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Ledbetter v. Goodyear: Letting the Air out of the Continuing Violations Doctrine?

Allison Cimpl-Wiemer

LEDBETTER V. GOODYEAR: LETTING THE AIR OUT OF THE CONTINUING VIOLATIONS DOCTRINE?

I. INTRODUCTION

This is the story of the United States Supreme Court's failure to properly apply and expand the continuing violations doctrine in *Ledbetter v. Goodyear Tire & Rubber, Co.*[1] This is also the story of how the continuing violations doctrine is an essential tool for Lilly Ledbetter and her supporters in their struggle to obtain equal pay for equal work for generations of women to come.

Ledbetter worked as an area manager at Goodyear's Gadsen, Alabama, plant for nineteen years.[2] A year before her retirement in 1998, she was making fifteen percent less than the lowest paid male area manager and forty percent less than the highest paid male area manager despite her high level of seniority, excellent performance reviews, and the second-highest score on the competency exam.[3] A jury found that Ledbetter was paid less because of her sex and awarded her over three million dollars in damages.[4]

However, the Supreme Court, by one vote, reversed the jury's decision, not because Ledbetter failed to prove her case on the merits but because she filed her claim outside of the statute of limitations.[5] The Court held that a claimant must file a wage discrimination claim within 180 days of the management's discriminatory decision to pay a person less because of gender, race, color, national origin, or religion.[6] The Court declined to apply the continuing violations doctrine to wage discrimination claims, which would have circumvented Title VII's statute of limitations and allowed each paycheck to serve as a new unlawful employment practice.[7] Instead, the

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1. 127 S. Ct. 2162 (2007).

2. *Id*. at 2165.

3. Brief for the Petitioner at 3–4, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074).

4. *Id*. at 9. Because of statutory caps, the district court judge reduced the award to approximately $300,000. *Id.*

5. *Ledbetter*, 127 S. Ct. at 2177.

6. *Id*. at 2179.

7. *Id*. at 2169. Generally, the continuing violations doctrine allows a plaintiff to bring a claim that would otherwise be time-barred for two reasons. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 275 (2007). The first reason is if the claim is actually a grouping of several separate but significantly connected claims, some of which happened within the limitations period and some outside of it. *Id*. The second reason is if the claim consists of several wrongdoings

Court held that, because the discriminatory intent involved in wage discrimination stems not from the paycheck but from the decision to pay a person less because of her gender, wage discrimination consists of a singular, discrete action.[8] Therefore, the statute of limitations clock begins to run from the date of the discriminatory decision.[9]

Thus, the Court's ruling, by focusing on the procedural requirements of Title VII rather than the substantive protections, makes it significantly harder for legitimate victims of wage discrimination to recover under Title VII. Ledbetter's post on the blog *The Huffington Post* explains why:

> I just couldn't let Goodyear get away with it so I went to court, and a jury agreed that Goodyear had broken the law. They awarded me $3 million. Then a trial judge reduced it to $300,000 because of a statutory cap on civil rights damages that I don't really understand. But I knew that made discrimination a lot less pricey, and painful, for Goodyear.
>
> Then, by one vote, the Supreme Court took that away too, saying that I should have filed my complaint within six months of the original act of discrimination, even though there was no way I could have known about it. . . .
>
> I worked hard at Goodyear, and was good at my job. But with every paycheck, I got less than I deserved and less than the law says I am entitled to. The discrimination continues today, because my pension and Social Security are based on my pay. But because Goodyear kept [the discriminatory pay disparity] a secret, five Justices on the Supreme Court said it didn't matter. It was a step backward, and a terrible decision not just for me but for all the women who may have to fight wage discrimination.[10]

In light of the consequences caused by the *Ledbetter* holding and illustrated by Ledbetter's personal struggle, this Comment argues that the Court should have applied the continuing violations doctrine to wage

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(that may or may not be actionable on their own) that are all connected by the same discriminatory animus. *Id*. Wage discrimination claims should fall within the latter characterization because each paycheck is a wrongdoing that is connected by the initial discriminatory decision to pay someone less. *But see id*. at 321 (stating that wage discrimination claims should fall into the first characterization because each paycheck itself represents a separate, actionable claim).

8. *Ledbetter*, 127 S. Ct. at 2165.

9. *Id*.

10. Posting of Lilly Ledbetter and Joan Blades to The Huffington Post, *Peaceful Revolution: Equal Pay for Equal Work—Time for the Senate to Vote*, http://www.huffingtonpost.com/lilly-ledbetter/empeaceful-revolutionem-e_b_98045.html (Apr. 22, 2008, 04:12 PM EST).

discrimination claims like Ledbetter's for two reasons. First, failing to classify wage discrimination claims as continuing violations is contrary to thirty years of precedent because prior precedent supports classifying wage discrimination claims as continuing violations. Classifying wage discrimination claims as continuing violations is supported by prior precedent because wage discrimination claims have many of the same characteristics as hostile work environment claims, which the Court classified as continuing violations in *National Railroad Passenger Corp. v. Morgan*.[11] Also, classifying wage discrimination claims as continuing violations is further supported by *Bazemore v. Friday*, where the Court recognized that each paycheck that pays less to an African-American than to a similarly situated white man is an unlawful employment practice.[12]

Second, the Court should have classified wage discrimination claims as continuing violations because classifying wage discrimination claims as singular, discrete actions frustrates the purpose of Title VII and violates the public policies behind Title VII. The holding frustrates the purpose of Title VII because it effectively bars a significant number of claims that substantively qualify as egregious violations of Title VII's prohibition of wage discrimination.

However, because the Court has already made its decision, there must be an act of Congress to rectify this mistake. Thus, this Comment also argues in support of the Lilly Ledbetter Fair Pay Act of 2009.[13] The Act classifies wage discrimination claims as continuing violations because it allows victims to bring a claim as long as the employer issues a paycheck representing the discriminatory pay decision within the statute of limitations.[14] Statutorily classifying wage discrimination claims as continuing violations remedies the harm caused by the *Ledbetter* holding because the Act invalidates the Court's significant narrowing of the continuing violations doctrine and reinforces Title VII's main purpose of providing relief from discrimination on the basis of sex.

For a complete understanding of the *Ledbetter* holding and the proffered criticisms and solutions, this Comment, in Part II, will first discuss the role and function of the Equal Employment Opportunity Commission (EEOC) in wage discrimination claims and the filing procedures for wage discrimination claims required by Title VII. Then, in Part III, it will examine the development of the continuing violations doctrine and trace the applicable Supreme Court precedent. Once the necessary background is established, this

11. 536 U.S. 101, 115, 117 (2002).
12. 478 U.S. 385, 395 (1986).
13. S. 181, 111th Cong. (2009).
14. *Id*.

Comment, in Part IV, will analyze the *Ledbetter* case and demonstrate why the Court's holding is erroneous both on precedential and public policy grounds. Finally, in Part V, it will weigh the merits of the Lilly Ledbetter Fair Pay Act and illustrate how the Act corrects the Court's errors and remedies the harms caused by the *Ledbetter* holding.

II. THE FUNCTION AND STATUTORY PROCEDURAL REQUIREMENTS OF THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION

To fully comprehend the *Ledbetter* holding, one must first recognize the role of the EEOC and examine the provision of Title VII that caused the issue in *Ledbetter*.

Created under Title VII of the Civil Rights Act of 1964, the EEOC's primary function is to enforce Title VII's statutory proscriptions on discrimination.[15] Prior to filing a discrimination claim in federal court, the claimant must exhaust administrative proceedings by filing a charge with the EEOC within 180 days of the occurrence of the act.[16] Once a claim is filed, the EEOC has ten days to notify the employer and begin its investigation.[17] After investigating the charge, if the EEOC finds that the claim is valid, then it must try to resolve the claim informally through the process of conciliation.[18] If the parties cannot reach a conciliation agreement, the EEOC has two options. It may either file suit itself in the federal district court, or it may issue a right to sue letter to the claimant, which enables the claimant to file a private action in the federal district court.[19] When the EEOC deems a claim valid, it has 180 days from the date the claim was initially filed with the EEOC to attempt conciliation and then pursue one of the two above-mentioned options.[20] However, if the EEOC determines that the claim is invalid or it takes the EEOC longer than 180 days to make a determination,

15. Amanda J. Zaremba, Note, National Railroad Passenger Corp. v. Morgan*: The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers*, 72 U. CIN. L. REV. 1129, 1131–32 (2004). Other functions include investigating complaints, operating as a mediator between the two parties, conducting negotiations, attempting conciliation, and generally resolving the conflict to prevent it from going into litigation. *Id*.; *see also* Kara M. Farina, Comment, *When Does Discrimination "Occur?": The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII*, 38 GOLDEN GATE U. L. REV 249, 253 (2008) ("Congress intended the EEOC to be the leading enforcement agency in workplace discrimination.").

16. 42 U.S.C. § 2000e-5(e)(1) (2000) (requiring employee to file a charge "within one hundred and eighty days after the alleged unlawful employment practice occurred"). The 180-day period is extended to 300 days if the claim falls within a state's anti-discrimination law. *Id*.

17. *Id*. § 2000e-5(b).

18. *Id*. Conciliation is a process where a neutral party (in this case the EEOC) meets with both sides to explore how the claim might be resolved. BLACK'S LAW DICTIONARY 307 (8th ed. 2004).

19. 42 U.S.C. § 2000e-5(f)(1) (2000).

20. *Id*.

then the EEOC must notify the claimant, who then has ninety days to file her own suit in federal district court.[21]

According to the statute, then, the federal district court may dismiss a discrimination claim that the EEOC found valid if the claim was not brought within 180 days of the alleged unlawful discriminatory act.[22]

At issue in *Ledbetter* is exactly when a victim of wage discrimination must file her claim with the EEOC. In other words, it is unclear what the alleged unlawful discriminatory act is that causes the 180-day clock to run. In wage discrimination claims, the alleged unlawful discriminatory act could be either: (1) the decision to discriminate based on wage, and the date of that decision is the start of the 180-day period; or (2) the act of paying a person less with each paycheck, and each paycheck starts a new 180-day period.[23] In *Ledbetter*, the Supreme Court picked the former of the two possibilities. However, to fully understand why the *Ledbetter* Court picked the date of the decision to discriminate as the starting point for the 180-day period, and why the *Ledbetter* Court's decision is erroneous, it helps to consider how the Court applied the continuing violations doctrine in other circumstances where it is unclear when the alleged unlawful discriminatory act occurred.

III. DEVELOPMENT AND EXPLANATION OF THE CONTINUING VIOLATIONS DOCTRINE

Considering the development of the continuing violations doctrine as it applies to the statute of limitations in other discriminatory actions sheds light on the *Ledbetter* holding. Thus, this section will first look at the definition and purpose of the continuing violations doctrine, and then examine how the Supreme Court has applied and limited the doctrine in Title VII actions over a thirty-year period.

A. Definition and Purpose of the Continuing Violations Doctrine

Generally, the continuing violations doctrine creates an exception to Title VII's 180-day requirement for filing claims with the EEOC.[24] The theory behind the continuing violations doctrine is that "if [the] alleged discrimination is part of a 'continuing pattern of discrimination,' the plaintiff

21. *Id*.

22. *Id*.

23. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 561 (1977) (Marshall, J., dissenting).

24. Graham, *supra* note 7, at 272–73 (stating that the doctrine has "the effect of rescuing a plaintiff's claim or claims from the statute of limitations"); Michael Lee Wright, Note, *Civil Rights—Time Limitations for Civil Rights Claims—Continuing Violation Doctrine*, 71 TENN. L. REV. 383, 384 (2004).

should be allowed to bring [a] claim based on the entire pattern of conduct, not just those acts occurring within the filing period."[25]

Between the enactment of Title VII in 1964 and the late 1970s, federal courts, most notably circuit courts of appeal, created several different definitions and applications of the continuing violations doctrine.[26] Each court-created definition falls into one of three broad types of continuing violations: serial violations, systemic violations, and past violations that have discriminatory effects in the present.[27]

A serial violation is "a violation . . . composed of a number of discriminatory acts emanating from the same discriminatory animus [with] each act constituting a separate wrong actionable under Title VII."[28] Usually, a serial violation occurs when the employer commits many discriminatory acts against one employee.[29] For example, an employee who is denied a promotion several times for the same discriminatory reason suffers from a serial violation.[30]

Courts applied the continuing violations doctrine to serial violations because each discriminatory act in the series originated from the same discriminatory intent.[31] However, each circuit had its own test to determine whether the doctrine should apply. For instance, the First Circuit's test mandated that the claimant demonstrate that at least one of the series of discriminatory acts fell within the 180-day period.[32] The Fifth Circuit, on the other hand, had a three-factor test that generally required the claimant to show a series of acts "constituting an organized scheme leading to a present violation."[33] Specifically, a claimant had to prove that to some degree the acts (1) all involved the same kind of discrimination; (2) were recurring; and (3) "ha[d] the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights."[34]

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25. Susan Strebel Sperber & Craig R. Welling, *The Continuing Violations Doctrine Post-*Morgan, 32 COLO. LAW. 57, 57 (2003).

26. *See infra* notes 28–50 and accompanying text.

27. Graham, *supra* note 7, at 304; Wright, *supra* note 24, at 386.

28. Jensen v. Frank, 912 F.2d 517, 522 (1st Cir. 1990).

29. Graham, *supra* note 7, at 304.

30. *Jensen*, 912 F.2d at 522.

31. Wright, *supra* note 24, at 386.

32. *Jensen*, 912 F.2d at 522.

33. Berry v. Bd. of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983) (quoting Nelson v. Williams, 25 Fair Empl. Prac. Cas. (BNA) 1214, 1215 (D.D.C. 1981)).

34. *Berry*, 715 F.2d at 981. Prior to the Supreme Court ruling that serial violations are not a valid exception to the statute of limitations under the continuing violations doctrine in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), most circuits adopted some variation of the Fifth Circuit test. *See, e.g.*, Green v. L.A. County Superintendent of Schs., 883 F.2d 1472, 1480 (9th Cir. 1989); Bruno v. W. Elec. Co., 829 F.2d 957, 961 (10th Cir. 1987); Valentino v. U.S. Postal

Alternatively, systemic violations consist of a promotional policy or hiring policy where, by the operation of the policy, minority groups are the last considered.[35] The difference between serial violations and systemic violations is that systemic violations involve a policy that affects a whole group where as serial violations involve a series of actions that affect an individual.[36] Courts apply the continuing violations doctrine to systemic violations because the unlawful action is not a result of any singular act, but rather it consists of an ongoing illegal policy, practice, or system.[37] For a systemic violation, "the limitations clock does not begin to tick until the invidious conduct [or policy] ends."[38] Thus, a systemic violation is actionable if the claimant can show "that a policy and practice operated at least in part within the limitation period," even if the policy or practice did not affect the plaintiff within 180 days of filing the complaint.[39]

The circuits have developed three different ways to measure when the limitations clock begins to run in the event of a systemic violation.[40] First, under the "date of injury" standard, "the statute of limitations begins to run when the plaintiff is notified of the discriminatory policy."[41] Second, the "manifestation" standard mandates that the statute of limitations period begins to run "from the date of enforcement . . . of the [discriminatory] policy."[42] Third, the "ongoing policy" standard states that a claimant can bring a claim as long as he "remains subject to the [discriminatory] policy."[43]

Finally, a past violation with discriminatory effects in the present is a situation where there used to be a discriminatory policy that has since been abandoned by the employer, but the employees are still feeling the effects of the policy.[44] Courts applied the continuing violations doctrine to this type of discrimination because past discrimination with significant effects in the

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Serv., 674 F.2d 56, 65 (D.C. Cir. 1982).

35. *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 337 (10th Cir. 1975).

36. *See* Graham, *supra* note 7, at 304.

37. *See* Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 183 (1st Cir. 1989); *see also Jensen*, 912 F.2d at 523 (noting that systemic violations have "roots in a discriminatory policy or practice"); *Green*, 883 F.2d at 1480 (finding that a plaintiff can satisfy the filing requirements by showing that "a policy or practice operated at least in part within the limitation period").

38. *Mack*, 871 F.2d at 183.

39. *Green*, 883 F.2d at 1480; *see also Mack*, 871 F.2d at 183.

40. Robert J. Reid, *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, 60 U. CIN. L. REV. 1335, 1344–46 (1992).

41. *Id*.

42. *Id*.

43. *Id*.

44. *See, e.g.*, United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 (1977); *see also infra* Part III.B.

present "rejuvenates the past discrimination in both fact and law regardless of present good faith."[45]

Circuit courts originally found that any violation falling into one of these three categories warranted the application of the continuing violations doctrine, and therefore, they allowed the claims, despite the fact that many of the alleged actions fell outside the statute of limitations.[46] Such liberal application of the doctrine stemmed from the circuit courts' need "to ameliorate the harsh effects" of Title VII's original ninety-day filing period.[47] Many circuits held that valid substantive claims were unfairly barred and that the ninety-day filing period often hindered the substantive goals of Title VII.[48] Thus, in order to advance Title VII's purpose, courts broadly applied the continuing violations doctrine.[49] However, the doctrine's application eventually became "inconsistent and confusing" because of the many different tests and applications of the doctrine, so the Supreme Court began to define when to apply the doctrine.[50]

B. Initial Supreme Court Limitations on the Continuing Violations Doctrine

United Air Lines, Inc. v. Evans[51] and *Delaware State College v. Ricks*[52] illustrate the Court's first attempts at limiting and defining the continuing violations doctrine.

In *Evans*, the Court determined that past violations with present effects were not a valid continuing violation under the doctrine.[53] *Evans* involved a flight attendant who was forced to resign in 1968 because, at the time, United had a policy that required all flight attendants to remain unmarried.[54] A few months later, United eliminated its policy because of the controversy surrounding it and entered into a new collective bargaining agreement where affected flight attendants could seek reinstatement as long as they filed grievances with their union.[55] Because the plaintiff did not file a grievance

45. Marquez v. Omaha Dist. Sales Office, Ford Div. of Ford Motor Co., 440 F.2d 1157, 1160 (8th Cir. 1971).

46. Wright, *supra* note 24, at 386.

47. *Id*. at 385. The 1972 Amendments to Title VII lengthened the filing period to 180 days. Equal Opportunities Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 103 (amending 42 U.S.C. § 2000e-5); *see Evans*, 431 U.S. at 554 n.3.

48. Wright, *supra* note 24, at 385.

49. *See id*. at 386.

50. Elliot v. Sperry Rand Corp., 79 F.R.D. 580, 585 (D. Minn. 1978).

51. 431 U.S. 553 (1977).

52. 449 U.S. 250 (1980).

53. *Evans*, 431 U.S. at 558.

54. *Id*. at 554.

55. *Id*. at 555; David R. Brugel & John R. Ruhl, Comment, Evans v. United Air Lines, Inc., 52 NOTRE DAME L. REV. 364, 364 (1977). Many United flight attendants who did not file grievances

she was rehired as a new employee and lost all her seniority, thus affecting her eligibility for benefits.[56] She then filed a claim under Title VII alleging that United's refusal to grant her pre-resignation seniority was an unlawful discriminatory action.[57]

The District Court of the Northern District of Illinois dismissed Evans's complaint because she did not file it within ninety days after her forced resignation; therefore, the action was time-barred.[58] The Seventh Circuit initially affirmed the district court ruling, but after the Supreme Court handed down its ruling in *Franks v. Bowman Transportation Co.*,[59] the Seventh Circuit reheard the case and unanimously reversed.[60]

The plaintiff then appealed to the Supreme Court, and the Court held that the plaintiff's claim was time-barred.[61] The Court reasoned that, because the plaintiff waited four years to bring a claim instead of seeking a remedy immediately when she was forced to resign, and because the current system was facially neutral and legal under Title VII, it would not further the goals of Title VII to allow her to bring a claim.[62] Consequently, the Court suggested that a past violation that has lasting effects in the present is not a continuing violation and therefore not an exception to the statute of limitations.[63]

Three years later, in *Ricks*, the Court explicitly affirmed its suggestion in *Evans* by holding that a past violation with effects in the present is not an exception under the continuing violations doctrine.[64] The plaintiff was a Liberian professor at Delaware State who was denied a tenured position. However, he was offered a one-year employment contract to give him time to look for new employment.[65] It was understood by both parties that once the employment contract ended, the plaintiff would no longer be employed at

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with the union brought suit to be reinstated immediately after United changed its policy. *Id*.; *see also* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). Plaintiff in the *Evans* case was not part of the *Sprogis* case. *Evans*, 431 U.S. at 554.

56. *Evans*, 431 U.S. at 555.

57. *Id*. at 556.

58. Evans v. United Air Lines, Inc., No. 74 C 2530, 1975 WL 11902, at *1 (N.D. Ill. Apr. 9, 1975). Because the case was filed prior to the 1972 amendments, Equal Opportunities Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 103 (amending 42 U.S.C. § 2000e-5), the applicable statute of limitations period was ninety days. *Id*.

59. 424 U.S. 747 (1976). The Court in *Franks* ruled that a facially neutral seniority system violates Title VII when the plaintiff can demonstrate that the seniority system deprives him of benefits because of past discriminatory actions. *Id*. at 764–66.

60. Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976).

61. *Evans*, 431 U.S. at 558.

62. *Id*. at 558–59.

63. *Id*.

64. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

65. *Id*. at 252–54.

Delaware State.[66] When the employment contract did end, the plaintiff filed a complaint alleging he was denied tenure and subsequently dismissed because of his national origin.[67] The plaintiff argued that his claim was not time-barred because, even though the decision to deny him tenure was made outside of the statute of limitations, the adverse effect did not occur until his employment contract terminated.[68]

The district court dismissed the complaint because the only unlawful employment action alleged, the denial of tenure, fell outside the statute of limitations.[69] However, the Third Circuit reversed, reasoning that the statute of limitations did not begin to run until Ricks's employment ended.[70]

Agreeing with the district court, the Supreme Court held that the statute of limitations began to run when the plaintiff's tenure was denied.[71] The Court reasoned that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."[72] In its holding, the Court stated explicitly that the focus should be on when the actual violation occurred and not on when the effects of the violation "became most painful."[73]

Together, *Ricks* and *Evans* limited the continuing violations doctrine by decreeing that one of the three definitions of a continuing violation, past discrimination that has present effects, is not an acceptable application of the continuing violations doctrine. However, it is important to note that in both cases the Court's reason for limiting the doctrine was because the unlawful discriminatory acts at issue were single, easily identifiable discriminatory acts that the plaintiffs knew about long before they filed claims with the EEOC. Thus, the Court had no issues with barring the meritorious claims.

Also, these decisions were relatively silent on the application of the doctrine to serial and systemic violations. So, circuit courts continued to apply the doctrine to these claims for another twenty years until the Court once again considered the application of the continuing violations doctrine to Title VII claims and severely limited the doctrine's utility.

66. *Id*.
67. *Id*.
68. *Id*. at 257.
69. *Id*. at 254–55.
70. *Id*.
71. *Id*. at 256–57.
72. *Id*.
73. *Id*. at 258 (quoting Abramson v. Univ. of Haw., 594 F.2d 202, 209 (9th Cir. 1979)).

C. Death of the Continuing Violations Doctrine in Title VII Cases? Morgan *and its Limitations*

In 2002, the Supreme Court once again considered the continuing violations doctrine in *National Railroad Passenger Corp. v. Morgan*.[74] While the Court did not completely kill the doctrine, it narrowed it severely by holding that the doctrine does not apply to serial violations.

The plaintiff in *Morgan* alleged that he was "consistently harassed and disciplined more harshly than other employees on account of his race."[75] While a few of the discriminatory acts he complained of took place within the 300-day limitation period,[76] the majority occurred outside of the period.[77] However, the plaintiff argued that even though the bulk of the acts were outside the filing period, all of them resulted from the same discriminatory impulse.[78] Because all the acts derived from the same impulse, he argued that they should be recognized as a serial violation of Title VII and that the Court should apply the continuing violations doctrine.[79] The plaintiff also argued that the repeated, daily use of racial slurs and epithets by fellow employees, managers, and supervisors created a hostile work environment and that the continuing violations doctrine should apply to the claim because a hostile work environment, by its nature, is a continuing violation.[80]

The district court held that the continuing violations doctrine did not apply to either claim because the allegations were discrete and singular, and thus, they were time-barred.[81] However, the Ninth Circuit reversed, holding that the actions falling outside the limitations period were sufficiently related to those that fell inside the limitations period; therefore, the continuing

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74. 536 U.S. 101, 108 (2002).

75. *Id*. at 105.

76. Because he filed with a state agency first, the applicable limitations period was 300 days. *Id*.; *see* 42 U.S.C. § 2000e-5(e)(1) (2000).

77. The plaintiff complained that because of his race, he was given the label "electrician's helper" and paid less than an electrician even though he did the same work. Bernice Yeung, *A Black and White Issue*, SAN FRANCISCO WEEKLY, May 1, 2002, *available at* http://sfweekly.com/content/printVersion/313233. He also alleged that he was constantly subjected to racial slurs; disciplined for things white co-workers were not disciplined for; denied access to training programs because his supervisors told him he lacked the mental capacity; and fired for the pretextual reason of threatening a supervisor when he was actually fired for complaining too many times about such racist treatment. *Id*. However, the plaintiff did not file his complaint with the EEOC until he was fired. *Id*.

78. *Morgan*, 536 U.S. at 106.

79. *Id*.

80. *Id*.; *see* Zaremba, *supra* note 15, at 1138.

81. *Morgan*, 536 U.S. at 106.

violations doctrine precluded them from being time-barred because they were classified as serial violations.[82]

The Supreme Court affirmed in part and reversed in part by distinguishing between the serial violations and the hostile work environment claim.[83] It held that the continuing violations doctrine did not apply to serial violations but that it did apply to the hostile work environment claim.[84] Because the alleged serial violations consisted of acts such as failure to promote, denial of training, or denial of transfer, the Court characterized the claims as discrete and easily identifiable.[85] Because the acts were discrete and easily identifiable, "each [discriminatory] adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"[86] Even though each discrete action had the same discriminatory impulse, the Court held that the continuing violations doctrine did not apply because the actions involved were actions that were separately actionable and easy to identify as discriminatory, and such easy identification warranted a strict application of the 180/300-day limitation.[87]

However, the Court held that the continuing violations doctrine did apply to the hostile work environment claim because the nature of the claim necessitated the exception.[88] The Court differentiated between serial violations and a hostile work environment, noting that hostile work environments are not easily identifiable or separately actionable.[89] Also, the Court acknowledged that the actionable unlawful employment practice "involves repeated conduct. . . . [and] [t]he unlawful employment practice therefore cannot be said to occur on any particular day" but usually happens over several days, months, or years.[90] Additionally, the Court noted that hostile work environment claims are difficult to prove in a short period of time because the plaintiff, to be successful, must be aware of the

82. *Id*. at 106–07.

83. *Id*. at 105.

84. *Id*.

85. *Id*. at 114; *see* Farina, *supra* note 15, at 266.

86. *Morgan*, 536 U.S. at 114.

87. *Id*.; *see* Joseph M. Aldridge, Note, *Pay-Setting Decisions as Discrete Acts: The Court Sharpens Its Focus on Intent in Title VII Actions in* Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007)*, 86 NEB. L. REV. 955, 966 (2008).

88. *Morgan*, 536 U.S. at 115.

89. *Id*. at 115–17; *see* Aldridge, *supra* note 87, at 966 ("A divided court held that because such claims allege a series of incidents, some of which may be difficult to identify and are not independently actionable, such claims collectively formed a single allegation of an offensive or intimidating atmosphere.").

90. *Morgan*, 536 U.S. at 115; *see* Zaremba, *supra* note 15, at 1144 (noting that the unemployment practice cannot have "occurred on one day, but rather requires days and even years of accumulated conduct to constitute a valid claim.").

discrimination and show that the discrimination in the work place is hostile and abusive enough to offend a reasonable person.[91]

As a result, while the *Morgan* Court severely limited the range of the continuing violations doctrine because it eliminated the traditional category of serial violations, it did not do away with the doctrine entirely, like many critics claim.[92] As shown above, the Court did endorse the application of the doctrine to hostile work environment claims, and it still has not commented on the applicability of the doctrine to systemic violations. This suggests that the Court could expand the doctrine by applying it to certain discriminatory acts for policy reasons. In fact, precedent exists suggesting that the Court should apply the doctrine to wage discrimination claims.

D. Possible Expansion of the Continuing Violations Doctrine to Wage Discrimination Claims: Bazemore v. Friday

Bazemore v. Friday[93] provides precedent allowing the Court to apply the continuing violations doctrine to wage discrimination claims even though wage discrimination claims are technically serial violations. The *Bazemore* Court's classification of pay disparities as current violations of Title VII and the Court's use of the paycheck to support this classification demonstrate that the Court considered the paycheck as a manifestation of the current violation. *Bazemore* also implies that wage discrimination claims are unique and their tendency to perpetuate discrimination justifies allowing claims where that are otherwise time-barred.

Bazemore does not involve a statute of limitations claim or an individual wage discrimination claim but instead deals with a discriminatory pay scale that was enacted prior to the passage of the Civil Rights Act of 1964.[94] The pay scale in place prior to August 1, 1965, divided whites and African-

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91. *Morgan*, 536 U.S. at 115 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)); *see* Graham, *supra* note 7, at 303 (discussing the subjective and objective components of a hostile work environment claim and how those components show that hostile work environment claims "typically are comprised of many slights instead of a single egregious event, . . . [making] it especially difficult for potential plaintiffs to determine when their claims have accrued.").

92. *See* Sperber & Welling, *supra* note 25, at 60 ("From a purely technical standpoint, the Court in *Morgan* did away with the continuing violations doctrine."); Zaremba, *supra* note 15, at 1134 (explaining how the Supreme Court rejected the application of the doctrine to Title VII claims in *Morgan*). *But see* Aldridge, *supra* note 87, at 978 ("*Morgan* thus constrained the continuing violation theory to hostile work environment claims . . . .").

93. 478 U.S. 385 (1986). This decision was a per curiam decision, but much of the analysis relevant to this Comment is contained in Justice Brennan's concurrence. *Id*. at 386–87 ("We hold, for the reasons stated in the concurring opinion of Justice Brennan, that the Court of Appeals erred in holding that under [Title VII] . . . the Extension Service had no duty to eradicate salary disparities between white and black workers that had their origin prior to the date Title VII was made applicable to public employers . . . .").

94. *Id*. at 390–91 (Brennan, J., concurring).

Americans into two branches where the African-Americans were given lower salaries than the whites.[95] After August 1, 1965, the employer integrated the two branches but did not correct the pay scale.[96] A class of African-American employees filed a wage discrimination claim asking the court to make the employer eliminate the pay disparities between whites and African-Americans.[97] The court of appeals held that the employer did not have a duty to eliminate the disparities caused by a policy that was not illegal at the time when it was in place.[98]

The Supreme Court held that the employer did have a duty because a present violation of Title VII existed despite the fact that the policy no longer was in place and all that remained was the effects of the policy.[99] The employer argued that the Court's holding went against *United Air Lines, Inc. v. Evans*[100] because there the Court held that the past discrimination with present effects was time-barred.[101] However, the *Bazemore* Court distinguished *Evans* by characterizing the pay disparities themselves as current violations of Title VII.[102] The Court found that the pay disparity was the present violation because it reasoned that ongoing pay disparities perpetuate discrimination.[103] The Court articulated that just because the employer

> discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the [employer] became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks.[104]

Bazemore, then, generally implies that it is against public policy not to correct pay disparities because failing to correct them exempts employers from liability and perpetuates discrimination.

It is also important to note that the *Bazemore* Court saw the paycheck as a manifestation of the pay disparity: "Each week's paycheck that delivers less

95. *Id*.
96. *Id*.
97. *Id*. at 386–87.
98. *Id*.
99. *Id*. at 386–87, 396.
100. 431 U.S. 553, 558 (1977).
101. *Bazemore*, 478 U.S. at 396.
102. *Id*. at 396 n.6; *see* Farina, *supra* note 15, at 265.
103. *Bazemore*, 478 U.S. at 395–96.
104. *Id*.

to a black than to a similarly situated white is a wrong actionable under Title VII . . . ."[105] This demonstrates that the Court regarded the paycheck as representative of the pay disparity, and thus the current violation, because it characterized the violation in terms of a paycheck. Employing the paycheck as a manifestation of the current violation allowed the *Bazemore* Court to put aside the procedural barrier to the claim (the fact that the action causing the pay disparity fell outside the enactment of the Civil Rights Act) in order to further the policy goals of Title VII because it gave the Court something current to base the claim on.

Indeed, the past thirty years of precedent suggests that the Court has a general policy of circumventing the statute of limitations or other procedural barriers to further the substantive goals of Title VII. In fact, courts used the continuing violations doctrine more often and broadly applied the doctrine when the limitations period was significantly shorter and thus more likely to bar meritorious suits. However, such broad usage caused confusion and inconsistency in the application of the doctrine, which is why the Court began limiting its utility in *Evans* and *Ricks*. And even though the Court in *Morgan* severely limited the doctrine's utility, *Morgan* still demonstrates the Court's willingness to use the doctrine when it believes there is good public policy to allow the claim to proceed.[106] The issue for wage discrimination claims, then, is whether the public policy behind preventing wage discrimination is enough for the Court to apply the doctrine. In light of *Morgan* and *Bazemore*, it seems like the doctrine should apply to wage discrimination claims. However, the *Ledbetter* Court disagreed and held that the doctrine does not apply.[107]

IV. THE COURT'S FAILURE TO APPLY THE CONTINUING VIOLATIONS DOCTRINE TO WAGE DISCRIMINATION CLAIMS: *LEDBETTER V. GOODYEAR*

In order to effectively analyze the *Ledbetter* holding, it is necessary to consider the facts, precedential history, and reasoning of the case. Thus, this Comment discusses the case before arguing that the holding goes against prior precedent and public policy.

A. Discussion of Ledbetter

The United States Supreme Court resolved the issue of whether the continuing violations doctrine applies to wage discrimination suits in *Ledbetter v. Goodyear Tire & Rubber Co.*[108] The Court held that a wage

105. *Id*.

106. *See, e.g.*, *supra* Part III.C (analyzing *Morgan*'s hostile work environment claim).

107. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007).

108. *Id*.

discrimination claim brought under Title VII is a discrete, easy-to-identify act, and therefore is not subject to the continuing violations exception to Title VII's statute of limitations.[109]

In *Ledbetter*, the plaintiff, Lilly Ledbetter, worked at Goodyear's Gadsen, Alabama, plant from 1979 to her early retirement in 1998 primarily as an area manager.[110] During her tenure at Goodyear, salaries of area managers would increase only if the business center manager believed they deserved a yearly raise.[111] Business center managers made their decisions based on yearly performance rankings, reports from performance auditors, and their own "subjective impressions."[112] As a result of this system, Ledbetter often did not receive a yearly raise, or if she did, it was significantly smaller than her male counterparts.[113] By 1997, she was making fifteen percent less than the lowest-paid male area manager (who had significantly less seniority and experience) and forty percent less than male area managers with "equal or less seniority."[114] When she retired in 1998, she filed a claim with the EEOC.[115]

Goodyear argued that Ledbetter's claim was time-barred because none of the alleged discriminatory acts took place after September 26, 1997, exactly 180 days from when Ledbetter filed her complaint with the EEOC.[116] Substantively, Goodyear maintained that the merit system was neutral and that Ledbetter was paid less because that is what her performance dictated.[117]

However, Ledbetter offered several pieces of evidence demonstrating that Goodyear's proffered reasons were pretextual. First, Ledbetter presented evidence that her performance rankings were inaccurate and sometimes falsified for various reasons.[118] She showed that other area managers and various supervisors believed her work was of high quality and that she won a "Top Performance Award" in 1996.[119] She also demonstrated that her one-time direct supervisor and performance auditor threatened to give her (and

109. *Id*.

110. *Id*.; *see also* Brief for the Petitioner, *supra* note 3, at 3–4. When Ledbetter was promoted to area manager, she scored the second-highest on the competency exam out of forty-five applicants for the job. *Id*.

111. Brief for the Petitioner, *supra* note 3, at 5.

112. *Id*.

113. *Id*.

114. *Id*. at 4. In 1997, Ledbetter was making $3727 per month while the lowest-paid male area manager was making $4286 per month, and the highest-paid male area manager was working $5236 per month. *Ledbetter*, 127 S. Ct. at 2178 (Ginsberg, J., dissenting). Thus, Ledbetter was making $6000 less per year than the lowest-paid male and $18,000 less a year than the highest-paid male.

115. *Ledbetter*, 127 S. Ct. at 2165.

116. *Id*. at 2166.

117. Brief for the Petitioner, *supra* note 3, at 5.

118. *Id*.

119. *Id*.

eventually did give her) poor performance evaluations if she continued rejecting his sexual advances.[120] Second, Ledbetter offered evidence of widespread gender discrimination at the plant.[121] Third, Ledbetter illustrated that her work environment was hostile toward women.[122]

The district court rejected Goodyear's statute of limitations claim and let the substantive issue of the Title VII pay discrimination claim go to trial.[123] The jury found that "it was more likely than not" that Ledbetter was paid less because of her sex and awarded her $223,776 in back pay, $4662 for mental anguish, and $3,285,979 in punitive damages.[124]

Goodyear appealed on the statute of limitations claim, and the Court of Appeals for the Eleventh Circuit reversed the district court, reasoning that the claim was time-barred by the 180-day filing limit.[125] The appellate court stated that even though there were two pay decisions made within the limitations period,[126] the evidence from those two pay decisions alone was insufficient to uphold the jury's verdict.[127]

On appeal to the United States Supreme Court, Ledbetter argued that her claim was timely. Relying heavily on *Bazemore*, Ledbetter asserted that each paycheck issued where she was paid less than her male counterparts was a separate act of discrimination and that the series of violations comprised a

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120. *Id*. at 5–6. When Ledbetter confronted this man about her poor evaluations, he told her that it was because she was "just a little female and these big old guys . . . [would] beat up on me and push me around and cuss me." *Id*. After this confrontation, Ledbetter claimed that her evaluations got worse. *Id*. Goodyear was supposed to retain these evaluations, but the records were not preserved. *Id*.

121. *Id*. at 7. There were only two other female area managers during Ledbetter's employment, and both made less than their male counterparts. *Id*. The first area manager testified at trial that her male supervisors told her she would be given low ratings because they did not think women were capable of handling the job. *Id*. The second area manager transferred from a secretarial position to the area manager position; however, she retained her secretarial pay and was making less than the men she supervised. *Id*.

122. *Id*. at 8. She was constantly told that the plant did not need women because they were "troublemakers." *Id*.

123. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007). The district court did grant Goodyear's motion for summary judgment on several other claims, including an Equal Pay Act claim. *Id*.

124. Brief for the Petitioner, *supra* note 3, at 9. By law, the district court had to reduce the back pay award to $60,000 because a plaintiff cannot receive more than two years' back pay. *Id*. The court, to comply with 42 U.S.C. § 1981a(b)(3)(D), also reduced the punitive damage award to $295,338. *Id*.

125. *Ledbetter*, 127 S. Ct. at 2166.

126. There was a decision made to deny Ledbetter a raise in the fall of 1997 and in the beginning of 1998. Brief for the Petitioner, *supra* note 3, at 10.

127. *Ledbetter*, 127 S. Ct. at 2166. The Eleventh Circuit did recognize that "a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." Ledbetter v. Goodyear Tire and Rubber Co., 421 F.3d 1169, 1181 (11th Cir. 2005).

continuing violation.[128] She argued that the *Bazemore* precedent created a "'paycheck accrual rule' under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred."[129] Essentially, Ledbetter argued that in light of *Bazemore*'s use of the paycheck as a manifestation of the current violation caused by the pay disparity, the Court should apply the continuing violations doctrine.[130]

The Court, however, held that Ledbetter's wage discrimination claim was not a continuing violation but a discrete act that was time-barred by the 180-day limitation.[131] For such claims, the statute of limitations begins to run when the discriminatory pay decision is made because that is the action which contains the necessary discriminatory intent.[132] The Court distinguished *Bazemore*, explaining that a paycheck represents a current violation of Title VII only when the pay scale is facially discriminatory, like in *Bazemore*, because the facially discriminatory nature of the scale causes the employer to engage in intentional discrimination each time a paycheck is issued.[133] However, the Court reasoned that the pay structure in *Ledbetter* was facially neutral and the paychecks stemming from the pay structure, by extension, were also neutral, so there was no discrimination associated with each paycheck.[134]

In further support of its holding, the Court used prior precedent and policy justifications for the strict adherence to the statute of limitations. The Court contended that prior precedent supported its ruling because Ledbetter argued "simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period," but *Evans*, *Ricks*, and *Morgan* held that such conduct does not fall under the continuing violation exception to the statute of limitations.[135]

Also, the Court reasoned that a short statute of limitations is good public policy because it requires complainants to file promptly.[136] Prompt filing is

128. *Ledbetter*, 127 S. Ct. at 2173.

129. *Id*. at 2172.

130. *See supra* Part III.D.

131. *Ledbetter*, 127 S. Ct. at 2165.

132. *Id*.

133. *Id*. at 2173; *see* Farina, *supra* note 15, at 265; Tristian K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 363 (2008).

134. *Ledbetter*, 127 S. Ct. at 2173; *see* Green, *supra* note 133, at 363.

135. *Ledbetter*, 127 S. Ct. at 2169.

136. *Id*. at 2170.

advantageous because as time passes, it becomes harder for "the parties and the fact finder to reconstruct what actually happened."[137] Finally, the Court noted that the statute of limitations also "protect[s] employers from the burden of defending claims arising from employment decisions that are long past."[138]

B. Ledbetter *Was Wrongly Decided Because Its Holding Goes Against Prior Precedent and Public Policy*

The Court's holding in *Ledbetter* is erroneous on two accounts. First, the holding goes against prior precedent because it ignores how substantially different wage discrimination claims are from traditional serial violations. Second, the holding goes against public policy because it frustrates the core purpose of Title VII—providing relief for discrimination based on race, national origin, color, religion, and gender.

1. The *Ledbetter* Holding is Contrary to *Morgan*, *Bazemore*, and the Appellate Courts' Treatment of the Issue

The *Ledbetter* holding goes against prior precedent because *Morgan* and *Bazemore* collectively stand for the proposition that claims that are hard to identify and perpetuate discrimination should be subject to the continuing violations doctrine in order to properly further the substantive goals of Title VII. As Part III.C demonstrated, *Morgan* differentiated between two kinds of claims: "discrete acts" that are "easy to identify" and recurring acts that are hard to identify and "cumulative in impact."[139] As examples of easy-to-identify acts, the *Morgan* Court listed "termination, failure to promote, denial of transfer, or refusal to hire."[140] As examples of recurring acts that are hard to identify, the Court's only example was a hostile work environment claim.[141] The Court declined to apply the continuing violations doctrine to the discrete acts because the ease of identification associated with discrete acts warranted strict adherence to Title VII's statute of limitations.[142]

However, the Court applied the doctrine to hostile work environment claims because the nature of the claims necessitates an exception to the statute of limitations in order to further the substantive goals of Title VII.[143] The *Morgan* Court viewed hostile work environments as "comprised of many

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137. *Id*. at 2171.

138. *Id*. at 2170 (quoting Del. State Coll. v. Ricks, 49 U.S. 250, 256–57 (1980)).

139. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114–15 (2002); *see* Graham, *supra* note 7, at 304; Sperber & Welling, *supra* note 25, at 59.

140. *Morgan*, 536 U.S. at 114.

141. *Id*. at 115; *see supra* Part III.C (discussing why the Court applied the continuing violations doctrine to hostile work environment claims).

142. *Morgan*, 536 U.S. at 114.

143. *Id*. at 115.

slights instead of a single egregious event . . . [which] makes it especially difficult for potential plaintiffs to determine when their claims have accrued."[144] Thus, the Court recognized that the nature of such claims causes the plaintiff trouble because it is much easier for the plaintiff to run the risk of filing too soon or filing too late.[145] If the plaintiff files too soon, then the plaintiff might not be able to show that the hostile work environment is abusive enough to offend a reasonable person.[146] If the plaintiff files too late because she was waiting for enough evidence to demonstrate that the environment was hostile enough to offend a reasonable person, her claim could be time-barred.[147]

Because wage discrimination claims fit better in the hard-to-identify recurring acts category than the easy-to-identify discrete acts category, *Morgan* mandates the application of the continuing violations doctrine to wage discrimination claims.[148] Wage discrimination claims are hard to identify in two ways. First, because a discriminatory pay decision often takes the form of a subtle action, an employee may not discern that the employer is discriminating against her until she notices a pattern develop, which may take many years.[149] For example, a woman who receives a smaller pay increase in 2007 may have no reason to suspect discrimination until she receives a smaller increase in 2008, 2009, and 2010 despite good performance reviews and other positive feedback.[150] Second, because salary information is often kept confidential, a woman may not even know that she received a smaller pay increase than her fellow male employees and consequently may not know that the pay decision had discriminatory effects.[151] Considering the inherent subtle nature of wage discrimination and the taboo associated with disclosing salary information in the workplace, wage discrimination claims may be harder to identify than hostile work environment claims.

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144. Graham, *supra* note 7, at 303.

145. *Id*.

146. *Id*.

147. *Id*.

148. *See* Aldridge, *supra* note 87, at 978–79; *see also* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2181 (2007) (Ginsberg, J., dissenting) (claiming that wage discrimination claims "have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination").

149. *See* Aldridge, *supra* note 87, at 980.

150. *Id*.

151. Marcia D. Greenberger, Editorial, *Paycheck Fairness is not a Burden*, WASH. POST, Aug. 20, 2007, at A14 ("Few employees have concrete information about the pay of peers to compare with their own, let alone whether discrimination played a role in pay decisions."); *see also* Julie F. Kay & Gillian L. Thomas, *A Chance to End Pay Gap*, ARK. DEMOCRAT-GAZETTE, Aug. 19, 2007, at 95 ("Many employers even have policies forbidding workers from disclosing their pay. Consequently, an employee who receives lower pay is unlikely to know his or her peers are paid more.").

The differences between wage discrimination claims and other discrete, easy-to-identify acts provide further proof that wage discrimination claims fit into *Morgan*'s hard-to-identify classification. Take a situation where the employer failed to promote a female employee. In that situation, the employee usually knows immediately that (1) she did not get the promotion and (2) who got the promotion over her. Thus, if a less experienced white male was chosen over her, she immediately has enough evidence to warrant filing a claim with the EEOC. However, as discussed above, the nature of wage discrimination claims does not allow for the same immediate suspicion as failure to promote claims. Because of the subtle nature of discriminatory pay decisions and the common confidentiality of the salaries of fellow employees, a victim of a discriminatory pay decision, unlike a victim of a discriminatory refusal to promote, may not have any reason to be suspicious.

In addition to being hard to identify, wage discrimination claims, as *Bazemore* implies, are recurring violations that are cumulative in impact. *Bazemore* states that the pay disparity itself is a current violation of Title VII, despite the origin of the pay disparity, because pay disparities themselves perpetuate discrimination.[152] *Bazemore* also asserts that the paycheck encapsulating the disparity is a manifestation of the current violation.[153] Thus, each paycheck representing a pay disparity is representative of a violation of Title VII. However, in the case of wage discrimination, pay disparities are initially slight,[154] and to become noticeable enough to justify filing a claim under Title VII, the employee needs to wait for the paychecks to accumulate.[155]

In this sense, wage discrimination claims are exactly like hostile work environment claims. In a hostile work environment claim, one racial slur, though technically actionable, realistically may not be enough to warrant filing a claim, but several slurs over many months is enough to warrant filing a claim.[156] In a wage discrimination claim, a small disparity in pay realistically may not be enough to justify filing a claim (because the disparity may not be enough evidence to allow the claimant to win on the merits) but over the course of many years, that small disparity can grow to quite a significant disparity that will surely suggest discrimination.[157] So, for a wage

152. Bazemore v. Friday, 478 U.S. 385, 395 (1986).

153. *Id*. at 395–96.

154. Aldridge, *supra* note 87, at 980.

155. In a compensation claim, the plaintiff must prove that (1) she is a member of a protected class; (2) she is paid less than men; and (3) there is significant similarity in the two jobs. AFSCME v. Washington, 770 F. 2d 1401, 1404 (9th Cir. 1985).

156. Graham, *supra* note 7, at 303.

157. *See* Kay & Thomas, *supra* note 151 ("One recent study from Carnegie Mellon University showed . . . that if a woman with a master's degree started out her career earning $5,000 less per year

discrimination claim to be an effective claim under Title VII, it must be a claim that is recurring and cumulative in impact.

Morgan and *Bazemore*, then, demonstrate that the *Ledbetter* Court erred in classifying wage discrimination claims as discrete, easy-to-identify acts and therefore erred in strictly adhering to the 180-day limitation. A comparison of wage discrimination claims to hostile work environment claims shows that wage discrimination claims are just as complex as hostile work environment claims. So, the Court should have followed *Morgan* and given wage discrimination claims the benefit of the continuing violations doctrine like it gave hostile work environment claims.

Indeed, prior to *Ledbetter*, many circuits interpreted *Morgan* and *Bazemore* as mandating application of the continuing violations doctrine to wage discrimination claims because wage discrimination claims necessitated circumventing the 180-day limitation.[158] Most notably, *Shea v. Rice*,[159] a case coming out of the D.C. Circuit in 2005, held that each paycheck an employee receives is an actionable wrong and that *Bazemore* is controlling in regards to whether the action is barred by the 180-day limitation period.[160] The court held that because such discrimination constitutes a "'pattern [that] was begun prior to' the limitations period," the suit was not time-barred.[161]

However, the *Ledbetter* Court failed to make the same conclusions as the appellate courts. Instead, the Court hedged the *Morgan/Bazemore* precedent. The Court focused solely on the discriminatory pay decision. Such focus allowed the Court to ignore the fact that wage discrimination as a whole is hard to identify. The Court could also ignore the fact that a claim is usually meritorious only when the disparity is noticeable enough to show a cumulative pattern. When those considerations are left out of the equation, all that is left is the single act of the employer deciding to pay a woman less because of her gender. Superficially, this is a discrete and easy-to-identify act. However, upon a closer look, a discriminatory pay decision is not a stand-alone decision like a decision not to promote a woman because, as shown above, the discrimination associated with this decision is not

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than her male counterpart, yet both received identical 3 percent annual increases, the female employee would have a pay disparity totaling more than half a million dollars by the time she reached age 60.").

158. *See, e.g.*, Forsyth v. Fed'n Employment and Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005); Hildebrandt v. Ill. Dept. of Natural Res., 347 F.3d 1014, 1027 (7th Cir. 2003); Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1010 (10th Cir. 2002); Cardenas v. Massey, 269 F.3d 251, 257 (3d Cir. 2001).

159. 409 F.3d 448 (D.C. Cir. 2005). This is actually a case concerning a federal employee with a pay discrimination claim brought under the Foreign Service Act, but the procedural requirements are the same and thus the precedent of *Morgan* and *Bazemore* applies. *Id*. at 456.

160. *Id*. at 452–53.

161. *Id*. (quoting *Bazemore*, 478 U.S. at 395–96).

immediately noticeable or identifiable and the effects of the decision are much longer lasting than the other acts classified as discrete and easy-to-identify.[162] Therefore, the *Ledbetter* Court should have acknowledged *Morgan*'s and *Bazemore*'s application of the continuing violations doctrine to complex claims.

2. The *Ledbetter* Holding Violates Public Policy Because It Frustrates the Purpose of Title VII

The *Ledbetter* Court should have applied the continuing violations doctrine to wage discrimination claims not only because it ignored prior precedent but also because strict adherence to the 180-day limitation period frustrates the purpose of Title VII. The holding frustrates the purpose of Title VII by significantly limiting the number of substantively meritorious wage discrimination claims. As the reasoning in both *Morgan* and *Bazemore* suggests,[163] the purpose of using the continuing violations doctrine as an exception to the 180-day statute of limitations is because it furthers the substantive goals of Title VII. The core purpose of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination."[164] A secondary purpose of Title VII (and the primary purpose of the 180-day limitation provision in Title VII) is to encourage voluntary compliance and to avoid needless litigation.[165] The Court's holding in *Ledbetter* promotes the secondary purpose over the primary purpose by upholding the 180-day limitation over Ledbetter's clearly viable claim. In doing so, the Court sets the precedent and therefore inherently limits the number of wage discrimination claims that will be litigated on the merits.

However, because of the nature of wage discrimination claims, it will be nearly impossible to successfully bring a substantive discrimination suit for three reasons. First, 180 days is often not enough time even to discover that a discriminatory pay decision was made. This is because pay disparities are often confidential and therefore unknown.[166] Indeed, in Ledbetter's case, the salaries of other Goodyear employees were kept confidential, and Ledbetter

162. *See generally* Kay & Thomas, *supra* note 151.

163. *See supra* Part IV.B.1.

164. Ablemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); *see also* Brief for the Petitioner, *supra* note 3, at 24.

165. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

166. *See* Kay & Thomas, *supra* note 151 (stating that employers have policies forbidding disclosure of salaries); Editorial, *Fair Pay, the Right Way: The House Overcorrects the Supreme Court Decision*, WASH. POST, Aug. 14, 2007, at A12 ("Employers jealously guard pay information, and credible specifics about who's being paid what are rarely the subject of lunchroom chit-chat."); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2181 (2007) (Ginsberg, J., dissenting) ("Compensation disparities . . . are often hidden from sight.").

only learned of her situation by an anonymous note left in her mailbox.[167] If employees do not have access to colleagues' salaries, how are they to ascertain in a six-month period whether they are making less than others similarly situated? It is even harder to determine pay discrimination when the employee is passively discriminated against. In this situation, the similarly situated males are given raises, but the female is not, or the female is given a substantially smaller raise.[168] Because it is generally inappropriate to discuss salaries and raises, how is the female to discern that a discriminatory pay decision was made?

Second, because the substantial effects of a discriminatory pay decision are cumulative in nature, it will be hard to adhere to the 180-day limitation. The cumulative effect is significant because "[p]ay disparities often occur . . . in small increments."[169] This means that most employees do not begin to suspect pay discrimination until a significant amount of time passes.[170] A secondary problem is that sometimes the initial discrepancies will be so minute that the employee will not even have enough evidence to claim a Title VII violation.[171]

Finally, such adherence to the 180-day limitation actually goes against the purpose the Court was trying to promote—mainly, that strict enforcement of the statute of limitations will reduce the number of frivolous and arbitrary lawsuits filed. This is because at the slightest indication of a discriminatory pay decision, it will be in the plaintiff's best interest to file a claim with the EEOC immediately.[172] Therefore, *Ledbetter*'s rigorous application of the 180-day limitation frustrates the purpose of Title VII because it not only significantly limits the ability of a plaintiff to bring successfully a meritorious claim but also creates the incentive for frivolous filings.

The *Ledbetter* Court, then, not only ignored precedent but also frustrated the purpose of Title VII in erroneously failing to apply the continuing violations doctrine. The Court ignored precedent by refusing to acknowledge the tradition of applying the continuing violations doctrine to complex claims that are recurring and hard to identify. The Court frustrated the purpose of Title VII by putting the secondary purpose of enforcing procedural requirements to weed out frivolous lawsuits over the primary purpose of remedying unlawful discrimination.

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167. *Ledbetter*, 127 S. Ct. at 2182; *Amendment of Title VII: Hearing Before the H. Comm. on Education and Labor*, 110th Cong. 2 (2007) (statement of Lilly Ledbetter).

168. *Ledbetter*, 127 S. Ct. at 2182.

169. *Id*. at 2178; *see* Aldridge, *supra* note 87, at 979–80.

170. *Ledbetter*, 127 S. Ct. at 2178–79.

171. *Id*. at 2179.

172. *See* Brief for the Petitioner, *supra* note 3, at 27.

V. CORRECTING THE COURT: THE LILLY LEDBETTER FAIR PAY ACT

Even in the short time since the Court handed down *Ledbetter*, federal district courts and federal courts of appeals have denied seemingly meritorious claims using *Ledbetter*'s misguided analysis concerning when the statute of limitations begins to run in cases with apparent ongoing violations.[173] For example, the Seventh Circuit, citing *Ledbetter*, dismissed a case brought by African-Americans alleging that the Chicago Fire Department was engaging in ongoing discriminatory hiring practices because the fire department's actions did not meet *Ledbetter*'s narrow definition of a continuing violation.[174] Because the fire department's actions were not classified as a continuing violation, the claim was barred by the statute of limitations.[175]

The lower courts have also expanded *Ledbetter*'s application beyond Title VII to other federal civil rights laws. For instance, in *Garcia v. Brockway*,[176] the Ninth Circuit, relying on *Ledbetter*, denied a handicapped person's claim alleging that his apartment building did not comply with the Fair Housing Act because he brought the claim within two years after he moved into the apartment and not within two years of construction of the building.[177]

These cases, which clearly are contrary to the substantive purpose of Title VII and other civil rights laws, create a need for corrective legislation. Congress once again has answered that need.[178] On January 8, 2009, the Lilly Ledbetter Fair Pay Act of 2009 (the Act) was introduced in the Senate.[179] The Act amends section 706(e) of the Civil Rights Act of 1964[180] and declares that

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173. *See* Robert Pear, *Justices' Ruling in Discrimination Case May Draw Quick Action by Obama*, N.Y. TIMES, Jan. 5, 2009, at A13.

174. Lewis v. City of Chicago, 528 F.3d 488, 492–94 (7th Cir. 2008).

175. *Id*.

176. 503 F.3d 1092 (9th Cir. 2007).

177. *Id*. at 1097–98. Two years was the duration of the statute of limitations in this case. *Id*.

178. Congress has in the past legislatively corrected the Court's narrow interpretation and application of the 180-day statute of limitations. *See* 42 U.S.C. § 2000e-5(e)(2), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); *infra* notes 179–85 and accompanying text.

179. S. 181, 111th Cong. (2009). The bill had fifty-four co-sponsors in the Senate and was signed into law on January 29, 2009. GovTrack.us., S. 181: Lilly Ledbetter Fair Pay Act of 2009, http://www.govtrack.us/congress/bill.xpd?bill=s111-181 (last visited Feb. 9, 2009). In June 2007, the House of Representatives introduced and passed an identical bill, The Lilly Ledbetter Fair Pay Act of 2007. H.R. 2831, 110th Cong. (2007). The Lilly Ledbetter Fair Pay Act of 2007 had ninety-three co-sponsors in the House and passed on July 31, 2007. GovTrack.us., H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007, http://www.govtrack.us/congress/bill.xpd?tab=main&bill=h110-2831 (last visited Feb. 9, 2009). The bill then passed to the Senate, and on April 23, 2008, a motion for cloture was brought up in the Senate (a motion to cut off debate and force a vote on the bill); the motion was rejected by a 56-42 vote, and the bill died. *Id*.

180. 42 U.S.C. § 2000e-5(e) (2000). This is the provision that contains the 180-day limitation.

> an unlawful employment practice occurs, with respect to discrimination in compensation in violation of [Title VII], 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.[181]

The Act reverses *Ledbetter* and states that a new EEOC claim may be filed with the issuance of each discriminatory paycheck. Essentially, the Act recognizes that a pay discrimination claim, like Ledbetter's, is a continuing violation because the Act adopts the paycheck accrual rule that the Court in *Ledbetter* rejected.

Also, the Act acknowledges that an exception must be made to Title VII's statute of limitations in order to remain true to the intended purpose of Title VII. In the Act, Congress expresses its dissatisfaction with the Supreme Court's decision:

> The Supreme Court in [*Ledbetter*] 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.[182]

This expression of dissatisfaction strongly supports the argument that the Court erroneously focused on the procedural aspects of Title VII instead of the vastly more important substantive protections afforded by the Civil Rights Act. It also indicates that Congress values remedying substantive claims over enforcing the procedural requirements.

Indeed, this is not the first time that Congress has corrected the Court for over-emphasizing the statute of limitations provision. The 1991 Civil Rights

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See supra Part II.

181. S. 181, 111th Cong. § (3)(A) (2009).

182. *Id*. § (2)(1).

Act amended 42 U.S.C. § 2000(e)-(5)(e)(2) to correct the Court's holding in *Lorance v. AT&T Technologies*.[183] In *Lorance*, the employer had a collective-bargaining agreement that enacted a seniority system where employees generally accrued seniority based on the number of years working at the plant.[184] However, in 1979, a new collective-bargaining agreement changed the accrual of seniority for the highly paid position of "tester."[185] The position of tester was traditionally a male-held position, but in the early 1970s, women became testers too.[186] When the plant had to lay off employees in 1982 because of poor economic performance, most of the female testers were demoted.[187] They brought a claim to the EEOC claiming that the seniority system was a discriminatory employment action.[188] The Supreme Court held that the claim was time-barred because the statute of limitations began to run from the date when the new seniority system was enacted.[189]

By adding section 2 to 42 U.S.C. § 2000e-5, Congress reversed the Court's holding and clarified that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII] . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system."[190] In adopting this amendment, Congress signified that there are certain claims where the interest of "mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination,"[191] overrides adherence to the EEOC time limitations.

Because *Ledbetter*'s holding is substantially similar to *Lorance*'s holding, legislation is again needed to correct the Court. In both cases, "the harsh reality of [the] decision . . . [was] glaringly at odds with the purposes of Title VII."[192] Thus, it is proper to amend the Civil Rights Act of 1964 with the Lilly Ledbetter Fair Pay Act of 2009 and create an exception to the 180-day statute of limitations. Failure to do so, as mentioned above in Part IV.B.2, would severely limit any member of a protected class's ability to bring a pay

183. 490 U.S. 900 (1989).

184. *Id*. at 901–02.

185. *Id*.

186. *Id*. at 902–03.

187. *Id*.

188. *Id*.

189. *Id*. at 909–11.

190. 42 U.S.C. § 2000e-5(e)(2) (2000).

191. Ablemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); *see also* Brief for Petitioner, *supra* note 3, at 24.

192. *Lorance*, 490 U.S. at 914 (Marshall, J., dissenting); *see* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2183 (2007) (Ginsberg, J., dissenting).

discrimination claim. It is unrealistic to demand that a worker file 180 days after the discriminatory pay decision was made.

In fact, as *Garcia v. Brockway*[193] shows, *Ledbetter* has the potentional to create enforcement of more unrealistic statutes of limitations beyond Title VI. Therefore, Congress should not only uphold the prohibition of discrimination "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin,"[194] with the Lilly Ledbetter Fair Pay Act of 2009, but also protect civil rights in general by passing more legislation preventing enforcement of unrealistic statute of limitations in all types of civil rights claims. Such action is consistent with President Barack Obama's stated goal of "updat[ing] the social contract . . . and "reinvigorat[ing] civil rights," so there is a good chance such legislation will come in the near future.[195] For now, the Lilly Ledbetter Fair Pay Act of 2009 is a good and necessary first step to overcome the trend set in motion by *Ledbetter v. Goodyear*.

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193. 503 F.3d 1092 (9th Cir. 2007).

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

195. Pear, *supra* note 173, at A13.

[*] Marquette University Law School, J.D. anticipated May 2009. The author thanks Erin Binns for alerting her to Lilly Ledbetter's story, Professor Phoebe Williams for giving her guidance, and her husband, Jamie, for putting up with her throughout this whole process.