plaintiffs' lawyer Ballard suggests starting a women's networking group to find out about pay differentials and plot a group strategy. Groups can be more effective than individuals in eliciting information as well as in bringing claims later.

Equal Pay Act claims will not be affected. The *Ledbetter* Court declined to extend its ruling to the Equal Pay Act of 1963. The statute of limitations in these cases is three years when willful violations can be proved.

The Court has not foreclosed the possibility of a discovery rule to temper the harsh effect of *Ledbetter*.

A discovery rule would extend the statute of limitations to the date when the plaintiff learned of the difference but might

only apply in cases where the defendant had made it unusually difficult to find out about salaries. Those in the civil rights community are gloomy about its prospects for obtaining relief. "Its application is likely to be very limited," Fernandes suspects.

It goes without saying that the clock will run out on many pending cases. In counseling new clients, Ballard says, lawyers must be careful to ascertain what the client really wants. "You have to find out what's more important to the client—the job or the [pay] increase." Ballard predicts most will elect to live with discrimination as women have for decades. "Your options are clearer now even if there's not a whole lot more you can do about them," she concludes. ☺

Stephanie B. Goldberg is a legal affairs journalist based in Chicago and is a former member of the Perspectives editorial board. Her work has appeared in the New York Times, BusinessWeek, the Chicago Tribune, and many legal publications.

Ledbetter Fair Pay Act of 2007 — H.R. 2831

(as introduced in U.S. House of Representatives, June 22, 2007)

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 to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

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SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

"(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 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.

"(B) In any action under this title with respect to discrimination in compensation, the Commission, the Attorney General, or an aggrieved person, may for purposes of filing requirements, challenge similar or related instances of unlawful employment practices with respect to discrimination in compensation occurring after an aggrieved person filed a charge without filing another charge with the Commission.

"(C) In addition to any relief authorized by 1977a of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in section (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."

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