

CLOSING THE GAP LEGISLATIVELY:
CONSEQUENCES OF THE LILLY LEDBETTER FAIR PAY ACT

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INTRODUCTION

In the United States, women still make less money than men.¹ One of those women was Lilly Ledbetter, an area manager at an Alabama factory, now famous as the plaintiff in the Supreme Court decision which decided that she had missed the statute of limitations to sue based on her discriminatorily low pay.² Ledbetter had discovered too late that she made less money than any of the other area managers, all males.³ She had sued under Title VII of the Civil Rights Act of 1964, which provides a remedy for employees whose employers intentionally discriminate on the basis of gender.⁴ However, remedies for pay discrimination are only available to plaintiffs who file their claims on time, and Title VII plaintiffs have only 300 days to file their claims.⁵

Now, Congress has responded to *Ledbetter* and its ostensible inequities with the Lilly Ledbetter Fair Pay Act (“LLFPA”), enacted on January 29, 2009.⁶ The new law expands the statutory limitations periods for Title

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1. U.S. DEP’T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2008, REPORT 1017 (July 2009), <http://www.bls.gov/cps/cpswom2008.pdf>. In 2008, women’s median income was eighty percent of men’s median income for the same period. *Id.*

2. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 637, 643 (2007).

3. *See id.* at 643.

4. 42 U.S.C. § 2000e-2 (2006). Under Title VII, it is unlawful to discriminate based on an individual’s race, color, religion, sex, or national origin. *Id.*

5. *Id.* § 2000e-5(e)(1). The limitations period is 180 days if the employment practice occurs in a state that does not have a state agency that deals with employment discrimination. The limitations period is 300 days if the employment practice occurs in a state or locality that does have such an agency and the plaintiff files with that agency before filing a federal claim.

6. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

VII claims based on paychecks, among other types of statutory claims.⁷ It does not change the statute of limitations in terms of the number of days within which a discrimination claim must be filed; plaintiffs still must file claims within 300 days of when an “alleged unlawful employment practice” occurs.⁸ Rather than altering the statute of limitations by changing the number of days from 300 to some larger number, the LLFPA instead broadens the statute of limitations for Title VII claims by adding a definition of when an unlawful unemployment practice “occurs”:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.⁹

This broad definition of when an unlawful unemployment practice occurs is a significant departure from the Supreme Court’s past interpretations of the statute of limitations on Title VII pay discrimination claims. In fact, the LLFPA is a direct reaction to a Supreme Court case, *Ledbetter v. Goodyear Tire & Rubber Co.*, a pay discrimination case which interpreted Title VII’s limitations period narrowly, and was motivated by Justice Ginsburg’s dissent in that case.¹⁰ This Note will explore the history, precedent, and implications of this new law.

Part I of this Note examines the *Ledbetter* decision, Justice Ginsburg’s dissent, and prior pay discrimination decisions that led to it. Part II will examine subsequent employment discrimination decisions in the lower courts. Part III will examine the scope and possible judicial interpretations of the LLFPA, informed by a small number of cases interpreting the scope of the LLFPA.

7. *Id.* It also affects the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. *Id.*

8. 42 U.S.C. § 2000e-5(e)(1).

9. Lilly Ledbetter Fair Pay Act § (3)(A). The LLFPA goes on to provide relief of up to two years of back pay, as with other Title VII enforcement provisions: “[L]iability 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.”

10. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

I. LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

Decided by a —five to four majority just two years before the enactment of the LLFPA, the *Ledbetter* case was a direct catalyst for the subsequent congressional amendment of Title VII's statute of limitations. This section summarizes the majority and dissenting opinions in this influential case, and the next section will demonstrate how the LLFPA specifically addresses the factual situation found in the *Ledbetter* case: an employee, discriminatorily paid less than similarly situated employees, who nonetheless did not discover the discrepancy in pay until it was too late to file suit.

A. Justice Alito's Majority Opinion

The plaintiff in the case, Lilly Ledbetter, was an employee of Goodyear Tire & Rubber Co. (Goodyear) from 1979 to 1998.¹¹ She argued and introduced evidence that her supervisors gave her poor evaluations based on her sex.¹² Because Goodyear determined whether to give or deny her raises based on these supervisors' performance evaluations, she ended up being paid less than her male co-workers.¹³ After her early retirement from Goodyear, Ledbetter filed a Title VII claim for alleged pay discrimination based on her gender.¹⁴

Under Title VII's pre-LLFPA statute of limitations, the Act's short limitations period began to run "after the alleged unlawful employment practice occurred."¹⁵ This language is deceptively simple, as the period in which a plaintiff can bring a claim hinges on a court's interpretation of what constitutes an "employment practice" and when exactly it "occurred."¹⁶ Thus the result of a case hinged on a court's interpretation of these terms, varying from allowing a plaintiff to bring in discriminatory acts that go back years from the initiation of the suit to strictly limiting a plaintiff only to occurrences within the 180- or 300-day period.

Ledbetter represented a narrow interpretation of when an unlawful employment practice "occurred" for purposes of the Act's limitations period. The majority rejected the argument that the paychecks created a hostile environment claim, which would have allowed Ledbetter to claim damages on every act of her employer as long as just one act occurred

11. *Id.* at 621.

12. *Id.* at 622.

13. *Id.*

14. *Id.* at 621–22.

15. 42 U.S.C. § 2000e-5(e)(1) (2006).

16. *Id.*

within 300 days of filing.¹⁷ Instead, Justice Alito determined the decision about her salary made by her supervisor was the only “independently identifiable and actionable” act, and thus that the statute of limitations started running well before the 300-day limit.¹⁸ The Court came to this conclusion by examining the text of Title VII and in a discussion of a line of Supreme Court cases interpreting the Title VII limitations period.

Under his reading of Title VII, Justice Alito stated that disparate treatment claims can only be based on intentional acts.¹⁹ Because Ledbetter did not assert that Goodyear acted “with actual discriminatory intent either when they issued her checks . . . or when they denied her a raise,” Justice Alito concluded that the issuance of paychecks and denial of raises were not unlawful employment practices.²⁰ In order to successfully state a claim, a plaintiff has to assert that there were unlawful acts (“an employment practice”), coupled with a present “discriminatory intent.”²¹ Both elements must be present at the same time within the filing period in order to successfully state a Title VII claim.²²

It is important to note that Justice Alito does not interpret the word “intent” in the ordinary, common law sense of a mental state that encompasses both purpose and knowledge. Rather, he assumes that intent was meant to include only purposeful intent. Thus, Ledbetter’s claim failed: she asserted unlawful employment practices in the issuance of low paychecks and the denial of a raise and asserted prior discriminatory intent in the performance evaluations that gave rise to the lower paychecks and denial of the raise, but she did not show that any paychecks were coupled with present, purposeful discrimination less than 300 days before she filed her claim.²³ The Court did not address whether the plaintiff’s allegations could give rise to an inference that Goodyear had knowledge of the unlawful discrimination in paying Ledbetter less than her male counterparts and in refusing her a raise. Instead, Justice Alito concluded that Ledbetter had not alleged any discriminatory acts within Title VII’s limitations period be-

17. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 638 (2007).

18. *Id.* at 628, 639.

19. *Id.* at 624.

20. *Id.*

21. *Id.* at 631.

22. *Id.* at 631 n.3.

23. *Id.* at 624. Justice Alito uses the term “intent” and “discriminatory intent” as the “central element” of a disparate treatment claim. *Id.* However, when he uses the term “actual discriminatory intent,” the implication is that Ledbetter failed to assert any discrimination with *purpose*, and there is no room in the analysis for the inference of discrimination with *knowledge*, although both knowledge and purpose would be included in the traditional notion “intent.”

cause the paychecks issued within the filing period were not coupled with discriminatory purpose.²⁴

Justice Alito justified this result by discussing a line of precedent dealing with the present effects of past discrimination, all of which rejected similar arguments to the effect that the continuing effects of past, purposefully discriminatory acts could give rise to present liability, as long as one of the effects happened within 300 days.²⁵ Justice Alito first distinguished *Bazemore v. Friday*, a case that Ledbetter argued had applied a “paycheck accrual rule” to a disparate-treatment claim.²⁶ The case involved an employer’s dual pay system, paying those in a “white branch” more than those in a “Negro branch.”²⁷ The employer eventually merged the two branches, but continued to pay blacks less than it paid whites.²⁸ Ledbetter argued that this case applied the paycheck accrual rule, which would mean that the statute of limitations began to run on each paycheck, even if the plaintiff did not prove that the paycheck was accompanied by a present discriminatory purpose.²⁹ Justice Alito rejected the paycheck accrual rule and rejected Ledbetter’s reading of the case. As Justice Alito understood it, the employer in *Bazemore* was continuing a past system of discrimination, and thus the plaintiff had proven that the paychecks were accompanied by discriminatory intent.³⁰ Without such discriminatory intent, however, the paychecks would not be actionable.³¹ Therefore, *Bazemore* did not lend support to Ledbetter’s paycheck accrual rule theory, and the Court still required that she prove discriminatory intent for each paycheck.³²

After concluding that Ledbetter would have to prove discriminatory intent on each separate paycheck, Justice Alito reviewed other Title VII Supreme Court cases which supported his reasoning, though none of them directly dealt with the effects of discrimination on pay raises.³³ First was *United Air Lines, Inc. v. Evans*, in which an airline fired a female flight attendant after her marriage, acting on a company rule that it would not employ married female flight attendants.³⁴ When the airline later rehired her after changing the rule, it refused to credit her for her past employ-

24. *Id.* at 637.

25. *Id.* at 624–25.

26. *Id.* at 633.

27. *Bazemore v. Friday*, 478 U.S. 385, 390–91 (1986).

28. *Id.* at 391.

29. *Ledbetter*, 550 U.S. at 633.

30. *Id.* at 634–35.

31. *Id.*

32. *Id.*

33. *Id.* at 636–37.

34. 431 U.S. 553, 554 (1977).

ment.³⁵ The Court held that the refusal to give her seniority credit was merely an effect of the airline's past discriminatory policy and did not constitute a "present violation."³⁶

Justice Alito discussed two other cases that followed similar reasoning, rejecting claims based on continuing effects of an employer's past discrimination rather than on acts accompanied by an employer's present discrimination. In *Delaware State College v. Ricks*, the Supreme Court also held that the plaintiff's employment discrimination claim was filed too late.³⁷ The plaintiff filed his claim within 300 days of the end of his employment, but the termination of his employment occurred at the end of the one-year terminal contract that he had signed a year earlier.³⁸ The Court held that he should have filed his claim after being given a nonrenewable one-year contract rather than waiting until it expired, as the expiration was merely an unactionable effect of past discrimination.³⁹ In *Lorance v. AT & T Technologies, Inc.*, females in a traditionally male occupation of "tester" were demoted due to their lower seniority than their male counterparts.⁴⁰ There, the Supreme Court again stuck to its rule that discriminatory effects could not give rise to present liability; thus, because the collective bargaining agreement that determined the seniority rules had gone into effect almost a decade before the female testers were hired, their claim was time-barred.⁴¹

With that discussion, the Court rejected Ledbetter's "paycheck accrual" rule; the Court went on to reject Ledbetter's argument that Goodyear's acts created a hostile environment.⁴² If Ledbetter's paychecks were deemed to create a hostile environment of discrimination, she could hold Goodyear liable for every discriminatory pay decision, even those from before the 300-day filing period.⁴³ Her hostile environment argument was based on a fairly recent Supreme Court case, *National Railroad Passenger Corp. v. Morgan*. In a five to four decision, the Supreme Court in *Morgan* held that the plaintiff's claim for racial discrimination was not barred by Title VII's limitations period because he had alleged a hostile environment

35. *Id.* at 555.

36. *Id.* at 559.

37. 449 U.S. 250, 261-62 (1980).

38. *Id.* at 253-54.

39. *Id.* at 258-59.

40. 490 U.S. 900, 902-903 (1989).

41. *Id.* at 911. As discussed below, *Lorance's* specific holding was later superseded by legislation, a fact not mentioned in Justice Alito's opinion.

42. *Ledbetter*, 550 U.S. at 638.

43. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638 (2007) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-116 (2002)).

that had continued up until less than 300 days before he filed his claim, making his claim timely.⁴⁴ Justice Thomas, writing for the majority, read the Act as creating liability for at least two kinds of unlawful acts: the discrete act and the hostile environment.⁴⁵ He first examined the nature of a hostile environment claim, which involves “repeated conduct,” as distinguished from the single occurrences that make up discrete acts.⁴⁶ A hostile environment claim “is composed of a series of separate acts that collectively constitute one ‘unlawful employment practice.’”⁴⁷ Factors to be considered in determining whether a hostile environment claim existed include all the surrounding circumstances: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁴⁸ An example of a successfully-alleged hostile environment is Morgan’s case, in which he provided evidence of racial jokes by managers, racially derogatory acts, negative comments, and use of racial epithets.⁴⁹

Having concluded that Title VII’s scope included hostile environments, Justice Thomas examined how the limitations period applies to hostile environment claims, concluding that hostile environments “occur” for as long as the environment continues to be hostile.⁵⁰ In essence, Justice Thomas reasoned that a hostile environment creates a single employment practice, rather than consisting of the many disparate acts that make up the hostile environment. A hostile environment creates one, unified claim—one lewd joke in the workplace is not actionable, but ten lewd jokes a day over a period of six months may be actionable as a hostile environment.

44. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002).

45. *Id.* at 115–116. Justice Thomas concluded that the Act contemplated both hostile environment claims and discrete act claims based on a careful reading of the entire Act. Clearly, discrete acts are covered, as Title VII lists specific acts by employers that give rise to a cause of action under the Act, for example “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1) (2006). However, Justice Thomas concluded that Title VII’s prohibition on workplace discrimination extended to all kinds of disparate treatment based on the use of the phrase “terms, conditions, or privileges of employment.” *Morgan*, 536 U.S. at 115–16 (citing 42 U.S.C. § 2000e-2(a)(1)). The phrase “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment’ . . . which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Id.* at 115–16 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

46. *Morgan*, 536 U.S. at 115.

47. *Id.* at 116 (quoting 42 U.S.C. § 2000e-5(e)(1)).

48. *Id.* (citing *Harris*, 510 U.S. at 23).

49. *Id.* at 120–21.

50. *Id.* at 117. Justice Thomas finds support for this conclusion in the fact that the text of Title VII “does not contain a requirement that the employee file a charge prior to 180 or 300 days ‘after’ the single unlawful practice ‘occurred.’” *Id.* at 118.

However, if a hostile environment is one claim, then there is a question as to when that claim “occurs” for purposes of Title VII’s statute of limitations. Justice Thomas held that the claim “occurs” throughout the duration of the hostile environment, with the practical effect that Title VII’s statute of limitations does not begin to run until the last day of the hostile environment, for example on the day of the final lewd joke. If any of the acts giving rise to a hostile environment occurred within 300 days of the suit, every act that is part of the hostile environment can be included in the claim, regardless of when it occurred and regardless of when the employee discovered that the hostile environment existed.⁵¹

The other type of discrimination claim discussed in the *Morgan* opinion is the more traditional claim, based on discrete acts. For a discrete act, or a single occurrence, of discrimination, the Court held that such a practice “occurs” on the day that it happens.⁵² Examples of discrete acts from Title VII are to fail or refuse to hire, to discharge, or to discriminate against an individual as to compensation or as to the terms, conditions, or privileges of employment.⁵³ Even if such a discrete act has a connection to other acts that occurred before the limitations period, all acts beyond 300 days from the date of filing are time-barred.⁵⁴ In holding as such, the Court overruled the appellate court’s use of a “serial violation” doctrine.⁵⁵ Thus, *Morgan* split all discrimination claims into two types: discrete acts, such as firing or refusing to hire, which are separately actionable and cannot pull in pre-filing period acts, and hostile environments, which can pull in pre-filing period acts, subject only to the limits of waiver, estoppel, and equitable tolling.

The *Ledbetter* decision applies the *Morgan* definition of a hostile environment: one that “typically comprises a succession of harassing acts,

51. *Morgan*, 536 U.S. at 118. Justice Thomas’s illustration of this point demonstrates how broad liability for a hostile environment claim can be: if acts create a hostile environment from days 1–100, there are no acts on days 101–400, and another act occurs on day 401, the act on day 401 can “pull the other acts in for the purposes of liability” as long as a claim is filed within 180 or 300 days of the last act. *Id.* at 118. Again, Justice Thomas looks to the text of Title VII to find support for his reasoning, and he finds it in the damages limitations sections of the statute. *Id.* at 118–19. The statute does not bar plaintiffs from recovering damages “for that portion of the hostile environment that falls outside the period for filing a timely charge,” and Justice Thomas sees this as a sign that Congress did not intend to limit liability for hostile environment claims to the statutory limitations period. *Id.* at 119 (citing 42 U.S.C. §§ 2000e-5(b), (c), (d)).

52. *Id.* at 115–16.

53. *Id.* at 111 (citing 42 U.S.C. § 2005e-2(a)).

54. *Id.* at 110–11.

55. *Id.* at 110 n.6. The “serial violations” doctrine held that “so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability,” and none are time-barred. *Id.* at 114.

each of which ‘may not be actionable on its own.’”⁵⁶ Although Justice Ginsberg’s dissent would characterize Ledbetter’s experience as a hostile environment, as discussed below, the majority found that each of her paychecks constituted a discrete act—an “independently identifiable and actionable” wrong.⁵⁷ Together, they were merely a series of wrongs, rather than a hostile environment. Each paycheck and performance evaluation was a discrete act, and under *Morgan* the limitations period began to run on the occurrence of each act.⁵⁸ Because Ledbetter did not allege a hostile environment, she could not benefit from the broad liability for such claims from *Morgan*.⁵⁹ Thus, with the majority’s application of *Morgan*, Ledbetter could only make claims for paychecks and performance evaluations she received within 300 days of filing her claim; otherwise, her claim was barred by Title VII’s statute of limitations.⁶⁰

B. Justice Ginsburg’s dissent

Justice Ginsberg’s dissenting opinion, joined by Justice Stevens, Justice Souter, and Justice Breyer, appears to have inspired the new amendment to Title VII, the Lilly Ledbetter Fair Pay Act.⁶¹ Her dissent highlights the unfairness of the majority’s outcome by critiquing the majority’s use of precedent, discussing the facts of the case in detail and the realities of workplaces in general and arguing that a broader interpretation of the Act would comply with lower courts’ and the Equal Employment Opportunity Commission’s interpretation of the act and the general policies behind Title VII.⁶²

From Justice Ginsberg we learn that Ledbetter worked at Goodyear as an area manager and that she was one of few women in the position, and the only female area manager by the end of 1997.⁶³ Not only was she very much in the minority, she also worked under a supervisor “openly biased

56. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638 (2007).

57. *Id.* at 639.

58. *Id.*

59. *Id.* at 638–39.

60. *Id.* at 628.

61. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(A), 123 Stat. 5, 5 (2009). The first finding listed in the text of the legislation states that the amendment is intended to overrule the majority’s holding: “(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), 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 or other practices, contrary to the intent of Congress.” *Id.*

62. See *Ledbetter*, 550 U.S. at 643–61 (Ginsberg, J., dissenting).

63. *Id.* at 643.

against women”; other women who worked for the plant testified to the discrimination pervasive at the plant where they worked, and Ledbetter herself testified to the plant manager’s statements that the “plant did not need women, that [women] didn’t help it, [and] caused problems.”⁶⁴ Due to the poor evaluations she received from male supervisors, the pay differential increased as she worked at Goodyear—by 1997, Ledbetter was paid \$3,727 per month while male managers were paid from \$4,286 to \$5,236 per month.⁶⁵ At one point during her career, her salary fell below Goodyear’s minimum salary for her position.⁶⁶ Ledbetter had also proven that the refusal of raises was not related to her performance, and that she had in fact received a “Top Performance Award” in 1996.⁶⁷ Most importantly, a jury had found for Ledbetter at trial; she had proven that “[s]he was a member of a protected class; she performed work substantially equal to work of the dominant class (men); she was compensated less for that work; and the disparity was attributable to gender-based discrimination.”⁶⁸

Justice Ginsberg presented policy arguments against the majority’s holding, noting that the decision was contrary to the “core purpose” of Title VII.⁶⁹ She noted that pay disparity cases are fundamentally different than the discrete acts listed in Title VII (“termination, failure to promote, . . . or refusal to hire”⁷⁰), as pay disparities are much more difficult for an employee to identify; they happen in small increments, employees rarely have access to comparative pay information, and employees are often willing to give the employer “the benefit of the doubt.”⁷¹ In Ledbetter’s case, she was first paid the same as other males, and over the course of the next nineteen years her salary fell incrementally in comparison to other male managers.⁷² Further, Goodyear had an official policy of keeping salaries confidential.⁷³

Because of the difficulties of identifying pay disparity discrimination and the fact that it often happens incrementally over several years, Justice Ginsberg argued that it would be within Title VII’s remedial purpose to

64. *Id.* at 659–60.

65. *Id.* at 643 (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1174 (11th Cir. 2005)).

66. *Id.* at 659.

67. *Id.*

68. *Id.* at 659.

69. *Id.*

70. *Id.* at 645 (quoting 42 U.S.C. § 2005e-2(a) (2006); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

71. *Id.* at 645.

72. *Id.* at 649.

73. *Id.* at 650.

consider each paycheck to be a discrete, actionable act.⁷⁴ Because Ledbetter's claim did not involve one discrete act but disparity in pay over time, Justice Ginsberg argued that the majority's line of authority in *Evans*, *Ricks*, and *Lorance* is "inapposite," as they all involved discrete act claims.⁷⁵ Justice Ginsberg also critiqued the majority's use of *Lorance*, which she considered "perplexing" given that Congress superseded its holding with a 1991 amendment to Title VII.⁷⁶

Thus distinguishing the majority's line of authority in *Evans*, *Ricks*, and *Lorance* with factual and policy-based arguments, Justice Ginsburg's dissent reverberated throughout the lower courts and in Congress.

II. THE LILLY LEDBETTER FAIR PAY ACT OF 2009

At the end of her dissenting opinion in *Ledbetter*, Justice Ginsberg stated that "the ball is in Congress's court" to revise the Act to overrule the majority's specific holding.⁷⁷ Taking up this call to action, the House of Representatives Committee on Education and Labor held a hearing in 2007 on the majority's holding's implications.⁷⁸ The hearings did not result in any legislative action until the election of President Barack Obama, as Republicans in the Senate were blocking passage of the proposed amendment.⁷⁹ After President Obama's election, his first bill signed into law was the Lilly Ledbetter Fair Pay Act.⁸⁰

A. The Lilly Ledbetter Fair Pay Act

Just before the LLFPA was passed in 2009, a Title VII plaintiff would have to determine whether his or her employer's actions constituted a "discrete act" or a "hostile environment" to assure that their claim was timely.⁸¹

74. *Id.* at 650–51.

75. *Id.* at 651–52.

76. *Id.* at 652 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991) (codified as amended at 42 U.S.C. § 2000e-5(e)(2) (2006))).

77. *Id.* at 661. Justice Ginsberg lists other cases in which Congress amended Title VII to comply with its "broad remedial purpose." *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (superseded in part by Civil Rights Act of 1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (same)).

78. *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing before the H. Comm. on Educ. and Labor*, 110th Cong. 1 (2007).

79. Lori Montgomery, *Senate Republicans Block Pay Disparity Measure*, WASH. POST, April 24, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/23/AR2008042301553.html>.

80. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, January 29, 2009, available at <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>.

81. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002).

Plaintiffs had to draw an even finer line between a “serial violation” and “hostile environment,” as a serial violation consists of separately actionable employment practices, and a hostile environment constitutes a single employment practice.⁸² The LLFPA eliminates timing difficulties and lack of information on comparative salaries for similar-situated employees for plaintiffs whose claims relate to discrimination in compensation.

Under the LLFPA, an unlawful employment practice occurs with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.⁸³

The LLFPA applies retroactively to discrimination claims pending on or after May 28, 2007.⁸⁴ The amendment provides for two years of back pay “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.”⁸⁵

The limitations period for Title VII claims remains 300 days, but now the period begins to toll when a practice is “adopted,” when a plaintiff “becomes subject” to the practice, or when a plaintiff is “affected” by the practice.⁸⁶ The LLFPA is somewhat contradictory, as its opening limits its modification of when an employment practice “occurs,” to claims “with respect to discrimination in compensation,” while later including the broader language of “other practice.”⁸⁷ Opening with the phrase “with respect to discrimination in compensation” limits the reach of the LLFPA to discriminatory compensation practices—it is in the first part of the sentence and thus must be understood to apply to everything that comes after.

The amendment is clearly designed to directly address the problem in the *Ledbetter* decision; it takes its name from the *Ledbetter* plaintiff and explicitly states that it is overruling *Ledbetter* in its first finding.⁸⁸ The LLFPA does indeed overrule *Ledbetter*, addressing her situation directly: her case involved a “discriminatory compensation decision,” and she was

82. *Id.* at 114, 117.

83. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 4, 123 Stat. 5, 5–6 (2009).

84. *Id.* § 6.

85. *Id.* § 3.

86. *Id.* § 4.

87. *Id.* § 3.

88. *Id.* § 2.

“affected” by its “application” when she was “paid.” Under the old Act, the Supreme Court held that in these circumstances, the unlawful employment practice did not “occur” within the statutory limitations period.⁸⁹ Under the amended Act, a court would have to hold that the practice did occur within the limitations period, as each paycheck paid to Ledbetter was an effect of the discriminatory compensation decision made before the limitations period began to run. Thus, as long as a Ledbetter-type plaintiff files a Title VII claim within 300 days of receiving a paycheck, the claim will not be barred by the statute of limitations, and such a plaintiff will no longer have to worry about when the original discriminatory decision first occurred.

The amended Act also reaches far beyond a Ledbetter-type situation. Although the language pertaining to Ledbetter is very specific, the legislation also contains very broad language that “could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionable only when they occur.”⁹⁰ The source of such broadness is in the phrase “other practice”: not only does the Act apply to discriminatory compensation decisions, but it also applies whenever an “other practice” is adopted, a plaintiff becomes subject to such practice, or when a plaintiff is affected by such practice.⁹¹

In addition to discrimination in salary decisions, this phrase “other practice” could also include discrimination based on denial of promotions, demotions, denial of training opportunities, denial of assignments, and anything else that could have an effect on an employee’s compensation by causing them to be paid less than others. Under a broad interpretation, the LLFPA could allow plaintiffs to file suits within 300 days of receipt of every paycheck that is lower than it would have been had they received a promotion or training opportunity, regardless of what exactly affected their compensation. Because the scope of the phrase “other practice” determines the scope of the LLFPA, lower courts’ opinions have focused on defining the phrase, thus separating LLFPA-claims from non-LLFPA claims.⁹²

To define the scope of the LLFPA, the broad policy concerns enunciated by Justice Ginsburg in her *Ledbetter* dissent and of Title VII as a whole should be considered. Such narrow interpretations of Title VII’s statute of limitations are at odds with the “broad, remedial purpose” of the

89. *See* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

90. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY—H.R. 2831 LILLY LEDBETTER FAIR PAY ACT OF 2007 (July 27, 2007).

91. Lilly Ledbetter Fair Pay Act § 3.

92. *See infra* notes 103-05 and accompanying text.

Act, as identified by Justice Ginsberg in her *Ledbetter* dissent.⁹³ Of course, the short limitations period of 300 days is “clearly intended to encourage the prompt processing of all charges of employment discrimination,” giving employers predictability and security from stale claims.⁹⁴ In general, statutes of limitations “represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within [the] specified period of time.”⁹⁵ However, Title VII also has a broad purpose of remedying civil rights violations—“the robust application of the civil rights laws that Congress intended,” as stated in the findings for the LLFPA.⁹⁶ The employee’s need for broad remedies to fight discrimination should be balanced with the employer’s need for repose, which under the LLFPA can only be provided by application of the equitable doctrine of laches.⁹⁷

B. Judicial Response to the Lilly Ledbetter Fair Pay Act

The Supreme Court has already narrowed the LLFPA’s scope as to seniority systems in *AT & T Corp. v. Hulteen*, an opinion decided little more than five months after the LLFPA’s passage.⁹⁸ In that case, AT & T discriminatorily refused female employees service credit under its seniority system during their pregnancy leaves.⁹⁹ However, because the seniority system was in place before the Pregnancy Discrimination Act (PDA) was passed, those pre-PDA effects of prior discrimination were not held to be actionable.¹⁰⁰ This may seem like a dramatic move, to narrow the LLFPA’s scope so soon after its passage, but *Hulteen* only applies an old rule in the Title VII context: pre-Act discrimination is not actionable if carried out through a bona fide seniority system.¹⁰¹ Post-act discrimination, and the effects of post-act discrimination, should remain fully actionable. Although

93. *Ledbetter*, 550 U.S. at 661 (Ginsberg, J., dissenting).

94. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

95. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

96. Lilly Ledbetter Fair Pay Act § 2.

97. Lower courts have rarely applied equitable doctrines of tolling to allow plaintiffs to file a Title VII claim based on a discrete act after the expiration of the limitations period. For example, in the Second Circuit, equitable tolling was only applied “if, *inter alia*, ‘the employee was actively misled by his employer’ or ‘he was prevented in some extraordinary way from exercising his rights.’” *Panecasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 112 (2d Cir. 2008) (“[E]quitable tolling is only appropriate in rare and exceptional circumstances, in which a party is prevented in some extraordinary way from exercising his rights.” (quoting *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003))). For a discussion of the possible renewal of equitable tolling under *laches* in this context, see Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TULANE L. REV. 499, 555–62 (2010).

98. 129 S. Ct. 1962 (2009).

99. *Id.* at 1967.

100. *Id.* at 1968–69.

101. *Id.* at 1969 (citing *Teamsters v. United States*, 431 U.S. 324 (1977)).

Hulteen establishes the old rule excluding pre-Act discrimination from Title VII and the PDA's remedial scope, the LLFPA does allow plaintiffs to reach back to the date of enactment, 1964 for Title VII, as long as they have recently been affected by the old discriminatory decision.

Because *Hulteen* provided only guidance as to the viability of claims based on pre-Act discrimination, lower courts are still free to interpret the LLFPA broadly or narrowly. Of course, lower courts have not accepted attempts to apply the LLFPA to claims that are clearly not related to compensation, such as retaliation claims¹⁰² and a failure to hire claim.¹⁰³ And, naturally, the LLFPA has been held to apply to Ledbetter-type situations, where an employee receives lower pay as a result of past discriminatory decisions.¹⁰⁴ One example of a broader interpretation of LLFPA was in a Colorado district court case that retroactively applied the phrase "other practice" to include the accrual (but not the mere payment) of retirement benefits.¹⁰⁵ The Third Circuit has held that a letter from an employer's Human Resources department, stating that an employee's allegations of discrimination were unfounded, was not a discriminatory pay decision or other practice, but that the failure to answer a request for a raise was a discriminatory pay decision.¹⁰⁶ In *Gentry v. Jackson State University*, a Mississippi circuit court held that the denial of tenure to a professor was a compensation decision governed by the LLFPA.¹⁰⁷ These cases suggest that the LLFPA could be applied to many types of cases, but that the plaintiff does have to show that her paycheck's bottom line was impacted by the employer's discriminatory decision in order to get the benefits of the LLFPA's extended statute of limitations.

C. The Precedential Value of Ledbetter and Morgan post-LLFPA

In addition to disputes over the scope of the phrase "or other practice" in the LLFPA, the question remains whether the reasoning of *Ledbetter* and *Morgan* will survive the LLFPA to apply to disparate acts and hostile environments respectively. It is likely that the Supreme Court's definition of when an unlawful employment practice occurs from *Ledbetter* will con-

102. *Rzepiennik v. Archstone-Smith, Inc.*, 331 F. App'x 584, 589 n.3 (10th Cir. 2009).

103. *Joseph v. Pa. Dep't. of Envtl. Prot.*, No. 06-4916, 2009 WL 3849696, at *7 (E.D. Pa. Sept. 30, 2009).

104. *See, e.g., Schengrund v. Pa. State Univ.*, No. 4:07-CV-718, 2009 WL 3182490, at *6 (M.D. Pa. Sept. 30, 2009).

105. *Tomlinson v. El Paso Corp.*, No. 04-cv-02686-WDH-MEH, 2009 WL 2766718, at *4 (D. Colo. Aug. 28, 2009).

106. *Mikula v. Allegheny County of Pa.*, 583 F.3d 181, 186 (3d Cir. 2009).

107. 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009).

tinue to be applied in situations not encompassed by the LLFPA. Already the Mississippi circuit court above held that *Ledbetter* does indeed apply to non-compensatory decisions.¹⁰⁸

Because the LLFPA amendment goes beyond the language directly aimed at overruling *Ledbetter* and changes the meaning of when an unlawful employment practice “occurs,” *Ledbetter*’s precedential value only applies to non-compensatory discrete acts. The statute’s examples of discrete acts are to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.¹⁰⁹ One circuit court has already held that the LLFPA does not apply to failures to hire, so the *Ledbetter* reasoning will apply in that situation.¹¹⁰ This seems to be a logical result, as the policy concerns Justice Ginsburg cited—the special difficulty for a plaintiff to discover disparities in pay—does not apply in a situation where a plaintiff will almost always know that she has not been hired. Otherwise, many discrimination claims will fall under the two employee-friendly rules: the LLFPA, which includes compensation, failure to promote, failure to award tenure, failure to accrue retirement benefits, and so on, and the expansive rule of *Morgan*, which includes all hostile environment claims. It may be that the cross-section of cases to which the employer-friendly *Ledbetter* rule applies, because the employer did not create a hostile environment and because the discrimination did not involve the employee’s compensation, will be narrow. Any limitations to these employee-friendly rules would have to come in the form of limitations on the definition of compensation-related practices that fall under the LLFPA and on the definition of hostile environments that fall under the *Morgan* rule.

CONCLUSION

On its face, the Lilly Ledbetter Fair Pay Act appears to aggressively broaden the statute of limitations for Title VII claims, a formerly modest limitations period of 300 days.¹¹¹ But there are ways in which lower courts can lessen the impact of the broadened limitations period: the LLFPA and the phrase “other practice” can be interpreted to apply only to cases directly

108. *Id.* at 566. The court’s analysis was followed in *Ragsdale v. Holder*, 668 F. Supp. 2d 7, 20 n.10 (D. D.C. 2009).

109. 42 U.S.C. § 2000e-2(a)(1) (2006).

110. *Joseph v. Pa. Dept. of Env’tl. Prot.*, No. 06-4916, 2009 WL 3849696, at *7 (E.D. Pa. Sept. 30, 2009).

111. *See supra* notes 5, 7 and accompanying text.

dealing with discriminatory compensation; and the reasoning of *Ledbetter* and other employment discrimination precedent can be applied in any case not directly affected by the LLFPA; such precedent can be held to supersede the LLFPA, as the Supreme Court did with precedent on bona fide seniority systems in the *Hulteen* case.¹¹² Other outside limitations on liability of employers will also continue to apply, such as equitable estoppel, waiver, and the practical difficulties of proving up intent if the discriminatory decisions happened long before suit was filed.¹¹³ For example, in his majority opinion in *Morgan*, Justice Thomas recognized that hostile environment claims would make employers vulnerable to hostile environment suits that extended far back into history, but concluded that “equitable doctrines” such as equitable estoppel and laches would protect employers from unreasonably old claims.¹¹⁴ However, earlier in the opinion Justice Thomas stated that such doctrines “are to be applied sparingly,” which suggests that such equitable doctrines may not provide much protection for employers.¹¹⁵ Thus it is possible that under the LLFPA, courts will continue to use sparingly such equitable doctrines to protect employers from stale discrimination claims.

Even under its strictest interpretation, the LLFPA makes it impossible for there to be another *Ledbetter* decision. Now, if an employee is paid less than her co-workers due to gender discrimination, he or she may file a claim within 300-days of any paycheck, and that claim will be timely: the LLFPA allows the limitations period to toll whenever the employee is affected by the discriminatory pay decision, including when the employee is paid.¹¹⁶ As long as the employee realizes that the wage discrimination is happening within six months of his or her latest paycheck, the employee can file a Title VII suit. If he or she prevails, the employee will be entitled to damages of two years of back pay.¹¹⁷ Thus, the LLFPA succeeds in that it assists plaintiffs in *Ledbetter*’s situation, and responds directly to Justice Ginsberg’s concerns about the difficulties posed for plaintiffs in wage discrimination suits.¹¹⁸ Beyond that, it is up to the lower courts to determine

112. See *supra* notes 98–101 and accompanying text.

113. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 n.4 (2007). One of *Ledbetter*’s male supervisors had died before the trial started, a fact that highlights the evidentiary difficulties of proving intent on stale claims. *Id.*

114. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002).

115. *Id.* at 113 (citing *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (*per curiam*)).

116. See *supra* note 9 and accompanying text.

117. See *supra* note 9.

118. See *supra* notes 71–74.

the scope of the LLFPA in defining “other practice” and to use their equitable powers to prevent stale claims from disturbing an employer’s repose.