PEPPERDINE UNIVERSITY

The Journal of Business, Entrepreneurship & the Law

Volume 2 | Issue 2 Article 4

4-20-2009

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007): Faithful to Title VII or Blind to Sex Discrimination?

Garrett M. Fahy

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Garrett M. Fahy, *Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007): Faithful to Title VII or Blind to Sex Discrimination?*, 2 J. Bus. Entrepreneurship & L. Iss. 2 (2009)
Available at: https://digitalcommons.pepperdine.edu/jbel/vol2/iss2/4

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LEDBETTER V. GOODYEAR TIRE & RUBBER CO., 550 U.S. 618 (2007): FAITHFUL TO TITLE VII OR BLIND TO SEX DISCRIMINATION?

GARRETT M. FAHY*

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* Pepperdine University School of Law, *Juris Doctor* Candidate, 2009. The author was moved to write about this decision after taking a class taught by Justice Alito at Pepperdine Law School in the summer of 2007. I would like to thank Justice Alito for his candor, patience, and thoughtful remarks.

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I. INTRODUCTION

A. Overview

In 1979, Lilly Ledbetter went to work for the Goodyear Tire and Rubber Company in Gadsden, Alabama.[1] Nineteen years later she retired and sued Goodyear for sex discrimination under Title VII of the 1964 Civil Rights Act ("Title VII"), alleging that Goodyear wrongly paid her less than some of her male counterparts on account of her sex.[2] A jury agreed with her and awarded her over $200,000 in back pay and mental anguish damages, and over three million dollars in punitive damages.[3] The United States Supreme Court saw the issues differently: it found her claim to be untimely and time-barred by the language of Title VII, and awarded her zero dollars.[4] This dramatic reversal is one of the many reasons this case, brought by an elderly woman from Alabama against a large company, garnered so much attention after its announcement.[5] The legal and practical implications of the *Ledbetter* decision are important enough. The human drama at the center of this "signature decision"[6] only added to the intense interest and the more intense reaction.

B. The Decision in Brief

In ruling against Ledbetter, the Court held that plaintiffs must file Title VII claims with the Equal Opportunity Employment Commission ("EEOC") within 180 days from the time the act of discrimination occurred, and it defined the decision to deny a promotion (or a raise) as the act of discrimination, not the later issuance of the paycheck reflecting the earlier decision.[7] In Ledbetter's case, she filed her EEOC claim within 180 days of receiving her paycheck, but not within 180 days of the decision to set the amount of her pay, which the Court found to be the controlling "act" of discrimination.[8] Thus, Ledbetter fell outside the 180 day statutory window for bringing a Title VII discrimination claim, and her claim was

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[1] Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173 (11th Cir. 2005).

[2] *Id.* at 1175.

[3] *Id.* at 1176. The district judge later remitted the entire award to $360,000. *Id.*

[4] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). *See also* Nicole Gaouette, *House Bill to Lift Limits on Pay Suits*, L.A. TIMES, July 31, 2007, at A12.

[5] *See infra* notes 11-40 and accompanying text.

[6] Linda Greenhouse, *Job Bias Case Turns on Filing Right Form*, N.Y. TIMES, Nov. 7, 2007, at A25.

[7] *Ledbetter*, 550 U.S. at 641.

[8] *Id.* at 621. Also, as will be discussed below, Ledbetter could not produce any evidence of discrimination within the 180 day period in which the statute requires the EEOC claim to be brought. *Id.* at 644. As Justice Alito makes clear, the Supreme Court has never permitted a Title VII suit to be brought without evidence that some intentional discrimination occurred within the 180 day window. *Id.*

time-barred.[9] Justice Ginsburg's dissent, discussed in much detail below, called the majority's reading of the law "parsimonious" and invited Congress to change Title VII to explicitly define the issuance of a paycheck (reflecting a discriminatory pay decision) as an act of discrimination, a position consistent with the interpretation given Title VII by many lower courts of appeals and the EEOC.[10]

C. Reaction to the Decision: The National Media

Editorial pages across the nation reacted swiftly, condemning the decision and urging Congress to overturn the Court's decision by amending Title VII to allow suits like Ledbetter's.[11] The *New York Times* editorial page called the decision, "a blow for discrimination," based on an "unreasonable reading of the law," the product of a majority that "blinded itself to the realities of the workplace."[12] The *Boston Globe* characterized the majority's interpretation as "hairsplitting," and said it "violates the intent of Title VII."[13] The *Denver Post* agreed with Justice Ginsburg's characterization of the majority as not comprehending or caring about the "insidious ways in which women can be victims of pay discrimination."[14] The *Dallas Morning News* called Justice Ginsburg's view "a more realistic reading of the realities many workers face" and called Justice Alito's interpretation of the 1964 Civil Rights Act a "strict" one.[15]

In a remarkable display of editorial balance, the *Washington Post's* front page "news" story on the decision devoted a "parsimonious" eight paragraphs to the details of the decision and an explanation of the majority's holding, and *seventeen* paragraphs to Justice Ginsburg's dissent and supporting quotes.[16]

[9] *Id.* at 621.

[10] *Id.* at 652, 659.

[11] The author would like to point out that there can arise some confusion when characterizing Congress' reaction to a Supreme Court decision. While some argue that it is incorrect to phrase a congressional re-write of a statute in response to a Court opinion a "correction," and others contend that Congress is plainly "overturning" or "correcting" the Supreme Court when it takes such an action, the author chose the wording employed by Justice Ginsburg, who called on Congress to "correct" the decision. *Id.* at 660. One example of this kind of "correction" is the following: in 2005, the Detainee Treatment Act was passed as a "response" or "correction" to the decision handed down *Rasul v. Bush*, 542 U.S. 466 (2004). Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e), 110 Stat. 2680, 2742-2744. In brief, the *Rasul* decision said that federal courts have jurisdiction to hear the habeas claims brought by the detainees held at the detention facility at Guantanamo Bay, Cuba. *Rasul*, 542 U.S. at 466. Passed almost one year later, the Detainee Treatment Act of 2005 said that federal courts do not have jurisdiction over the habeas claims brought by detainees held at Guantanamo Bay. Detainee Treatment Act of 2005, Pub. L. No. 109-148, Sec. 1005(e) 110 Stat. 2680, 2742-44. Such a correction was quickly sought by some members of Congress to the decision discussed here.

[12] Editorial, *Injustice 5, Justice 4,* N.Y. TIMES, May 31, 2007, at A18.

[13] Editorial, *Women Getting Even,* BOSTON GLOBE, Aug. 6, 2007, at 10A.

[14] Editorial, *Court Bias Deadline Too Tight*, DENVER POST, June 4, 2007, at B7, *available at* http://origin.denverpost.com/opinion/ci_6053385.

[15] Editorial, *A Matter of Justice: Congress Should Correct Ruling on Fair Pay*, DALLAS MORNING NEWS, June 5, 2007, at 14A. Justice Alito would probably be more flattered than offended by that view of his opinion.

[16] Stuart Taylor Jr., *Injustice 5, Justice 4*, NATIONAL JOURNAL, June 11, 2007, *available at*

Writing in the *Christian Science Monitor,* Lilly Ledbetter characterized the opinion as "completely out of line with legal precedent" and wrote that the Court's "gutting" of "this key civil rights protection" would negatively impact minorities such as seniors, Latinos, gays, disabled, Muslims, etc., and she called on Congress to act.[17] Just how the decision would impact those specific groups was not clear from her article.

D. Reaction to the Decision: Interest Groups

Interest groups on both sides of the issue added their voices to the chorus of response. Marcia Greenberger of the National Women's Law Center said, "The Court's decision is a setback for women and a setback for civil rights. The ruling essentially says 'tough luck' to employees who do not immediately challenge their employer's discriminatory acts, even if the discrimination continues."[18] Conversely, Karen Harned, executive director of the National Federation of Independent Business, hailed the decision, claiming to be "thrilled" with it because it will spare small-business owners from the "burdensome task" of defending themselves against claims alleging discrimination that occurred years in the past.[19]

Yet more noteworthy than these responses was the response of one member of the high court. Members of the Supreme Court most often express themselves through their written opinions. But when *Ledbetter* was announced at the Supreme Court, Justice Ginsburg, who wrote for the four dissenting (and traditionally more

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http://www.theatlantic.com/doc/200706u/supreme-court-sexism (last visited Mar. 26, 2009). A more measured and analytical response was offered by respected *National Journal* Supreme Court commentator and Harvard Law School graduate Stuart Taylor Jr. *See id.* Taylor surveyed some of the more extreme reactions to the decision and asked, "Are Alito and company really such heartless, pro-discrimination brutes? Hardly." *Id.* Taylor believed that, "Alito had the better of the argument as to congressional language and the Court's own precedents," and "as a policy matter, it's far from clear that justice would be better served by the Ginsburg approach of opening the door wide to employees who...wait for many years to claim long-ago – and this is difficult to disprove – pay discrimination." *Id.* He argued that the proper vehicle for statutory "fine-tuning" is Congress, not the Court, which must rely upon a "strained interpretation" of the language to accomplish its task. *Id.* In contrast to the lamentations of many editorial pages, Taylor found the claim that the decision leaves women such as Ledbetter without an adequate remedy for pay discrimination "vastly exaggerated." Taylor, *supra* note *16*. Further, Taylor pointed out what most editorial pages found inconvenient to mention: that the Title VII claim never should have gone to the jury because there was "no proof of intentional discrimination during the 180-day period set by Congress." *Id.* Reviewing the evidence presented to the trial court, Taylor believed the evidence concerning Goodyear's discriminatory intent was "old and stale," and the pay disparities between Ledbetter and similarly situated men "were largely attributable to the cumulative effect of repeated layoffs, which made her ineligible for raises...and which she has not alleged to be discriminatory." *Id.* Taylor further pointed out that even before the case went to trial in federal district court, a federal magistrate judge had found that Ledbetter's comparatively low pay owed to "weak" performance as indicated in her performance evaluations, which were "at or near the bottom." *Id.* In sum, Taylor painted a very different picture of the *Ledbetter* decision, a picture less sympathetic to Lilly Ledbetter, a picture hardly deserving of the scorn it engendered.

[17] Lilly Ledbetter, *Equal Work, Unequal Pay*, CHRISTIAN SCIENCE MONITOR, July 31, 2007, at 9, *available at* http://www.csmonitor.com/2007/0731/p09s01-coop.html.

[18] Joan Biskupic, *Alito, Ginsburg Opinions Highlight Court's Division*, USA TODAY, May 30, 2007, at 2A.

[19] David G. Savage, *Supreme Court Narrows Rules for Claims of Unfair Pay*, L.A. TIMES, May 29, 2007.

liberal) justices, took the unusual step of reading from the bench what some court watchers called a "vigorous," "blistering," and "angry" dissent.[20] Justice Ginsburg called the majority's reading of the applicable statute "parsimonious" and invited Congress to change the statute, saying, the "ball is in Congress's court."[21]

E. Reaction to the Decision: Congress

It did not take long for some members of Congress to react. Prominent Democrats excoriated the Supreme Court's majority bloc and announced their intentions to change the law to allow suits like Ledbetter's.[22] Then-Senator Hillary Clinton announced, within hours of the ruling, that she would be submitting a bill to change the language of Title VII.[23] Said Sen. Clinton, "Unless Congress Acts, this Supreme Court ruling will have far-reaching implications for women, and will gravely limit the rights of employees who have suffered pay discrimination based on their race, sex, religion or national origin."[24] Liberal Senator Ted Kennedy, D – Mass. and chairman of the Senate Health, Education, Labor and Pensions Committee, introduced the Fair Pay Restoration Act to change the law.[25]

In the House of Representatives, Representative George Miller, D – CA and chairman of the Committee on Education and Labor, submitted the Lilly Ledbetter Fair Pay Act, H.R. 2831, and quickly attracted many co-sponsors.[26] Speaking to the House of Representatives, Rep. Miller called the majority's decision "absurd" and said the ruling was done in order to "satisfy" an ideological agenda.[27] Representative Miller's bill would allow a worker to file a complaint within 180 days of receiving a paycheck that resulted from a discriminatory pay decision, regardless of when that initial discriminatory decision was made.[28] Thus, as the *Washington Post* pointed out, every paycheck becomes "a possible trigger for

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[20] Linda Greenhouse, *Justices' Ruling Limits Lawsuits On Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1; David G. Savage, *Narrowing Unfair Pay Rules*, S.F. CHRON., May 30, 2007, at A-6, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/05/30/MNGS1Q3HRC1.DTL; Patti Waldmeir, *High Court Backs Limits On Equal-Pay Suits*, FINANCIAL TIMES, May 29, 2007, http://www.ft.com/cms/s/0/e16d904a-0e26-11dc-8219-000b5df10621.html?nclick_check=1 (last visited Mar. 26, 2009).

[21] *Ledbetter*, 550 U.S. at 659.

[22] Then-Senator Obama said the decision "strikes at the heart of equality in this country." Barack Obama, *Kennedy, Specter, Obama, Senators Work to Overturn Supreme Court Decision on Pay Discrimination*, July 20, 2007, http://obama.senate.gov/press/070720-kennedy_specter (last visited February 3, 2008). Senator Obama became President Obama on January 20, 2009 and his support for Ledbetter's cause is detailed in note 223 *infra*.

[23] *Id.*

[24] Hillary Clinton, *Kennedy, Harkin, Clinton, Mikulski to Introduce Legislation to Stop Pay Discrimination*, May 30, 2007, http://kennedy.senate.gov/newsroom/press_release.cfm?id=7484A8AB-94A2-4D72-865C-616A89EDF4AD (last visited February 3, 2008).

[25] Marcia Coyle, *Employment Cases Spur Congress to Act*, 29 NAT'L L. J., 51, Aug. 20, 2007.

[26] Lilly Ledbetter Fair Pay Act, summary page, http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1:./temp/~bdVS8A:@@@X|/bss/110search.html (last visited Feb. 3, 2008).

[27] 153 CONG. REC. H8942 (daily ed. July 30, 2007) (statement of Rep. Miller).

[28] *Id.*

filing a complaint."[29] Additionally, the bill extended the statute of limitations period to include any "other practice" that remotely affects an individual's wages, benefits or other compensation."[30]

Republicans in Congress had a different reaction to the decision, and generally opposed Democrat-sponsored legislation because they believed it eviscerated the existing statute of limitations.[31] Rep. Howard "Buck" McKeon, the senior Republican on the House Committee on Education and Labor, opposed the measure because the proposed legislation "guts the statute of limitations" by "creating an open-ended timeline" for employees to file suit.[32] Senator Mike Enzi, senior Republican on the Senate Health, Education, Labor and Pensions Committee, opposed Senator Kennedy's bill because it was "too "vague."[33] The White House threatened to veto the House bill, H.R. 2831, because it "would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved."[34] According to the Statement of (Bush) Administration Policy issued on July 27, 2007, "this legislation effectively eliminates any time requirement for filing a claim involving compensation discrimination."[35]

The full House of Representatives passed H.R. 2831 by an almost party-line vote of 225-199 on July 31, 2007.[36] Following House passage, the bill was sent to the Senate, where it remained until January 2009.[37] Reaction to passage of the

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[29] Editorial, *Fair Pay, the Right Way*, WASH. POST., Aug. 14, 2007, at A12.

[30] Statement of Administration Policy, July 27, 2007, http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf (last visited Feb. 3, 2008). The Bush administration argued that this language "could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionably only when they occur." *Id.* The bill creates an open invitation for workers to sue over every employer action that would negatively impact an employee's compensation, and thus cannot be seen as a reasonable extension of Title VII's standard of addressing those claims arising out of intentionally discriminatory actions. Such a change in statutory construction would likely harm businesses by making them defend illegitimate suits, discredit the legitimate claims of injured workers, and create additional administrative burdens for the EEOC by encouraging workers to bring claims and complaints after any management decision to reduce an employee's compensation. If this bill were to pass the House and Senate, President Bush would likely have vetoed it. On January 20, 2009, the White House website as it had existed under President Bush was taken down, and replaced by President Barack Obama's content. While the citations to the Bush White House website can no longer be accessed, the Statement of Administration Policy can be found in the Congressional Record, 153 CONG. REC. H8943 (daily ed. July 30, 2007) (Statement of Administration Policy).

[31] See *infra* notes 32 and 33.

[32] Jacqueline Palank, *Democrats Will Try to Counter Ruling On Discrimination Suits*, N.Y. Times, July 13, 2007, at A13; *see also* 153 CONG. REC. H8943 (daily ed. July 30, 2007) (statement of Rep. McKeon).

[33] *Id.*

[34] Statement of Administration Policy, *supra* note 30 and accompanying text.

[35] *Id.*

[36] 153 CONG. REC. H9226 (daily ed. July 31, 2007) (roll call vote on Lilly Ledbetter Fair Pay Act of 2007).

[37] After the Democratic gains in the 2008 elections, the bill bearing Ledbetter's name would fare much better. The Lilly Ledbetter Fair Pay Act of 2009, H.R. 11, was introduced January 6, 2009 by Representative George Miller and passed the full House 247- 171 on January 9, 2009. 153 CONG. REC.

House bill was mixed outside the halls of Congress. The *Washington Post* was troubled that the House bill "would all but eliminate a statute of limitations, which was not Congress's original intent."[38] The *Washington Post* suggested the Senate adopt a "reasonable person" standard, which "would allow a worker to file a claim beyond the 180 days now mandated by the [C]ourt's decision, but not beyond the point where a court could conclude that a 'reasonable person' could have or should have been aware of the discrimination."[39] The more conservative *Wall Street Journal* editorial page, in an editorial titled, "A Backpay Bonanza," called the House bill "a crucial victory for the tort bar" because it would lead to trial lawyers discovering "all manner of ancient slights, many of which, compounded over decades, would add up to tiny sums for the plaintiffs and their lawyers."[40]

Clearly, *Ledbetter* provoked a reaction. Depending on one's perspective, the decision can be viewed as a simple matter of strict statutory interpretation or a grave, heartless injustice visited upon an innocent woman. Some have described the decision as the ineluctable result of a more business-friendly Court tilted to the right following the appointments of John Roberts and Samuel Alito; others see it as the worst kind of judicial activism.[41] This case note discusses, evaluates and largely affirms the *Ledbetter* decision, while also attempting to explain its key holdings and forecast its impact on the nation's businesses and employees. Part II briefly summarizes legal precedent behind the decision, touching on Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Civil Rights Act

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H138 (daily ed. Jan. 9, 2009) (roll call vote on H.R. 11), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H138&dbname=2009_record. The Senate companion bill, S. 181, was introduced January 8, 2009 by Senator Mikulski and passed by the full Senate 61-36 on January 22, 2009. 153 CONG. REC. S775 (daily ed. Jan. 22, 2009) (roll call vote on S. 181), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S775&dbname=2009_record (last visited Mar. 26, 2009).

[38] *Fair Pay, the Right Way*, *supra* note 29.

[39] *Id.* This is an intriguing proposal, but a flawed one. Determining just what a reasonable person would have done in this kind of situation is not defined and would be left to juries and judges, who are informed by hindsight and left only with a legal term of art to guide their deliberations. The current statutory scheme, prescribing a defined number of days in which to bring a charge, is preferable because a defined window within which a suit can be brought enables all parties to operate within a known time frame more concrete than the nebulous "reasonable person" standard.

[40] Editorial, *A Backpay Bonanza*, WALL. ST. J., Aug. 2, 2007, at A10, *available at* http://online.wsj.com/article/SB118601012282285342.html.

[41] Marcia Coyle, *In The First Full Term With Alito, Court Took Marked Conservative Turn*, 29 National L. J. 49, (2007); Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, at A16. Writes Cohen,

> It [the Supreme Court] overturned the policies of federal agencies, which are supposed to be given special deference because of their expertise. In a pay-discrimination case, the majority interpreted the Civil Rights Act of 1964 in a bizarre way that makes it extremely difficult for many victims of discrimination to prevail. The majority did not care that the Equal Employment Opportunity Commission has long interpreted the law in just the opposite way...The conservative activism that is taking hold is troubling in two ways...Employees will be freer to mistreat workers like Lilly Ledbetter, who was for years paid less than her male colleagues, if they know that any lawsuit she files is likely to be thrown out on a technicality.

Cohen, *supra* note 41, at A16.

of 1991.[42] Part III outlines the key facts of Ledbetter's employment history and her experience before the EEOC.[43] Part IV traces the procedural history of Ledbetter's legal journey from Gadsden, Alabama to the Supreme Court.[44] Part V examines the majority and dissenting opinions and offers critiques of them.[45] *Ledbetter's* impact on the courts, future plaintiffs, employers and employees is discussed in Part VI.[46] Part VII provides recommendations to employers and employees on how to proceed in a post-*Ledbetter* legal world.[47] Finally, Part VIII offers some closing remarks and concludes the case note.[48]

II. LEGAL BACKGROUND

A. Statutes

Lilly Ledbetter based her discrimination claims on the following statutes; thus, it is necessary and useful to briefly touch on them.

Equal Pay Act of 1963. The Equal Pay Act provides that "No employer. . .shall discriminate. . .between employees on the basis of sex by paying wages to employees. . .at a rate less than the rate at which he pays wages to employees of the opposite sex. . .for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.. . ."[49]

Title VII, Civil Rights Act of 1964. Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.[50] Title VII applies to all private employers, state and local governments, and education institutions that employ fifteen or more individuals.[51]

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[42] *See infra* notes 49-55 and accompanying text. Part I is the introduction.

[43] *See infra* notes 56-74 and accompanying text.

[44] *See infra* notes 75-111 and accompanying text.

[45] *See infra* notes 112-221 and accompanying text.

[46] *See infra* notes 222-225 and accompanying text.

[47] *See infra* note 226 and accompanying text.

[48] *See infra* notes 227-235 and accompanying text.

[49] 29 U.S.C. § 206(d)(1) (emphasis added).

[50] 42 U.S.C. § 2000e-2(a)(1).

[51] EEOC website, http://www.eeoc.gov/facts/qanda.html (last visited Jan. 7, 2008). *See generally* 42. U.S.C. § 2000e-5(e)(1), (2). In relevant part, Title VII reads,

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not the discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

Civil Rights Act of 1991. Passed in the wake of the Court's decision in *Lorance v. AT&T Tech., Inc.*, the Act amended Title VII to "allo[w] for Title VII liability [to arise] from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application."[52]

B. Administrative Law

An employee may not walk into federal court and file a federal lawsuit against an employer under Title VII of the 1964 Civil Rights Act; an employee must first file a claim with the EEOC, the agency responsible for enforcing workplace discrimination laws.[53] The agency will then grant (or not grant) the right to pursue a claim in federal court, and will decide whether or not it will pursue a claim against an employer.[54] In Ledbetter's case, the EEOC granted her the right to sue, but did not pursue a claim against Goodyear.[55]

III. FACTUAL BACKGROUND

Goodyear hired Ledbetter on February 5, 1979, for a supervisor position at

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Id.

[52] *Ledbetter*, 550 U.S. at 627 n.2. *See* 42 U.S.C. § 2000e-5(e)(2). For a detailed discussion of *Lorance*, *see infra* notes 148-154 discussing Justice Alito's analysis of *Lorance* and other cases.

[53] 42 U.S.C. § 2000e-5(e)(1).

[54] *See* Federal Laws Prohibiting Job Discrimination: Questions and Answers, http://www.eeoc.gov/facts/qanda.html (last visited Mar. 25, 2009). This is not as limiting as it sounds, for according to the EEOC, "Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with the EEOC." *Id.* A charge is filed by filling out a questionnaire and providing basic information, such as contact information of the complaining party and the employer, agency, or union that is alleged to have discriminated, as well as a "short description" and the dates of the alleged violation. *Id.* Further, there are strict filing requirements: a charge must be filed with EEOC within 180 days from the date of the alleged violation, "in order to protect the charging party's rights." *Id.* Just what constitutes a violation for purposes of the 180 day deadline was one of the questions before the Court in *Ledbetter*. *Ledbetter*, 550 U.S. at 618. After a charge is filed, it may be assigned for priority investigation if the initial facts appear to support a violation of the law. Federal Laws Prohibiting Job Discrimination, *supra* note 54. When the evidence is less compelling, the charge may be assigned "for follow up investigation to determine whether it is likely that a violation has occurred." *Id.* At any point, a settlement may be pursued or mediation entered into as alternatives to a lengthy EEOC investigation. *Id.* A charge may be dismissed at any point, "if, in the agency's best judgment, further investigation will not establish a violation of the law," meaning there is insufficient evidence to pursue the charge. *Id.* In that case, the EEOC will notify the employee and the employer by letter and will attempt conciliation with the employer. *Id.* If conciliation is unsuccessful, the EEOC may bring a case in federal court. Federal Laws Prohibiting Job Discrimination, *supra* note 54. If the EEOC does not bring the case, it gives the charging party ninety days to file a lawsuit after providing the party a "right to sue" notice. *Id.* Under Title VII, a party alleging discrimination can also request a notice of "right to sue" from the EEOC 180 days after the charge was first filed with the EEOC, and "may then bring suit within [ninety] days after receiving this notice." *Id.* If discrimination is found, remedies may include back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation, or "other actions that will make an individual 'whole.'" *Id.* Under Title VII, plaintiffs may in some situations receive attorney's fees, expert witness fees, court costs, compensatory and punitive damages (where intentional discrimination is found), damages for actual monetary loss and future monetary losses, and damages for mental anguish and inconvenience. *Id.*

[55] *Ledbetter*, 421 F.3d at 1173.

its Gadsden, Alabama tire factory.[56] She was forty years of age.[57] Goodyear later promoted Ledbetter to an Area Manager position, but Goodyear laid her off in 1986 and 1989.[58] In 1992, she was chosen for and employed in a new section of the Tire Assembly business center, which produced large radial tires for SUVs and light trucks.[59] Ledbetter retained her Area Manager title, and worked with four other area managers from 1992-1996.[60] For most of those years, Ledbetter's supervisor ranked her "at or near the bottom of her co-workers in terms of performance."[61] In spite of this, Goodyear awarded her a 5.28% increase one year, and a 5% merit increase the year she was ranked last, 1994.[62]

The next year, 1995, Ledbetter received a "substantial" salary increase of 7.85%, a raise "intended to be used to reward and recognize the uppermost level of top performer."[63] In 1996, however, she was ranked twenty-third out of twenty-four salaried employees, and fifteenth out of sixteen Area Managers.[64] In March of 1996, Ledbetter was transferred to another department, where her new supervisor informed her that she was transferred because of her "sub-standard" performance in her last department.[65] Near the end of 1996, Goodyear announced it would be conducting another round of layoffs, and Ledbetter was slated for termination.[66] However, she was not laid off, but worked as a substitute for other Area Managers who were out on extended medical leave.[67] She stayed in that position and retained her 1995 salary through 1997, making her the lowest paid Area Manager in Tire Assembly, where she made roughly fifteen percent less than the next highest paid Area Manager, who was a man.[68]

Still facing the prospect of the layoff announced in 1996, Ledbetter was advised (by her supervisor) to apply for a non-supervisory Technology Engineer position because doing so would preserve her employment with Goodyear and enable her to retire with full pension benefits.[69] Ledbetter took this advice, applied

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[56] *Id.*

[57] *Id.*

[58] *Id.* Ledbetter was laid off in a series of general layoffs Goodyear routinely conducted at its various plants. *Id.* at 1173. The layoffs were not permanent, however, as Ledbetter's case shows. *Id.* While the details of these layoffs are not perfectly clear, what is clear for purposes of this discussion is that the layoffs did not restart her seniority clock at the company when she was re-hired, or brought out of semi-retirement. *Id.*

[59] *Id.*

[60] Ledbetter, 421 F.3d at 1173.

[61] *Id.*

[62] *Id.*

[63] *Id.*

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

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

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

for the position, and was accepted the same day.[70] However, she retained the Area Manager position for the remainder of 1997.[71]

In January of 1998, Ledbetter started her new assignment as a Technology Engineer, at the same 1995 salary.[72] Ledbetter's previous supervisor in the Tire Assembly department evaluated her performance and ranked her twenty-third out of twenty-four salaried employees, and fifteenth out of sixteen area managers.[73] As she had been in 1996 and 1997, Ledbetter was denied a raise for 1998 and remained at her 1995 pay level.[74]

IV. PROCEDURAL HISTORY

A. Ledbetter's EEOC Claim

In the spring of 1998, after nineteen years at Goodyear's Gadsden plant, Ledbetter filed a questionnaire with the EEOC, "alleging that she had been forced into the Technology Engineer Position and was being subjected to disparate treatment in her new department on account of her sex."[75] In July of 1998, Ledbetter filed a charge of discrimination with the EEOC, alleging that her paycheck was lower than that of men in comparable positions, and that this was the result of intentional sex discrimination.[76] During the fall of 1998, after Goodyear announced that it was downsizing the plant at which Ledbetter worked, Goodyear offered early retirement to employees likely to be laid off during the downsizing.[77] Ledbetter applied for early retirement and retired effective November 1, 1998.[78]

B. District Court

In November of 1999, twenty years after Goodyear hired her, Ledbetter filed suit in federal district court for the Northern District of Alabama, alleging multiple claims of age discrimination and sex discrimination under Title VII of the 1964 Civil Rights Act, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act.[79] After most of her claims were abandoned or dismissed by the court through summary judgment or judgment as a matter of law, a jury found for

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Ledbetter*, 421 F.3d at 1175.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

Goodyear on the transfer-related claims[80] and for Ledbetter on her Title VII claim, finding that "it was more likely than not that Defendant paid Plaintiff an unequal salary because of her sex."[81] The jury suggested over $200,000 in back pay, awarded Ledbetter over $4,000 for her mental anguish, and awarded over three $3 million dollars in punitive damages.[82]

After the verdict, Goodyear renewed its motion for judgment as a matter of law on Ledbetter's disparate pay claim, and moved for a new trial or a remittitur.[83] It based the new trial motion on the fact that the district court had permitted Ledbetter to challenge every annual review of her salary, all of which fell outside the 180 day EEOC window, save one.[84] The court denied the motion for judgment as a matter of law because, "[t]he jury's finding that Plaintiff was subjected to a gender disparate salary is abundantly supported by the evidence."[85] However, the court remitted the entire award to $360,000, the statutory maximum available under Title VII.[86] The court remitted the punitive damages award to $295,338.[87] Ledbetter accepted the amount and judgment was entered for $360,000.[88] Goodyear then appealed.[89]

C. Court of Appeals

The Eleventh Circuit reversed.[90] On appeal, Goodyear made two arguments: first, Title VII's filing requirement allowed Ledbetter to challenge only the

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[80] Ledbetter alleged violations of Title VII and the Age Discrimination in Employment Act relating to her transfer to a department at the Goodyear plant, claiming that she was forced to transfer "because of her sex or her age, or in retaliation for having made complaints of sex discrimination." *Id.* The District Court granted summary judgment on some claims after Goodyear alleged that Ledbetter had not pled sufficient facts, at the outset of the trial, to prove her claim. *Id.* Judgments as a matter of law are motions made by one party after the opposing party presents all its evidence. *Id.* This motion argues essentially what a summary judgment motion does, but at a later procedural date: that even if the evidence the nonmoving party has presented is true, the nonmoving party has still failed to produce sufficient evidence to allow a jury to find for the nonmoving party. *See* FED. R. CIV. P. 56. Goodyear moved in this case and was successful in dismissing some of Ledbetter's claims through this procedural device, namely her claims under the Equal Pay Act and the Age Discrimination in Employment Act. *Ledbetter*, 421 F.3d at 1174.

[81] *Id.*

[82] *Id.* at 1176.

[83] *Id.* A remittitur is a procedural motion that asks the judge to reduce the jury's award after the verdict has been announced, but before judgment has been entered. *See generally* Friedenthal § 12.4; FED. R. CIV. P. 59.

[84] *Ledbetter*, 421 F.3d at 1176.

[85] *Id.*

[86] *Id.*

[87] *Id. See also* 42. U.S.C. § 1981a(b)(3)(D) (2000). That is the amount that, combined with the $4,662 for mental anguish damages, reaches the Title VII statutory ceiling on compensatory and punitive damages permitted against employers with more than 500 employees.

[88] *Ledbetter*, 421 F.3d at 1176.

[89] *Id.*

[90] *Id.* at 1189.

February 1998 decision not to increase her salary for that year, the only decision directly affecting her pay within the 180-day limitations period; and second, Goodyear argued it was entitled to judgment as a matter of law because "no reasonable jury could find that decision to have been improperly motivated by gender discrimination."[91] The court disagreed with the first contention and agreed with the second.[92]

As to the first claim, Circuit Judge Tjoflat, writing for the majority, made clear that "only those 'practice[s]' that 'occurred' within 180 days of the operative EEOC charge can form the basis for Title VII liability."[93] Under Supreme Court precedent laid down in *Nat'l R.R. Passenger Corp. v. Morgan*, 536. U.S. 101 (2002), the timely filing requirement is an "absolute bar" on recovery for "discrete []or retaliatory acts" occurring outside the limitations period.[94] Applying the *Morgan* framework, the court stated that pay claims "of the type Ledbetter asserts are governed by that part of the *Morgan* decision addressing claims alleging 'discrete acts of discrimination'" because "a pay–setting decision or the issuance of a confirming paycheck . . . is . . . discrete in time, easy to identify, and—-if done with the requisite intent-independently actionable."[95] Thus, Ledbetter's claim was not entirely time-barred because there were pay decisions in 1997 and February 1998, within the 180 day EEOC charge window.[96]

However, at trial Ledbetter introduced circumstantial evidence from outside the 180 day window showing that women workers made less than their male counterparts at different times during Ledbetter's tenure at Goodyear, "and then put the onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar of difference between her salary and her male co-workers' salaries."[97] Ledbetter's justification for this method of proof was a series of cases predating *Morgan* that applied the following rule: "a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful."[98] Crucially, this rule was followed by the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits.[99] The Eleventh Circuit observed that,

> The cases on which Ledbetter relies hold simply that pay claims are not *time-barred* if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the

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[91] *Id.* at 1177.

[92] *Id.* at 1176.

[93] *Ledbetter*, 421 F.3d at 1178.

[94] *Id.* at 1178.

[95] *Id.* at 1179.

[96] *Id.* at 1180.

[97] *Id.* at 1181.

[98] *Ledbetter*, 421 F.3d at 1181.

[99] *Id.*

> intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim.[100]

The court then announced this rule:

> [I]n cases in which the employer has a system for periodically reviewing and re-establishing employee pay [as Goodyear did from the yearly performance reviews], an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period.[101]

This entitled Ledbetter to put at issue two pay-setting decisions: one in 1997, another in 1998. Under a burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a female Title VII plaintiff establishes a prima facie case of sex discrimination "by showing that she occupies a job similar to that of higher paid males."[102] Once a prima facie case is established, the defendant must "articulate a legitimate, non-discriminatory reason for the pay disparity."[103] Once the employer offers this justification, the plaintiff must show "that a discriminatory reason more likely than not motivated the employer to pay her less."[104] Ultimately, the plaintiff bears the burden of proving that she was paid "at a disparate rate out of intent to discriminate on the basis of sex."[105]

After analyzing both the 1998 decision and the 1997 decision, the court agreed with Goodyear's second contention and concluded that there was no credible evidence that Goodyear and Ledbetter's supervisors possessed the discriminatory intent necessary to impose liability on Goodyear.[106] Rather, the evidence from Ledbetter's performance reviews undermined her attempts to impugn the motives of her reviewers and confirmed that Ledbetter's failure to be awarded raises owed primarily to her poor performance on the job: Ledbetter was ranked next-to-last in 1992, 1995, and 1997, and was ranked last in 1993.[107] In

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[100] *Id.* at 1182.

[101] *Id.* at 1183.

[102] *Id.*

[103] *Ledbetter*, 421 F.3d at 1185.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 1186-87, 1189.

[107] *Id.* at 1188. Further, the Eleventh Circuit opinion went out of its way to accurately detail with great precision just how fair Ledbetter was treated and how badly she performed. *Id.* at 1189. Indeed, to the charge that Ledbetter made at trial, that she was transferred to the Technology Engineer position as retaliation or because she was old or a woman, the court's opinion recounts this event this way:

> That the jury rejected these theories suggests that it accepted Goodyear's evidence that Jones did not mistreat Ledbetter, that he correctly told her she would be laid off if she remained an Area Manager, and that he arranged an interview for her for the Technology Engineer position as a gratuitous kindness, in an effort to keep her working until she would be eligible for full retirement.

Id.

concluding, the court made clear that Ledbetter "could recover on her disparate pay claim only to the extent she proved intentional discrimination in the one decision affecting her pay made within the limitations period . . . or the last such decision made immediately preceding the limitations period."[108] However, because she "failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions (1997, 1998) was a pretext for sexual discrimination," the district court judgment was reversed and Ledbetter's complaint was dismissed with prejudice.[109]

Following the Eleventh Circuit's ruling, Ledbetter filed a petition for a writ of certiorari.[110] The Supreme Court granted certiorari "[i]n light of disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases."[111]

V. ANALYSIS OF THE COURT'S OPINION

A. Justice Alito's Majority Opinion

Writing for the five member majority, Justice Alito began his opinion by making clear that the Court would not be breaking much new ground.[112] He wrote, "[T]his case calls upon us to apply established precedent in a slightly different context,"[113] and then briefly outlined the contours of the case. The issue: when does the EEOC charge filing period begin in cases alleging discrete acts of employment discrimination? The rule: "the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission begins when the discriminatory act occurs."[114] The application: "this rule applies to any '[d]iscrete ac[t]' of discrimination, including discrimination in 'termination, failure to promote, denial of transfer, [and] refusal to hire."[115] The application to Ledbetter's case: a pay-setting decision is a "discrete act that occurs at a particular

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[108] *Ledbetter*, 421 F.3d at 1185.

[109] *Id.* at 1189.

[110] *Ledbetter*, 550 U.S. at 623. Ledbetter sought review of the following question: "Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." *Id.*

[111] *Id.*

[112] *Id.* at 621. Justice Alito wrote for himself, Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Kennedy.

[113] *Id.* Unlike some justices, who make the reader flip to the last page of the opinion to find the holding; or others, who couch the holding in convoluted prose somewhere in the middle, Justice Alito offers the reader a one paragraph brief of the entire case, succinctly summarizing the issue, the rule, the application and the holding.

[114] *Id.*

[115] *Id.*

point in time."[116] And the conclusion: Ledbetter's argument that "discrimination in pay is different from other types of employment discrimination and . . . should be governed by a different rule . . . must be rejected." [117]

Justice Alito's majority opinion was comprised of five sections, which shall be addressed in the order in which they were presented. Part I recounted the legally significant facts from Ledbetter's tenure at Goodyear, summarized the District Court ruling as well as the Eleventh Circuit's reversal, and offered the question presented in Ledbetter's petition for certiorari.[118] Part II introduced the statutory provisions at issue, introduced Ledbetter's main arguments and rejected them, chiefly by explaining Ledbetter's misreading of key cases and misapplication of this principle: that "the EEOC charging period [runs] from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt."[119] The main cases treated in Part II were the following: *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *United Air Lines v. Evans*, 431 U.S. 553 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

Part III was comprised of Justice Alito's response to a key decision and an attempted distinction: (1) Ledbetter's reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986) to support a "paycheck accrual rule" that Justice Alito believed to be at odds with the true holding in *Bazemore*;[120] and (2) a distinction that Ledbetter (and the dissent) attempted to draw between *Bazemore* and the *Evans, Ricks, Lorance, Morgan* line of cases.[121]

In Part IV, Justice Alito tackled Ledbetter's analogies to "other statutory regimes" and "extrastatutory policy arguments" that supported her "paycheck accrual rule,"[122] as well as Ledbetter's policy arguments "in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC."[123]

1. Part I

Given the specificity of the question presented, Justice Alito's recitation of the facts was limited to mentioning Ledbetter's tenure at Goodyear, Goodyear's employment practice of awarding or denying raises based upon performance evaluation results, Ledbetter's two EEOC submissions, and the filing of the instant

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[116] *Ledbetter*, 550 U.S. at 621.

[117] *Id.*

[118] *Id.* at 621–23.

[119] *Id.* at 623-32.

[120] *Id.* at 623-33.

[121] *Id.* at 633-39.

[122] *Ledbetter*, 550 U.S. at 640.

[123] *Id.* at 642-43.

action, which included a Title VII pay discrimination claim.[124]

Justice Alito's recounting of the District Court disposition was also brief.[125] It touched on the dismissal of her Equal Pay Act claim, Ledbetter's proffer of evidence showing that several of her evaluations were poor on account of her sex, her claim that her pay was not increased as much as it would have been if she had been evaluated fairly, and the jury's award of backpay and damages.[126]

From the District Court judgment, Justice Alito moved to the Eleventh Circuit's opinion, which held that because "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 charging period,"[127] and "there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span," the District Court judgment was reversed.[128]

Finally, Justice Alito quoted the question of which Ledbetter sought review, and the basis for the Court's consideration of the question: "[a] disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases."[129]

2. Part II

In Part Two, Ledbetter's central contentions were outlined, discussed, and rejected. First, Justice Alito outlined the basic framework of Title VII: it is unlawful to discriminate on the basis of sex; to challenge an employment practice under Title VII, an employee must file a charge with the EEOC first, and this charge must be filed within either 180 or 300 days "after the alleged unlawful employment practice occurred;" and if the employee does not submit a "timely EEOC charge, the employee may not challenge that practice in court."[130]

Thus, the first question is: what is the employment practice at issue? Ledbetter suggested two alternatives: that her receipt of paychecks during the EEOC charge period were separate acts of discrimination; or the 1998 decision denying her a raise was a discriminatory employment practice because it reflected discriminatory practices from prior years.[131] Justice Alito quickly rejected these offers: "Both of these arguments fail because they would require us . . . to jettison the defining element of the legal claim on which her Title VII recovery was

[124] *Id.* at 621-22.

[125] *Id.* at 622.

[126] *Id.*

[127] *Id.* at 622-23.

[128] *Ledbetter*, 550 U.S. at 623.

[129] *Id.*

[130] *Id.* at 623-24.

[131] *Id.*

based."[132]

Justice Alito's answer to Ledbetter's suggested interpretation of the statute was quickly and surely offered, "This argument is squarely foreclosed by our precedents."[133] The Justice then traced a line of cases—*Evans*, *Ricks*, *Lorance*, and *Morgan*—that dealt with Title VII claims brought years after the initial act of discrimination allegedly occurred but while the effects of those actions were still felt.[134]

In *Evans*, the plaintiff had been employed by the defendant airline for two years but was forced to retire upon her marriage because of a company policy that prohibited flight attendants from being married.[135] In 1968, the year she resigned, she did not file a charge with the EEOC.[136] Years later, she was rehired by the airline, but the airline refused to credit her earlier years of employment towards its seniority system.[137] In the intervening years between her stints with the airline, it was determined that the company marriage policy violated Title VII.[138] However, Evans was not a party to that case.[139] Evans did file charges with the EEOC in 1973, five years after she resigned, alleging that she was discriminated against in 1968.[140] The question presented was, "whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972."[141] Writing for the Court, which ruled for the airline, Justice Stevens noted that "A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences."[142] Comparing *Evans* to Ledbetter's situation, Justice Alito

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[132] *Id.* at 624. To prove disparate treatment under Title VII, a plaintiff must prove the employer acted with discriminatory intent. *Id.* Yet, Ledbetter did not argue that Goodyear acted with discriminatory intent when it issued her paychecks during the EEOC charging period, or when it denied her the raise in 1998. Ledbetter argued that those actions were unlawful because they reflected and "carried forward" the effects of previous discriminatory acts that occurred prior to the charging period. *Ledbetter*, 550 U.S. at 624-25. In Justice Alito's words, "[s]he suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period." *Id.* at 625. In essence, Ledbetter admitted that she did not meet the plain requirements of the statute, that she was the victim of discrimination within the charging period, but she sought to substitute ongoing discriminatory effects where the statute on its face required a present intent to discriminate. This theory, in essence one relying on the ripple effects of past actions, was rejected.

[133] *Id.*

[134] *Id.* at 625-29. Collectively, these cases stand for the proposition that a plaintiff may maintain an action under Title VII only if he proves his employer intentionally discriminated against him during the charge filing period; alleging that his current pay reflects discriminatory decisions made years earlier is insufficient.

[135] United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977).

[136] *Id.*

[137] *Id.*

[138] *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

[139] *Evans*, 431 U.S. at 554.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 558. It is noteworthy to point out that Justice Stevens, who authored the Court's opinion in *Evans*, came down on Ledbetter's side. The cases have many similarities: both women had worked

wrote, "[i]t would be difficult to speak to the point more directly."[143]

Next, Justice Alito analogized to *Delaware State College v. Ricks*, a case involving a college librarian who alleged in 1975 that he was fired because of his race after being denied tenure in 1974.[144] Ricks did not file a charge with the EEOC within 180 days of being denied tenure, but argued that the EEOC charging period ran not from the date he was denied tenure, but from the date the college terminated his employment.[145] Citing to *Evans*, Justice Black, writing for the Court, noted that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."[146] Because Ricks did not identify any discriminatory act "that continued until, or occurred at the time of, the actual termination of his employment," the Court held that the EEOC charging period ran from the date of the tenure denying decision, not the date of Rick's termination, and Ricks' claim was time-barred.[147]

The third case Justice Alito cited was *Lorance v. AT& T Technologies, Inc.*, 490 U.S. 900 (1989), where female plant workers were laid off after their seniority rankings were affected by a change in the seniority system calculation.[148] The first system, which calculated seniority exclusively on the basis of total years spent in the plant, was changed in 1979 to calculate seniority based on time spent in a particular, and traditionally male, position.[149] During an economic downturn in

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for many years for a large employer; both were terminated at one point or another; both claimed they were victims of sex discrimination; and both waited years after the claimed act of discrimination to file suit against their employer. *Id.* Yet, unlike in *Evans*, which catalogued an "unfortunate event in history which has no present legal consequences," Ledbetter's case, in Justice Stevens' opinion, had present legal consequences. *Ledbetter*, 550 U.S. at 626. As he joined Justice Ginsburg's dissenting opinion, it is safe to say that he joined her reasoning and would have joined in the result her opinion would have produced had it carried the day. But it is less obvious why he joined her opinion.

[143] *Ledbetter*, 550 U.S. at 626.

[144] Del. State Coll. v. Ricks, 449 U.S. 250 (1980).

[145] *Id.* at 257.

[146] *Id.* (citing *Evans*, 431 U.S. at 558).

[147] *Id.* at 258. This case seems to be making the same point made in *Evans*: that employment decisions alleged to be discriminatory operate according to a statute of limitations that the claimant determines. It is almost a cruel irony that alleged victims of discrimination can be time-barred from bringing their claims simply because they waited too long. Yet the reasons for the rule are, on balance, probably sound. Encouraging employees to bring timely claims assists claimants as much as it assists employers. Further, claimants, especially those like Lilly Ledbetter, have much more to lose than a company such as Goodyear. Few would argue that, viewed in isolation, a contrary result here would ruin Goodyear: Goodyear could easily afford to pay Ledbetter the three million the Alabama jury awarded her. But even in spite of this, Ledbetter was still able to retire with full benefits after working in supposedly "discriminatory" conditions. There is a fair question to be asked: were the working conditions as onerous as Ledbetter alleged? If so, why would she, or any other employee, choose to suffer in such conditions? The intuitive answer seems to suggest that the conditions were not beyond bearing.

[148] *Lorance*, 490 U.S. at 902; *Ledbetter*, 550 U.S. at 626-27.

[149] *Lorance*, 490 U.S. at 902. This system appears, upon initial inspection, to be more egregious than the one Ledbetter alleged to exist at Goodyear. There, women were summarily disqualified from senior status when the seniority system was changed to disfavor them. *Id.* Yet, the Court's decision here, and its decisions in the cases discussed above, make clear that what matters under the current EEOC system is not the particulars of the employment environment at the time the initial decisions were made, but the conditions as they exist within the 180 day window of when the suit is brought. It is

1982, women were slated for demotion, though they would not have been under the prior seniority system.[150] In 1983, female plaintiffs claimed the new seniority system was the result of intentional sex discrimination and filed complaints with the EEOC.[151] The district court and Seventh Circuit concluded that the plaintiffs' claims were time-barred because "the relevant discriminatory act that triggers the period of limitation occurs at the time an employee becomes subject to a facially neutral but discriminatory seniority system that the employee knows, or reasonably should know, is discriminatory."[152] Noting that the "continuing violation theory" had been rejected by *Ricks* and *Evans*, Justice Scalia wrote for the majority that the EEOC charging period ran from the time when the discrete act of intentional discrimination occurred (when the new seniority system was adopted), 1979, not from the date when the effects of the system were felt.[153] Because the plaintiffs did not file a charge until the effects were felt, their claim was time barred and rejected.[154]

The last case in the line of cases Justice Alito catalogued was *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), a case involving an Amtrak employee who claimed that he had been subjected to "discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment."[155] Employing new arguments to facts familiar to the Court, Morgan complained of discriminatory acts in years past, but argued that "the statute does not require the filing of a charge within 180 or 300 days of each discrete act, but . . . the language requires the filing of a charge within the specified number of days after an 'unlawful employment practice,'" which Morgan defined as an ongoing violation that can "endure or recur over a period of time."[156] Rejecting this argument, Justice Thomas wrote, "There is simply no indication [in the statute] that the term 'practice' converts related discrete acts into a single unlawful practice for purposes of timely filing."[157] Rather, "[w]e have repeatedly

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clear that many plaintiffs were not so outraged by the allegedly discriminatory systems as to quit immediately or file suit immediately; many remained in the employ of an allegedly discriminatory employer for several more years. This suggests several interesting personality or psychological inquiries beyond the scope of this analysis, such as, what prompts an employee to persist in conditions the employee finds discriminatory? What compels an employee to file suit years after the discrimination occurred? Is it the promise of a large damage award? The chance to get one's day in court and right a long-overdue wrong? These questions are worthy of exploration by those more capable of providing answers than this author.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 903.

[153] *Lorance,* 490 U.S. at 911.

[154] *Id.* The dissent attempts to undermine the majority's recognition of *Lorance* because the Civil Rights Act of 1991 purportedly covered the situation presented in *Lorance.* Justice Alito dismisses this argument, however, because he says that *Evans* and *Ricks*, "upon which *Lorance* relied, and which employed identical reasoning, were left in place, and these decisions are more than sufficient to support our holding today." *Ledbetter*, 550 U.S. at 627.

[155] *Morgan*, 536 U.S. at 101.

[156] *Id.* at 110.

[157] *Id.* at 111. Even if the Court had ruled that related discrete acts can be converted into a single

interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts."[158] In conclusion, Justice Thomas wrote for the Court, "We hold that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."[159]

Justice Alito concluded Part II by reinforcing the Court's belief that the best way to ensure "evenhanded administration of the law" is to strictly adhere to the procedural requirements established by Congress, not invent new understandings by judicial fiat.[160] Accordingly, the Court rejected "the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful . . . because it gives some effect to an intentional

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unlawful employment practice for purposes of timely filing, this holding would be of no help to Ledbetter because she was unable to prove discriminatory related acts during her tenure at Goodyear. At trial, she proved that she was paid less because she was a woman, but she was not able to prove specific examples of discrimination that could be linked to show a pattern of discrimination. Further, Ledbetter's argument fails to account for her own poor performance. If there is any pattern that emerges from a closer look at her employment record, it is a pattern of poor performance reviews and repeated denials of raises and promotions. In spite of those findings, the Eleventh Circuit still noted that Goodyear's supervisor at one point suggested she interview for a position so that she could retire with full benefits instead of being laid off without her full benefits. *Ledbetter*, 421 F.3d at 1174. When one considers that she was repeatedly fired, given low performance ratings, and denied promotions and raises, one cannot help but be struck by the thought that Goodyear did Ledbetter a favor by retaining her, rather than do what a more cutthroat employer might have done: fire an underperforming employee.

[158] *Id.*

[159] *Id.* at 105. To Justice Alito's mind, the rule that emerges from this line of cases is clear, "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur . . . upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Ledbetter*, 550 U.S. at 628. Thus, Ledbetter's argument, "that the paychecks she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period" fails because she is not identifying any intentionally discriminatory conduct during the charging period, as the statute and cases require, but merely bootstrapping discriminatory intent from years past into current actions. *Id.* at 628. In perhaps his most quotable line from the opinion, Justice Alito makes clear that "current effects alone cannot breathe life into prior, uncharged discrimination." *Id.* The underlying assumption present throughout Justice Alito's opinion seems to be that Ledbetter's failure to adduce any evidence of discriminatory intent during the EEOC charge period requires to her entertain alternate liability-producing scenarios that cannot be reconciled with the statute, the Court's previous cases, or the Congressional judgment that enacted Title VII. *Id.* Further, Ledbetter's arguments invite the Court to overturn Congress' judgment concerning statutes of limitations, which "serve a policy of repose," and to create exceptions to deadlines that "protect employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 629 (citing *Ricks*, 449 U.S. at 256-57). Indeed, Ledbetter's suggestions seem to fly in the face of "Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 629-30. Prompt resolution is desirable, writes Justice Alito, because "[i]n most disparate-treatment cases, much if not all of the evidence of intent is circumstantial . . . and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Id.* at 632. This is a key point, which Ledbetter and the dissent do not constructively address. Further, it is not a hypothetical concern, as Justice Alito points out: "this case illustrates the problems created by tardy lawsuits. Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances . . . Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously." *Id.* n. 4.

[160] *Id.* at 632.

discriminatory act that occurred before the charging period."[161]

3. *Part III*

In Part III, Justice Alito addressed and dismissed Ledbetter's argument that the Court's decision in *Bazemore* "requires different treatment of her claim because it relates to pay."[162] He also rejected the dissent's argument that "a pay discrimination claim is like a hostile work environment claim because both types of claims are 'based on the cumulative effect of individual acts.'"[163]

Ledbetter analogized her case to *Bazemore* and attempted to explain away the inconsistencies between her reading of *Bazemore* and the earlier-discussed *Evans/Ricks/Lorance/Morgan* line of cases by arguing that none of those cases involved pay raises.[164] With respect to *Bazemore*, Ledbetter argued that the Court established a "paycheck accrual" rule that commands the current Court to treat her claim differently than the claims in *Evans, Ricks,* and *Lorance.*[165] Specifically, Ledbetter argued that under this rule, each paycheck, "even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred."[166] Justice Alito found this reading of *Bazemore* unsound because it dispensed with the requirement of proving actual discriminatory intent in pay cases.[167]

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[161] *Id.*

[162] *Id.* at 633.

[163] *Id.* at 636.

[164] *Id.* at 638. Ledbetter was correct to point out that the previous line of cases did not involve pay raises, but each case involved decisions that bore directly on the claimant's pay. Further, like Ledbetter's case, each case sought to blame the employer's actions, and play down the employee's possible shortcomings, in an attempt to paint the employer's misdeeds as the reason for the employee's paycheck. What is also noticeable is this: while each claimant in the line of cases discussed previously complained about discriminatory treatment at some juncture in the claimant's employment history, the fact that each claimant's suit was time barred suggests that the employees would have fared better had their respective employers discriminated against them more often and with more consistency. It seems perverse and yet also fair to allow employers who once allegedly discriminated against their employees to escape liability because they ceased discriminating at some point. It is perverse because it allows employers to discriminate as long as an employee does not immediately file a claim, yet it also rewards employers who correct their mistakes by granting them immunity from suits brought years after they may have learned their lesson and cleaned up their operation.

[165] *Id.* at 632.

[166] *Id.* at 633. Ledbetter's suggested rule cannot be taken seriously. It defies common sense notions of justice to hold an employer liable for past acts regardless of how long ago the allegedly discriminatory acts occurred. Under Ledbetter's rule, if company A purchases company B, and the claimant alleges discrimination at the hands of company B, company A could be sued decades later and company A could be held responsible for the sins of company B, even if all past employees of company B are dead. Holding employers responsible for acts they could not have committed does more violence to the purpose of Title VII than denying recovery to a plaintiff like Lilly Ledbetter.

[167] *Id.* Indeed, if the plaintiff does not have to show any discriminatory intent for a current paycheck and may link a current paycheck to a decades old discriminatory act, what is to prevent employees from making all manner of wildly fantastic claims about discriminatory reasons for their paychecks? Such a

To the claim that the previous line of cases (*Evans, Ricks, Lorance, Morgan*) was not applicable because they did not deal with pay raises, Justice Alito answered that the logic of those cases was fully applicable because the "relationship between past discrimination and adverse present effects is the same in *Evans*" as it was in Ledbetter's case.[168]

Justice Alito then addressed the dissent's argument that a pay discrimination claim is akin to a hostile work environment "because both types of claims are 'based on the cumulative effect of individual acts.'"[169] Justice Alito easily dismissed that argument because he found the distinction recognized in *Morgan* controlling.[170] The line drawn in *Morgan* between "discrete" acts and a hostile work environment was the following: discrete acts are those that in themselves are actionable 'unlawful employment practice[s],' whereas hostile work environments "comprise a succession of harassing acts, each of which 'may not be actionable on its own.'"[171] What Ledbetter alleged was a "series of discrete, discriminatory acts," identifiable and actionable on their own, not a succession of harassing acts.[172] Thus, Ledbetter's case could not be analogized to and reconciled with a hostile work environment analysis.

4. Part IV

In the final section of the majority opinion, Justice Alito responded to Ledbetter's analogies to other statutory regimes and extra-statutory policy

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rule seems boundless in its potential for a tort nightmare. Like Ledbetter, the *Bazemore* plaintiffs brought a disparate treatment pay claim. *Id.* at 632. Unlike Ledbetter's case, which was brought after Title VII went into effect and involved merit raises or promotions following routine performance evaluations, *Bazemore* was brought by black employees who were victims of segregation that predated Title VII's passage. *Id.* at 633. After Title VII was extended to public employees, the employees brought suit and claimed that the pay differences owing to the segregated offices still persisted. *Id.* The Court held that "when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees." *Id.* As Justice Alito put it, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure." *Id.* at 637. In contrast, and dispositive for Ledbetter's situation, "a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.* Ledbetter produced no evidence that she was put on a lower pay scale because of her gender, she produced no evidence that Goodyear's system was facially discriminatory and non-neutrally applied, and Ledbetter could not produce any evidence that Goodyear adopted its performance-based pay system "in order to discriminate on the basis of sex" or that it "applied this system to her within the charging period with any discriminatory animus." *Id.*

[168] *Ledbetter*, 550 U.S. at 636-37.

[169] *Id.* at 638.

[170] *Id.*

[171] *Id.* (citing *Morgan*, 536 U.S. at 115-16).

[172] *Id.* Ledbetter did not allege that she was harassed each time she received a paycheck, which would have been her likely claim had she brought a hostile work environment claim. But such a claim would be tenuous at best because Ledbetter herself alleged that she was only rarely harassed; her main claim was that she was discriminated against when pay-setting decisions were made. *Id.* Thus, she was probably wise to bring a discrimination claim based on discrete acts rather than one based on a succession of harassing acts.

arguments that support her "paycheck accrual rule."[173]

In addition to relying on Title VII, Ledbetter also relied on the Equal Pay Act to suggest the Court hold that "Title VII is violated each time an employee receives a paycheck that reflects past discrimination."[174] Justice Alito dismissed this argument because "the EPA and Title VII are not the same:" where Title VII requires filing a charge with the EEOC showing proof of intentional discrimination, the EPA does not.[175] Further, as Ledbetter's counsel must have known, the magistrate judge dismissed the EPA claim before Ledbetter's case even went to trial; thus, the EPA claim was not preserved for Supreme Court review and was of no help to Ledbetter.[176]

Ledbetter also appealed to the Fair Labor Standards Act of 1938 (FLSA), a pursuit Justice Alito called "equally unavailing"[177] because unlike the FLSA, which addresses minimum wage and overtime claims that do not require proof of a specific intent to discriminate, Title VII does require proof of discriminatory intent.[178]

Ledbetter's next analogy, to the National Labor Relations Act (NLRA), "[was] on firmer ground" than the EPA application because "the NLRA provided a model for Title VII's remedial provisions, and like Title VII, requires the filing of a timely administrative charge . . . before suit may be maintained."[179] Yet, as with previous appeals to statutory interpretation, Ledbetter fell short: her argument that the NLRA's six month statute of limitations "begins anew for each paycheck reflecting a prior violation of the statute" was foreclosed by Court precedent, specifically *Machinists v. NLRB*, 362 U.S. 411 (1960).[180]

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[173] *Ledbetter*, 550 U.S. at 640.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* at 641.

[178] *Ledbetter*, 550 U.S. at 641. Title VII is unique because it requires an employee to prove that he was discriminated against because an employer specifically intended to discriminate. 42 U.S.C. § 2000e-2(a)(1). Other statutory regimes do not contain the same requirement. Thus, Title VII erects a higher barrier for potential claimants, and likely encouraged Ledbetter to bring claims under other statutes, statutes which do not require the plaintiff to prove discriminatory intent. However, Title VII rewards employees who prove discriminatory intent by offering the reward of punitive damages, which some other statutory remedies do not. 42 U.S.C. § 2000e-5(g)(1). Further, Justice Alito rejected Ledbetter's reliance on these other regimes because they are not relevant: the Fair Labor Standards Act addresses minimum wage and overtime claims, claims not at issue in Ledbetter's situation. *Ledbetter*, 550 U.S. at 641. Thus, their remedies were inapposite because Ledbetter's claims did not concern the practices those other statutes were written to address. *Id.*

[179] *Id.* at 641.

[180] *Id.* at 641-42. There, the Court offered an analysis that "corresponds closely" to the analysis in *Evans* and *Ricks*: "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice, the use of the earlier unfair labor practice [merely] serves to cloak with illegality that which was otherwise lawful." *Id.* It bears repeating that Ledbetter produced no evidence that Goodyear's conduct during the 180 day charging period itself was discriminatory, or that Goodyear possessed the requisite discriminatory intent; all Ledbetter could argue was that previous discrimination turned her paychecks received during the 180 day period into acts of discrimination. *Id.*

Lastly, Ledbetter attempted to persuade the Court to overturn the Eleventh Circuit and allow alleged victims of pay discrimination more time before they must file with the EEOC by offering a series of policy arguments.[181] Justice Alito did not bother to entertain her claims because, he said, "[w]e are not in a position to evaluate Ledbetter's policy arguments and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination.'"[182] Further, Ledbetter's policy arguments "find no support in the statute and are inconsistent with our precedents."[183]

Justice Alito concluded his opinion by reemphasizing that "we apply the statute as written," meaning that Ledbetter was required to present her claims of discriminatory treatment to the EEOC within the 180 day period required by Title VII. Because she did not, the Court affirmed the judgment of the Eleventh Circuit.[184]

B. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg's opinion, joined by Justices Stevens, Souter, and Breyer, was comprised of four sections. An introduction recited the facts and the procedural history.[185] Part I addressed the *Bazemore* decision and argued that Ledbetter's claim was correctly understood as a hostile work environment claim

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[181] *Ledbetter*, 550 U.S. at 642.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 643. Justice Alito's opinion ends with a footnote addressing Ledbetter's argument that the EEOC position is owed more deference than the Court grants it. *Id.* at 643 n.11. In her reply brief, Ledbetter argued that the EEOC was owed *Chevron*-style deference and was "particularly well-situated to evaluate the practical consequences of the proposed accrual rules" because it had reviewed thousands of discrimination complaints over many decades. Reply Brief for the Petitioner at 19, *Ledbetter*, 550 U.S. 618 (No. 05-1074). Further, Ledbetter cited to the Court's opinion in *EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988), where the Court gave "*Chevron*-style deference to the EEOC's interpretation of Section 706." *Id.* at 17. The Court there held that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *Comm. Office Prods.*, 486 U.S. at 115. Ledbetter suggested that deference be given to EEOC's formal adjudications of federal sector complaints. Reply Brief for the Petitioner, *supra* note 181, at 18. Justice Alito found those arguments unconvincing, writing that "we . . . similarly decline to defer to the EEOC's adjudicatory positions. The EEOC's views in question are based on its misreading of *Bazemore* . . . Agencies have no special claim to deference in their interpretation of our decisions." *Ledbetter*, 550 U.S. at 643. This decision will only reinforce that belief. This decision will likely also reinforce the belief, discussed in the conclusion below, that Justice Alito is simply a Justice lock step in line with business interests. Predictions before, during, and after his confirmation hearings suggested that he would be "friendly" to business interests and would likely be a "pro-business" Justice. *See infra* note 238 and accompanying text. Just how Justice Alito sees himself, and whether he would agree with or even take note of such characterizations is unknown. The relative brevity of his majority opinion, combined with the frank language his opinion employs suggests that this was not a close call for Justice Alito. Perhaps then what is important to discern from this case is not that Justice Alito is quick to align himself with business interests, but that he is quick to decide cases when he believes Court precedent provides ascertainable answers to the disputes before the Court. The number of opinions offered in this case, two, also suggests that the members of the Court who joined the two written opinions found them sufficient to cover all the disputed issues.

[185] *Ledbetter*, 550 U.S. at 643-45.

rather than a discrete act claim; considered some practical realities that weigh upon the determination of Ledbetter's claim; discussed why the majority's reliance on the *Evans/Ricks/Lorance/Morgan* line of cases was misplaced; and explained how the majority's reading of Title VII conflicted with that of the Courts of Appeals and the EEOC itself.[186] Part II addressed the majority's assertion that treating pay discrimination as a discrete act was "necessary to protect employers from the burden of defending claims arising from employment decisions that are long past," and rejected the majority's assertion that if Ledbetter had pursued her claim under the Equal Pay Act she would not have to deal with the requirements of Title VII.[187] Part III attempted to show how far the Court's interpretation "strayed" from Title VII's "core purpose" by emphasizing the evidence Ledbetter presented at trial and the deleterious consequences that flow from the Court's holding.[188] The dissenting opinion concluded by inviting Congress to overturn the Court's decision.[189]

1. Introduction

In marked contrast to Justice Alito's opening paragraph, which began with a recitation of the applicable statute, Title VII, Justice Ginsburg began with the human story: Lilly Ledbetter and her experience at Goodyear.[190] Further, in her recounting of the facts, Justice Ginsburg nowhere mentioned Goodyear's periodic evaluation system, which tied raises and bonuses to performance, Ledbetter's abysmal performance rankings, and the instances when she was fired.[191] Rather, Justice Ginsburg focused on Ledbetter's sex in relation to other managers, her salary compared to her male counterparts, and the fact that by 1997, the pay discrepancy between Ledbetter and her fifteen male counterparts was "stark."[192] In short, where Justice Alito focuses his opinion on Ledbetter's claims, Justice Ginsburg equally focused on Ledbetter herself.

In her discussion of the District Court's decision, Justice Ginsburg mentioned the jury's holding, that it was more likely than not that Goodyear paid Ledbetter less because of her sex, but did not discuss, as does Justice Alito, Ledbetter's Equal Pay Act claim, or the District Court's remittitur of Ledbetter's damage award.[193]

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[186] *Ledbetter*, 550 U.S. at 646-656. *See infra* notes 198-214 and accompanying text.

[187] *Id.* at 657-59. *See infra* notes 215-216 and accompanying text.

[188] *Id.* at 659-60. *See infra* notes 217-221 and accompanying text.

[189] *Id.*

[190] *Id.* at 643.

[191] *Ledbetter*, 550 U.S. at 621, 643.

[192] *Id.* at 643-44. Indeed, one of the central assumptions that can be discerned throughout Justice Ginsburg's opinion is the belief that pay differences are essentially indicative of pay discrimination. *Id.* at 652. Less than scant attention is paid to the shortcomings of Ledbetter's performance. What is dispositive for Justice Ginsburg is simply this: that Ledbetter made less than her male counterparts, and this fact alone is seemingly sufficient to establish discrimination. Unfortunately, Title VII requires discriminatory intent to be shown, and this Lilly Ledbetter could not do.

[193] *Id.* at 621, 641.

Justice Ginsburg read the Eleventh Circuit and majority opinion as requiring Ledbetter to have filed charges "year-by-year, each time Goodyear failed to increase her salary commensurate with the salaries of male peers."[194] This assumes that each time Goodyear failed to increase her salary commensurate with the salary of her male peers, it was a discriminatory act.[195]

Touching on *Morgan*, the dissent argued that pay disparities are different from other adverse actions, such as a failure to promote or refusal to hire, because pay differences are incremental and are not as easy to identify.[196] Because pay disparities are different from adverse actions, they should not be governed by *Morgan*, but by *Bazemore*, which held that the payment of current salaries infected by discrimination can be the act of discrimination that counts for purposes of Title VII.[197] This brought the dissent to a discussion of Title VII and *Bazemore*.

2. Part I

Central to the dissent's argument and analysis of *Bazemore* was the contention that there are two views concerning the two activities that qualify as unlawful employment practices in cases of discriminatory compensation: one view (the majority's) emphasized the pay-setting decision itself as the act of discrimination; another view, which the dissent embraced, "counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices."[198] Only the second view empowers a claim such as Ledbetter's by considering each paycheck "infected" by sex-based discrimination an unlawful employment practice.[199] The dissent found support for its preference in *Bazemore*.

Justice Ginsburg believed *Bazemore* stands for the proposition that "paychecks perpetuating past discrimination are . . . actionable . . . not simply because they are 'related' to a decision made outside the charge-filing period . . . but because they discriminate anew each time they issue."[200] Yet Justice Ginsburg does not address the underlying distinction between the facts in *Bazemore* and the facts before the Court: the plaintiffs there were victims of a discriminatory pay system, whereas Ledbetter alleged discrimination at the hands of a facially neutral pay system.[201]

[194] *Id.* at 644.

[195] This does not follow because the jury did not find that each denial of a pay raise was an act of discrimination; only that Ledbetter was discriminated against because of her sex at some point during her tenure at Goodyear. *Ledbetter*, 550 U.S. at 642. As the Eleventh Circuit pointed out and the majority opinion makes clear, Ledbetter did not prove that discrimination occurred within the 180 day charging period, only that she was paid less during the 180 day period because of sex discrimination in the past. *Id.*

[196] *Id.* at 645.

[197] *Id.*

[198] *Id.* at 646.

[199] *Ledbetter*, 550 U.S. at 646.

[200] *Id.* at 647; *See Bazemore*, 478 U.S. at 395-96.

[201] *Ledbetter*, 550 U.S. at 636. Justice Alito wrote that *Bazemore* is of no help to Ledbetter because

Justice Ginsburg's next argument, drawn from *Morgan*, was that Ledbetter's claim was more accurately characterized as a hostile work environment claim than one arising from a "single episode" of discrimination.[202] This was because Ledbetter alleged that she was the victim of discriminatory actions compounded over time, not a single, isolated act of discrimination.[203] Each time Goodyear failed to match Ledbetter's salary to her male counterparts, went the argument, Goodyear incrementally discriminated against her.[204] Yet Justice Ginsburg failed to address Goodyear's explanation for its repeated refusals to award Ledbetter a raise: her demonstrably poor performance reviews. Further, Justice Ginsburg failed to mention or explain how Goodyear's periodic performance review system itself was in any way discriminatory, other than taking Ledbetter's word for it.

Further, Justice Ginsburg argued that pay discrimination does not belong in the category of a discrete act of discrimination because unlike a promotion or transfer, which is immediately communicated to the employee, compensation decisions are often "hidden from sight," not published, or in the case of an employee who receives a comparably smaller raise multiple times over, not evident for some time.[205]

Ascribing to the position that pay disparities are different from discrete employment situations compels Justice Ginsburg to reject the Court's reliance on

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she did not present any evidence that Goodyear "initially adopted its . . . pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with discriminatory animus." *Id.* at 637. To the argument that the Goodyear evaluation system was facially neutral, Goodyear pointed out in its brief that Ledbetter received the same starting salary as male supervisors, she was "subject to the same salary adjustment rules as were male employees," and Ledbetter received larger "percentage salary adjustments" in some years than did male supervisors. Brief of Respondent at 33, *Ledbetter*, 550 U.S. 618 (No. 05-1074). Since these facts do not lend any support to Justice Ginsburg's theory of the case, they are not dealt with in any great detail.

[202] *Id.* at 647-48. This was a perplexing argument for Justice Ginsburg to make, given that Ledbetter conceded in her brief that she was the victim of "discrete" acts of discrimination. Brief for the Petitioner at 13, 18, 22, 32, *Ledbetter*, 550 U.S. 618 (No. 05-1074).

[203] *Id.*

[204] *Ledbetter*, 550 U.S. at 648. Justice Ginsburg's background as a noted feminist attorney may explain the unspoken assumptions behind her statements. Where Goodyear offers Ledbetter's poor performance as the justification for her smaller raises or denied promotions, Justice Ginsburg sees only one narrative: a woman employee earning less than most of her male colleagues. Such a selective reading of the facts does an injustice to the legal system because it tells employers that there is at least one member of the Supreme Court that is not terribly concerned about an employee's performance as long as she is a woman. What appears to matter more to Justice Ginsburg than an employee's performance is her sex. Rather than enabling women to pierce whatever glass ceiling still exists, such considerations may only serve to reinforce the perception that women should not be evaluated on the merits of their labors, but rather on the basis of their accidental, immutable characteristics. Surely Justice Ginsburg does not intend such a result. But it is hard to escape the conclusion that Justice Ginsburg is attempting to paint Ledbetter as a victim to fit her within the mold of the statute when Ledbetter could also be viewed as a less-than-stellar employee who was tolerated for almost twenty years.

[205] *Id.* at 648-49. The notion that a smaller pay raise is discriminatory just because it is smaller, or awarded to a woman, confounds logic, especially considering that following many of Ledbetter's performance evaluations, she was rewarded higher raises than some men. Employees have no right to pay raises in the first place, so to argue that receipt of a smaller pay raise equals discrimination is thoroughly unconvincing. Further, Justice Ginsburg fails to mention that throughout much of Ledbetter's tenure at Goodyear, she was ranked above men in her department, and often, a man received a smaller bonus than she did. *See Ledbetter*, 421 F.2d at 1185-89.

Evans, Ricks, Lorance, and *Morgan* because those cases addressed discrete pay decisions.[206] Specifically, in *Evans* and *Ricks*, the employee "filed charges well after the discrete discriminatory act occurred . . . ."[207] Here, that was not the case because the discriminatory act was the ongoing receipt of Goodyear's paychecks. Similarly, Justice Ginsburg rejects any similarity to *Machinists v. NLRB*, 362 U.S. 411, because "the employment decision at issue was easily identifiable and occurred on a single day."[208]

For that reason, and also because Justice Ginsburg believed that the Civil Rights Act of 1991 "repudiated" the Court's holding in *Lorance,* Justice Ginsburg also rejected the majority's reliance on *Lorance*.[209] Even though the 1991 Civil Rights Act only concerned itself with discrimination in seniority systems, Justice Ginsburg believed that Congressional intent behind the 1991 act was not to "immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption."[210]

In the final paragraphs of Part I of her opinion, Justice Ginsburg referenced the opinions of the Courts of Appeals and the position taken by the EEOC.[211] She wrote, "the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination . . . ."[212] Further, the EEOC had given voice to the same position through its Compliance Manual and administrative decisions.[213] The EEOC Compliance Manual states, "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."[214]

3. Part II

Justice Ginsburg began the second part of her opinion by arguing, contrary to the concerns of the majority, that the decision does not protect Goodyear from "the burden of defending claims arising from employment decisions that are long past,"

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[206] *Id.* at 650.

[207] *Id.*

[208] *Id.* at 652.

[209] *Id.* In Justice Ginsburg's opinion, "Congress . . . agreed with the dissenters in *Lorance* that 'the harsh reality of [that] decision' was 'glaringly at odds with the purposes of Title VII.'" *Id.* at 2183. (citing *Lorance*, 490 U.S. at 914) (Marshall, J., dissenting). Yet, as Goodyear points out in its brief, the sponsors of the 1991 Act wrote at the time that, "[t]his legislation should not be interpreted to affect the sound ruling of the Supreme Court" in Ricks. Resp't Br. 48; 137 Cong. Rec. S15472-01, S15485 (daily ed. Oct. 30, 1991). And, as Justice Alito made clear in his opinion, and Justice Ginsburg did not contest, *Ricks* is thoroughly within the precedent established in *Lorance*, *Evans*, and *Morgan*.

[210] *Ledbetter*, 550 U.S. at 654. Justice Ginsburg believed this follows from the fact that Congress never intended to confer absolute immunity on discriminatorily adopted seniority systems that survive their first 180 days. *Id.*

[211] *Id.* at 655-56.

[212] *Id.* at 654.

[213] *Id.* 655-56.

[214] *Id.* at 655. *See also* 2 EEOC Compl. Man. § 2-IV-C(1)(A), p. 605:0024, and n.183 (2006).

because Ledbetter did not allege discrimination long past, but rather discrimination in every paycheck she received, up to the last one.[215]

Second, Justice Ginsburg argued that though Ledbetter would not be left without relief after the majority's decision (she would have recourse to the Equal Pay Act), "racial and other minorities" would be impeded from gaining similar relief.[216]

4. Part III

Here, Justice Ginsburg returned to the evidence Ledbetter presented at trial to demonstrate how far the Court strayed from interpreting Title VII in accord with the purpose of the Civil Rights Act of 1964, which is to provide "robust protection against workplace discrimination . . . ."[217] At trial, Ledbetter's evidence "demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular."[218] Yet, in spite of this evidence, under the majority's approach, "[k]nowingly carrying past pay discrimination forward must be treated as lawful conduct."[219] Justice Ginsburg finds this to be a "cramped" interpretation, a "parsimonious" reading of Title VII.[220]

She concluded by inviting Congress to act, as it did in 1991, to correct the Court's decision.[221]

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[215] *Id.* at 657. Yet, as the Eleventh Circuit and Justice Alito's opinion made clear, Ledbetter failed to prove that Goodyear discriminated against her during the charge period, the period that counts, or possessed the requisite discriminatory intent during the charge period. *Id.* These evidentiary shortcomings do not seem to bother Justice Ginsburg. Further, to the claim that a more expansive charge filing period could pose potential hardships to businesses, Goodyear's contention that "employers would annually have to investigate all prior salary decisions and attempt to determine whether or not they were based solely on non-discrimination factors" is well put. (Resp't Br. 23). The potential burden on an employer could be so large as to encourage businesses to settle just to avoid the onerous burden of a trial. Such a result would surely encourage the tort bar to bring claims.

[216] *Ledbetter*, 550 U.S. at 658. Justice Ginsburg seemed to be saying that many plaintiffs, who could not resort to the Equal Pay Act, would be forced, as Ledbetter was here, to sue within 180 days of the act of discrimination, though they may not know within 180 days of a pay decision whether or not they have been discriminated against. Thus, some plaintiffs could be left out in the cold. *Id.* n.8. Such concern is admirable, but the Court can do better than to reject straightforward statutory interpretation because *potential* victims could be harmed. Arguably no statute can be enforced without detriment flowing to some future plaintiff. The different concerns animating the attentions of the majority and dissenting opinions show just how different an approach each author takes towards his task. Justice Alito's opinion expressed the conviction that adherence to the plain meaning of the statute is the Court's ultimate responsibility. Justice Ginsburg's opinion was animated by an ongoing concern about the effects of the statute, rather than the consistent interpretation of its terms. Where Justice Alito dismissed a compelling human story because the law clearly foreclosed the relief Ledbetter sought, Justice Ginsburg seemed more willing to look within the background purposes and intentions of the law to find Ledbetter an avenue of redress. *Id.* at 2162-87.

[217] *Id.* at 659.

[218] *Id.* at 659.

[219] *Id.* at 660.

[220] *Id.* at 661.

[221] *Id.*

VI. IMPACT OF THE COURT'S DECISION

A. Legal Impact

Ledbetter's immediate legal impact was to resolve the disagreement among the Courts of Appeals concerning the proper interpretation of Title VII claims as they relate to the EEOC charge filing deadline for alleged discrete acts of discrimination in disparate pay cases. The broader legal impact of the holding has been nullified as President Obama signed legislation expressly overturning the decision.[222] As 2008 was an election year, few were surprised when Democrats used the decision as a piece of campaign propaganda to paint the Supreme Court as "business friendly" and "insensitive" to the plight of victims of discrimination.[223]

B. Impact on Employers

The immediate impact *Ledbetter* portended for employers was negligible because the Court did not fundamentally alter its Title VII jurisprudence in any consequential way. Indeed, by affirming a line of cases stretching back to the 1970s, the Court probably gave the nation's employers a reason to breathe easier.

Yet Justice Ginsburg's invitation to Congress to "correct" the Court's ruling was not comforting for the nation's employers. Now that Title VII of the Civil Rights Act has been amended to permit suits like Ledbetter's, employers have been

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[222] On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, the first bill he would sign as President. *See* http://www.whitehouse.gov/blog_post/AWonderfulDay/ (last visited Mar. 26, 2009). Under the Fair Pay Act,

> 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.

42 U.S.C. 2000e-5(e), Section 706(e)(3)(A); *see* http://www.whitehouse.gov/briefing_room/LillyLedbetterFairPayActPublicReview/ (last visited Mar. 26, 2009). Essentially, any time an employee receives a paycheck reflecting a discriminatory pay setting decision, the employee could sue under Title VII of the Civil Rights Act of 1964. At the signing ceremony, President Obama said:

> So signing this bill today is to send a clear message: that making our economy work means making sure it works for everybody; that there are no second-class citizens in our workplaces; and that it's not just unfair and illegal, it's bad for business to pay somebody less because of their gender or their age or their race or their ethnicity, religion or disability; and that justice isn't about some abstract legal theory, or footnote in a casebook. It's about how our laws affect the daily lives and the daily realities of people: their ability to make a living and care for their families and achieve their goals.

[223] Lilly Ledbetter herself became something of a celebrity during the campaign. After clinching the nomination, Senator Barack Obama hosted Ms. Ledbetter at the Democratic Convention in Denver on August 26, 2008, where she addressed the convention delegates. *See* ABC, Lilly Ledbetter Addresses Democratic National Convention, http://www.abc3340.com/news/stories/0808/547794.html (last visited Mar. 2, 2009).

greatly disadvantaged and put on notice that they may be held to account for pay decisions made years ago.[224] Ironically, employers have essentially been encouraged to pay female employees the same as similarly situated male employees, regardless of merit, to avoid discrimination suits. Further, and perhaps perversely, employers have an additional incentive to not hire female employees out of worry that they may be courting future lawsuits.

Finally, employers should take additional steps to ensure that salary figures are kept confidential, such as enforcing confidentiality agreements as a condition precedent to awarding raises or bonuses.

C. Impact on Employees

Employees alleging employment discrimination will probably not realize significant advantages or disadvantages from the Court's opinion. In spite of Justice Ginsburg's pronouncements that the opinion may prove detrimental to some minorities, it is not clear that alleged victims of sex discrimination are any worse off. What was true before *Ledbetter* was true after *Ledbetter*: plaintiffs who wait years after a discrete act of discrimination to file a disparate pay discrimination claim with the EEOC will probably be time-barred from bringing their claims. The Majority opinion noted that it did no more than "apply established precedent in a slightly different context."[225] On balance, that is probably true. In view of the revised state of the law, employees have been granted additional time in which to investigate and file complaints, an obvious advantage to them. In spite of the additional time granted to plaintiffs, the safest course of action is to file a claim with the EEOC as soon as an employee suspects he may be the subject of workplace discrimination.

VII. RECOMMENDATIONS

Finally, the case note will offer some recommendations to the parties I believe may be affected by the *Ledbetter* decision.

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[224] In an insightful column, previously referenced writer Stuart Taylor, Jr. wrote that the Lilly Ledbetter Fair Pay Act of 2009, which President Obama signed, "may be bad for most workers and may benefit mainly lawyers" because the bill "make[s] it harder than ever for employers to defend themselves against bogus (as well as valid) discrimination claims, effectively adding to the cost of each new hire." Stuart Taylor, Jr., *Does The Ledbetter Law Benefit Workers, Or Lawyers?*, NationalJournal.com, Jan. 31, 2009, *available at* http://www.nationaljournal.com/njmagazine/or_20090131_9126.php (last visited Mar. 26, 2009). Taylor writes that the law will "virtually wipe out the 300-day time limit" in which employees can file discrimination claims, leaving employees free to "wait many years before hauling employers into court for supposedly discriminatory raises, promotions, or any other actions affecting pay." *Id.* Taylor is correct here, and the author has read no news accounts or commentary to the contrary. Taylor appropriately calls the new bill "an overreach" to the Court's *Ledbetter* decision, where "Congress chose to shift the balance dramatically against employers by effectively eliminating time limits for filing all manner of discrimination claims that have some impact on pay." *Id.*

[225] *Ledbetter*, 550 U.S. at 621.

A. Recommendations to Employees

Legitimate victims of discrimination may and should pursue claims against their employers through the EEOC. *Ledbetter's* only limitation, time, serves their interests and those of their employers because everyone's memory can fade with time, and both the employee and the employer stand a better chance of presenting their best case when an action is brought as soon as possible. Further, employees should acquaint themselves with the policies and procedures of the Equal Employment Opportunity Commission. There is no better place to inform oneself about the protections against workplace discrimination than the agency charged with preventing and addressing claims of employment discrimination.

Lastly, employees who believe they are victims of employment discrimination should not wait until they have absolute proof beyond any reasonable doubt. In short, an employee who believes he has been the victim of discrimination should first attempt to resolve the situation within the workplace authority structure. Employees unsatisfied with an internal resolution to an alleged act of discrimination should contact the EEOC immediately. The EEOC, not the employee, is in the best position to evaluate whether the employee has a legitimate claim. Further, EEOC staff is better equipped to address the procedural hurdles that await any potential claimant.

B. Recommendations to Employers

Given that employees may now sue within 180 days of receiving a paycheck they believe is discriminatory, or within 180 days of any action that may have negatively impacted their paycheck, employers can lessen the likelihood of incurring liability by taking the following steps: Ensuring that their evaluation procedures are free from any taint of discrimination by carefully screening and evaluating those employees charged with conducting evaluations; emphasizing that any raises, promotions, demerits or layoffs are strictly the result of performance evaluations; conscientiously staying abreast of EEOC regulations and procedures; and taking extra precautions to ensure that employee salary figures remain confidential.[226] Further, employers should work to cultivate an environment that encourages the airing of grievances in a prompt and confidential manner.

VIII. CONCLUSION

In conclusion, *Ledbetter* is worthy of study for many reasons. First, the opinion illustrates how the legal complexities of a complicated case can often be overshadowed by the human drama involved. The legal issues involved are not as

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[226] The facts of *Ledbetter* may not provide much reassurance to employers, even in spite of the ruling. As the Eleventh Circuit and news accounts referenced, Ledbetter only found out about the disparity in her pay as compared to similarly employed male workers because a coworker left an anonymous note for her, detailing other salaries. CNN.com, *Day of Vindication for Grandma as Pay Law Signed*, http://www.cnn.com/2009/POLITICS/01/29/obama.fair.pay/ (last visited Mar. 8, 2009). Just how an employer may prevent this kind of disclosure is beyond the conjecture of this author.

easily identifiable or as seemingly contentious as some debates, such as whether the Constitution provides the right to an abortion, but the story of Lilly Ledbetter was not complicated, and her tale of unequal pay for equal work was captivating. Proof of this is found in the reporting of the case, the fact that one presidential candidate incorporated Ledbetter's story on the campaign trail, and the fact that the Lilly Ledbetter Act was the first piece of legislation President Obama signed.[227]

Second, the case illustrates the continuing ideological divide on the Supreme Court. The majority opinion, supported by the four reliable conservatives and the one swing Justice, Justice Kennedy, seems to focus on the statute, the applicable case law, and its implications. Ledbetter's story seems to be lost in the majority's dissection of the arguments. Indeed, after watching the oral argument, Ledbetter commented to one reporter that it seemed that once the argument began, it ceased to be about her at all.[228] As one journalist pointed out, the only time Ledbetter's name was mentioned throughout the entire oral argument was when the Chief Justice announced the case.[229]

If the majority opinion was indifferent to the plight of Lilly Ledbetter, the dissent more than compensated for this. Writing for the Court's reliably liberal contingent, Justice Ginsburg heavily stressed that Ledbetter was one of the only females employed at the tire plant, that she earned less than similarly positioned male counterparts, that her working environment was infused with sex discrimination, and that the decisions not to award her raises were the result of sex discrimination, not poor performance.[230] This does not suggest that the Court's conservatives do not care about the stories of the people who appear before them, but rather that in this case at least, the conservative majority was more concerned about faithfully applying the statute than speculating about the impact that application could have on Ledbetter and other plaintiffs. Similarly, this recognition of differences in attention does not suggest that the Court's liberal members care only about the human outcome. But it does suggest which components of the claim the Court's divided sides found more worthy of attention.

Third, while the *Ledbetter* decision is compelling on its own merits, it

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[227] *See supra* note 223 and accompanying text. Posting of David Swanson to Democrats.com blog, http://www.democrats.com/node/13335 (June 20, 2007, 19:52pm); Patrick Healy, *Clinton Find Subtle Ways to Cast Herself As A Trailblazer*, N.Y. TIMES, June 11, 2007, *available at* http://www.nytimes.com/2007/06/11/us/politics/11web-healy.html (last visited Feb. 3, 2008) ("Mrs. Clinton herself then told the story of Lilly M. Ledbetter, the lone female supervisor at a tire plant in Alabama, who lost a landmark pay discrimination suit before the United States Supreme Court on May 29.").

[228] Robert Barnes, *A Hearing Without Being Heard*, WASH. POST, Feb. 20, 2007, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900762.html?nav=emailpage (last visited Mar. 26, 2009). As Mr. Barnes recounts in his article, Justice Scalia once said, in response to the question of whether the duty of the Supreme Court is to provide justice for those who come before them or simply to interpret the law, "[] I don't care much about your particular case . . . I am not about to produce a better result in your case at the expense of creating terrible results in a hundred other cases." *Id.* While it is unknown whether Justice Alito would share this particular sentiment's manner of expression, it is clear that a similar desire to produce the correct result animates Justice Alito's approach to deciding the cases before him.

[229] *See* Barnes *supra* note 228, and accompanying text.

[230] *Ledbetter*, 550 U.S. at 643-44.

becomes more noteworthy when considered in the context of the other "business-friendly" cases that the Court has decided since Justices Roberts and Alito joined the Court.[231] Just in the 2006 Term, the Court handed down enough pro-business cases to warrant the title, "the most business-friendly Court in decades."[232] The predictions that Justice O'Connor's departure would produce a more business-friendly Court could not have been more correct.[233]

Lastly, the case highlights the increasingly divided nature of the Supreme Court. After his confirmation, Chief Justice Roberts articulated a vision of a more unified Court that would seek unanimity rather than the spotlight, that would maintain its legitimacy by working together to find common ground rather than lose credibility by issuing ever more divided rulings.[234] While his first term witnessed a significant number of unanimous or near-unanimous rulings, the term that produced *Ledbetter* could not have less harmonious: more key decisions were decided by a vote of 5-4 than 8-1 or 9-0, the greatest indication of a Court not speaking with one voice.[235] Has Chief Justice Roberts failed in his mission to lead a more united Supreme Court? While it is probably too early to be drawing any definitive conclusions, if *Ledbetter* is any indication, then Chief Justice Roberts surely has his work cut out for him.

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[231] Greg Stohr, *Alito Champions Business Causes In First Full High-Court Term*, Bloomberg.com, http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=a8MaW0PF9zK4 (last visited Mar. 26, 2009). This article points out that in his first full term on the bench, Justice Alito sided with the U.S. Chamber of Commerce, the largest business lobby, in thirteen of fourteen cases, and was on the "pro-business" side "every time." *Id.* Even going beyond Justice Roberts, Justice Alito was the most consistent supporter of business interests in his opinions and votes. *Id.* The article noted that a common theme of the "pro-business" decisions was a reticence to allow cases to go before juries. *Id.*

[232] Stohr, *supra* note 231.

[233] Lorraine Woellert, *Why Big Business Likes Alito*, BUSINESS WEEK, Nov. 1, 2005, http://www.businessweek.com/bwdaily/dnflash/nov2005/nf20051111_5289_db016.htm (last visited Feb. 3, 2008); Greg Stohr & Laurie Asseo, *U.S. Supreme Court Nominee Alito Is Perceived As Ally for Business*, INTERNATIONAL HERALD TRIBUNE, Nov. 3, 2005, *available at* http://www.iht.com/articles/2005/11/03/business/courtbiz.php (last visited Mar. 26, 2009).

[234] Jeffrey Rosen, *Robert's Rules*, THE ATLANTIC MONTHLY, Jan./Feb. 2007, *available at* http://www.theatlantic.com/doc/200701/john-roberts (last visited Mar.. 26, 2009).

[235] Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf (June 28, 2007, 17:20 pm EST) (last visited Feb. 3, 2008).