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by Gregory DeFreit s nd Bh s ti eng pt

Latest Trends in Key Labor Market Indicators
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Briefly, the Supreme Court opted for the first approach: According to the majority opinion, the plaintiff has 180 days after the pay decision that sets the discriminatory wage to file her charge with the EEOC in compliance with Title VII's statute of limitations. The majority declined to consider whether a discovery rule might be used to extend the statute of limitations for discrimination that is unknown to the employee and flatly rejected the paycheck accrual rule.

This ruling turned primarily on the Court's interpretation of its own precedent, a 2002 ruling in *N tion R i ro d P ssenger Corpor tion A tr Morg n*.[5] There, it had held that "discrete" acts of discrimination must be challenged within 180 days of their occurrence. In so ruling, the Court rejected the so-called "continuing violations" doctrine, under which some lower federal courts had permitted plaintiffs to challenge a series of related acts of discrimination together, as long as at least one had occurred within the 180 days prior the filing of an EEOC charge.

In *Morg n*, the Court carved out an exception for "hostile environment" harassment since, by its very nature, such a claim accrues over time and through the aggregation of multiple incidents of misconduct that together create the hostile environment. For such claims, a plaintiff can challenge harassment as long as at least one of the acts that together created the hostile environment occurred within the 180-day charge-filing period.

Thus, the issue in *Ledbetter* was whether pay discrimination claims should be treated like a discriminatory firing, where the clock starts ticking immediately, or like hostile environment claims, where the clock starts ticking anew with each incident. In an opinion written by Justice Samuel Alito, the *Ledbetter* majority ruled that the "discrete" act rule applies to pay discrimination claims, departing from the longstanding position of the EEOC, the agency charged with enforcing Title VII.

The Court's rejection of Ledbetter's claim turned on two basic conclusions: First, the Court ruled that under *Morg n*, a discriminatory pay decision is a discrete act that triggers the statute of limitations. Second, it ruled that a paycheck containing a discriminatory amount of money is not a present violation, but, instead, is merely the present *effect* of a prior act of discrimination. "[C]urrent effects alone cannot breathe life into prior, charged discrimination," the Court wrote, "such effects have no present legal consequences."[6]

To reach the second conclusion, the Court relied on *nited Air Lines E ns*, in which it had dismissed the discrimination claim of a flight attendant who had been wrongfully terminated and then rehired -- without seniority -- years later.[7] The Court refused to permit her to challenge the loss of seniority, since it held that that was just an "effect" of the prior, uncharged wrongful termination. The Court also relied on *De re t te Co ege Ric s*,[8] in which a librarian who had been denied tenure, allegedly on the basis of race, was not permitted to sue within 180 days of his termination, since the notice of the tenure denial had been communicated to him a year earlier. Again, the Court held that the s(s)-1((s)-1,)Tj R13[ofulhe sination. lih a (e)4(a)

Ledbetter's Inhibition of Rights-Claiming for Pay Discrimination Victims

In order to prevail on a pay discrimination claim after *Ledbetter*, a victim must quickly perceive that she has suffered discrimination and promptly report it. But that is a rare occurrence rather than the usual case. *Ledbetter*'s insistence that discriminatory pay decisions be challenged within 180 days is blind to the difficulties employees face in perceiving and challenging pay discrimination.

Obst c es to Percei ing Discri in tion

There are many obstacles to victims' perceiving discrimination in the workplace.[11] For example, there is a well-documented "minimization bias" that leads targets to resist perceiving and acknowledging discrimination even in the face of conduct that objectively qualifies as discrimination.[12] Researchers have also shown that victims tend to downplay the likelihood of discrimination and attribute negative outcomes to other causes when discrimination is less obvious.[13] In addition, social psychologists have shown that women, and members of

a male colleague, while leaving her pay unchanged for a discriminatory reason. And without access to full information about all of their colleagues' salaries and the underlying reasons (whether legitimate or discriminatory) for the pay differences among them, it is next to impossible for an employee to accurately perceive individual instances of pay discrimination.[21]

The burden that *Ledbetter* places on new employees to quickly perceive pay discrimination is particularly acute. The kind of informal connections through which employees learn the salaries of their peers do not exist for new employees. New employees are not likely to learn about pay discrimination until much later, after the offending pay decisions have long been in place.

Obstacles to Challenging Discrimination

Perceiving bias in pay before the limitations period expires is only half the problem. Even if an employee fortuitously learns that a recent pay decision was tainted before the 180 days elapse, there are significant obstacles to challenging discrimination that is accurately perceived. Research shows that employees rarely challenge discrimination, even when it is obvious.[22] Even in the harassment context, for example, where the discrimination tends to be relatively blatant, filing a complaint is a last resort, after other strategies have failed.[23]

The high risk of retaliation and the social costs imposed on people who complain about discrimination sharply discourage women from reporting it to authorities or legal institutions.[26] The fear of retaliation is the primary reason why people choose not to challenge discrimination.[27] Although it is impossible to know exactly how

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found offensive. She was subsequently assigned to less desirable job duties and relieved of her supervisory responsibilities – as a result, she alleged, of her speaking out.

Title VII outlaws not only discrimination, but retaliation done to punish those who speak out about it. Yet the Supreme Court rejected Breeden's retaliation claim on the ground tha

Although the gender wage gap today is narrower than the 1970s measure of fifty-nine cents on the dollar, the bulk of the change occurred during the 1980s, and studies show little additional progress since 1990.[36] Moreover, the disparity in men's and women's wages extends, with some variation, throughout the employment lifecycle. Women in their 40s and 50s earn salaries more disparate from their male counterparts than do women at the beginning of their careers.[37] When earnings over a longer period of time are aggregated, the gap is even starker. In their prime earning years, women earn only 38 percent of what men earn over a 15-year period.[38]

Discrimination accounts for a significant part of the wage gap. Although there are plausible nondiscriminatory reasons for pay differences between men and women, none of them, even in the aggregate, explains the entire gap.[39] For example, part of the wage gap is sometimes attributed to differing degrees of labor force attachment between men and women. Yet, women who work year-round and full-time during at least 12 of 15 consecutive years earn only 64 percent of what men with a similar attachment to the labor force earn.[40]

Differences in the number of hours worked also fail to explain the gender disparity in wages. Hour-for-hour, women earn less than men.

With *Ledbetter*, current law provides inadequate protection against pay discrimination, particularly given the difficulties individual victims have in perceiving and challenging discrimination.

Protection nder the Eq P y Act

Some pay discrimination victims will find supplementary protection in the federal Equal Pay Act of 1963, which follows the paycheck accrual rule, and may thereby enable them to avoid *Ledbetter*'s harsh statute of limitations.[48] The Equal Pay Act requires employers to pay men and women equally if they do substantially similar work, with possible defenses for pay disparities resulting from merit-based systems, seniority systems, or a factor other than sex. A plaintiff may challenge an ongoing violation of the Equal Pay Act at any time, and may seek recovery for the prior two years of discrimination (or three years, if the violation is "willful").

The existence of the Equal Pay Act as an alternative statutory remedy for sex discrimination in pay does not, however, solve the problems created by the *Ledbetter* ruling. First, much pay discrimination that violates Title VII is not covered under the Equal Pay Act. The Equal Pay Act is limited to cases where the plaintiff can point to a comparator of the opposite sex who does the same work in the same job for more money. Title VII, in contrast, reaches all claims of intentional pay discrimination, regardless of whether there is an opposite-sex comparator who earns more. For example, a woman who holds a unique job in a workplace, or simply a job that is not the equivalent of any job performed in that workplace by a higher-earning man, will have no hope of prevailing under the Equal Pay Act, even if can clearly be proven that the employer paid her less because of her sex.

Second, the Equal Pay Act does not fully remedy even that pay discrimination that it does cover. Unlike Title VII, the Equal Pay Act does not permit compensatory or punitive damages. It is limited to back pay and, in certain cases, fixed and limited liquidated damages. The limited relief under the Equal Pay Act is wholly insufficient to create significant incentives on employers, especially large employers such as Goodyear, to prevent pay discrimination in the workplace, or to provide full remedies to the victims of pay discrimination.

The unfortunate consequence of the Court's ruling in *Ledbetter* is to effectively nullify Title VII's broader reach by imposing a harsh and unrealistic filing deadline, leaving women only the protection of the narrower Equal Pay Act. This is an odd result, given that Title VII was passed after the Equal Pay Act and was intended to <u>broaden</u> pre-existing federal legal protection from sex discrimination. Moreover, the consequences are even harsher for victims of pay discrimination on bases other than sex: They are not protected by the Equal Pay Act at all. Victims of race-based pay discrimination, for example, will have no recourse if their claims are more than 180-days old. Women of color, in particular, who already have difficulty sorting out the "race" from the "gender" components of bias in court cases, will have a particularly tough road to navigate. This seems especially unfair, as women who may be suffering two types of pay discrimination that converge, may end up having no viable case at all.

Disco ery R es nd Eq it b e o ing

The majority in *Ledbetter* held that the limitations period begins to run when the "discriminatory pay decision was made and communicated," but it failed to provide clarification about what kind of information suffices to put an employee on notice that such a decision has been made. Is it enough for the employer to simply specify the employee's new pay level? Perhaps, more charitably, the majority meant that the time period starts running once the employee learns that she will receive an amount that is less than some of her male comparators who perform similar work? Or that she will receive a specified percentage raise that is less than the raises received

by others? The Court's refusal to address such questions suggests its lack of concern for the plight created for employees under this new rule.

The harshness of *Ledbetter* is exacerbated by the Court's express refusal to consider whether a "discovery rule" applies to Title VII claims. (Such a rule, if adopted, operates to delay the statute of limitations until a plaintiff has "discovered" her injury.) The Court dismissed as "policy arguments" the concerns raised by the dissent about the hardship for employees who do not learn about pay disparities until it is too late to file a charge. The Court's silence invites lower courts to design their own approach to handling delayed claims.

In prior rulings, lower federal courts have split over the existence and scope of a discovery rule under Title VII or other federal anti-discrimination laws. The Fourth Circuit, for example, refused to apply a discovery rule to toll the statute of limitations in in *i ton st o rce B n* ,[49] a case alleging wrongful discharge under the Age Discrimination in Employment Act. In *i ton*, the plaintiff learned during the discovery process for his age discrimination lawsuit that he was paid less than younger employees in the same position. Based on this information, he filed a new complaint for pay discrimination, also under the ADEA, seventeen months after he had been discharged by the employer. The plaintiff specifically requested that the court apply a discovery rule to his pay discrimination claim, but the Fourth Circuit found the claim time-barred because "the 180-day period for filing claims begins to run from the time of an alleged discriminatory act."[50]

Other federal appellate courts have acknowledged the existence of a discovery rule in the context of federal anti-discrimination laws, but have construed it narrowly. The Seventh Circuit's ruling in *C d B ter e thc re Corp* is a good example.[51] The plaintiff in that case brought an age discrimination suit against his employer when, after telling a manager at the company that he would not be retiring, he was told he would be terminated. The plaintiff did not believe the manager had the authority to fire him, but the termination was reaffirmed by his direct supervisor in a meeting a few weeks later. His suit was filed within the limitations period[52] of the meeting with his actual supervisor, but not of the conversation with the manager who first promised to fire him. The Seventh Circuit in *C d* recognized the existence of a discovery rule, but declined to apply it since it believed the date of accrual was the day the plaintiff was first informed he would be fired.

Application of a discovery rule in the pay discrimination context is likely to be particularly unhelpful. A court would likely start the limitations period running from the time the employee learned that a male comparator earned a higher salary,[53] even if the employee had no reason to suspect that discrimination has occurred.[54] Such an approach would not solve the problems with perceiving discrimination. Even if an employee fortuitously learns of a male colleague's salary, this information is unlikely to be accompanied by an explanation from the

The absence of a meaningful discovery rule and fair equitable tolling rules makes plaintiffs' compliance with *Ledbetter* all the more difficult, yet adoption of such rules will not solve the problem. At best, these are stop-gap measures that can help avoid injustice in rare situations. Even a broad discovery rule would not appreciably ease the burdens on employees to quickly perceive and challenge discrimination. Rather than hope for the best in the lower courts, Congress should step in to overturn the *Ledbetter* ruling.

At the root of the problem for rights-claiming under Title VII is the statute's unusually short statute of limitations. Under current law, a victim of employment discrimination must file a charge with the EEOC within 180 days "after the unlawful employment practice occurred."[59]

When Title VII was first enacted in 1964, the statute of limitations was a mere 90 days, a provision meriting little discussion beyond the occasional reference to the problem of stale claims.[60] Congress extended the limitations period to 180 days in 1972 to bring it into line with the National Labor Relations Act, the federal law that regulates unions.[61] Although Title VII's statute of limitations is 2-3 years shorter than the applicable period for most civil lawsuits, no serious effort was made to extend it again until 1990.

A proposed Civil Rights Act of 1990, a bill that was ultimately vetoed, included a provision extending the statute of limitations to two years. The proposed extension was inte

[59] 42 U.S.C. § 2000e-2(a)(1) (2000).
[60] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (1964); *see* 110 CONG. REC. 7243, at 12723 (1964) (statement of Sen. Case).
[61] Equal Employment Opportunity Act of 1972, Pub L. No. 92-261, sec. 4(a), § 706(e), 86 Stat. 103, 105 (1972).
[62] H. R. REP. NO. 101-644(I), at 25-26, 45-46 (1990).
[63] H. R. REP. NO. 102-40(I), at 63-64 (1991), *s reprinted in* 1991 U.S.C.C.A.N. 549, 601-02.
[64] *ee* 137 CONG. REC. H3922-05, H3922 (1991) (statement of Rep. Stenholm).

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