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When Does Discrimination "Occur?: The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII

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COMMENT

WHEN DOES DISCRIMINATION "OCCUR?:

THE SUPREME COURT'S LIMITATION ON AN EMPLOYEE'S ABILITY TO CHALLENGE DISCRIMINATORY PAY UNDER TITLE VII

INTRODUCTION

After working for the same company for over fifteen years and just before her retirement, Violet discovered that she was earning only sixty percent of what her male co-workers were making.¹ Violet, an employee of Tiremaker, had no reason to suspect such a significant discrepancy in her pay because she was first hired at a starting salary equivalent to other employees in the same position, both male and female. She had performed well in her job and received a raise each year, based on her supervisor’s evaluation and recommendation.

Violet had been working for Tiremaker for a few years, when her supervisor started making sexual advances towards her. He repeatedly asked her out to dinner, commented on how her business suits fit the curves of her body, and asked her to meet him in the copy room for “a good time you’ll never forget.” Violet spurned his many requests to

¹ Violet’s story is a hypothetical intended to demonstrate the workplace realities of discriminatory pay.
engage in intimate acts in the workplace, and he eventually moved on to harassing the newer and younger employees.

After the incidents subsided, Violet continued to receive small raises each year. Tiremaker managers consistently warned employees to “keep their mouths shut” about pay, so she never knew what kind of raises, if any, her co-workers had received. It was not until the day of Tiremaker’s holiday party, in the last few months of Violet’s employment, that she discovered the reality of her low pay. One of Violet’s more talkative co-workers, Grant, told Violet how much he made and about the great raise he had just received. Since Grant’s salary was so much more than Violet’s, she began to ask whether anyone else was also making so much more than she made. Because employees were reluctant to violate company policy and discuss their salaries, it took Violet several months to get more information about salaries of other account managers. She eventually learned that she was making forty percent less than her male counterparts. Violet immediately consulted an attorney to find out what she could do about the economic harm she suffered as a result of the inequity. Yet, on the day she discovered the discriminatory pay, she was already barred from bringing a claim for pay discrimination under Title VII of the Civil Rights Act of 1964 because the decision to pay her, which was based on unlawful sex discrimination, happened more than 180 days ago.

This is the predicament plaintiffs face following the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* Prior to the *Ledbetter* decision, courts had allowed plaintiffs to file claims for discriminatory pay on the basis of paychecks received within the administrative filing limitations period, regardless of when the discriminatory pay decision was first made. Yet, in the majority opinion by Justice Samuel Alito, the Supreme Court held that the pay-setting decision is the “discrete act” of discrimination, and thus the time period

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for filing a charge with the Equal Employment Opportunity Commission ("EEOC") begins when the act occurs.\(^5\) Thus, the Court's ruling in *Ledbetter* provides that a plaintiff does not state a claim cognizable under Title VII when she alleges that she is receiving discriminatory low pay at the time she files a claim, based on prior discriminatory denials of appropriate salary increases, unless the actual pay-setting decision was made within the limited filing period.\(^6\)

This Comment contends that the Court's holding in *Ledbetter* marks a substantial deviation from the purpose of Title VII—to rectify past and prevent future workplace discrimination and provide a remedy for economically injured employees—and thereby weakens the prohibition against discrimination in the workplace.\(^7\) The Court's failure to consider the hidden nature of discriminatory pay claims significantly limits employees' ability to challenge disparate pay under Title VII. This comment asserts that discrimination "occurs" with each paycheck that delivers discriminatorily low pay.

Part I of this Comment explains the congressional intent and purpose in establishing the Equal Employment Opportunity Commission and required administrative procedures for filing a Title VII claim of discrimination. It also discusses the different types of discrimination that can give rise to a claim under Title VII and analyzes the development of doctrines applied in the adjudication of employment discrimination claims prior to *Ledbetter*. Part II dissects the basis of the majority and dissenting opinions in *Ledbetter* to highlight the tenuous nature of the decision. Part III explains the nature of discriminatory pay claims and the prevalence of pay secrecy in today's workplace to demonstrate how the *Ledbetter* Court ignored the reality of disparate pay. Part IV describes the implications of *Ledbetter* on employees and employers, as well as on future litigation of disparate pay claims. Part V identifies a door left open by the Court that allows plaintiffs to apply the discovery rule in Title VII actions, thereby delaying the start of the administrative filing period until the plaintiff is reasonably aware of the discrimination occurring with each disparate paycheck. Part V also examines the Civil Rights Act of 1991, the legislative response to five controversial Supreme Court opinions in 1989, which, like *Ledbetter*, unduly limited

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\(^5\) *Ledbetter*, 127 S. Ct. at 2165.

\(^6\) *Id.*

\(^7\) See H.R. Rep. No. 88-914 (1963) (stating the purpose of Title VII is "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (discussing back pay as a remedy to fulfill the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination).
an employee’s ability to file legitimate claims for discrimination in the workplace. It further contends that the action taken by Congress in enacting the Civil Rights Act of 1991 serves as a model for new legislation to ameliorate the consequences of *Ledbetter* and carry out the remedial purpose of Title VII. Such an amendment will ensure that employers and employees are aware that discrimination occurs both at the time of the pay-setting decision as held by *Ledbetter*, as well as each time compensation is paid pursuant to a discriminatory pay decision. Thus, disparate pay claims should be actionable as long as at least one paycheck was received within the statutory filing period. Part VI concludes by highlighting the negative consequences of *Ledbetter* and stressing the need for congressional action to ultimately restore the power of Title VII to rectify and prevent workplace discrimination.

I. BACKGROUND: EMPLOYMENT DISCRIMINATION AND THE TIMELY FILING REQUIREMENT OF TITLE VII

In order to identify the changes made by *Ledbetter*, one must first understand what is required to file a charge under Title VII alleging employment discrimination. A statutory prohibition against employment discrimination was initially established by the Civil Rights Act of 1964 (hereinafter CRA of 1964), and was subsequently amended by the Equal Employment Opportunity Act of 1972. As amended, Title VII outlines the administrative procedures for filing a claim of employment discrimination under the CRA of 1964. Once a claim has been filed, various doctrines determine what must be proven depending upon the type of discrimination that is alleged.

A. TITLE VII OF THE CRA OF 1964 AND THE CORRESPONDING ADMINISTRATIVE PROCEDURES

Section 2000e-2(a) of the CRA of 1964 makes it an unlawful employment practice for an employer to discriminate “against any individual with respect to his compensation... because of such individual’s race, color, religion, sex or national origin.” The statute was enacted as a means of redressing the injustices of racial and other discrimination facing the nation. The passage of Title VII is considered

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a defining moment in the nation’s dedication to eliminating unequal treatment in employment. Title VII authorizes economic and injunctive relief for injured employees, to serve as incentives to employers to eliminate discriminatory practices within the workplace. An individual challenging an employment practice as discriminatory must first meet the administrative requirement of filing a charge with the EEOC within 180 or 300 days after the alleged practice occurred.

Congress intended the EEOC to be the leading enforcement agency in workplace discrimination. However, upon its formation, the EEOC only had the authority to “receive, investigate, and conciliate complaints.” Over five years after the passage of Title VII and the creation of the EEOC, protected groups were still besieged by widespread discrimination throughout the public and private sector. Congress responded by passing the Equal Employment Opportunity Act of 1972, which provided the EEOC with the power to litigate against public and private employers and labor unions.


13 42 U.S.C. § 2000e-5(g) (Westlaw 2008) (courts may enjoin an employer from engaging in unlawful employment practices and may order reinstatement or hiring of employees with or without back pay); see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (discussing back pay as a remedy to fulfill the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination).


15 42 U.S.C. § 2000e-5(e)(1) (Westlaw 2008). In states where a state agency has a work-sharing agreement with the EEOC and discrimination may be covered by state law, the time for filing a charge of discrimination is extended from 180 to 300 days. 42 U.S.C. § 2000e-5(e)(1) (Westlaw 2008). While most states have anti-discrimination laws, Alabama, Arkansas, Georgia and Mississippi do not. See Workplace Fairness, Discrimination Claims – State Laws, http://www.workplacefairness.org/index.php?page=minimum (last visited April 11, 2008). North Carolina has antidiscrimination laws, but none provide a remedy. Therefore an individual can file a claim with the North Carolina state agency, but can only enforce the law by bringing a public-policy claim in court. See N.C. GEN. STAT § 143-422.2 (2007).


17 Id.


Congress implemented an administrative remedial scheme intended to be easily navigable by unrepresented claimants. Yet, while providing for administrative relief, Congress also intended that Title VII claimants have access to the courts and that the federal courts ultimately be responsible for enforcing civil rights. A plaintiff must exhaust administrative remedies before establishing jurisdiction for a discrimination claim in federal court. In order to exhaust administrative remedies, a plaintiff must file a charge with the EEOC within the charge-filing period of 180 days after the discriminatory act has occurred. This 180-day filing deadline is extended to 300 days if the charge is also covered by a state or local anti-discrimination law. The EEOC is required to notify the employer within ten days of receiving the charge and then begin investigating. If after investigation of the charge, the EEOC determines that there is reasonable cause to believe a claim is valid, the EEOC may invite the parties to work with

Teeth—A New Era of Enforcement, http://www.eeoc.gov/abouteeoc/35th/1970sl/index.html (last visited April 11, 2008). The five major provisions of the Equal Employment Opportunity Act of 1972 are as follows: (1) the EEOC received litigation authority to sue nongovernmental respondents, employers, unions and employment agencies (42 U.S.C. § 2000e-6(e)); (2) the EEOC could file pattern or practice lawsuits (42 U.S.C. § 2000e-6(e)); (3) title VII coverage was expanded to include the federal government and state and local governments (42 U.S.C. § 2000e-16); (4) the number of employees needed for Title VII coverage over employers was reduced from 25 to 15 (42 U.S.C. § 2000e(b)); and (5) the Equal Employment Opportunity Coordinating Council, which includes the EEOC, the Departments of Justice and Labor, the Civil Service Commission, and the Civil Rights Commission, was established to improve efficiency (42 U.S.C. § 2000e-14).


23 Exhaustion of administrative remedies under Title VII requires that the complainant file a timely charge with the EEOC, thereby allowing the agency time to investigate the charge. See 42 U.S.C.A. § 2000e-5(b) (Westlaw 2008); see also Lyons v. England, 307 F.3d 1092, 1103-04 (9th Cir. 2002) (holding that to establish federal subject matter jurisdiction, a plaintiff is required to exhaust administrative remedies before seeking adjudication of a Title VII claim); Jones v. Runyon, 91 F.3d 1398, 1399 (10th Cir. 1996) (exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII); Vinieratos v. U.S. Dep’t of the Air Force, 939 F.2d 762, 767-68 (9th Cir. 1991) (whether claimant has exhausted administrative remedies is a question of law reviewable de novo).

24 42 U.S.C. § 2000e-5(e)(1) (Westlaw 2008). The employee must file a charge “within one hundred and eighty days after the alleged unlawful employment practice occurred.” Id.

25 Id. If the employee has filed with a State or local agency with “authority to grant or seek relief from such practice,” the employee must file the charge with the EEOC “within three hundred days after the alleged unlawful employment practice” or “within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law.” See also U.S. Equal Employment Opportunity Comm’n, Filing a Charge of Employment Discrimination, http://www.eeoc.gov/charge/overview_charge_filing.html (last visited April 11, 2008).


27 A determination of reasonable cause to believe that discrimination occurred is based upon
it to resolve the claim through an informal process of conciliation. However, if a conciliation agreement is not reached, the EEOC may file suit itself or issue a “right to sue” letter within 180 days from the date the charge was filed. The right to sue letter is necessary for the complainant to file a private action. However, if the EEOC does not find reasonable cause, it will dismiss the case but issue a notice informing the claimant of the right to file a lawsuit within ninety days.

B. TITLE VII DISCRIMINATION CLAIMS

Since the enactment of the CRA of 1964, case law regarding discrimination claims brought under Title VII is typically divided into two main categories, each with its own method of proof. First, disparate treatment theory makes different treatment of individuals based on protected group characteristics unlawful. In a disparate treatment case, liability depends on whether the protected trait actually motivated the employer’s decision. The requisite proof of discriminatory motive may be inferred from differential treatment. The second category, disparate impact theory, prohibits the use of facially neutral employment practices that have an adverse effect on members of particular groups and are not justified by business necessity. Proof of discriminatory motive is not required under disparate impact theory.

29 See 42 U.S.C.A. § 2000e-5(f)(1) (Westlaw 2008) (the EEOC provides notice that a civil action may be brought against the respondent named in the charge by the person named in the charge or by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice); see also U.S. Equal Employment Opportunity Comm’n, EEOC’s Charge Processing Procedures, www.eeoc.gov/charge/overview_charge_processing.html (last visited Apr. 14, 2008) (stating that a charging party can request a notice of “right to sue” from the EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice).
31 Id.
34 Id.
35 See id.
36 Id.
In *Ledbetter*, the plaintiff asserted a claim of disparate treatment, thus requiring a showing of discriminatory intent on the part of the employer through direct or circumstantial evidence. 37 Within disparate treatment and disparate impact discrimination cases, various doctrines have been applied to prove a claim of employment discrimination.

In *United Airlines, Inc. v. Evans*, the Supreme Court first addressed the concept of continuing violations of discrimination law. 38 In 1968, Carolyn Evans was forced to resign from her position as a flight attendant for United Air Lines (hereinafter “United”) because United refused to employ married flight attendants. 39 At that time, she did not file a charge with the EEOC challenging her termination. 40 Evans was rehired in 1972, after United had rescinded its “no marriage” policy. 41 However, she was treated as a new employee for seniority purposes. 42 Evans sued under Title VII asserting that United’s failure to credit her with seniority for her prior service perpetuated into the present the effects of its prior illegal discrimination. 43 The Supreme Court recognized that the decision not to credit Evans’ prior service had an adverse continuing impact on her pay and fringe benefits, but stated that “the crucial issue was whether any present violation existed.” 44 It concluded that Evans had no viable claim because she failed to file a charge of discrimination with the EEOC within the filing period mandated by the CRA of 1964. 45 The Court further stated:

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. 46 It may constitute relevant background evidence
in a proceeding in which the status of a current practice is at issue, but separately considered, "it is merely an unfortunate event in history which has no present legal consequences." 47

Essentially, as to the conduct that was a violation—the discriminatory company policy against employing married flight attendants—Evans had not filed a timely charge. Regarding the conduct that still affected her, United’s failure to recognize seniority, the Court found no violation because the employer was not engaged in discriminatory practices at the time Evans brought suit.

As in Evans, the plaintiff in Delaware State College v. Ricks failed to establish a continuing violation. The plaintiff, a college librarian, was denied tenure but did not file a charge with the EEOC until more than a year after being informed that he would be terminated. 48 The plaintiff argued his charge was timely because the unlawful employment practice of which he complained—his termination—did not occur until a later date that fell within the administrative filing period. 49 The Court rejected that position, holding that the limitations period commenced when he learned that he had been denied tenure and therefore would be terminated at the end of the year. 50 The Supreme Court held that the statute of limitations started to run on the date a tenure decision was made and communicated to the employee. 51 Thus, Ricks established that a violation occurs when the discriminatory decision is made and communicated, not when its effects are felt. In Evans and Ricks, the Supreme Court held there was no continuing violation where the effects of prior discriminatory acts, but no actual discrimination, occurred within the limitations period. 52 Thus, these cases effectively bar claims where

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47 Id.
49 Id. at 254.
50 Id. at 258.
51 Id. at 259.
52 42 U.S.C.A. § 2000e-5(e)(1) (Westlaw 2008) requires that a Title VII plaintiff file a charge with the EEOC either 180 or 300 days after the alleged unlawful employment practices occurred. Thus, the administrative filing period commences on the date of the alleged discrete discriminatory act or the last of a series of individual acts that constitute a hostile work environment, in which case the unlawful employment practice cannot be said to occur on any particular day. It does not matter that some of the component acts of the hostile work environment fall outside the statutory time period as long as an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. See Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). Therefore courts will identify the date a charge is filed with the EEOC and count backwards (either 180 or 300 days according to the state) from the filing date to determine whether or not the alleged discrimination occurred within that time period.
the relevant aspect of the employment system, such as promotion, seniority, or termination decision, is facially neutral, and any discrete discriminatory conduct took place and ceased outside the period of limitations.

However, the Supreme Court found a present continuing violation in *Bazemore v. Friday*, in which it held that an employer had committed an unlawful employment practice every time it issued unequal pay for similarly situated black and white employees. The Court found a violation of Title VII, despite the fact that the discriminatory pay decision was made before the passage of the Act, because the employer had perpetuated the unequal pay and “was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII.” The Court held that each and every paycheck that continued the past discrimination was actionable not because the paychecks were “related” to the decision made outside the limitations period, but because the employer discriminated each and every time it issued the paychecks. According to the Court, “each week’s paycheck that delivered less to a black than to a similarly situated white is a wrong actionable under Title VII.” Thus, the claims were actionable in *Bazemore* because the discriminatory employment practice occurred within the relevant filing period. Essentially, under *Bazemore*, a new filing period began with the issuance of each inequitable paycheck based on a discriminatory decision. The Court’s holding was consistent with *Evans*, as *Bazemore* focused on the current salary structure, finding it illegal if it is a continuation of the discriminatory pay structure. Lower courts applied *Bazemore* in discriminatory compensation cases to find that each paycheck, rather than the initial setting of the discriminatory salary, constitutes a violation. Therefore, under the continuing

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54 *Id.* at 387.


56 *Bazemore*, 478 U.S. at 395.

57 Zaremba, 72 U. Cin. L. Rev. at 1152.

58 Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1010 (10th Cir. 2002) (reversing the district court’s dismissal of an employee’s claim of discriminatory pay, finding that discriminatory salary payments constituted fresh violations of Title VII and that each action of pay-based discrimination was separately actionable and independent for purposes of statutory time limitations); Cardenas v. Massey, 269 F.3d 251, 255 (3d Cir. 2001) (finding plaintiff’s claim timely when he had received allegedly discriminatory paychecks within 300 days prior to the filing of his administrative charge); Anderson v. Zubieta, 180 F.3d 329, 337 (D.C. Cir. 1999) (finding plaintiff need not show that the entire violation of disparate pay occurred within the actionable period as long as plaintiff can show discrimination continued into the actionable period).
violations doctrine, the statute of limitations begins to run on the date of the last occurrence of discrimination, or last paycheck, rather than the first.\textsuperscript{59}

The Supreme Court rejected application of the doctrine of continuing violations under Title VII for discrete actions,\textsuperscript{60} but upheld the doctrine for hostile work environment cases in \textit{National Railroad Passenger Corporation v. Morgan}.\textsuperscript{61} In Morgan, the plaintiff, a black former employee of AMTRAK, filed a claim under Title VII alleging that "he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment."\textsuperscript{62} Some of the conduct of which Morgan complained took place within the administrative filing period, but most of the conduct predated that period.\textsuperscript{63} The Ninth Circuit held that the plaintiff could sue on claims related to conduct that occurred not only within the limitations period but with respect to actions that "would ordinarily be time barred so long as they are either sufficiently related to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the limitations period."\textsuperscript{64} The Supreme Court reversed the Ninth Circuit's holding that an employer could be held liable for discrete acts of discrimination that occur outside the limitation period, but upheld that a charge alleging a hostile work environment will not be time-barred as long as all acts that constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.\textsuperscript{65} The Supreme Court explained that discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are "easy to identify."\textsuperscript{66} In contrast to

\textsuperscript{59} See Thomas v. Eastman Kodak Co., 183 F.3d 38, 54 (1st Cir. 1999) ("The continuing violation doctrine ensures that plaintiffs' claims are not foreclosed merely because the plaintiffs needed to see a pattern of repeated acts before they realized that the individual acts were discriminatory.").

\textsuperscript{60} The Supreme Court has explained discrete acts as those that are easy to identify, such as the denial of training, termination, failure to promote, denial of transfer, and refusal to hire. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002).


\textsuperscript{62} Morgan, 536 U.S. at 104.

\textsuperscript{63} Id. at 105.

\textsuperscript{64} Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1015 (9th Cir. 2000).

\textsuperscript{65} Morgan, 536 U.S. at 122.

\textsuperscript{66} Id. at 114. Courts interpreting Morgan have subsequently expanded the scope of what may constitute a discrete act. See, e.g., Porter v. Cal. Dep't of Corr., 419 F.3d 885, 893 (9th Cir. 2005) (refusing to grant vacation requests, requiring plaintiff to obtain medical tests by her own treating physician, leaving negative performance evaluations in plaintiff's personnel file and instructing plaintiff to enter work site through a back gate); Lyons v. England, 307 F.3d 1092, 1108
discrete acts, hostile work environment claims involve repeated conduct, occurring over a series of days or years. Later events may still be part of the same hostile work environment claim, and therefore a claimant may file a charge at a later date that still includes the entirety of events. Thus, the Supreme Court made it clear that discrete acts will not be considered as forming the basis of a continuing violation even if they are related, but that if there is a truly discrete act, the charge-filing period will begin to run when that discrete act occurs and will not be affected by further discrete acts.

Three principles can be derived from this line of cases. First, discrete discriminatory acts are not actionable unless a charge filed with the EEOC is timely, even if an act is related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges. Therefore, the charge alleging a discrete act must be filed within the applicable time period after the discriminatory conduct occurred. Second, past acts of discrimination and an employee's prior knowledge of their occurrence do not bar the employee from filing charges about related discrete acts as long as the acts are independently discriminatory and the claim on each act is timely filed. Finally, so long as all acts that constitute a claim are part of the same unlawful employment practice and at least one act falls within the time period, the claim will not be time-barred.

A distinction between filing limitations for discrete acts of discrimination and those for ongoing violations, has made it difficult for most employees to decipher what constitutes a timely claim, which

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(9th Cir. 2002) (denying favorable assignment of temporary military assignments).

67 Morgan, 536 U.S. at 115.

68 Id. at 117.

69 However, the Supreme Court's opinion in Morgan has been criticized for "leaving the door open" on the question of when a discrete act actually occurs. See Benjamin J. Morris, Comment, A Door Left Open? National Railroad Passenger Corporation v. Morgan and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits, 43 CAL. W. L. REV. 497 (2007); see also Amanda J. Zaremba, National Railroad Passenger Corp. v. Morgan: The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers, 72 U. CIN. L. REV. 1129, 1148 (2004) (discussing the failure of the Court in Morgan to provide guidance as to when a discrete act occurs because it was "preoccupied with defining a discrete act and finding that serial acts do not make them all timely under the limitations period.").

70 Morgan, 536 U.S. at 122.

71 Id.


73 Morgan, 536 U.S. at 105.

74 Id. at 117 (stating that for claims that cannot be said to occur on any particular day, it does not matter that some component acts fall outside of the statutory time period).
depends on the type of discrimination alleged.\textsuperscript{75} One criticism of the division between hostile work environment claims and claims for discrete acts is that an employee is much less likely to go through the trouble of filing an EEOC charge over a denial of training than an employee is to file a charge after being terminated.\textsuperscript{76} Daily discriminatory actions by employers that are tolerated by employees may go unchallenged, thereby allowing employers to escape liability for discrimination.\textsuperscript{77}

This problem is particularly disconcerting in the area of discriminatory pay. Prior to \emph{Ledbetter}, a split among the federal appellate courts had developed over how to deal with disparate pay claims under Title VII. The Eleventh Circuit held that the receipt of a paycheck allegedly depressed in value because of prior acts of discrimination was not an independent act of discrimination.\textsuperscript{78} However, most of the other circuits that have considered the issue have adopted the contrary reasoning.\textsuperscript{79} The Second Circuit, in \emph{Forsyth v. Federation Employment and Guidance Service}, held that any discriminatory paycheck received within the statute of limitations period could be the basis for a claim, even if a discriminatory pay scale was established outside of the statutory period.\textsuperscript{80} Similarly, the D.C. Circuit held in \emph{Shea v. Rice} that each week’s paycheck that delivers less to a black employee than to a similarly situated white employee is a wrong actionable under Title VII, regardless of the fact that the discriminatory pay structure began prior to the limitations period.\textsuperscript{81} Several circuits have recognized that a claim of disparate pay is “fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete,

\textsuperscript{76} Id. An example is an employee who is denied training on numerous occasions, disciplined more harshly than other employees, and eventually terminated. However, by the time he or she files the charge for being terminated, the discrete discriminatory act of denying training may be outside the limitations period. This is similar in nature to disparate pay, where the decision or performance review that denies an employee a raise falls outside the limitations period because the employee is unlikely to file a discrimination claim the first time he or she is not given a raise or simply given a smaller raise than fellow employees. \emph{Id.}
\textsuperscript{77} Id. at 1155.
\textsuperscript{78} See \emph{Ledbetter v. Goodyear Tire & Rubber Co.}, 421 F.3d 1169, 1183 (11th Cir. 2005).
\textsuperscript{79} Forsyth v. Fed’n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005); Shea v. Rice, 409 F.3d 448, 453 (D.C. Cir. 2005); Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1010 (10th Cir. 2002) (recognizing that each race-based discriminatory salary payment constitutes a fresh violation of Title VII); Hildebrandt v. Illinois Dep’t of Human Res., 347 F.3d 1014, 1028 (7th Cir. 2003) (each paycheck that includes discriminatory pay is a discrete discriminatory act).
\textsuperscript{80} Forsyth, 409 F.3d at 573.
\textsuperscript{81} Shea v. Rice, 409 F.3d 448, 453 (D.C. Cir. 2005).
individual wrongs rather than a single and indivisible course of wrongful action." Thus, prior to Ledbetter, the majority of circuits struck a balance between permitting redress for an ongoing wrong and imposing liability for conduct long past.

II. THE SUPREME COURT’S DECISION IN LEDBETTER V. GOODYEAR

A. THE FACTS

Lilly Ledbetter worked as a supervisor from 1979 until 1998 at the Gadsden, Alabama, plant of the Goodyear Tire and Rubber Company (hereinafter “Goodyear”). The plant used a merit-based compensation system under which salaried employees were given or denied raises based on their supervisors’ evaluation of their performance. In March 1998, Ledbetter filled out an EEOC questionnaire, alleging specific acts of sex discrimination and subsequently filed a formal EEOC charge in July. After taking early retirement in November 1998, Ledbetter filed an action asserting, among other claims, a Title VII pay discrimination claim. The Title VII pay discrimination claim survived a summary-judgment motion and proceeded to trial. Ledbetter presented evidence that, throughout her employment, several supervisors had given her poor performance evaluations because of her gender and, therefore, her pay had not increased as much as it would have had she been evaluated

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82 Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 119 (2d Cir. 1997) (citing Developments in the Law—Statute of Limitations, 63 HARV. L. REV. 1177, 1205 (1950) (“Each continuation or repetition of the wrongful conduct may be a separate cause of action for which suit must be brought within the period beginning with its occurrence.”)); accord, Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1010 (10th Cir. 2002) (recognizing that each race-based discriminatory salary payment constitutes a fresh violation of Title VII); Cardenas v. Massey, 269 F.3d 251, 257 (3d Cir. 2001); Wagner v. NutraSweet Co., 95 F.3d 527, 534 (7th Cir. 1996); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 347 (4th Cir. 1994) (applying continuing violation theory to both Title VII and EPA disparate-pay claims).


84 Id.

85 Id.

86 Id.; see also Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1175-76, n. 7 (11th Cir. 2005) ("Ledbetter asserted multiple claims of age discrimination, sex discrimination, and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (as amended), the Equal Pay Act (‘EPA’), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act (‘ADEA’), 29 U.S.C. §§ 621-34. Other than her disparate pay claim brought under Title VII, and her age-, sex-, and retaliation-based claims relating to her transfer, each of Ledbetter’s claims was abandoned or dismissed by the district court through summary judgment or judgment as a matter of law in favor of Goodyear.").

87 Ledbetter, 127 S. Ct. at 2165.
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without the underlying discrimination.\(^{88}\) She demonstrated that these past pay decisions continued to affect the amount of her pay throughout her employment.\(^{89}\) Near the end of Ledbetter’s employment she was being paid considerably less than any of her male colleagues.\(^{90}\) Finding for Ledbetter, the jury awarded back pay and damages.\(^{91}\)

Goodyear appealed the judgment, arguing that Ledbetter’s pay discrimination claim was time-barred with respect to all pay decisions made prior to 180 days before the filing of her EEOC questionnaire\(^{92}\) and that no discriminatory act relating to Ledbetter’s pay occurred during the 180-day period.\(^{93}\) The Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee’s pay during the EEOC filing period.\(^{94}\) Ledbetter sought review of the Court of Appeals’ holding as to when a plaintiff may bring an action for unlawful pay discrimination under Title VII when the disparate pay is the result of a discriminatory pay decision that occurred outside the statutory limitations period but is received within the limitations period.\(^{95}\)

B. THE MAJORITY OPINION

In May 2007, the Supreme Court held that Ledbetter’s claims failed because the limitations period had run by the time she submitted her EEOC filing.\(^{96}\) The majority opinion focused on the intent of the employer, stating that Ledbetter failed to show that Goodyear decisionmakers acted with actual discriminatory intent when they issued

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\(^{88}\) Id. at 2165-66, 2171 (“Ledbetter’s claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor. Ledbetter testified the supervisor retaliated against her when she rejected his sexual advances during the early 1980’s, and did so again in the mid-1990’s when he falsified deficiency reports about her work. Ledbetter argued that his misconduct was the primary basis for her performance evaluation in 1997.”).

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1178 (11th Cir. 2005). The parties assumed that the EEOC filing period ran from the date that Ledbetter completed an EEOC questionnaire in March 1998, even though Ledbetter’s discriminatory pay claim was not added until she filed a formal EEOC charge in July 1998. In reliance on the parties’ stipulation, the court used the questionnaire filing date as Ledbetter’s administrative claim filing date.


\(^{94}\) Id. at 1182-83.

\(^{95}\) Ledbetter, 127 S. Ct. at 2166 (2007).

\(^{96}\) Id. at 2171. Specifically, with respect to the alleged discriminatory conduct of falsified deficiency reports and unwelcome sexual advances by a supervisor in the early 1980s and mid-1990s, the Court found Ledbetter’s claims untimely.
her paychecks during the EEOC filing period. The Court held that her claim for discriminatory pay based upon receipt of paychecks was not actionable because the limitations period commenced "when the discrete act of alleged intentional discrimination occurred, not [on] the date when the effects of this practice were felt." Relying on its decisions in Evans, Ricks, and Morgan, the Court held that the EEOC charging period is triggered when a discrete unlawful practice takes place. Therefore, a new violation does not occur, and a new charging period does not begin, upon the occurrence of subsequent nondiscriminatory acts that are later adverse effects resulting from the past discrimination. Thus, from the Court's perspective, the actionable discrimination could have occurred only at the time of the pay-setting decision.

The majority also concluded that, by creating the relatively short EEOC filing period in Title VII, Congress "intended to encourage the prompt processing of all charges of employment discrimination." The Court stressed the unfair burden of "tardy lawsuits," with reference to the timely filing provisions of Title VII. The majority noted that ultimately, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." The Court referred back to the statutory language of Title VII, holding that by operation of the enforcement provisions, a Title VII "claim is time-barred if it is not filed within these time limits."

Furthermore, the majority opinion disputed Ledbetter's argument that the Court had adopted the "paycheck accrual rule" in Bazemore v. Friday, under which each paycheck would trigger a new limitations period during which a plaintiff may challenge any discriminatory conduct that adversely impacted that paycheck, regardless of when the

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97 Id. at 2167.
98 Id. at 2168.
99 See id. at 2168-69.
100 Id. at 2169 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)).
101 Id. at 2170 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 819-21 (1980), which noted that legislative compromises preceded the enactment of Title VII, and to remain respectful of the legislative process, full deference must be given to the statute as it was enacted).
102 Id. at 2171-72 (addressing the dissent's attempt to dismiss the majority's reliance on the policy underlying the limitations period, the majority responds that the case illustrates the problems created by tardy lawsuits). By the time of the trial, Ledbetter's supervisor had died and therefore could not testify. The majority stated that "a timely charge might have permitted his evidence to be weighed contemporaneously." Id.
103 Id. (citing Mohasco, 447 U.S. at 826).
conduct occurred.105 Ledbetter relied on the Court's statement in Bazemore that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."106 The Court distinguished the holding in Bazemore by stating that it was based on a current violation, the employer's use of a discriminatory pay structure, not the carrying forward of a past act of discrimination.107 Thus, the Court held that Ledbetter's claim failed because she produced no evidence that Goodyear adopted the performance-based pay system with the intent to discriminate on the basis of sex and that it was applied to her in a discriminatory manner within the statutory filing period.108

C. THE DISSENTING OPINION

Justice Ginsburg's dissenting opinion, which Justices Stevens, Souter, and Breyer joined, explained that pay claims are more "akin to hostile environment claims because they may be viewed as the cumulative effect of individual acts" and should therefore be treated differently from other types of workplace discrimination.109 The dissent analogized Ledbetter's discriminatory pay claim to the hostile work environment claim in Morgan.110 The dissent noted that the entire scope of a discriminatory pay claim, including behavior that occurred outside the limitations period, should be timely for the purposes of assessing liability, so long as any act contributing to the discriminatory pay claim takes place within the statutory time period.111 The majority's holding, it argued, ignored the realities of the workplace regarding the hidden nature of compensation disparities.112 The dissent pointed out that the discrimination of which Ledbetter complained is not long past, noting that the jury found that Goodyear continued to treat Ledbetter differently because of her gender during each pay period, resulting in cumulative

105 Ledbetter, 127 S. Ct. at 2172.
107 Ledbetter, 127 S. Ct. at 2173.
108 Id. at 2174 (holding that because Ledbetter did not file timely EEOC charges relating to her employer's discriminatory pay decisions in the past, she could not maintain a suit based on that past discrimination at the present time). The Court matter-of-factly stated that "all Ledbetter has alleged is that Goodyear's agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks." Id.
109 Id. at 2180-88.
110 Id. at 2181; see also Nat'l R.R. Passenger Corporation v. Morgan, 536 U.S. 101, 117 (2002).
111 Ledbetter, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).
112 Id. at 2181-82 (stating that the record shows that Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings).
harm. The dissent sought to refute the majority's assertion that allowing employees to challenge discrimination "that extend[s] over long periods of time" into the charge-filing period would leave the employer defenseless against prejudicial delay. It cited defenses available to employers such as estoppel, which would prevent an employee from bringing a stale claim, thus serving the intent of Title VII to rectify workplace discrimination, without nullifying the purpose of the filing provision to provide timely notice to employers. Finally, the dissent argued that under the Court's decision, the discrimination Ledbetter had proven is no longer rectifiable under Title VII. Thus, the effect of the majority decision is that an employer's act of knowingly carrying past pay discrimination forward must be treated as lawful conduct that will remain unchallenged by employees.

III. PAY DISCRIMINATION: THE NATURE OF PAY DISPARITY CLAIMS

The Supreme Court in *Ledbetter* treated a Title VII claim for disparate pay as based on a discrete act of discrimination which occurred at the time of the pay-setting decision. Yet, there are significant differences between pay-setting decisions and traditional discrete acts of employment discrimination. Since the nature of the act of discrimination ultimately determines whether or not a complainant's claim is timely and therefore actionable, it is essential that discriminatory pay claims are realistically evaluated and properly characterized.

A. DISCRIMINATORY PAY: DISCRETE ACT OR INHERENTLY UNDISCOVERABLE?

The *Morgan* court characterized discrete acts, such as denial of training, termination, failure to promote, denial of transfer, and refusal to hire as easy to identify. As the *Ledbetter* dissent noted, pay disparities and discrete employment actions differ greatly from one another. Two of the cases cited by the *Ledbetter* majority, *Evans* and *Ricks*, both involved a "single, immediately identifiable act of discrimination:"

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113 Id. at 2185-86.
114 Id.
115 Id. Estoppel is a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. BLACK'S LAW DICTIONARY 470 (Abridged 8th ed. 2005).
116 *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting).
117 Id. at 2188.
119 *Ledbetter*, 127 S. Ct. at 2182.
constructive discharge and a denial of tenure.\textsuperscript{120} Thus, neither case focused on a recurring or cumulative discriminatory employment practice.\textsuperscript{121}

The Court ruled in \textit{Evans} that a continuing violation required some present violation beyond mere continuing effect on a plaintiff of past discrimination.\textsuperscript{122} In \textit{Evans}, no present violation existed because Evans had failed to file a timely charge for discrimination within ninety days of her termination,\textsuperscript{123} and although there was a "continuing impact on her pay and fringe benefits," there was no present violation.\textsuperscript{124} The Court noted that Evans did not have any more of a right to be rehired than any other similarly situated applicant; therefore, she was treated equally to other applicants.\textsuperscript{125} Accordingly, by refusing to credit Evans with seniority she had formerly earned and by continuing to adhere to the nondiscriminatory seniority policy, United did not violate Title VII.\textsuperscript{126}

Similarly, in \textit{Ricks}, the Court stated that the "mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."\textsuperscript{127} Thus, in order for the statutory filing period to have commenced at the time of the discharge of the plaintiff in \textit{Ricks}, instead of the time of the denial of tenure, he "should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment."\textsuperscript{128}

\textit{Ledbetter}, however, involved more than mere continuity of employment and the denial of tenure.\textsuperscript{129} Thus, neither case focused on a recurring or cumulative discriminatory employment practice.\textsuperscript{130}

120 \textit{Evans}, 431 U.S. at 557-58. In \textit{Evans}, the single identifiable act was a constructive discharge. See \textit{United Airlines, Inc. v. Evans}, 431 U.S. 553, 554 (1977). In \textit{Ricks}, it was a denial of tenure. Delaware State College v. \textit{Ricks}, 449 U.S. 250, 252 (1980). In each case, a claim was filed a significant amount of time after the occurrence of the discrete discriminatory act. Evans failed to file a charge until four years after she was forced to resign because of United's discriminatory policy barring married female flight attendants. \textit{Ledbetter}, 127 S. Ct. at 2182 (citing \textit{Evans}, 431 U.S. at 554-57). Ricks did not object to the denial of tenure until a year later when his contract actually ended. \textit{Ricks}, 449 U.S. at 253-54, 257-58.

121 \textit{Ledbetter}, 127 S. Ct. at 2182; see also \textit{Evans}, 431 U.S. at 557-58; \textit{Ricks}, 449 U.S. at 258.

122 \textit{Evans}, 431 U.S. at 558.

123 \textit{Evans}, 431 U.S. at 557. The applicable time limit in February 1972 was 90 days; effective March 24, 1972, this time was extended to 180 days. Section 706(d), 42 U.S.C. § 2000e-5(d), then provided in part: "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred . . . ." The 1972 amendments to Title VII added a new subsection (a) to § 706. Subsection (d) was redesignated as subsection (e) and it was amended to enlarge the limitations period to 180 days. See 42 U.S.C. § 2000e-5(e) (Westlaw 2008); P.L. 92-261 §4(a), 86 Stat. 103 (1972).


125 \textit{Id.} at 559.

126 \textit{Id.}


128 \textit{Id.} at 257.
employment. There was evidence of ongoing discriminatory pay decisions and disproportionately low pay that continued throughout Ledbetter's employment with Goodyear.\textsuperscript{129} Since each paycheck reflected the discriminatory pay in Ledbetter, a present violation existed within the continuous pattern of disparate pay. In holding that Ledbetter's claim failed because she produced no evidence that Goodyear adopted the performance-based pay system with the intent to discriminate, the majority failed to adequately consider the intentional, ongoing payment of discriminatorily low paychecks to Ledbetter. The economic harm to Ledbetter was not completed in one day, by a single act. Instead, the continuous intentional act of discrimination by issuing paychecks that delivered a disparate wage because of unlawful discrimination compounded to establish a total quantifiable economic harm.

Pay disparities, like that which Ledbetter experienced, operate more like a hostile work environment than a discrete incident of discrimination. As the Court in Morgan explained, a discrete discriminatory act "'occurred' on the day that it 'happened.'"\textsuperscript{130} Yet, discriminatory pay is unlike the easily identifiable occurrences of discrimination in the workplace such as termination or denial of transfer. When an employer acts openly by terminating an employee, the employee has an opportunity to ask why she was terminated and determine whether the employer acted based on a legitimate business reason or if discrimination played a part. Disparities in pay, however, are often concealed and therefore, a discriminatory pay claim should not be based solely on the pay-decision.\textsuperscript{131} Acts that underlie the claim—payment of inequitable paychecks—are part of the same unlawful employment practice.\textsuperscript{132} Thus, as long as one paycheck falls within the time period, a claim for disparate pay should not be barred under Title VII.

\textsuperscript{129} Ledbetter \textit{v.} Goodyear Tire \& Rubber Co., 127 S. Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting) (citing Ledbetter \textit{v.} Goodyear Tire \& Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005)) (Lilly Ledbetter worked at the Goodyear Tire and Rubber plant in Gadsden, Alabama, from 1979 until her retirement in 1998. She worked as an area manager, a position typically occupied by men. At first, Ledbetter's salary was in line with the salaries of men performing substantially similar work but over time her pay dropped in comparison to the pay of male area managers with equal or less seniority. "By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236.").


\textsuperscript{131} See infra notes 141-163 and accompanying text.

\textsuperscript{132} Morgan, 536 U.S. at 122.
B. The Prevalence of Pay Secrecy

Ledbetter, and the practical problems it has created, stem from the inability of employees to become aware that they are receiving disparate pay. The nature of discrimination in the workplace has changed since the implementation of the CRA of 1964. In the 1960's through the 1980's employment discrimination was more likely to be overt. Today, discrimination in the workplace operates less as company policy or an easily identifiable decision to discriminate, and more as a persistent and underlying hindrance to equal opportunity and advancement. The key reason pay disparity claims differ from claims based on discrete acts, such as termination or refusal to hire, is that compensation disparities are often hidden. Justice Ginsburg's dissenting opinion in Ledbetter noted that

When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries.

The Ledbetter decision ignores the reality that pay discrimination is difficult to detect. Employees often have no access to company-wide salary data or any other information that would be necessary to raise a suspicion of discriminatory pay. Unlike termination or denial of promotion decisions, when an individual immediately knows that she has suffered an adverse employment action, an employee may not know that a pay decision of which she is aware of is, in fact, adverse. For instance, a discriminatory pay gap may not begin with a change in a

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134 Id.
135 Id.
136 See Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1008-1009 (10th Cir. 2002).
137 Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2181 (2007) (Ginsburg, J., dissenting); see, e.g., Goodwin, 275 F.3d at 1008-09 (plaintiff did not know what her colleagues earned until a printout listing salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries); McMillan v. Mass. Soc. for Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper).
139 Id.
female employee's pay, but instead with a decision only to increase the pay of male colleagues.\textsuperscript{140} Therefore, a pay-setting decision, unless it implements a pay cut, is unlikely to be viewed as discrimination at the time that it occurs.\textsuperscript{141}

Discussion by individuals of their salaries violates an American social norm.\textsuperscript{142} One-third of United States private-sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers, rules known as pay secrecy/confidentiality rules.\textsuperscript{143} A significant number of employers have more informal expectations that employees "keep their lips sealed about their salaries."\textsuperscript{144}

A recent study of employment practices in the United States and Canada found pay secrecy to be a significant concern in many organizations.\textsuperscript{145} The knowledge of differences in wages among employees may strain relationships among employees and negatively impact individual satisfaction and office unity.\textsuperscript{146} For many individual employees, their rate of pay is a very private matter.\textsuperscript{147} Employees do not want their employers disclosing their rate of pay, nor do they want co-workers asking them how much they make.\textsuperscript{148}

The reasons behind the very private nature of employees vary. Some individuals do not want pay or related information revealed because they think it might lead others to think less of them, while others are concerned that the disclosure of their pay may compromise the advantageous work arrangement they have with their employer.\textsuperscript{149} Others may be more reluctant to show off one's wealth and success.\textsuperscript{150} Some employees may be motivated to keep their salaries secret to avoid

\textsuperscript{140} The Lilly Ledbetter Fair Pay Act of 2007: Hearing Before the House Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Deborah Brake, Law Professor at the University of Pittsburgh School of Law, at 5).

\textsuperscript{141} Id. For example, an employee who learns that she is about to receive a four-percent raise would have no reason to suspect pay discrimination when she does not know about the raises her colleagues earned.

\textsuperscript{142} Bierman & Gely, 25 BERKELEY J. EMP. & LAB. L. at 168.

\textsuperscript{143} Id. at 168; see also The Lilly Ledbetter Fair Pay Act of 2007: Hearing before the House Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, at 3).

\textsuperscript{144} Bierman & Gely, 25 BERKELEY J. EMP. & LAB. L. at 168.

\textsuperscript{145} Id. at 171.

\textsuperscript{146} See generally Robert L. Opsahl, Managerial Compensation: Needed Research, 2 ORG. BEHAV. & HUM. PERFORMANCE 208 (1967) (discussing negative effects of open pay systems).

\textsuperscript{147} See Bierman & Gely, 25 BERKELEY J. EMP. & LAB. L. at 176.

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Id.
conflict with other co-workers.\textsuperscript{151} Professors Danziger and Katz suggest that labor mobility is facilitated by employees revealing to co-workers their salary as well as other job offers they have received.\textsuperscript{152} For that reason, employers who impose pay secrecy/confidentiality rules may do so to maintain the status quo.

Salary confidentiality policies run contrary to the purpose of the National Labor Relations Act (hereinafter NLRA), which protects the rights of all employees, whether represented by a union or not, to engage in “concerted activity for the purpose of . . . mutual aid or protection.”\textsuperscript{153} The federal courts and the National Labor Relations Board have held that discussion of wages is protected concerted activity under section 7 of the NLRA.\textsuperscript{154} Furthermore, some states have enacted statutes to protect employee discussions of their wages.\textsuperscript{155} Unfortunately, without awareness or notification of such rights, it remains extremely difficult for employees to discover that they have been subject to discriminatory pay.

C. \textsc{The Cumulative Effects of Disparate Pay}

Discriminatory pay decisions are not separate and distinct from the paychecks that follow them.\textsuperscript{156} One rationale behind treating employment practice claims differently from discrete act claims under Title VII is that a series of separate acts collectively constitute one
Essentially, the substantial collective effect of individual acts amounts to discrimination. Claims of pay disparity, such as Ledbetter's, rest not on one particular paycheck, but on the "cumulative effect of individual acts." In a pay disparity claim, it is not only the pay decision but the cumulatively lower income over a person's career that amounts to discriminatory harm that is impermissible under Title VII. Each pay decision builds on the prior one, and unless corrected, discriminatory pay decisions can be magnified by subsequent percentage-based adjustments. Under Ledbetter, the very cases where harm of the most egregious variety occurs, over the course of an individual's career, are the cases that are not actionable.

In Ledbetter, the plaintiff was the only woman working as an area manager, and the discrepancy between her pay and that of her fifteen male counterparts was severe; Ledbetter was being paid approximately twenty percent less than the lowest paid male area manager and almost forty percent less than the highest paid male. When a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented. Thus, the employer gains a windfall from a discriminatory pay decision as long as the discrimination goes undetected for 180 days, after which the premium only increases over time. This cumulative characteristic distinguishes pay claims from discrete employment actions.

As in Morgan, the discriminatory acts in Ledbetter—the issuance of discriminatory paychecks—fell outside the period to file a charge with the EEOC, yet with each new paycheck, Goodyear contributed incrementally to the harm. Each paycheck that amounted to less than Ledbetter would have received if her employer adhered to a nondiscriminatory compensation regime should have been treated as a

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158 See Morgan, 536 U.S. at 117.
161 Id. Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, and the highest paid male received $5,236. Ledbetter, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).
162 Ledbetter, 127 S. Ct. at 2182 (Ginsburg, J., dissenting).
163 Id.
cognizable harm because it was the type of harm that Title VII was designed to rectify.\textsuperscript{165} Each paycheck within the filing period compounded the discrimination Ledbetter encountered and thus contributed to the "actionable wrong" or the succession of acts constituting a pattern of discriminatory pay.\textsuperscript{166}


designed to rectify.\textsuperscript{165} Each paycheck within the filing period compounded the discrimination Ledbetter encountered and thus contributed to the "actionable wrong" or the succession of acts constituting a pattern of discriminatory pay.\textsuperscript{166}

IV. THE IMPACT OF THE SUPREME COURT'S DECISION IN LEDBETTER

Ledbetter has changed the understanding of when discrimination occurs and when a plaintiff may file a claim based on such discrimination. It conflicts with current administrative guidance issued by the EEOC.\textsuperscript{167} Furthermore, the decision fails to consider workplace realities and effectually creates a catch-22 for employees who may be suffering pay discrimination. If an employee does not file a charge within the limited filing period from the time of the discriminatory pay decision, she loses the right to challenge it. But if an employee files a charge too soon, she will most likely be unable to establish a prima facie case of discrimination under Title VII. Thus, the Ledbetter decision effectively weakens the statutory protections against discrimination in compensation.

A. CONTRADICTION WITH THE EEOC GUIDANCE

The EEOC's Compliance Manual currently reflects the pre-Ledbetter rule on pay discrimination. Its latest revision following Morgan explained:

\begin{quote}
In \ldots Morgan, the Supreme Court ruled that the timeliness of a charge depends upon whether it involves a discrete act or a hostile work environment claim. \ldots A discrete act, such as the failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge. Such acts must be challenged within 180/300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date. \ldots Repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks,
\end{quote}

\textsuperscript{165} See Morgan, 536 U.S. at 111-12; see also Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005).

\textsuperscript{166} Ledbetter, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).

\textsuperscript{167} See infra notes 176-183 and accompanying text.
can be challenged as long as one discriminatory act occurred within the charge filing period.\textsuperscript{168}

Ledbetter runs counter to the prevailing understanding articulated in the EEOC Compliance Manual excerpt, which shows a more realistic view of the nature of pay discrimination. The EEOC’s application of Title VII to disparate pay claims permits an employee to challenge continuing pay disparity as long as one paycheck that pays the employee less because of discrimination falls within the limitations period.\textsuperscript{169} The EEOC Compliance Manual provides that certain serial and systemic violations constitute continuing violations and allows relief for “repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, [that] can be challenged as long as one discriminatory act occurred within the charge filing period.”\textsuperscript{170} In Ledbetter, the Court declined to give any consideration to agency guidance and dismissed the EEOC’s interpretation as unworthy of any deference.\textsuperscript{171}

While the Court is not required to defer to the EEOC, the agency guidance plays a critical role in providing uniform direction to those who seek administrative relief for employment discrimination. The EEOC’s


\textsuperscript{169} EEOC Compliance Manual, § 2-IV-C(1)(a), http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-1-a (last visited April 11, 2008); see also Ledbetter, 127 S. Ct. at 2185 (Ginsburg, J., dissenting) (citing EEOC administrative rulings and litigation positions permitting employees to challenge any discriminatory paychecks received within the limitations period).


interpretation of Title VII, unlike the varied interpretations by the courts, provides meaning to the ambiguous statute which complainants look to when determining whether or not they have suffered actionable workplace discrimination. The EEOC guidance represents an interpretation of the law by the government entity with the greatest expertise and interest in determining the meaning of the statute. The expertise of the EEOC in the area of employment discrimination is unparalleled by the courts. Congress granted enforcement powers to the EEOC under Title VII, thereby requiring the agency to investigate and conciliate claims, with the intent that administrative resolution would eliminate the need for judicial action. To effectively conciliate claims of employment discrimination the EEOC must interpret the meaning of the statute, yet without deference to those interpretations, the value of the conciliation process is significantly minimized until the courts make their own determination as to the statutory meaning. This runs contrary to the purpose of the EEOC’s role in informal resolution of employment discrimination claims.

B. PAY DISCRIMINATION EXEMPT FROM CHALLENGE

The Ledbetter Court focused on the timeliness provision of Title VII as a protection for the defendant employer against stale claims. Consequently, Ledbetter dramatically weakens the provisions of Title

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172 See Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 595 (1985) (arguing courts should grant deference to the EEOC even though the EEOC lacks specific rulemaking authority).

173 See Theodore W. Wem, Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?, 60 OHIO ST. L. J. 1533, 1535 (1999) (arguing that the EEOC’s interpretations of Title VII have not received their fair share of judicial deference); see H.R. REP. No. 92-238 (1971), reprinted in 1972 U.S.C.A.A.N. 2137, 2146 (“Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.”).

174 See supra notes 18-39 and accompanying text (discussing congressional intent and purpose in establishing the EEOC); EEOC v. Shell Oil Co., 466 U.S. 54, 77-78 (1984) (“Congress did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation.”); see also Rebecca Hanner White, The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation, 1995 UTAH L. REV. 51, 96 (1995).

175 Id.; see also Jennifer M. Follette, Comment, Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence, 68 WASH. L. REV. 651, 667 (1993) (“If the courts do not defer to reasonable guidelines created by the EEOC, they frustrate the primary purpose for the Commission’s existence . . . . Moreover, deference to the guidelines will encourage parties to settle claims before they reach litigation, thus promoting the EEOC’s goal of conciliation.”).
VII intended to combat discriminatory employment practices. The Supreme Court has stated that Title VII’s prohibitions were intended to be “broadly inclusive, proscribing not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”

The *Ledbetter* holding that only the original discriminatory pay decision triggers the EEOC filing period leaves the employer insulated from liability after the initial statutory filing period passes, even though the discriminatory harm continues and aggregates. Thus, if an employee fails to file a charge of discrimination within 180 days of the discriminatory pay decision, *Ledbetter* effectively immunizes discriminatory pay from challenge, permitting the employer to continue to pay the employee in a discriminatory fashion for the rest of her employment.

C. THE IMPACT OF *LEDGETTER* ON LITIGATION OF DISCRIMINATORY PAY CLAIMS

The *Ledbetter* decision creates a catch-22 scenario for employees. If an employee does not file a charge within 180 days of a discriminatory pay decision, she loses the right to challenge it. But if the employee complains to an employer too soon—that is, without adequate factual and legal foundation—she can be terminated and left unable to demonstrate a prima facie case under Title VII. Thus, the narrow window in which to file may result in an employee not having adequate time to explore and investigate or even become aware of what would otherwise have been a valid claim. By the time the discrimination becomes clearly identifiable, under *Ledbetter*, the victim of pay discrimination would find her Title VII claims foreclosed.

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179 Id.
180 *Ledbetter*, 127 S. Ct. at 2182; see also Clark County School District v. Breeden, 532 U.S. 268 (2001) (single incident of allegedly lewd joking held inadequate to support a claim of sexual harassment violating Title VII of Civil Rights Act.).
182 See *The Lilly Ledbetter Fair Pay Act of 2007: Hearing Before the House Education and Labor Committee*, 110th Cong., 1st Sess. (2007) (written testimony of Deborah Brake, Law Professor at the University of Pittsburgh School of Law, at 2); see also LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATIONS AND THE GENDER DIVIDE (Princeton University Press, 2003) (demonstrating how a discriminatory pay decision can continue to produce an increasing pay disparity throughout an individual’s career).
The Ledbetter decision encourages more charges and litigation, running counter to the Title VII statutory preference for informal resolution of claims through administrative remedy.\textsuperscript{183} Under Ledbetter, an employee must file a charge within 180 days of each pay decision, in order to preserve her rights to challenge discrimination.\textsuperscript{184} The court's narrow construction of what constitutes a discriminatory act in a disparate pay claim forces an employee to act by filing a claim with the EEOC when she first suspects discrimination, despite the fact that the law tries to encourage informal conciliation between employer and employee to avoid conflict and litigation.\textsuperscript{185} Thus, an employee may be forced to skip the process of asking questions, gathering information, and attempting to resolve the matter informally with the employer. The result benefits neither employers nor employees.\textsuperscript{186} Not only does the decision encourage more EEOC claims, it also undermines congressional intent to encourage informal conciliation between the employer and employee.\textsuperscript{187}

While Ledbetter may increase the number of charges filed with the EEOC, it may also lead to an overall decrease in the number of legitimate claims. In testimony to Congress, Wade Henderson, President and Chief Executive Officer of the Leadership Conference on Civil Rights, pointed out that because it will become more difficult for employees to bring Title VII pay discrimination claims, countless meritorious claims will never be adjudicated as they are found to be time-barred.\textsuperscript{188} Thus, the decision in Ledbetter will act as a significant

\textsuperscript{184} Ledbetter, 127 S. Ct. at 2165.
\textsuperscript{186} After the EEOC investigation finds "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions in which EEOC investigators work with the parties to develop an appropriate remedy for the discrimination. Conciliation is a voluntary negotiation process that allows employers and employees to present counter-offers and remove the uncertainty, cost, and animosity surrounding litigation. U.S. Equal Employment Opportunity Comm'n, EEOC Investigations-What an Employer Should Know, How Does a Charge Get Resolved, Conciliation, http://www.eeoc.gov/employers/investigations.html#conciliation (last visited April 16, 2008); See also 42 U.S.C.A. § 2000e-5(b) (Westlaw 2008).
\textsuperscript{188} The Lilly Ledbetter Fair Pay Act of 2007: Hearing Before the House Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, at 6). The Leadership Conference on Civil Rights (LCCR) was founded in 1950 by three leaders of the civil rights movement: A. Philip Randolph, founder of the Brotherhood of Sleeping Car Porters; Roy Wilkins, Executive Secretary of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory
deterrent for those that may actually be aware of discrimination but simply do not believe there has been enough time to establish a sufficiently significant harm to justify raising a complaint. As Justice Ginsburg stated in the Ledbetter dissent, "even if an employee suspects that the reason for a comparatively low raise is not performance but sex or some other protected class, the amount involved may seem too small, or the employer’s intent too ambiguous, to make the issue immediately actionable—or winnable."189 While an employee may be motivated to complain to her employer at the first sign of a pay gap, she may lack an adequate foundation for a reasonable belief that the gap is because of gender discrimination, and thus, under Ledbetter, after only 180 days, an otherwise legitimate claim of discrimination will have no remedy under Title VII.190 One of the most troubling aspects of Ledbetter is the absurd disconnect between the majority’s narrow construction of the running of the filing requirement at the time of a pay decision and the statutory requirement for a reasonable belief that a discriminatory act has occurred before a person may file a claim of pay discrimination.

Ledbetter directly conflicts with workplace realities and creates confusion as to when discrimination occurs and becomes actionable. The Ledbetter rule for filing a Title VII disparate pay claim forces employees to either bring pay claims prematurely when there is insufficient evidence that there has been unlawful pay discrimination or wait until a later time when more substantial evidence exists and risk being barred from bringing such claims by the statute of limitations.

V. SOLUTIONS: THE APPLICATION OF THE DISCOVERY RULE TO TITLE VII CLAIMS AND A CALL FOR CONGRESSIONAL ACTION

The purpose of statutes of limitations is to provide defendants with prompt notice of claims and prevent plaintiffs from raising old claims.191 The Supreme Court has held that, while statutes of limitations serve to protect defendants from the burden of defending stale claims, this interest may be outweighed “where the interests of justice require vindication of the plaintiff’s rights.”192 Consistent with this holding,
courts have applied equitable principles to prevent unjust results to plaintiffs with legitimate claims.

The filing requirement of Title VII, like a statute of limitations, is intended to provide prompt notice to employers.\textsuperscript{193} In the Title VII context, the filing provision serves the additional purpose of allowing the EEOC to attempt to resolve the dispute through informal means before court action is commenced. The charge-filing and suit-filing periods under Title VII are also subject to principles of equity.\textsuperscript{194} The Supreme Court has held that the filing period is not a jurisdictional prerequisite but instead is subject to waiver, estoppel, and equitable tolling "when equity so requires."\textsuperscript{195} Yet, the Supreme Court has given little guidance as to when such doctrines should be applied in Title VII cases.

Courts will apply the doctrine of equitable tolling to suspend the running of a statute of limitations when a defendant has misled a plaintiff to conceal the existence of a cause of action.\textsuperscript{196} Accordingly, the Supreme Court has held that for equitable tolling to apply, a party must show more than neglect.\textsuperscript{197} Some circuits apply equitable tolling only if the defendant's wrongdoing is found to have proximately caused the late filing of a claim.\textsuperscript{198} Thus, while equitable tolling may be attractive to victims of discriminatory pay, courts have imposed limitations that

\textsuperscript{193} Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." \textit{Burnett}, 380 U.S. at 428 (citing \textit{Order of R.R. Telegraphers v. Ry. Express Agency, Inc.}, 321 U.S. 342, 348-49 (1944)).

\textsuperscript{194} \textit{Irwin v. Dep't of Veterans Affairs}, 498 U.S. 89, 95 (1990) (noting statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling).

\textsuperscript{195} \textit{Nat'l R.R. Passenger Corp. v. Morgan}, 536 U.S. 101, 121 (2002); \textit{see also Zipes v. Trans World Airlines, Inc.}, 455 U.S. 385, 398 (1982) (noting equitable doctrines allow courts to honor Title VII's remedial purpose "without negate the particular purpose of the filing requirement, to give prompt notice to the employer").

\textsuperscript{196} \textit{Lurie v. Meserve}, 214 F. Supp. 2d 546, 551 (D. Md. 2002) (stating equitable tolling of a statute of limitations only applies in limited circumstances, "where the defendant has wrongfully deceived or misled the plaintiff") (quoting \textit{C.M. English v. Pabst Brewing Co.}, 828 F.2d 1047, 1049 (4th Cir. 1987)).

\textsuperscript{197} \textit{Irwin v. Dep't of Veterans Affairs}, 498 U.S. 89, 96 (1990) (finding "garden variety" neglect cannot support equitable tolling).

\textsuperscript{198} \textit{Ramirez v. City of San Antonio}, 312 F.3d 178, 183-84 (5th Cir. 2002) (holding that a court will equitably toll a limitations period only when the employer's affirmative acts misled the employee); \textit{Seay v. Tennessee Valley Authority}, 339 F.3d 454, 469-70 (6th Cir. 2003) (finding an abuse of discretion in declining to extend equitable tolling to a plaintiff after defendant employer had misrepresented the circumstances surrounding the non-selection of plaintiff).
Another doctrine applicable to Title VII claims of employment discrimination is estoppel. Based on the concept of fairness, the doctrine of estoppel is intended to prevent a person from benefiting from action or inaction he has induced another to take. Equitable estoppel requires misleading conduct by the party to be estopped which caused the other party to rely in a way that was detrimental to her legal or economic interests. Therefore, an employer's mere silence will not raise estoppel in an employment discrimination claim.

While the doctrines of tolling and estoppel may be applicable in a Title VII context, their application depends on showing evidence of employer wrongdoing. The burden of showing employer misconduct may make the application of these doctrines an unlikely remedy for an employee who filed an untimely but otherwise legitimate claim of employment discrimination. Furthermore, courts have rejected application of estoppel defenses in favor of protecting statutory interests.

A. A DOOR LEFT OPEN? APPLYING THE DISCOVERY RULE TO TITLE VII DISCRIMINATORY PAY CLAIMS

The common law rule that a cause of action accrues at the time of the injury has been modified by the discovery rule. The discovery rule is an exception which shields a plaintiff from the accrual of a cause of action until she discovers or should have discovered that she may have an actionable claim, or until she discovers or should have discovered all of the essential elements of the claim. It was developed to rectify the

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199 Courts rarely apply the doctrine of equitable tolling, often stating that it should be reserved for extraordinary circumstances. See, e.g., Zerilli-Edelglass v. N.Y. City Transit Auth., 333 F.3d 74, 80-81 (2d Cir. 2003) (considering whether the person seeking application of equitable tolling has acted with reasonable diligence during the time period she seeks to have tolled and has proved that the circumstances are so extraordinary that the doctrine should apply); Beckel v. Wal-Mart Assocs., 301 F.3d 621, 624 (7th Cir. 2002) (finding that even admissible evidence of threatening retaliatory firing if employee sued for sexual harassment under Title VII would not make out a defense of equitable estoppel).

200 Nassau Trust Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265, 1269-70 (N.Y. 1982). The doctrine of estoppel is a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. BLACK'S LAW DICTIONARY 470 (Abridged 8th ed. 2005).


202 See Hotel Corp. v. Seaman Corp., 833 F.2d 1570, 1573 (Fed. Cir. 1987) (discussing the test for estoppel to require misleading conduct).

203 See Wolin v. Smith Barney, Inc., 83 F.3d 847, 855 (7th Cir. 1996) (discussing availability of estoppel as a defense under ERISA when the statute provides a limitation period).

204 Brown v. Nationsbank Corp., 188 F.3d 579 (5th Cir. 1999); see also Vaught v. R.R.
harsh results from the foreclosure of otherwise legitimate plaintiffs from seeking recourse because the plaintiff was not aware of the injury within the requisite statute of limitations. Unlike doctrines of estoppel and equitable tolling, the discovery rule does not rely on evidence of employer wrongdoing. Instead, the discovery rule applies if an element of a cause of action, such as damages, has occurred but cannot be pleaded in a complaint because it is not yet discoverable with reasonable diligence or because the injured party is unable to know of the injury because the nature of the injury is inherently undiscernible.

Thus, application of the discovery rule in Title VII disparate pay claims would provide that the filing period begins to run at the time the plaintiff discovers the injury. The discovery of the injury means not the actual discovery of the reason for the injury, but rather the discovery of facts constituting the basis of the cause of action or of facts sufficient to put a person of ordinary intelligence on notice that would lead to the discovery of facts constituting the basis of the cause of action. Thus, in a claim for discriminatory pay, the necessary discovery would be the knowledge of the receipt of the discriminatory pay, rather than the plaintiff's awareness of the reason for the injury such as the underlying racial or gender bias or the pay-setting decision. For example, the Seventh Circuit, in Wolfolk v. Rivera, held the time limit was tolled until the plaintiff, a black male, discovered that he was being paid less than white employees doing the same job. The court found that the plaintiff's lack of knowledge of facts that supported a discrimination claim constituted circumstances beyond his control that prevented him from submitting the matter to the defendant's equal employment opportunity counselor within the filing period. Consistent with the

Donnelley & Sons Co., 745 F.2d 407, 411 (7th Cir. 1984) (holding it appropriate to toll the statute of limitations until a reasonable plaintiff should have known facts that would support a charge of discrimination).


Geo. Knight & Co., Inc. v. Watson Wyatt & Co., 170 F. 3d 210, 216 (1st Cir. 1999) (finding appellant knew or reasonably should have ascertained the underfunded status of retirement plan); AT&T Corp. v. Rylander, 2 S.W.3d 546 (Tex. App. 1999) (cause of action for discrimination was not inherently undiscoverable because it was based on the Comptroller's failure to provide information that was publicly available).


Wolfolk v. Rivera, 729 F.2d 1114 (7th Cir. 1984); see also Posey v. Skyline Corp., 702 F.2d 102 (7th Cir. 1983) (180-day period began running on the day plaintiff's employer told him his job was terminated because of his age and ill health); see also Tucker v. United Parcel Serv., 657 F.2d 724 (5th Cir. 1981) (time limit began running on date black employees learned that white seasonal employees were being recalled and blacks were not).

Wolfolk, 729 F.2d at 1118.
equitable nature of the discovery rule, the court allowed the complainant's claim, striking a balance between fairness to the complainant and the importance of initiating the prompt investigation of a claim.\textsuperscript{211}

The Supreme Court has discussed the application of the principle in discrimination claims under Title VII but has yet to apply the rule.\textsuperscript{212} Morgan noted that there may be circumstances where it will be difficult to determine when the time period should begin to run, and one issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered.\textsuperscript{213} In Ledbetter, the Court explicitly stated it would not consider whether the discovery rule should be applied.\textsuperscript{214} The Court noted that because the rule was not argued by Ledbetter, the court had "no occasion to address the issue."\textsuperscript{215} This leaves the door open for Title VII plaintiffs to argue that the discovery rule applies to toll the administrative filing period upon the plaintiff's discovery of the disparate pay. The Supreme Court has not foreclosed the application of the discovery rule; therefore it may be one way for courts to curb the limiting effects of Ledbetter in Title VII discriminatory pay cases.\textsuperscript{216} However, it may also create uncertainties for plaintiffs. Since the discovery rule is applied at the discretion of the court there will be great variance among courts as to whether equity requires its application. Courts may differ on determinations of what a plaintiff should have known and when the plaintiff should have known it. Ultimately, the discovery rule is not a reliable remedy because of the discretionary nature of its application.

\textsuperscript{211} Id.

\textsuperscript{212} Delaware State College v. Ricks, 449 U.S. 250, 262 n.16 (1980) (recognizing that the limitations periods should not begin to run so soon that it is too difficult for a plaintiff to utilize protections under the civil rights statutes); see also Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979); Love v. Pullman Co., 404 U.S. 522, 526-527 (1972).

\textsuperscript{213} Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 n.7 (2002).

\textsuperscript{214} Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2187 n.10 (2007) (Ginsburg, J., dissenting) (stating that the Court has previously declined to address whether Title VII suits are subject to the discovery rule in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114, n. 7 (2002)); see also Peter E. Leckman, Ledbetter v. Goodyear Tire & Rubber Co.: Discovery Rule May Limit Impact of Supreme Court's Title VII Decision, BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN, July 2007, at 181, 183.

\textsuperscript{215} Ledbetter, 127 S. Ct. at 2177.

\textsuperscript{216} Leckman, 'BENDER'S CALIFORNIA LABOR & EMPLOYMENT BULLETIN, July 2007, at 181; see also Erwin Chemerinsky, The Court Deals a Blow to Pay Discrimination Plaintiffs, 43 JTLA Trial 60 (Sept. 2007).
B. A LEGISLATIVE REMEDY: CONGRESS RESPONDED TO THE WEAKENING OF FEDERAL CIVIL RIGHTS PROTECTIONS FOR EMPLOYEES WITH THE CIVIL RIGHTS ACT OF 1991

Congress has previously amended the CRA of 1964 to strengthen and improve federal civil rights laws, finding legislation necessary to provide additional protections against unlawful discrimination in employment.\(^\text{217}\) Congress enacted the Civil Rights Act of 1991 largely in response to five employment discrimination cases that greatly weakened the scope and effectiveness of federal civil rights protections for employees.\(^\text{218}\) Congress found that additional remedies under federal law were needed to deter unlawful harassment and intentional discrimination in the workplace.\(^\text{219}\)

The *Ledbetter* majority relied on one of the five controversial decisions leading up to the Civil Rights Act of 1991, *Lorance v. AT&T Technologies*, which involved the application of a discriminatory seniority system.\(^\text{220}\) *Lorance* and its aftermath illustrates how Congress has stepped in to remedy inequity created by the Supreme Court’s Title VII jurisprudence. In *Lorance*, an employer and the union representing its employees modified the manner in which seniority was measured for one specific job classification, from years of service with the employer generally to years of service in the specific job classification.\(^\text{221}\) When female employees in that specific job were laid off due to their low seniority, they filed a charge with the EEOC.\(^\text{222}\) The plaintiffs alleged that, had seniority continued to be measured as years of service with the employer, they would not have been laid off.\(^\text{223}\) They also alleged that the seniority scheme had been adopted with discriminatory intent to protect incumbent male employees when women with substantial plant


\(^\text{220}\) See Pub. L. No. 102-166, §§ 2-3, 105 Stat. 1071 (1991); see also Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989); Martin v. Wilkes, 490 U.S. 755 (1989) (expanding after-the-fact challenges to affirmative action plans); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (making it more difficult for plaintiffs to prevail in disparate impact claims); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (limiting liability for intentional discrimination in "mixed motive" cases); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that an employee could not sue for damages caused by racial harassment on the job, because even if the employer’s conduct was discriminatory, the employer had not denied the employee the same right to make and enforce contracts that is enjoyed by white citizens).

\(^\text{221}\) Lorance v. AT&T Techs., 490 U.S. 900, 902-03 (1989).

\(^\text{222}\) *Lorance*, 490 U.S. at 902.

\(^\text{223}\) Id. at 902-03.
seniority began to move into the traditionally male positions. However, the Court held that the claim was untimely, noting that the new seniority system did not, on its face, treat men and women differently and that the plaintiffs did not allege that it had been applied in a discriminatory manner. Thus, the Court concluded that the limitations period ran from the date of the signing of the underlying agreement, not from the date when the effects of the new system were manifested because the "invalidity of the facially nondiscriminatory and neutrally applied . . . seniority system is wholly dependent on the alleged illegality of signing the underlying agreement."

In response to the Court’s ruling, Congress amended Title VII with the passage of the Civil Rights Act of 1991, providing a legislative solution to the problem created by Lorance, the limitation on the right of an employee to challenge discriminatory seniority systems. Section 112 of the 1991 Civil Rights Act expanded the ability of employees to challenge discriminatory seniority systems by adding that a discriminatory seniority system constitutes an unlawful employment practice when such a system is adopted, when a person becomes subject to it, or when a person is injured by application of the seniority system or a provision of the system. Essentially, Congress agreed with the dissenters in Lorance that "the harsh reality of [that] decision," was "glaringly at odds with the purposes of Title VII." The difference, of course, was that Congress could do something about it by strengthening statutory authority.

The majority in Ledbetter narrowly interpreted the statute’s applicability:

For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory

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224 Id.
225 Id. at 910-12.
226 Id. at 911; see also Stephen A. Plass, Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem, 68 MONT. L. REV. 151, 156-57 (2007) (discussing Title VII’s loss of “pedigree” as evidenced by the Court’s decision in Lorance focusing on insulating employers from employees’ “stale” claims, instead of accommodating employee debility stemming from lack of notice).
229 See Lorance, 490 U.S. at 914 (Marshall, J., dissenting); see also Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991) (The 1991 Civil Rights Act was designed “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination”).
seniority system, not to other types of employment discrimination. Evans and Ricks, upon which Lorance relied, and which employed identical reasoning, were left in place.230

However, the dissent in Ledbetter noted that the Court’s reliance on Lorance is misplaced because the decision is no longer effective,231 since Congress superseded the Court’s holding by passing the 1991 Civil Rights Act.232 The Ledbetter dissent also distinguished the majority’s application of Lorance by noting that Lorance is irrelevant because Lorance involved a one-time discrete act—the adoption of the seniority system—unlike the ongoing disparate pay present in Ledbetter.233

While Section 112 of the 1991 Civil Rights Act specifically addresses seniority systems, Congress found that the Court had unduly contracted the scope of protection afforded by Title VII and other civil rights statutes. Congress, therefore, set out to insure that the rule established in Bazemore be generalized.234 The Senate Report accompanying the proposed Civil Rights Act of 1990,235 which had a provision similar to the one in the 1991 Act dealing with seniority systems, explained:

Where, as was alleged in Lorance, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In Bazemore the Supreme Court properly held that each application . . . i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in Bazemore.236

Thus, the Supreme Court in Ledbetter failed to give due weight to the congressional intent to extend specific filing limitation protections to

233 Ledbetter, 127 S. Ct. at 2183 (Ginsburg, J., dissenting) (discussing the one-time adoption of a new seniority system that “had its genesis in sex discrimination”).
plaintiffs bringing disparate pay claims under Title VII as amended by
the Civil Rights Act of 1991.

C. PROPOSED LEGISLATION TO REMEDY THE EFFECTS OF LEDBETTER

The legislative reaction to five controversial employment discrimination decisions in 1989 including Lorance, which resulted in the 1991 Civil Rights Act, serves as a model for Congress to act in response to Ledbetter. The Lilly Ledbetter Fair Pay Act, H.R. 2831, (hereinafter “H.R. 2831”), which was passed in the House of Representatives on July 31, 2007 by a 225 to 199 vote, is narrowly designed to reverse the Ledbetter decision without upsetting any other current law. The House Committee on Education and Labor acknowledged H.R. 2831 to be a remedy similar to that created by Congress after Lorance, stating that Lorance has been superseded by Congress, and likewise, Ledbetter would be reversed with this bill.

The Ledbetter decision applies to Title VII pay discrimination cases affecting not only women, but also those involving race, color, national origin, and religion. The Committee found that, if undisturbed, the Ledbetter decision might also affect pay discrimination under parallel employment discrimination statutes that are patterned on Title VII, such as the Age Discrimination in Employment Act (hereinafter ADEA) or the Americans with Disabilities Act (hereinafter ADA). H.R. 2831 was thus intended to amend the CRA of 1964, the ADEA, the ADA, and the Rehabilitation Act of 1973 to clarify that a discriminatory compensation decision or other practice that is unlawful under such laws occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice or when a person is affected by the decision or

237 See 42 U.S.C.A. § 2000e-5(e)(2) (Westlaw 2008), which allows for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application.

238 Roll No. 768, 153 CONG. REC. 124 (2007).


240 H.R. Rep. No. 110-237, at 29 (2007). The report notes that while the Committee cannot foresee “every fact pattern” in which charges might be brought within 180/300 days of an act that effectuates a past decision to discriminate, the application of the seniority system in Lorance was one and paycheck issuance in Ledbetter was another. In the Committee Report’s analysis of the Amendment, the differences between this provision and the Lorance legislative fix for seniority systems, codified at 42 U.S.C. § 2000e-5(e)(2), are specified to “ensure that Ledbetter is fully and clearly reversed.” The distinctions in the terms used in the 1991 Amendment and H.R. 2831 are explained as having no substantive difference.


practice, including each time compensation is paid.\textsuperscript{243} According to the congressional committee findings, the limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the comprehensive application of the civil rights laws that Congress intended.\textsuperscript{244}

H.R. 2831 would amend the CRA of 1964 by adding language that clarifies when an unlawful employment practice occurs with respect to discrimination in compensation.\textsuperscript{245} The bill states that

A discriminatory compensation decision or other practice is adopted when an individual becomes subject to the decision or practice, or when an individual is affected by application of the decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.\textsuperscript{246}

H.R. 2831 also states that liability may accrue and an aggrieved person may obtain relief, 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 practices that occurred outside the time for filing a charge.\textsuperscript{247}

In passing H.R. 2831, the House rejected the Court’s reasoning that the statute of limitations starts to run upon the “mere decision to discriminate” and not also upon the employer’s implementation of that discriminatory decision.\textsuperscript{248} The Committee clearly stated that an employer who decides to discriminate should be subject to challenge with every repeated instance of the employer effectuating that decision.\textsuperscript{249} The Committee Report clarified that because current and future instances of discrimination “must not be immunized by a cramped reading of when an unlawful employment practice occurs” for purposes of the statute of limitations, pay discrimination occurs both when an employer decides to discriminate and also when the employer actually carries out the discriminatory decision.\textsuperscript{250} As noted in the Committee Report, H.R. 2831 intends to “reverse Ledbetter in order to ensure the robust application of Title VII [and other laws] to fully protect workers

\textsuperscript{244} See H.R. 2831, 110th Cong. § 2(2) (2007).
\textsuperscript{245} See H.R. 2831, 110th Cong. § 3(3)(A) (2007).
\textsuperscript{246} Id.
\textsuperscript{247} See H.R. 2831, 110th Cong. § 3(3)(B) (2007).
\textsuperscript{249} Id.
\textsuperscript{250} Id.
from discrimination” and to “reassert the viability of discrimination claims with respect to pay.”251 Thus, H.R. 2831 would provide some recourse, as intended by Title VII, to individuals who have suffered discriminatory pay.

Similar legislation has been introduced in the Senate.252 The Fair Pay Restoration Act, S. 1843, (hereinafter “S. 1843”) would amend Title VII of the CRA of 1964 and the ADEA to clarify that an unlawful practice occurs every time compensation is paid pursuant to a discriminatory compensation decision or other practice.253 Like H.R. 2831, its counterpart in the Senate, S. 1843, would reverse Ledbetter and establish that the clock for filing a claim of discrimination starts when a discriminatory pay decision or practice is adopted, when a person becomes subject to the pay decision or practice, or when an individual is affected by the pay decision or practice, including whenever she receives a discriminatory paycheck.

D. OPPOSITION TO A LEGISLATIVE SOLUTION

The bills have been subject to criticism. In the floor debate on the H.R. 2831, Representative Kay Granger, a Republican from Texas, argued that “to overturn the Supreme Court decision would allow for a flood of decades-old claims to resurface.”254 Opponents of this legislation further claimed that it would encourage plaintiffs to sit on their right to sue and, because of the passage of time, put the employer at a disadvantage when a case is finally filed.255 Opponents have also contended that H.R. 2831 would effectively eliminate the statute of limitations.256

Another criticism is that the language used in H.R. 2831 is overly broad and allows for persons other than the injured employee to bring a discrimination claim.257 The language of the bill uses the term “individual” instead of referring to the “aggrieved party” and refers to persons “affected by” a discriminatory decision.258 Thus, the terms

251 Id.
254 153 CONG. REC. 123 (2007); see also Christine Cave, Could a legislative fix to Ledbetter override a presidential veto?, 14 FEDERAL HUMAN RESOURCES WEEK 320 (Aug. 27, 2007).
258 H.R. 2831, 110th Cong. § 3.
within the bill have been criticized as including more people than those actually "injured by" discrimination. Some critics have also argued that the bill should be revised to bar pay discrimination claims that are based on non-pay personnel decisions. An example of a non-pay personnel decision would be when an employee is transferred to another position that happens to have a different, but not necessarily discriminatory, compensation scheme. These criticisms reflect employers’ concerns that claims may be filed when there is no discriminatory reason for a change in an employee's salary.

There is, however, little substance to the criticisms of the proposed legislation. The argument that a delay in bringing claims for discriminatory pay will unfairly disadvantage the employer runs contrary to the realities of proving a claim of discrimination. While a claimant might theoretically defer filing, doing so would only impose a greater burden on the claimant because it is the claimant who bears the burden of proof; the passage of time only makes it more difficult to meet that burden. Also, it would be pointless for a victim to allow discriminatory paychecks to pile up over several years because the back pay award authorized in the bill is limited to two years. For example, if an employee brought a ten-year-old claim, she would in essence forfeit the right to make a claim for eight years of back pay, since the back pay award would be limited to two years.

Furthermore, the criticism that the bill’s language is overly broad is without merit. Individuals’ ability to bring claims is limited by the doctrine of standing; a party may bring a claim only if she can demonstrate that she has suffered some injury. An uninjured individual would undoubtedly fail to establish a prima facie claim of

261 Id.
263 H.R. 2831 § 3(B) (“In addition to any relief authorized by section 1977a of the Revised Statutes (42 U.S.C. 1981a), 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.”).
266 Standing is defined as “a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” See BLACK’S LAW DICTIONARY 1172 (Abridged 8th ed. 2005).
discrimination. Additionally, there are sufficient legal protections for employers who contend that they are disadvantaged by unreasonable or prejudicial delay. For example, an employer may raise a laches defense to cut off a plaintiff's right to sue if the plaintiff unreasonably delays in filing and as a result harms the defendant, even if the employee has met the filing requirements for Title VII.

Moreover, H.R. 2831 maintains the 180/300 day statutory requirement for filing discrimination charges with the EEOC. It does not extend that time limit. Thus, to have a viable claim, a victim of pay discrimination must file a charge within 180/300 days of receiving discriminatory pay. The House Report makes it clear that if the discriminatory pay were received more than 180/300 days before the filing of the charge, the claim would be untimely under the Act.

Rather than encouraging employers to run out the clock and continue reaping the financial rewards of paying someone less for discriminatory reasons, as Ledbetter permits, H.R. 2831 is designed to encourage employers to stop paying individuals in an unlawful, discriminatory fashion. Such incentive to stop discrimination existed in law prior to the

268 H.R. Rep. No. 110-237, at 17 (2007); see also Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2186 (2007) (Ginsburg, J., dissenting) (“Doctrines such as waiver, estoppel, and equitable tolling allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002)).
269 See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-25 (1975). Laches is the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought. See BLACK'S LAW DICTIONARY 726 (Abridged 8th ed. 2005).
270 The Lilly Ledbetter Fair Pay Act of 2007: Hearing Before the House Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Deborah Brake, Law Professor at the University of Pittsburgh School of Law, at 11); see Morgan, 536 U.S. at 121 (noting the defense of laches may be invoked to block an employee's suit if a plaintiff unreasonably delays in bringing suit and as a result the defendant was substantially prejudiced by that delay); see, e.g., Pande v. Johns Hopkins Univ., 598 F. Supp. 1084 (D. Md. 1984) (finding an unreasonable ten-year delay between the filing of EEOC charges and the commencement of suit where plaintiff was represented by counsel from the time charges were first filed and plaintiff had vicarious notice of his right to request a right-to-sue letter); Boone v. Mech. Specialties Co., 609 F.2d 956 (9th Cir. 1979) (dismissing a case due to laches after plaintiff was informed on several occasions that he could have a right-to-sue letter and institute a civil action but waited seven years to take action).
272 Id.
273 Id. If an employee left employment and is no longer receiving compensation from the employer or because the employer rectified the discriminatory pay and now has been paying the employee in a nondiscriminatory and lawful fashion for at least 180/300 days, a charge would be untimely under this bill. See H.R. 2831, 110th Cong. (2007).
Title VII Limitation Period

Court’s decision in *Ledbetter* and H.R. 2831 and S. 1843 ensure that it will exist after *Ledbetter* as well.\(^{274}\)

VI. CONCLUSION

Returning to Violet’s case, under *Ledbetter*, a woman earning sixty percent of what her male counterparts earn because of unlawful discrimination would be precluded from bringing a claim even if she received the discriminatorily low paychecks within the statutory filing period. Unfortunately, Violet’s example is more than a simple hypothetical; it is reality for many working women. A recent study by the American Association of University Women found that one year out of college, women earn eighty percent of what men earn, and ten years later they earn only sixty-nine percent.\(^{275}\) With a record sixty-nine million women in the workforce, wage discrimination could have a significant economic effect on a staggering number of employees.\(^{276}\) Considering the prevalence of the pay gap, the legal standard established by *Ledbetter* will undoubtedly affect the rights of employees who are legitimately suffering from pay disparity.

*Ledbetter* is inconsistent with the intent of the statutory protections against employment discrimination that Congress has established. The rule developed by *Ledbetter* frustrates the enforcement of Title VII by insulating current discriminatory conduct from challenge. In its holding, the Court failed to recognize the nature of wage discrimination. As a result, employers can easily escape liability merely by remaining secretive about discriminatory pay decisions during the statutory period, and once that time has passed they are essentially free to discriminate.


\(^{275}\) H.R. Rep. No. 110-237, at 29 (Strengthening the Middle Class: Ensuring Equal Pay for Equal Work, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Catherine Hill, Research Director at the American Association of University Women, at 1)). The AAUW’s analysis further demonstrated that female full-time workers earn less than male full-time workers in nearly every field they work. After controlling for factors such as major, occupation, industry, workplace flexibility, experience, education, enrollment status, grade point average, institution selectivity, age, race/ethnicity, region, marital status and children, a five percent difference in the earnings of male and female college graduates is unexplained. The AAUW’s analysis showed that ten years after graduation there is a twelve percent difference in the earnings of male and female college graduates that is attributable only to gender. See also Linda Lopez, *Women Have a Long Way to Go to Close Gender Pay Gap*, TUCSON CITIZEN, Aug. 30, 2007; U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Highlights of Women’s Earnings in 2005*, Report 995, http://www.bls.gov/cps/cpswom2005.pdf (last visited on April 16, 2008) (noting that among workers aged 45 to 54, women earned 75% as much as men where as workers 25 to 34 years old, women earned 89% as much as men).

openly. Thus, *Ledbetter* encourages employers to cover up their actions related to unfair compensation.

Defining when discrimination occurs is a question that has long troubled Congress and the courts. The history of Title VII is, in part, a historical pattern of the courts interpreting the statute and Congress responding to judicial decisions with further amendments to ensure that the Act fulfills its purpose. As was the case after *Lorance*, Congress again is confronted by a judicial decision that undermines the effectiveness of Title VII. While equity may allow a court to remedy the harsh effects of *Ledbetter*, only an amendment to Title VII will uniformly remedy the inequity created by *Ledbetter* and restore force to Title VII.

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