

No. 07-543

IN THE
Supreme Court of the United States

AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET;
LINDA PORTER; ELIZABETH SNYDER;
COMMUNICATIONS WORKERS OF AMERICA,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**PETITIONER'S OPPOSITION TO MOTION FOR
LEAVE TO FILE SUPPLEMENTAL BRIEF
AFTER ARGUMENT AND CONDITIONAL
CROSS-MOTION TO FILE RESPONSIVE
SUPPLEMENTAL BRIEF AND PETITIONER'S
RESPONSIVE SUPPLEMENTAL BRIEF**

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**PETITIONER'S OPPOSITION TO MOTION
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AFTER ARGUMENT AND CONDITIONAL
CROSS-MOTION TO FILE RESPONSIVE
SUPPLEMENTAL BRIEF**

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, petitioner AT&T respectfully submits this opposition to respondents' motion for leave to file a supplemental brief after argument, and its conditional cross-motion for leave to file the attached responsive supplemental brief.

On January 29, 2009, the President signed into law the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 ("LLFPA"). Two weeks later, on February 12, 2009, respondents filed a motion for leave to file a post-argument supplemental brief, and an attached supplemental brief. In their supplemental brief, respondents argue that the new legislation mandates affirmance of the decision below. Alternatively, they seek vacatur of the lower court's judgment without opinion by this Court, and a remand for reconsideration in light of the new legislation.

AT&T submits that the proper course in these circumstances is for the Court to resolve the issues that have been briefed and argued and allow the lower court to consider what implications, if any, the new law has for respondents' claim. If the judgment is affirmed based on pre-LLFPA law, neither this Court nor the Ninth Circuit will need to consider the LLFPA's meaning or its relevance to this case. If this Court reverses the judgment below, it can remand to allow the Ninth Circuit to determine what, if any, application the new law has to this case. Indeed, any such consideration would significantly benefit from

this Court's resolution of the issues currently pending before it. Accordingly, respondents' motion should be denied.

Should the Court nevertheless decide to grant respondents' motion and accept their supplemental brief, AT&T respectfully requests that the Court grant AT&T leave to file the attached responsive supplemental brief. As AT&T explains in that brief, the plain terms, purpose and structure of the new legislation demonstrate that it does not apply where, as here, employees seek to sue based on the present effects of past conduct that was legal when that conduct occurred.

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**PETITIONER'S RESPONSIVE
SUPPLEMENTAL BRIEF**

Petitioner AT&T submits this supplemental brief to explain why the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (the "LLFPA"), does not affect the proper disposition of this case.

As prior briefs have shown, the service credit adjustments AT&T made for women who took pregnancy leaves before the Pregnancy Discrimination Act ("PDA") were lawful, and the PDA did not retroactively render those adjustments unlawful. Accordingly, AT&T was entitled to rely on those lawful pre-PDA adjustments when calculating post-PDA pensions. See Pet. Br. 16-21; U.S. Br. 13, 19-20. Nothing in the LLFPA alters that conclusion.

The LLFPA amends Title VII to extend the time period for bringing claims of "discrimination in compensation." LLFPA, § 3. The amendment is limited to only those suits based on the present effects of past conduct *that violated Title VII when that conduct occurred*. It does not apply where, as here, employees challenge the present effects of past conduct that did *not* violate Title VII when it occurred. Respondents' contrary arguments ignore the plain language, structure, and purpose of the LLFPA.

Further, § 3 of the LLFPA governs only *when* lawsuits may be brought. It neither expressly nor impliedly alters Title VII's standard of liability. As AT&T and the government have explained, § 703(h) provides that a seniority system's perpetuation of past sex-based discrimination is not an "unlawful employment practice" if the system, as here, is bona fide and facially neutral. Pet. Br. 47-49. No aspect of

the new law would affect this Court's ruling regarding the application of § 703(h) to this case.

Because the LLFPA does not apply, there is no need to address the other issues respondents seek to raise. As explained in detail in Part II, moreover, those issues simply underscore why this Court should resolve the issues fully briefed and argued before remanding for consideration of the effect, if any, of the LLFPA.

BACKGROUND

The LLFPA is designed narrowly to supersede this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). See LLFPA, § 2(1) & (2). In that case, an employer unfairly evaluated Ms. Ledbetter's performance because of her sex; and, as a result, her pay was not increased as much as it would have been had she been evaluated fairly. *Ledbetter*, 127 S. Ct. at 2165-66. These discriminatory pay-setting decisions were plainly unlawful at the time they occurred, but Ms. Ledbetter did not challenge them within the relevant limitations period. This Court held that the suit she brought years later was untimely: the limitations period ran from each unlawful pay-setting decision, and did not start anew with each paycheck issued in accordance with her previously established rate of pay. *Id.* at 2169. Each new paycheck was deemed the present effect of a past act of unlawful discrimination that was no longer actionable. *Id.* at 2174.

Congress concluded that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation" by imposing a restriction "on the filing of discriminatory compensation claims [that] ignores the reality of wage discrimination." LLFPA, § 2(1) & (2). Congress removed that restriction by

amending § 706(e) of Title VII, which prescribes the limitations periods for challenging practices made unlawful by Title VII's substantive proscriptions. See 42 U.S.C. § 2000e-5(e). New subsection (e)(3) expands the limitations period for claims of “discrimination in compensation” by providing that:

[f]or purpose 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.

LLFPA § 3.

ARGUMENT

I. THE NEW STATUTE DOES NOT APPLY TO THIS CASE.

A. The LLFPA has no bearing on the disposition of this case. The new subsection it adds to § 706 merely extends the limitations period for certain types of claims—those involving “discrimination in compensation”—by permitting suit based on the present effects of past conduct that violated Title VII when it occurred. This new provision, however, does not permit suit based on the present effects of conduct that was lawful when it occurred.

In attempting to show otherwise, respondents ignore the text of the statute and theorize that the LLFPA “embraces” this Court’s decision in *Bazemore*

v. *Friday*, 478 U.S. 385 (1986), and “rejects” the supposedly “competing” framework of *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), which held that the present effects of actionable, but time-barred acts of discrimination do not give rise to new violations of Title VII. Resp. Supp. Br. 1-2. Nothing in the LLFPA’s text supports this “interpretation” (which also fundamentally mischaracterizes *Bazemore*¹). While the LLFPA explicitly rejects *Ledbetter*, it does not even mention *Bazemore* or *Evans*, much less “embrace[]” the former while “reject[ing]” the latter.

Instead, new subsection (e)(3) provides that “an unlawful employment practice occurs, with respect to discrimination in compensation *in violation of this title*, when” any of three specified events take place, including “when an individual is affected by application of a discriminatory compensation decision or other practice.” LLFPA, § 3 (emphasis added). The underscored language, which respondents ignore, makes clear that this provision merely changes the standards governing when conduct *already prohibited by Title VII* is deemed to “occur.” It thus permits suits based on the present effects of past “discrimination in compensation” when that past conduct violates (or violated) Title VII. It does not, however, amend Title VII to permit suit based on the present effects of previously *lawful* conduct.

Respondents’ contrary interpretation gives no meaning to the underscored language. If Congress meant to allow suit based on the present effects of

¹ The *Bazemore* Court saw no conflict or “competition” between its decision and *Evans*; it correctly deemed its decision “consistent with *Evans*.” 478 U.S. at 396 n.6 (Brennan, J., concurring); *see also* Ptr. Reply Br. 9-11.

past compensation discrimination regardless of whether that past act was lawful when it occurred, Congress would have simply provided that “an unlawful employment practice occurs, with respect to discrimination in compensation, when” any of the three specified events takes place. Using the simpler phrase “with respect to discrimination in compensation” would have limited the provision to a particular type of discrimination—*i.e.*, that involving compensation—without regard to the lawfulness of that past discrimination. Use of the qualified phrase “with respect to discrimination in compensation *in violation of this title*” narrows the provision to past compensation discrimination that violated Title VII when it occurred.

This plain meaning is confirmed by the LLFPA’s purpose and structure. The statute is expressly intended to supersede *Ledbetter*, a case in which the plaintiff challenged the current effects of past discrimination that was indisputably unlawful when it occurred. The central issue in *Ledbetter* was whether issuance of subsequent paychecks permitted Ledbetter to challenge the initial unlawful conduct. See 127 S. Ct. at 2172 (noting Ledbetter’s argument that each paycheck “triggers a new EEOC charging period” permitting a challenge to the “*prior* discriminatory conduct”) (emphasis added). This Court held that she could not, because the time period for challenging that initial discrimination had run. Congress responded by amending Title VII’s limitations provision and allowing challenges to earlier, unlawful conduct based on a subsequent effect. As *Ledbetter* involved no claim that employees should be allowed to sue based on the present effects of previously lawful conduct, the LLFPA should not be interpreted to authorize such claims, which this

Court's cases foreclosed when the LLFPA was enacted. Pet. Br. 18-21.

Reading the LLFPA as respondents do, moreover, is inconsistent with the fact that new subsection (e)(3) amends Title VII's limitations rules, not its substantive prohibitions. Limitations provisions define when legal challenges to conduct deemed unlawful by other provisions can be brought. As respondents read it, however, new subsection (e)(3) would make it unlawful to rely on decisions or practices that were lawful when made or adopted. The provision would thus retroactively alter the legality of previously lawful conduct. It is not the office of a limitations provision to effect such a change in substantive legal norms. Cf. Tr. of Oral Arg. 19 (counsel for U.S. explaining that the PDA is not retroactive).

The preamble of the LLFPA, and the House Report from which respondents selectively quote, confirm that new subsection (e)(3) has no such effect. The preamble states that the LLFPA amends both Title VII and the Age Discrimination in Employment Act “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.” LLFPA, Caption (emphasis added). This language makes clear that the new provision permits suit based on a current effect of “a discriminatory compensation decision or other practice *that is [or was] unlawful under [Title VII]*” when it occurs or occurred.

The House Report respondents quote confirms this straightforward meaning. It states that the law “is drawn narrowly to define when—for purposes of the 180-day (or 300-day) statute of limitations—an unlawful employment practice (*already defined by Title*

VII) ‘occurs.’” H.R. Rep. No. 110-237, at 5 (2007) (emphasis added; footnote omitted). It likewise states that the law “is designed to be a narrow reversal of the Ledbetter decision, *without upsetting any other current law*,” *id.* at 17 (emphasis added)—a statement at odds with any claim that Congress rendered it unlawful to rely on decisions that were lawful when made.²

The LLFPA plainly does not permit suit based on the present effects of previously lawful conduct. And that is precisely the claim respondents make.

B. As AT&T and the government have shown, the Net Credited Service (“NCS”) system is facially neutral. Neither that system nor its associated accrual rules draw any distinctions based on pregnancy or gender. Ptr. Br. 26; Rep. Br. 2-4; U.S. Br. 18-19. Instead, the NCS system simply gives present effect to past conduct—*i.e.*, the adjustments AT&T made to the NCS dates of women who took pregnancy leaves under AT&T’s pre-PDA pregnancy leave policies.

Those pre-PDA pregnancy leave policies and resulting NCS date adjustments were entirely lawful. Title VII proscribes two broad types of discrimination—disparate treatment and disparate impact. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Respondents have disavowed any claim that AT&T’s pre-PDA pregnancy leave policies and resulting NCS

² This statement is also inconsistent with respondents’ speculation that the LLFPA rejected *Evans*. In fact, like the *Ledbetter* dissenters, who went out of their way, *see* 127 S. Ct. at 2182 (Ginsburg, J., dissenting), to acknowledge the validity of *Evans* and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the House Report distinguishes *Evans* and *Ricks*, noting that pay discrimination is “qualitatively different” than claims involving “single, immediately identifiable’ acts of discrimination.” H.R. Rep. No. 100-237, at 15 n.71.

date adjustments had an unlawful disparate impact. Tr. of Oral Arg. at 27 (“This is a disparate treatment case.”). Similarly, respondents waived any claim that AT&T’s pregnancy leave policies or the NCS system were facially neutral but adopted with discriminatory purpose. Resp. Br. 18 n.5, 29.

Thus, AT&T’s pre-PDA leave policies were unlawful only if they were facially discriminatory. And this Court’s decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), forecloses any claim of facial discrimination here. See Pet. Br. 22-24.

In sum, the NCS date adjustments caused by AT&T’s pre-PDA pregnancy leave policies were lawful. Because the PDA did not retroactively render those date adjustments unlawful, AT&T’s post-PDA reliance on lawfully adjusted NCS dates was likewise lawful. Thus, the LLFPA could affect the disposition of this case only if it permits suit based on the present effects of previously lawful past conduct. The plain terms, structure, purpose and history of the new legislation confirm, however, that the LLFPA does not.

C. The LLFPA modifies the statute of limitations for Title VII lawsuits. It does not affect the underlying standard of liability, including § 703(h)’s protections for bona fide seniority systems. As this Court has explained, even “absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.” *TWA, Inc. v. Hardison*, 432 U.S. 63, 82 (1977). Nothing in the LLFPA diminishes Title VII’s “special treatment” of bona fide seniority systems. *Id.* at 81. Respondents do not claim otherwise.

Instead, respondents tacitly accept that the LLFPA could apply to this case only if this Court were *first* to conclude that § 703(h) did not. Tellingly, respondents’ discussion of why § 703(h) does not apply here is premised not on the LLFPA, but on mistaken arguments already made to this Court. See Pet. Br. 47-54.

Similarly, respondents claim that a denial of service credit, or seniority, is a “discriminatory ... other practice,” within the meaning of subsection (e)(3). Resp. Supp. Br. 4-5. In fact, the phrase “other practice” is modified by the phrase “discriminatory compensation.” Thus, subsection (e)(3) applies only if an employee is affected by a “discriminatory compensation decision or other [discriminatory compensation] practice.”³ See, e.g., *Hughey v. United States*, 495 U.S. 411, 419 (1990) (rejecting broad reading of the term “other factors” “in light of the principle ... that a general statutory term should be understood in light of the specific terms that surround it”). Seniority is not “compensation”; it is a separate “term[], condition[], or privilege[] of employment” under Title VII. See Ptr. Br. 38-40; see also LLFPA, § 2(2) (*Ledbetter* “ignore[d] the reality of *wage* discrimination”) (emphasis added). Thus, an employer’s denial of seniority is not a “compensation decision or other [compensation] practice,” and any resulting loss in

³ First, respondents’ broader reading—*i.e.*, that the subsection refers to any other discriminatory practice—would make the reference to a “discriminatory compensation decision” superfluous. Second, the LLFPA is focused on “discrimination in compensation” and “discriminatory compensation decision,” using those terms 23 times. Third, § 5 of the LLFPA makes subsection (e)(3) applicable to “claims of discrimination in compensation”—but not to other types of discrimination—brought under the Americans with Disabilities Act, the Rehabilitation Act and the federal sector provisions of Title VII. See LLFPA § 5.

benefits is not based “in whole or in part,” on a compensation decision or practice.⁴

II. ASSUMING THE LLFPA COULD CONCEIVABLY AFFECT THIS CASE, THE COURT SHOULD REVERSE THE DECISION BELOW AND REMAND FOR FURTHER PROCEEDINGS IN LIGHT OF THE LLFPA.

Because the LLFPA does not apply to this case, there is no reason to address the additional issues respondents raise concerning the scope and meaning of new subsection (e)(3). If, however, the Court harbors any doubt about the applicability of this new would be improvident to vacate the decision below without a decision and to remand for briefing on the LLFPA.

If this Court accepts respondents’ contention of “facial discriminat[ion],” there is no reason for any court to consider whether the LLFPA applies here. See *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); § 706(e)(2) of Title VII, 42 U.S.C. 2000e-5(e)(2). But if the Court rules that respondents’ adjusted NCS dates were lawful and that AT&T could (prior to the LLFPA) rely on those NCS dates when calculating post-PDA benefits, reading the LLFPA to impose liability for that reliance would raise very serious retroactivity issues. Respondents attempt to brush aside these issues by claiming that AT&T “could have complied with” the LLFPA “by using a different, nondiscriminatory measure of

⁴ Relatedly, respondents do not suggest that the LLFPA’s amendment to Title VII silently repeals the provision that *directly* precedes it: § 706(e)(2), the statute of limitations provision for seniority systems. If the plain meaning of the LLFPA could be extended to denials of seniority, § 706(e)(2) would be rendered nugatory.

company service when it calculated respondents' pensions." Resp. Supp. Br. 9. But AT&T made those calculations between 1994 and 2000—some nine to 15 years before the LLFPA was enacted.

Thus, if the LLFPA could plausibly be read to apply to this case—which it cannot—such an application would upset over three decades of settled expectations concerning the legality of pre-PDA NCS date adjustments, including critical actuarial calculations and pension funding decisions. And such a reading would change the legality of pension calculations that were made more than a decade ago.

Accordingly, a determination that AT&T's actions were legal under the law that existed when it took those actions would critically inform the issues on remand. It would require the lower courts to decide whether Congress intended severe retroactive liability to be imposed on AT&T if the LLFPA permits suits based on the present effects of past lawful conduct. The lower courts would be required to examine the statutory text to determine whether it contains *clear evidence* that Congress intended such retroactive applications.⁵ Moreover, because retroactive legislation can, at a certain point, run afoul of

⁵ The fact that the LLFPA applies to all claims of discrimination in compensation pending on or after May 28, 2007, LLFPA § 6, does not provide such evidence. Under *Ledbetter*, employers could not be sued based on the subsequent effects of *unlawful* compensation discrimination that was no longer actionable. Section 6 of the LLFPA retroactively alters this rule, by authorizing suits for such subsequent effects if they were the basis of a suit pending nearly two years before the LLFPA was adopted. This provision, however, does not suggest that Congress authorized suit based on the subsequent effects of *lawful* conduct—a reading that entails a far greater degree of retroactivity.

constitutional constraints, see *Eastern Enters. v. Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion), the doctrine of constitutional avoidance affects whether the LLFPA should be read to impose severely retroactive liability.

In sum, if this Court believes the LLFPA could apply to this case, it should first resolve the issues that have been fully briefed and argued, then remand for further proceedings in light of the LLFPA.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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