LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

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Ledbetter v. Goodyear Tire & Rubber Co.[1] illustrates two competing legal interpretations of Title VII and the body of law it provokes. In accordance with its pattern in recent years, the Court's majority chose a view that aids corporate defendants and disadvantages plaintiffs charging discrimination.[2] Indeed, the Supreme Court's previous jurisprudence interpreting Title VII influenced the *Ledbetter* case, and, in fact, dictated its ultimate disposition.[3] When that precedent collided with the facts in *Ledbetter*, a familiar question faced the Court: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation pay

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[1] 127 S. Ct. 2162 (2007).

[2] *Id.* at 2165 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

[3] *Id.* at 2169.

> The instruction provided by *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.

Id. *See e.g.*, Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Del. State Coll. v. Ricks, 449 U.S. 250 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

cases?[4]

Addressing that issue in *National Railroad Passenger Corp. v. Morgan*,[5] the Court held, in a five-four decision, that a discrete act of discrimination triggers the mandate that a potential litigant under Title VII shall file a complaint within a given time period (either within 180 or 300 days of the alleged discriminatory conduct) with the Equal Employment Opportunity Commission ("EEOC").[6] The Court proceeded to apply that rule in *Ledbetter*, finding that Lilly Ledbetter should have filed a complaint upon receipt of a salary substantially less than male workers similarly situated.[7]

The dissent's view is that for discrete actions, the majority's standard is appropriate.[8] *Ledbetter*, though, is a pay-setting decision where once the plaintiff's pay is set at a discriminatory level, the result is that future paychecks will always be less.[9] Therefore, the dis-

[4] *See id.* at 2165. In the first paragraph of *Ledbetter*, Justice Alito, writing for the majority, frames that familiar issue by pitting petitioner's arguments against Title VII precedent embodied in *Morgan*. *Id.* *See also Morgan*, 536 U.S. at 110. The *Morgan* Court identified the two critical inquiries for Title VII employment discrimination claims predicated upon impropriety in pay-setting: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred?' " *Id.*

[5] 536 U.S. at 101.

[6] *Morgan*, 536 U.S. at 122.

[7] *Ledbetter*, 127 S. Ct. at 2165 (reasoning a salary decision constitutes a discrete act and thus the time limit for filing an EEOC claim runs when the decision is made).

[8] *See generally Ledbetter*, 127 S. Ct. at 2179-88 (Ginsburg, J., dissenting).

[9] The four dissenting Justices disagreed with the majority's reasoning and characterization of Title VII precedent and offered an alternative disposition.

> Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view, but the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose.

crimination continues and courts can always go back beyond 180 days and show the earlier paychecks infected later payments, all of which are covered by the 180 day rule.[10]

From 1979 to 1998, Lilly Ledbetter was an area manager, and the sole female to occupy a supervisory position at Goodyear Tire and Rubber Company's plant in Gadsden, Alabama.[11] At that plant, salaried employees were either furnished with, or denied increases in compensation based on performance evaluations.[12] During the course of her employment, Ledbetter's evaluations reflected both positive and negative performance; her compensation responded accordingly.[13] Generally, the evaluations and pay were unsatisfactory, and by retirement she was making substantially less than her fifteen male counterparts.[14]

At the time of her retirement, Ledbetter was paid $3,727 per month.[15] By contrast, the lowest paid male manager was paid $4,286 per month;[16] the highest paid manager, also a male, received $5,236 per month.[17] Based upon, among other things, Ledbetter's belief that her compensation was predicated on her status as a female—as opposed to her performance as an employee—she filed a questionnaire with the EEOC on March 25, 1998. She filed a formal charge of dis-

Id. at 2179 (internal citation omitted).

[10] *See id.* at 2179-84.

[11] *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 421 F.3d 1169, 1173-75 (11th Cir. 2005).

[12] *See id.* at 1172-73.

[13] *See id.* at 1173-75.

[14] *Id.* at 1174 (indicating a similarly situated male supervisor at the same plant received compensation substantially in excess of that paid to Ledbetter).

[15] *Id.*

[16] *Ledbetter*, 421 F.3d at 1174.

[17] *Id.*

crimination with the commission in July 1998, and on November 24, 1999 (after opting for early retirement), she filed suit under Title VII in an Alabama federal district court.[18] She asserted that "several supervisors had given her poor evaluations because of her sex,"[19] and as a result, her pay had not increased as much as it would have but for the discriminatory evaluations.[20] Goodyear argued that the evaluations were nondiscriminatory.[21] The jury found in favor of Ledbetter, awarding her back pay and damages that totaled, after remittitur, about $360,000 in compensatory and punitive damages, plus attorneys' fees and costs.[22]

On appeal, Goodyear contended the plaintiff was limited to alleged discrimination she suffered during the 180 days, and for the two denials of promotion that had occurred during that period, beyond which she could not assert bias.[23] The Eleventh Circuit agreed with Goodyear's interpretation and reversed the district court's decision;[24] the Supreme Court majority followed the Eleventh Circuit.[25]

As so often happens in these cases, both Justice Alito (for the majority) and Justice Ginsburg (for the dissent) cited the same authorities, with each giving quite different readings of what those cases held.[26] Alito believed that Ledbetter's argument failed because she was going back beyond 180 days, and he thought that in disparate

[18] *Id.* at 1175.
[19] *Ledbetter*, 127 S. Ct. at 2166.
[20] *Id.*
[21] *Id.*
[22] *Ledbetter*, 421 F.3d at 1176.
[23] *Id.*
[24] *Id.* at 1189-90.
[25] *See Ledbetter*, 127 S. Ct. at 2165.
[26] *Compare id.* at 2168 (majority opinion), *with id.* at 2182 (Ginsburg, J., dissenting).

treatment cases of this type, it is too difficult for anyone to evaluate whether there was discriminatory intent going all the way back through those years.[27] To support his position, Justice Alito cites several cases, all of which involve discrete incidents of discrimination.

United Air Lines, Inc. v. Evans[28] involved a woman who was fired by United Air Lines because, at the time, they did not permit married women to be flight attendants.[29] She was later rehired, but treated as a new employee for seniority purposes, so she filed suit. Ruling against her, the Court said Evans should have filed when United Air Lines fired her. Thus, she was barred from filing suit because the present effect of the past action went back beyond the limitations period.[30]

Justice Alito cited other cases along the same line, including *Delaware State College v. Ricks*.[31] Ricks was a librarian who was denied tenure, and waited until after the end of the final year of his contract to file suit.[32] The Court ruled that he should have filed suit when he was first denied tenure, which was the discrete act of discrimination.[33] In fact, he did not.[34]

There are a couple of other cases of the same type, all of which—even though the issue before the Court was on this continu-

[27] *Id.* at 2167 (majority opinion).
[28] 431 U.S. at 553.
[29] *Id.* at 554-55.
[30] *Ledbetter*, 127 S. Ct. at 2167.
[31] *See id.* at at 2168 (citing *Ricks*, 449 U.S. 250 (1980)).
[32] *Ledbetter*, 127 S. Ct. at 2168 (citing *Ricks*, 449 U.S. at 252-53). Ricks was given a non-renewable contract for a term of one year.
[33] *Id.* (citing *Ricks*, 449 U.S. at 257).
[34] *Id.*

ing practice—Alito cites as clearly discrete discriminatory cases. *Morgan* concerned a black man who alleged he was discriminated against over a long period of time on the job with a railroad company.[35] A split decision, affirming in part, reversing in part, indicated that Morgan could not sue for discrete acts that were time-barred, but could sue for continuing acts.[36] Justice Thomas wrote the opinion and made the distinction between these two types of cases; between the discrete acts and those of a continuing series.[37] Alito dismissed Ledbetter's reliance upon these cases as well as the policy arguments in favor of her position. Justice Alito essentially disregarded how difficult it was for Ledbetter to become aware that she was being discriminated against with regard to the pay she was receiving.[38]

Justice Ginsburg, on the other hand, argued in dissent, that this was a major reason for making a distinction in pay cases as compared to those cases in which there is one discrete discriminatory act.[39] Ginsburg said, "Pay disparities are thus significantly different from adverse actions 'such as termination, failure to promote . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory."[40] Ginsburg said, "It is only when the disparity [regarding pay] becomes apparent and sizable" that the individual plaintiff, such as Ledbetter, would know to complain that

[35] *Morgan*, 536 U.S. at 104-05.

[36] *Id.* at 122.

[37] *Id.* at 115 (distinguishing between the single acts that collectively create a hostile work environment and discrete acts which are actionable standing alone).

[38] *Ledbetter*, 127 S. Ct. at 2169, 2177 ("Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents.").

[39] *Id.* at 2179 (Ginsburg, J., dissenting).

[40] *Id.* (citing *Morgan*, 536 U.S. at 114).

she has been discriminated against.[41] Ginsburg makes a strong argument that the reading she urges "is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[42] Justice Ginsburg again made the argument that discrete acts are easy to identify whereas pay disparities are not, citing cases like *Morgan*, where Justice Thomas wrote the opinion.[43] Although Thomas made the distinction when he wrote the opinion in *Morgan*, he sided with the majority in *Ledbetter*.[44] This result tends to move or integrate the discrete cases into the continuing discrimination cases, and that is what the majority held.[45] Again, Ginsburg argued that it is difficult for employees to know pay differentials,[46] and that employees do not want to take it right to court; they may think it is just a poor evaluation.[47] The employee may hope the situation will rectify itself, or, over time, a new supervisor will take the place of the previous one. All of these possibilities would justify filing a delayed suit. However, by the time Ledbetter became aware of such a serious disparity between her pay and that of her male counterparts, her suit was already time barred.[48] Due to the similarity between claims involving pay disparities and hostile work environ-

[41] *Id.*

[42] *Id.*

[43] *Ledbetter*, 127 S. Ct. at 2180 (Ginsburg, J., dissenting).

[44] *See id.* at 2165 (majority opinion).

[45] *Id.* at 2181.

[46] *Id.* at 2179 (Ginsburg, J., dissenting) ("Comparative pay information . . . is often hidden from the employee's view.").

[47] *Id.* at 2182. Justice Ginsburg posits an employee may believe the amount is too small, or that the true intent of the employer is too speculative, to make the matter worthwhile to pursue.

[48] *Ledbetter*, 127 S. Ct. at 2177 (majority opinion) ("[A]ny unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.").

ments, Ledbetter argued that she should be permitted to recover because the current discrimination resulted from the cumulative effect of recurring prior violations.[49] That argument failed.[50]

As previously stated, adherents of critical legal studies can have a field day with this decision. Both sides of the case, majority and dissent, find different instructions in the same case. It illustrates, for them, that precedent is indeterminate; it can be utilized to reach quite different results. It is interesting how Justice Thomas, who wrote a seemingly very clear decision in *Morgan*, remained quiet and went along with the majority in Ledbetter's situation, and so helped to create precedent that either now, or perhaps in the future, is going to wipe out the continuing pay discrimination-type situation in the pay cases.

One of my friends whose firm represents companies in employment discrimination cases felt the *Ledbetter* decision would have little effect on the field. He said that very few plaintiffs would wait nineteen years, and that, therefore, this case would be standing on its own. However, the majority's effort to sweep all the complaints into this discrete incident field will provide a valuable defense to employers and a further obstacle to the already minefield-packed terrain that Title VII complainants must negotiate. Justice Ginsburg, at the end of her opinion, calls for the cavalry of Congress.[51]

Sure enough, the House has introduced what they call the

[49] *See id.* at 2181 (Ginsburg, J., dissenting).
[50] *Id.* at 2187.
[51] *See id.* at 2183-84.

Lilly Ledbetter Fair Pay Act of 2007.[52] It is intended to, in effect, overrule the *Ledbetter* decision by an amendment to Title VII, which says that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions . . . ."[53] The bill states that this new Court-imposed filing restriction fails to take into account real-world wage discrimination and thus undermines congressional intent with regard to civil rights protection.[54] Thus, the bill attempts to make clear that "nothing in [the] Act is intended to preclude or limit an aggrieved person's right to introduce evidence of unlawful employment practices that have occurred outside the time for filing a charge of discrimination."[55] At least as this is worded, it does not seem to be limited to pay. It might pass through the House, but getting it through the Senate will be a little more difficult, and getting it past the current administration will be close to impossible. At least Congress—those members who introduced the Act—has tried to answer Justice Ginsburg's call to come to the rescue.

Anjana Samant, who researched and contributed to this presentation, views *Ledbetter as* a dangerous precedent which, unless it is

[52] Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (1st Sess. 2007).
[53] *Id.*
[54] *Id.*
[55] *Id.*

legislatively altered by Congress, will be cited in future pay cases even though it, in part, or in substantial part, relies on discrete act cases. She said that the conservative bloc has a historical bias when it comes to cases involving anti-discrimination efforts. Events are chopped up into isolated instances. The past is the past, let bygones be bygones and focus on the now—as if the now has any real meaning when divorced from its precedents.

Under the *Ledbetter* ruling, results such as those in *Thomas v. Eastman Kodak Co.*,[56] may not be possible. Thomas was a black woman who worked for Kodak for almost twenty years during which she was the only black customer service representative her office.[57] Throughout the period of her employment, Thomas had outstanding recommendations from her supervisors.[58] In 1989, she received a new supervisor who started a string of very poor evaluations.[59] When the company decided it was going to lay off employees, it looked over the evaluations of the most recent years.[60] Based on the poor evaluation from her new supervisor, she was let go.[61] Thomas was permitted by the First Circuit to go back and show her good evaluations and what had happened.[62] By reviewing the complete history of her job performance, Ms. Thomas was able to prove discrimination. *Ledbetter* is troubling at the very least, even as a five-four decision. The willingness of the Court majority to look at discrete cases in or-

[56] 183 F.3d 38 (1st Cir. 1999).
[57] *Id.* at 42.
[58] *Id.* at 43.
[59] *Id.* at 44-45.
[60] *Thomas*, 183 F.3d at 46.
[61] *Id.*
[62] *See id.* at 43-45.

der to make the argument that pay cases should fall in the same category, provides a precedent, which at least the majority of this Court is willing to follow in the future. This will make it even more difficult to win these already-difficult pay cases.

As Justice Ginsburg suggested, employees want to work, not sue. Their tendency is not to challenge the employer until it becomes obvious, particularly after dismissal, that they have been the victims of discrimination. After *Ledbetter*, such patience, far from a virtue, may render it much more difficult to prevail.