COMMENTS

Fait Accompli?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override under the Lilly Ledbetter Fair Pay Act

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I. INTRODUCTION

Barack Obama's 2008 presidential campaign promise of change quickly materialized. Emblematic of this change, on January 29, 2009, President Obama signed his first major piece of legislation, the Lilly Ledbetter Fair Pay Act.[1]

The Act directly answers the employment-discrimination case *Ledbetter v. Goodyear Tire & Rubber Co.*[2] In a 5–4 decision authored by Justice Samuel Alito, the Supreme Court held that employers cannot be sued under Title VII of the Civil Rights Act over gender-based or race-based pay discrimination if the claims are based on decisions made by the employer 180 days or more prior to filing.[3] Relying in part on its holding in *National Railroad Passenger Corp. v. Morgan*, the Supreme Court held that a new statute of limitations was not triggered with each individual paycheck a claimant receives after the initial limitations period has lapsed.[4] Since Lilly Ledbetter did not file timely Equal Em-

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1. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

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

3. *Id*.

4. *Id.* at 636 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)) ("The existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves *timely filed*.") (emphasis added). Equitable doctrines may limit or toll the time period in which employees must file the charge, and courts

ployment Opportunity Commission (EEOC) charges regarding her employer's discriminatory pay decisions in the past,[5] Ledbetter's claim was not cognizable.[6]

Title VII of the Civil Rights Act requires a plaintiff to file a discrimination charge against an employer within 180 days[7] "after the alleged unlawful employment practice occurred."[8] The Lilly Ledbetter Fair Pay Act addresses the particular application of Title VII's charge-filing requirement.[9] Stating that "unlawful employment practice occurs, with respect to discrimination in compensation . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a [discriminatory] decision," the Act's charge-filing period begins anew regardless of when the employee's compensation was initially set at a discriminatory rate.[10] Consequently, virtually every time individuals realize their employer's decision to pay them less, the charge-filing period begins to run.[11]

The Act repudiates what Justice Ruth Bader Ginsburg referred to as a "cramped" majority reading of Title VII's charge-filing requirement in *Ledbetter*.[12] In doing so, the Act accounts for the problem Ledbetter encountered when bringing her claim—that potential plaintiffs often will

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may consider the entire scope of the hostile work environment claim so long as the act took place during the statutory period.

5. Civil Rights Act of 1964 § 2000e-5(e)(1), 42 U.S.C. § 2000e-5 (2000):

> (1) A charge under this section shall be filed *within one hundred and eighty days* after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved *within three hundred days* after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. (emphasis added).

6. *Ledbetter*, 550 U.S. at 637.

7. Some states, such as Ohio, allow 300 days. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

8. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C.§ 2000e-5(e)(1)).

9. *Id.* (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

10. *Id.* (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

11. Sameena Mohammed, *President Obama Keeps Campaign Promise in Signing Fair Pay Act, Drawing Praise and Criticism*, 14 PUB. INT. L. REP. 147, 148 (2009).

12. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

not discover that their employers are paying them less than other employees until years later.[13] Supporters of the bill, including the EEOC's Acting Chairman, Stuart Ishimaru, noted that "the [A]ct is a victory for . . . all workers across the country who are shortchanged by receiving unequal pay for performing equal work."[14]

While many praise the Lilly Ledbetter Fair Pay Act as "restoring the status quo," others criticize the Act for potentially exposing employers to a great deal of legal liability.[15] Some commentators deem the Act a "trial lawyer giveaway," an "economic stimulus" for trial attorneys.[16] In addition, the U.S. Chamber of Commerce expressed concern about the increase in litigation that could result from the Act.[17]

But such criticisms are misguided. The Act does not change the requirements of a valid Title VII claim beyond the terms of the claim-filing period.[18] Plaintiffs must still overcome the difficulties inherent in obtaining the proof necessary to make a sufficient discrimination claim under Title VII.[19] In practice, since plaintiffs still carry the burden of proving a discrimination claim, the Act will not alter the landscape of employment-discrimination litigation even if more claims arise as a result of the amendments to Title VII.

The Lilly Ledbetter Fair Pay Act has many possible implications. The central claim of this Comment is that, while the congressional action passing the Act was correct, the terms of the Act must be narrowly construed to avoid further restrictive legislative action on Title VII claims.[20] In other words, this Comment recommends that the Lilly Ledbetter Fair

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13. Mohammed, *supra* note 11.

14. *Id.* (quoting *Supporters Cheer, Critics Brace for Litigation as Obama Signs Ledbetter Measure into Law*, Bureau of National Affairs, 18 DAILY LAB. REP., Jan. 30, 2009, at A-1) [hereinafter *Supporters Cheer*].

15. Mohammed, *supra* note 11, at 149.

16. Congressional Documents, *Democrats Lock Down House Floor, Send Trial Lawyer Giveaway to President Without Serious Debate*, Jan. 27, 2009, 2009 WLNR 1630289; Derrick Cain, *Ledbetter*, *Paycheck Fairness Measures Win House Approval*, 60 HUMAN RES. REP. (BNA), Jan. 13, 2009, at 2.

17. Mohammed, *supra* note 11, at 149 (citing *Supporters Cheer*, *supra* note 14).

18. The Act amends Title VII by adding:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, 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.

Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

19. *Id.*

20. *Id.* (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

Pay Act should be restricted to current payment schemes to prevent a flood of claims unwarranted by Congress's narrow amendment to Title VII of the Civil Rights Act.

This Comment argues the Lilly Ledbetter Fair Pay Act's consequences will be minimally felt, so long as the Act is narrowly construed. This Comment proceeds in four parts. Part II suggests congressional action was appropriate after the Supreme Court's *Ledbetter* decision and discusses the political and legislative debate leading to the Act. Part III analyzes the Act in application, exploring its meaning, implications, and function. Part IV argues that the concerns and consequences arising from the enactment of the Act can be alleviated and avoided by a narrow interpretation of its amendment to Title VII of the Civil Rights Act. Finally, Part V recommends a narrow interpretation of the Act that will ensure that employment-litigation rates will not drastically increase, will solve the problems posed by current paycheck schemes, and will finally realize fair pay for all Americans.

II. *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.* AND THE AFTERMATH

The signing of the Lilly Ledbetter Fair Pay Act embodies a climactic moment in an ongoing struggle between Congress and the courts to define the meanings of the civil rights statutes in a variety of contexts.[21] Despite the fact that the core issue of the *Ledbetter* case turned on a statute of limitations technicality, the case, nonetheless, captured the nation's attention.[22] Lilly Ledbetter's compelling personal story garnered an outcry of support and effectuated federal legislation.

This Part profiles the events leading up to enactment of the Act. First, I explore Lilly Ledbetter's personal experience during her employment at Goodyear. Second, I follow the progression of Ledbetter's federal court claim, ultimately ending at the Supreme Court's decision. Third, I discuss the political aftermath of the Supreme Court's decision in *Ledbetter* and examine the Act as it was signed into law. Finally, I analyze the employment-litigation landscape immediately prior to the Act's implementation to set the context in which the Act went into effect.

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21. *Id.*

22. *See generally* Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, N.Y. TIMES, May 30, 2007, http://www.nytimes.com/2007/05/30/us/30pay.html?scp=33&sq=lilly%20ledbetter&st=cse; Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, http://query.nytimes.com/gst/fullpage.html?res=9505E4D81430F933A05756C0A9619C8B63&&scp=83&sq=lilly%20ledbetter&st=cse.

A. Lilly Ledbetter

In 1979, Lilly Ledbetter began working as an overnight supervisor[23] at the Goodyear tire production plant in Gadsden, Alabama.[24] Ledbetter worked at Goodyear for the next nineteen years.[25] During the course of Ledbetter's employment at Goodyear, approximately eighty people held the same position, but only a handful were women.[26] Ledbetter found that it was difficult to fit in amongst her predominantly male colleagues.[27] Eventually, Ledbetter complained to the company about how she was treated by her male supervisors.[28] In addition, she filed a complaint with the EEOC.[29] Though her supervisor was reassigned, Ledbetter experienced continued feelings of isolation and patterns of discrimination,[30] as some co-workers refused to talk to her, and she was excluded from important management meetings.[31]

For years, Ledbetter was paid less than male employees working at the same level.[32] In 1997, Ledbetter was the only female manager at the plant but was earning less than the lowest-paid male employee in the department. [33] At the time Ledbetter started working at Goodyear in 1979, all the managers were paid the same amount regardless of gender, so Ledbetter knew she was earning the same amount as the male manag-

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23. Kate Pickert, *2-Minute Bio: Lilly Ledbetter*, TIME, Jan. 29, 2009, http://www.time.com/time/nation/article/0,8599,1874954,00.html.

24. *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear Tire *Employment Discrimination Decision: Hearing Before the Committee on Education and Labor of the United States House of Representatives on Amendment of Title VII*, 110th Cong. 10 (2007) (statement of Lilly Ledbetter) [hereinafter *Testimony*].

25. *Id.* at 11.

26. *Id.*

27. Ledbetter described her experience with male colleagues at Goodyear:

> The plant manager flat out said that women shouldn't be working in a tire factory because women just made trouble. One of my supervisors asked me to go down to a local hotel with him and promised if I did, I would get good evaluations. He said if I didn't, I would get put at the bottom of the list. I didn't say anything at first because I wanted to try to work it out and fit in without making waves.

Id.

28. Ledbetter testified before Congress that she suffered sexual harassment and day-to-day discrimination. Pickert, *supra* note 23.

29. According to Ledbetter:

> The manager I complained to refused to do anything to protect me and instead told me I was just being a troublemaker. So I complained to the EEOC . . . but after that, the company treated me badly. They tried to isolate me. People refused to talk to me . . . . So I got a taste of what happens when you try to complain about discrimination.

Testimony, *supra* note 24, at 11.

30. Pickert, *supra* note 23.

31. *Testimony*, *supra* note 24, at 11.

32. *Id.* at 11–12.

33. Linda Greenhouse, *Court Explores Complexities in Job Discrimination Case,* N.Y. TIMES, Nov. 28, 2006, http://www.nytimes.com/2006/11/28/washington/28scotus.html?fta=y.

ers.[34] But things changed when Goodyear switched to a new performance-based pay system.[35] The new pay system meant that people doing the same jobs could get paid differently, and the company kept all compensation information confidential.[36]

Over the course of the next several years, Ledbetter's pay rate changed.[37] After some time, Ledbetter suspected she was not earning as much as male employees.[38] Hearing rumors that some men were being paid as much as $20,000 a year for overtime work, Ledbetter volunteered for the same amount of overtime as those men.[39] When Ledbetter did not receive anything near that $20,000 range in overtime pay, she "figured their salaries must be higher than [hers], but [she] didn't have any proof—just rumors."[40]

Eventually, Ledbetter obtained the proof she needed. One of Ledbetter's managers "told [Ledbetter] that [she] was in fact, getting paid less than the mandatory minimum salary put out in the Goodyear rules."[41] Viewed annually, Ledbetter earned anywhere from 15–40% less than her male counterparts, and "this pay gap, which resulted from receiving smaller raises than the men, 'added and multiplied' over the years."[42] According to Ledbetter, conclusive evidence of the pay disparities between Ledbetter and her male counterparts arrived "when someone anonymously left a piece of paper in [her] mailbox at work, showing what [she] got paid and what three other male managers were getting paid."[43]

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34. *Testimony*, *supra* note 24, at 11.

35. *Id.*

36. *Id.*

37. Ledbetter stated:

> Over the following years, sometimes I got raises, sometimes I didn't. Some of the raises seemed pretty good, percentage-wise, but I didn't know if they were as good as the raises other people were getting . . . . I worked hard and did a good job. I got a "Top Performance Award" in 1996.

Id.

38. *Id.*

39. *Id*.

40. *Testimony*, *supra* note 24, at 11.

41. Ledbetter stated:

> So I started asking my supervisors to raise my pay to get me up to Goodyear's mandatory minimum salary levels. And after that, I got some good raises percentage-wise, but it turned out that even then, those raises were smaller in dollar amounts than what Goodyear was giving to the men, even to the men who were not performing as well as I was.

Id. at 11–12.

42. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 539 (2009) (citing *Testimony*, *supra* note 24, at 10).

43. *Testimony*, *supra* note 24, at 12.

Shortly after receiving this information, Ledbetter filed another complaint of discrimination with the EEOC in 1998.[44] Ledbetter, now nearly seventy years old, filed her EEOC complaint after she was transferred from her management job to a job requiring her to lift eighty-pound tires for an entire shift.[45] From Ledbetter's perspective, this was retribution for filing her complaints.[46] After the EEOC complaint was filed, Ledbetter received another anonymous package[47] showing again what other male managers were being paid in comparison to her.[48] Subsequently, Ledbetter filed a lawsuit against Goodyear and through discovery was finally able to get a complete picture of her pay compared to her male colleagues.[49] The lawsuit drew national attention to Ledbetter's story and inspired heated debates evaluating how employment-discrimination cases were handled by courts in the present, and how they should be handled in the future.

B. Ledbetter v. Goodyear Tire & Rubber Co.

Filing a claim in federal court, Ledbetter won a jury award of over $3 million in back pay and compensatory damages.[50] Specifically, the jury found that Ledbetter had lost approximately $224,400 in salary over time, and even more since her lower paychecks were used to calculate her pension and social security benefits.[51] The jury found it was "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex."[52] At trial, Goodyear admitted that Ledbetter was being paid less than men doing the same work.[53] But Goodyear claimed that the difference arose because of Ledbetter's poor performance.[54] To rebut Goodyear's justification, other female managers testified and explained that they were also discriminated against.[55] One female manager, who

44. *Id.*

45. *Id.*

46. Pickert, *supra* note 23.

47. *Testimony*, *supra* note 24, at 12.

48. According to the information Ledbetter received, she was making $3,727 per month, compared to men doing the very same job who were paid $4,286 to $5,236 per month. Pickert, *supra* note 23.

49. *Testimony*, *supra* note 24, at 12.

50. *Id.*

51. *Barriers to Justice: Examining Equal Pay for Equal Work: Hearing Before the Committee on the Judiciary of the United State Senate*, 110 Cong. (Sept. 23, 2008) (statement of Lilly Ledbetter).

52. Guinier, *supra* note 42, at 540 (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting) (quoting Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005))).

53. *Ledbetter*, 421 F.3d 1169, 1173–74.

54. *Id.*; *see also Testimony*, *supra* note 24, at 11–12.

55. *Id.* at 12.

was promoted from a secretary position, was only paid a secretary's salary.[56] The trial court judge agreed that the jury's decision was supported by ample evidence, but reduced the punitive and mental anguish award to the $300,000 statutory cap under Title VII.[57] Goodyear appealed the verdict.[58]

The Eleventh Circuit Court of Appeals heard the case and overturned the verdict in its entirety.[59] The court of appeals held that Ledbetter failed to present a viable claim because she could not show intentional discrimination in the 180-day period before she complained to the EEOC.[60] The Supreme Court granted certiorari to resolve a circuit-court split[61] on the statute of limitations issue for Title VII pay-discrimination

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56. *Testimony*, *supra* note 24, at 12.

57. *Id.*; *Ledbetter*, 421 F.3d at 1176. Ledbetter's $3 million jury award was capped at $300,000 by a statute regulating punitive and compensatory damages in Title VII actions against employers with 500 or more employees. *See* 42 U.S.C. § 1981a(b)(3)(D) (limiting compensatory damages awarded under Title VII to $300,000 "in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year . . . .").

58. *Ledbetter*, 421 F.3d 1169.

59. *Id.*

60. *Id.* at 1182–84. Because Goodyear had a periodic employee review system in place, the court held:

> We think, therefore, that at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, 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.

Id. at 1182–84.

Thus, Ledbetter's limitations period began at the last affirmative decision setting her pay rate and not at each paycheck that followed.

61. Some circuit courts had taken the view that pay discrimination in every paycheck is just part of one continuing discrimination violation. *See, e.g.*, Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 348–49 (4th Cir. 1994) (noting that when the language of other pay-discrimination claims are taken together "[p]aychecks are to be considered continuing violations of the law."); Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 449 (11th Cir. 1993) ("When the claim is one for discriminatory wages, the violation exists for every single day the employee works." Further concluding, "[R]ace based, discriminatory wage payments constitute a continuing violation of Title VII."); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1399 (9th Cir. 1986) ("The policy of paying lower wages to female employees on each payday constitutes a 'continuing violation.'").

Yet, at the time *Ledbetter* was heard, other circuit courts had already adopted the "paycheck accrual rule" that Ledbetter argued for. The Supreme Court's ruling in *Bazemore v. Friday*, a racial-discrimination case, formed the foundation for the "paycheck accrual rule." 478 U.S. 385, 395–96 (1986). Since the Court's ruling in *Bazemore*, several circuit courts have adopted the rule. *See, e.g.*, Wedow v. City of Kansas City, 442 F.3d 661, 671 (8th Cir. 2006) (using the *Bazemore* analysis, which held that, "[e]ach week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation."); Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (noting that "a discriminatory pay schedule is a discrete act, even though it involves repeated conduct," and further holding that "[a]ny paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period. But, a claimant could only recover damages related to those paychecks actually deliclaims.[62] In a 5–4 decision authored by Justice Alito, the Supreme Court held that Ledbetter's claim was untimely because it relied on intentional discriminatory pay decisions that occurred outside of the 180-day charging period under Title VII.[63]

In order for Ledbetter's EEOC claim to be cognizable, two elements had to be met. First, a plaintiff must show an "unlawful employment practice." Included among Title VII's "unlawful employment practices" is compensation discrimination based on one of five protected classes: race, color, religion, sex, or national origin.[64] Second, a plaintiff must show that the unlawful employment practice constitutes disparate treatment or, alternatively, creates a disparate impact.[65] A disparate-treatment claim requires a plaintiff to "provide sufficient evidence to support an inference that the differential treatment resulting from an employment decision was rooted in discriminatory intent."[66] Disparate treatment "is the most easily understood type of discrimination"[67] and arises when "the employer simply treats people less favorably than others because of their race, color, religion, sex, . . . national origin," or other proscribed attribute.[68]

In contrast, an employer's intent is irrelevant under the disparate-impact theory of employment discrimination.[69] A disparate-impact claim arises from "an unjustified exclusion caused by some hiring or other employment device that disproportionately disadvantages a group defined by race, color, religion, sex, age or national origin."[70]

Ledbetter made a disparate-treatment claim under Title VII,[71] alleging an unlawful pay scheme applied with discriminatory intent.[72] Under

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vered during the statute of limitations period." The specific holding in *Forsyth* would be abrogated by the Court's holding in *Ledbetter*.); Shea v. Rice, 409 F.3d 448, 452–53 (D.C. Cir. 2005) (using the *Bazemore* holding, the court held "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the limitations period.").

62. Katie Putnam, Note, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 690 (2009).

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

64. Civil Rights Act of 1964 § 2000e-2, 42 U.S.C. § 2000e-2(a)(1) (2000).

65. *Id.*

66. Putnam, *supra* note 62.

67. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

68. For example, situations where an employer promotes or pays younger employees more than older employees. *See* Shannon v. Pay 'N Save, 709 P.2d 799, 803 (1985).

69. For example, situations where an employer refuses to hire women. *See* 16A Wash. Prac. § 24.4.

70. *Id*. (citing *Shannon*, 709 P.2d at 803).

71. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 618–19 (2007).

72. Putnam, *supra* note 62.

the statute, Ledbetter's claim had to be filed within a 180-day period.[73] Ledbetter conceded that her paychecks were not issued during the single 180-day statute of limitations period.[74] Thus, under the plain language of the statute, the paychecks Ledbetter received after 180 days did not result from intentional discrimination because the statute of limitations had passed. Ledbetter argued, however, that the issuance of each paycheck was still actionable because each paycheck was implemented by a prior discriminatory decision made by Goodyear.[75] As such, each paycheck was tainted by Goodyear's intentionally discriminatory pay decision.[76]

Ledbetter's primary legal argument was based on the "paycheck accrual rule," described in dicta by Justice William Brennan in *Bazemore v. Friday*.[77] *Bazemore* was a racial-discrimination case brought by individual plaintiffs against the North Carolina Agricultural Extension Service based on unfair pay and job selection.[78] Originally, the Service employees in *Bazemore* were segregated into "a white branch" and a "Negro branch," the latter receiving less pay.[79] In 1965, the two branches were merged.[80] When Title VII was extended to public employees in 1972, African-American employees brought a lawsuit against the Service, claiming that the pay disparities originating in the old dual pay scale persisted.[81]

Both the district court and the Fourth Circuit Court of Appeals held that the plaintiffs did not prove the necessary elements of a discrimination claim.[82] The district court made the general proposition that the Service had conducted itself in a nondiscriminatory manner since the merging of the two branches and since it became subject to Title VII.[83] The court of appeals went further, holding that the Service was under no obligation to eliminate any salary disparity between white and African-American employees that originated prior to 1972, when Title VII became applicable to the public employees of the Service.[84] The court of appeals also acknowledged, however, that after the merger of the Ser-

73. *Ledbetter*, 550 U.S. at 623 (citing 42 U.S.C. §2000(e)(1) (2000) ("A charge under this section shall be filed within *one hundred and eighty days after the alleged unlawful employment practice occurred* . . . ." (emphasis added)).

74. *Id*. at 619.

75. *Id.* at 618.

76. Putnam, *supra* note 62, at 691.

77. *Ledbetter*, 550 U.S. at 618; Bazemore v. Friday, 478 U.S. 385, 395–96 (1986).

78. *Bazemore*, 478 U.S. at 385–88.

79. *Id.* at 390–91.

80. *Id.*

81. *Id.* at 391.

82. *Id.* at 385–88.

83. *Id.* at 393.

84. *Id*. at 394.

vice's two branches "[s]ome pre-existing salary disparities continued to linger on," that these disparities continued after Title VII became effective on the Service in 1972, and continued even after the lawsuit was filed.[85] Yet, the court of appeals held that the law does not require that a pre-Civil Rights Act pay disparity that should have been eliminated over time, but has not yet been, be affirmatively eliminated.[86]

The Supreme Court reversed, holding that the Service had a duty to eradicate pay disparities based on race that existed before Title VII was enacted.[87] Justice Brennan, writing for the majority, stated that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[88] Justice Brennan's statement forms the backbone of the "paycheck accrual rule."

In *Ledbetter*, Justice Alito's majority opinion distinguished *Bazemore*, which Ledbetter argued required the Court to treat her claim differently because it related to pay.[89] Stating that the rule was only meant to apply to cases where an employer institutes a pay system that discriminates on its face, Justice Alito rejected Ledbetter's argument for the "paycheck accrual rule."[90] Unlike the pay structure used by the Service in *Bazemore*, Goodyear's salary structure used during Ledbetter's tenure at the company was not a mere continuation of a pre-1965, pre-Title VII, discriminatory pay structure.[91] Thus, the *Bazemore* analysis did not apply to Ledbetter's claim.[92]

To further distinguish the difference between a continued use of a discriminatory base wage and a discrete discriminatory act with continu-

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85. *Id.* (citing Bazemore v. Friday, 751 F.2d 662, 666 (4th Cir. 1984)).

86. *Id*. at 395.

87. *Id*. at 395–96.

88. *Id.*

89. The Supreme Court in *Ledbetter* described the holding of *Bazemore* as:

> [W]hen 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. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 634 (2007).

90. Justice Alito states:

> [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." The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

Id. at 637 (internal citations omitted).

91. *Id.* at 635.

92. *Id.* at 635–36.

ing adverse results from the intentional use of a discriminatory pay system, the majority opinion discussed *National Railroad Passenger Corp. v. Morgan*.[93] *Morgan* defined a discrete act of discrimination as an act which, in itself, "constitutes a separate actionable 'unlawful employment practice'"[94] and that is "temporally distinct."[95] The *Morgan* Court identified examples of such discrete acts as "termination, failure to promote, denial of transfer, or refusal to hire."[96]

Furthermore, the *Morgan* Court distinguished the fact that a hostile work environment claim "'cannot be said to occur on any particular day.' In other words, the actionable wrong is the environment, not the individual acts that, taken together, create the environment." [97] Thus, because Ledbetter alleged a series of discrete discriminatory acts, each of which was "independently identifiable and actionable," under *Morgan* she was required to file a timely EEOC charge for each act of discrimination.[98] Since Ledbetter did not do so, Justice Alito rejected her argument.[99]

Ultimately, the Court held that Ledbetter lost her case because her Equal Pay Act claim had been abandoned after a magistrate judge dismissed it.[100] The Equal Pay Act is not only narrower than Title VII, but also does not require a showing of intent and does not have a statute of limitations.[101] An Equal Pay Act claim requires a plaintiff to show that she was doing equivalent work but receiving less than a male employee.[102] The Court held that Ledbetter's argument was unsound under Title VII because it would "shift [the employer's] intent from one act [that which consummated the discriminatory employment practice] to a later act that was not performed with bias or discriminatory motive."[103]

93. *Id.* at 634–36. In *Morgan*, an African-American former employee brought a lawsuit against a railroad for racial discrimination and retaliation under Title VII. The Supreme Court held that Morgan could only recover for discrete acts of discrimination which occurred within 300 days of the date that he filed his charge with the EEOC or appropriate state agency under Title VII. Morgan could also recover using a hostile work environment theory for acts occurring more than 300 days before the EEOC charge was filed, as long as the acts were part of the same hostile work environment and at least one occurred within the 300 day period. *See* Nat'l R.R. Corp. v. Morgan, 536 U.S. 101 (2002).

94. *Ledbetter*, 550 U.S. at 638 (quoting *Morgan*, 536 U.S. at 114, 117 (internal quotations omitted)).

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

96. *Id.* (quoting *Morgan*, 536 U.S. at 114).

97. *Id*. (quoting *Morgan*, 536 U.S. at 115–16).

98. *Id.*

99. *Id.*

100. *Id.* at 640 n.9.

101. Equal Pay Act of 1964, 29 U.S.C. § 206(d) (2006).

102. *Id.*

103. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 619 (2007).

But the Court held that had Ledbetter pursued her Equal Pay Act claim, "she would not face the Title VII obstacles that she now confronts."[104]

In other words, Ledbetter's failure to strictly follow arguably unclear statutory requirements warranted the Court to refuse her arguments and the entire claim. By focusing more on the totality of the circumstances of her discriminatory treatment, Ledbetter lost what cognizable individual claims she may have had for individual discriminatory acts under an EEOC claim. Had Ledbetter pursued the Equal Pay Act claim that was dismissed at the district court level, she potentially would have been more successful in bringing the totality of her discriminatory treatment forward.

The dissenting opinion in *Ledbetter* took a different approach to Justice Alito's interpretations of both *Bazemore* and *Morgan*.[105] Departing from traditional Court custom, Justice Ginsburg's dissent was read from the bench, "an act that, in her own words, reflects 'more than ordinary disagreement.'"[106] Ginsburg powerfully used personal pronouns in her dissent to speak directly to every hypothetical "you," namely women, in the audience, including her colleagues and every other potential Title VII claimant.[107] Justice Ginsburg stated that "[i]ndeed initially you may not know the men are receiving more for substantially similar work . . . [and] you sue only when the pay disparity becomes steady and large enough to enable [you] to mount a winnable case, you will be cut off at the Court's threshold for suing too late."[108] The fact that Ginsburg read her dissent from the bench essentially raised a red flag over the *Ledbetter* decision, making the headlines of the newspapers and inspiring heated debates in both Congress and the presidential campaign.[109]

C. A Legislative Override: The Signing of the Lilly Ledbetter Fair Pay Act

The Supreme Court's decision in *Ledbetter* quickly became a part of campaign platforms in the subsequent presidential election and in dis-

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104. *Id.* at 640.

105. *Id.* at 645–49 (Ginsburg, J., dissenting).

106. Guinier, *supra* note 42, at 540 (quoting Justice Ruth Bader Ginsburg, The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html).

107. Guinier, *supra* note 42, at 540.

108. *Id.* at n.13; *see also* Lani Guinier, *The Supreme Court, 2007 Term-Forward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40–41 (2008).

109. Linda Greenhouse, *Supreme Court Memo; Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, http://www.nytimes.com/2007/05/31/washington/31scotus.html; Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html.

cussion of what was perceived as a conservative Court.[110] The Court's 5–4 decision was heavily criticized and denigrated by Ledbetter as "siding with big business."[111] Democrats immediately took up legislation to "right the wrong" of the Court's decision.[112] This led to Ledbetter's compelling testimony in the House on the first version of the Lilly Ledbetter Fair Pay Act, the Fair Pay Restoration Act.[113] Then-Senator Obama cosponsored the first version of the Act in January 2008.[114] Ledbetter's testimony echoed Justice Ginsburg's dissent.[115] But when the Fair Pay Restoration Act bill was introduced, President George W. Bush threatened a veto.[116] The bill eventually passed the House but died in the Senate, where Republicans, such as Senator John McCain, publically denounced the bill as "anti-business."[117]

Infuriated by Senator McCain's refusal to vote for a legislative remedy, Ledbetter emerged as a major figure in the subsequent presidential campaign.[118] Having met then-Senator Obama, Ledbetter began campaigning on his behalf.[119] In the 2008 election, then-democratic presidential candidate Obama and future First Lady Michelle Obama[120] fre-

110. Tamara Lytle, *Pay Equity: Are Women Still Being Run Over in the Workplace?*, WASH. LAWYER, Oct. 2009, at 27–28.

111. Guinier, *supra* note 42, at 540; *see also* Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASH. POST, Sept. 5, 2007, http://www.washingtonpost.com/wpdyn/content/article/2007/09/04/AR2007090401900.html; Linda Greenhouse, *supra* note 22; Steven Greenhouse, *supra* note 22; Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, http://www.nytimes.com/2007/05/31/opinion/31thu1.html.

112. Jacqueline Palank, *Democrats Will Try to Counter Ruling on Discrimination Suits,* N.Y. TIMES, July 13, 2007, http://query.nytimes.com/gst/fullpage.html?res=9F02E3D71E3EF930A25754C0A9619C8B63.

113. *Testimony*, *supra* note 24, at 10–13.

114. Mohammed, *supra* note 11, at 147.

115. *Testimony*, *supra* note 24, at 10. Ledbetter testified:

> Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their coworkers how much they are making. Plus, even if you know some people are getting paid a little more than you, which is no reason to suspect discrimination right away. Especially when you work at a place like I did, where you are the only woman in a male dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.

Id. at 10.

116. Mohammed, *supra* note 11, at 148.

117. Guinier, *supra* note 42, at 542.

118. *Id.*

119. Pickert, *supra* note 23.

120. When interviewed, Michelle Obama had kind words for Lilly Ledbetter: "She's [Ledbetter] long since lost her ability to gain any financial return from her Supreme Court loss, but she is out on the road, fighting hard to make sure that our daughters and granddaughters get paid equally for the work that they do. She's a special lady, a working class lady, and a fighter." Michelle Obama, *Larry King Live*, CNN, Oct. 8, 2008, *transcript available at* http://transcripts.cnn.com/TRANSCRIPTS/0810/08/lkl.01.html.

quently referenced Ledbetter during campaign stops and in debates with Republican opponent McCain.[121] At the Democratic National Convention, Ledbetter was a featured speaker.[122] As a presidential candidate, Obama made a campaign promise to see the Lilly Ledbetter Fair Pay Act through into law.[123]

The Act passed Congress on January 28, 2009, with a largely party-line vote.[124] The next day, President Obama fulfilled his campaign promise.[125] With Ledbetter by his side, President Obama signed the Act into law and proclaimed: "[M]aking our economy work means making sure it works for everyone."[126]

By making the claim-filing period start anew each time a claimant receives an unequal paycheck, the Act specifically addresses the Supreme Court's decision in *Ledbetter*, which, according to the Act, "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."[127] The language of the Act amends Title VII in a narrow fashion, codifying the "paycheck accrual rule."[128] The Act also makes an important accommodation to employer interests,[129] however, expressly limiting back-pay recovery to no more than two years prior to the filing of the claim.[130] This limitation prevents the

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121. The Third McCain-Obama Presidential Debate (Oct. 15, 2008), http://www.debates.org/pages/trans2008d.html.

122. Pickert, *supra* note 23.

123. Mohammed, *supra* note 11, at 147.

124. *Id.* at 148.

125. Ledbetter remained at the forefront of the newly elected president's agenda after his victory. Traveling with Obama to Washington, D.C. on a celebratory train trip prior to the inauguration, Ledbetter was in attendance at the various ceremonies and danced with the President at one of the inauguration balls afterwards. Pickert, *supra* note 23.

126. Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html.

127. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). Furthermore, Congress found: "The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress." *Id.* § 2 (codified at 42 U.S.C. § 2000e-5).

128. *Id.* § 3 (codified at 42 U.S.C. § 2000e-5(e)).

129. Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 524 (2010).

130. Section 3 of the Lilly Ledbetter Fair Pay Act states:

> In addition to any relief authorized by [42 U.S.C. § 1981(a), which provides for compensatory and punitive damages], liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment

Act from imposing potentially enormous liability on employers, while allowing a plaintiff to receive compensation that will still reflect the effect of discrimination over the years.[131] Overall, however, the vast majority of a plaintiff's lost wages are unrecoverable since most claims are based on discrimination spanning several decades.[132] While the Act effectively eliminates the 180-day statute of limitations faced by Ledbetter, it also limits the recovery of back pay to two years preceding the filing of the charge.[133]

D. Implementing the Act in the Current Employment-Litigation Landscape

Now, after the enactment of the Lilly Ledbetter Fair Pay Act, a plaintiff must meet several requirements for a discrimination claim to be cognizable under Title VII. First, a plaintiff must present a claim that is cognizable under the laws enforced by the EEOC.[134] More specifically, a claim must allege a basis covered by EEOC statutes.[135] Second, a claim must allege that a plaintiff was subjected to employment discrimination based on membership in one or more of the EEOC's protected categories.[136] Third, the claim must pertain to an issue covered by the EEOC statutes, such as the Equal Pay Act of 1963.[137] Under Title VII, plaintiffs may bring either a disparate-treatment or disparate-impact claim.[138]

A plaintiff filing a disparate-treatment claim almost always bears the burden of persuasion in proving an employer's discriminatory intent

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> practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (2009) (codified at 42 U.S.C. § 2000e-5(e)(3)(B)).

131. Sullivan, *supra* note 129, at 525–26.

132. Lytle, *supra* note 110, at 27.

133. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

134. EEOC, EEOC COMPLIANCE MANUAL § 2 (2009), *available at* http://archive.eeoc.gov/policy/docs/threshold.html#2-I.

135. *Id.*

136. Covered bases include: Title VII: Race/color; national origin; religion; sex (including pregnancy). EPA: Sex (compensation discrimination only). ADEA: Age (40 years or older). ADA: Disability. All Statutes: Retaliation for protected activity; opposition to discrimination; participation in the EEO process. *Id.*

137. Covered issues include: job decisions, employment practices, and other terms, conditions, and privileges of employment; harassment based on a protected basis; reasonable accommodation; referral practices; labor organization practices; practices undertaken by apprenticeships and other training programs; advertising and recruitment; medical inquiries and examinations; maintenance and confidentiality of medical records; limiting, segregating, and classifying; and retaliation and actions likely to deter protected activity. *Id.*

138. Putnam, *supra* note 62, at 690.

under Title VII.[139] In addition, a plaintiff filing under Title VII must first file a precursory charge with the EEOC before filing a lawsuit.[140] If a plaintiff is filing under the Equal Pay Act, however, he or she does not have to file a charge with the EEOC first.[141] This EEOC requirement does not apply to Equal Pay Act claims because the language of the Act does not require a plaintiff to file an EEOC charge before filing a private law suit.[142] Since most Equal Pay Act claims will also raise Title VII sex discrimination issues, however, plaintiffs are encouraged to file a charge with the EEOC to prevent their claim from being precluded by time limits.[143]

In 2008, before the Lilly Ledbetter Fair Pay Act went into effect, in terms of litigation, the EEOC filed only 325 lawsuits.[144] It is important to understand the following statistics in order to consider the possible implications of the Act. In 2008, 95,402 discrimination charges were filed with the EEOC, an increase of nearly 13,000 from 2007.[145] Sex-based claims totaled 29.7% of these charges—28,372—and only 954—roughly 1%—arose from the Equal Pay Act.[146] Claims arising from Title VII alone totaled 30%—28,698.[147] None of the lawsuits filed by the EEOC included an Equal Pay Act claim, as Ledbetter's suit did.[148] This indicates several things. First, out of all the EEOC discrimination claims filed in a year, typically less than 1% actually move forward to the litigation stage. Second, this indicates that an even smaller percentage actually make it into the courtroom. Last, the fact that not a single Equal Pay Act claim moved forward to litigation indicates just how rare it is for pay-discrimination claims to make it to the courtroom in the first place.

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139. *Id.* at 691. Under the Equal Pay Act, however, a plaintiff bringing a claim does not have to prove discriminatory intent. 29 U.S.C. § 206(d)(1) (2006). Under the EPA, a "plaintiff must prove that two workers of opposite sex (1) in the same establishment are (2) receiving unequal pay (3) on the basis of sex (4) for work that is equal." MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 574 (6th ed. 2003).

140. *Time Limits for Filing a Charge*, EEOC, http://www.eeoc.gov/employees/timeliness.cfm (last visited Aug. 26, 2010).

141. *Id.*

142. Equal Pay Act of 1964, 29 U.S.C. § 206(d) (2006).

143. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, EEOC, http://www.eeoc.gov/facts/qanda.html (last modified Nov. 21, 2009).

144. EEOC, LITIGATION STATISTICS FOR FISCAL YEAR 1997 THROUGH FISCAL YEAR 2008 (2009), http://archive.eeoc.gov/stats/litigation.html.

145. EEOC, CHARGE STATISTICS FOR FISCAL YEAR 1997 THROUGH FISCAL YEAR 2008 (2009), http://archive.eeoc.gov/stats/charges.html.

146. *Id.*

147. *Id.*

148. *Id.* Although, Ledbetter's Equal Pay Act claim failed very early on in her case. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 638 (2007).

Generally, federal courts[149] disfavor employment-discrimination plaintiffs.[150] As a whole, employment-discrimination claims end less favorably for plaintiffs than any other type of claim.[151] As a result, plaintiffs are filing fewer suits.[152] Yet, the number of EEOC charges has remained constant, indicating, according to Stewart J. Schwab, that the drop in lawsuits has not been caused by less discrimination.[153]

Between 1979 and 2006, plaintiffs won just 15% of employment-discrimination cases, compared with 51% of other types of suits.[154] Some suggest this is due to hurdles that employment-discrimination plaintiffs are forced to overcome.[155] The statistics are even bleaker at the appellate level. Defendants, often companies, win 41% of employment-discrimination cases on appeal that they lost at the lower level.[156] Plaintiffs, on the other hand, win only 9% of employment-discrimination cases that they previously lost.[157] This disparity is much wider than for non-employment-discrimination cases.[158]

But plaintiffs should not be dissuaded from either filing a charge with the EEOC or filing a private lawsuit based on the current statistics. A strategy exists for the EEOC when filing a lawsuit. The EEOC has become better at prioritizing plaintiffs' claims that have the best chances of winning at trial.[159] Defendant companies tend to use this information to settle more cases, leaving plaintiffs with a weaker employment-

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149. While many states have supplemented the federal discrimination statutes, this Comment's focus will remain on federal courts because the Act is a federal statute. *See Federal Laws Prohibiting Job Discrimination Questions and Answers*, EEOC, http://www.eeoc.gov/facts/qanda.html (last modified Nov. 21, 2009).

150. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009).

151. *Id.*

152. In 1998 the number of federal employment-discrimination cases filed was 23,722. By 2007, that number dropped to 15,007. Lytle, *supra* note 110, at 29.

153. *Id.*

154. Clermont & Schwab, *supra* note 150, at 111.

155. *See* Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 701–03 (2005); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–58 (2001). For example, David Benjamin Oppenheimer conducted a jury verdict study of California state and federal employment-discrimination cases which revealed that minorities and women fare particularly badly in wrongful discharge and discrimination jury trials, as compared to other types of plaintiffs and other types of employment cases. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 513–18 (2003).

156. Clermont & Schwab, *supra* note 150, at 116.

157. *Id.*

158. *Id.*

159. Lytle, *supra* note 110, at 29.

discrimination case to move to trial, where they ultimately will lose.[160] In addition, the EEOC has increased its use of mediation, ending many cases before they end up in court.[161]

Taking these statistics into account, the Lilly Ledbetter Fair Pay Act should not drastically change the litigation landscape for employment-discrimination cases, which is already complicated at best. Regardless of the amendments the Act brought to Title VII, it did not eliminate the elements required of a cognizable discrimination claim. Thus, a proper narrowly tailored interpretation of the Act should not cause a dramatic increase in litigation. By narrowly applying the Act to the different compensation schemes at issue, courts will ensure that the Act's possible implications are minimally felt by concerned employers.

III. THE LILLY LEDBETTER FAIR PAY ACT IN APPLICATION

The Lilly Ledbetter Fair Pay Act was specifically tailored to amend Title VII for claims arising from discriminatory compensation schemes. Using the facts in *Ledbetter* as a guide, the scope of the Act is limited to a "discriminatory compensation decision or other practice."[162] In addition, the Act has a retroactive effect.[163]

This Part analyzes the Act in application. To fully illustrate how the Act will function in terms of litigation, this Part will examine the different compensation schemes likely to come into question under the Act.

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160. *Id.*

161. *Id.*

162. Section 2 of the Lilly Ledbetter Fair Pay Act states:

> Congress finds the following:
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> (1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.
>
> (2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.
>
> (3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.
>
> (4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5–6 (2009) (codified at 42 U.S.C. § 2000e-5).

163. *Id.* Though enacted on January 29, 2009, the Act took effect as if enacted on May 28, 2007, a day before the Supreme Court's decision in *Ledbetter*.

In addition, examples are presented to illustrate the function, meaning, and implications of the Act under a narrow judicial interpretation.

A. Different Compensation Schemes at Issue Under the Lilly Ledbetter Fair Pay Act

Given the *Ledbetter* decision and the subsequent statutory enactments of the Lilly Ledbetter Fair Pay Act amending Title VII, employers seeking to limit their future liability must now carefully assess how their compensation decisions may be interpreted. But what qualifies as a compensation decision under the Act? *Ledbetter* presented perhaps the most common scenario—the regular paycheck. The Act should be narrowly interpreted for this purpose, to dissuade plaintiffs from filing a flood of unwarranted claims based on other compensation schemes. Yet, there are a number of other claim possibilities in light of the circumstances in *Ledbetter*. Beyond regular paychecks received by an employee, the impact of the Act must be considered in light of 401(k) accounts, pension plans, and social security benefits because if the Act is not interpreted narrowly, each of these income sources could potentially fall under the protective umbrella of the Act.

In order to completely examine the potential effects of the Act in the near future, this section will address the different compensation schemes most likely to be challenged. To begin, the most common retirement fund plans are examined, starting with 401(k) accounts. Next, another familiar retirement plan is discussed, the pension plan. A brief discussion of social security benefits follows. Finally, the compensation scheme most likely to be effected by the Act's provisions, current paychecks, is introduced and analyzed.

1. 401(k) Accounts and the Narrow Implications of the Act

A 401(k) retirement account is considered an employee benefit plan.[164] A 401(k) is a retirement and savings plan that allows an employee to elect to have a portion of his or her pretax salary contributed to

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164. Simply put, an "employee benefit plan" is defined as:

> A written stock-purchase, savings, option, bonus, stock-appreciation, profit-sharing, thrift, incentive, pension, or similar plan solely for employees, officers, and advisers of a company. The term includes an employee-welfare benefit plan, an employee-pension benefit plan, or a combination of those two. *See* 29 U.S.C. § 1002(3). But the term excludes any plan, fund, or program (other than an apprenticeship or training program) in which no employees are plan participants. — Often shortened to *plan*. *Cf.* PENSION PLAN.

BLACK'S LAW DICTIONARY 564 (8th ed. 2004).

a defined-contribution plan.[165] These retirement plans are heavily regulated by both Congress and the Internal Revenue Service (IRS).[166] This section is divided into two subparts. The section first discusses 401(k) accounts as defined-contribution plans and presents examples of typical 401(k) account cases. The section then analyzes 401(k) accounts in terms of potential implications of a narrow interpretation of the Act.

a. Defined-Contribution Plans and Employment-Discrimination Litigation

A 401(k) defined-contribution plan allows employees to defer current income taxes on saved earnings and money until it is withdrawn. Employees are able to elect to have a portion of their current wages placed into a 401(k) account.[167] Employee benefit plans are regulated under the Employee Retirement Income Security Act (ERISA).[168] Under ERISA, 401(k) accounts are a defined-contribution plan regulated by the IRS. In addition, there are built-in nondiscrimination tests in 401(k) plan administration to ensure that a plan does not favor highly paid employees.[169]

Employers may prefer 401(k) accounts for a number of reasons. Instead of making guaranteed pension payments, employers need only pay employees to maintain a 401(k) plan.[170] This makes 401(k) accounts a cost-effective benefit to employers. In addition, 401(k) accounts are generally more secure because they contain protections such as insurance.[171] Despite whatever ills may befall a business, employees are always guaranteed the funds placed into their 401(k) accounts. For the most part, cases based on 401(k) plans are litigated in the form of class

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165. A defined-contribution plan is covered under ERISA. Employees have a separate retirement account funded by both employee and employer contributions. The benefit that the employee receives is based solely on what has accumulated in his or her individual account. *Id.*

166. EMP. BENEFIT RESEARCH INST., HISTORY OF 401(K) PLANS (2005), http://www.ebri.org/pdf/publications/facts/0205fact.a.pdf.

167. *Id.*

168. 26 U.S.C. § 414 (2009).

169. *Id.*

170. *Id.*

171. 401(k) accounts are regulated by built-in insurance, which protects an individual's investment into their account. Insurance is regulated by both Congress and the IRS to protect from tax fraud and irresponsible fund management. In addition, a 401(k) is considered more secure than a traditional pension plan because the money that an individual deposits is placed in a secure account. An easy way to think of this account is depositing money into one's savings account. Despite what unpredictable events occur in the course of business, an individual savings account will always be protected, and the employee is guaranteed to get it either at their election to withdraw early or in retirement. While 401(k) plans can have complicated structures in terms of aggressive investment schemes, for the purposes of this Comment the discussion will refer to the most simple 401(k) plans. EMP. BENEFIT RESEARCH INST., *supra* note 166.

action lawsuits because funds are generally managed as groups rather than individually. As a compensation scheme, 401(k) accounts are investment plans that rely heavily on the administration of the plans themselves.[172] Built-in nondiscrimination tests and other protections are constructed around the plan's administration. These protections, in theory, will prevent problems with plan administration.[173] Generally, most 401(k) litigation arises out of the plan's administration. An illustration of a common type of 401(k) case clarifies these concepts.

Several common types of 401(k) plan lawsuits exist. One common type of lawsuit arising from 401(k) plans is breach of fiduciary duty.[174] Another common type of lawsuit—although not often resolved in favor of plaintiffs[175]—is improper 401(k) plan fees.[176]

Most 401(k) plan lawsuits, including the aforementioned common types of lawsuits, come in the form of class actions. Class actions may arise when an employer or plan administrator invests a 401(k) in underperforming stocks, thereby diminishing investor returns and cutting an employee's potential retirement income.[177] When a 401(k) plan administrator mismanages a fund, investors will typically come together in litigation since many are affected, it is less costly, and a class action will often result in a faster resolution than many individual lawsuits.

In addition, since 401(k) accounts fall under ERISA,[178] a number of litigation preemptions may also come into play.[179] Conflict preemption under ERISA occurs when a state remedy is not permitted by federal law or exceeds federal remedies.[180] Essentially, under ERISA, conflict

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172. By their very nature, investment plans are forward-looking, because contributions are made early and hopefully grow over time.

173. *Id.*

174. *See* LaRue v. DeWolff, Boberg & Assoc., Inc., 552 U.S. 248 (2008); Debra Cassens Weiss, *Supreme Court Allows Lawsuit Alleging Mishandled 401(k)*, A.B.A. J., Feb. 20, 2008, http://www.abajournal.com/news/article/supreme_court_allows_lawsuit_alleging_mishandled_401k/; Carrie Johnson, *Supreme Court Rules Employees Can Sue Over 401(k) Misconduct,* WASH. POST., Feb. 21, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/20/AR2008022001157.html.

175. Most cases end in dismissal. *See* Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009).

176. *See id.*

177. *See supra* note 174.

178. 29 U.S.C. § 1003(a) (2002).

179. *Id.* § 1144 (2006).

180. *See* Metro Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); Darcangelo v. Verizon Commc'ns, Inc., 292 F.3d 181, 186–87 (4th Cir. 2002). It is important to note that the proceeding example, *LaRue*, is an example of a case which overturned one type of conflict preemption under ERISA. Prior to *LaRue*, the Court had held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), that a participant in a disability plan "that paid a fixed level of benefits could not bring suit under § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, 29 U.S.C. § 1132(a)(2), to recover consequential damages arising from delay in the

preemption provides a court with a ground to dismiss a cause of action if the claim falls under certain provisions.[181]

Between the challenges posed by class action claims and ERISA preemptions, it is difficult for individual claims based on 401(k) accounts to succeed. Individual claims based on 401(k) accounts are difficult to handle, but are still possible because 401(k) accounts are administered in large groupings, typically by companies independent of an individual's employer.[182] What affects one person will certainly affect the rest of the individuals who are being administered under the same plan.[183]

An illustration of a 401(k)-related case that reflects more similarities to an individual discrimination case can be found in *LaRue v. DeWolff, Boberg & Associates, Inc*.[184] Plaintiff James LaRue filed a lawsuit against his former employer and its ERISA-regulated 401(k) retirement plan in 2004.[185] The plan allowed participants to direct the investment of their contributions per specific plan rules. In 2001 and 2002, LaRue asked his employer to make certain specific changes to the investments in his individual account.[186] LaRue's employer, however, never followed through, causing over $150,000 in losses to his retirement account.[187] The Supreme Court recognized that the landscape of retirement investments has changed over the years and encouraged lower courts to interpret employee-benefits law to allow individuals to sue over administrative problems with their accounts.[188]

As compensation schemes, 401(k) accounts are relatively complicated. In many respects, a 401(k) is not what one might consider a traditional compensation scheme because it does not generate a regular "paycheck" to an individual. It may be easier to think of a 401(k) account as more of a savings account or trust fund that an employee can access at a

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processing of her claim." *LaRue*, 552 U.S. at 250. *LaRue* was different than *Massachusetts Mutual* in that the plaintiff was specifically claiming as a participant in a contribution plan. *Id.*

181. John R. Richards & Howard S. Suskin, *Understanding Complete and Conflict Preemption Under ERISA: A Primer for Lawyers*, 6 MEALEY'S LIT. REPORT 1 (Aug. 2007).

182. DEP'T OF LABOR, A LOOK AT 401(K) PLAN FEES, http://www.dol.gov/ebsa/publications/401k_employee.html.

183. 29 U.S.C. § 1003(a) (2002); 29 U.S.C. 1144 (2006).

184. 552 U.S. 248 (2008).

185. *Id.* at 250–51.

186. *Id.* LaRue made the decision to make these changes when the stock market began to hit turbulence following the burst of the Internet bubble and after the September 11, 2001 terrorist attacks. Johnson, *supra* note 174.

187. *LaRue*, 552 U.S. at 251.

188. *Id.* at 255–56. *LaRue* is an important example in the context of the Lilly Ledbetter Fair Pay Act comparisons because discrimination cases are generally pursued at the individual level because specific individual circumstances are at issue in comparison to traditional class action based cases.

certain age or at his or her own election.[189] But the growth of the 401(k) account depends on many factors that are completely out of the employer's control. Investment and interest rates are not applied in a discriminatory fashion. An employer's discriminatory practices, then, will have little effect on what the employee receives in the end.

b. The Minimal Implications of a Narrow Interpretation of the Act on 401(k) Accounts

If the Act is narrowly construed, it is highly unlikely that such compensation schemes will be affected by the Lilly Ledbetter Fair Pay Act because of the unique characteristics of 401(k) accounts and their management. Contributions to a 401(k) plan happen at the time of the actual paycheck. When viewed in light of the Lilly Ledbetter Fair Pay Act, 401(k) contributions can be considered a compensation decision because a percentage is taken out of an employee's salary, and if that salary is discriminatory, then the percentage might also be tainted by discrimination. Therefore, interpreting the language of the Act narrowly, to fall under the Act, an unfair pay claim would have to be filed within the 180-to-300-day time frame a paycheck is received.[190] Though there may be reason to apply the Act to 401(k) accounts, doing so would broaden the construction of the Act, creating a novel area of litigation if such a claim could be pursued alone, which is expensive, tedious, and difficult to prove.

Furthermore, the Act's implications in terms of 401(k) plans can create a number of complications for potential claimants. To make a claim, the discriminatory compensation scheme should be fairly obvious to the employee at the outset because once the paycheck claim is lost, so would be an accompanying 401(k) claim. Essentially, the only way a

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189. Many plans allow employees to make a hardship withdrawal before their retirement, but an individual will end up paying a withdrawal penalty, on top of regular income taxes. After the economy crashed in the Fall of 2009, many 401(k) accounts (in addition to pension plans) were affected. Tara Siegel Bernard, *401(k)'s-What You Need to Know*, N.Y. TIMES, Dec. 16, 2008, http://www.nytimes.com/2008/12/17/your-money/401ks-and-similar-plans/primer401k.html?ref=401ks-and-similar-plans; Steven Greenhouse, *65 and Up and Looking for Work*, N.Y. TIMES, Oct. 23, 2009, http://www.nytimes.com/2009/10/24/business/economy/24older.html?ref=401ks-and-similar-plans; Phyllis Korkki, *The Horror of Examining a 401(k) Balance*, N.Y. TIMES, Jan. 24, 2009, http://www.nytimes.com/2009/01/25/business/25count.html?ref=401ks-and-similar-plans; Editorial, *From Here to Retirement*, N.Y. TIMES, Jan. 25, 2009, http://www.nytimes.com/2009/01/26/opinion/26mon1.html?ref=401ks-and-similar-plans; Paul J. Lim, *When Nest Eggs Change Colors*, N.Y. TIMES, Apr. 4, 2009, http://www.nytimes.com/2009/04/05/your-money/05fund.html?ref=401ks-and-similar-plans.

190. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

claimant should be able to bring a 401(k) account claim under the Act is if he or she also brings a claim based on a current paycheck.[191]

In addition, if a claimant filed a successful claim under the Act, the back pay would only increase two years from the percentage of the amount entered into the account today.[192] Employers will likely benefit from selecting 401(k) plans because they cannot be substantially affected by any changes that the Lilly Ledbetter Fair Pay Act brings in its current form.[193] The benefits of a 401(k) plan are better understood when compared to the problems that will likely be encountered under pension plans.

2. Pension Plans and the Act's Minimal Implications Under a Narrow Interpretation

Pension plans fundamentally differ from 401(k) accounts in a variety of ways. Unlike 401(k) accounts, pension plans are not guaranteed to employees if an employer goes bankrupt.[194] Therefore, employee pension plans are less secure than 401(k) accounts, which are more heavily regulated and protected.[195] While still an employee benefit, pensions are considered defined-*benefit* plans as opposed to 401(k) accounts, which are considered defined-*contribution* plans.[196] First, this subpart will explain the basic scheme of pension plans. Second, this subpart will discuss why a narrow interpretation of the Act is a correct solution to *Ledbetter* and why its implications will be minimally felt.

a. Defined-Benefit Plans

A defined-benefit plan is one established and maintained by an employer, whereas a 401(k) is typically maintained by the employee himself.[197] Usually a defined-benefit plan systematically provides for the

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191. *See infra* Part III.A.4.

192. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

193. *Id.*

194. 26 U.S.C. § 414 (2009).

195. *Id.*

196. A pension plan differs from a contribution plan because it is:

> A plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usu. for life, after retirement; any pension plan that is not a defined-contribution plan. Retirement benefits under a defined-benefit plan are generally based on a formula that included such factors as years of service and compensation. If the trust funding the plan lacks sufficient assets to pay the promised benefits, ERISA requires the employer to cover the shortfall.

BLACK'S LAW DICTIONARY 564 (8th ed. 2004).

197. *Id.*

compensation of definitively determinative payments to employees.[198] Definitively determinative payments are in an amount that is certain to be calculated by determining factors such as tenure, service, and earnings history.[199]

Pension plan benefits are typically distributed over many years during retirement and include any plan that is not a defined-contribution plan.[200] Generally, defined retirement benefit plans are based on set factors such as earnings history, tenure of service, and age.[201] Whereas 401(k) plans are based on investment returns, pensions, as defined plans, are based on a set formula known well in advance.[202]

Pension plans leave more room for discrimination because of the factors considered when generating the plan. For example, one determining factor in an individual's pension plan is his or her earnings history with the company.[203] Thus, if an individual, like Ledbetter herself, has an earnings history tainted with discriminatory pay decisions, his or her pension plan will be at least partially based on a history of discriminatory pay decisions. A 401(k) account, on the other hand, will be built by taking a fixed percentage or amount out of every paycheck.[204] While the paychecks that may be applied to a 401(k) account may be based on discriminatory pay decisions, the discrimination virtually stops at the account. In a pension plan, discriminatory pay decisions continue with each and every pension check issued by the company.[205]

In addition, pension plans are distributed in monthly increments to employees. Under a 401(k), all contributions may be deposited into one fund.[206] A 401(k) plan does not have the employer doling out monthly "paychecks" during retirement, but leaves the individual employee to withdraw funds at his or her own election.[207] Unlike the guise of a savings account that may protect a 401(k), pension checks give the impression that discrimination is ongoing, and the employer is very much responsible for it.[208]

Pension cases are generally more common than 401(k) account cases because claims arise from checks that an individual regularly receives.

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198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. 26 U.S.C. § 414 (2009).
203. *Id.*
204. Bernard, *supra* note 189.
205. *Id.*
206. IRS, PENSION AND ANNUITY INCOME 3–4 (2009), http://www.irs.gov/pub/irs-pdf/p575.pdf.
207. *Id.*
208. Bernard, *supra* note 189.

The fact that a pension plan continues to issue paychecks to a retired employee thus potentially opens an employer up to more liability under the Act. It is possible that pensions could give rise to a claim under the Act because an employee, like Ledbetter, who receives a regular pension paycheck tainted with an employer's discriminatory pay scheme, will have an opportunity to file claims during retirement while those retired employees with a 401(k) account will not.[209] But it is important to note the congressional findings under the Act. The congressional findings state that "[n]othing in [the Lilly Ledbetter Fair Pay Act] is intended to change current law treatment of when pension distributions are considered paid."[210] Thus, for pension plans under the Act "it may be determined that pension benefits are considered paid 'upon entering retirement and not upon issuance of each annuity check.'"[211]

b. Minimal Pension Implications and a Narrow Interpretation of the Act

Essentially, the Lilly Ledbetter Fair Pay Act does not amend the pre-*Ledbetter* requirements for a pension scheme. Therefore, the same rules the *Ledbetter* Court considered and based its ruling upon should still stand under a narrow interpretation of the Act.[212] The paycheck accrual rule is not intended to come into effect for regular pension checks an individual may receive from the plain language of the Act.[213] Under the Act's direct language, if employees want to bring an EEOC claim based on their pension scheme, they must do so within 180 to 300 days from the date they retire. Otherwise, an individual may find his or her claim to be time-barred.[214]

Perhaps the best illustration of how a pension plan may be affected by the Act can be distinguished from the *Ledbetter* case itself.[215] Since the Act is retroactive, the circumstances in the *Ledbetter* case fell pre-

209. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). *See supra* Part III.A.1. This is also evident from the fact that the Lilly Ledbetter Fair Pay Act directly refers to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

210. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

211. EEOC, COMPLIANCE MANUAL § 2-IV (2009), http://archive.eeoc.gov/policy/docs/threshold.html#2-IV-A (quoting Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.)) [hereinafter EEOC, COMPLIANCE MANUAL].

212. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

213. *Id.*

214. EEOC, COMPLIANCE MANUAL, *supra* note 211.

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

cisely within the terms of the legislation.[216] Unlike what Ledbetter argued in her Supreme Court case, the paycheck accrual rule, under an interpretation of the Act constricted to its terms, will not directly apply to pension checks received by a plaintiff.[217] Had the Act existed prior to *Ledbetter*, using a similarly narrow, or perhaps what may be described as a "cramped interpretation,"[218] Ledbetter would have been required to file an EEOC claim within 180 to 300 days from when she retired, not from when she received her very first discriminatory paycheck from Goodyear. If Ledbetter did not do so, her claim would be properly time-barred as the majority decision in *Ledbetter* discussed.[219] Despite all of the discussion in *Ledbetter* about the paycheck accrual rule, the Act does not extend the accrual rule to pension schemes.

Essentially, a narrow interpretation of the Lilly Ledbetter Fair Pay Act ought not to disrupt established precedents in terms of discrimination in pension schemes.[220] If the Act is not interpreted narrowly as it was intended evidenced by the direct language of the Act, a great deal of precedent could be unsettled by applying the paycheck accrual rule to pension checks.[221] This application would surely cause an increase in litigation.

Largely unaffected by the Act's amendments to Title VII, under a narrow interpretation, concerned employers who do use pension schemes should consider moving to a 401(k) plan. In general, pension plans are falling out of favor because such plans are more expensive for employers to maintain and do not provide the same level of protection for employees.[222] Therefore, it would be mutually beneficial for both employees and employers to move to 401(k) accounts because employers will face less potential liability and employees' retirement will be better protected.[223]

3. Social Security Benefits and the Act

Like both 401(k) plans and pensions schemes, social security benefits may also be considered in an EEOC pay-discrimination claim. Like a 401(k) plan, social security benefits are based on a percentage of the

216. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

217. *Ledbetter*, 550 U.S. at 619–20.

218. *Id.* at 661 (Ginsburg, J., dissenting).

219. *See generally id.*

220. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

221. *See id.*

222. *See supra* Part III.A.1.

223. *Id.*

amount an individual earned each pay period. Therefore, the percentage being deducted and contributed into a social security fund can possibly be tainted if an individual's earnings are based on discriminatory pay decisions.[224]

Social security benefits share similarities and differences with both pension plans and 401(k) plans. Unlike a 401(k), where individuals control when to withdraw the money they contributed out of their paychecks, social security disbursements come in the form of a check received incrementally similar to a pension plan. Like a 401(k) check, however, a social security benefits check is based on a fixed percentage of what was taken out of an employee's paycheck at one point over an entire work history. This calculation differs from a pension scheme that considers many different factors in calculating the amount an employee receives.[225] In addition, the amount of social security benefits received by an individual is typically much less than an average pension check or the average monthly amount contained within a 401(k) fund itself.[226] Thus, for most plaintiffs, a narrow interpretation of the Act would cause the cost and risks posed by litigation to outweigh any potential recovery, ensuring that the Act's implications would be minimally felt.

There is very little information on pay-discrimination litigation based solely on social security checks. Still, it may be possible for a plaintiff who cannot make a claim based on a 401(k) plan to pursue a claim based on a social security check. Based on the findings of the Lilly Ledbetter Fair Pay Act on pension schemes, however, it is unlikely that such a claim would be cognizable. If it were, a plaintiff would likely have to file within 180 to 300 days of becoming eligible for his or her social security benefits.[227] In addition, social security benefit checks are usually quite small in comparison to the paycheck itself. It is unlikely that very many people would waste time and money on this type of litigation unless the discrimination was egregious and a class action was undertaken.

4. The Implications of the Act on Current Paychecks

Although the effects of the Lilly Ledbetter Fair Pay Act on 401(k) accounts, pension schemes, and social security benefits will be minimal, the Act will surely affect current employee payment schemes. The intent

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224. Amalia Goldvaser, Note, *Inflating Goodyear's Bottom Line: Paying Women Less and Getting Away With It*, 15 CARDOZO J.L. & GENDER 99, 102 (2008).

225. *See supra* Part III.A.2.

226. Goldvaser, *supra* note 224.

227. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

of the Act was to directly affect paychecks that an individual receives on a regular basis.[228] This subpart will explore how the Act has already started affecting the handling of current paychecks based in discriminatory practices as illustrated through *Mikula v. Allegheny County* and will conclude with a discussion of the various compensation schemes that will be affected by a narrow interpretation of the Act.[229]

Mikula is the first case other than *Ledbetter* to illustrate the retroactive effect of the Act.[230] Plaintiff Mary Lou Mikula brought a lawsuit against her employer, Allegheny County, alleging that the county discriminated against her on the basis of her gender by failing to give her a pay raise in violation of Title VII and for paying her less than a male employee performing equal work in violation of the Equal Pay Act.[231] Despite lobbying for salary increases, Mikula never received a response from the county.[232] Eventually, Mikula filed a complaint with the county's human resources department complaining about gender and age discrimination and asserting that a comparable male employee was paid $7,000 more than her.[233]

In March 2006, Mikula filed her lawsuit, which, at the time, only included an Equal Pay Act claim.[234] In August 2006, Mikula received a response from the county's human resources department concluding that her allegations of discrimination were unfounded.[235] In April 2007, Mikula filed her precursory Title VII charge with the EEOC claiming that the county committed a violation by paying her less than a male in her same position would receive.[236] Upon her receipt of a right to sue letter, Mikula amended her original complaint to include the Title VII claim.[237]

At the time before passage of the Lilly Ledbetter Fair Pay Act, however, Title VII required plaintiffs to file charges with the EEOC within 300 days of the unlawful employment practice.[238] Since Mikula's EEOC charge was filed in April 2007, all claims based on acts before June 2006 were time-barred.[239] Before the summary judgment briefs were filed in *Mikula*, the Court issued its decision in *Ledbetter*.[240] Miku-

228. *Id.*
229. Mikula v. Allegheny County of Pa., 583 F.3d 181 (3d Cir. 2009).
230. *Id.* at 182.
231. *Id.*
232. *Id.* at 182–83.
233. *Id.* at 183.
234. *Id.* at 182.
235. *Id.* at 183.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

la's claims, like Ledbetter's, were considered untimely under the traditional application of Title VII.[241] Despite Mikula's attempts to distinguish her case from *Ledbetter*, the district court granted summary judgment in favor of the county.[242]

Mikula appealed the district court's decision. While the appeal was pending, the Lilly Ledbetter Fair Pay Act became law.[243] For the first time in the proceedings, Mikula defined her claim as a "classic paycheck accrual" case—precisely the type of claim the Act was designed to protect.[244] Under the paycheck rule, Mikula's paychecks reflected a "'periodic implementation' of a previously made intentionally discriminatory employment decision or 'other practice,'" and, therefore, her claim was no longer untimely under the Act.[245] Now operating under the Act, the Third Circuit Court of Appeals reversed the district court's decision that Mikula's claims were untimely as to her paychecks and remanded for further proceedings.[246]

Mikula reflects the precise scenario that the Act was intended to apply to. The Act was constructed to operate primarily in the context of current payment schemes. A narrow interpretation of the Act reflects its purpose in this context. Based on the plain language contained within the Act, the Act specifically serves as a solution to the grossly disproportionate pay scheme at Goodyear in the *Ledbetter* case.[247] The facts in *Ledbetter* seem to represent the most extreme in terms of pay discrimination, one which Ledbetter had tried to rectify with the EEOC on many occasions.[248] Thus, the Act was written with the narrow purpose of addressing the most extreme employment scenarios.

Ultimately, the compensation schemes affected by the Act appear fairly predictable under a narrow interpretation. Due to the specific circumstances that apply to 401(k) accounts and social security benefits, it is clear that if narrowly construed, the Act should only apply in the specific contexts of pension schemes and current paychecks. This application is not surprising considering the number of protections for such schemes already existing in both Title VII and the Equal Pay Act. In addition, Ledbetter's pension and former paychecks were the essential

241. *Id*.

242. *Id.*

243. *Id.* at 184.

244. *Id.* at 183.

245. *Id.* at 186 (quoting Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (2009) (codified at 42 U.S.C. § 2000e-5 (3)(A))).

246. *Id.* at 187.

247. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

248. *Testimony*, *supra* note 24, at 11–12.

aspects of her case.[249] Yet, the implications of the Lilly Ledbetter Fair Pay Act will not come without criticism and concern.

IV. A NARROW ANSWER TO THE CONCERNS AND CONSEQUENCES ARISING OUT OF THE LILLY LEDBETTER FAIR PAY ACT

Legislation and politics go hand-in-hand. In a manner of speaking, it would be more concerning to the general public if legislation were not followed by criticism and debate in Washington, D.C. This Part allays the concerns arising out of the Lilly Ledbetter Fair Pay Act by examining the nature of the Act's criticism and by arguing the necessity to keep the Act narrowly tailored to its intended purpose. This Part will first address specific criticisms voiced after the Act was signed into law. Next, the Part will argue that the implications of the Act will be minimally felt so long as the Act is narrowly construed.

A. The Resulting Critical Aftermath

Criticism of the Act arises mostly along political party lines. Businesses and conservative politicians generally prefer the *Ledbetter* decision to the Act because *Ledbetter*'s reasoning greatly limited the number of claims that could pass the time bar.[250] In many ways, it may have been better for businesses if Ledbetter had actually won her case. Had Ledbetter succeeded, the Act would not be exposing businesses to the same extent of liability as it is now.[251] Some critics suggest that a better *Ledbetter* outcome would have been to narrowly tailor the decision to the facts of the case, rather than invoking public outrage and the subsequent legislative response.[252] Now employers must find ways to limit the potential liability that may arise from employees' claims against them.[253]

By and large, companies now consider the Act to be extremely dangerous because this legislation could "open the door to lawsuits that employers cannot defend."[254] After the Act was signed, some described it as a "dangerous rush to judgment."[255] Conservative politicians also want to protect businesses for many of the same reasons.[256] It comes as

249. *See generally id.*; *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

250. Gerald Skoning, *Overruled by Legislation*, NAT'L LAW J., Oct. 5, 2009.

251. *Id.*

252. *Id.*

253. Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, N.Y. TIMES, May 30, 2007, http://www.nytimes.com/2007/05/30/us/30pay.html.

254. Barnes, *supra* note 111.

255. *Id.*

256. *Id.*

no surprise that when the first version of the Act passed the House of Representatives, President Bush threatened a veto of the legislation.[257]

Concerns about litigation overload are the primary criticism of the Act. Conservatives who support unfettered capitalism and big businesses criticize the Act as economic stimulus for trial attorneys.[258] The theory behind this concern is that amending Title VII to include the paycheck accrual rule will provoke employees to bring claims. This criticism, however, seems to ignore the fact that the Act is meant to be narrowly tailored and therefore, narrowly interpreted.

B. Recommendation: A Narrowly Tailored Interpretation of the Act

The Act, in its own language, applies only to "compensation decisions or other practices."[259] This means that the Act will apply only to a very limited number of plaintiffs who deserve the Act's protections.[260] In addition, the Act does not eliminate the requirements that must always be met for a cognizable EEOC claim.[261] Therefore, a narrow interpretation of the Act will not create a free pass for plaintiffs bringing dubious or unfounded claims, despite the criticisms of some employers and politicians.

Applying the Act to anything but current payment schemes would only create problems in the field of employment-discrimination litigation. The Act should be narrowly tailored to avoid problems of interpretation in the future, not exacerbate them. The need for a narrowly tailored interpretation explains why the language of the Act is focused on compensation schemes.[262] Thus, a careful, narrow interpretation of the

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257. *Id.*

258. According to one critic:

> For the tort bar, this is pure gold. It would create a new legal business in digging up ancient workplace grievances. This would also be made easier by the bill's new definition of discrimination. Companies could be sued not merely for outright discrimination but for *unintentional* acts that result in pay disparities. Since these supposed wrongs could be compounded over decades, the potential awards would be huge. Most companies would feel compelled to settle such claims rather than endure the expense and difficulty of defending allegations about long-ago behavior. The recipe here is file a suit, get a payday. And the losers would be current and future employees, whose raises would be smaller as companies allocate more earnings to settle claims that might pop up years after litigating employees had departed.

Editorial, *Trial Lawyer Bonanza: Off and Suing with the 111th Congress*, WALL ST. J., Jan. 9, 2009, http://online.wsj.com/article/SB123146294351966567.html.

259. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

260. Putnam, *supra* note 62.

261. *See supra* Part III.A.1.

262. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

Act by the courts is the most feasible solution to prevent a flood of litigation that could possibly result from a broad interpretation, which may disregard the Act's own language.

Furthermore, given the current economic climate, it is likely that compensation schemes will markedly shift from pensions to 401(k) accounts. The case for pension schemes is further weakened by the fact that people lost a great deal of money during the recent economic recession.[263] In addition, pensions are not guaranteed to the same degree as 401(k) accounts because if an employer goes bankrupt, the employee will likely lose his or her pension.[264] Companies who bought out other companies during the current economic climate will likely shift to 401(k) accounts to better protect themselves from liability under the Act. In addition, by shifting to 401(k) accounts, companies will be able to provide better compensation schemes for their employees.[265] Not only will employees be better protected, but employers will also save a great deal of money.[266] Thus, a shift to 401(k) plans would be mutually beneficial for employees and employers.

In terms of future pay-discrimination claims filed with the EEOC, the Act will not usher in radical changes to the field of employment discrimination if its interpretation is limited to current payment schemes. With the two-year back-pay-limiting language and restrictive congressional findings on pension schemes, employers will not be liable for much unless their practices are grossly disproportionate to what a plaintiff would be entitled to be rewarded.[267] Thus, employer liability will still be reasonably limited.

While the pay-discrimination portions of the Act will likely not have the effect that critics worry about, there could be a potential problem with how courts interpret the Act's vague "other practices" language.[268] For the most part, the language in the Act appears to refer to

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263. Mike Caggeso, *Retirement Blues: Financial Crisis Pulls Billions from Pension Plans, Crimping Consumers Dreams and Corporate Profits*, MONEY MORNING, Feb. 16, 2009, http://www.moneymorning.com/2009/02/16/pension-relief/.

264. *Id.* 401(k) plans differ from pension plans as well because an individual may be able to tailor how he or she wants his or her money invested. Thus, very aggressive plans may rely more heavily on stocks. These more aggressive plans were hit harder by the recession than a more conservative plan. *See* Bernard, *supra* note 189; Korkki, *supra* note 189; Editorial, *supra* note 189.

265. Stephen Mihm, *The Guaranteed Retirement Account*, N.Y. TIMES, Dec. 14, 2008, http://www.nytimes.com/2008/12/14/magazine/14Ideas-Section2-C-t-001.html?fta=y.

266. *Id.*

267. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

268. Joanna L. Grossman & Deborah L. Brake, *The Lilly Ledbetter Fair Pay Act of 2009: A Preliminary Report, Part Three*, FIND LAW, Oct. 13, 2009, http://writ.news.findlaw.com/grossman/20091013.html.

the specific concerns posed by *Ledbetter* itself.[269] Yet, there is no mention of "other practices" anywhere in *Ledbetter*.[270] At this point, no dominant trend has emerged in interpreting this language.[271]

However, this single phrase is the portion of the Act that could have the largest impact on the employment-discrimination litigation landscape. This is because no one is entirely sure how courts will interpret "other practices" in the future.[272] If courts interpret the "other practices" language broadly, the Act could extend beyond the intended scope of the legislation and its findings.[273] Such an interpretation may indeed open a floodgate of litigation creating a novel area of the law under the Act. Though, if courts interpret "other practices" conservatively, maintaining the Act's focus on compensation schemes, very little could change in terms of the amount of employment-discrimination litigation which is brought each year.[274] At this point, only time will tell.

In keeping with the rule of narrow interpretation of the Act as discussed in this Comment, "other practices" should be clearly defined, ultimately either by Congress or in application by the courts. Because the Act specifically refers to "compensation decisions," I propose that the definition of "other practices" be limited to existing compensation practices.[275] Narrowly construing the term "other practices" will necessarily limit courts and plaintiffs from overreaching in terms of existing statutes of limitation in employment-discrimination claims. A reading of both *Ledbetter* and the Act suggests that this definition of "other practices" was intended, since both focus squarely on the issue of discriminatory compensation practices.[276]

At this point it is uncertain if Congress clearly anticipated this risk. Some suggest that Congress was too narrowly focused on the specific facts of the *Ledbetter* case.[277] If this is true, and the Act is interpreted more broadly than anticipated, then Congress should have focused more on the possible judicial ramifications of future legislation.[278] Indeed, the

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269. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

270. *See Ledbetter*, 550 U.S. 618.

271. Grossman & Brake, *supra* note 268.

272. *Id.*

273. *Id.*

274. *See generally id.*

275. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

276. *Id.*; *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

277. Kathryn A. Eidmann, Comment, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 979 (2008).

278. *Id.*

facts of *Ledbetter*, while similar to many other cases, will certainly be very different to the individual experiences of other future plaintiffs.

One of the first indications of how the Court will interpret "other practices" came during the current Supreme Court term. In February, the Court heard *Lewis v. City of Chicago*, a firefighter entrance testing case.[279] At issue in *Lewis* was a question of disparate impact against racial minorities under Title VII.[280] Though the facts are very different from *Ledbetter*—and therefore not directly covered by the Lilly Ledbetter Fair Pay Act—*Lewis* raised issues similar to those raised in *Ledbetter*, determining whether the Court's or Congress's *Ledbetter* reasoning controls Title VII claims that are not specifically covered by the Act.[281] In the end the Court held, "[I]t does not follow that no new violation occurred—and no new claims could arise—when the City implemented that decision [adoption of a potentially discriminatory practice] down the road. If petitioners could prove that the City 'use[d]' the 'practice' that 'causes a disparate impact,' they could prevail."[282] Essentially, the Court's holding in *Lewis* extended the Act to apply to decisions made in the hiring process perhaps opening the door to broader interpretations of the "other practices" language in the future.

It will likely take years to determine how the Act may continue to be interpreted. If courts use the same narrowly tailored principles that Congress used in creating the legislation, then the Act will not have a widespread effect. Instead, it will help sympathetic plaintiffs, such as Ledbetter, who deserve the protections of the Act. If interpreted more broadly, however, the Act may realize some of the concerns of its critics. The potential for this outcome lies in how courts will continue to interpret the "other practices" language in upcoming cases that exercise the provisions of the Act. Until those decisions are made, it will be difficult to criticize the legislation itself in practice.

V. CONCLUSION

Every American deserves to be fairly compensated for his or her work regardless of race or gender. In this respect, the Lilly Ledbetter Fair Pay Act is commendable for breaking down some of the remaining barriers in the Civil Rights Act. The Lilly Ledbetter Fair Pay Act is precisely tailored because employers do not spontaneously discriminate against their employees, and only those who are deliberately discriminating in pay will be subject to the Act if narrowly construed. Thus, with a

279. Lewis v. City of Chicago, 130 S. Ct. 2191 (2010).
280. *Id.* at 2195.
281. Grossman & Brake, *supra* note 268.
282. *Lewis*, 130 S.Ct. at 2199.

narrow interpretation, employers should not run a high risk of future litigation as a result of the Act. The Act was a proper remedy for *Ledbetter*, addressing a problem that should have been dealt with decades ago, since it is not always possible to know when someone is being discriminated against. The Act was meant as a direct solution to problems posed by current paycheck compensation schemes and, if narrowly interpreted, will avoid opening the door to incessant, frivolous litigation.

Furthermore, even if more employment-discrimination claims are brought as a result of the Act, plaintiffs still have to meet a high burden of proof. If employers are worried about any potential liability the Act imposes, they should continue the trend of moving towards 401(k) compensation schemes instead of pension schemes. By narrowly interpreting the Lilly Ledbetter Fair Pay Act to current paycheck schemes and restricting the Act's "other practices" language to existing payment schemes, fair pay for all Americans may finally be realized, and drastic changes to the employment-litigation landscape will be avoided. Finally, the *fait accompli* referred to by Justice Ginsburg in *Ledbetter*, will no longer be beyond repair.[283]

283. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 644 (2007).