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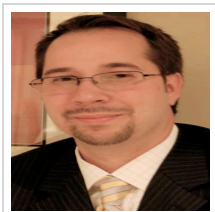
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Ledbetter Fair Pay Act Restores Protection From Pay Discrimination

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Jeffrey Campolongo

The extent of the allegedly discriminatory pay was not even known to Ledbetter until during the course of discovery when she learned that male co-workers with less experience and seniority than her were making much more than she was, and that she was being paid approximately 20 percent less than the lowest paid male employee.

It looks as if the nation's highest court has gotten itself overturned again. On Jan. 29, President Obama signed his bill into law called the Lilly Ledbetter Fair Pay Act of 2009, in direct response to the Supreme Court's mishandling of *Ledbetter v. Goodyear Tire*. This comes just weeks after the Jan. 1 ADA Amendments Act of 2008 went into effect, where Congress rejected the Supreme Court's decisions in

Sutton v. United Air Lines Inc. (requiring ameliorating factors to be taken into consideration in disability cases) and *Toyota Motor Mfg. v. Williams* (requiring an impairment of only those major life activities which are of central importance to most people's daily lives).

Because the courts were placing increasingly high burdens on disabled employees trying to assert their rights, Congress made changes to the Americans With Disabilities Act as a means of curtailing the courts'

overly strict interpretations of the law. Congress has yet again had to make amendments to the law to remedy the way the Supreme Court decided to handle pay discrimination cases. With two laws within one month coming out of Congress to protect employees' rights against harsh treatment by the Supreme Court, we have a pretty clear indication of what Congress thinks of the way judges have been protecting individual rights.

Lilly Ledbetter worked her way up at Goodyear Tire over 19 years, putting up along the way with what she at the time considered to be mere work place issues, or at most a regional problem of discrimination. The outraged response to the *Ledbetter* decision opened her eyes to the similarities of her experiences with those of many other women in the workplace, moving her to help lead a movement toward equalizing pay and cutting away at discriminatory barriers.

During congressional hearings on the proposed Fair Pay Act, Ledbetter testified before Congress that pay discrimination was not the only unfair situation she was subjected to as an employee. Ledbetter testified that she experienced sexual harassment throughout her employment with Goodyear, never receiving the amount of respect that she deserved, and even filed an EEOC complaint against a supervisor. The supervisor was moved out of Ledbetter's department, but her complaint resulted in what appeared to be retaliation against her by Goodyear.

While Ledbetter was working for Goodyear, the company changed its pay structure to be based on performance.

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Ledbetter testified that, despite being put down by her male peers on a regular basis, she had always received excellent performance reviews, one year even receiving the Top Performance of the Year award. At various points in her employment, she testified, Ledbetter suspected that some of her co-workers might have been getting paid more than she was, but she had nothing to verify that fact, and nothing that showed the pay discrepancy was discriminatory in nature.

One day, after questioning her employer about her salary, she did receive some raises, leading her to believe the pay discrepancy had been resolved. In actuality, no pay raise ever brought her salary up to what Goodyear would have allegedly paid her had she been male.

An employee of Goodyear Tire since 1979, Ledbetter only learned of the ongoing pay discrimination in 1998, just before her retirement, by virtue of an anonymous note left for her. The note listed her salary and that of three male coworkers. Those coworkers were making substantially more money than her, she testified. At that point, Ledbetter filed a complaint, leading to the *Ledbetter v. Goodyear Tire* decision. The extent of the allegedly discriminatory pay was not even known to Ledbetter until during the course of discovery when she learned that male co-workers with less experience and seniority than her were making much more than she was, and that she was being paid approximately 20 percent less than the lowest paid male employee. Eventually, Ledbetter proceeded to trial and was awarded more than \$3 million in damages by the jury for the years of pay discrimination.

Because Ledbetter had allegedly been subjected to a continuing violation over many years and had been subjected to unfair pay within the requisite statutory filing period, based upon prior law, she should have easily satisfied the prerequisites for filing a claim of pay discrimination. Prior to the May 29, 2007, *Ledbetter* decision, the issuing of a paycheck that reflected a discriminatory pay decision constituted a discrete act of discrimination. Courts had generally considered pay discrimination to be evidence of a pattern or practice of discrimination, and so long as a discriminatory paycheck was received within the statutory period, a claim could be brought.

In fact, the Supreme Court had ruled in *Bazemore v. Friday* that each paycheck reflecting unfair pay due to discrimination was a perpetuation of the unequal pay decision. Each time an employee was paid less than another with a discriminatory purpose, there was an actionable wrong. This position was further supported by *National Railroad Passenger Corp. v. Morgan*, which distinguished between discrete acts of discrimination and hostile work environment claims. Hostile work environment claims are similar to pay disparity claims, in that they are "based on the cumulative effect of individual acts." In a hostile work environment claim, there must be an act of discrimination within the limitations period that contributes to the claim. So as long as a paycheck reflecting the discrimination was received within the statutory filing period, employees could file a discrimination claim. This served well to protect employees claiming pay disparity, as it was well acknowledged that employees do not typically discuss and compare their salaries among themselves, and so it follows that at the time of hiring an employee would not necessarily know that he or she is being treated unfairly. So each paycheck triggered a new filing period.

Despite this logical approach, in *Ledbetter* the Supreme Court went against the remedial nature of the Civil Rights Act and constricted employees' rights. The Supreme Court decided that there must be a discrete act of discrimination within the limitations period, and in pay disparity cases the discrete act in question is the actual pay decision. So if an employee did not learn that a pay decision was unlawful and file a claim within 180 days of that pay decision, the employee lost her ability to sue. The court distinguished *Bazemore* on the grounds that the pay structure at issue in that case was discriminatory on its face, whereas Goodyear Tire's pay system was performance based and, thus, facially neutral. Because Ledbetter started out at the same pay as her similarly situated co-workers, and raises were supposedly based upon performance, the pay decisions made outside of the filing period were time-barred. Thus, each biased pay decision was a discrete act giving rise to a right to make a claim of discrimination, but the issuing of each paycheck following and reflecting that biased pay decision is not in itself an actionable violation. The court did not view the issuance of a paycheck that reflects an unlawful pay decision as being a discriminatory act, despite the obvious implication that such a rule allows employers to get away with paying unlawful wages in perpetuity.

Yearly percentage pay raises also were not considered to be discrete pay decisions giving rise to a cause of action, so long as the percentage of the raise given was not a discriminatory decision. But even if two employees get the same 2 percent raise each year, if one has a higher base pay than the other the employees will never receive the same pay. In fact, Goodyear Tire tried to pacify Ledbetter's complaints by giving her percentage raises, but she still retired at a pay rate well below that of any male employee, according to the opinion. To the Supreme Court, this was not actionable discrimination because Ledbetter had "waited" too long to complain — even though she complained as soon as she learned of the discrimination.

Under *Ledbetter*, as long as the employer kept pay structures quiet for the requisite filing period, the employer could never be held liable for paying a female employee thousands of dollars less than an equally situated male employee. As exemplified in Ledbetter's case, that can cost an employee decades of earnings. *Ledbetter* garnered much criticism from employees, the legal community and from Justice Ruth Bader Ginsburg in her dissent, for ignoring the realities of the workplace. Comparing one's salary to that of co-workers is not common practice, so employees are unlikely to learn of the discriminatory pay structure until well after the statutory period has lapsed — as in the case of Ledbetter.



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The Lilly Ledbetter Fair Pay Act serves to reinstate the rule that was commonly applied prior to the *Ledbetter* decision, and is retroactive to May 28, 2007, the day before the *Ledbetter* decision. The receipt of each paycheck that pays one employee less than another employee, based upon a discriminatory animus, starts the running of the statute of limitations. The issuance of each paycheck is a discrete act, so employees are no longer bound to the *Ledbetter* decision's unrealistic burdens. Employers should not view this as a huge burden, as employees are still limited to going back two years from the date of filing.

A potentially huge impact that the much publicized *Ledbetter* decision and Lilly Ledbetter Fair Pay Act may have is putting employees on notice of the ongoing possibility of discrimination in pay decisions. Employees might start to feel more comfortable inquiring of their employers and of their coworkers as to what the salary distribution is like and how pay decisions are made. Employers may feel pressured about avoiding potential litigation, and may even publish salary figures or act with more transparency in pay decisions.

Advocacy efforts under the Ledbetter Fair Pay Act have focused on a woman's right to "equal pay for equal work." While studies have well documented that, on average, women get paid less than men, one should not forget that the act changes the language of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act and the Rehabilitation Act. So instituting pay bias to a member of any protected class — race, sex, religion, national origin, age or disability — gives rise to a cause of action for pay discrimination.

Unfortunately, Ledbetter will never receive her just compensation for her 19 years of service. For her, like many women, the effects of the discrimination are far-reaching. While Ledbetter is now retired, she is still affected because each Social Security and pension check she receives is less than it should be, as a direct result of alleged sex discrimination. Hopefully, the Ledbetter Fair Pay Act will provide relief from pay discrimination for future generations and restore hope in our judicial system.

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at jcamp@jcamp.com or 215-592-9293.

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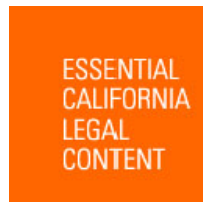
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