IMPACT OF LEDBETTER V. GOODYEAR ON THE EFFECTIVE ENFORCEMENT OF CIVIL RIGHTS LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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IMPACT OF LEDBETTER V. GOODYEAR ON THE EFFECTIVE ENFORCEMENT OF CIVIL RIGHTS LAWS

THURSDAY, JUNE 28, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Davis, Wasserman Schultz, Ellison, Scott, Watt, Franks, and Issa.

Staff present: Heather Sawyer, Majority Counsel; David Lachmann, Subcommittee Chief of Staff; Keenan Keller, Majority Counsel; Kanya Bennett, Majority Counsel; Susana Gutierrez, Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Today's hearing will examine the Supreme Court's recent decision in the case of *Ledbetter v. Goodyear* and its impact on the effective enforcement of the civil rights laws.

I want to welcome everyone here today. I strongly believe in maintaining an open process, and the Subcommittee will proceed with its work.

The Chair will recognize himself for 5 minutes for an opening statement.

Today's hearing examines the Supreme Court's recent decision in the case of *Ledbetter v. Goodyear* in which the court severely limited the ability of victims of discrimination to seek vindication of their rights as guaranteed under law.

We will have the opportunity to hear from Lilly Ledbetter directly, but I think it is important to point out that the question before the court had nothing to do with whether or not she had been a victim of intentional discrimination over the course of her 19 years at Goodyear or whether she had, in fact, suffered harm as a direct result of that intentional unlawful discrimination.

What was at issue was whether it was an act of discrimination each time she was paid less than her male counterparts solely because of her gender or whether it was only the initial decision that

counted for the purpose of getting past the courthouse door under a discrimination complaint.

I am very concerned that once again the Supreme Court has gone out of its way to read our antidiscrimination laws as narrowly as possible so as to deny relief to as many victims of discrimination as possible. I am particularly disturbed that the Congress seems to have addressed this particular issue very specifically in the 1991 Civil Rights Restoration Act, and the court seems to have ignored that.

The court has now rewarded employers who successfully conceal their discriminatory actions from their employees. That is not hard to do when it comes to pay. Unlike the Congress, which publishes all salaries quarterly and anyone can look and see what any of our aides or we are making by looking at those quarterly statements, private business can and does conceal from its employees how much each worker is receiving.

The court's decision is an open invitation to violate the law with virtual impunity. The court's narrow reading of the 180-day rule would also seem to invite more litigation as employees rush to court, lest they forfeit any chance of redress.

Perhaps, as Congress did in 1991, we will have to go back and clarify the law again and, this time, hope the Supreme Court does not ignore the plain words on the paper. If that is necessary, so be it.

I recall being asked once when the court seemed incapable or unwilling to follow clear congressional intent on an antidiscrimination statute, "Don't you guys have some boilerplate language you can put in there that says 'We really mean it this time'?" Well, we really mean it. I think it is important that the Congress respond to this decision swiftly and effectively.

Our colleague, the Chairman of the Education and Labor Committee, Mr. Miller of California, has introduced legislation to try to clarify one more time for the court the intent of Congress to provide timely, accessible recourse to victims of intentional discrimination. I have co-sponsored it, and I hope to have the opportunity to vote for it soon.

I would appreciate any thoughts or suggestions members of the panel might have on how they believe we ought to proceed.

I want to welcome our witnesses today. I look forward to hearing from your testimony.

The Ranking minority Member is not here yet, so we will recognize him when he arrives for his opening statements.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit an opening statement for the record.

Without objection, the Chair will be authorized to declare a recess of the hearing at any time, especially should there be votes called on the floor.

We will now turn to our first panel of witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority, minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I now recognize the gentleman from Georgia to do the first introduction. Did I get it wrong? Alabama? Alabama. I am sorry.

Mr. DAVIS. I thank my friend from New Jersey. [Laughter.]

Thank you, Mr. Chairman, for recognizing me to introduce a member of my State, unfortunately not one of my constituents. She is about an hour away, but I was near her territory on Saturday night.

Lilly Ledbetter is from the Gadsden area, and she has worked at a Goodyear plant for a number of years. This case is ultimately about her. She is a very brave, very principled woman who did everything that she was asked to do by her company. She received exemplary performance evaluations.

There was only one problem. They were committed to paying the men at the company more and, of course, she did not know about it for a long, long period of time. She eventually followed what was the law in the 11th Circuit and, frankly, the prevailing law of the United States by filing within 180 days of the last known instance of discriminatory pay an EEOC claim.

She had her day in court. A jury of her peers in a district that is notoriously hostile to our plantiffs in title VII cases still found in her favor, and the jury awarded compensatory and punitive damages as well as backpay.

The U.S. Supreme Court changed the rules on her in midstream, undercut years of established precedent in law, and I am happy to report to you, Ms. Ledbetter, that yesterday the Education and Labor Committee voted 25 to 20 to pass a bill that will correct what the Supreme Court did in the *Ledbetter* case. I assure you that is very prompt action by a congressional Committee.

The ruling happened just several weeks ago. You and I were in Birmingham at our press conference just several weeks ago. The Committee on Education and Labor has acted in a prompt expeditious fashion. I compliment Chairman Miller for that, and I welcome you here today.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

Our next witness is Martha Chamallas, the Robert J. Lynn Chair in Law at the Ohio State University, where she teaches employment discrimination law, torts and gender in the law. With more than 30 years as a law professor, she has written numerous articles on gender and race discrimination in employment, pay equity and sexual harassment. She has served on task forces investigating race and gender bias in the courts for the states of Iowa and Pennsylvania.

Our next witness is Neal Mollen, a partner with the firm of Paul Hastings. He is the local office chair of the employment law department in Washington and co-chair of the firm's appellate practices group. He regularly represents employers and employer associations as parties and amici curiae in labor and employment matters before the Supreme Court and other Federal and State courts. He

is an adjunct professor of labor law at the Georgetown University Law Center. He appears today on behalf of the U.S. Chamber of Commerce.

Our final witness is Marcia Greenberger, the founder and co-president of the National Women's Law Center. Ms. Greenberger and the center have worked with the Congress in advocating the courts to ensure the rights of women. Ms. Greenberger received a presidential appointment to the National Skills Standards Board and is currently a member of the executive committee of the Leadership Conference on Civil Rights, is on the board of directors of the Women's Law and Public Policy Fellowship Program, the Religious Coalition for Reproductive Choice and the National Student Partnerships, and a councilmember of the American Bar Association's section on individual rights and responsibilities. In 1972, she started and became director of the Women's Rights Project of the Center for Law and Social Policy, which became the National Women's Law Center in 1981.

I am pleased to welcome all of you. Your written statements will be made part of the record in its entirety.

I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when the time is up.

And before we go to our first witness, I will now recognize for 5 minutes the distinguished gentleman from Arizona, the Ranking minority Member, for his opening statement.

Mr. FRANKS. Thank you, Mr. Chairman. Thank you for your forbearance here.

I was delayed earlier, but I thank all of you for being here. It is a good day. We are looking forward to hearing what you have to say.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice to discriminate against any individual with respect to his compensation because of the individual's sex."

An equally important provision of title VII provides that an individual wishing to challenge an employment practice must first file a charge with the Equal Employment Opportunity Commission, the EEOC. In order to facilitate the timely resolution of claims, such a charge must be filed within a specified period, either 100 or 300 days, depending upon the State. After the alleged unlawful employment practice occurred, if the employee does not submit a timely filing to the EEOC, the employee may not challenge that practice in court.

In May, the Supreme Court handed down a case called *Ledbetter v. Goodyear Tire & Rubber Company, Inc.,* and in that case, the plaintiff, Ms. Ledbetter, filed a charge of pay discrimination with the EEOC 19 years after a decision was allegedly made to pay her less than her male colleagues.

Ms. Ledbetter argued that her 1998 filing with the EEOC, was timely regarding the decision that allegedly occurred 19 years earlier because the effect of that decision 19 years earlier was to keep her salary lower than it should have been until the present day.

The Supreme Court properly rejected that claim, relied on the clear terms of the statute and held that a claim of discrimination

must be brought within 180 or 300 days of the discriminatory act, not up to 20 years later when there was no evidence that Goodyear was currently making any discriminatory decisions.

The court appropriately held that, "Ledbetter's claim would shift intent from one act to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite discriminatory intent. The statutes of limitation serve a policy of repose. They represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and the right to be free of stale claims."

The EEOC filing deadline protects employees and employers from the burden of defending claims arising from employment decisions that are long past. Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.

The court also stated that it was proper to impose a statute of limitations on discrimination claims because "evidence relating to intent may quickly fade with time, and the passage of time may seriously diminish the ability of the parties and the fact finder to reconstruct what actually happened."

A person making a claim of discrimination will always be able to tell their side of the story, but, over time, an employer has less and less ability to tell its story, as managers quit, retire or die, and businesses are reorganized, taken apart or sold. Consequently, the timely filing of discrimination claims is essential.

In fact, the court concluded that this case illustrates the problems created by tardy lawsuits.

To put the case in context, at her trial, Ms. Ledbetter challenged every one of her employee evaluations and associated pay increases all the way back to 1979 when she started working at Goodyear. Most of her complaints centered on the actions of a single manager whom she claimed had retaliated against her when she refused to go out with him on a date.

By the time the case went to trial, however, the manager had died and could not possibly have told the jury that he never asked Ms. Ledbetter on a date at all or that he never made a discriminatory compensation decision.

The *Ledbetter* decision simply applied long-established precedent and a proper reading of the statutory text to what it appropriately called a tardy lawsuit. These claims were known to Ms. Ledbetter at the time they occurred 19 years earlier. That is not the proper way to bring a lawsuit. People should bring their claims when they know they have them.

The Supreme Court upheld that principle. In so doing, it helped protect both victims and the accused by providing both sides and the judges who decide these cases with fresh available evidence that is absolutely essential to a just result.

And, Mr. Chairman, with that, I look forward to hearing from all our witnesses today. Thank you.

Mr. NADLER. Thank you.

We will now hear from our first witness. Ms. Ledbetter, you may proceed.

TESTIMONY OF LILLY LEDBETTER, JACKSONVILLE, AL

Ms. *Ledbetter.* Good morning. Thank you, Mr. Chairman and Mr. Ranking Member, for inviting me. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work.

I wish my story had a happy ending, but it does not. I hope that this Committee can do whatever is necessary to make sure that in the future, what happened to me does not happen to other people who suffer discrimination like I did.

My story began in 1979 when Goodyear hired me to work as supervisor in their tire plant in Gadsden, AL. Toward the end of my career, I got the feeling that maybe I was not getting paid as much as I should or as much as the men, but there was no way to know for sure because pay levels were kept strictly confidential.

I only started to get some hard evidence of discrimination when someone anonymously left a piece of paper in my mailbox at work showing what I got paid and what three other male managers were getting paid.

When I later complained to the EEOC just before I retired, I found out that while I was earning about $3,700 per month, all the men were earning between $4,300 and $5,200 per month. This happened because time and again I got smaller raises than the men, and, over the years, those little differences added up and multiplied.

At the trial, the jury found that Goodyear had discriminated against me in violation of title VII. The jury awarded me more than $3 million in backpay, mental anguish and punitive damages. I can tell you that was a good moment.

It showed that the jury took my civil rights seriously and was not going to stand for a big company like Goodyear taking advantage of a chance to pay me less than others just because I was a woman, and it seemed like a large enough award that a big company like Goodyear might feel the sting and think better of it before discriminating like that again.

I was very disappointed, however, when the trial judge was forced to reduce that award to the $300,000 statutory cap. It felt like the law was sending a message that what Goodyear did was only 10 percent as serious as the jury and I thought it was.

I am not a lawyer, but I am told that most of the time, the law does not put an arbitrary cap like that on the amount a defendant has to pay for mental anguish or punitive damages. I do not see why a company like Goodyear should get better treatment just because it broke a law protecting workers against discrimination instead of some other kind of law.

But, in the end, the Supreme Court took it all away, even the backpay. They said I should have complained every time I got a smaller raise than the men, even if I did not know what the men were getting paid and even if I had no way to prove the decision was discrimination.

Justice Ginsburg hit the nail on the head when she said that the majority's rule just does not make sense in the real world. You cannot expect people to go around asking their coworkers how much money they are making. Plus, even if you know some people are

getting paid a little more than you, that is no reason to suspect discrimination right away.

Every paycheck I received, I got less than what I was entitled to under the law. The Supreme Court said that this does not count as illegal discrimination, but it sure feels like discrimination when you are on the receiving end of that smaller paycheck and you are trying to support your family with less money than what the men are getting paid for doing the same job.

According to the Supreme Court, if you do not figure things out right away, the company can treat you like a second-class citizen for the rest of your career. That is not right.

The truth is Goodyear continues to treat me like a second-class worker to this day because my pension and Social Security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

My case is over, and it is too bad that the Supreme Court decided the way that it did. I hope, though, that Congress will not let this happen to anyone else. I would feel that this long fight was worthwhile if, at least at the end of it, I knew that I played a part in getting the law fixed so that it can provide real protection to real people in the real world.

Thank you.

[The prepared statement of Ms. Ledbetter follows:]

TESTIMONY OF LILLY LEDBETTER
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
ON THE IMPACT OF *LEDBETTER V. GOODYEAR* ON THE
EFFECTIVE ENFORCEMENT OF CIVIL RIGHTS LAWS

June 28, 2007

Good afternoon. Thank you, Mr. Chairman and Mr. Ranking Member for inviting me. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work. I wish my story had a happy ending. But it doesn't. I hope that this Committee can do whatever is necessary to make sure that in the future, what happened to me does not happen to other people who suffer discrimination like I did.

Experience At Goodyear

My story began in 1979, when Goodyear hired me to work as supervisor in their tire production plant in Gadsden, Alabama. I worked there for nineteen years. During that time, there must have been eighty or so other people who held the same position as me, but only a handful of them were women. But I tried to fit in and to do my job. It wasn't easy. 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. But it got so bad that I finally complained to the company. 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. The company worked out a deal with the EEOC so that supervisor would no longer manage me. But after that, the company treated me badly. They tried to isolate me. People refused to talk to me. They left me out of important management meetings so I sometimes didn't know what was going on, which made it harder to do my job. So I got a taste of what happens when you try to complain about discrimination.

When I started at Goodyear, all the managers got the same pay, so I knew I was getting as much as the men. But then Goodyear switched to a new pay system based on performance. After that, people doing the same jobs could get paid differently. Goodyear kept what everyone got paid confidential. No one was supposed to know. 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 got laid off during general layoffs a couple of times when business was bad, but they brought me back and I worked hard and did a good job. I got a "Top Performance Award" in 1996.

Over time, I got the feeling that maybe I wasn't getting paid as much as I should, or as much as the men. I had heard rumors that some of the men were getting up to $20,000 a

year extra for overtime work. However, I volunteered to work as much overtime as any of them, but I did not get anywhere near that much pay in overtime. I figured their salaries must be higher than mine, but I didn't have any proof – just rumors.

Eventually one of my managers even told me that I was, in fact, getting paid less than the mandatory minimum salary level put out in the Goodyear rules. 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.

I only started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three other male managers were getting paid. Shortly after that, I filed another complaint of discrimination with the EEOC in 1998, when I got transferred from my management job to a job doing manual labor, requiring me to lift 80 pound tires all shift long. A little while after I filed my EEOC complaint, someone sent me an anonymous package showing what the other male managers were getting paid compared to me.

Pay Discrepancies

After I filed my EEOC complaint and then filed a lawsuit, I was finally able to get the whole picture on my pay compared to the men's. It turned out that I ended up getting paid what I did because of the accumulated effect of pay raise decisions over the years. In any given year, the difference wasn't that big, nothing to make a huge fuss about all by itself. Some years I got no raise, when others got a raise. Some years I got a raise that seemed ok at the time, but it turned out that the men got bigger percentage raises. And sometimes, I got a pretty big percentage raise, but because my pay was already low, that amounted to a smaller dollar raise than the men were getting.

For example, in 1993, I got a 5.28 percent raise, which sounds pretty decent. But it was the lowest raise in dollars that year because it was 5.28 percent of a salary that was already a lot less than the men's because of discrimination. So the gap in my pay grew wider that year. Without knowing what the other men were getting paid, I had no way of knowing whether that raise was potentially discriminatory or not. All I knew was that I got a raise.

The result was that at the end of my career, I was earning $3,727 per month. The lowest paid male was getting $4,286 per month for the same work. The highest paid male was making $5,236. (An exhibit from my trial, showing my salary compared to some of the male managers, is attached to the end of this statement). So, I was actually earning twenty-percent less than the lowest paid male supervisor in the same position. There were lots of men with less seniority than me who were paid much more than I was.

Lower Court Proceedings

When we went to court, Goodyear acknowledged that it was paying me a lot less than the men doing the same work. But they said that it was because I was a poor performer and consequently got smaller raises than all the men who did better. That wasn't true and the jury didn't believe it. At the trial, two other women managers took the stand and explained how they were also discriminated against. One of them was a secretary who got promoted to manager, but only paid a secretary's salary. They kept telling her they would give her a raise, but they never did and she got fed up with that and went back to being a secretary. The other woman was also paid less than Goodyear's mandatory minimum wages.

At the end of the trial, the jury found that Goodyear had discriminated against me in violation of Title VII. The jury awarded me backpay as well as $4,662 for mental anguish and $3,285,979 in punitive damages.

At the trial, the jury found that Goodyear had discriminated against me in violation of Title 7. The jury awarded me more than $3 million in back pay, mental anguish and punitive damages. I can tell you that was a good moment. It showed that the jury took my civil rights seriously and wasn't going to stand for a big company like Goodyear taking advantage of a chance to pay me less than others just because I was a woman. And it seemed like a large enough award that a big company like Goodyear might feel the sting and think better of it before discriminating like that again.

I was very disappointed, however, when the trial judge was forced to reduce that award to the $300,000 statutory cap (which would, in the end, be reduced further by taxes, my trial lawyer informed me). It felt like the law was sending a message that what Goodyear did was only 10% as serious as the jury and I thought it was.

I'm not a lawyer, but I am told that most of the time, the law doesn't put an arbitrary cap like that on the amount a defendant has to pay for mental anguish or punitive damages. I don't see why a company like Goodyear should get better treatment just because it broke a law protecting workers against discrimination instead of some other kind of law.

Supreme Court Decision

The Supreme Court took it all away, even the backpay. They said I should have complained every time I got a smaller raise than the men, even if I didn't know what the men were getting paid and even if I had no way to prove that the decision was discrimination. They said that once 180 days passes after the pay decision is made, the worker is stuck with unequal pay for equal work under Title VII for the rest of her career and there is nothing illegal about that under the statute.

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 money they're making. At a lot of places, that could get you fired. And nobody wants to be asked those kinds of questions anyway.

Plus, even if you know some people are getting paid a little more than you, that's no reason to suspect discrimination right away. Pay can go up and down and you want to believe that your employer is doing the right thing and that it will all even out down the road. Especially when you work at a place like I did, where you are one of the only women in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along. As I found out all too well, calling something "discrimination" isn't appreciated -- I suffered the consequences when I went to the EEOC with proof of sexual harassment. Without proof, I would never go to the EEOC because it might cost me my job.

Anyway, the little amount of money at issue early on isn't worth fighting over at first. No lawyer is going to take a case to fight over an extra $100 a month and most people can't afford to pay a lawyer out of their own pockets. It would have been hard to demonstrate to the EEOC or a jury that the first $100 pay difference was discrimination. It was only after I got paid less than men again and again, without any good excuse, that I had a case that I could realistically bring to the EEOC or to court.

Consequences

What happened to me is not only an insult to my dignity, but it had real consequences for my ability to care for my family. Every paycheck I received, I got less than what I was entitled to under the law. The Supreme Court said that this didn't count as illegal discrimination, but it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family with less money than the men are getting for doing the same job. And according to the Court, if you don't figure things out right away, the company can treat you like a second-class citizen for the rest of your career. That isn't right.

The truth is, Goodyear continues to treat me like a second-class worker to this day because my pension and social security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

As you may know, making ends meet during retirement is not easy for a lot of seniors like me, even under the best of circumstances. It shouldn't be harder just because you are a woman who was discriminated against during your career.

Conclusion

My case is over and it is too bad that the Supreme Court decided the way that it did. I hope, though, that Congress won't let this happen to anyone else. I would feel that this long fight was worthwhile if, at least at the end of it, I knew that I played a part in getting the law fixed so that it can provide real protection to real people in the real world. Thank you.

(Excluding Overtime)

LILLY LEDBETTER

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
10/1/79	$18,216.96
10/1/79	$18,633.00
11/1/98	$44,724.00
	(Last day worked)

TERRY AMBERSON

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
7/1/79	$18,216.96
10/1/79	$18,633.00
7/1/98	$59,028.00
4/1/99	$60,816.00
4/1/99	$64,944.00
5/1/99	$67,541.52
5/1/02	$69,221.52

DAVID BARNES

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
7/1/79	$18,216.96
10/1/79	$18,633.00
9/1/98	$55,679.16
4/1/99	$58,463.16
4/1/99	$61,247.16
5/1/01	$63,383.16

DONALD MYERS

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
7/1/79	$18,216.96
10/1/79	$18,633.00
11/1/98	$57,696.00
1/1/99	$66,348.00

JERRY THOMPSON

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
7/1/79	$18,216.96
10/1/79	$18,633.00
5/1/98	$58,226.88
4/16/99	$60,555.96
4/16/99	$64,049.16
10/16/00	$73,644.00
5/1/01	$76,956.00
5/1/02	$78,876.00

JIMMY TODD

Date:	Base Salary:
4/1/79	$16,760.52
4/16/79	$17,842.56
7/1/79	$18,216.96
10/1/79	$18,633.00
9/1/00	$58,464.00
5/1/01	$60,444.00
5/1/02	$61,656.00

Exh 201

ATTACHMENTS

I

110TH CONGRESS
1ST SESSION

H. R. 2831

To amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973 to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 22, 2007

Mr. GEORGE MILLER of California (for himself, Mr. HOYER, Ms. DELAURO, Mr. ANDREWS, Ms. NORTON, Ms. WOOLSEY, Ms. SHEA-PORTER, Ms. HIRONO, Mrs. CAPPS, Mrs. MALONEY of New York, Ms. LINDA T. SÁNCHEZ of California, Mrs. MCCARTHY of New York, Mr. LOEBSACK, Ms. SLAUGHTER, Mr. VAN HOLLEN, Ms. MCCOLLUM of Minnesota, Mr. HINOJOSA, Mr. DAVIS of Illinois, Mr. KUCINICH, Mr. MCDERMOTT, Mr. FARR, Ms. BERKLEY, Mr. NADLER, and Ms. CLARKE) introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973 to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ledbetter Fair Pay Act of 2007".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., No. 05–1074 (May 29, 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 charges of discrimination under any law, nothing in this Act is intended

to preclude or limit an aggrieved person's right to introduce evidence of unlawful employment practices that have occurred outside the time for filing a charge of discrimination.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(e)) is amended by adding at the end the following:

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

"(B) In any action under this title with respect to discrimination in compensation, the Commission, the Attorney General, or an aggrieved person, may for purposes of filing requirements, challenge similar or related instances of unlawful employment practices with respect to

discrimination in compensation occurring after an aggrieved person filed a charge without filing another charge with the Commission.

"(C) In addition to any relief authorized by 1977a of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in section (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) in the first sentence—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking "(d)" and inserting "(d)(1)";

(2) in the third sentence, by striking "Upon" and inserting the following:

"(2) Upon"; and

(3) by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

"(B) In any action under this Act with respect to discrimination in compensation, the Secretary or an aggrieved person, may for purposes of filing requirements, challenge similar or related instances of unlawful employment practices with respect to discrimination in compensation occurring after an aggrieved person filed a charge without filing another charge with the Secretary.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendment made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to sec-

1 tion 107(a) of such Act (42 U.S.C. 12117(a)), which
2 adopts the powers, remedies, and procedures set forth in
3 section 706 of the Civil Rights Act of 1964 (42 U.S.C.
4 2000e–5).

5 (b) REHABILITATION ACT OF 1973.—The amend-
6 ments made by section 3 shall apply to claims of discrimi-
7 nation in compensation brought under sections 501 and
8 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791,
9 794), pursuant to—

10 (1) sections 501(g) and 504(d) of such Act (29
11 U.S.C. 791(g), 794(d)), respectively, which adopt
12 the standards applied under title I of the Americans
13 with Disabilities Act of 1990 for determining wheth-
14 er a violation has occurred in a complaint alleging
15 employment discrimination; and

16 (2) paragraphs (1) and (2) of section 505(a) of
17 such Act (29 U.S.C. 794a(a)) (as amended by sub-
18 section (c)).

19 (c) CONFORMING AMENDMENTS.—

20 (1) REHABILITATION ACT OF 1973.—Section
21 505(a) of the Rehabilitation Act of 1973 (29 U.S.C.
22 794a(a)) is amended—

23 (A) in paragraph (1), by inserting after
24 "(42 U.S.C. 2000e–5 (f) through (k))" the fol-
25 lowing: "(and the application of section

706(e)(3) (42 U.S.C. 2000e–5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsections (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964.—Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended by adding at the end the following

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION ACT OF 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and

1 504 of the Rehabilitation Act of 1973, that are pending
2 on or after that date.

○

I

110TH CONGRESS
1ST SESSION

H. R. 2660

To amend title VII of the Civil Rights Act of 1964 to extend the period for filing charges of discrimination in violation of such title and to provide relief for certain current injuries arising from compensation calculations attributable to compensation decisions made at any time in violation of such title.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2007

Mr. RUPPERSBERGER (for himself, Ms. KILPATRICK, and Ms. WASSERMAN SCHULTZ) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend title VII of the Civil Rights Act of 1964 to extend the period for filing charges of discrimination in violation of such title and to provide relief for certain current injuries arising from compensation calculations attributable to compensation decisions made at any time in violation of such title.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "2007 Civil Rights Pay Fairness Act".

SEC. 2. AMENDMENTS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(e)) is amended—

(1) in paragraph (1)—

(A) by striking "one hundred and eighty" and inserting "360", and

(B) by striking "three hundred" and inserting "480", and

(2) by adding at the end the following:

"(3) For purposes of this section, an unlawful employment practice occurs with respect to compensation when a person aggrieved is injured as a result of a compensation calculation attributable in whole or in part to the application or continuation of a compensation decision that was made—

"(A) at any time before a charge relating to such calculation is filed under this section; and

"(B) for an intentionally discriminatory purpose in violation of this title.".

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Chicago Tribune

May 30, 2007 Wednesday
Chicago Final Edition

SECTION: BUSINESS ; ZONE C; Pg. 1

LENGTH: 825 words

HEADLINE: Justices restrict pay bias lawsuits;
Split Supreme Court rules for employers

BYLINE: By Robert Manor, Tribune staff reporter

BODY:

A deeply divided Supreme Court ruling Tuesday sharply limited the ability of workers to sue employers for gender pay discrimination linked to actions taken years earlier.

Employer groups praised the 5-4 decision, saying it protects employers from unfair liability and requires workers to act promptly to protect their rights. Civil-rights advocates criticized the ruling, saying it will prevent workers who are discriminated against from recovering all the money they are due from employers.

In its simplest terms, the court said alleged victims of pay discrimination must file a complaint with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. They cannot seek redress for discrimination prior to that time.

A public policy law firm associated with the U.S. Chamber of Commerce praised the decision.

"What the court is doing is reading the statute the way Congress wanted it to read," said Robin Conrad, executive vice president of the National Chamber Litigation Center. "It was to resolve disputes as quickly as possible."

But Kim Gandy, president of the National Organization for Women, described the ruling as "a terrible, terrible decision" that "has turned our understanding of employment discrimination law on its head."

The legal decision involved Lilly Ledbetter, who worked for 19 years at the Goodyear Tire & Rubber Co. plant in Gadsden, Ala.

Shortly before her retirement in 1998, she filed an EEOC complaint alleging she was paid significantly less than men doing the same work, and that she had been discriminated against for many years.

Ledbetter argued that over the years her male counterparts received larger pay raises than she did, and as a result they eventually earned much more money.

For example, court documents say that she started out in 1979 earning the same as male co-workers. By 1997 she was earning $3,727 per month, the lowest of 15 male co-workers and significantly less than the $5,236 a month earned by the highest paid male co-worker.

Goodyear argued in court that Ledbetter got smaller pay raises because her work was not as good as that of other employees.

Under an anti-discrimination provision of the Civil Rights Act, which requires review by the EEOC, Ledbetter prevailed in court and eventually won a $360,000 award.

But the award was thrown out by a federal appeals court, which determined that jurors should have looked only at Ledbetter's most recent pay increases, not pay increases dating back for years.

The Supreme Court agreed.

"Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her," wrote Justice Samuel Alito for the majority. Joining him were Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas, the conservative majority on the court.

Justice Ruth Bader Ginsburg, writing for the minority, said pay disparity between employees can occur over time, as was the case with Ledbetter, and discrimination might not become apparent immediately.

She also said the court's decision would offer a perverse incentive to encourage discrimination lawsuits against employers.

"Today's decision counsels: Sue early on, when it is uncertain whether discrimination accounts for the pay disparity you are experiencing," said Ginsburg, the only woman on the court. Joining her were Justices Stephen Breyer, David Souter and John Paul Stevens, the liberal wing of the court.

The National Organization for Women said the decision especially affects victims of job discrimination and harassment based on gender. Other civil rights laws often are used on behalf of people arguing they are discriminated against because of a disability or other reasons.

Quentin Riegel, vice president of litigation at the National Association of Manufacturers, said the decision "has important ramifications for all companies.

"It is fair to the employer to have these cases resolved promptly," Riegel said. "It is fair to the employee to get it resolved promptly too."

John Russo, co-director of the Center for Working-Class Studies at Youngstown State University in Ohio, said limits on how far back a discrimination victim can go in claiming compensation are common in arbitration. Unionized workplaces often use arbitration rather than litigation to settle discrimination claims.

"Frequently, arbitrators put some sort of limitation on time," Russo said. "There is some precedent in arbitration law for limiting the amount of back pay."

But Bob Bruno, associate professor of labor and industrial relations at the University of Illinois at Chicago, described himself as "stunned" by the court's decision, which he said puts an unfair burden on women in the workplace.

"A female in a male-dominated workplace, she now has to be fully aware of her discrimination, and she has to be able to ferret it out as it is happening in real time," Bruno said.

That is often be difficult to do, Bruno said.

LOAD-DATE: May 30, 2007

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May 30, 2007 Wednesday
Met 2 Edition

SECTION: A-SECTION; Pg. A01

DISTRIBUTION: DC

LENGTH: 965 words

HEADLINE: Over Ginsburg's Dissent, Court Limits Bias Suits

BYLINE: Robert Barnes; Washington Post Staff Writer

BODY:

A Supreme Court once again split by the thinnest of margins ruled yesterday that workers may not sue their employers over unequal pay caused by discrimination alleged to have occurred years earlier.

The court ruled 5 to 4 that Lilly Ledbetter, the lone female supervisor at a tire plant in Gadsden, Ala., did not file her lawsuit against Goodyear Tire and Rubber Co. in the timely manner specified by Title VII of the Civil Rights Act of 1964.

The decision moved Justice Ruth Bader Ginsburg to read a dissent from the bench, a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights.

Speaking for the three other dissenting justices, Ginsburg's voice was as precise and emotionless as if she were reading a banking decision, but the words were stinging.

"In our view, the court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination," she said.

Last month, Ginsburg rebuked the same five-justice majority for upholding the federal Partial Birth Abortion Ban Act and for language in the opinion that she said reflected "ancient notions about women's place in the family and under the Constitution -- ideas that have long since been discredited."

Yesterday she said that "Title VII was meant to govern real-world employment practices, and that world is what the court today ignores." She called for Congress to correct what she sees as the court's mistake.

In a case that Justice Samuel A. Alito Jr. said was easily decided on the statute "as written," her statement from the bench was noteworthy.

Marcia Greenberger, co-president of the National Women's Law Center, said Ginsburg's attention-getting dissents are a "clarion call to the American people that this slim majority of the court is headed in the wrong direction." She noted Ginsburg's background as a feminist legal activist who helped establish women's legal rights and added: "To see them being dismantled is especially troubling."

While Greenberger and others said the court's decision in Ledbetter v. Goodyear Tire and Rubber Co. was a "setback for women and a setback for civil rights," business groups applauded the "fair decision" that, in the words of the U.S. Chamber of Commerce, "eliminates a potential wind-fall against employers by employees trying to dredge up stale pay claims."

A jury had originally awarded Ledbetter more than $3.5 million because it found "more likely than not" that sex discrimination during her 19-year career led to her being paid substantially less than her male counterparts.

An appeals court reversed, saying the law requires that a suit be filed within 180 days "after the alleged unlawful employment practice occurred," and Ledbetter could not prove discrimination within that time period. She had argued that she was discriminated against throughout her career, receiving smaller raises than the men received, and that each paycheck that was less was a new violation.

Alito wrote for the majority that "current effects alone can't breathe life into prior, uncharged discrimination." He was joined by Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. Thomas is a former chairman of the Equal Employment Opportunity Commission.

"We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented . . . within the period prescribed by the statute," Alito said.

Robin Conrad, executive vice president of the National Chamber Litigation Center, said: "If the court ruled the opposite way, employers could have been hauled into court on decades-old claims of discrimination."

But Ginsburg, joined by Justices John Paul Stevens, David H. Souter and Stephen G. Breyer, said the decision sets up a sometimes impossible barrier. "Pay disparities often occur, as they did in Ledbetter's case, in small increments; only over time is there strong cause to suspect that discrimination is at work," she wrote.

Even when unequal pay is discovered, she wrote, women may be reluctant to go to federal court over small amounts: "An employee like Ledbetter, trying to succeed in a male-dominated workplace, in a job filled only by men before she was hired, understandably may be anxious to avoid making waves."

Ginsburg's empathetic statement added that "the same denial of relief" would apply to those alleging discrimination based on race, religion, age, national origin or disability.

Ledbetter, like Ginsburg a woman in her 70s, said she was "disappointed, very, very disappointed" with the decision. "I worked a lot of years doing the hard work and not to get paid as much as the men will affect me every day in the future" in the form of lower retirement benefits, she said.

Judith L. Lichtman, a senior adviser to the National Partnership for Women and Families, said that is what Ginsburg's dissents speak to.

"She talks about the real-world consequences of Supreme Court decisions on the lives of women," Lichtman said.

Ginsburg has been the court's lone female member since Alito replaced Justice Sandra Day O'Connor in January 2006, and both women have expressed consternation about that in interviews since then.

"The word I would use to describe my position on the bench is 'lonely,' " Ginsburg told USA Today this year. Asked what difference O'Connor's departure would make, Ginsburg said only: "This term may be very revealing."

Richard Lazarus, co-director of Georgetown University Law Center's Supreme Court Institute, said that reading a dissent from the bench is significant for a justice. "It's a different order of magnitude of dissent," he said.

Lazarus said Ginsburg's dissents "may be signifying an increasing frustration."

LOAD-DATE: May 30, 2007

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The New York Times

May 31, 2007 Thursday
Late Edition - Final

SECTION: Section A; Column 1; Editorial Desk; Pg. 18

LENGTH: 438 words

HEADLINE: Injustice 5, Justice 4

BODY:

The Supreme Court struck a blow for discrimination this week by stripping a key civil rights law of much of its potency. The majority opinion, by Justice Samuel Alito, forced an unreasonable reading on the law, and tossed aside longstanding precedents to rule in favor of an Alabama employer that had underpaid a female employee for years. The ruling is the latest indication that a court that once proudly stood up for the disadvantaged is increasingly protective of the powerful.

Lilly Ledbetter, a supervisor at the Goodyear Tire & Rubber Company in Gadsden, Ala., sued her employer for paying her less than its male supervisors. At first, her salary was in line with the men's, but she got smaller raises, which created a significant pay gap. Late in her career, Ms. Ledbetter filed a complaint with the Equal Employment Opportunity Commission. A jury found that Goodyear violated her rights under Title VII of the Civil Rights Act of 1964.

Goodyear argued that she filed her complaint too late and, by a 5-4 margin, the Supreme Court agreed. Title VII requires employees to file within 180 days of "the alleged unlawful employment practice." The court calculated the deadline from the day Ms. Ledbetter received her last discriminatory raise. Bizarrely, the majority insisted it did not matter that Goodyear was still paying her far less than her male counterparts when she filed her complaint.

In dissent, Justice Ruth Bader Ginsburg noted that there were strong precedents supporting Ms. Ledbetter. The Supreme Court ruled in a similar race discrimination case that each paycheck calculated on the basis of past discrimination is unlawful under Title VII. The courts of appeals have overwhelmingly agreed. So did the E.E.O.C., the agency charged with enforcing Title VII.

In addition to interpreting the statute unreasonably and ignoring the relevant precedents, the majority blinded itself to the realities of the workplace. Employees generally do not know enough about what their co-workers earn, or how pay decisions are made, to file a complaint precisely when discrimination occurs. At Goodyear, as at many companies, salaries were confidential. The court's new rules will make it extraordinarily difficult for victims of pay discrimination to sue under Title VII. That is not how Congress intended the law to be enforced, merely how five justices would like it to be.

It is disturbing that Anthony Kennedy, the court's swing justice, cast the deciding vote in favor of gutting a key part of the Civil Rights Act. Fortunately, Congress can amend the law to undo this damaging decision. It should do so without delay.

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Roll Call

June 18, 2007 Monday

SECTION: GUEST OBSERVER

LENGTH: 786 words

HEADLINE: An Invitation To Justice for New Congress

BYLINE: Rep. Steny Hoyer

BODY:

Until two weeks ago, I thought my 26 years in the House of Representatives had inured me to those disappointing occasions on which the Supreme Court restricts legislative acts of Congress whose intent is clear, means are constitutional and ends are just.

I have had firsthand experience at being frustrated by the court. As the principal House sponsor of the landmark Americans with Disabilities Act, I have been deeply troubled by recent court decisions that narrowly construe the ADA's protections because I know Congress intended the law to be given broad application.

Yet even a Congressional veteran like me was taken aback by the court's recent 5-4 decision involving Lilly Ledbetter, a supervisor at the Goodyear Tire and Rubber Co., who sued her former employer for paying her less than all of her male counterparts.

Ledbetter's complaint was based on Title VII of the 1964 Civil Rights Act, one of our nation's most important civil rights statutes, which prohibits employment discrimination based on race, color, religion, sex and national origin.

The merits of Ledbetter's complaint were never in doubt. A federal jury found that Goodyear violated her rights under Title VII, which requires employees to first file complaints with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory practice.

Notwithstanding the jury's finding, the court dismissed Ledbetter's complaint. Simply stated, the court held that Ledbetter's claim was not timely because the later effects of past discrimination (specifically, the paychecks Ledbetter received after Goodyear's decision to pay her less than her male co-workers) do not restart the clock for filing an EEOC charge.

Although each subsequent paycheck collected by Ledbetter reflected a discriminatory decision about her compensation made years before by Goodyear, the majority ruled that the window for filing a complaint was within 180 days of the first discriminatory decision about her pay.

No matter that each subsequent paycheck Ms. Ledbetter collected perpetuated Goodyear's initial discriminatory action or even, as Justice Ruth Bader Ginsburg pointed out in her dissent, that the realities of the workplace militate against detecting pay discrimination when it first occurs can take years to uncover, usually by accident.

Ask yourself: When was the last time you and your co-workers stood around the office water cooler and openly

discussed your salaries, raises and bonuses? This is not a common occurrence. In fact, in this case, the evidence showed that Goodyear tried to keep salary information confidential.

The logic of the court's holding is worrisome.

Suppose a complaint fitting the same timeline as Ledbetter's but alleging employment discrimination based on race or color rather than gender had been filed. Would the Ledbetter majority have dismissed the complaint because it was not filed within 180 days of when the discrimination first took place?

In other words, if it could be proved outside the initial 180-day window in which her employer set her compensation that an African-American employee was paid less than her white peers on the basis of her color rather than her gender, would the court still have held that the Civil Rights Act was, in effect, a useless tool for remedying injustice?

If the answer is "no," then arguably the court does not consider gender discrimination a social and economic ill on par with other forms of discrimination addressed in Title VII. If the answer is "yes," then today's court trivializes discrimination in all its incarnations that, since Brown v. Board of Education, the federal government has dedicated itself to combating. Either way, the Supreme Court of 2007 looks more like Plessy v. Ferguson (which established the separate-but-equal doctrine) than Brown.

As Ginsburg pointed out in her dissent, the majority conveniently ignored precedents supporting Ms. Ledbetter's case, including decisions by at least eight of the federal circuit courts of appeals.

But Justice Ginsburg is too kind. The majority chose a dangerous reading of the Civil Rights Act that is inconsistent with Congressional intent. In fact, the court itself has even recognized in prior cases that Congress intended Title VII to have a broad remedial purpose: to make persons whole for injuries suffered on account of unlawful employment discrimination.

At the end of her dissent, Justice Ginsburg invites Congress "to correct the Court's parsimonious reading of Title VII." Given the cramped reasoning of the majority in Ledbetter, I believe that is exactly what the new majorities in Congress will - and must - do.

Rep. Steny Hoyer (D) is the House Majority Leader. He represents Maryland's 5th district.

LOAD-DATE: June 18, 2007

Mr. NADLER. Thank you.

Professor Chamallas, you are recognized for 5 minutes.

TESTIMONY OF MARTHA CHAMALLAS, ROBERT J. LYNN CHAIR IN LAW, MORITZ COLLEGE OF LAW, OHIO STATE UNIVERSITY

Ms. CHAMALLAS. Thank you, Mr. Chairman, Ranking Member Franks. I very much appreciate this opportunity to testify on the impact of the *Ledbetter* decision.

My written testimony discusses the statute of limitations problem, and I will not address that issue now. Instead, I want to use my time to indicate why I think that Congress should lift the caps on compensatory and punitive damages currently imposed by title VII and by the ADA. The *Ledbetter* case itself dramatically illustrates the need for this reform.

The jury awarded Lilly Ledbetter over $3.5 million in compensatory and punitive damages. Because of the title VII cap, however, her damages were reduced to $300,000, a sum the trial court regarded as well below that which would be sufficient to punish and deter Goodyear from discriminating in the future.

Title VII set the $300,000 cap for employers with more than 500 employees, even very large employers such as Goodyear who employ more than 75,000 workers.

The title VII cap is particularly harsh because it is a combined cap on both compensatory and punitive damages. The caps are inequitable because they interfere with the two primary purposes of title VII: to prevent and deter discrimination and to make victims whole for their injuries.

Because of their very nature, caps on damages do not serve to screen out meritless claims or otherwise streamline litigation. Instead, they have their greatest impact in two types of case.

The first type of case, the plaintiff is able to prove that because he suffered severe harm, he deserves a large award for compensatory damages beyond the capped amount. A good example is a recent disability discrimination case brought by Ulysses Hudson against the Department of Homeland Security.

Hudson proved that his supervisor stalked and harassed him, made threats to damage his property and repeatedly discriminated against him because of his disability. As a result of his cruel treatment, Hudson was unable to return to work, was forced to file bankruptcy and, through medical testimony, establish that he suffered post-traumatic stress disorder, anxiety and depression.

The jury recognized the severity of this harm and awarded $1.5 million in compensatory damages. Because of the caps, however, the trial court reduced the award to $300,000 representing only 20 percent of the damages as assessed by the jury.

In the second type of case in which the caps are inequitable, the plaintiff is able to prove that because her employer was guilty of reprehensible behavior, she should be able to receive a punitive damages award sizeable enough to deter the employer from discriminating in the future.

In a 1977 Kansas case, for example, the plaintiff, Sharon Deters, proved that her manager created a sexually hostile environment by persistently ignoring her complaints of harassment by co-employees. Rather than punishing the harassers, the manager excused

their conduct, telling Deters that the harassers were revenue producers and she was not a revenue producer. The manager even attempted to convince Deters that being called the F word and the C word was just part of the roughness of the job.

The jury awarded Deters $1 million dollars in punitive damages. Because of the title VII caps, however, the court again was forced to reduce the award only to $300,000, even though the defendant was a multibillion-dollar company who would not feel the sting from such a small award.

The courts themselves have recognized that the title VII caps undermine the deterrent effect of the law. In the disability case against Wal-Mart in which a judge was forced to slash a $5 million punitive damages award to $300,000, the court stated that, "Although the reduction respected the law, it did not achieve a just result."

He noted that for corporate behemoths such as Wal-Mart, such a small punitive damages award had virtually no deterrent value, given that Wal-Mart's total net sales in 2004, for example, were $256 billion and that it thus took only 37 seconds to achieve a sales equal to the $300,000 it was required to pay to the plaintiff.

The caps also affect plaintiffs who sue for religious discrimination. In one egregious case of religious discrimination, Albert Johnson, the plaintiff, was subjected to a hostile environment by his supervisor. The supervisor was annoyed that Johnson had asked for Sundays off. He called Johnson a religious freak and told him he was tired of his religious B.S., and he made fun of Johnson's religion in highly insensitive and lewd terms.

The jury awarded Johnson $400,000 for compensatory damages and $750,000 for punitive damages. Again, the award was reduced to $300,000 to stay within the cap.

Now it is interesting because, in this case, Johnson's jury award for the $400,000 in compensatory damages was itself over the capped amount, the reduction had the effect of totally wiping out the punitive damages and, with it, any chance of a deterrent effect.

Lifting the caps would not lead to disproportionate liability. Under title VII, damages are only awarded in cases of intentional discrimination. Employers who have not deliberately violated the civil rights laws are thus required only to afford plaintiffs equitable relief.

Moreover, since the 1999 ruling in the Kolstadt case in the Supreme Court, plaintiffs can recover punitive damages only in a very small subset of cases in which they prove not only intentional discrimination, but also that the employer acted with malice or reckless indifference to the plaintiff's federally protected rights and the evidence shows that the employer did not even make good faith efforts to enforce the company's antidiscrimination policy.

These strict limits show that title VII's enforcement scheme is very different from common law tort, which sometimes allows compensatory and punitive damages in negligence and strict liability cases.

Since 1991, the legal landscape has changed considerably. Lifting the caps would allow discrimination victims who have suffered the most to receive fair awards.

And finally, I would like to say that lifting the cap would help those that were injured the most and would hold the worst offenders accountable.

Thank you very much.

[The prepared statement of Ms. Chamallas follows:]

PREPARED STATEMENT OF MARTHA CHAMALLAS

"The Need to Assure Adequate Remedies for Workers Subjected to Intentional Violations Civil Rights Laws"

Testimony of Martha Chamallas, Robert J. Lynn Chair in Law
Moritz College of Law, The Ohio State University

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties

U.S. House of Representatives
June 28, 2007

I appreciate the opportunity to come before you today to discuss the need to examine the problems created for victims of intentional employment discrimination following the Supreme Court's decision this Term in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[1] My testimony will focus on two important issues arising from *Ledbetter*: the need to restore protection for victims of pay discrimination by correcting the Court's specific ruling with respect to the statute of limitations under Title VII and the pressing need to provide adequate remedies to all victims of intentional discrimination by lifting the caps on compensatory and punitive damages currently imposed by Title VII. Because the statute of limitations issue has received the most attention to date, the bulk of my testimony will pertain the issue of caps on damages.

The *Ledbetter* case dramatically illustrates the need for each of these two reforms. As the record of her litigation reveals, Lilly Ledbetter suffered from a form of entrenched pay discrimination on the basis of sex, characteristic of a male-dominated workplace where she worked as the only woman area manager for a major corporation. Over the course of her 19-year employment at Goodyear, Ledbetter's salary fell 15 to 40 percent below the salaries of her male counterparts, despite the fact that she performed substantially the same job as the men. Ledbetter

[1]Slip Opinion, No. 05-1074 (May 29, 2007).

was successful at trial: the jury determined that Goodyear had intentionally discriminated against her on the basis of sex and awarded her backpay, compensatory and punitive damages for a total amount of $3,843,041.93. However, largely because of the statutorily-imposed cap on compensatory and punitive damages under Title VII,[2] the trial judge was compelled to cut the jury's verdict to $360,000.00, a sum considerably below that which the court itself determined that a reasonable jury would find sufficient to punish and deter Goodyear from discriminating in the future.[3] At the Supreme Court, Ledbetter's recovery was taken away completely when the 5-4 majority ruled that her claim was untimely and barred by the statute of limitations.

1. The Ledbetter Rule on the Statute of Limitations is Unfair to Victims of Pay Discrimination and Creates Perverse Incentives for Employer Behavior

The *Ledbetter* decision rejected the longstanding "pay-check accrual rule" that had permitted victims of pay discrimination to bring claims under Title VII if they received a paycheck tainted by illegal discrimination within the statute of limitations period. The Court's ruling now requires that a worker challenge an employer's initial *decision* to discriminate in pay within Title VII's short limitations period (typically within 180 days, or 300 days in states with fair employment agencies), or lose forever the right to challenge ongoing discrimination traceable to that earlier decision. The rule has created a nearly insuperable obstacle for victims of pay discrimination, as highlighted by Justice Ginsburg's detailed dissent inviting Congress to

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[2] *See* 42 U.S.C. § 1981a(b) (3) (2006).

[3] Ledbetter v. Goodyear Tire and Rubber Co., No. 99-C-3137-E (N.D. Ala. Sept. 24, 2003).

correct the Court's "parsimonious" reading of Title VII.[4]

Simply put, under the *Ledbetter* ruling, victims of pay discrimination are likely to be left without a remedy under Title VII because of the realities of how pay discrimination typically occurs and is uncovered in today's workplace. The *Lebetter* rule is untenable because it requires employees to challenge a discriminatory pay decision at a time when they are unlikely to have the kind of information necessary to raise a suspicion that their pay is discriminatory, for the simple reason that employers rarely disclose company-wide salary information and the fact that powerful workplace norms often discourage employees from comparing their pay to others in the workplace.[5] The strict limitations of *Ledbetter* are especially harsh on new hires who are often in no position to realize that their starting salaries are inequitable and are likely to perceive that they have been a victim of discrimination only years later when the disparity in pay has greatly magnified and compounded.[6]

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[4] *See* Slip Opinion at 19 (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

[5] *See* Leonard Bierman & Rafael Gely, *Love, Sex and Politics?" Sure. Salary? No Way: Workplace Social Normand and the Law*, 25 Brekeley F. Emp. & Labor L. 167, 168, 171 (2004) (noting that one-third of the U.S. private sector employer have policies prohibiting employees from discussing salaries and that many more communicate informally an expectation of confidentiality with respect to employee salaries.)

[6] *See* Deborah L. Brake, *Retaliation,* 90 Minn. L. Rev. 18, 28-37 (2005) (discussing social

The *Ledbetter* decision puts discrimination victims in a Catch-22 position. Under the Court's ruling, employees are faced with a dilemma: to preserve their right to contest pay discrimination, *Ledbetter* requires them to complain at the very first hint of discrimination, but, under prevailing Title VII law, employees have no protection against employer retaliation if it is later determined that their internal complaint of discrimination was "unreasonable."[7] Because few employees will be willing to risk retaliation by complaining to their employers "too soon,"[8] the *Ledbetter* rule will likely operate as a practical bar to examination of the kind of entrenched pay disparities that have produced the persistent gap in pay between men and women in the American workforce

If left uncorrected, the Court's ruling is *Ledbetter* will also create perverse incentives for

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science research documenting a "minimization bias" in which targets of discrimination resist perceiving and acknowledging it as such, even when they experience behavior that objectively qualifies as discrimination); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law,* 26 Harv. Women's L.J. 3, 25-26 (2003); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination,* in THE HANDBOOK OF RESEARCH ON EMPLOYMENT DISCRIMINATION: RIGHTS AND REALITIES 279, 295-296 (discussing the importance of social support as a factor influencing the decision to report discrimination).

[7] *See* Clark County School District v. Breeden, 532 U.S. 268, 271 (2001).

[8] For a sampling and critique of some of the lower court rulings applying the retaliation standard, see Brake, *Retaliation, supra* note 6, at 82-102.

employer behavior: it will reward those employers who have not internally taken steps to eliminate sex bias in pay by allowing them to pocket the gains derived from illegal – but undetected – discrimination. Because *Ledbetter* now provides employers with immunity from lawsuits challenging pay discrimination that is not immediately discovered and made the subject of a lawsuit, the ruling discourages, rather than encourages, employers to reassess their own pay scales and correct salary inequities. In this respect, the *Ledbetter* rule actually works against the parmount goal of curbing Title VII lawsuits through the prevention of discrimination and the private resolution of employee complaints internally.

Finally, the Court's harsh reading of the statute of limitations in *Ledbetter* was entirely unnecessary to protect employers from disproportionate liability for claims of backpay. Because an explicit provision of Title VII already limits backpay awards to a maximum of two years from the date the charge was filed,[9] there is built-in protection against an undue burden being imposed on employers. The net effect of *Ledbetter* is thus to deny plaintiffs with meritorious claims of pay discrimination from pursuing their claims under Title VII, leaving a wide gap in the protection against salary discrimination, not only for women, but particularly for victims of race and other forms of discrimination who have no right to sue under the Equal Pay Act. [10]

2. Title VII's Combined Cap on Compensatory and Punitive Damages is Arbitrary and Harms Victims of the Most Severe and Egregious Forms of Discrimination

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[9] *See* 42 U.S.C.§2000e-5(g) (2006).

[10] *See* Slip Opinion at 17 (Ginsburg, J. dissenting).

Even before Lilly Ledbetter's jury award was taken away completely by the ruling of the Supreme Court, it was reduced substantially by the trial court, in order to comply with the cap on damages currently imposed under Title VII. Since damages were first introduced by the 1991 Civil Rights Act, the amount of compensatory and punitive damages has been keyed to the size of the employer. For large employers such as Goodyear who employ more than 500 employees,[11] the statute sets a cap on the combined amount of compensatory and punitive damages at $300,000. The cap for smaller employers is even lower, set at $50,000 for employers with 15-100 employees, $100,000 for employers with 101-200 employees, $200,000 for employers between 200-500 employees.[12] The caps cover a wide range of compensatory damages for injuries suffered by victims of employment discrimination, including not only mental anguish and emotional pain, loss of enjoyment of life and other non-pecuniary losses, but also future pecuniary losses.[13] Notably, the Title VII cap is a combined cap on both compensatory and punitive damages, in contrast, for example, to many state law caps on tort malpractice awards, which often target punitive damages only.[14] Under the current statutory

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[11] Goodyear's website indicates that it employs more than 75,000 associates. http://www.goodyear.com/careers.

[12] 42 U.S.C. § 1981a(b)(3) (2006).

[13] 42 U.S.C. § 1981a (b) (3)(2006).

[14] *See* Catherine Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev.391, 496 (2005).

scheme, there is no provision that adjusts the caps to take into account cost-of-living increases or inflation, and judges have no discretion to waive the caps in individual cases to respond to especially serious injuries or egregious violations of Title VII.

In addition to damage caps, both the statute and the case law governing the award of damages under Title VII impose significant restrictions on recovery. Most importantly, the explicit language of Title VII allows the award of compensatory and punitive damages only if the plaintiff proves *intentional* discrimination.[15] Thus, damages are not recoverable in cases of disparate impact involving unintentional discrimination.[16] The statute also contains express limitations on the recovery of punitive damages: in addition to proving intentional discrimination, to be eligible for punitive damages, plaintiffs must prove that the employer acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual."[17] After passage of the 1991 Act, the Supreme Court further tightened the requirements for eligibility for punitive damages in *Kolstad v. American Dental Ass'n.*,[18] ruling that employers can escape liability for punitive damages if they have made "good faith efforts to

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[15] 42 U.S.C. § 1981a (a) (1) (2006).

[16] Employers who violate the ADA also escape damages in reasonable accommodation cases where they can prove they have made good faith efforts to accommodate the disabled individual, even if the accommodation is determined not to satisfy the ADA. 42 U.S.C. § 1981a(a)(3) (2006).

[17] *See* 42 U.S.C.§1981a (b)(1) (2006).

[18] Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).

enforce an antidiscrimination policy,"[19] despite any malicious or reckless behavior on the part of its managerial employees.

As they currently stand, the caps interfere with the two primary purposes which inform Title VII: to prevent and deter discrimination and to "make victims whole" for injuries suffered on account of employment discrimination.[20] Because of their very nature, caps on damages do not serve to screen out meritless claims or to streamline litigation. Instead, they have the greatest impact in two types of cases: (1) cases in which plaintiffs are able to prove that they have suffered severe injuries and thus deserve a large award for compensatory damages and (2) cases involving egregious behavior on the part of an employer warranting a punitive damage award sizeable enough to deter such an employer from discriminating in a like manner in the future.

Two recent disability discrimination cases illustrate the inequity of imposing caps on compensatory damages in cases in which plaintiffs prove that they have suffered severe emotional distress and other personal injuries as a result of the defendant's discriminatory behavior. In one case,[21] Ulysses Hudson, a former employee of the Department of Homeland Security was awarded $1.5 million in compensatory damages after proving that he was hurt, both financially and emotionally, from retaliatory and discriminatory behavior on the part of his supervisor, which included stalking, harassment and threats to plaintiff's property. Due to the severity of his harm, Hudson was unable to return to work, ultimately was forced to file for

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[19] Kolstad, 527 U.S. at 546.

[20] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[21] Hudson v. Chertoff, 473 F.Supp. 2d 1286 (S.D. Fla. 2007).

Chapter 13 bankruptcy, and proved through medical testimony that he suffered post-traumatic stress disorder, anxiety, and depression because of the defendant's treatment of him. Nevertheless, the trial court was compelled by the Title VII caps to reduce his compensatory damages to $300,000, representing only 20% of his damages as assessed by the jury. In another disability case,[22] an employee of a state prison who had been illegally refused accommodation for his severe asthma had his compensatory damages reduced from $420,300 to $300,000, despite proof of serious harm, including mental suffering over a period of two years, economic hardship, termination, and actual physical injury.

There is no justification for denying the most seriously injured plaintiffs their right to be "made whole." Particularly in civil rights cases involving intentionally discriminatory behavior, federal law should guarantee that it is employers, not victims, who should pay for the proven costs of discrimination, as determined by the facts of the particular case. The current Title VII scheme that sets an artificial limit on compensatory damages based on the size of the employer denies employees their right to individualized justice and may unfairly force victims to forego medical treatment or other services needed to repair the damage caused by a violation of their civil rights.

3. The Title VII Caps on Damages Undermine the Deterrent Effect of Federal Civil Rights Law

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[22] Muller v. Costello, 997 F.Supp. 299 (N.D.N.Y. 1998). *See also* Peyton v. DiMario, 287 F.3d 1121 (D.C. Cir. 2002) (compensatory damages reduced from $482,000 to $300,000 in sexual harassment suit); Velez v. Roche, 355 F. Supp.2d 1022 (N.D. Cal. 2004) (compensatory damage award of $505,623 reduced to $300,000 in sexual harassment suit).

When Congress authorized the imposition of punitive damages in the 1991 Civil Rights Act, it reinforced its longstanding commitment to enforce Title VII law in a manner designed to prevent future discrimination. Since the 1970s, the Supreme Court has described the primary objective of Title VII as "prophlylactic" in nature, creating incentives for employers "to self-examine and self-evaluate their employment practices" in order to eliminate discriminatory practices before they cause any additional harm.[23] By permitting plaintiffs to sue for punitive damages, Congress recognized that punitive damages are tailor-made to punish and deter and thus can be an important means to assure that violators do not simply write off the amount they pay to discrimination victims as an acceptable cost of doing business. By providing that punitive damages would be available only in a small subset of intentional discrimination cases in which plaintiffs also prove "malice or reckless indifference to federal rights," Congress carefully balanced the deterrent effect of punitive damages against the interest of employers in being free from disproportionate punishment.

Unfortunately, the caps on damages – particularly in cases involving large employers – work against these objectives. In many cases of egregious discrimination by employers, the caps reduce damage awards so substantially that they effectively destroy any meaningful deterrence. As one trial court recently stated, an employer must "feel the pinch" of punitive damages if they are to accomplish the objective of simultaneously punishing reprehensible conduct and

[23] Albemarle Paper Co. v. Moody, 422 U.S. at 418.

restraining employers from violating the law once again.[24]

The devastating effect of the caps can best be seen in Patrick Brady's recent case against Wal-Mart Stores. Brady suffered from cerebral palsy, a serious disability that affected his physical mobility, vision, balance, as well as his ability to read and to drive. He proved to a jury that Wal-Mart intentionally discriminated against him in numerous ways, including transferring him from the pharmacy to collecting shopping carts in the store's parking lot, asking prohibited questions in the application process before making a conditional offer of employment, and failing to meet its obligation to offer him a reasonable accommodation. The evidence in the case showed that Wal-Mart had continued to ask Brady the same type of prohibited questions it had previously agreed to abandon when it had entered into a consent decree in an earlier case and that Wal-Mart employees were ignorant of the anti-discrimination policies that Wal-Mart had previously agreed to disseminate. The magistrate judge concluded from the testimony that the company had "wilfully failed to provide [its employees] with sufficient training to abide by the anti-discrimination law."

The jury awarded Brady $5 million in punitive damages, which the trial judge reluctantly reduced to $300,000 to stay within the statutorily-imposed caps of the ADA which incorporates the Title VII limitations on damages.[25] In the court's words, slashing the award in the case "respect[ed] the law, but it d[id] not achieve a just result."[26] The court expressed concern that for

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[24] Brady v. Wal-Mart Stores, Inc., 2005 WL 1521407 (E.D.N.Y. 2005).

[25] *See* 42 U.S.C.§1981a (a)(2) (2006). The plaintiff in Brady was able to recover her compensatory damages under New York state law which does not cap such awards.

[26] Brady, 2005 WL 1521407 *4.

"corporate behemoths such as Wal-Mart," such a small punitive damages award would have virtually no deterrent value, given that Wal-Mart's total net sales for 2004 were $256 billion and it took only 37 seconds to achieve sales equal to the $300,000 it was required to pay to Mr. Brady. The court lamented the fact that "there is no meaningful sense in which such an award can be considered punishment" and expressed the view that it was unlikely that "the award in this case can suffice to restrain Wal-Mart from inflicting similar abuses on those who may be doomed to follow in Brady's footsteps."[27]

Other courts have noticed that the Title VII caps undermine the deterrent effect of the law. In the *Ledbetter* case itself, the trial judge took care to point out that although an award of $500,000 in punitive damages represented a "sufficient amount to punish and deter Goodyear,"[28] he was required to lower the punitive damages portion of the award by more than $200,000 under that amount in order to stay within the statutory limit. Additionally, a district court in Kansas remarked that a jury award of $1 million in punitive damages was reasonable, given the compelling evidence of sexual harassment offered by the plaintiff in that case.[29] The plaintiff, Sharon Deters, established that she was subjected to a sexually hostile work environment by her manager who persistently ignored her complaints of harassment by male employees. Rather than

[27] Brady, 2005 WL 1521407 *5.

[28] Ledbetter v. Goodyear Tire and Rubber Co., No. 99-C-3137-E (N.D. Ala. Sept. 24, 2003).

[29] Deters v. Equifax Credit Information Services, Inc., 981 F.Supp. 1381, 1388 (D. Kan. 1997).

punishing the harassers, the manager responded by reminding plaintiff that her harassers were "revenue producers" and that she was not a revenue producer and explaining to her that "being called a fucking cunt" was just part of the "roughness" of the job. The court noted that, in its view, the jury acted "with calculation and reason" in awarding Deters $1 million in punitive damages and recognized that such a verdict was needed "to sting the defendant"– a multi-billion dollar company – and "deter it from allowing sexual harassment in the future."[30] Nonetheless, the court was required to reduce the award to $300,000, after applying the statutory cap.

It should be noted that because the Title VII cap is a combined cap on compensatory and punitive damages, it is particularly harsh. In one egregious case of religious discrimination, for example, the plaintiff Albert Johnson proved that his supervisor subjected him to a hostile environment.[31] In part because the supervisor was annoyed that Johnson had asked for Sundays off, he called Johnson "a religious freak" and told him that "he was tired of his religious bullshit."[32] The supervisor and co-workers also repeatedly made fun of Johnson's religious beliefs, in lewd and highly offensive language. The jury awarded Johnson $400,000 in compensatory damages and $750,000 in punitive damages. The total award was reduced to the statutory cap of $300,000. In reviewing the case, the appellate court noted that because the jury's $400,000 award for compensatory damages was higher than the cap, the result was the same as if no punitive damages had been awarded.[33]

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[30] Deters, 981 F.Supp. at 1388.

[31] Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368 (1st Cir. 2004).

[32] 364 F.3d at 374.

[33] 364 F.3d at 377-78.

These cases indicate that the current low caps on compensatory and punitive damages, especially the limitation of $300,000 for large employers, significantly weaken the ability of civil rights law to influence the conduct of employers and allow employers easily to "budget" in advance for any future damage awards by prevailing plaintiffs, without changing their illegal behavior. The illogic of the current scheme is that it serves as a deterrent only for those less profitable businesses who cannot afford to pay even low punitive damages judgments, while having no measurable effect on the conduct of the largest and most profitable employers found guilty of intentional and egregious discrimination.

4. The Title VII Caps Create an Unfair Distinction between Victims of Sex, Disability and Religious Discrimination as Compared to Employees Discriminated Against on the Basis on Race or National Origin

An additional inequity produced by the Title VII caps is that they place victims of discrimination based on sex, disability or religious discrimination at the disadvantage in comparison to employees who suffer racial or national origin discrimination. The anomaly arises because employees who charge racial or national origin discrimination in employment may assert claims under 42 U.S.C. §1981. Section 1981 is the Reconstruction-era civil rights statute which bars racial and ethic discrimination in the making of contracts (including employment contracts), but does not reach other forms of discrimination. Significantly, there are no caps on either compensatory or punitive damage awards under §1981. This means that plaintiffs who can

categorize their claims as either racial or ethic discrimination stand to be fully compensated, while others claimants are subject to significant reductions of their awards under the Title VII caps.

The anomalous scheme works a particular hardship on women of color who suffer racialized forms of sexual harassment or discrimination, but are unable to classify their discrimination as "race" discrimination for purposes of suing under Section 1981. The recent case of *Jones v. Rent-A-Center*,[34] is a good example. In that case, the plaintiff was an African American woman who was subjected to a series of sexually demeaning comments and touchings, including numerous incidents in which her store manager deliberately bumped into and grabbed her buttocks and insulted her by making offensive comments, such as "once you go black, you'll never go back" and "the blacker the berry, the sweeter the juice."[35] Because the case was tried as a sexual harassment case under Title VII – and treated exclusively as a case of sex, rather than race, discrimination – compensatory and punitive damages were subject to the Title VII caps. This categorization resulted in a significantly lower award than plaintiff might have received had she been able to sue under Section 1981: notably, the jury awarded plaintiff $1.2 million in punitive damages and $10,000 compensatory damages, which were reduced to $300,000, pursuant to the Title VII caps.

This double standard in damages does not reflect a considered Congressional judgment that somehow sex, disability or religious discrimination is of a lesser order than either racial or

[34] Jones v. Rent-A-Center, 240 F. Supp.2d 1167 (D. Kan. 2002).

[35] 240 F. Supp. 2d at 1171-72.

national origin discrimination. Instead, it is simply a product of historical accident, created by the distinct development of the two separate statutes. Most importantly, the current discrepancy in protection for victims of intentional discrimination cannot be justified by any principle of fairness or justice. It stands to reason that equal rights warrant equal remedies and that federal civil rights law should be reformed to provide uniform and adequate remedies for all victims of intentional discrimination.

5. The Title VII Caps are Unnecessary to Prevent Disproportionate Liability

In closing, it is important to emphasize that eliminating the Title VII caps on compensatory and punitive damages will not open the floodgates to unlimited liability. Presently, there are several checks against disproportionate liability, as provided by Title VII, traditional limits on damage awards imposed by courts, as well as due process limits under the U.S. Constitution. Under Title VII's two-tiered scheme, damages are reserved for cases of intentional discrimination and cannot be awarded in a case of unintentional discrimination in which an employer uses a policy that has a disparate impact on a protected group. Nor are damages available in disability cases alleging a failure to provide a reasonable accommodation when the employer acts in good faith. [36] This insures that "innocent" employers who have not deliberately violated civil rights law are protected against large damage awards and required only to afford plaintiffs equitable relief. Most importantly, since the Supreme Court's 1999 ruling in *Kolstad,* plaintiffs are eligible to recover to punitive damages only in the small subset of cases in which they prove that the employer acted with malice or reckless indifference to federally protected

[36] *See* 42 U.S.C. § 1981a(a)(3) (2006).

rights and the evidence shows that the employer did not make "good faith efforts" to enforce the company's anti-discrimination policy.These strict limits on the eligibility of damage awards assure that only the worst offenders pay damages under Title VII and demonstrates that Title VII's enforcement scheme is markedly different from common law tort remedies which typically allow for recovery of compensatory and punitive damages in negligence and strict liability cases.

Beyond these restrictions, there is ample evidence that Title VII courts are not reluctant to employ other measures to guard against excessive awards, sometimes even in cases in which the awards are well within the Title VII caps. Not infrequently, courts require plaintiffs to agree to a remittitur of compensatory and punitive damages in lieu of a new trial[37] and courts have conscientiously compared the award made by the jury to awards in comparable cases.[38] These traditional procedural checks serve to control the amounts awarded for damages, while allowing courts to exercise their discretion in individual cases, thus preserving the plaintiff's right to individualized justice and assuring that the defendant is not required to pay a judgment out of proportion to its culpability.

The final check on excessiveness of awards derives from the Supreme Court's recent cases dealing with due process limitations on punitive damages. Since the Court's landmark 1996 decision in *BMW of Northern America, Inc. v. Gore*,[39] the Court has devised guideposts for the courts to follow in reviewing large damage awards, several of which track the protections already afforded by Title VII itself. Thus, the constitution requires courts to consider the

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[37] *See e.g.*, Hines v. Grand Casino of La., 358 F.Supp.2d 533 (W.D. La. 2005).

[38] *See e.g.* Velez v. Roche, 355 F. Supp.2d 1022, 1040-41 (N.D.Cal.2004).

[39] 517 U.S. 559 (1996).

reprehensibility of the defendant's conduct, whether the defendant showed "indifference to or reckless disregard" for the health or safety of others, and whether the defendant engaged in tortious conduct while knowing or suspecting that its conduct was unlawful.[40] Outside the civil rights context, the Court has also advised courts to consider the ratio between the compensatory and punitive damages award.[41] While these constitutional checks are principally used to curb state tort awards, they serve as additional constraints on excessive jury awards and protection for defendants in civil cases generally.

The legal landscape has changed considerably since Congress first adopted the damage caps in the 1991. The Supreme Court cases interpreting Title VII, as well as the due process precedents, now provide adequate protection against the misuse of punitive damages. These checks are superior to the Title VII caps because they evenhandedly apply to all cases and attempt to balance the interests of both parties to the lawsuit. The Title VII cap on damages is a blunt instrument that does not serve the interest in justice. Lifting the caps would allow discrimination victims who have suffered the most to receive fair and adequate awards and would hold the worst offenders of civil rights laws fully accountable.

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[40] 517 U.S. at 576-77.

[41] *See* State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

Mr. NADLER. Thank you.

I now recognize Mr. Mollen for 5 minutes.

TESTIMONY OF NEAL D. MOLLEN,
U.S. CHAMBER OF COMMERCE

Mr. MOLLEN. Thank you, Mr. Chairman, Mr. Ranking Member Franks, Members of the Committee. Thank you for giving me this opportunity to testify.

My name is Neal Mollen. I am here today to testify on behalf of the Chamber of Commerce of the United States of America about proposed legislation that would reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber.*

I had the privilege of serving as counsel of record for the Chamber in the National Federation of Independent Business in the *Ledbetter* case.

The Chamber unequivocally supports equal employment opportunities for all, and it also supports and promotes the implementation of fair and appropriate mechanisms to achieve that critical societal goal.

When Congress passed title VII, it selected cooperation and voluntary compliance as the preferred means for achieving that result, with vigorous enforcement in court by private parties and the EEOC when those voluntary efforts fail. It seems evident to me that Congress's chosen enforcement scheme has been vindicated over the intervening 43 years. The *Ledbetter* decision emphatically endorsed that statutory process.

The rule emanating from *Ledbetter* is a simple one: If an employee believes that he or she has been treated discriminatorily by an employer, that matter should be raised internally and then with the EEOC or a similar State agency promptly. Only in this way can the process of investigation, voluntary cooperation and conciliation be expected to work. When disagreements and disputes in the workplace fester and potential damage amounts increase, compromise and cooperation become far more difficult.

Ms. Ledbetter claimed, however, that the period of limitations was renewed every time she received a paycheck and, thus, that she was entitled to wait until she retired to raise her claim to bias. Such a rule would have utterly frustrated Congress's design for attempting to resolve such matters, at least in the first instance, without litigation.

Moreover, the *Ledbetter* decision recognized the profound unfairness inherent in a rule that would permit an individual to wait for years or even decades before raising a claim of discrimination. To defend itself against a claim of discrimination, an employer has to be in a position to explain why it did what it did first to the EEOC and the charging party and then perhaps later to a jury.

To do so, it has to rely on the existence of documents and the availability of witnesses, memories of individuals, neither of which is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination, the effort could leave an employer effectively unable to defend itself in any sort of meaningful way.

Perhaps most importantly, the paycheck rule is antithetical to the principle goal of title VII which is eradicating discrimination.

When a charge is filed promptly after an allegedly discriminatory decision, the decision maker can be confronted by the employer, and if misconduct is discovered, he or she can be disciplined, can be removed from decision-making authority or can be terminated.

When the charge is delayed by a period of years, however, the decision maker is very likely to remain in place. There is an increased risk in that circumstance that the misconduct will be repeated and that others will suffer the same fate. Only prompt action can root out this sort of serious misconduct and prevent injuries to others.

If the goal of title VII is eliminating discrimination and not encouraging stale lawsuits, the paycheck rule cannot be justified.

Now critics of *Ledbetter* have suggested that workers do not often have sufficient information to conclude that discrimination has occurred in time to meet the filing deadlines. I think there are a couple of responses to this.

First and foremost, the legislation currently being considered is not limited to or even primarily about that sort of circumstance. By embracing the paycheck rule, the legislation explicitly and unambiguously authorizes those who do have all of the pertinent information to delay for years or decades before bringing suit. Rather than solving the perceived problem, the legislation creates another larger one.

Second, it is not common in my experience as an employment lawyer for someone to claim that they have worked for years on end without having any inkling that discrimination has occurred, and that plainly was not the case in *Ledbetter*. It is undisputed that Ms. Ledbetter had all the information that she needed to file a charge of discrimination years before she did so. That, in my experience, is a far more common scenario.

Third, the courts have developed a number of very effective tolling rules that can mitigate the impact of filing deadlines in those few cases in which the employer has engaged in concealment, as referred to by the Chairman in his opening statement, and prevented the individual from learning the information necessary to file a charge.

Finally, *Ledbetter* critics seem to be confusing the threshold standard for filing a lawsuit with a much lower standard for filing a charge of discrimination.

To file a lawsuit in Federal court, one has to be able to attest that after reasonable inquiry, the allegations contained in the complaint have evidentiary support. This threshold requirement does not apply to the administrative charge of discrimination.

The charge does not initiate litigation. It begins a fact-finding process in which the EEOC goes to the employer for precisely the sort of comparative pay information that individuals may not have access to. Through this process, the truth usually comes out, and the parties are able to mediate their dispute.

Voluntary compliance and conciliation is the process Congress envisioned when it enacted title VII, and in the ensuing decades, it has produced remarkable results. That process cannot work if the employee sits on the sidelines for decades before raising the complaint.

The statute of limitations are an expression of society's principled collective judgment that it is unfair to call upon an employer to answer serious charges years after the fact. A rule that refreshes the period of limitations with every paycheck cannot be squared with this important societal value.

Accordingly, the chamber does not support proposals that would reverse or limit the decision handed down in *Ledbetter*.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Mollen follows:]

PREPARED STATEMENT OF NEAL D. MOLLEN

Testimony of Neal D. Mollen

Paul, Hastings, Janofsky & Walker LLP

June 28, 2007

Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

I am here today to testify, on behalf of the Chamber of Commerce of the United States of America ("Chamber"), about proposed legislation that would reverse the Supreme Court's decision in *Ledbettter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___ (2007). I had the privilege of serving as counsel of record for the Chamber in the *Ledbetter* case. I am a practitioner in the area of employment law, handling matters across a broad spectrum of employment discrimination and personnel practices. I have counseled and defended employers with respect to such issues for the past 21 years. I am co-editor of the American Bar Association/Bureau of National Affairs treatise **Employment Discrimination Law** (4th and 5th eds.), and the **Equal Employment Law Update** (BNA 7th ed. Fall 1999). For three years, I served as an Adjunct Professor of Labor Law at the Georgetown University Law Center. I currently serve as the chair of the Washington, D.C. Employment Law Department of Paul, Hastings, Janofsky &Walker LLP, and as Co-Chair of the Firm's Appellate Practice Group.[1] Paul Hastings has over 1,100 attorneys internationally and 130 attorneys in our Washington office.

The Chamber strongly supports equal employment opportunities for all and appropriate mechanisms to achieve that important goal. When Congress passed Title VII, it selected

[1]The views expressed in this paper are my own and those of the Chamber, and not necessarily those of the Firm.

"[c]ooperation and voluntary compliance . . . as the preferred means for achieving" that goal,[2] with vigorous enforcement by private parties and the Equal Employment Opportunity Commission when those efforts at voluntary compliance fail. The Chamber believes that Congress' chosen enforcement scheme — voluntary compliance and conciliation first, litigation thereafter whenever necessary — has been vindicated over the intervening 43 years. Without question, discrimination remains a problem in society as a whole, but the enormous progress made by employers in assuring non-discrimination is undeniable, and stands as a testament to the efficacy of the enforcement tools selected by Congress.

The *Ledbetter* decision emphatically reaffirmed the wisdom of Congress' chosen enforcement scheme. The rule emanating from *Ledbetter* is simple: if an employee believes that he or she has been treated discriminatorily by an employer, that matter should be raised with the EEOC (or similar state agency) promptly and confronted forthrightly. Only in this way can the processes of investigation and voluntary cooperation and conciliation be expected to work. When disagreements and disputes in the workplace fester and potential damage amounts increase, compromise and cooperation become far more difficult.

Ms. Ledbetter claimed, however, that a special "paycheck rule" applicable only to claims of alleged pay discrimination allows employees to sleep on their rights for *decades* before raising such concerns with the EEOC. This "paycheck" limitations rule, soundly and expressly rejected in *Ledbetter*, would have utterly frustrated Congress' design for attempting to resolve such matters promptly and, at least in the first instance, without litigation.

Moreover, in order to embrace this "paycheck" rule, the Supreme Court would have been required to renounce a rule announced in a long line of well-understood cases regarding the application of rules of limitation under Title VII. The Court has repeatedly held that the statute's limitations period begins to run when the alleged discriminatory decision is made and communicated, *not* when the complainant feels the consequences of that decision.[3] For the Court to overrule this precedent or for the Congress to supersede this settled law with legislation would promote instability and confusion in the law.

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[2] *Occidental* Life *Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355 (1977), *quoting Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974).

[3] *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 554-58 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 912 n.5 (1989) (*superseded by statute on other grounds*).

Finally and perhaps most importantly, the *Ledbetter* decision recognized the profound unfairness inherent in a limitations rule that would permit an individual to sleep on his or her rights for years, or even decades, before raising a claim of discrimination. To defend itself against a claim of discrimination, an employer must be in a position to explain — first to the EEOC and the charging party, and perhaps later to a jury — the reasons it had for making the challenged decisions. To do so, it must rely on the existence of documents and the memories of people, neither of which is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination, he or she can "wait out" the employer, *i.e.*, ensure that the employer is effectively unable to offer any meaningful defense to the claim. Even where the delay is attributable to employee inattention rather than strategy, the effect is the same: to deny the employer the ability to defend itself in litigation. That, the Court properly held, is patently unfair. It does not serve Congress' goal — eliminating discrimination — to substitute a game of "gotcha" for the investigation and conciliation Congress envisioned.

Statutes of limitation are an expression of society's principled, collective judgment that is it is unfair to call upon a defendant to answer serious charges when placed at such a disadvantage. A rule that "refreshes" the period of limitations with every paycheck received to permit a challenge to every decision that contributed to current pay cannot be squared with this important societal value.

I would like to expand briefly on some of these observations:

1. Congress' Design In Creating Title VII's Charge-Filing Period Was Based On Fundamental Fairness To Employees *And* Employers Alike. Statutes of repose "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). A period of limitation represents a balance between competing interests: it "afford[s] plaintiffs with what the legislature deems a reasonable time to present their claims, [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

The interest in repose is particularly compelling in the employment setting. To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged

decision, and to do so convincingly. In such a case, the employer attempts to show at trial that it had good reason for treating the plaintiff in the way it did, and the plaintiff tries to show that the employer's explanation is unworthy of credence; the jury must decide whom to believe. In many such trials, the testimony devolves to a "he said/she said" battle of recollections, and the most vivid rendition of events usually prevails.

An employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no "opportunity to gather and preserve the evidence with which to sustain [itself]. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)). That is precisely why Congress wisely selected relatively brief periods of limitation for filing administrative charges under Title VII.

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, expansions, acquisitions, reductions-in-force, divestitures and reorganizations. When a dispute in the workplace is raised promptly as Congress intended, most or all of the decision-makers, witnesses, and human resources representatives an employer will need to consult and to tell its story convincingly are likely to still be working for the defendant-employer at the time of a trial, or at least the employer will usually be able to locate them. The employer's ability to muster a defense dwindles, however, as the challenged decision recedes into the past. The American workforce currently has a median job tenure of only four years.[4] This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties. *Id.* It also varies by job category. For example, employees in "administrative and support services" and "accommodation and food services" have median tenures of only 1.9 and 1.6 years respectively. *Id.* Thus, when an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.

The *Ledbetter* case is a perfect example. At her trial, Ms. Ledbetter challenged every one of her employee evaluations (and associated pay increases) back to 1979, when she started at

[4] *See* Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, www.bls.gov/news.release/tenure.nr0.htm (last viewed on 6/6/07).

Goodyear. Most of her complaints centered on the actions of a single manager; she claimed that this man had retaliated against her when she refused to accede to his sexual overtures. By the time the case went to trial, however, the manager had died of cancer and was unavailable to tell the jury that he had never asked Ms. Ledbetter for sexual favors or that he never made a biased compensation decision. Goodyear was effectively unable to counter Ms. Ledbetter's in-person testimony in front of the jury and, not surprisingly, the jury returned a verdict for her. As the *Ledbetter* Court recognized, "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." Op. at 12.

The fact that an employer may keep some employment records documenting decisions affecting pay is of little comfort. First, in practice, employers rarely record detailed explanations on paper as to why one employee might have received an incrementally lower or higher pay increase than his or her co-worker. Unlike terminations, which are relatively rare and therefore are usually documented thoroughly at the time, most employers make compensation decisions about every one of their employees every year. The employer can hardly be expected to write extended narratives explaining the rationale for every one of those decisions for every employee, or record comparisons between and among all of the other similarly situated employees — *i.e.*, why Employee A got a 3.5% increase and Employee B got 4%.

Second, even if this kind of documentation existed, the "story line" of an employment decision cannot be told at trial solely with a few pieces of paper. Few defendants are likely to prevail at a trial — even when the challenged decision was entirely bias-free — by meeting the live, detailed, and often emotional testimony of the plaintiff with a few words recorded on a document.

It is important to note that the Equal Employment Opportunity Commission requires employers to keep only certain specified employment records (including those relating to "rates of pay or other terms of compensation"), and then only requires that the records be kept for one year. *See* 29 C.F.R. § 1602.14. The agency selected one year as the appropriate period "so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added). But when an EEOC charge has been filed, the employer is obligated to keep all records related to the substance of the charge until the matter

has been resolved. If Title VII is amended to embrace a "paycheck rule," employers would be obligated to keep these records, not for one year, but in perpetuity.

Thus, the limitations periods selected by Congress in enacting Title VII are rooted in notions of fundamental fairness that are the hallmarks of our American system of justice. The American people are fair. They want individuals to have an opportunity to raise their concerns and, where their legal rights have been invaded, a process through which they can seek redress.

But they also believe — correctly — that an injured party has to act with reasonable dispatch in pressing his or her claims. It violates the most basic notions of justice to allow an individual — even one who may have been subjected to discrimination — to wait until the employer is essentially defenseless to raise the allegation. The Court rightly concluded that this sort of delay is unacceptable. That decision should be embraced, not reversed.

2. The Outcome In *Ledbetter* Was Compelled By A Long Line Of Supreme Court Cases. Those criticizing the *Ledbetter* decision have suggested that it is a departure from prior precedent. That simply is not the case. The Supreme Court's cases in this area have *always* emphasized the distinction between *decisions* and *consequences*. For example, in *United Airlines v. Evans*, 431 U.S. 553 (1977), the plaintiff challenged the downstream, seniority-related consequences of her discriminatory termination; the Court held that the employer's actionable conduct occurred at the time of discharge, not when she felt the consequences in her comparative seniority when she was rehired. In *Delaware State College v. Ricks*, 449 U.S. 250, 252-54, 258 (1980), the plaintiff was a college professor who was informed that he had been denied tenure and that, when the coming school year ended, so would his employment. Instead of filing a charge when notified of the decision, he waited until he was actually terminated before filing a charge of discrimination. This, the Court held, was too late. *Accord Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1982) (once "the operative decision was made — and notice given," the limitations period began to run).

Ledbetter is merely a relatively straightforward application of this long-recognized distinction. Under well-understood principles dating back decades, Ms. Ledbetter should have complained to the EEOC when she was informed of her evaluation results; waiting until her retirement — decades after some of these *decisions* — was unfair.

The *Ledbetter* critics have suggested that a special rule should be created for pay cases. The distinction they seek to make is a false one. Nearly every form of adverse employment

action has an impact on compensation — denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline — they *all* have the potential to affect pay. In this case, Ms. Ledbetter complained that her low salary could be attributed to low evaluations she received over the years. She complained about the *consequences* of those evaluations rather than the evaluations themselves.[5]

The compensation *consequences* of any of these otherwise discrete employment decisions will appear in an employee's paychecks as long as that employee is with the same employer. If there were a separate rule of limitations for "pay" cases, nearly *every* Title VII case would become a "pay" case, including those that previously have been characterized as denial-of-promotion or discipline cases. Employers would, undoubtedly, be forced to defend out-of-time claims challenging discrete actions because those discrete decisions ultimately led to a paycheck disparity.

3. Title VII's Charge-Filing Period Was Intended To Foster Conciliation And Resolution; These Goals Become Much Less Attainable As Time Passes. Finally, I believe that much of the criticism recently leveled at the *Ledbetter* decision reflects a fundamental misunderstanding of the charge-filing process mandated by Title VII and the manner in which the process begins. Critics, including Justice Ginsburg, have suggested that it is often unfair to expect a worker to possess sufficient information to conclude that discrimination has occurred in time to meet the statute's filing deadlines. I believe this concern is misplaced for several reasons.

First, Ms. Ledbetter testified at trial, and reiterated in her prior Congressional testimony, that she believed that she had been the victim of discrimination as early as 1992, and claimed that by 1994, she knew precisely what her co-workers earned. Yet, she waited *until 1998* before beginning the EEOC investigatory process by filing a charge of discrimination. Thus, one need only look at this case to recognize that the concern voiced by *Ledbetter* critics is vastly overstated. Ms. Ledbetter knew every year what her evaluation results were, and understood the relationship between those results and her pay — low evaluation scores inevitably resulted in

[5] It is also incorrect to assert, as the *Ledbetter* critics have, that the courts had uniformly embraced a paycheck rule prior to the Supreme Court's decision. *See, e.g.*, *Dasgupta v. University of Wisconsin Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997).

low pay increases. She also complained to her co-workers *at the time* that she believed she was being treated unfairly. This is not a case, then, where the alleged victim was ignorant of her potential claim. She simply failed to do anything about it until she had decided to retire. Most compensation systems are not nearly as opaque as *Ledbetter* critics suggest.

Second, the courts have developed a number of special rules that can mitigate the impact of the filing deadlines in those few cases in which the employer has in some fashion misled the employee into allowing the period of limitations to lapse or otherwise prevented the employee from gaining access to the administrative process.[6] In those circumstances, strict adherence to the statute's limitations provisions would be unfair, but legislative action is unnecessary to achieve justice because the law already provides a mechanism for avoiding harsh results.

Third, and most importantly, *Ledbetter* critics seem to be confusing the threshold standard for filing a *lawsuit* with the *much lower* standard for filing a charge of discrimination. To file a *lawsuit* in federal court, one must attest that, after reasonable inquiry, the allegations contained in the complaint "have evidentiary support." Fed. R. Civ. P. 11(b)(3). No similar threshold requirement exists for filing a charge of discrimination. The charging party need not have "evidentiary support" to go to the agency for help, merely an inkling of unfair treatment.[7]

"[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is 'reasonable cause' to believe that the employer

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[6] *See, e.g.*, *Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993) ("relief from limitations periods through equitable tolling … remains subject to careful case-by-case scrutiny."); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (equitable tolling may apply "when defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" and equitable estoppel may apply when, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.").

[7] "[L]oose pleading" is permitted before the EEOC." *Deravin v. Kerik*, 335 F.3d 195, 202 (2d Cir. 2003); *Alvarado v. Bd. of Tr. of Montgomery Cmty. Coll.*, 848 F.2d 457, 460 (4th Cir.1988) ("precise pleading is not required for Title VII exhaustion purposes").

has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding." *EEOC v. Shell Oil Co.*, 466 US. 54, 68 (1984).

That is, the purpose of the charge is to *begin* the fact-finding process. Once filed, the charge arms the EEOC with the authority to go to the employer and ask for precisely the sort of detailed pay information the *Ledbetter* critics seem to assume a charging party must have *before* going to the agency. That is simply not the case.

Once the charging party has shared his or her suspicions with the EEOC, and an investigation has commenced, the truth usually comes out. The charging party sometimes realizes that her concerns were unfounded. The employer sometimes realizes that it (or one of its supervisors) made a mistake or even a biased decision. Whatever the facts reveal, the parties then sit together with an agent of the EEOC and discuss the possibility of compromise — of an arrangement that resolves the employee's concerns in a manner acceptable to the employer. That is precisely the process Congress envisioned when it enacted Title VII, and in the ensuing decades, it has produced remarkable results.

Only if this Congressionally mandated process of voluntary cooperation and conciliation fails to result in an acceptable compromise does the case end up in court, and if it does, the complainant is then armed with the evidence divulged during the agency process to support the much higher pleading standard applicable in federal court.

In order for the conciliation process to work as Congress intended, allegations must be presented to an employer in a timely fashion. If allowed to fester over years — or decades — instead of being addressed when the employee first believes a problem might exist, it is much less likely that conciliation will work. As time passes, the parties may become more and more entrenched in their positions, potential "fixes" for the employee's problems become more difficult (and more expensive) to arrange. Simply put, the process envisioned by Congress cannot work if disappointed employees are allowed to wait years before filing a charge.

4. The Proposed Legislation Would Be Profoundly Inequitable. A bill currently pending before the House Education and Labor Committee purports to overrule *Ledbetter*, in fact would go well beyond the confines of that case and would codify a profoundly unfair set of rules of limitation applicable to many discrimination cases. The bill purports to address the perceived inequity of requiring employees to file charges at a time when they do not possess, and could not reasonably possess, the necessary information, yet it creates a new rule of limitations (or rather,

eliminates the existing one) for all charging parties, even those who *have* the necessary information and simply fail to act on it. The deficiencies in the proposed legislation are many.

First, for the reasons given above, it would be unwise to authorize individuals to delay for many years before initiating the EEOC's investigatory process, especially where the charging party possesses substantial information about the relative fairness of the decision at the time it is made. When an individual knows enough to start that process, allowing them to wait indefinitely for years or decades serves no legitimate end.

Second, the bill purports to renew the charge filing period with each payment of "wages, benefits, or other compensation is paid." This language, whether intended or not, arguably would go far *beyond* a "paycheck rule, potentially allowing individuals to file charges well into their retirement years if an alleged disparity in the amount received in their retirement checks can be traced to an allegedly discriminatory pay decision. There can be no logical basis for extending the right to file a charge for such a period. Third, the bill does not expressly distinguish between cases that are "about" pay discrimination from those that involve other forms of employment decision-making but that have compensation consequences. For example, the legislation arguably would permit a retiree to challenge a decision made to deny a promotion made many years before retirement so long as retirement benefits received by the individual reflect to some degree the compensation "missing" because of the denied promotion. It is unlikely that this was the intent of the legislation, which purports simply to overrule *Ledbetter*, but this ambiguity is particularly worrisome and could vastly extend the reach of the bill in unforeseen ways. Neither does the bill distinguish between disparate *treatment* claims (the only kind at issue in *Ledbetter*) and disparate *impact* claims, where individuals claim to have been disadvantaged by the operation of a facially neutral rule.

Finally, the bill purports to apply retroactively to all claims pending at the time the *Ledbetter* decision was rendered, presumably including the *Ledbetter* case itself. This raises serious questions of Constitutional dimension, as "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would 'alter the substantive rights' of a party and 'increase a party's liability'."[8]

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[8] *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994) (citations omitted).

Congress has provided a mechanism through which employees can raise allegations of bias and have them addressed, and it has judged that this process will work best if those allegations are raised, and, one hopes, resolved promptly. The system works.

But that system cannot work effectively to eradicate discrimination, and employers will not be treated fairly, if Congress turns its back on the important societal goal underlying Title VII's period of limitations. Accordingly, the Chamber does not support proposals that would reverse or limit the decision handed down in *Ledbettter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___ (2007).

Mr. NADLER. Thank you.

Ms. Greenberger, you are recognized for 5 minutes.

TESTIMONY OF MARCIA GREENBERGER, CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

Ms. GREENBERGER. Thank you. I am Marcia Greenberger, co-president of the National Women's Law Center, and I very much appreciate the opportunity to testify here today on behalf of the Leadership Conference on Civil Rights to discuss the important ramifications of the *Ledbetter* decision.

And I would ask that the full statement of Wade Henderson, the president and CEO of the Leadership Conference, who was unable to be here today, be submitted and be part of the record.

Mr. NADLER. Without objection.

Ms. GREENBERGER. Thank you very much.

As has been discussed and, Mr. Chairman, as you have eloquently described, the *Ledbetter* decision has had enormous adverse implications for those who face discrimination on the basis of their sex, race, national origin, age, disability and religion, and, certainly, I think it is very difficult for anyone sitting in this room not to be moved by the courage that was shown by Ms. Ledbetter and the injustice——

Mr. NADLER. Apparently, it was not for the 20 Members of the Education and Labor Committee.

Ms. GREENBERGER. Well, it is very distressing that that is the case, and I have to say in response to that that it is all well and good for those to say that they oppose discrimination in the workplace, but if they also oppose having laws that actually give us the tools to eliminate that discrimination, then those words of support for the ultimate goal ring hollow, and that is what I think those who unfortunately oppose the legislation that was marked up in the Committee yesterday would cause to happen.

What we have here and we have been talking about is a statute of limitations. In fact, there is a statute of limitations that would apply in title VII cases and would remain unchanged. Plaintiffs who suffer discrimination can only recover for a limited period of time, going back just a few years from the time that they complain of the pay discrimination at issue, and that would have been and was a limitation in the amount that Ms. Ledbetter was awarded by the jury and by the judge below.

What is at issue here, obviously, is when the actual complaint of the discrimination has to be made, and I must say, with all due respect to Mr. Mollen, that what we have here is a situation of Goodyear benefiting every paycheck month after month, year after year. How could Goodyear justify the fact that it knew it was paying all of its male employees similarly situated to Ms. Ledbetter so much more money every month than Goodyear was paying her?

As Ms. Ledbetter pointed out, not only is she suffering those consequences today with lower pension benefits, with Goodyear pocketing the amount of money that she and her family should be having right now, but, for all those years, Goodyear was pocketing the amount of money they should have paid her that she should have been able to accumulate in her savings and use for herself or her family, and they are the ones who have been enriched by this deci-

sion unfairly, and they are the ones who are not being held accountable for their current actions by this 5-4 decision by the Supreme Court.

I have a second point I want to make, and that is in bringing a lawsuit, it is the plaintiff who has a very high burden to show that discrimination, to prove the discrimination. It is not the defendant who has the burden of proving that the discrimination did not exist. It is the plaintiff, especially in the courts these days, who has an extremely difficult burden of showing that the discrimination did exist.

The fact that Ms. Ledbetter was able to show such severe and unfair discrimination that she suffered and that was reflected in the jury award and the judge's—the trial judge who heard the testimony—own comments and reaction to the case is testimony to how strong her case was, how she was able to meet that burden, how weak the case was for Goodyear, not based on one manager, but based on each time that she was getting that paycheck and each time that Goodyear had to know—someone had to know—that they were working out a paycheck that was lower for her, and, obviously, someone gave her that anonymous piece of paper because it was known by Goodyear up until the present time when she filed that complaint.

I have another point to make, and that has to do with the issue of retaliation. Mr. Mollen properly pointed to the fact that we would like employees to come forward and to try to work out claims of discrimination and file complaints, but we know, all of us who live in the real world, that if one is the only woman in the job and is suffering retaliation and is dealing with harassment, to willy nilly expect this person to file a complaint with the Equal Employment Opportunity Commission while she is trying to keep her job and without her having a sense that she has a slam-dunk case, as we have heard that term being used, to just see if she can rely upon the goodwill of Goodyear to work it out is very naive, and, therefore, simply filing early complaints is not realistic.

And I would like to close also with respect to this damages issue. The caps have not only allowed Goodyear to take a pitiful amount of money, $300,000, a billion-dollar company, as a cost of doing business, a piddling cost of doing business, to continue to pocket that discriminatory pay, but also that cap reduces the ability for each kind of discrimination, not just the pay decimation, but any subsequent retaliation would have been able to be done to Ms. Ledbetter and other employees like her all within the cap. So they could retaliate with impunity.

And, therefore, that is why this whole case shows that the 180-day fix needs to be made and that these arbitrary caps which reduce the ability to get full relief and have full enforcement of title VII also have to be changed.

And finally, if you would indulge me for one last very quick point, we do not have caps right now for certain victims of employment discrimination under section 1981, but we do have caps for other victims. It has become a defense for women of color to be told by employers, "Oh, no, we are not discriminating against you on the basis of your race. We are discriminating against you on the

basis of your gender, and that is why we do not owe you a full recompense for the injury you suffered." That is simply unacceptable.

Thank you.

Mr. NADLER. Thank you.

We will begin the question period. The Chair will yield himself 5 minutes for questioning.

Let me just say that I am totally offended by this. I am offended by Mr. Mollen's arguments. I am offended by the actions of the Supreme Court. I am offended by the fact that certain types of discrimination are capped and certain types are not. We have had everything we could get, we could do. We have barely managed to stave off further caps from being extended over the years.

Let me ask a few questions.

Ms. Ledbetter, when did you first realize that you were being discriminated against?

Ms. *Ledbetter*. I suspected earlier in my career that I might be getting less based on the fact that I heard my male peers talking about how much overtime dollars they had earned versus mine. Well, I could calculate a month, you know, how much money mine was.

Mr. NADLER. Why didn't you file a lawsuit at that point?

Ms. LEDBETTER. I did not have any proof. I went to——

Mr. NADLER. Thank you.

Mr. Mollen, given the fact that Ms. Ledbetter did not think she had proof until later, how can you say that admitted cases of discrimination should be time barred well before the plaintiff either knows about it or could prove it?

Mr. MOLLEN. Well, there are actually a couple of questions embedded in that. Let me see if I can take them one at a time. First of all, I think that the testimony that Ms. Ledbetter gave at trial was that she began to believe that she had been the victim of bias in 1992, that she got this document that she referred to in her opening statement, and——

Mr. NADLER. Excuse me. Do not go through the facts of the case. I asked you a question, and I only have 5 minutes so please answer the question specifically. How can you say, since suspicion is not sufficient, proof is necessary? Is it not the case that very often it will take a long time to find the proof?

Mr. MOLLEN. I think you are operating under a false understanding of what is required to file a charge. You do not need proof. The whole idea is to go to the EEOC to begin an investigatory process.

Mr. NADLER. But if you file without proof, are you not subject to retaliation and all kinds of other things——

Mr. MOLLEN. Well——

Mr. NADLER [continuing]. In the real world as opposed to the fantasy world?

Mr. MOLLEN. Mr. Chairman, there is no question that retaliation does occur occasionally, but that is a very different problem.

Mr. NADLER. Don't you think that the prospect of retaliation might inhibit people who are not lawyers, who are simple workers, from filing lawsuits when perhaps they should?

Mr. MOLLEN. The answer then would be to eliminate all statutes of limitation for title VII, not just for pay cases, but all——

Mr. NADLER. All right. So we agree with that.

Mr. MOLLEN. That would be a disaster, Mr. Chairman, and when Congress passed this statute in 1964——

Mr. NADLER. You have answered the question.

Ms. Greenberger, lawfully, could we make any legislative fix retroactive so that Ms. Ledbetter could benefit from it?

Ms. GREENBERGER. Well, I would not even call it retroactive because it has often been the case that Congress has made a statute effective as of a particular date when a decision has come down in order to cover that case and cases going forward and——

Mr. NADLER. We can make it effective——

Ms. GREENBERGER [continuing]. Cases that are pending.

Mr. NADLER. So we can make it effective January 1, 2007, or January 1, 1995.

Ms. GREENBERGER. Yes.

Mr. NADLER. Okay.

Ms. GREENBERGER. Yes, you could, but, certainly, if it were effective to cover Ms. Ledbetter's case, I would not view that as being retroactive.

Mr. NADLER. I appreciate that.

Mr. Mollen, you talked about case law as if the Supreme Court were following prior case law. Prior case law is completely the opposite. Oh, we have a whole bunch of cases. And, in fact, in the *Bazemore* case, which I am sure you are familiar with, made very clear that each paycheck is continuing discrimination, and as Ms. Greenberger pointed out, that is equitable because, whether they knew about the initial decision 20 years ago or never, they certainly knew that they were paying people differently every time they made out the payroll.

In the *Lorance* case, the Supreme Court went the other way and Congress came back in 1991 and said, "Oh, no, you do not. Every different paycheck." In the 1991 Civil Rights Restoration Act, Congress was very clear on that.

So how can you say that we would now depart that the Supreme Court is following stated precedents?

Mr. MOLLEN. Well, first of all, I think that the lower courts were divided on how to treat *Bazemore.* I do not believe that they were all uniform in their treatment of *Bazemore.*

Second of all, I think if you look at both the *Lorance* decision, but, more importantly, the EVANS decision——

Mr. NADLER. So *Lorance* decision was overturned by Congress, so we should not look at that.

Mr. MOLLEN. With respect to seniority systems, it had nothing to do with pay.

Mr. NADLER. You do not think that it had to do with when you could file a discrimination suit based on seniority.

Mr. MOLLEN. Regarding a——

Mr. NADLER. Yes. You do not think that that showed congressional intent in this field?

Mr. MOLLEN. I do not believe that it affected this at all, no. It was a different section.

Mr. NADLER. Ms. Greenberger, would you comment on that? Did that show congressional intent——

Ms. GREENBERGER. Well, in fact, as Justice Ginsburg pointed out in the dissent, the legislative history of the Civil Rights Act explicitly said it was fixing *Lorance* that had to do with seniority, but the reasoning of *Lorance* was entirely wrong and, therefore, Congress was expecting—and this was explicitly in the legislative history of the Civil Rights Act of 1991—the Supreme Court to understand that in fixing the one bad decision, it was also fixing the faulty reasoning.

Mr. NADLER. Thank you.

Mr. Mollen, one final question. Since it is your position that the 180 days should be interpreted from the first time a decision was made and since it is obvious that pay scales are usually confidential, do you think it would be right—and if not, why not—and isn't the only other way other than changing the Supreme Court decision to require that perhaps pay be publicized as it is in the public sector?

Mr. MOLLEN. I think that there are a variety of mechanisms, including that one, that Congress could consider to——

Mr. NADLER. You would think that that would be a good idea, to require that everyone's pay in the private sector be public?

Mr. MOLLEN. I think that there are a variety of mechanisms——

Mr. NADLER. Would you endorse that position?

Mr. MOLLEN. No, I would not endorse that position. There would be——

Mr. NADLER. Because?

Mr. MOLLEN [continuing]. Problems with that particular position. You know, if we think that the Internet distracts from productivity in business today, publishing the salaries of every worker would be a nightmare from the employers' standpoint. However——

Mr. NADLER. So let me ask you one last question then. Would you at least concede that the 180 days should not begin until the person discovered that there was pay discrimination?

Mr. MOLLEN. Well, I think you and I would differ about when that discovery——

Mr. NADLER. Well, whenever that happens, would you concede that point?

Mr. MOLLEN. Mr. Chairman, I do not think that the law ought to require somebody to do something that they cannot do.

Mr. NADLER. Well, that is what it does right now under this decision.

Mr. MOLLEN. I do not believe that is the case. In fact, Justice Alito, in his opinion, expressly said, "We are not dealing with a case in which the individual was in the dark about the pay."

As I was saying earlier, Ms. Ledbetter's testimony both at trial and in the hearing before Education and Labor was that she knew years before——

Mr. NADLER. So you think that under this case, if you could show that you did not know about it, the 180 days does not start to run until then?

Mr. MOLLEN. It is not a belief. It is what Justice Alito said in the opinion.

Mr. NADLER. Thank you very much.

The time of the Chairman has expired. The gentleman from Arizona is recognized for 5 minutes.

Ms. LEDBETTER. Mr. Chairman?

Mr. NADLER. My time has expired. The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, reserving the right to reclaim my time, I would like to give Ms. Ledbetter a chance to say what she wanted to say.

Ms. LEDBETTER. Thank you, sir.

What I wanted to respond to there quickly is I had gone to EEOC earlier when I really suspected I was getting paid less. EEOC told me that I would have to have two signatures for them to do an investigation into Goodyear, and I could not get the other female at the time to sign because she was afraid of losing her job, even though we were assured by EEOC Goodyear would not know who signed the requirement to investigate.

But she said, "You know they will know who signed for the investigation," the two women, and I could not get any investigation into it, and I had no proof. I could not tell them, "I think I am being paid less," other than to get the investigation, and I needed two signatures, and I could not get it.

Mr. FRANKS. Thank you, Ms. Ledbetter.

Ms. LEDBETTER. Thank you.

Mr. FRANKS. Mr. Mollen, in the *Ledbetter* case, the Supreme Court held that "the statutes of limitation serve a policy of repose. They represent a pervasive legislative judgment that it is unjust to put the adversary on notice to defend within a specified period of time and that to be free of stale claims, time ultimately comes to prevail over the right to prosecute them."

The EEOC filing deadline protects employers from the burden of defending claims arising from employment decisions that are long past. Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. There is just no way to avoid that.

Do you not believe that Congress should continue to encourage the prompt processing of all charges of employment discrimination, and what would be the practical effect of failing to do so?

Mr. MOLLEN. I do, Congressman Franks. I think that it is essential to the effective operation of the statute, and I want to come back just very briefly to the discussion that I had with the Chairman.

The *Ledbetter* decision did not have anything to do with the circumstance in which somebody was prevented from learning about the information necessary to file a charge. That is a very different circumstance, and, frankly, I think it is one that Congress might reasonably investigate.

The legislation that has been proposed here does not apply simply to people who had no reason to know. It applies to everyone. It applies to someone who is told on the first day of their employment, "We are going to pay you less because of your race or your sex," and who sits on that information for a period of 20 years before filing a charge.

That, I think, is what the *Ledbetter* opinion was referring to when it says, "Look, if we cannot get these things resolved quickly, it is going to be very difficult for the processes of the act to work. If they are raised quickly the parties can sit down together and me-

diate that kind of dispute. Investigation occurs through the auspices of the EEOC, and the parties can talk about that kind of dispute.

When they are caught early, those kinds of disputes are nearly always resolved in the mediation and conciliation process. When the thing goes on for 20 years, it makes it almost impossible for the employer even to find out what happened.

The Chairman referred earlier to admitted cases of discrimination, but I think really that is putting the cart before the horse because we do not get to a knowledge of what actually happened until there is a trial, and if the trial occurs at a time when the employer is unable to defend itself, then we do not really know what happened. That is the whole point.

Mr. FRANKS. Well, Mr. Mollen, I am, you know, just trying to think from an employer's perspective. You know, first of all, it has to be said just for clarity, even though I suppose it is redundant, that discriminating against anyone on the basis of their religion or sex or other things of that nature is reprehensible, and all of us understand that.

But in order to reach a just ability to even respond to that effectively, isn't it necessary to have some type of statute of limitations even for the sake of clarity for both parties, and what, again, would be the practical effect of failing to have that? In other words, if this legislation were to pass, what would this do to the employment mechanism essentially ubiquitous in America?

Mr. MOLLEN. It makes it almost impossible for employers to gather the evidence that they need in order to determine whether what the charging party is saying is true and, if it is not, to mount an effective defense.

There are instances, by the way, in which that delay will work to the detriment of the charging party, and I think that that has been said here already today. And I do not want to retry Ms. Ledbetter's case because, frankly, I was not there, and we have a sort of skewed view of the facts because the company was not able to put forward its defense.

But what she alleged was that this particular manager had made improper advances to her, and when she rebuffed them, she paid a price for that, which, as you say, is a repugnant sort of activity, but he was not there to say, "I never did that. That is not how it happened," and "Here is why I made the salary decisions that I made with respect to Ms. Ledbetter."

Mr. FRANKS. Mr. Mollen, let me crowd one more, if I could. In terms of protecting those people who are discriminated against in the fashion that has been under discussion today, isn't it possible that if we put legislation like this that just completely throws the doors wide open where confusion becomes the byword, that there will probably be opportunities for those who have not been discriminated to make outrageous cases that cannot possibly be searched out in the process simply because of the stale evidence, and then those who are genuinely being discriminated against are kind of lost in all that process?

Mr. MOLLEN. I think that the search for truth and justice is served on all sides by having these matters addressed promptly. And, yes, it is true, the longer these things are delayed, the more

likely it is that the undeserving will recover and that the deserving will not. It is just a terrible state of affairs, and to have a blanket rule that permits essentially an evergreen limitations period, irrespective of the circumstance of the charging party, really strikes me as being nonsensical.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. NADLER. The gentleman from Alabama is recognized for 5 minutes.

Mr. DAVIS. Of course. Thank you for putting me in the right place, Mr. Chairman.

Mr. NADLER. I would never put you in your place in the——

[Laughter.]

Mr. DAVIS. I will settle for either one, Mr. Chairman.

Let me try to make three quick points in the time that I have, and let me start, Mr. Mollen, with your observation.

One of the things that I think bothers those of us on this side of the dais about the ruling is when you interpret a statute, when you interpret legal precedents, it is very easy to get lost in the dry abstractions around the words, and it is very easy to get lost in the theory.

All legal regimes trigger incentives toward conduct or disincentives toward other conduct. Ms. Greenberger made that point. We can either have a title VII regime that, frankly, makes it harder to bring these cases, or we can have one that makes it easier. But you cannot just stop at that.

A title VII regime that makes it harder to bring these cases will inevitably encourage employers to be more willing to engage in discrimination. Class example. In this instance, if you adopt the *Ledbetter* rule and you apply it, the wily discriminator, the company that is somewhat shrewd in its discrimination, can say, "Look, if we can disguise our pay practices for a long enough period of time, we can get away with it. We can make an initial decision to pay women less than men, disguise it, make sure nobody knows about it, and, frankly, once the 180 days passed after that decision, we are home free." That will produce more discrimination, and none of us think that is a good thing.

Now the second point that I want to make—Mr. Mollen, my friend from Arizona, was speaking from the employer's perspective, so let me speak from the employee's perspective—is the legal standard that the court announces, but you endorse in *Ledbetter* would also, I think, create a hair trigger. You have testified today that, well, if someone has a suspicion that they are not being paid properly, they ought to immediately go and file an EEOC complaint.

Mr. Mollen is probably the only person on the panel who I think has practiced plaintiff's employment law and defense employment law. I have done both in phases in my life before I came to this work.

I cannot imagine that that is the world that you and the chamber really want. If the legal standard is such that you have to file a claim within 180 days of your suspicion of backpay being discriminatory, instead of waiting until the last discriminatory check, that would mean that if John says to Peter who says to Mary who

says to Stewart who writes a note to John that there may be a difference in the pay, I have got to go in and file my EEOC complaint.

Plaintiffs' lawyers are pretty smart. The advice they are going to start giving to their clients right now is, "If you have any suspicion whatsoever that you are not being paid the same, go in and file an EEOC complaint."

Frankly, right when I was practicing plaintiffs work, I would say to my clients, "Let me see what evidence you have. Let me see whether you have any proof that the EEOC might find persuasive or that a court might find persuasive." I never said to a plaintiff, "I do not really care about the facts. Let's just hurry in and get this claim filed."

You are creating a world where a shrewd plaintiff's lawyer has every incentive to send someone into the process of filing a complaint when they know very little beyond rumor or innuendo. That will not be a good world for the defense bar.

The final point that I want to make before I invite you all to respond to some of this, I am concerned—Ms. Greenberger, I would really like you to address this—as I read *Ledbetter*. I think an argument could be made that it could be far more sweeping than backpay claims. The *Ledbetter* analysis is of title VII and I think may have implications for the doctrine of continuing discrimination in other contexts, for example, in hospital environment claims that may be brought based on race or gender.

I could see this Supreme Court in particular, Mr. Mollen, taking the position that if you are alleging hostile environment over a period of time, you have to bring a complaint within 180 days of the first hostile act. I could see that being interpreted very easily from this case, and if that is the case, once again, you create a situation that is very unsettling to the law that we have today.

The final point that I would make—I would like to see if Ms. Greenberger first would try to find some way to make sure that Ms. Ledbetter herself is able to get relief from this case—is I think it would be a mistake if the Congress were to correct this ruling that I think is a wrong one, but, frankly, have future litigants benefit from it, but not her because understand the state of uncertainty today. All over the country, courts are trying to figure out, the EEOC is trying to figure out, litigants are trying to figure out the meaning and the relevance of *Ledbetter*.

Every day and moment that goes by, there are cases that are at risk of being dismissed and thrown out because of this ruling. So, when Congress comes up with the fix, we need to make sure that all the women and all the African-Americans who may be affected by this gap are not left without a remedy.

Ms. Greenberger, would you like to respond to some of that?

Mr. NADLER. The gentleman's time has expired. The time of the gentleman has expired.

Ms. Greenberger, Mr. Mollen may answer the questions.

Ms. GREENBERGER. Okay. Well, certainly, as I said, making the effective date early enough to cover all pending cases as of the time of the decision and including Ms. Ledbetter's decision is perfectly acceptable, proper and should certainly be done for all the reasons that you said.

Secondly, with respect to having the issue that you raised about a plaintiff's lawyer urging people to file complaints early without evidence, I think it puts plaintiffs' lawyers in an impossible position. We have had major fights in the courts, with Justice Alito fortunately not prevailing in the Burlington case this term, trying to cut back on retaliation protections and a number of judges being very hostile to retaliation cases and real protection with respect to retaliation.

So the idea that somebody who has a general suspicion without facts should be filing an EEOC charge, I would find that to be very surprising from an employer's point of view, and very few plaintiffs' lawyers would want to put their own time and effort into representing somebody who had no facts to begin with that really could demonstrate a strong case.

It is extremely difficult for plaintiffs to meet a burden of proof. Most plaintiffs' lawyers are reluctant to take on a matter at all unless there is a very strong case to begin with, though that is in response to the second important point you made about going in early to file a charge without the real facts to the EEOC.

Also, it is really living in the Never Never Land to think that the EEOC then goes and investigates all the charges that it gets to figure out what the real facts are, as Mr. Mollen seemed to imply. We all know that there is an extraordinary backlog. The EEOC does not begin to investigate anything but a teeny percentage of the complaints that it gets.

So people who file charges with EEOC routinely, if they do not want them to be dead letter, get a right-to-sue letter, then they have to go to court with the burden of having to go forward without any access to any information anyway.

So this has nothing to do with the real world.

And I do want to get back to the caps issue because it is so interrelated. As you pointed out, who would want a situation where the incentives were on the employer to delay and to retaliate and to try to keep people from going forward?

But that is exactly what the combination of this 180-day ruling and the caps have created here so that Goodyear, by keeping things quiet, by making people afraid of coming forward, by harassing women, by paying them less, by keeping that system going forward, was never at risk of having to ever really own up to or pay for its employment discrimination because of those caps.

And the caps, when Congress passed them in 1991, it was taking a step forward. We now have over 15 years. Those caps have eroded in value, as ridiculous as they were even at the time, because, for some employers, they start at $50,000 total, for the caps no matter how egregious or how extreme the discrimination. That for the employment cost index has gone up 67 percent over that period of time, so these caps are a joke.

Mr. NADLER. These caps are not indexed to inflation.

Ms. GREENBERGER. I'll say.

Mr. NADLER. Thank you.

Mr. Mollen?

Mr. MOLLEN. Congressman Davis, let me see if I can address your questions quickly in some sort of order here.

First of all, you expressed a concern that the *Ledbetter* rule might be applied more broadly to harassment cases. The *Ledbetter* case decision embraced and built upon the court's Morgan against Amtrak case from 2002, which established a separate rule, sui generis rule for harassment cases. So I think that that fear is misplaced.

Second, you talked about the incentive that an employer would have for disguising, obfuscating, preventing employees from knowing about discrimination. As I said in my opening, there are rules currently in place regarding tolling the limitations period for just that kind of conduct. An employer rule that prohibits employees from discussing their compensation is likely unlawful under the National Labor Relations Act. So I think that there are already a number of prophylactic rules in place to deal with that situation.

Third, regarding the hair trigger problem that you referred to, I am sure that my friends at the chamber would be very unhappy if anything I said here suggested that they would like to see a flood of new litigation. However, the fact of the matter is that these problems cannot be resolved short of litigation unless they are raised early.

So I think that it is to the good for everyone if the goal is to eradicate discrimination, then we all benefit when these matters are raised early rather than late, and if Congress adopts a rule that gives incentive and license to individuals to wait for years or decades before raising them, we are going to have more litigation, not less.

And finally, with respect to the role of the EEOC in investigating this, we get information requests at my firm regarding every charge that is filed. Now I am not going to claim that the EEOC investigates all the charges equally or that they put as much effort into all of them as they do uniformly across the board, but I get information requests from the EEOC with respect to every charge that is filed against one of my clients, and we produce the information.

If that information discloses the sort of disparities that are questionable, that charge is going be carried forward. What very typically happens is that when the data is produced, the EEOC investigator looks at it and finds that there are very good substantial business reasons for the disparities and the matter dies with a quick mediation session or a no probable cause finding by the EEOC, and that is the way the process was designed to work.

Thank you, Mr. Chairman.

Mr. NADLER. The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

I think this is an important hearing, and I think it is an important hearing for two reasons.

Ms. Ledbetter, I think you are getting here what you did not get in court essentially, an opportunity to say there was discrimination, an opportunity without consideration, if you will, of the merits, an opportunity to be considered to have been discriminated against. I am not going to make a judgment decision based on your testimony or anyone else about whether you were discriminated against, but, certainly, I would say that, in my opinion, today, you

are getting, except for money damages, what you believe you deserve.

Having said that, I do believe there is a strong principle here, and, Mr. Mollen, I would like to give you more time to elaborate, the basic principle that everything we do, with the exceptions against exceptions of Holocaust-related activities, crimes against humanity, first-degree murder, and I think we also do kidnapping, they basically have relatively short times in which to bring a case, and I am looking and saying, if an armed robber is free and clear after a decade or 2, most civil suits are done in a year, 2, 3, maybe 4 in some States—that, in fact, for better or worse, you have a limited time, and that is fair to both sides.

And I certainly believe that the other part of it is that the longer a discrimination practice goes on without being alleged, without getting into the process, the more companies, in fact, can be going the wrong direction.

So I for one think that the question here today and that I hope we are dealing with is whether or not the time limits are reasonable and whether or not they should be adhered to strictly. I believe the latter. I am happy to hear your comments on whether or not some easing of the times would be of any value.

Mr. MOLLEN. Well, thank you, Congressman, for the question. I have to tread carefully here because I am here on behalf of the Chamber of Commerce, and we have not really discussed what fix they might prefer with respect to the time, if any.

I did point out when I testified in front of the Education and Labor Committee that currently there is a distinction between States that do and do not have fair employment practice agencies, 180 days in the cases where no such agency exists and 300 for those that do.

The vast majority of employees in this country work in States, in jurisdictions where the limitation is 300 days. It seems to me that the distinction that Congress made in 1964 between those kinds of States may not be sensible any longer and ought to be examined.

Now, whether 300 days is long enough, I think that that is a valid question for this Committee and the Congress as a whole to investigate. But I think there has to be an effective date. There has to be a cutoff date. And, as you point out, Congressman, there is with respect to nearly every cause of action. Even the most opprobrious behavior that can be pursued civilly has a connected statute of limitations.

Mr. ISSA. And I want to give others a chance to comment on this. I would like your dates, if you will, but isn't 1 year one of the shortest—365 days, so to speak—periods that we allow for the statute to toll or to run out on any civil procedure? Isn't it generally longer, at least 1 year?

Does anyone see a problem because I for one think that it is perhaps too short, and I have been an employer, and I, certainly, like everybody else, have had somebody who—never successfully—quit or left and they included that in their reasons of things they thought. So, in your opinion of anyone, including Ms. Ledbetter, is there any reason that 365 days, 1 year, like most other litigation

would not be a reasonable point for Congress to consider moving to?

Yes, ma'am? Professor?

Ms. CHAMALLAS. I would like to note that with respect to claims like tort claims, generally, the statute of limitations runs from 2 to 5 years, and so something like 180 days and 380 days is an exceptionally short time for a statute of limitations.

However, I think it is very important to note that in cases of pay discrimination, there has been a statute of limitations starting to run from when the last discriminatory paycheck was received by the plaintiff. This is the classic example of a continuing violation.

So it does seem to me that the *Ledbetter* decision upset settled law and that, regardless of the kind of fix, which I think is very necessary, that Congress should do with respect to the general statute of limitations, it is very important that with respect to pay discrimination in which there are continuing violations, where there is a pattern of incremental harm that compounds over time very much like the hostile environment situation, that the statute of limitations begins to run only when the employer has stopped benefiting from its illegal discrimination, that is when the last paycheck tainted by discrimination has been——

Mr. ISSA. I know my time has expired. Does anyone else want to talk about the latches that essentially this creates under the *Ledbetter* decision?

Mr. NADLER. The time of the gentleman has expired. A witness may——

Mr. ISSA. I just want to——

Mr. NADLER. A witness may answer the question if one of the witnesses wants to.

Ms. GREENBERGER. I just want to say, Congressman, that I think that the statute of limitations term is a confusing term because there is a statute of limitations in title VII that really has not been at issue here at all which has to do with how far back you can go in recovering for the discrimination that you are suffering.

So Ms. Ledbetter is and would under any statutory fix be limited in terms of how far back she could go of the number of years of backpay that she was denied because of the existing statute of limitations that applies.

What we are talking about here is, in essence, really an exhaustion requirement which is not usual in many laws, where you must file a complaint or exhaust your administrative remedies with the Equal Employment Opportunity Commission or your State agency before you can go into court. Many, many statutes, many civil rights statutes and other statutes have no such requirement to begin with, so that full 180-day thing, which has to do with the exhaustion requirement, is an exception to begin with.

And as the professor said, what changed here is the EEOC for many, many years consistently and in Ms. Ledbetter's case below argued that the discrimination continued and did not stop until that last paycheck, and that is when you begin to think about when that 180 days begins, as short as it is, and because every paycheck was another instance of discrimination, then we deal with the 180 day issue from the last paycheck.

The EEOC did not participate in the Supreme Court. The Administration changed the position of the government in the Supreme Court for the first time, but this 180-day every paycheck principle has been what has been in place for decades.

Mr. NADLER. The time of the gentleman has expired.

I now recognize the gentlelady from Florida for 5 minutes.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

I am going to speak as the only woman that serves on this entire Subcommittee, but also as the non-lawyer on our side of the aisle, and so forgive my plain English as opposed to the legal terminology that some of very learned colleagues have used.

And the reason that I am even qualifying what I am saying at the beginning is that, Mr. Mollen, under your description of the way the world should work, if I were hired by a company in January, like I was essentially when my constituents hired me in January and I was sworn in, it is June now.

So I would have immediately upon being hired by my new employer or promoted to a new position had to suspect and investigate under a 180-day statute of limitation whether or not I might be discriminated against in order to be able to preserve the possibility of my pursuing a claim and then pursue it within that 6-month period.

That is just completely unrealistic and, quite frankly, it is hostile to the environment that is a new beginning that you begin when you are hired or promoted. So I would like you to address that. I mean, how would that possibly work or be realistic in the real world?

And then, you know, I have been, on top of the time I have been here, in public office in my State legislature and now in Congress for 14 years, and I have heard time and again the U.S. Chamber of Commerce, the Florida Chamber of Commerce argue against the cottage industry of lawyers that exist where the law is designed to make it so that lawyers have an interest in going after plaintiffs, enticing them to file claims, and essentially what you are arguing with the logic that you are using is that that is the scheme that we should establish and promote.

Can you respond to both of those things because I do not see how what you are suggesting is realistic for an employee?

Mr. MOLLEN. Okay. I would be happy to respond.

Taking the second question first, as I said earlier, it is not the Chamber's view and I do not think any employers' view that generating more litigation is a good thing. However, the statutory scheme that Congress devised when it passed title VII was to have these matters raised first administratively in a process where they can be resolved voluntarily.

And so the hope and aim of the statute, and I think the remarkable success of the statute over the last 43 years is that has encouraged individuals to raise these issues early and have them resolved at a time when the expense for resolving them is relatively limited and positions have not hardened so much that they go forward.

Ms. WASSERMAN SCHULTZ. Can I interrupt you for a second and ask you a question?

Mr. MOLLEN. Of course.

Ms. WASSERMAN SCHULTZ. Because I have heard the Chamber argue the opposite when it comes to ADA claims because I have been sympathetic to the Chamber's argument that there are lawyers that shop through businesses, that go through business districts looking for ADA violations, and then encourage plaintiffs to file them. Well, under your argument, in that scenario, you say we should not have a cottage industry like that and we should tighten the ADA to prevent situations like that, you know, allowing lawyers to aggressively pursue businesses with ADA claims.

But in this case, you are saying, no, no, no, which is the argument that people who have ADA claims make. Under your argument in this scenario, we should encourage employees to work it out, but under ADA claims, we should not.

Mr. MOLLEN. Well, they are two very different things.

First of all, I think that talking to folks and trying to get things worked out without litigation is a good thing under any statutory regime. That is the first thing.

The second thing, I think that your reference to the ADA is the accessibility standards under the statute, not the employment standards. That is that there are lawyers out there who go looking for buildings that may or may not be accessible.

The difference is that in the employment context, there is an existing relationship between the employer and the employee. When Congress passed title VII and devised this system, it determined that the best way to have these matters resolved and maintain that employment relationship was to have them raised early and disposed of at a time when, again, the fever pitch had not been reached and they can be resolved voluntarily.

They are not all going to be resolved that way. I happen to think that a rule that encourages people to raise these matters as early as possible is going to lead to less litigation, not more litigation.

Ms. WASSERMAN SCHULTZ. You know, with all due respect, you are not a woman and you are never going to be a woman, and you are never going to be in the situation that Ms. Ledbetter was in along with her colleagues to be able to understand the intimidation and the feeling of trepidation over the possibility of losing her job if she raised the issue and tried to work it out. That is just not realistic.

And, Ms. Greenberger, if you could address my question as well, I would appreciate it.

Ms. GREENBERGER. Well, I am so admiring of Ms. Ledbetter for her determination for the stellar career and the really groundbreaking job that she did for so many years in such difficult circumstances, and it is very angering to think about the reduction in pay that she had to suffer through all those years with her family and to see that unresolved. I certainly hope, as we discussed earlier, in her set of circumstances, if her case is pending in any way now, that Congress is able to fix this for her, too.

To go back to your point, though, about how unrealistic it is, Mr. Mollen talked about that this is an administrative scheme to try to resolve matters as quickly as possible. Obviously, it is not possible the minute that somebody comes in to a workplace for them, even if they knew about the discrimination, which they certainly mostly do not, to try to resolve it.

And, secondly, if they get a job which was a difficult job for them to get to begin with and they need that job to support themselves and their families, who would tell them to go the next day and file a complaint against their employer when you do not even necessarily have all of the facts rather than hope that you could work it out?

The Supreme Court on top of everything else in 2001 in a decision said you are not protected against retaliation if you file the complaint with EEOC and you did not have enough evidence to constitute a "reasonable belief," that that complaint was valid, a cutback on retaliation principles, as I said, already.

So we have our employees in an impossible spot and, again, to bring it back to these caps that are so ineffective at this point now,16 year after they were put into place and they were mighty modest to begin with, every incentive is on the employer to retaliate and keep people from learning or from acting on what they find.

Mr. NADLER. Thank you.

The time of the gentlelady has expired. The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chair.

Ms. Ledbetter, I just want to express my admiration for you. I think you are a hero. I know you would rather just have no discrimination have ever happened, and you would rather just have your money if it had to happen, but, unfortunately, you are thrust into being the nationally known figure standing up for the rights of people, which I think we all owe you a debt of gratitude for.

I think you can help me understand the decision. I happen to be a lawyer, but I still just sort of need a little help here. Maybe I am a little slow.

How come, Ms. Greenberger, if we are going to apply the 180-day rule, Ms. Ledbetter did not at least get the pay that she should have received that the Court of Appeals thought that she had coming? Why would the Supreme Court say she gets nothing?

Ms. GREENBERGER. Well, it was the trial court, and, basically, what the Supreme Court 5-4—and I think that four justices of the Supreme Court were in your shoes in having a hard time trying to figure out how the five came to that conclusion themselves—decided that even though she did file within this very short timeframe within the last paychecks that she got, that that was not soon enough and that the minute that it was clear many years ago, even though she did not know it, that she was suffering discrimination, that is when she should have divined the discrimination was happening, that is when she should have complained, and forget the fact that the discrimination was re-occurring with every single paycheck that she was getting.

Mr. ELLISON. What about that, Mr. Mollen? I mean, I think the decision was wrongly decided, I will agree, but don't you think that she at least should have got the pay that she should have received going back 180 days at least?

Mr. MOLLEN. No, Congressman.

Mr. ELLISON. Why not?

Mr. MOLLEN. Here is why.

Mr. ELLISON. I mean, you agree each check was an act of discrimination?

Mr. MOLLEN. Well, I think that that is——

Mr. ELLISON. Based on the facts that you said you already agree with——

Mr. MOLLEN. No.

Mr. ELLISON. I thought I heard you say that there was admitted discrimination.

Mr. MOLLEN. No. I was actually——

Mr. ELLISON. You say there was not?

Mr. MOLLEN. I was actually quoting the Chairman who claimed there was admitted discrimination.

Here is the distinction that the court attempted to make or did make. The court has distinguished both in *Ledbetter* and in a long line of prior cases between decisions and consequences, and the court has said that the time begins to run the decision has been made and communicated, not when the consequences come home to the——

Mr. ELLISON. So just assume with me then that each check where Ms. Ledbetter did not get her pay because of her gender, her sex. Are we saying that an employer can continue discriminatory behavior, I mean, can renew it every single month?

Mr. MOLLEN. I mean, I think this is where you and I may disagree, where we are struggling.

Mr. ELLISON. I am asking you to assume that there was discrimination——

Mr. MOLLEN. Okay.

Mr. ELLISON [continuing]. That it was because of her sex and she got paid less because of it. Why at least doesn't she get her 180 days, given that each new check is another opportunity to tell her, "You are less and you are going to get paid less because you are a woman."

Mr. MOLLEN. Because just as statutes of limitation act to cut off valid claims in every other form of civil action, they do here. If you are injured in a personal injury suit——

Mr. ELLISON. Good example, Mr. Mollen, because if I get injured in a personal injury suit, that is a discrete, isolated point in time, and then if I do not act on it within a certain amount of time, then, you know, I deal with that.

But the employer could have rectified the discriminatory pay every check she ever got. They could have said, "You know what? We have been basically sticking you for the last—I do not know—15 years, but today we are going to stop it and you are going to get your pay just like the men do." They are the ones who continued the discriminatory behavior.

Ms. Greenberger, why doesn't that analysis work?

Ms. GREENBERGER. I think it works, as I have to say, even to this day. You know, Goodyear is a multibillion-dollar company, and I would have thought that if the idea is just bring this inequity to Goodyear's attention, they will fix it, I am waiting to hear. I mean, we may have problems——

Mr. ELLISON. Ms. Greenberger, I am sorry to interrupt you because Lord knows I would love to hear what you have to say, but that yellow light means I am going to be done in a moment. I just

want to ask you, have we defeated sex discrimination in American employment?

Ms. GREENBERGER. Well, were only that the case. When you look at the——

Mr. ELLISON. Have we defeated racism?

Ms. GREENBERGER. When you look at the pay discrimination and the pay gaps for gender, for race, and certainly women of color who bear a double burden, we have a long way yet to go. When we look at glass ceilings that still exist in this country, we have a long way to go.

When you ask the American public, as public opinion surveys have, do they see a real problem of pay discrimination, off the charts in the support to combat pay discrimination in this country because people know how unfair it is and how much it still exists. This is just a major, major step backward.

Mr. ELLISON. Thank you very much, ma'am.

And I thank all of you for your work.

Mr. NADLER. Thank you. The time of the gentleman has expired.

The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you.

Mr. Chairman, we had a hearing in the Education and Workforce Committee and had about the same panel. So EEOC jurisdiction is actually in the Education and Workforce Committee, and that is why they had a hearing. We are considering the civil rights implications of the decision, so, of course, we have jurisdiction over the same problem.

Let me just ask Mr. Mollen a question. If Ms. Ledbetter were to prevail, if we passed the bill, she would still have to show that the paycheck she received was, in fact, discriminatory. Is that right?

Mr. MOLLEN. It is good to see you again, Congressman.

Yes, I believe that if the legislation that has been proposed becomes law that the burden of the plaintiff would be to show that there is a disparity due to bias in the paycheck.

Mr. SCOTT. Right.

Mr. MOLLEN. I do think that its application to Ms. Ledbetter would be retroactive and probably unconstitutional, but I take your point.

Mr. SCOTT. Well, let me ask the professor a question. Is there any precedent for retroactively passing legislation that would reverse the results for an unsuccessful plaintiff in private litigation?

Ms. CHAMALLAS. I basically agree with what Marcia Greenberger said, that with respect to remedial legislation like this, that there is precedent because it is not retroactive with respect to this pending group of cases. So I think it would be possible and constitutional for Congress to do this.

Mr. SCOTT. In her case?

Ms. CHAMALLAS. Yes.

Mr. SCOTT. Okay. Now, Mr. Mollen, we asked you this question before. We do not know whether the discovery rule is the law of the land or not. Is that right?

Mr. MOLLEN. We know that the Supreme Court refused to reach that question, correct.

Mr. SCOTT. Okay. Professor, do you know what the law of the land is on the discovery rule?

Ms. CHAMALLAS. The lower courts have generally held that the discovery rule can be applied in title VII cases, but the Supreme Court expressly reserved that question. So there is uncertainty, and——

Mr. SCOTT. So, based on the law that we have now, if we lose on the discovery rule, in fact, the employer could have the ball for 180 days and be free and clear for that employee forever.

Ms. CHAMALLAS. That is the harshest feature of the *Ledbetter* ruling, and I must say that there is also uncertainty as to how to apply the discovery rule, and the standards to be followed for the discovery rule. So it is certainly no help to victims of pay discrimination to know that perhaps in some rare cases they can be successful by relying on a rule that the Supreme Court has not yet totally endorsed.

Mr. SCOTT. Well, if we do not have a discovery rule and we do not pass legislation to allow each discriminatory paycheck to renew the statute, would it be the fact that an employee could be discriminated against, hide the ball for 180 days, and then the employee inquire, "Why am I being paid less than everybody else around here?" and the answers were just right between the eyes, "Well, you are Black" or "You are a woman, and we just decided to pay you less."

Would there be any remedy if we do not fix the *Ledbetter* ruling? Would there be any remedy, even injunctive relief available, to stoop the discrimination if we do not fix this decision?

Ms. CHAMALLAS. No. We need to fix the *Ledbetter* decision.

Mr. SCOTT. And if we do not fix it, would it not be true that the employer could tell the person that, "Yes, you are being discriminated against, but you waited 180 days, and there is nothing you can do, you have no remedy, not even injunction relief."

Ms. CHAMALLAS. That is correct because under the *Ledbetter* decision, the employee has only the 180 days from the very first decision to discriminate against that employee, so after, even though the paychecks are tainted by discrimination, essentially the discrimination is no longer actionable in court, and the employer has then no incentive to go back and look at its pay scale and say, "Have we engaged in pay equity?"

Mr. SCOTT. And since people talk about disruption, is it not true everybody thought there was a paycheck rule to begin with? I mean, does this decision come as a surprise in most jurisdictions?

Ms. CHAMALLAS. Yes. In fact, I must say that as a law professor, when I teach this area of the law, I use the *Bazemore* case and the example of pay discrimination that continues over time and builds and accumulates as an example of a continuing violation that is well accepted by the courts.

Mr. SCOTT. Wait, Mr. Chairman.

So that means that most people thought there was, in fact, a paycheck rule before this decision?

Ms. CHAMALLAS. Yes.

Mr. SCOTT. Okay.

Ms. CHAMALLAS. It was a well-established rule.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. By unanimous consent, we will grant the gentleman from Minnesota 1 minute.

Mr. ELLISON. Ms. Chamallas, just for the record, I was wondering if you would just take a minute to just talk about some of the breadth and scope of modern pay discrimination when it comes to sex in America today? How serious is the problem?

And I ask you this question because I would like you to give us some context of what happened to Ms. Ledbetter. You know, she is not an isolated case. She stands for millions of people. Could you elaborate just for a moment, please?

Ms. CHAMALLAS. Yes. I think in looking at pay discrimination, what is most poignant is that there still is a very big gap between the earnings of women and men in the workforce so that we see that women still make on average only 77 percent of the salary of men, and so for women employees, the pay discrimination issue is absolutely central.

One other thing that we see is that because salaries and wages are not known, many women do not know that they are victims of discrimination and only find that out later when disparities have become very great. So what we have seen is this is a kind of persistent problem that has not been fixed by the various civil rights laws that we have and can only be compounded by *Ledbetter*.

The other thing I will note is that not only is pay discrimination economic and the kind of economic harm that follows the worker all through her career, including into retirement, but it also affects a worker's status because how highly one is paid determines a great deal about what their working life is like.

So I think if we asked American women in terms of their working conditions, what would they most want this Committee and other Committees to address, I think it would be to assure that their work is not undervalued.

Mr. NADLER. Thank you.

And by unanimous consent, I will grant myself 1 minute to ask questions. I would ask Mr. Mollen and Professor Chamallas to answer briefly please.

Mr. Mollen, because of everything you were saying before about the burden of proving things from 20 years ago and so forth, isn't it true that in any pay discrimination case or any case like this, the burden of proof is on the plaintiff?

Mr. MOLLEN. It is true, Mr. Chairman. Now the problem—and I think that Ms. Ledbetter's case—again, not getting too deeply into the facts of her case—is a very good example of why that may be an illusion. Ms. Ledbetter testified about certain actions, discussions, behavior that occurred to her, and there was no way for the employer to rebut that.

Mr. NADLER. Thank you, Mr. Mollen.

Professor Chamallas, do you want to comment on that?

Ms. CHAMALLAS. What was that?

Mr. NADLER. The fact that the assertion, which I will make, that the fact that the plaintiff has the burden of proof largely negates the argument of the unfairness to employers of the possibility of leaving these cases open for a long time.

Ms. CHAMALLAS. I think it is crucial because not only is it very difficult for the plaintiff to establish intentional discrimination, there are all the circumstances surrounding intentional pay discrimination, because, after all, it is the employer who has all the

access to the salary and other comparative data. So the plaintiff's burden of proof is very difficult, and also it is very difficult for plaintiffs generally to succeed in employment discrimination cases. The success rate is often well below 50 percent.

Mr. NADLER. Thank you very much.

Ms. WASSERMAN SCHULTZ. Mr. Chairman?

Mr. NADLER. Yes.

Ms. WASSERMAN SCHULTZ. Can I ask unanimous consent for just 1 minute to address a——

Mr. NADLER. Certainly. Without objection.

Ms. WASSERMAN SCHULTZ. Thank you. And it is just 1 minute.

Ms. Ledbetter, as a woman who has benefited from the fights that generations of women have led before me, I really want to thank you for standing up for women and what you are doing today and what you did in the Supreme Court to benefit generations of women to come, and I truly appreciate it.

Thank you, Mr. Chairman.

Mr. NADLER. And——

Ms. LEDBETTER. May I take just a moment to clarify a couple of points? As Mr. Mollen referred to, I did ask my superior. He told me that I was listening to too much B.S. from the men, to go on home and forget it, "You are just listening to too much B.S." When I went to EEOC, I needed two signatures because I had no proof. Okay.

Reasonable. It is not reasonable that I would wait 20 years to ask about a pay raise or pay differential because I would have earned more money. I was paid overtime. I would have gotten more overtime. My retirement that I put into would have been greater. My 401(k) would have been greater. The amount that Goodyear matched would have been larger. There is no reasonable way that I would want to sit back and wait.

Now Goodyear did have a problem with records. In fact, the person they are referring to is deceased. He was still working when I retired. I had filed my charge before I retired, and the judge told Goodyear that they are required by law to retain those records until this case is settled. They could not produce those at trial because the judge asked for them and they did not have them, and one of Goodyear's representatives said he did not know what happened to them.

Mr. NADLER. I thank and——

Ms. LEDBETTER. So thank you, sir.

Mr. NADLER. Thank you. And let me join the gentlelady in expressing our appreciation to you.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as you can so that their answers may be made part of the record.

Without objection, all Members who will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, I thank the witnesses, I thank the participants, and this hearing is adjourned.

[Whereupon, at 11:50 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF WADE HENDERSON, PRESIDENT AND CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Good Morning. My name is Wade Henderson and I am the President of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957. The Leadership Conference's nearly 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Distinguished members of the Committee, I am here this afternoon to call on Congress to act. To restore the ability of victims of pay discrimination to obtain effective remedies, and to end the inequality of remedies across classes of victims.

Lilly Ledbetter, a supervisor at Goodyear Tire & Rubber in Gadsden, Alabama, sued her employer for paying her less than its male supervisors and a jury found that Goodyear intentionally paid Ms. Ledbetter less than her male counterparts for more than 15 years, in violation of Title VII of the Civil Rights Act of 1964. Week after week, year after year, she was paid less. Significantly less. And this disparity was because of her sex. The jury also found Goodyear's conduct to be bad enough to warrant an award of compensatory and punitive damages totaling $3 million.

On its face, it looked like Ms. Ledbetter had won. That she had finally received compensation for the years of discrimination, including the impact on her pension and retirement benefits. But that was before the Title VII damages cap and the Supreme Court intervened.

After the jury awarded Ms. Ledbetter her $3 million, the court was required by law to reduce her award to $300,000. Why? In 1991, Congress set damages caps in Title VII, which apply to gender, age and disability claims only, at $300,000. That amounts to ten percent of what the jury believed Ms. Ledbetter should receive, and a drop in the bucket to a corporation like Goodyear.

Two weeks ago, the second shoe dropped. The Supreme Court issued an opinion in *Ledbetter v. Goodyear Tire & Rubber*[1] which prevented Ms. Ledbetter from recovering *anything* to remedy the discrimination that she endured. According to the Court's new rule, Ms. Ledbetter filed her discrimination complaint too late. A 5–4 Court held that Title VII's requirement that employees file their complaints within 180 days of "the alleged unlawful employment practice,"[2] means that the complaint must be filed within 180 days from the day Goodyear first started to pay Ms. Ledbetter differently, rather than—as many courts had previously held—from the day she received her last discriminatory paycheck.

The Court's ruling on the statute of limitations in *Ledbetter* is fundamentally unfair to victims of pay discrimination. First, by immunizing employers from accountability for their discrimination once 180 days have passed from the initial pay decision, the Supreme Court has taken away victims' recourse against continuing discrimination.

Moreover, the Court's decision in *Ledbetter* ignores the realities of the workplace. Employees typically don't know much about what their co-workers earn, or how pay decisions are made, making it difficult to satisfy the Court's new rule.

As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding

[1] Slip op. No. 05–1074 (U.S. Supreme Court)
[2] 42 U.S.C. 2000e et seq.

salary information in the United States. It is common practice for many employers to withhold comparative pay information from employees. One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers, and a significant number of other employers have more informal expectations that employees do not discuss their salaries. Only one in ten employers has adopted a pay openness policy.[3]

Workers know immediately when they are fired, refused employment, or denied a promotion or transfer, but norms of secrecy and confidentiality prevent employees from obtaining compensation information. As Justice Ginsberg's dissent points out, it is not unusual for businesses to decline to publish employee pay levels, or for employees to keep private their own salaries.

The reality is that every time an employee receives a paycheck that is lessened by discrimination, it is an act of discrimination by the employer. The harm is ongoing; the remedy should be too.

In addition, the impact of the Title VII caps on Ms. Ledbetter clearly illustrates the need to eliminate this arbitrary provision from the law.

Under current law, individuals who prove that they have been the victims of intentional discrimination based on sex, disability or religion are only able to recover compensatory and punitive damages up to a cap of $300,000. This is true no matter how egregious the conduct of the discriminator, nor how long the discrimination continued. The caps create an artificial ceiling on damages awards that does not exist for individuals whose discrimination was based on race or national origin. If a person who was discriminated against on the basis of sex suffers the same adverse employment consequences as a person discriminated against on the basis of race or national origin, why should one be eligible to receive more damages than another?

Moreover, often it is the most severe cases of discrimination that are affected by the damages caps. Damages caps, effectively, protect the worst offenders while denying relief to those who were harmed the most.

Caps also minimize the deterrent effect of Title VII. If the potential liability for sex discrimination is capped, it is manageable for corporations. More like a cost of doing business. However, uncapped damages, at a minimum, create more of an incentive for employers to ensure that their workplaces are free from discrimination. Compensatory damages are designed to make the victim whole. If the economic harms suffered by the victim of discrimination are greater than the statutory cap, it should not be the discrimination victim who is left with less.

Finally, in employment discrimination cases based on race or national origin—where there are no damages caps—we have not seen runaway verdicts. This is, in part, due to the numerous existing limitations in the current law that guard against improperly high verdicts. Courts can use their *remitter* power to reduce or vacate excessive damage awards, and there are constitutional limitations on punitive damages.[4]

The impact of the Court's decision in *Ledbetter* will be widespread, affecting pay discrimination cases under Title VII affecting women and racial and ethnic minorities, as well as cases under the Age Discrimination in Employment Act[5] involving discrimination based on age and under the Americans with Disabilities Act[6] involving discrimination against individuals with disabilities.

Here is an example. Imagine you have worked for a company for 30 years. You are a good worker. You do a good job. Unknown to you, the company puts workers who are 50 or older on a different salary track; lower than the younger workers who do the same work. At 60, you learn that for the last 10 years, you have been earning less—tens of thousands of dollars less than colleagues doing comparable work.

How do you feel?

Imagine you are this worker. How do you feel?

Even more, how do you feel when you learn that 180 days after you turned 50—six months after you started getting paid less—you also lost your right to redress for the hundreds of discriminatory paychecks.

The decision in *Ledbetter* will have a broad real world impact. The following are just two examples of recent pay discrimination cases that would have come out very differently if the Court's new rule had been in effect.

In *Reese v. Ice Cream Specialties, Inc.*[7] the plaintiff, an African-American man, never received the raise he was promised after six months of work. He did not real-

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[3] Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004).

[4] BMW of Northern America, Inc. v. Gore, 517 U.S. 559 (1996)

[5] 29 U.S.C. 621 et seq.

[6] 42 U.S.C. 12101 et seq.

[7] 347 F.3d 1007 (7th Cir. 2003)

ize his raise had never been awarded until three and a half years later, when he requested a copy of his payroll records for an unrelated investigation.[8] The employee filed a charge of race discrimination with the EEOC, and the court initially granted summary judgment to the employer. On appeal, the employee argued that his claim was timely under the continuing violation theory, and the court concluded that the relevant precedents compelled the conclusion that each paycheck constituted a fresh act of discrimination, and thus his suit was timely.[9] If the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to seek relief.

In *Goodwin v. General Motors Corp.,*[10] an African-American woman was promoted to a labor representative position, with a salary that was between $300 and $500 less than other similarly-situated white employees.[11] Over time, Goodwin's salary disparity grew larger until she was being paid $547 less per month than the next lowest paid representative, while at the same time pay disparities among the other three labor representatives shrank from over $200 per month to only $82.[12] Due to GM's confidentiality policy, Goodwin did not discover the disparity until a printout of the 1997 salaries "somehow appeared on Goodwin's desk."[13] She then brought a race discrimination action against her employer under Title VII. The district court dismissed the action, but the Tenth Circuit reversed and remanded, holding that discriminatory salary payments constituted fresh violations of Title VII, and each action of pay-based discrimination was independent for purposes of statutory time limitations. Again, if the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to obtain relief.

Pay discrimination is a type of hidden discrimination that continues to be an important issue in the United States. In the fiscal year 2006, individuals filed over 800 charges of unlawful, sex-based pay discrimination with the EEOC. Unfortunately, under the *Ledbetter* rationale, many meritorious claims will never be adjudicated.

While today we are focused on the immediate problem of the *Ledbetter* decision, it is also important to understand that this decision is part of the Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination. The Court's decisions have weakened the basic protections in ways that Congress never intended by Congress.

Under the Supreme Court's recent rulings, older workers can no longer recover money damages for employment discrimination based on age if they are employed by the state,[14] state workers can no longer recover money damages if their employers violate minimum wage and overtime laws;[15] there is no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964;[16] and workers can now be *required* to give up their right to sue in court for discrimination as a condition of employment.[17] In many of these cases, as in *Ledbetter,* the Court is acting as a legislature, making its own policy while acting directly contrary to Congress's intent.

For opponents of civil rights, there is no need to repeal Title VII. Instead you can substantially weaken its protections by chipping away at bedrock interpretations. Or, you can instead make it difficult or impossible for plaintiffs to bring and win employment discrimination cases. Or if you make the remedies meaningless.

As Justice Ginsburg pointed out in her dissent, Congress has stepped in on other occasions to correct the Court's "cramped" interpretation of Title VII. The Civil Rights Act of 1991 overturned several Supreme Court decisions that eroded the power of Title VII, including *Wards Cove Packing Co. v. Atonio,*[18] which made it more difficult for employees to prove that an employer's personnel practices, neutral on their face, had an unlawful disparate impact on them, and *Price Waterhouse v. Hopkins,*[19] which held that once an employee had proved that an unlawful consideration had played a part in the employer's personnel decision, the burden shifted to the employer to prove that it would have made the same decision if it had not been motivated by that unlawful factor, but that such proof by the employer would con-

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[8] Id. at 1007
[9] *Id.* at 1013
[10] 275 F.3d 1005 (10th Cir. 2002)
[11] *Id.* at 1008
[12] *Id.*
[13] *Id.* at 1008
[14] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)
[15] Alden v. Maine, 527 U.S. 706 (1999)
[16] Alexander v. Sandoval, 532 U.S. 275 (2001)
[17] Circuit City Stores v. Adams, 532 U.S. 105 (2001)
[18] 490 U.S. 642 (1989)
[19] 490 U.S. 228 (1989)

stitute a complete defense. As Justice Ginsburg sees it, "[o]nce again, the ball is in Congress' court."

We agree.

We also reiterate the need to end the disparity in employment discrimination law by removing the damages caps that apply to women, individuals with disabilities and older Americans under current law. The caps undercut enforcement, are unnecessary, and reward the most egregious discriminators with a substantial limitation on liability for their intentional discriminatory acts.

The issues in this case are not academic. The fallout will have a real impact on the lives of people across America.

People like Lily Ledbetter.

Members of the Committee, today you begin the process of responding to Justice Ginsburg's call. A process that will reaffirm that civil rights have legally enforceable remedies.

Thank you.

RESPONSE TO POST-HEARING QUESTIONS FROM MARCIA GREENBERGER, CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

Questions for Ms. Greenberger:

Have the caps on damages under 42 U.S.C. Section 1981a prevented plaintiffs from being compensated fully or from getting full and fair relief? Have they undermined the deterrent effect of the law? Are there specific examples that you can cite in support of your answer?

Answer:

The caps on damages do, indeed, limit both the remedial and deterrent effect of awards for discrimination. The case law is replete with examples of situations in which plaintiffs were denied adequate relief for their injuries, and in which employers guilty of egregious discrimination were allowed to escape with what amounted, effectively, to not even a slap on the wrist. Described below is a sample of those cases:

- *Baty v. Willamette Industries*[1]

While working at Willamette Industries, Plaintiff Patricia Baty was subjected to a hostile work environment and retaliation for raising her grievances. The court recounted examples which are painful even to read, let alone endure. Ms. Baty's co-workers wrote vicious graffiti on the bathroom and plant walls about her supposed sexual behavior, including "Patty sucks a big dick" and "Patty blew me here."[2] They also called her nicknames that referred to her breasts, such as "bouncing Betty" and "flopping Frieda."[3] One co-worker repeatedly asked Ms. Baty offensive questions and made sexually inappropriate comments to her. This employee asked her whether she could suck a golf ball through a garden hose at 150 feet, asked her what turned her on and made her hot, and told her that his wife shaved his crotch because she ended up with pubic hair in her teeth.[4] Ms. Baty also complained of inappropriate touching by her male co-workers and the display of sexually explicit images in the office. Moreover, the jury concluded that her employer's justification for firing Ms. Baty was pretextual and that there was ample evidence that she suffered retaliation.

The jury awarded Baty $120,000 in compensatory damages and $500,000 in punitive damages for her sexual harassment claim, and $25,000 in compensatory damages, $500,000 in punitive damages, and back and front pay for her retaliation claim, for a total damages award of $1.1 million. Although the trial judge "conclude[d] that the jury's damage awards were supported by the evidence," and stated explicitly that the punitive damages were necessary to deter "a huge national company, from like conduct in the future,"[5] the judge had no choice but to reduce the damages to only $300,000 to

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[1] Baty v. Willamette Indus., 985 F. Supp. 987 (D. Kan. 1997), *aff'd*, Baty v. Willamette Indus., 172 F.3d 1232 (10th Cir. 1999).
[2] 985 F. Supp. at 992.
[3] Id.
[4] Id.
[5] Id. at 996.

comply with the statutory cap.[6] Ultimately, as a result of the statutory cap on damages, Baty, who endured countless acts of vicious sexual harassment, was not fully compensated and her employer, who not only stood idly by as the behavior took place but ultimately fired the target of the discrimination, went unpunished and undeterred from behaving similarly in the future.

- *Brady v. Wal-Mart Stores, Inc.*[7]

Plaintiff Brady's cerebral palsy affected the way he moved around, as he had a noticeable limp, vision problems that required four operations, and poor balance. He had three operations on his legs and feet and used leg braces, hip braces, supports, and orthotics. Brady's supervisor at Wal-Mart transferred him from the pharmaceutical job, for which he had relevant experience, to a less prestigious position pushing carts in the parking lot. Brady had no training for this new position and was expected to perform physically demanding tasks that were particularly challenging given his disability. Wal-Mart engaged in this discrimination even though it had, as part of a settlement of a previous discrimination case, agreed to comply fully with the Americans with Disabilities Act and to establish an anti-discrimination training program for its employees.

The jury concluded that Wal-Mart discriminated against Brady by the job transfer, created a hostile work environment, and impermissibly asked him about his disability in its job description form. The jury awarded Brady $5 million in punitive damages for these violations. In reducing the award to $300,000, the trial judge openly expressed his discontent with the damage caps. He noted:

> [M]y concern is that the law creates a regime in which smaller businesses are subject to effective punishment for violating anti-discrimination laws but corporate behemoths such as Wal-Mart are not…with total net sales of $ 256 billion in 2004,…it took Wal-Mart only 37 seconds last year to achieve sales equal to the $300,000 it must now pay Brady in punitive damages. There is no meaningful sense in which such an award can be considered punishment.[8]

Noting that the de minimis impact of the caps gave Wal-Mart "effective immunity from the civil punishment scheme," the judge also made clear that Title VII's current remedies provide little deterrence against future discrimination:

> Despite entering into a consent decree to settle previous complaints of ADA violations, Wal-Mart asked Brady the same type of prohibited questions it had previously agreed to abandon, and its employees were entirely ignorant of the anti-discrimination policies that Wal-Mart had previously agreed to disseminate…it appears unlikely that the award in

[6] Id. at 998.
[7] Brady v. Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 12151 (2005).
[8] Id. at 10.

this case can suffice to restrain Wal-Mart from inflicting similar abuses on those who may be doomed to follow in Brady's footsteps.[9]

- *Deters v. Equifax Credit Information Services, Inc.*[10]

Not only did four co-workers subject Deters to constant sexual harassment, but the boss to whom she reported the conduct dismissed her complaints and insulted her work performance. Deters' supervisor told her he would address the conduct but did not follow through. Worse, he told Deters that the accused were revenue producers, while she was not, and justified the behavior by saying that in order to be a successful revenue producer one had to be "rough around the edges." According to the supervisor, calling Deters a "fucking cunt" was evidence of the sorts of traits that made her harassers successful.[11]

A jury awarded Deters $5,000 in compensatory and $1 million in punitive damages. The trial judge recognized that in awarding $1 million in punitive damages, "the jury acted with calculation and reason,"[12] and stated that "[t]he jury easily could have believed a punitive damage award of $1,000,000 was needed to sting the defendant and deter it from allowing sexual harassment in the future…Defendant's gross operating revenue for the year ended December 31, 1996 was $1.8 billion. The jury award of $1 million is less than one-tenth of one percent of defendant's gross revenue."[13] Finally, the judge cautioned, "Defendant's large size also mitigates in favor of awarding a substantial sum. A large award may be necessary in order to command defendant's attention and change defendant's conduct"[14] Despite these statements, however, the judge was forced to reduce the award to $300,000.

- *Johnson v. Spencer Press of Maine, Inc.*[15]

Albert Johnson was tormented for nine years by his boss, Halasz, who disapproved of Johnson's religious convictions. A former minister who worked as a custodian at Spencer Press, Johnson asked to have Sundays off so that he could attend church. Not only was he denied the time off, but for years, Johnson was forced to endure inappropriate and sexual comments made by Halasz. Among other comments that the court noted, Halasz asked Johnson to "help hold [his] dick," to suck his dick, and commented, "if Al fucks like he works, then he must be slow as a nigger."[16] Halasz also specifically taunted Johnson for being Catholic, particularly when Johnson refused to look at the Playboy magazine that Halasz brought to work. Halasz announced, "Al doesn't fuck, drink or smoke, he must be a Catholic."[17] Halasz also called Johnson a

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[9] Id. at 12.
[10] Deters v. Equifax Credit Information Services, Inc., 981 F.Supp 1381 (D. Kan. 1997).
[11] Id. at 1384.
[12] Id. at 1388.
[13] Id.
[14] Id. at 1390-1.
[15] Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368 (1st Cir. 2004).
[16] Id. at 373.
[17] Id.

"religious freak," and told Johnson he was tired of his "religious bullshit."[18] While giving Johnson a hard time for not working overtime on Sundays, Halasz asked Johnson, "if you could work overtime ... and make $120 or love Jesus, what would you do?" When Johnson expressed his preference for loving Jesus, Halasz responded, "well, why don't you take Mary and turn her upside down and pull her dress over her head."[19] Halasz also held a knife under Johnson's chin and made real and terrifying threats to Johnson, describing several ways in which he could kill Johnson. But although Johnson made several complaints to the human resources department, he was turned away each time.

Johnson suffered substantial emotional and physical harm from the constant harassment to which he was subject. Johnson endured severe depression as a result of the religious harassment and experienced multiple panic attacks at work that required his being taken to the hospital in an ambulance. Faced with an unresponsive management, Johnson finally resigned from the company.

A jury concluded that Johnson was the victim of religious discrimination and awarded him $400,000 in compensatory damages and $750,000 in punitive damages. Because his award was reduced to $300,000—$100,000 less than the compensatory award alone—Johnson's employer essentially faced no punitive damages judgment and thus the cap removed any potential deterrent effect.

Question for Ms. Greenberger:

If the caps on damages contained in 42 U.S. C. Section 1981a are eliminated, is there a risk that awards against employers would be unfair or excessive?

Answer:

The real danger, as described above, is the one being faced by employees because of the caps – rather than damages employers would face if the caps are removed. Federal statutes and recent Supreme Court decisions constrain the types of cases in which plaintiffs can receive damages and the amount of the damage awards. The Supreme Court's decision in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), limits punitive damages awards to the small subset of cases in which plaintiffs are able to prove that employers acted with "actual malice" or "reckless indifference" and did not make "good faith efforts" to comply with a company anti-discrimination policy. Thus punitive damages are easily avoidable, and are only available against the most egregious offenders today.

Moreover, since *BMW of Northern America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court has consistently broadened due process limitations on the magnitude of punitive damage awards. And punitive damages may not be assessed against the nation's largest employer—the government—per the terms of

[18] Id. at 374.
[19] Id.

the statute.[20] All of these constraints would limit the amount of punitive damages that employers would have to pay if the caps under Section 1981a were eliminated, as they have already effectively limited the punitive damage awards seen in Section 1981 cases.

In addition to the above limits on punitive damages, judges serve as an additional check on excessive punitive awards. Judges have the power of remittitur, which allows the court to require plaintiffs to choose between accepting a lower damage award than the jury's award or to risk a different verdict in a new trial.

These principles are illustrated by an examination of cases brought under 42 U.S.C. Section 1981 in which plaintiffs are awarded compensatory and punitive damages for discrimination based on race or national origin. The damage awards under Section 1981 often exceed the $300,000 statutory cap imposed by Section 1981a by a relatively small margin. This margin, however, can be significant in its ability both to make a victim whole and to punish and deter future discriminatory conduct. The sorts of damage awards seen regularly in cases under Section 1981 show that juries are using reason and calculated judgment to determine that the damages they award effectively achieve the real purposes behind compensatory and punitive damages. The following is a small sample of the types of awards made under Section 1981. But of vital importance, the greater awards are possible in egregious circumstances.

Pavon v. Swift Transportation Co.[21]

Fernando Pavon, a US citizen born in Honduras, was subjected to racial harassment by his co-worker on a near-daily basis. His co-worker called him names like "fucking Mexican," "spic," and "beaner," and told him to "go back to Columbia."[22] Pavon informed his shop foreman, who in turn notified his supervisor. Instead of responding to the co-worker's harassment, the supervisor gave Pavon a disciplinary warning and transferred Pavon to another workstation. Although the transfer was not technically a demotion in pay or benefits, the new position generally was known as the place where new and inexperienced employees worked. Despite the transfer, Pavon's co-worker continued to seek him out and attack him with racial slurs. Pavon continued to inform his supervisors until he was called into a meeting with them one day. At the meeting, the company recruiter asked Pavon, "Do you know who Martin Luther King was? Remember what happened to him?"[23] That same day, Pavon was fired.

A jury awarded Pavon $250,000 in compensatory damages and $300,000 in punitive damages. In upholding the jury's decision, the judge determined that "the evidence was sufficient to support the damages awarded and…the award is not

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[20] 42 U.S.C. § 1981a(b)(1) (barring recovery of punitive damages against any government, governmental agency, or political subdivision).
[21] Pavon v. Swift Transportation Co., 192 F.3d 902 (9th Cir. 1999).
[22] Id. at 905.
[23] Id. at 906.

excessive."[24] Pavon was awarded a total of $550,000 in compensatory and punitive damages.

Swinton v. Potomac Corp.[25]

As the only African American of approximately 140 employees in his company's shipping department, Troy Swinton was subjected to unceasing harassment based on his race. Many of Swinton's co-workers, including his supervisor, told racially offensive jokes and made racial slurs to him. These comments included, "Did you ever see a black man on 'The Jetsons'? Isn't it beautiful what the future looks like?," references to "Pontiac" as an acronym for "Poor old nigger thinks it's a Cadillac," and calling Swinton a "Zulu Warrior," among many other offensive behaviors.[26] Swinton testified that he heard the term "nigger" more than fifty times during the six months he worked at the company.

A jury awarded Swinton $30,000 in damages for emotional distress and $1 million in punitive damages. The judge upheld the punitive damage award, emphasizing that "the highly offensive language directed at Swinton, coupled by the abject failure of Potomac to combat the harassment, constitutes highly reprehensible conduct justifying a significant punitive damages award."[27] Had the Section 1981a statutory cap applied to Swinton's case, it is clear that reducing the one million dollar punitive damage award to less than $300,000 would have undermined the very purpose for which it was intended—to be severe enough to deter Potomac Corporation from engaging in similar conduct in the future.

Brown v. Hillcrest Foods, Inc.[28]

The employer of Joe Stanley Brown retaliated against Brown after Brown filed a race discrimination claim with the EEOC. In fact, Brown's employer fired him two days after his manager drafted the company's memo in response to Brown's EEOC charge. A jury entered judgment in favor of Brown and awarded him $70,000 for emotional pain and mental anguish and $250,000 in punitive damages. The district judge affirmed the jury's award of punitive damages, noting, "the facts as found by the jury regarding Hillcrest's overall 'indifference' regarding its compliance with federal anti-retaliation/anti-discrimination laws, justify the amount of punitive damages award."[29] The judge even personally endorsed the jury's assessment, "Had the undersigned been tasked with evaluating the evidence independently, it would have likewise found the evidence presented at trial supported the jury's finding that Hillcrest had little genuine concern with its compliance with federal anti-discriminatory/anti-retaliatory laws."[30]

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[24] Id. at 909.
[25] Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001).
[26] Id. at 799-800.
[27] Id. at 818.
[28] Brown v. Hillcrest Foods, Inc., 2006 U.S. Dist. LEXIS 85090 (W.D.N.C. 2006).
[29] Id. at *30.
[30] Id. at n.10.

Question for Ms. Greenberger:

Does the Supreme Court's ruling in Ledbetter leave open the question of whether the time period for filing a charge with the Equal Employment Opportunity Commission might be subject to equitable arguments? What, for example, did the Court decide with regard to application of the "discovery rule" to pay violations?

Answer:

The Supreme Court's opinion in *Ledbetter* explicitly leaves open the question whether a discovery rule – pursuant to which the statute of limitations under Title VII does not begin to run unless and until a plaintiff becomes aware of the discrimination against him/her – continues to apply to pay discrimination claims. As the Court stated,

> We have previously declined to address whether Title VII suits are amenable to a discovery rule . . . Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.[31]

The existence of a discovery rule, while helpful, does not, however, obviate the need for Congress to restore the paycheck accrual rule that eight circuit courts and the EEOC applied prior to the Court's *Ledbetter* decision. This is because, among other things, a discovery rule necessitates an inquiry into what a plaintiff knew and when, and creates evidentiary hurdles and the potential for mini-trials entirely divorced from the primary inquiry into whether a plaintiff has, in fact, been subject to discrimination. In addition, it allows a company to discriminate with impunity with each paycheck that follows the plaintiff's arguable discovery of the discrimination. Restoring the paycheck accrual rule is thus critical to ensuring that plaintiffs who are subject to discrimination in compensation can efficiently and effectively protect their rights under the law.

Restoring the paycheck accrual rule will not, moreover, leave employers defenseless against claims brought years after the original discrimination. Contrary to assertions made by employers, there is no incentive whatsoever for employees to delay challenging discriminatory pay until years or decades into the future; in fact, all of the incentives work in the opposite direction. For example, Title VII permits plaintiffs to recover back pay only for the two year period that precedes the date of their EEOC charge; as a result, a plaintiff who delays filing a pay discrimination claim will sacrifice the recovery of any pay s/he is owed for periods that predate that two year period. Moreover, in the unlikely event that pay discrimination claims are in fact unreasonably delayed, employers will remain free to argue, in the same way and subject to the same standards that have always been applied, that a court should apply equitable principles to foreclose those claims.

[31] Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162, 2177 n.10 (2007) (citations omitted).