A Practical Solution to the Courts' Broad Interpretation of the Lilly Ledbetter Fair Pay Act

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I. INTRODUCTION

"[Congress,] you did not mean what the Court said. So fix it."[1]

Answering Justice Ginsburg's call to action and correcting the injustice against women's rights, Congress enacted the Lilly Ledbetter Fair Pay Act (LLFPA)[2] to amend the Court's "cramped" and "parsimonious" interpretation of Title VII of the Civil Rights Act of 1964[3] in *Ledbetter v. Goodyear Tire & Rubber Co.*[4] The LLFPA essentially creates a new statute of limitations regime for one class of cases, pay discrimination,[5] but the inclusion of the terms "other practices" in the statute's language begs the question: did Congress intend the Act to apply more broadly?[6] The courts are beginning to answer this question and have come to vastly different conclusions.[7]

The courts' broad and inconsistent interpretation of the Act appears to stem primarily from the fact that pay discrimination claims are often intertwined with other discrimination claims, such as a failure to promote or

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[1] Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 542 (2009) (quoting Ruth Bader Ginsburg, Celebration Fifty-Five: A Public Conversation Between Dean Elena Kagan '86 and Justice Ruth Bader Ginsburg '56–'58 at the Harvard Law School Women's Leadership Summit (Sept. 20, 2008) (from notes taken by and on file with author)).

[2] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified in scattered sections of 29 U.S.C. and 42 U.S.C.). The Act was signed into law on January 29, 2009. *See* Gail Collins, *Lilly's Big Day*, N.Y. TIMES, Jan. 29, 2009, at A27; Richard Leiby, *A Signature with the First Lady's Hand in It*, WASH. POST, Jan. 30, 2009, at C01; Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES (Jan. 29, 2009), http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html.

[3] 42 U.S.C. § 2000e (2006).

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

[5] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (2009) ("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.").

[6] *See* Charles A. Sullivan, *Raising the Dead? The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 527 (2010) (noting that one factor in the LLFPA achieving its full potential will depend on how the courts interpret "other practices").

[7] *See infra* Part VI.

hire, with the courts left to resolve the complexity of this interconnectivity independently. While the convoluted nature of pay discrimination claims may explain the courts' broad interpretation and inconsistent application of the LLFPA to statute of limitations issues, awareness of the problem is not enough; a predictable approach for applying the LLFPA is necessary to protect the interests of employees, employers, and society as a whole.[8]

This Note analyzes and compares the courts' interpretation and application of the LLFPA, and offers a balanced solution that protects the interests of both the employee and employer. Part II begins by providing the background of Lilly Ledbetter's personal story, which establishes a context for discussing the principals and policies of Title VII's 180-day filing period. Part III briefly describes the development of Title VII's 180-day filing period and, in addition, provides an overview of the seminal cases interpreting Title VII's statute of limitations.

The Court's controversial and deeply divided decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which it applied Title VII's statute of limitations to a compensation claim, is then addressed in Part IV. Congress's response to the injustice of the *Ledbetter* decision, the enactment of the LLFPA, is reviewed in Part V. Part VI then analyzes and compares the courts' interpretation and application of the LLFPA and also examines the intended scope of the legislation. A solution, the Three-Step Analytical Framework, is then presented and discussed in Part VII, which reconciles the inconsistencies in the courts' application of the LLFPA and reestablishes a balance between the employee's and employer's interests, as noted in the conclusion to this Note in Part VIII.

Lilly Ledbetter's story precipitated the legislation the, courts are now broadly and inconsistently interpreting. [9] The insidious and subtle discrimination Lilly Ledbetter experienced is exactly the type of discrimination Title VII was intended to redress,[10] and the enactment of the

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[8] *See* Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 617–18 (noting that statute of limitations may further the interests of the plaintiff, the defendant, and society in two ways: (1) by helping to ensure the accuracy of adjudication, "without which the adjudication of claims on their substantive merits would arguably possess little societal value" and (2) by encouraging defendants to timely file meritorious claims, "so as to maximize both the compensatory value and the deterrent value of the litigation of claims"); 1 CALVIN W. CORMAN, LIMITATIONS OF ACTIONS 11–14 (1991) (discussing how the legislature must weigh the interests of the plaintiff, the defendant, and society when determining a statute of limitations period).

[9] *See infra* Part VI.

[10] While Title VII has helped to address the inequities in our workforce, pay disparities still exist. *See Statement from U.S. Secretary of Labor Hilda L. Solis on Equal Pay*, U.S. DEP'T OF LAB., (Apr. 28, 2009),

LLFPA was necessary to tear down the additional roadblock the *Ledbetter* decision added on the path to equality.[11] The lessons learned from Ledbetter's story reinforce both the importance of the policy reasons for Title VII's statute of limitations—maintaining a balance between employer and employee interests[12]—and the need for a predictable analytical framework when applying the LLFPA to pay discrimination claims.[13]

II. *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*: LILLY LEDBETTER'S STORY

"I wish my story had a happy ending. But it doesn't. I hope . . . in the future, what happened to me does not happen to other people who suffer discrimination like I did."[14]

Just before Lilly Ledbetter planned to retire in 1998, after nineteen years of employment with Goodyear, she received an anonymous tip that she was being paid less than men in the same position.[15] Ledbetter filed an Equal Employment Opportunity Commission (EEOC) complaint upon receiving the news and later sued Goodyear in federal court to enforce her right to equal pay for equal work,[16] alleging that a series of discriminatory pay decisions resulted in her being paid considerably less than males in the same position.[17]

Ledbetter brought a Title VII disparate treatment claim against Goodyear for the "unlawful employment practice" of discriminating against her

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http://www.dol.gov/opa/media/press/wb/wb20090469.htm (noting that women earn seventy-eight cents for every dollar a man earns, with women of color earning even less).

[11] *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) (focusing on the practical aspects of Ledbetter's case, Ginsburg noted that pay disparities often occur in small increments, comparative pay information is often not available to employees, and employees are not likely to bring a federal case against an employer when it is likely the employee "is averse to making waves" in a nontraditional work environment such as Ledbetter's).

[12] *See* CORMAN, *supra* note 8, at 11–14 (discussing how the legislature must assess the subject and the purpose of a specific statute in order to identify an appropriate statute of limitations period to balance the interests of potential litigants); *infra* Part III.

[13] The predictable analytical framework is presented in the solution section of this Note. *See infra* Part VII.

[14] *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear *Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 11 (2007) (prepared statement of Lilly Ledbetter) [hereinafter *Ledbetter House Hearing*].

[15] *See id.* at 12 (noting that at retirement, Ledbetter was making "twenty-percent less than the lowest paid male supervisor in the same position").

[16] *See id.*

[17] *Id.*

because of her sex.[18] Under Title VII, Ledbetter had the burden of persuasion that the differential treatment of paying her less than a similarly situated man was rooted in discriminatory intent.[19] A jury awarded Ledbetter $223,776 in back pay and more than $3 million in punitive damages for her injuries after finding that it was "more likely than not" that Ledbetter was paid an unequal salary by Goodyear because of her sex.[20]

Goodyear appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit, which, departing from the rulings of nine other federal appellate courts,[21] found that Ledbetter's suit was brought too late.[22] Ledbetter's case turned on whether her EEOC complaint was timely filed within the 180-day filing period.[23] The circuit court found that her complaint was not timely filed, noting that while an employee may receive a paycheck reflecting the result of a discriminatory pay decision within the 180-day filing period, the actual discriminatory decision to pay Ledbetter less fell outside the filing period.[24] Ledbetter argued that paychecks received within

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[18] *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 624 (2007) ("Ledbetter asserted disparate treatment, the central element of which is discriminatory intent."). A disparate-treatment claim comprises of two elements: an employment practice and discriminatory intent. *Id.* at 631. Ledbetter could have avoided proving discriminatory intent if she brought a disparate impact claim but likely would have had difficulty due to the fact that Goodyear's performance-based pay system appeared facially neutral and therefore not susceptible to claims that it adversely affected members of protected groups. Additionally, Ledbetter likely brought a disparate treatment claim instead of a disparate impact claim because compensatory and punitive damages are available only for disparate treatment. *See* 42 U.S.C. § 1981a(a)(1) (2006) (allowing for compensatory and punitive damages to be sought against an employer "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)").

[19] *See Ledbetter*, 550 U.S. at 659 (Ginsburg, J., dissenting).

[20] *Id.* at 644 (quoting record from below).

[21] *See id.* at 654–55 (citing appellate court decisions supporting the opposite conclusion of the 11th Circuit and the majority's decision in *Ledbetter*); Brief for the Petitioner at 13, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074) [hereinafter Brief for the Petitioner] (citing that the majority of the courts of appeals and the EEOC had recognized that "*Morgan* and *Bazemore* establish the timely filing requirements for disparate pay claims under Title VII: each paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period").

[22] Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005). Reversing, the Court of Appeals for the 11th Circuit found Ledbetter's claim was time-barred, relying in part on Goodyear's system of annual merit-based raises. *See id.* at 1171, 1182–83.

[23] *Id.* at 1171.

[24] *Id.* at 1178–80.

the 180-day period were actionable because they "implement[ed] a prior discriminatory decision."[25] Grounding her argument in the "paycheck accrual rule,"[26] Ledbetter argued that because her paychecks reflected an intentional discriminatory pay decision, they were actionable despite the lack of present discriminatory intent within the 180-day filing period.[27] Ruling against precedent of most circuit courts,[28] the 11th Circuit found that because Ledbetter did not file a claim when the discriminatory decision to pay her less occurred, her claim was untimely.[29]

The 11th Circuit concluded Ledbetter's claim was untimely even though she had no way of knowing of the discriminatory pay decision at the time it was made.[30] She was barred from bringing her claim of discrimination because she failed to file a complaint with the EEOC for a discriminatory act that she had absolutely no notice of when it occurred.[31] To understand how the 11th Circuit arrived at this harsh conclusion, which was subsequently affirmed by the Supreme Court, it is necessary to review the policy behind Title VII's 180-day filing period and, in addition, to review the Supreme Court's precedent in interpreting when a discriminatory act triggers this 180-day filing period.

III. TITLE VII'S 180-DAY FILING PERIOD AND ITS COURT-IDENTIFIED TRIGGERS

A. *Title VII's 180-Day Filing Period and the Development of the "Continuing Effects Doctrine"*

According to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, it is unlawful for an employer to discriminate "against any individual with respect to his [or her] compensation . . . because

[25] Brief for the Petitioner, *supra* note 21, at 13.

[26] *See* Bazemore v. Friday, 478 U.S. 385 (1986) (Brennan, J., concurring). The "paycheck accrual rule" finds its source in the dicta of Justice Brennan's concurring opinion: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395–96.

[27] *See Ledbetter*, 421 F.3d at 1181.

[28] *See supra* note 21 and accompanying text.

[29] *Ledbetter*, 421 F.3d at 1189.

[30] *Id.*; *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) ("Comparative pay information . . . is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors . . . .").

[31] *See Ledbetter House Hearing*, *supra* note 14, at 11 (prepared statement of Lilly Ledbetter).

of such individual's race, color, religion, sex or national origin."[32] This statutory prohibition against intentional discrimination applies to facially neutral employment practices that have a disparate impact on a protected group.[33] It is necessary for an employee to exhaust administrative remedies before filing a suit against an employer under Title VII.[34] As part of its administrative requirements, an individual must file a complaint with the EEOC within 180 days of the alleged unlawful employment practice or within 300 days if the claim goes directly to a state agency.[35] The 180-day filing period serves as a statute of limitations because if an employee fails to file an EEOC claim within the statutory filing period, the employee is precluded from later challenging the alleged discriminatory employment practice in court.[36]

Title VII's requisite 180-day filing period functions as a remedial measure to protect the interests of both the employer and employee.[37] It reflects a policy decision that 180 days is enough time to recognize and bring a claim of discrimination, furthering the plaintiff's and society's interests in having claims prosecuted while also being a short enough period to protect the defendant, the court, and society from wasting time and resources litigating old claims.[38] In addition to eliminating the employer's burden of defending against old claims,[39] the 180-day period encourages claims of

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[32] 42 U.S.C. § 2000e-2 (2006). Specifically, section (a)(1) of the Act states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

[33] *See generally* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1–12 (1st ed. 1976).

[34] 42 U.S.C. § 2000e-5(f)(1) (2006).

[35] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(e)(1) (2006)).

[36] *See* Wistrich, *supra* note 8, at 609–10 (defining a statute of limitation as the deadline by which a claimant must file a lawsuit, after which the right to a decision on the merits and eligibility for a remedy are forfeited).

[37] *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., 86 NEB. L. REV. 955, 956 (2007) (noting how discriminatory pay-setting decisions can present unique challenges to both employees and employers).

[38] CORMAN, *supra* note 8, at § 1.1.

[39] *See* Wistrich, *supra* note 8, at 616–18 (noting that policies providing strong support for limiting civil actions include: (1) promoting repose, (2) minimizing

discrimination to be brought as soon as possible, protecting employees by ensuring evidence and witnesses in support of the claim are preserved and reliable.[40] Therefore, as recognized by the Court in *Ledbetter*, the 180-day EEOC filing period is really a reflection of Congress's intent to encourage the prompt processing of all charges of employment discrimination, which is in the interests of both the employee and employer.[41]

It is important to note that the 180-day filing period is an extension from Title VII's original ninety-day filing period for charges of discrimination.[42] Recognizing the harsh effects the original ninety-day filing period had on employees, Congress reevaluated the interests of the employee, the employer, and society and found the balance was better struck by extending the filing period from ninety to 180 days.[43] Prior to Congress extending the filing period to 180 days, courts had adopted the "continuing effects doctrine" to soften the effects the strict application of the ninety-day filing period posed.[44] Under the "continuing effects doctrine," the courts allowed a claim of discrimination to be brought outside the statutory time limit to account for situations, such as Lilly Ledbetter's, where it was difficult for the employee to discern when the discriminatory acts took place.[45] The

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deterioration of evidence, (3) encouraging the prompt enforcement of substantive law, and (4) avoiding the retrospective application of contemporary standards).

[40] *Id.*

[41] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 630–31 (2007).

[42] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (codified as amended at 42 U.S.C. § 2000e-5(e)(1) (2006)).

[43] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(e)(1) (2006)). At the same time, Congress also expanded the state filing limit with fair employment agencies from 180 days to 300 days. *Id.*

[44] *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 200, 352, 357 (2002); *see also* Michael Lee Wright, *Civil Rights—Time Limitations for Civil Rights Claims—Continuing Violations Doctrine*, 71 TENN. L. REV. 383, 385 n.15 (2004). Wright noted:

> Federal courts "began to refuse to automatically dismiss" belated discrimination claims for three main reasons. First, the purpose of Title VII is to "root out discrimination and make injured parties whole." Second, various reasons exist for why employees might not file a discrimination claim within the time prescribed by statute, some of which justify extending opportunities for relief to employees. For instance, employees may not know of the time limitation for filing the complaint. Also, employees may fear retaliation and thus refrain from promptly filing discrimination complaints. Finally, it may be difficult to discern when the discriminatory acts took place. The *Sumner* court found that many discriminatory acts could be described as "*unfold[ing]* rather than *occur[ring]*."

Wright, *supra*, at 385 n.15 (citations omitted).

[45] Wright, *supra* note 44, at 385 n.15.

application of the "continuing effects doctrine" and its effect on Title VII's statute of limitations is at the core of both the *Ledbetter* decision, as well as Congress's subsequent decision to enact the LLFPA.

To understand the split in the courts' application of the "continuing effects doctrine" and its effect on the 180-day filing period in pay discrimination claims,[46] it is necessary to review the Supreme Court precedent that created the ambiguity and which ultimately led to the *Ledbetter* decision.

B. *The "Continuing Effects Doctrine": Laying the Foundation for the* Ledbetter *Decision*

The divided *Ledbetter* Court reflects the diverging interpretations of two previously decided Title VII statute of limitations cases: *National Railroad Passenger Corp. v. Morgan*[47] and *Bazemore v. Friday*.[48] The cases establish the doctrines of "discrete act analysis" and the "paycheck accrual rule," respectively, which the lower courts have applied inconsistently and are at the core of the disagreement between the majority and the dissent in *Ledbetter*. Both the majority and the dissent rely on *Morgan* and *Bazemore* to lay the foundation in support of their decisions, which ultimately lead to two very different conclusions.[49] In order to understand the divergence, a brief summary of the two doctrines is necessary.

1. National Railroad Passenger Corp. v. Morgan *and the "Discrete Act Analysis"*

The Supreme Court in *Morgan* first applied the doctrine of "discrete act analysis" to determine whether a claim of discrimination fell within the 180-day filing period by categorizing the act as either a "discrete act" or a "hostile work environment claim."[50] *Morgan* establishes the difference between related discriminatory acts that collectively constitute a single cause of action and discrete discriminatory acts that are considered separate causes of actions.[51] Discrete acts of discrimination, such as termination, failure to promote, denial of transfer, or refusal to hire constitute unlawful employment practices under Title VII and trigger the 180-day filing period on the date

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[46] *See* discussion and cases cited *infra* note 72.

[47] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

[48] Bazemore v. Friday, 478 U.S. 385 (1986).

[49] *See infra* Part IV.

[50] *See Morgan*, 536 U.S. at 115–17.

[51] *See id.* at 114–15.

they occur.[52] If an employee fails to file a claim within 180 days, he or she is barred from bringing the action.[53] Addressing the application of the "continuing effects doctrine" as an exception to Title VII's 180-day filing requirement, the Court in *Morgan* distinguished between actions that are discrete and actions that make up a hostile work environment.[54] In making the distinction, the Court noted that "discrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire," are examples of employment actions that are "easy to identify"[55] and, therefore, because an employee is put on notice of the discriminatory act, a claim must be filed within the 180-day filing period from the day in which it "occur[s]."[56]

The Court contrasted the "discrete acts" of a promotion or demotion with the individual acts making up a "hostile work environment" claim, which consists of a series of acts that constitute a single violation.[57] Arriving at this distinction, the Court rejected the application of the "continuing effects theory" to discrete discriminatory acts, which would have allowed an employment practice that occurred outside the applicable 180-day period to be actionable if it "related to" a discriminatory act that occurred within the 180-day period.[58] By making this distinction, discrete acts that occurred outside the 180-day period for filing a claim were time-barred—no matter how related the act may have been to a later discriminatory act.

The only exception to the "discrete act" analysis is a hostile work environment claim.[59] In a hostile work environment claim, a complaint is considered timely as long as the most recent harassing act occurred within the 180-day filing period.[60] Explaining the exception, the Court noted, "[a] hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.'"[61] Therefore, notwithstanding the one exception of a hostile work environment claim, the general rule that discrete acts cannot be aggregated to toll the statute of limitations applied in all other cases, a claim of discrimination must be filed within 180 days of the act occurring.

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[52] *Id.* at 114.

[53] *Id.* at 113.

[54] *Id.* at 115.

[55] *Id.* at 114.

[56] *Morgan*, 536 U.S. at 109 n.5.

[57] *Id.* at 117.

[58] *See id.* at 112 ("[D]iscrete acts that fall within the statutory time period do not make timely acts that fall outside the time period.").

[59] *Id.* at 115.

[60] *Id.* at 117.

[61] *Id.*

As a result of *Morgan*, an EEOC complaint was considered timely if: (1) an employee filed a complaint within 180 days of a discrete discriminatory act;[62] or (2) an employee filed a complaint within 180 days of a single act that comprised a "hostile work environment" claim, even if other acts that constituted the claim fell outside the 180-day period.[63] While *Morgan* made the distinction between a discrete discriminatory act and an act comprising a hostile work environment claim clear for determining the start of the 180-day filing period, the decision failed to address where a discriminatory pay decision fell in this categorization.

The unique nature of discriminatory pay claims and their failure to fall perfectly into one of the two categories identified in *Morgan* is what ultimately led to *Ledbetter*, but in order to fully understand the policy arguments in Ledbetter's case, the implications of the "paycheck accrual rule" introduced by the Court in *Bazemore* must first be discussed.

2. Bazemore v. Friday *and the "Paycheck Accrual Rule"*

Applying the "continuing effects doctrine" to a discriminatory pay system, the Court in *Bazemore* held that the continued application of a discriminatory pay structure constituted a present violation under Title VII.[64] In *Bazemore*, the Court found that an employer had committed an unlawful employment practice each time it paid black employees less than similarly situated white employees.[65] Finding that each week's paycheck delivering "less to a black than to a similarly situated white is a wrong actionable under Title VII,"[66] the Court established what would come to be known as the "paycheck accrual rule."[67]

Courts subsequently interpreted *Bazemore* as recognizing the realities of wage discrimination, that regardless of whether the discriminatory decision to pay an employee less fell outside the 180-day filing period, the wrong was still actionable because the employer discriminated each time it issued a paycheck.[68] They reasoned that the issuance of each paycheck reflecting an amount less than that payable to similarly situated employees had an

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[62] *See Morgan*, 536 U.S. at 110.

[63] *Id.* at 118.

[64] Bazemore v. Friday, 478 U.S. 385, 397 n.6 (1986) (Brennan, J., concurring).

[65] *Id.* at 395–96.

[66] *Id.* at 395.

[67] *Id.* at 395–96.

[68] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 654 (2007) (Ginsburg, J., dissenting).

employer adhered to a nondiscriminatory compensation regime constituted a cognizable harm.[69]

The Supreme Court's failure to address the correctness of the "paycheck accrual rule"[70] courts had adopted from the *Bazemore* ruling set the stage for inconsistent interpretation and application of Title VII's 180-day filing period in discriminatory pay claims. This uncertainty of whether *Morgan*'s "discrete act" analysis applied to claims of pay disparity led to the reversal of Ledbetter's jury verdict by the 11th Circuit, and ultimately to the Supreme Court granting certiorari to resolve the circuit court split.[71] In light of the historical development and purpose of the 180-day filing period, in addition to the Court's precedent as established by *Morgan* and *Bazemore*, the Supreme Court in *Ledbetter* attempted to resolve the question of when the 180-day filing period began to toll for pay discrimination claims.[72]

IV. *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*: A COURT DIVIDED

Echoing the reasoning of nine federal courts of appeals and the Equal Employment Opportunity Commission (EEOC), [73] the four dissenting Justices found: "Paychecks perpetuating past discrimination ... are actionable not simply because they are 'related' to a decision made outside the charge-filing period, but because they discriminate anew each time they issue."[74]

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[69] *Id.* at 654–56 (citing circuit court and EEOC decisions citing *Bazemore* and applying the paycheck accrual rule).

[70] *Bazemore*, 478 U.S. at 395–96 (Brennan, J., concurring).

[71] *Compare* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1189 (11th Cir. 2005), *with* Wedow v. City of Kansas City, 442 F.3d 661, 671 (8th Cir. 2006) (interpreting *Bazemore* as establishing that "each week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation"), *and* Forsyth v. Fed'n Empl. & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act.").

[72] While the Court's majority did not explicitly address the circuit split at the time of the *Ledbetter* decision, a total of nine circuit courts and the EEOC had all determined that the discrete act analysis did not apply to discriminatory pay claims. *See Ledbetter*, 550 U.S. at 654–56 (Ginsburg, J., dissenting) (citing federal courts of appeals and EEOC rulings); *see also The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases: Hearing of the S. Comm. on Health, Educ., Labor, & Pensions*, 110th Cong. 2 (2008) [hereinafter *Ledbetter Senate Hearing*] (opening statement of Hon. Edward M. Kennedy, Chairman, S. Comm. on Health, Educ., Labor, & Pensions) (noting the nine circuit courts finding each paycheck to be a discrete discriminatory act).

[73] *See Ledbetter*, 550 U.S. at 654–56 (Ginsburg, J., dissenting) (citing federal court of appeals and EEOC rulings).

[74] *Id.* at 647.

A. *A Divided Supreme Court: The* Ledbetter *Majority*

In *Ledbetter*, the Supreme Court held in a 5–4 decision that the plaintiff may not attribute intent from past discriminatory pay decisions to make the present effects of such decisions independently actionable under Title VII; in other words, that the "continuing effects doctrine" did not apply.[75] Ruling in favor of the employer, the Court found Ledbetter's claim untimely because Goodyear's intentional discriminatory decision to pay her less than similarly situated males had occurred outside Title VII's 180-day charging period.[76] Under Title VII, an employee must file a claim with the EEOC within 180 days of the unlawful employment practice.[77] The slim majority of the Court found that while Ledbetter filed within 180 days of learning that she received discriminatory pay from Goodyear, her claim was not timely because she had failed to file within 180 days of the discriminatory decision to pay her less.[78] As a result of the decision, Goodyear owed Ledbetter nothing for discriminating against her on account of her sex.[79] The majority came to its conclusion by analogizing pay discrimination claims to cases involving fully communicated public acts of discrimination, such as termination or a denial of tenure,[80] and thereby failed to acknowledge the differences between these overt acts and the secretive nature of pay discrimination.[81]

The *Ledbetter* majority, relying on *Morgan*'s discrete act analysis, found that "because a pay-setting decision is a 'discrete act,' it follows that the

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[75] *Id.* at 624 (majority opinion).

[76] *Id.* at 633–43.

[77] 42 U.S.C. § 2000e-5(e)(1) (2006) (stating in Section 706(e) of the Act that an individual must file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred," and if the employee files a charge of discrimination with a state agency with appropriate jurisdiction, the employee is allowed 300 days to file her charge with the EEOC).

[78] *Ledbetter*, 550 U.S. at 633–43.

[79] In support of this result, the Bush Administration filed a Supreme Court amicus brief arguing that the employee must file a claim within 180 days of the initial discriminatory decision to pay an employee less, whether or not detectible. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 6–8, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (No. 05-1074).

[80] *See Ledbetter*, 550 U.S. at 625–26 (discussing United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977) (female forced to resign due to policy disallowing married female flight attendants); Del. State Coll. v. Ricks, 449 U.S. 250 (1980) (decision to deny tenure)).

[81] *See Ledbetter House Hearing*, *supra* note 14, at 13 (statement of Wade Henderson, President & CEO, Leadership Conf. on Civil Rights) ("As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding salary information in the United States.").

period for filing an EEOC charge begins when the act occurs."[82] Limiting *Bazemore* to discriminatory pay decisions that involve "facially discriminatory" pay systems [83] —which were unlike the secretive discriminatory pay practices in Ledbetter's case—the Court held that Ledbetter's failure to file an administrative discrimination claim within 180 days from the date the discriminatory pay-setting decision was made precluded her from bringing her claim.[84]

Analogizing Ledbetter's pay-discrimination claim to discrete discriminatory acts, such as termination[85] or denial of tenure,[86] the Court distinguished *Bazemore* from *Ledbetter.* [87] Noting that Goodyear's pay system was neutral on its face and not adopted "in order to discriminate,"[88] the majority found that the paychecks issued during the charging period were merely the effect of discriminatory acts that occurred outside the period and did not support a timely cause of action.[89] In support of its decision not to treat each paycheck as a discrete discriminatory employment practice, the Court emphasized the importance of protecting the employer from "stale claims."[90]

B. *Ginsburg's Dissent*

The *Ledbetter* dissent, issued by Justice Ginsburg, emphasized the Court's failure to comprehend the insidious way that women can be victims of pay discrimination.[91] Drawing attention to the "real world" context in which pay discrimination occurs, Ginsburg emphasized how pay discrimination is cumulative over time, and in addition, how employees are not likely to inquire into the salaries of coworkers or are forbidden from doing so, thereby making it almost impossible for an employee to ever bring a Title VII claim within the 180-day filing period.[92]

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[82] *Ledbetter*, 550 U.S. at 621.

[83] *Id.* at 634.

[84] *Id.* at 628–29.

[85] *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977).

[86] *See* Del. State Coll. v. Ricks, 449 U.S. 250, 250 (1980).

[87] *Ledbetter*, 550 U.S. at 633–37.

[88] *Id.* at 637.

[89] *Id.* at 639–40.

[90] *Id.* at 631.

[91] *Id.* at 649–50 (Ginsburg, J., dissenting).

[92] *Id.*; *see also* Deborah L. Brake, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 873–74 (2008) (discussing statutes of limitations as applied to Title VII, emphasizing how Title VII's doctrines place unrealistic expectations and pressure on employees to recognize and challenge discrimination quickly).

In contrast to the majority, the dissent emphasized why *Morgan*'s discrete act analysis should not apply to pay discrimination: unlike acts of "termination, failure to promote, denial of transfer or refusal to hire,"[93] pay discrimination does not fall into the "discrete acts" category as an "easy to identify" act.[94] Grounding analysis in "the realities of the workplace," Justice Ginsburg explained that unlike promotions, transfers, hirings, and firings, which are generally public events where "an employee can immediately seek out an explanation and evaluate [the decision] for pretext," compensation discrimination and its resulting disparities are often "hidden from sight."[95] In addition to the fact that employee compensation is often kept private by employers,[96] thereby preventing salary comparisons, pay disparities often occur in small increments such that "cause to suspect that discrimination is at work develops only over time."[97] Thus, Justice Ginsburg argued that *Morgan*'s discrete act analysis does not apply because pay discrimination is not a fully communicated discrete act—like termination, failure to promote, or refusal to hire—as nothing in Ledbetter's case would have placed her on notice of an adverse discriminatory decision, prompting her to file an administrative claim.[98]

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[93] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002).

[94] *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).

[95] *Id.*

[96] *See* Brief for the Petitioner, *supra* note 21, at 26 (noting that a denial of a raise is not grounds for filing an EEOC charge and that it is not uncommon for employee pay levels to be kept confidential or for workers to be reluctant to share salary information with each other) (citing Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 171 (2004) (contrasting the prevalence of workplace norms and rules against discussing salaries with the fact that only one in ten employers have actively adopted "pay openness" policies)).

[97] *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

[98] *Id.*; *see also* Martha Chamallas, Ledbetter, *Gender Equality and Institutional Context*, 70 OHIO ST. L.J. 1037, 1042 (2009) ("Research indicates that it is often very difficult for employees to recognize when they have experienced discrimination. At the individual level, social psychologists have documented the tendency of victims to minimize events and to resist perceiving and acknowledging bias, even when they experience behavior that objectively qualifies as discrimination."); Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. OF MGMT. REV. 55, 57 (2007) (citing a poll in which 36 percent of surveyed employers "prohibited discussion of pay"); Charles Stangor et al., *Reporting Discrimination in Public and Private Contexts*, 82 J. PERSONALITY & SOC. PSYCHOL. 69, 73 (2002) (discussing how "the costs of reporting discrimination are particularly salient when the social context includes members of another social category").

Arguing that precedent established that the "paycheck accrual rule" applied in pay discrimination cases,[99] Justice Ginsburg emphasized how pay discrimination claims "have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination."[100] Justice Ginsburg analogized pay discrimination to *Morgan*, in which the discrimination accumulates over time and "cannot be said to occur on any particular day," but "occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act . . . may not be actionable on its own."[101] Supporting the analogy to a hostile work environment claim and speaking to the majority's concern of protecting the employer from "stale claims," [102] Justice Ginsburg noted that in a case like Ledbetter's, management should have been on notice of the existence of the discriminatory conduct considering the persistence of its occurrence: producing a cognizable harm.[103] Moreover, Ginsburg noted that "[d]octrines such as 'waiver, estoppel, and equitable tolling' 'allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.'"[104]

Frustrated by the additional roadblock the majority's holding placed on achieving equality, Justice Ginsburg concluded the reading of her dissent by issuing a challenge to Congress to fix the Court's mistake, stating: "[o]nce again, the ball is in Congress' [sic] court."[105] Taking Ginsburg's challenge, Congress enacted the LLFPA to ensure "that victims of pay discrimination on the basis of race, sex, color, religion, national origin, disability, or age are entitled to justice with each paycheck."[106]

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[99] *Ledbetter*, 550 U.S. at 645–48 (Ginsburg, J., dissenting) (citing *Bazemore* and lower court cases).

[100] *Id.* at 648.

[101] *Id.* (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002)).

[102] *See id.* at 631–32 (majority opinion).

[103] *Id.* at 648 (Ginsburg, J., dissenting); *see also* Chamallas, *supra* note 98, at 1045 (discussing Ginsburg's dissent and how Goodyear knew or should have known about the pay disparities and yet apparently did nothing to address and correct the situation in the nearly twenty years that Ledbetter worked for Goodyear).

[104] *Ledbetter*, 550 U.S. at 657 (Ginsburg, J., dissenting) (quoting *Morgan*, 536 U.S. at 121).

[105] *Id.* at 661 ("Once again, the ball is in Congress' [sic] court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."); *see also Ledbetter House Hearing*, *supra* note 14, at 3 (statement of George Miller, Chairman, H. Comm. on Educ. & Labor).

[106] *Ledbetter House Hearing*, *supra* note 14, at 3 (statement of George Miller, Chairman, H. Comm. on Education and Labor).

V. THE LILLY LEDBETTER FAIR PAY ACT

"Reason—and justice—demand a different result."[107]

The Supreme Court's sharp distinction between "discrete acts" of discrimination and the "continuing effects" of past violations[108] influenced hundreds of subsequent court decisions,[109] impeding justice by allowing statutes of limitations to be "twisted by courts to limit the scope and thrust of civil rights laws."[110] Lilly Ledbetter's personal story, and the injustices perpetuated by the *Ledbetter* decision, provided the impetus for "women to push back on the dominant norms of the Court's conservative majority and to elaborate their own stories."[111] Advocates pushed for the law's acknowledgement of the various forms of sex discrimination in our society, including the acknowledgement of both subtle and blatant discriminatory acts.[112]

Responding to the events and circumstances surrounding the *Ledbetter* decision,[113] Congress acted to correct the Court's narrow interpretation of

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[107] *Id.* at 4.

[108] *Ledbetter*, 550 U.S. at 638–40 (finding that receiving a paycheck that perpetuates the effects of pay decisions made in the past does not violate the law when an employer's recent actions have no discriminatory purpose).

[109] *See* Robert Pear, *Justices' Ruling in Discrimination Case May Draw Quick Action by Obama*, N.Y. TIMES, Jan. 5, 2009, at A13 (reporting that courts around the country cited the *Ledbetter* decision hundreds of times as a reason for rejecting lawsuits claiming discrimination based on race, sex, age, and disability, without regard to the underlying merits of the individual cases, including cases involving Title VII, the Age Discrimination in Employment Act, the Fair Housing Act, and Title IX).

[110] *See* Garcia v. Brockway, 526 F.3d 456, 466 (9th Cir. 2008) (Pregerson, J. & Reinhardt, J., dissenting) (responding to the majority's finding that while the plaintiff filed suit within two years of renting the apartment, he failed to timely challenge the "discriminatory housing practice," which began running ten years earlier when construction of the building was complete); *see also* Pear, *supra* note 109, at A13 (identifying federal cases applying *Ledbetter* and reversing prior decision in favor of the employer).

[111] *See* Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 42 (2008) (ascribing the credit to Justice Ginsburg's provocative dissenting opinion).

[112] *See* Collins, *supra* note 2; *see also* Chamallas, *supra* note 98, at 1038 (noting the deep understanding of gender bias present in Ginsburg's opinions, which merits her reputation as a judicial champion of gender equality).

[113] *See* H.R. REP. NO. 110-237, at 32–33 (2007). The House Report noted that the Ledbetter decision was almost immediately met with criticisms from plaintiffs' advocates; the trial bar, and others in the civil rights community, claiming:

> [T]he decision represented a radical departure from established law validating the "paycheck rule." The Supreme Court's decision "severely weakens remedies for

Title VII[114] by passing the Lilly Ledbetter Fair Pay Act (LLFPA).[115] With its enactment, Congress attempted to "strike the right balance" between the employer and employee interests in Title VII claims without tipping the balance too far in either one's favor.[116] Finding that the *Ledbetter* decision significantly impaired statutory protections against discrimination in compensation, Congress adopted the LLFPA to codify the "paycheck accrual rule" in discriminatory pay claims.[117] With its codification, the time period for filing a pay discrimination charge with the EEOC[118] now restarts each time an employee receives a paycheck reflecting a discriminatory pay decision.[119] The LLFPA amends the existing statutory filing period for Title

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> employees who have faced wage discrimination and represents a flawed interpretation of our civil rights laws," said the National Women's Law Center. "Not only does the ruling ignore the reality of pay discrimination, it also cripples the law's intent to address it, and undermines the incentive for employers to prevent and correct it. "The National Partnership for Women & Families described the decision as "a painful and costly step backward for the nation and a deep disappointment to those of us who want to see strong measures in place to give all workers meaningful protections against discrimination."

Id.

[114] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5, 5 (2009).

[115] *See id.* (citing the decision specifically, stating: "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."); *see also* S. REP. NO. 92-415, at 6 (1971) (stating that, consistent with the 1971 amendments, Congress intended Title VII to address the economic harm—and the resulting social effects—from discrimination in pay).

[116] *Ledbetter House Hearing*, *supra* note 14, at 5–6 (statement of Howard P. "Buck" McKeon, Senior Republican Member, H. Comm. on Educ. & Labor).

[117] 42 U.S.C.A. § 2000e-5 (West 2010) (appearing in "Revision Notes and Legislative Reports").

[118] 42 U.S.C. § 2000e-5(e)(1) (2006).

[119] *See* 42 U.S.C. § 2000e-5(e)(3) (2006 & Supp. 2010). The LLFPA applies to: the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2006); the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–97 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–300 (2006), but not the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006). To bring an EPA claim, the plaintiff must have a comparator of "equal work," which is not required to bring a compensation claim for sex discrimination under Title VII. In addition, "Title VII requires a showing of intent. In practical effect, 'if the trier of fact is in equipoise about whether the wage differential is motivated by gender discrimination,' Title VII compels a verdict for the employer, while the EPA compels a verdict for the plaintiff." Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 659 (Ginsburg, J., dissenting) (quoting 2 CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 7.08[F][3], at 532 (3d ed. 2002)).

VII and other federal discrimination laws[120] by codifying the "paycheck accrual rule":

> [A]n 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.[121]

In addition to codifying the "paycheck accrual rule," the LLFPA applies retroactively to claims pending on or after May 28, 2007, the day before the Supreme Court issued the *Ledbetter* decision.[122] Congress also authorized recovery of back-pay for up to two years preceding the filing of the EEOC charge for employees making a successful discriminatory compensation decision claim under the LLFPA.[123]

While the LLFPA remedies the injustice created by the *Ledbetter* decision, the courts' broad interpretation and application of the statute creates a similar injustice for employers. The majority's holding in *Ledbetter* failed to recognize the realities of wage discrimination, requiring an employee to file a complaint with the EEOC under circumstances in which it would be impossible to know that a discriminatory decision had been made, thereby diminishing an employee's power to bring a claim. The LLFPA was enacted to remedy this imbalance of power. However, courts' subsequent interpretation of the Act has created a power shift in the opposite direction, against the employer.[124] The inconsistent approach to interpreting the

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[120] *See* discussion and statutes cited *supra* note 119.

[121] 42 U.S.C. § 2000e-5(e)(3)(A) (2006 & Supp. 2010).

[122] *Id.* § 2000e-5 note; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 6, 123 Stat. 5, 7 (2009).

[123] 42 U.S.C. § 2000e-5(e)(3)(B); H.R. REP. NO. 110-237, at 19 (2007) ("This section is added to ensure that back pay in cases such as Ledbetter are not limited to 180 days. The statute of limitations period and the back pay recovery period are two separate periods in the Act."); *see also* Mikula v. Allegheny Cnty., 583 F.3d 181 (3d Cir. 2009). The Third Circuit decision creates the impression that the recovery period is limited to 300 days rather than two years, but upon review the *Mikula* court was faced with a statute of limitations issue and not a limitation on recovery of back-pay. *Mikula*, 583 F.3d at 186–87.

[124] *See* Jason R. Bent, *What the Lilly Ledbetter Fair Pay Act Doesn't Do: 'Discrete Acts' and the Future of Pattern or Practice Litigation*, 33 RUTGERS L. REC. 31, 37 (2009) (noting that a legislative solution should attempt "to strike an appropriate balance between the legitimate interests of employers in obtaining reasonable repose from stale

LLFPA stems from the statute's inclusion of "other practice" and in some instances has created a broadening of the 180-day filing period for claims other than "discriminatory compensation decisions."[125]

VI. THE COURTS' INCONSISTENT INTERPRETATION OF THE LILLY LEDBETTER FAIR PAY ACT

After the amendment of the LLFPA, the statute of limitations for federal discrimination statutes now defines an "unlawful employment practice" as occurring every time an employee is subject "to a discriminatory compensation decision or other practice,"[126] with a new claim occurring each time the employee receives a paycheck affected by an earlier "discriminatory compensation decision or other practice."[127] Congress enacted the LLFPA to abrogate the *Ledbetter* decision,[128] allowing employees to bring a claim for pay discrimination as long as they receive one paycheck affected by a discriminatory pay decision within the limitations period but to otherwise leave the existing case law alone.[129] The statute's language, "compensation decision or other practice," leaves open the question of whether "other practices" include the types of "discrete acts" identified in *Morgan*—"termination, failure to promote, denial of transfer, or refusal to hire"[130]—which would otherwise require an individual to file a charge of discrimination within 180 days of the date of the act or lose the ability to recover for it.[131]

Not surprisingly, courts have taken the language, "compensation decision or other practice," and interpreted it differently. Some, expressing the same concerns as those opposed to the bill's initial introduction,[132] have refused to

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claims and the competing interests of plaintiffs in having a reasonable opportunity to learn of the discriminatory nature of the employment decision that affected them").

[125] *See* cases cited *infra* note 153.

[126] Section 2000e-16(f) expressly states that, at least with respect to claims against the federal government, § 2000e-5(e)(3) applies only "to complaints of discrimination in compensation." 42 U.S.C. § 2000e-16(f) (2006).

[127] *Id.* § 2000e-5(e)(3)(A).

[128] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (2009) ("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.").

[129] *See id.*

[130] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002).

[131] *Id.*

[132] *See* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 283—LILLY LEDBETTER FAIR PAY ACT OF 2007 (2007). ("[T]he bill far exceeds the stated purpose of undoing the Court's decision

read "other practices" to reach the discrete decisions of promotion or termination[133] while others have allowed previously time-barred employment decisions that indirectly affect compensation but are not themselves considered "compensation decisions" to be included.[134] The courts' failure to apply a universal analytical framework creates instability and inconsistency in discriminatory pay decisions, with the broader reading taken by some courts having a detrimental effect on the employment relationship and, in turn, the economy.[135] The LLFPA was enacted to correct the Court's narrow interpretation in *Ledbetter*,[136] but the broader reading of "other practices" breathes new "life into prior, uncharged discrimination"[137] and is contrary to both the policy justifications offered in Justice Ginsburg's dissent[138] and Congress's intent[139]—tipping the balance too far in the employee's favor.[140]

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in *Ledbetter* by extending the expanded statute of limitations to any 'other practice' that remotely affects an individual's wages, benefits, or other compensation in the future. This could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionable only when they occur.").

[133] *See* cases cited *infra* note 152.

[134] *See* cases cited *infra* note 153.

[135] *See* Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454, 464–65 (1993) (noting that statutes of limitations help to provide predictability in our economy, which in turn has a stabilizing effect on commercial and property transactions by allowing employers to plan and arrange commercial transactions accordingly).

[136] *See* H.R. REP. NO. 110-237, at 3 (2007) (stating that the Act "seeks to reverse the Supreme Court's May 29, 2007, [sic] ruling in Ledbetter v. Goodyear, which dramatically restricted the time period for filing pay discrimination claims under Title VII and made it more difficult for workers to stand up for their basic rights at work").

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

[138] *Id.* at 650–51 (Ginsburg, J., dissenting) (explaining the justification for "separating pay claims from the discrete employment actions identified in *Morgan*"). Notably, Justice Ginsburg emphasized how an employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer, stating:

> When a male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched. But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented.

Id.

[139] *See* H.R. REP. NO. 110-237, at 7 (2007). Due to the fact that "pay discrimination is rarely accompanied by circumstances suggestive of bias . . . [u]nlike hiring, firing, promotion and demotion decisions where an individual immediately knows that she has suffered an adverse employment action," the Act is necessary to prevent injustice, as in Ledbetter's case. *Id.*

A. *"Breath[ing] Life Into Prior, Uncharged Discrimination"*[141]

Easily identifiable, discrete employment decisions, such as terminations, promotions, demotions, and transfers, all typically entail a change in an employee's pay rate, putting an employee on notice that the decision may be pretextual for discrimination.[142] Allowing an employee to bring a pay discrimination claim that is a result of one of these fully communicated discrete acts, which, unlike the secretive nature of Ledbetter's pay discrimination, are overt and easily identifiable, effectively rejects the holding of *Morgan* and establishes the "continuing effects" doctrine as law.[143]

Courts' interpreting "other practices" to include easily identifiable, discrete acts[144] broadens the reach of the LLFPA beyond what Congress intended and places the employer at an unfair disadvantage. For example, the district court in *Gentry v. Jackson State University*, expansively reading the LLFPA, found that "it can hardly be denied that the denial of tenure was a 'discrete' act of which plaintiff was obviously aware,"[145] but because the plaintiff asserted that "the denial of tenure *also* denied her a salary increase," the plaintiff's claim was a "compensation decision" within the meaning of the LLFPA.[146] This interpretation of the LLFPA does not take into account the distinction between discrete acts, which are obvious and, therefore, place an employee on notice that the pay decision could be a pretext for

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[140] *See Ledbetter House Hearing*, *supra* note 14, at 6 (Howard P. "Buck" McKeon, Senior Republican Member, H. Comm. on Educ. & Labor) (noting that the purpose of the Act is to "strike the right balance without tipping it too far toward employers and employees").

[141] *Ledbetter*, 550 U.S. at 619 (syllabus) (justifying its rejection of Ledbetter's pay discrimination claim).

[142] *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (establishing a non-exhaustive list of discrete acts: termination, failure to promote, denial of transfer, or refusal to hire, and requiring an individual to file a charge within 180 days of the date of the act or lose the ability to recover).

[143] *See id.* at 109 (noting that by "choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination"); *see also* Ledbetter, 550 U.S. at 630 (quoting the same language from *Morgan*); Bent, *supra* note 124, at 36 (discussing *Ledbetter* and the competing interests of employers and employees).

[144] *See* Sullivan, *supra* note 6, at 527 (noting that one factor in LLFPA achieving its full potential will depend on how the courts interpret "other practices").

[145] Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009).

[146] *Id.* (emphasis added).

discrimination—the type of covert discrimination suffered by Ledbetter—which the Act is intended to remedy.[147]

The plaintiff in *Gentry* was an associate professor who was denied tenure in 2004 but did not file a claim of sex discrimination with the EEOC until 2006.[148] The court found the denial of tenure qualified as a "compensation decision" or "other practice" affecting compensation within the meaning of the LLFPA, which allowed the plaintiff to pursue the otherwise "stale" claim.[149] Thus, the court allowed the plaintiff's argument—that the denial of tenure prevented a salary increase and was a compensation decision negatively affecting the plaintiff's compensation—to prevail two years after the overt and discrete act occurred. At trial, the jury awarded the plaintiff $100,000 on claims that the university retaliated against her in violation of Title VII by placing her on a non-tenure job track and by not allowing her to chair dissertation committees after she complained of sex discrimination.[150] While the jury rejected Gentry's sex discrimination claim for denial of tenure and related salary increase, it awarded her the total amount of damages she requested for all three claims.[151]

B. *Interpreting the LLFPA Narrowly*

Some district courts have distinguished discrete discriminatory acts, such as failure-to-promote claims from compensation claims, finding such claims time-barred under LLFPA if the plaintiff does not file an EEOC complaint within 180 days of the discriminatory action.[152]

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[147] *See* H.R. REP. NO. 110-237, at 3 (2007).

[148] *Gentry*, 610 F. Supp. 2d at 566.

[149] *Id.*

[150] *See Retaliation: Jury Awards $100,000 to Professor Claiming Sex Bias Complaints Led to Non-Tenured Job*, Daily Lab. Rep. (BNA) No. 226, at A-7 (Nov. 27, 2009), *available at* http://news.bna.com/dlln/ (follow "News Archive" hyperlink; then click through "11/27/2009" and "News" in the drop-down menu).

[151] *See id.* The "three claims" referred to by the author are the plaintiff's retaliation claim, promotion claim, and compensation claim. *Id.*

[152] *See* Grant v. Pathmark Stores, Inc., No. 06 Civ 5755(JGK), 2009 WL 2263795, at *7–9 (S.D.N.Y. July 29, 2009) (rejecting the application of the Fair Pay Act to failure-to-promote claims); Johnson v. District of Columbia, 632 F. Supp. 2d 20, 23 (D.D.C. 2009) (holding that the Act revives claims of pay lower than that of similarly situated employees, but not retaliation claims); Chelgren v. S. Holland Sch. Dist. No. 150, No. 07 C 6931, 2009 WL 1789350, at *9 (N.D. Ill. June 24, 2009) (holding that failure to promote qualifies as a discrete act of discrimination and it is untimely when it occurs more than 300 days before an EEOC charge was filed); Richards v. Johnson & Johnson, Inc., Civ. Action No. 05-3663 (KSH), 2009 WL 1562952, at *9 (D.N.J. June 2, 2009) (holding that the claim that the employer had failed to hire the plaintiff for more advanced positions was not revived by the Act because the LLFPA "does not save

Unlike the court's interpretation in *Gentry*, some courts have recognized the important distinction between fully communicated, discrete discriminatory acts, and the insidious, subtle acts that the LLFPA is intended to target.[153] In *Bush v. Orange County Corr. Dep't*, the female African-American plaintiffs believed their 1990 transfers were promotions, but learned sixteen years later that the transfers were documented by their employer as voluntary demotions that had reduced their pay without their knowledge.[154] The court found that the plaintiffs' claims fell within the LLFPA and were not administratively time-barred because the plaintiffs filed their complaint within 180 days of their last discriminatory paycheck.[155]

The LLFPA showing that was intended to remedy the type of "compensation decision or other practice" in *Ledbetter* is analogous to the situation in *Bush* but inconsistent with *Gentry*.[156] The approach in *Gentry* places a great burden on the employer to defend what, if not for

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otherwise untimely claims outside the discriminatory compensation context"); Rowland v. Certainteed Corp., Civ. Action No. 08-3671, 2009 WL 1444413, at *6 (E.D. Pa. May 21, 2009) (holding that the LLFPA does not cover the ongoing consequences from the denial of a promotion because that would "eliminate any statute of limitations with respect to reporting discrimination [in promotion] to the appropriate agency, a change in law not found in the Ledbetter Act"); Vuong v. New York Life Ins. Co., No. 03 Civ. 1075(TPG), 2009 WL 306391, at *7–9 (S.D.N.Y. Feb. 6, 2009) (holding that the failure-to-promote claims were time-barred, but applying the LLFPA to the discriminatory compensation claim).

[153] *See* Mikula v. Allegheny Cnty., 583 F.3d 181, 186–87 (3d Cir. 2009) (finding the failure to answer the request for a raise was timely under the LLFPA); Shockley v. Minner, Civil Action No. 06-478 JJF, 2009 WL 866792, at *1 (D. Del. Mar. 31, 2009) (applying the LLFPA to find the failure-to-promote claim timely); Gertskis v. New York City Dep't of Health and Mental Hygiene, No. 07 Civ. 2235(TPG), 2009 WL 812263, at *4 (S.D.N.Y. Mar. 26, 2009) (finding the claim for discriminatory failure to promote plaintiff to the Associate Chemist position timely); Gilmore v. Macy's Retail, No. 06-3020(JBS), 2009 WL 305045, at *2–3 (D.N.J. Feb. 4, 2009) (finding a failure-to-promote claim timely under the LLFPA, but unsuccessful on the merits).

[154] Bush v. Orange Cnty. Corr. Dep't, 597 F. Supp. 2d 1293, 1295 (M.D. Fla. 2009).

[155] *Id.* at 1296 (finding the claim timely, but unsuccessful on the merits).

[156] In addition to the federal courts' inconsistent interpretations, state courts have diverged when deciding whether or not the LLFPA applies to state law. *Compare* Klebe v. Univ. of Tex. Sys., 649 F. Supp. 2d 568, 571 (W.D. Tex. 2009) (reading the LLFPA to apply to state anti-discrimination laws without state legislature amending state statutes), *with* Alexander v. Seton Hall Univ., 983 A.2d 1128, 1136–37 (N.J. Super. Ct. App. Div. 2009) ("[T]here is some merit for the proposition that we should not follow *Ledbetter*. However, we believe that we would be more faithful to our state jurisprudence by following *Ledbetter*, particularly in the absence of a post-*Ledbetter* amendment to LAD. We thus follow Title VII and LAD jurisprudence as it stood at all relevant times because no amendments have been made to the LAD which would affect its construction at the time when *Ledbetter* was decided.").

compensation being interconnected with the promotion, would be a stale claim in a case where the fully communicated decision not to promote should have placed the employee on notice that she had been subjected to a discriminatory pay decision at the time it was made.[157] Support showing that Congress intended the LLFPA to apply in a broader context than situations similar to Ledbetter's is unfounded and contrary to the explicit language appearing in the statute.[158] While the threat of this expansive interpretation of the Act forces employers to assess their employee review practices and develop clear guidelines to measure performance of their employees, which is arguably beneficial to both the employer and employee,[159] it also places a tremendous burden on the employer to defend against stale claims.[160]

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[157] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 650–51 (2007) (Ginsburg, J., dissenting). Justice Ginsburg noted the differences between failure-to-promote and compensation claims:

> [S]eparating pay claims from the discrete employment actions identified in *Morgan*, an employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer. When a male employee is selected over a female for a higher level position, someone still gets the *promotion and is paid a higher salary; the employer is not enriched.*

Id. (emphasis added).

[158] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(1), 123 Stat. 5, 5 (2009) ("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.").

[159] *See* KATHERINE C. NAFF, TO LOOK LIKE AMERICA: DISMANTLING BARRIERS FOR WOMEN AND MINORITIES IN GOVERNMENT 197–98 (2001) (identifying the "[r]e-examination of the organization's structure, culture, and management systems" as an approach to effectively manage diversity in the workplace).

[160] *See* Robin E. Shea et al., *The Impact of the Lilly Ledbetter Fair Pay Act of 2009*, *in* ASPATORE SPECIAL REPORT 17 (2009) (highlighting the financial and social ramification the Act will likely have on businesses); Bent, *supra* note 124, at 36 (noting "employers will face difficultly in gathering, preserving, and presenting the evidence necessary to defend against . . . claims" of "discrete act[s] of discrimination taking place years ago"); *see also Ledbetter Senate Hearing*, *supra* note 72, at 49 (prepared statement of Hon. Michael B. Enzi, Member, S. Comm. on Health, Educ., Labor, & Pensions). Senator Enzi addressed the policy reason for statute of limitations, stating:

> First, a statute of limitations encourages the prompt and vigorous pursuit of important protected rights. This is particularly true in the instance of employment discrimination. . . . [T]he drafters [of Title VII] adopted a relatively short limitations period to ensure the quick eradication of discriminatory workplace practices. Statutes of limitation are designed to encourage the prompt resolution of contested claims; and, this is particularly important in the context of employment discrimination claims. An unresolved allegation or suspicion of discrimination is particularly corrosive in the workplace where the parties to a potential claim are in

C. *The Necessity of a Fact-Intensive Analysis*

Balancing the interests of both the employee and employer, the LLFPA is intended to apply to "discrimination in compensation" cases only, not to "discrete personnel decisions, like promotions and discharges."[161] The Act was intended to address the unfair result in *Ledbetter*, where the plaintiff had no way of knowing she was suffering from a discriminatory pay decision—receiving lower pay than males in the same position.[162] Therefore, it is necessary for a court to determine whether the plaintiff in a particular case was subject to discrimination similar to Ledbetter's, in which he or she had no way of knowing of the discriminatory act at the time the discrimination occurred, in order to determine if the Act should apply. The Act is not intended to apply to situations where employees are aware, or should be aware, of a pretextual discriminatory act and its subsequent effects on pay, yet fail to file a claim within the 180-day period. To allow such claims under the LLFPA exposes employers to otherwise time-barred complaints, encouraging employees to abuse the system by waiting to file claims until an employer may no longer have documentation available to defend itself. This interpretation undermines the balance Congress struck between the interests of the plaintiff, the defendant, and society as a whole when enacting the LLFPA.[163]

As Justice Ginsburg established in the *Ledbetter* dissent, and Congress reaffirmed when enacting the LLFPA, requiring the plaintiff to file a discrimination claim within 180 days of the discriminatory pay decision is unjust in some cases because certain forms of pay discrimination are difficult to detect, with victims only discovering pay discrepancy over time.[164] It was

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> daily contact, and where the potential claim has effect, both direct and indirect, on everyone in the workforce. The drafters wisely determined that such matters cannot be allowed to fester, and should be addressed promptly and resolved as quickly as possible.

Id.

[161] *See* 155 CONG. REC. S739, S757 (daily ed. Jan. 22, 2009) (statement of Sen. Mikulski) (expressing concern that the bill "could apply to discrete personnel decisions, like promotions and discharges. That's not true. The bill specifically says that it is addressing 'discrimination in compensation.' That limiting language means that it already only covers such claims—nothing more, nothing less.").

[162] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(2), 123 Stat. 5, 5 (2009) ("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.").

[163] *See supra* Part III (discussing statute of limitations policy).

[164] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649–51 (2007) (Ginsburg, J., dissenting); *see also Ledbetter Senate Hearing*, *supra* note 72, at 16–17

unfair to begin running the 180-day filing period from the day the original compensation decision was made in Ledbetter's case because the comparative information necessary to assess pay disparities, suggesting discrimination, "is often hidden from the employee's view."[165] Addressing the differences between pay discrimination and other overt, discrete acts, Justice Ginsburg specifically noted: "Pay disparities are . . . significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory."[166] Therefore, the LLFPA needs to be applied in a uniform manner in order to ensure that courts do not interpret it broadly to include these fully communicated, easy-to-identify discrete acts of discrimination.

VII. SOLUTION: THREE-STEP ANALYTICAL FRAMEWORK

Title VII requires a claim to be filed with the EEOC within 180 days of a discriminatory act.[167] The EEOC filing requirement is analogous to a statute of limitations, barring all claims arising outside the 180-day filing period. In order to preserve the balance of the employee and employer interests struck by the EEOC filing requirement,[168] it is necessary to establish a predictable analytical framework to determine a claim's timeliness. This framework entails a three-step process (the Three-Step Analytical Framework) for determining whether a discrimination claim meets the 180-day filing requirement: (1) classifying the claims into one of three categories—a discrete act, a hostile work environment claim, or a discriminatory compensation decision or other practice; (2) based on the step-one category, identifying the applicable statute or case precedent; and (3) applying the statute or case precedent to determine the timeliness of the claim.

To understand how this framework leads to a consistent application of Supreme Court precedent and the LLFPA discussed in Parts III and VI of this Note, it is necessary to first explain each step separately and then to apply the framework to a hypothetical discrimination claim.

(statement of Samuel R. Bagenstos, Professor of Law & Associate Dean, Washington University) ("[E]mployees are unlikely to know that they have gotten paid less than their co-workers. They are unlikely to attribute differences in pay to discrimination, and they are unlikely to bring a lawsuit after the initial discriminatory pay decision even if they do know they have been the victims of discrimination because of the small stakes of any incremental pay discrimination decision.").

[165] *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

[166] *Id.* (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

[167] 42 U.S.C. § 2000e-5(e)(1) (2006).

[168] *See supra* Part III (discussing statute of limitations policy).

A. *Step One: Classifying the Claims into One of Three Categories*

To correctly categorize a discriminatory compensation decision into one of three categories—a discrete act, a hostile work environment claim, or a discriminatory compensation decision or other practice—it is necessary to disentangle a compensation claim from other claims of discrimination in a particular case. After the enactment of the LLFPA, the courts' difficulty[169] in correctly categorizing discriminatory pay claims stems from a failure to take this first step of identifying, and then separately analyzing, the discriminatory compensation claim.

A discrimination claim falls into the category of a "discrete act," as distinguished from a hostile work environment or discriminatory compensation decision or other practice, if the discriminatory act is public and has been fully communicated.[170] Acts such as promotions, transfers, hirings, and firings are discrete acts because they are generally known by coworkers and place an individual employee on notice that discrimination could be involved. In contrast, a "hostile work environment" claim does not entail one discrete act, but requires a series of individual acts taken together to create an "environment."[171] A "hostile work environment" does not fall under the discrete act category because the actionable wrong is the environment, not the individual acts.[172] Finally, a claim falls under the third category of a "discriminatory compensation decision or other practice" if an employer pays a different wage, or provides different benefits, to similarly situated employees.[173]

Therefore, when categorizing a discrimination claim under Step One, it is necessary to determine whether the allegation involves: (a) a fully communicated discrete public act; (b) an act that, when coupled with other acts, creates a hostile work environment; or (c) a claim of pay disparity when compared to similarly situated employees.

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[169] *See supra* Part VI.

[170] *See supra* Part III.

[171] *See supra* Part III.

[172] *See supra* Part III.

[173] *See* Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 522 (5th Cir. 2008) (noting that a prima facie case of "discrimination in compensation" under Title VII involves showing plaintiff "was paid less than a non-member [of the protected class] for work requiring substantially the same responsibility"); Anderson v. Zubieta, 180 F.3d 329, 338 (D.C. Cir. 1999) (plaintiff alleging "wage discrimination" under Title VII must show he was "performing work substantially equal to that of . . . employees . . . compensated at higher rates" (internal quotation marks omitted)); MacPherson v. Univ. of Montevallo, 922 F.2d 766, 774 (11th Cir. 1991) (proof of "discrimination in compensation" under ADEA requires showing "similarly situated persons outside the protected age group received higher wages").

B. *Step Two: Identifying the Applicable Statute or Case Precedent*

After categorizing the discrimination claim, the task of identifying and applying the applicable case precedent or statute is straightforward. If categorized as a "discrete act," *Morgan* applies with the discrete act triggering the 180-day filing period.[174] If categorized as a "hostile work environment," *Morgan* also applies, but the 180-day filing period is measured from the most recent discriminatory act constituting the claim.[175] Finally, if the claim involves discriminatory compensation, the LLFPA applies and the 180-day filing period begins to run from the day of the last paycheck reflecting discriminatory compensation.[176]

C. *Step Three: Applying the Applicable Statute or Case Precedent to the Facts*

The third step in the analytical framework requires the application of the statute or case precedent based on the category of the claim. In order to provide a thorough explanation of the proposed framework, it is necessary to establish a hypothetical scenario to complete the third step of applying case precedent or the LLFPA to the facts of a case.

Using, in part, a district court case as the basis for our facts,[177] the hypothetical involves a sex-based Title VII discrimination claim. Sally, a female sales representative working for a pharmaceutical company, alleges that male employees in the same position receive a higher salary and larger bonuses. In addition, Sally claims her employer promoted a male, instead of Sally, to regional manager because of her gender on February 20, 2009. She learned of the higher salaries and larger bonuses only recently when someone left an anonymous tip on her desk. The tip informed Sally that she was initially hired over fifteen years ago at a lower salary than men in the same position and with her same experience and, in addition, she discovered that she had received lower bonuses than her male counterparts even though she consistently outperformed them by all measures. The bonuses had been allocated over the last fifteen years, with the last bonus given in December of 2007. No one received a bonus in 2008 because the economy was so poor and the company was struggling. Sally filed a claim with the EEOC upon receiving the tip on December 15, 2009.

In order to determine if Sally's claim is timely within the 180-day filing

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[174] *See supra* Part III.

[175] *See supra* Part III.

[176] *See supra* Part V.

[177] *See* Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 744–47 (S.D. Tex. 2009).

period, it is necessary to apply the Three-Step Analytical Framework by: (1) classifying her claims into one of three categories—a discrete act, a hostile work environment claim, or a discriminatory compensation decision or other practice; (2) based on the category, identifying the applicable statute or case precedent; and (3) applying the statute or case precedent to determine the timeliness of the claim. Applying Step One, it must be determined whether the allegation involves: (a) a fully communicated discrete public act; (b) an act that, when coupled with other acts, creates a hostile work environment; or (c) a claim of pay disparity when compared to similarly situated employees. Based on the facts of the hypothetical, Sally potentially has two claims: a compensation claim arising from the disparity in her salary and bonuses over the past fifteen years and a failure-to-promote claim resulting from the February 20, 2009 decision.

1. *Sally's Compensation Claim: An Application of the LLFPA*

Analyzing the compensation claim first, it does not fit into category (a) as a fully communicated discrete public act because Sally was not aware of the salary and bonus differences until she received the anonymous tip. Sally's employer is similar to most employers and does not make salary and bonus schedules public; therefore, the decision to pay Sally less than her male counterparts, while a discrete act when it was made, was not a fully communicated public act that would place Sally on notice of discrimination because of her sex.[178] The act of paying Sally a lower starting salary and smaller bonuses is not an act that, taken with other acts, creates a hostile work environment claim; therefore, category (b) also does not apply. However, the salary and bonus decisions are claims of pay disparity, as Sally is being paid less than similarly situated males. Therefore, Sally's allegation falls into category (c) as a discriminatory pay decision.

Applying Step Two of the analytical framework; because this is a discriminatory pay decision, the LLFPA applies to determine whether or not Sally timely filed her EEOC complaint.

Moving to Step Three and applying the LLFPA to Sally's claim, Sally meets the filing requirement since she filed her complaint within 180 days of receiving a paycheck reflecting the discriminatory pay decision. Note, however, that the conclusion in Sally's case is different than the conclusion courts would have found if the LLFPA had not been enacted.[179] Without the LLFPA, Sally's claim would have been time-barred because the filing period would have started running the day the discriminatory pay decisions were

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[178] This portion of the facts is similar to the facts in Lilly Ledbetter's case. *See supra* Part II.

[179] *See supra* Part IV.

made, with the first being over fifteen years ago, and not from the date of her last paycheck. However even under the LLFPA, Sally cannot recover her bonuses since those pay decisions were not reflected in a paycheck received within the last 180 days. While Sally is not completely barred from recovery for the discriminatory pay under the LLFPA, she is limited to receiving two years of back pay.[180]

2. *Sally's Failure-to-Promote Claim: LLFPA Should Not Apply*

Moving to Sally's failure-to-promote claim, and applying the Three-Step Analytical Framework, one must conclude that the LLFPA does not apply. Analyzing the failure-to-promote claim under Step One, it must be determined what category the discriminatory act falls under: (a) a fully communicated discrete public act; (b) an act that, when coupled with other acts, creates a hostile work environment; or (c) a claim of pay disparity when compared to similarly situated employees. The failure-to-promote claim seems to fit best under "category (a)" as a fully communicated discrete act. Sally was aware when the decision was made that she did not receive the promotion and if it was not announced publicly, she could have easily discovered that a male was appointed to the position upon realizing she was not the new regional manager. The decision not to promote Sally, but instead to place a male in the position, is not a "category (b)" claim because it is not a part of a larger compilation of acts, creating a hostile work environment. The challenge in categorizing Sally's failure-to-promote claim is whether it is a "category (c)" claim, as the decision not to promote Sally likely resulted in a lost income opportunity.

The challenge this scenario presents is the same challenge district courts have grappled with since the enactment of the LLFPA: does a failure-to-promote claim qualify as an "other practice" within the meaning of the Act? While the decision not to promote Sally likely results in lower pay, it is not a situation that Sally was unaware of when it occurred. Instead, the decision was a fully communicated discrete act and, therefore, while the decision does affect Sally's pay, it is not the type of secretive wage discrimination that Congress intended to protect when enacting the LLFPA.[181]

To fully understand the implications of recognizing Sally's failure-to-

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[180] *See supra* Part V.

[181] Congress found that "[t]he limitation imposed by the Court [in *Ledbetter*] 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." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2(2), 123 Stat. 5, 5 (2009) (emphasis added). Congress is referring to the wage discrimination in *Ledbetter*, which was kept secret and left her with no way of discovering the disparity in order to timely file an EEOC claim.

promote claim as a fully communicated discrete act, as well as a discriminatory pay decision under the LLFPA, it is necessary to move to Step Two of our framework. Under Step Two, the rule established by case precedent or statute is identified based on the claim's category. In the case of a fully communicated discrete act, the *Morgan* decision would apply and under Step Three, the 180-day filing period would be triggered from the date the promotion decision was made. Conversely, if the promotion decision is a discriminatory pay decision, then the LLFPA applies and under Step Three, the 180-day filing period would be triggered on the date Sally received her last paycheck reflecting the discriminatory pay.

These two results are at odds with one another and if allowed, would not only undermine the Court's *Morgan* analysis, but would also provide the wrong incentive to employees. If the failure-to-promote claim is allowed under the LLFPA, even though it qualifies as a fully communicated discrete act, then instead of encouraging employees to file with the EEOC as soon as the decision has been made and communicated, employees could wait as long as they want to bring the claim so long as they continue to receive a paycheck. This result is not only contrary to what Congress intended in enacting the LLFPA, it is also contrary to the policy behind the EEOC 180-day requirement.[182] It would allow employees to wait to bring a claim, which not only makes it more difficult for employers to defend against these stale claims as time passes, it allows potentially discriminatory behavior to go unchecked because the employer is not held accountable for its unjust actions as soon as possible, which is what the 180-day requirement helps to enforce.[183]

As supported by the policy reasons of the 180-day requirement and Congress's intent when enacting the LLFPA, Sally's failure-to-promote claim is not a claim of "discrimination in compensation," but a fully communicated discrete act triggering the 180-day filing period on the date the decision was made, February 20, 2009. Applying the reasoning from *Morgan*, the effects alone cannot breathe new life into past discrimination, and Sally is barred from bringing her claim because her EEOC complaint was filed on December 15, 2009, more than 180 days after she learned she failed to receive the promotion.

VIII. CONCLUSION

The limitations period of the anti-discrimination statutes are intended to encourage employees to promptly assert their rights and to protect employers from the burden of defending against claims arising from employment

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[182] *See supra* Part V.

[183] *See supra* Part III.

decisions that are long past.[184] The ruling in *Ledbetter* disrupted the balance struck by the limitations period, and Congress, heeding Justice Ginsburg's call, shifted the balance back to equilibrium by enacting the LLFPA. The LLFPA was necessary to prevent injustice in cases like Ledbetter's and was a reminder that discrimination based on sex is still embedded within society. Just as the *Ledbetter* majority failed to recognize the "real world" context to which the Court applied the law,[185] resulting in injustice for employees, some courts are failing to recognize the "real world" context to which they are applying the LLFPA,[186] resulting in injustice for employers. In either scenario, the failure to analyze the facts of each case leads to a blind application of the law, preventing the extinguishment of the intended ills the LLFPA was meant to address. As Justice Ginsburg so pointedly stated:

> The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts "easy to identify." A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight.[187]

Recognizing this important distinction between public and private discrete acts, Congress enacted the LLFPA to prevent the injustice Ledbetter suffered from occurring in the future.

In order to protect and preserve the delicate balance of the employer/employee relationship, courts must recognize the context in which the LLFPA was enacted to address and apply the Three-Step Analytical Framework to avoid using the LLFPA as a blunt-force instrument. Courts must analyze the facts of each case to determine whether or not the discriminatory act, which resulted in a pay discrepancy, is the type of

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[184] *See Ledbetter Senate Hearing*, *supra* note 72, at 28 (prepared statement of Eric S. Dreiband, Partner, Akin Gump Strauss Hauer & Feld LLP) ("[L]imitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." (internal quotation marks omitted) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256–57 (1980))); CORMAN, *supra* note 8, §1.1.

[185] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting).

[186] *See* cases cited *supra* note 153.

[187] *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).

"discriminatory compensation decision or other practice" the LLFPA was passed to protect.[188]

As Justice Ginsburg's dissent makes clear, compensation claims are fundamentally different from claims based on "discrete acts" because the discrimination accumulates over an extended period of time: the discrimination can take years to identify. The same is not true for failure-to-promote or demotion claims; these "public acts" place an employee on notice that the decision could be a pretext for discrimination and therefore the underlying reasoning and policy justification for enacting the LLFPA do not apply. In fact, by applying the LLFPA to these overt, discrete acts, too much power is given to the employees to the detriment of the employer, creating an equally unjust situation as the Court created in *Ledbetter*.[189]

In order to reestablish and maintain the balance of employer/employee interests that Congress intended when enacting the LLFPA, courts must disentangle discrete employment acts from the resulting pay discrimination. Courts must first determine whether the discrete act is secretive, like the act leading to the pay disparity in *Ledbetter*, or if it is an overt and public act that the employee was aware of at the time of its occurrence, similar to the promotions in *Gentry*. If the discriminatory act is overt and public, then the court should apply the *Morgan* discrete act analysis and deny the plaintiff's claim if it falls outside the 180-day filing period. If the claim is more like *Ledbetter* and *Bush*, where the discriminatory pay decisions were kept private and only discoverable over time, then the LLFPA should apply to prevent injustice. Making the distinction as to whether the initial discriminatory pay decision stems from an act that is either covert or overt is essential to enforcing Title VII's statute of limitations in a fair and predictable way, and necessary to maintain the balance of interests of the employer, the employee, and society as a whole.

The LLFPA amends the federal anti-discrimination statutes to recognize the unique challenges of discriminatory compensation claims and the nature of the workplace in which the claims arise. Reading the Act's terms broadly to incorporate obvious and discrete acts of discrimination creates a similar and equally prejudicial effect on employers that the *Ledbetter* decision created for employees. Therefore, the distinction as to whether the initial

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[188] *See* Bush v. Orange Cnty. Corr. Dep't, 597 F. Supp. 2d 1293, 1296–97 (M.D. Fla. 2009).

[189] As Justice Ginsberg noted in the *Ledbetter* dissent, defenses, such as the defense of laches, are available to protect employers from stale claims, that have yet to be used. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121–22 (2002) (to prove laches, an employer must demonstrate that (1) there was inexcusable delay on the part of the plaintiff in bringing the claim; and (2) there is prejudice to the defendant resulting from the delay); *see also* Sullivan, *supra* note 6, at 38–42 (noting that the defenses will prove critical for employers under the act).

discriminatory pay decision stems from an act that is either covert or overt is essential to establishing the balance necessary to further both the interests of employer and employees in the context of the "real world" work environment. This distinction is consistent with the concerns expressed in Justice Ginsburg's dissent, the statutory language of the LLFPA, and Congress's intent when enacting the statute. While it requires courts to analyze the facts of each claim, it is a manageable rule, prevents injustice, and is consistent with Court precedent.[190]

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[190] This approach reconciles *Morgan*, 536 U.S. 101 (discrete discriminatory acts must be filed within 180 days from the date of occurrence); *Ledbetter*, 550 U.S. at 618 ("overt" pay decisions are discrete acts triggering the 180-day filing period); and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5 (2009) (the filing period for a "covert" discriminatory pay decision is renewed upon receiving a paycheck reflecting the discrimination).