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Megan E. Mowrey

DISCRIMINATORY PAY AND TITLE VII: FILING A TIMELY CLAIM

MEGAN E. MOWREY*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Generally, an employee who claims employment discrimination in violation of Title VII must file his or her claim within 180 days of the employer's alleged discriminatory conduct.[2] The Supreme Court examined the time limitations under Title VII in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[3] The Supreme Court's resolution of *Ledbetter* rested on the Court's characterization of the conduct that triggers the time limitation in cases concerning discriminatory pay.[4] The Court held that discriminatory pay is a discrete act, similar to, for example, a discriminatory termination or denial of a promotion.[5] The Court found that a claim for discriminatory pay must be filed, therefore, within 180 days of the employer's initial illegal act.[6] For Ledbetter, the Court's decision meant that her case was time barred, because the primary basis for Ledbetter's lawsuit concerned conduct that occurred prior to the 180-day period.[7]

Among the implications of the *Ledbetter* decision, the Court considered two critical factors in reaching its determination as to

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* Assistant Professor, Clemson University, College of Business and Behavioral Science.

1. 42 U.S.C. § 2000e-2(a)(1) (2000).

2. 42 U.S.C. § 2000e-5(e)(1) (2000). The statute also allows a 300-day time limitation "in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief . . . ." *Id.* States in which the 300-day time period is permitted are known as deferral states. C.J.S *Civil Rights* § 536 *Deferral States*, (2007).

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

4. *Id.* at 2165-66.

5. *Id.* at 2175. Further, see this Article's discussion of *Nat'l. Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (*Morgan*), in Section III, distinguishing between a claim alleging a discrete act of discrimination or a claim alleging a hostile environment, the latter of which may involve conduct that occurs prior to expiration of the 180-day period.

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

7. *Id.* at 2167.

whether the acts alleged by Ledbetter constituted discriminatory conduct. First, as noted, the Court held that discriminatory pay is a discrete event.[8] The moment the act occurs, the Title VII clock begins to run and potential plaintiffs must file within 180 days of the act or be barred from filing.[9] While the Court refused to consider that the discriminatory act was repeated with each paycheck, the circuit courts had found, in cases similar to *Ledbetter*, that the employer repeated its illegal conduct.[10]

The second factor that the Court considered underlies discrimination claims in general: a discriminatory act must pose an intentional harm, and this harm must be sufficiently material in order to trigger many of Title VII's protections.[11] The Supreme Court has discussed the standard of materiality in discrimination extensively, with examples including: *Meritor Sav. Bank v. Vinson*,[12] *Harris v. Forklift Sys., Inc.*,[13] *Oncale v. Sundowner Offshore Svcs., Inc.*, [14] *Burlington Indus., Inc. v. Ellerth*,[15] and

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8. *Id.* at 2165.

9. *Id.*

10. *Id.* at 2169; *see also infra* Section IV. *See, e.g.*, Anderson v. Zubieta, 180 F.3d 329, 335 (D.C. Cir. 1999) (acknowledging that "[t]he Courts of Appeals have repeatedly reached the . . . conclusion" that pay discrimination is "actionable upon receipt of each paycheck").

11. *Ledbetter*, 127 S. Ct. at 2171. The Court reiterated that the claim must be filed within 180 days, thus preventing actions against an employer where a worker fails to file a timely suit alleging a discrete act of discrimination and intent. *Id.*

12. *See* 477 U.S. 57, 62 (1986) (demonstrating that discrimination based upon sex that does not affect economic benefits may create a hostile work environment in violation of Title VII); *see also* Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1275 (1987) (suggesting that courts should impose a vicarious liability standard upon employers for sexually discriminatory acts of supervisors who create hostile and offensive work environments).

13. *See* 510 U.S. 17, 21 (1993) (examining a hostile work environment in the spirit of *Meritor*, but also considering the proper standard to determine whether specific conduct rises to the level of a discriminatory act in violation of Title VII by examining a number of factors including the severity and frequency of the discriminatory acts); Jeffrey M. Lipman & Hugh J. Cain, *Evolution in Hostile Environment Claims Since* Harris v. Forklift Systems, Inc., 47 DRAKE L. REV. 585 (1999) (providing an in depth analysis of the U.S. Supreme Court's decision); Edward Cerasia II, Harris v. Forklift Systems, Inc.: *An Objective Standard, but Whose Perspective?*, 10 LAB. LAW. 253 (1994) (examining the *Harris* Court's adoption of a "reasonable person" standard to determine if a work environment is hostile for purposes of the application of Title VII).

14. *See* 523 U.S. 75, 81-82 (1998) (announcing that the standards and elements of a Title VII claim also govern same-sex sexual harassment); *see also* Ramona L. Paetzold, *Same-Sex Sexual Harassment, Revisited: The Aftermath of* Oncale v. Sundowner Offshore Services, Inc., 3 EMP. RTS. & EMP. POL'Y J. 251 (1999) (arguing that the parameters of causation for same-sex sexual harassment in terms of Title VII violations appeared expansive in

Burlington Northern & Santa Fe Ry. Co. v. White.[16] With respect to the *Ledbetter* decision, is 180 days enough time to generate a recognizable act of pay discrimination?[17]

This Article discusses *Ledbetter* and the issues that *Ledbetter* presents for claims of illegal pay discrimination. Section II begins by briefly discussing the decisions of both the Eleventh Circuit[18] and the Supreme Court.[19] Section II then gathers facts about Ledbetter's circumstance from the several courts that heard the case,[20] as well as from Ledbetter's Brief to the Supreme Court.[21] An examination of the facts through several sources is necessary, because the nature of the discrimination allegedly suffered by Ledbetter changed, depending on whether a court allowed Ledbetter to introduce only evidence of discriminatory conduct

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Oncale, but in reality were very narrow in application).

15. *See* 524 U.S. 742, 765 (1998) (holding that an employer may raise an affirmative defense that it took reasonable care to prevent and correct harassing activity when it faces vicarious liability for the discriminatory activities of supervisors and the harassment did not result in a tangible employment action like a firing or demotion); *see also* Megan E. Mowrey & Virginia Ward Vaughn, *Employer Liability for Sexual Harassment Culminating in Constructive Discharge: Resolving the Tangible Employment Action Question*, 14 S. CAL. REV. L. & WOMEN'S STUD. 101 (2004) (examining the ramifications of the Supreme Court's failure to decide whether or not voluntary resignation from employment in the face of intolerable working conditions is a constructive discharge that qualifies as a tangible employment action); *see also* Kelly Collins Woodford & Harry A. Rissetto, *Tangible Employment Action: What Did the Supreme Court Really Mean in* Faragher *and* Ellerth*?*, 19 LAB. LAW. 63 (2003) (chronicling lower courts' struggles to determine what constitutes "tangible employment action" that would preclude application of the employer affirmative defense).

16. *See* 126 S. Ct. 2405, 2409 (2006) (regarding what constitutes illegal retaliation in violation of Title VII); *see also* John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539 (2007) (arguing that the *Burlington Northern* standard of "materially adverse" should apply to First Amendment retaliation claims of public employees); Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893 (2007)(examining the circuit split on the standard for discriminatory retaliation prior to *Burlington Northern* and the subsequent decision by the Supreme Court).

17. Justice Ginsburg's dissent in *Ledbetter* analyzes how incidents of discrimination often accrue over time before they are cognizable as material both in terms of the application of Title VII and also with regard to a victim's knowledge or understanding that the discrimination is even happening. *Ledbetter*, 127 S. Ct. at 2178-88. Materiality may become an issue when considering whether the suit may be filed in the first place. *See infra* Part V.

18. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 421 F.3d 1169 (11th Cir. 2005).

19. Ledbetter, 127 S. Ct. 2162.

20. *Id.*; Ledbetter v. Goodyear Tire & Rubber Co. Inc., 421 F.3d 1169 (11th Cir. 2005); Ledbetter v. Goodyear Tire & Rubber Company, Inc., No. 99-C-3137-E, 2003 WL 25507253 (N.D. Ala. Sept. 24, 2003).

21. Brief for Petitioner-Appellant, Ledbetter v. Goodyear Tire & Rubber Co., Inc., No. 05-1074, 2006 WL 2610990 (U.S. Sept. 7, 2006).

that occurred within the 180-day limitation specified by Title VII, or if a court considered facts and conduct that occurred prior to the 180-day period.

Section III of this Article precisely evaluates *Ledbetter* by exploring more deeply the Supreme Court's decision and expanding this Article's summary of the decision. Section IV investigates the circuit court cases that dealt previously with pay discrimination, including the *Ledbetter* decision in the Eleventh Circuit. Section V evaluates the Supreme Court's *Ledbetter* decision in terms of materiality of discriminatory conduct. Section V also explores the practical context for filing pay-related discrimination claims and provides a hypothetical example derived from the facts offered by *Ledbetter* to examine the results for similarly situated plaintiffs. Lastly, Section VI concludes the evaluation, discussing efforts by Congress to change the law governing discriminatory pay.

II. *LEDBETTER* IN THE CIRCUIT AND SUPREME COURTS: A BRIEF ANALYSIS OF THE DECISIONS AND AN EXAMINATION OF THE FACTS CONTEMPLATED BY THE COURTS

A. Summary of the Eleventh Circuit Court Decision: Ledbetter v. Good Year Tire & Rubber Co., Inc.[22]

Lilly Ledbetter worked for Goodyear Tire & Rubber Co., Inc. (Goodyear) for nineteen years before her retirement.[23] When she left, her salary was the lowest of her fellow managers.[24] When Ledbetter found out about her pay discrepancy, she filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging, among other theories of liability, discriminatory pay based on sex.[25]

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

23. *Id.* at 1173-75.

24. *Id.* at 1174.

25. *Id.* at 1175. Ledbetter found out about the pay discrepancy late in the game; Ledbetter did not know that she was paid less until an anonymous note reflecting this fact was given to her. Valerie Dowdle, *Ledbetter, Lilly v. Goodyear Tire & Rubber Co.*, MEDILL NEWS SERVICE, http://www.docket.medill.northwestern.edu/archives/003741.php (posted June 26, 2006). Justice Ginsburg also stated in her dissent that Goodyear's confidentiality policy prevented Ledbetter from an earlier discovery of the pay difference. *Ledbetter*, 127 S. Ct. at 2181-82. Although the district and circuit court decisions, as well as the decision reached by Supreme Court and the briefs to the Court, fail to mention the anonymous note, Ledbetter's access to the note was reported by the press. *See, e.g.*, Robert Barnes, *A Hearing Without Being Heard*, WASHINGTON POST, February 20, 2007, at A03. The note was also discussed in an interview with Lilly Ledbetter. *See* Interview with Lilly Ledbetter, YouTube.com, http://youtube.com/watch?v= YhSFttshcPk &mode=related&search= (last visited May 15, 2008) (The interview was posted in association with information made available by an organization,

Ledbetter filed suit, and the only issue to reach the district court concerned Ledbetter's pay discrepancy, claimed by Ledbetter to violate Title VII's prohibition against sex discrimination.[26] After hearing the evidence presented by Ledbetter and Goodyear, the jury awarded Ledbetter $223,776 in back pay, $4,662 for mental anguish, and $3,285,979 in punitive damages.[27] The court reduced the punitive damage award to $295,338 consistent with the statutory guidelines for punitive damages in claims establishing employment discrimination.[28] Goodyear appealed.[29]

The primary issue on appeal concerned whether Ledbetter had timely filed her Title VII claim.[30] Title VII requires claims of discrimination to be filed within 180 days of the employer's alleged illegal conduct.[31] When Ledbetter won in the district court, the jury verdict contemplated that each and every paycheck that she received was a discrete act, contaminated by discrimination, thus reviving the 180-day limitation with each paycheck.[32] The Eleventh Circuit took a different approach.

On appeal, the Eleventh Circuit dismissed the case, holding that Ledbetter's claim was largely, but not entirely, stale.[33] The Eleventh Circuit stated that the only potentially illegal act available for purposes of claiming sex discrimination was a performance review and its associated pay decision which took place in February 1998.[34] The 1998 review was Ledbetter's last performance appraisal prior to her retirement.[35] The Eleventh Circuit stated that Ledbetter could challenge the 1998 review as discriminatory because it fell within the 180-day limitation.[36] Goodyear agreed with this finding.[37] Goodyear argued, however, that because the 1998 review and pay decisions were not

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People for the American Way and an associated Web site, www.CorrectTheCourt.com). The district court proceeding also established that Goodyear's confidentiality policy generally prevented employees from knowing what their coworkers earned. Brief for the Petitioner, *supra* note 21, at 26.

26. *Ledbetter*, 421 F.3d at 1175.

27. *Id.* at 1175-76.

28. *Id.* at 1176; *see also* 42 U.S.C § 1981(a)(b)(3)(D) (2000) (limiting punitive damage awards to $300,000 in cases involving employers such as Goodyear). The remitted award also included attorney fees and costs. *Ledbetter*, 421 F.3d at 1176.

29. *Ledbetter*, 421 F.3d at 1176.

30. *Id.* at 1178.

31. *Id.*; *see also* 42 U.S.C. § 2000e-5(e)(1); *supra* note 3 (discussing deferral states).

32. *Ledbetter*, 421 F.3d at 1176, 1181.

33. *Id.* at 1189-90.

34. *Id.* at 1180.

35. *Id.* at 1175, 1180.

36. *Id.*

37. *Id.*

motivated by discrimination, Ledbetter failed to prove a Title VII violation.[38] The Eleventh Circuit sided with Goodyear, holding that the performance review and subsequent salary award[39] failed to pose employment practices that a reasonable jury could find discriminatory.[40]

B. Summary of the Supreme Court Decision: Ledbetter v. Goodyear Tire & Rubber Co., Inc.[41]

The Supreme Court affirmed the decision reached in the Eleventh Circuit, holding five to four[42] that the employee's claim was barred given the time limitations of Title VII.[43] The Court identified two analyses of the facts, as proposed by Ledbetter, which would have allowed Ledbetter's claim to be timely filed.[44] First, Ledbetter argued that each paycheck, consisting as it did of less pay than her male coworkers, constituted a violation of Title VII and kept open the window of opportunity for her to file.[45] Second, Ledbetter claimed that the employer's initial decision to pay her less than her male coworkers was the relevant act for purposes of triggering the statute, and because this decision "carried forward intentionally discriminatory disparities from prior years,"[46] the claim was valid through the discriminatory decision's current effects.[47]

Despite Ledbetter's assertions to the contrary, and even if the employer's prior actions were discriminatory and the impact was ongoing, the Court held, "current effects alone cannot breathe life into prior, uncharged discrimination . . . . Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."[48] Ledbetter did not do so, and the paychecks that were issued to her within the 180 days prior to the filing of her EEOC charge did not provide a basis for overcoming her failure to file.[49]

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38. *Id.* at 1177.

39. The performance review was the one aspect of the employer's action that did constitute a timely action in the Eleventh Circuit's opinion. *Id.* at 1189.

40. *Id.* at 1178, 1189.

41. *Ledbetter*, 127 S. Ct. 2162 (2007).

42. *Id.* at 2165. Justice Alito wrote the majority opinion, in which Justices Roberts, Scalia, Kennedy, and Thomas joined. *Id.* Justices Stevens, Souter, and Breyer joined Justice Ginsburg in her dissent. *Id.* at 2178.

43. *Id.*

44. *Id.* at 2169.

45. *Id.*

46. *See id.* (quoting Reply Brief for the Petitioner, at 20, Ledbetter v. Goodyear Tire & Rubber Company, No. 05-1074, 2006 WL 3336479 (U.S. Nov. 14, 2006).

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

48. *Id.*

49. *Id.*

C. The Facts Considered by the Eleventh Circuit and the Supreme Court and the Discrimination Alleged by Ledbetter

Ledbetter's lawsuit concerned whether discriminatory pay decisions might establish a claim, regardless of whether the decisions were made before or after the 180-day time period specified by Title VII, so long as the impact of the pay decisions were felt within the 180-day period.[50] Whether Ledbetter had a viable claim based upon actions beyond the 180-day window depended on the particular court's interpretation of the facts. Regarding the first alternative, if a court allowed Ledbetter's claim, it also considered facts stretching back throughout Ledbetter's nineteen-year tenure with Goodyear because Ledbetter asserted that the employer's actions could be felt long after the actions occurred.[51] Regarding the second alternative, if the claim was denied, only the discriminatory conduct falling within the 180-day period could be examined, regardless of the initial conduct's ongoing impact.[52] Whether a specific court allowed Ledbetter's claim depended on the facts considered by that court in reaching its decision – the facts shifted depending on each individual court and whether that court permitted Ledbetter's claim.[53] The shift did not contemplate the truth or falsity of the facts, but rather concerned the totality of the facts examined by the court. To understand the evidence presented in the case, the facts evaluated by the Eleventh Circuit, as well as the facts analyzed by the Supreme Court and the facts discussed in the Brief for the Petitioner before the Supreme Court, must be discussed.

The district court's slip opinion did not extensively discuss the facts that Ledbetter introduced at trial and were admitted into evidence – facts both heard and considered by the jury when it reached its verdict.[54] The Eleventh Circuit's review focused on an analysis of Ledbetter's 1998 performance ratings and did not generally reference Ledbetter's supervisor's statements and conduct that were made pre-1998, which Ledbetter alleged to have been discriminatory and the primary basis for her claim that her performance ratings, subsequent pay, and associated raises were based on discriminatory animus.[55] The Eleventh Circuit limited

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50. *Id.*

51. *See, e.g.*, *Ledbetter*, 2003 WL 25507253, at *3 (holding "because of the continuing nature of the disparate salary payments, Plaintiff is entitled to recover for the disparate salaries from March 25, 1996, until her retirement thirty-one months later.").

52. *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2178; *Ledbetter*, 421 F.3d at 1189.

53. *Ledbetter*, 2003 WL 25507253; *Ledbetter*, 421 F.3d 1169; *Ledbetter*, 127 S. Ct. 2162.

54. *See Ledbetter*, 2003 WL 25507253, at *2 ("Plaintiff's charge of discrimination relates back to March 25, 1998, when she completed the Equal Employment Opportunity Commission ("EEOC")'s questionnaire.").

55. *Ledbetter*, 421 F.3d at 1180-81. The performance reviews were used in

its discussion of the facts because, "[t]he rub is that Ledbetter did not want to stop at the 1998 raise decision . . . [t]his necessarily put at issue every salary-related decision made during Ledbetter's nineteen-year career."[56] Having reached its decision that the 1998 performance review constituted the only timely claim for employment discrimination, the court did not consider seriously the pre-1998 facts heard in the district court.[57]

When the Eleventh Circuit heard Goodyear's appeal, Goodyear acknowledged that Ledbetter was paid less for the same work performed by men in the same position, but Goodyear insisted that the discrepancy was due to Ledbetter's poor performance ratings.[58] The pay discrepancy principally was attributed to small, or nonexistent, raises awarded to Ledbetter during her tenure with Goodyear, and according to Goodyear was consistent with Ledbetter's poor ratings and not due to discriminatory conduct by Goodyear.[59] In particular, Goodyear argued that Ledbetter's poor 1998 performance review was free of discrimination and Ledbetter's low pay was attributable to that review, rather than any illegal discriminatory act.[60]

In response to Goodyear's account of her lower pay and poor ratings, Ledbetter countered in the district court with explanations of her own, which Ledbetter repeated in her Brief for the Petitioner to the Supreme Court.[61] First, Ledbetter presented evidence in the district court, including her own testimony and the testimony of two additional workers, "of widespread discrimination against female managers at the [Goodyear] plant."[62] Second, the district court heard testimony that "the performance rankings did not accurately reflect the true quality of [Ledbetter's] work . . . ."[63] As evidence of the questionable accuracy of the ratings, the district court heard the testimony of a coworker, and also examined notes from Ledbetter's supervisors, all of which asserted that Ledbetter's performance ratings were inaccurate.[64]

In this regard, Ledbetter further testified that her direct supervisor threatened to give Ledbetter "poor evaluations if she

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Goodyear's system of annual merit raises. The raises "were based primarily on each employee's performance in relation to that of other salaried employees in the business center during the previous year." *Id.* at 1172.

56. *Id.* at 1180.

57. *Id.* at 1184-85.

58. Brief for the Petitioner, *supra* note 21, at 4-5.

59. *Id.* at 5.

60. *Ledbetter*, 421 F.3d at 1186-87.

61. Brief for the Petitioner, *supra* note 21, at 5-8. One should keep in mind that the district court jury heard Ledbetter's explanations, found them credible, and held for Ledbetter. *Ledbetter*, 2003 WL 25507253, at *1-2.

62. *Id.* at 7.

63. Brief for the Petitioner, *supra* note 21, at 5.

64. *Id.*

did not succumb to his sexual advances."[65] Additionally, Ledbetter experienced harassment including statements by her direct supervisor that, "[y]ou're just a little female, and these big old guys, I mean, they're going to beat up on me and push me around and cuss me."[66] The harassment continued and Ledbetter testified that her evaluations worsened.[67] The direct supervisor's evaluations were the primary source of information for establishing Ledbetter's pay and for denial of Ledbetter's raises, eventually leading, according to Ledbetter, to her pay disparity.[68]

Third, Ledbetter testified in the district court regarding the "discriminatory animus by plant officials toward [Ledbetter]," including statements made by the Plant Manager that "the plant did not need women, that we didn't help it, we caused problems."[69] Ledbetter continued to testify that an employee in Goodyear's personnel office repeated the discriminatory sentiments when the employee told her, "I was a troublemaker . . . these men had good careers at Goodyear . . . and that Goodyear really didn't need troublemakers like me."[70]

Both the Eleventh Circuit's and the Supreme Court's opinions failed to include any detailed facts describing the acts that were alleged to have been discriminatory, because each court determined that a timely claim had been foreclosed, thus rendering treatment of those facts irrelevant to consideration of the case.[71] Instead, the Eleventh Circuit discussed the need to demonstrate a prima facie case of discrimination under Title VII,[72] which, the Eleventh Circuit acknowledged, Ledbetter may have established[73] but which Goodyear successfully rebutted.[74]

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65. *Id.* at 6. The supervisor was removed initially from involvement in Ledbetter's ratings, but was later reinstated to this position. *Id.* at 5-6. Ledbetter discussed the supervisor's conduct in an interview. Interview with Lilly Ledbetter, YouTube.com, http://youtube.com/watch?v=LkOFO1c2j3A&mode=related&search= (last visited May 15, 2008).

66. Brief for the Petitioner, *supra* note 21, at 6.

67. *Id.*

68. *Id.* Because neither the Eleventh Circuit nor the Supreme Court allowed evidence of the supervisor's acts to be used as evidence of Ledbetter's discrimination claim, the facts regarding the supervisor's conduct come largely come from the Petitioner's Brief to the Supreme Court, as she sought to have the Court include the supervisor's acts in making her case. *Id.* The facts that Ledbetter submitted were heard in the district court and were considered by the jury in reaching its verdict. *See id.* at 5-10.

69. Brief for the Petitioner, *supra* note 21, at 8.

70. *Id.*

71. *See generally, Ledbetter*, 127 S. Ct. 2162; *Ledbetter*, 421 F.3d 1169.

72. See the Eleventh Circuit's discussion of the requirements of the *prima facie* case for employment discrimination. *Ledbetter*, 421 F.3d 1169, 1185 (a female plaintiff must show that the she holds a position that is similar to that of a higher paid male employee).

73. *Id.* at 1186.

74. *Id.*

Similarly, the Supreme Court discussed generally the need to establish intent in Title VII cases and only referred to the discrimination to which Ledbetter was allegedly subjected in three sentences in a footnote:

> Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980's, and did so again in the mid-1990's when he falsified deficiency reports about her work. His misconduct, Ledbetter argued, was "a principal basis for [her] performance evaluation in 1997." Yet, by the time of trial, this supervisor had died and therefore could not testify.[75]

The Court's brief mention of the events underlying Ledbetter's claim was not made specifically to address the lower courts' analysis of the evidence, as might be true if a lower court applied, in the Supreme Court's opinion, an incorrect rule of law, or to evaluate the lower court's application of the law to the facts, as might be the case if the Court believed that the correct rule was applied but the lower court's analysis in light of the law was incorrect. Rather, the facts were discussed in the footnote when the Court wished to emphasize Ledbetter's current inability to raise a timely claim when the elements of a Title VII claim require proof of intent, such intent being more difficult to prove as the Court noted, than the establishment of an employment practice itself.[76]

By limiting the facts to those relating primarily to the 1998 performance review, both the Eleventh Circuit and the Supreme Court decimated Ledbetter's argument that a discriminatory pay decision that reached back, prior to the statutory 180-day limitation, may form the timely basis of a Title VII lawsuit, despite the claim made by Ledbetter that the impact of discriminatory pay decisions carried forward to future pay awards made within the 180-day period.[77]

Section III of this Article examines the decision of the Supreme Court and the Supreme Court cases on which the Court relied to support its decision in *Ledbetter*. Section IV investigates the decision of the Eleventh Circuit as well as the decisions

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75. *Ledbetter*, 127 S. Ct. at 2171 n.4.

76. *Id.* at 2171-72. Similarly, no mention is ever made of the anonymous note in the Eleventh Circuit or Supreme Court opinion. Ledbetter did not know, until after the 180-day deadline, that she may have been receiving lower pay than her coworkers. *See supra* note 25 and accompanying text.

77. For example, if Ledbetter's supervisor made sexually harassing statements in connection with her 1998 evaluation, Ledbetter would have been allowed to sue, and the supervisor's conduct would have been contemplated, in reaching the courts' decisions.

reached by other circuit courts that also have dealt with the issue of discriminatory pay.

III. THE SUPREME COURT: *LEDBETTER V. GOODYEAR TIRE & RUBBER COMPANY, INC.*[78]

As noted in Section II of this Article, the Supreme Court held that Ledbetter failed to timely file her claim of employment discrimination. Section III below discusses the Court's decision more extensively and examines the cases relied upon by both the Court and the parties to the dispute.

A. The Majority Opinion

Justice Alito introduced the majority opinion by stating:

> In light of disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases,[79] compare [*Ledbetter* in the Eleventh Circuit][80] with *Forsyth v. Federation Employment & Guidance Serv.*;[81] *Shea v. Rice*,[82] we granted certiorari . . . .[83]

While raising the issue of the split among the circuit courts, the majority then declined to discuss the circuit court cases that it

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78. *Ledbetter*, 127 S. Ct. 2162.

79. The case and its review proceeded without a claim made under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) (2000), present in the initial complaint. *Ledbetter*, 421 F.3d at 1175 n.7. When asked by Justice Ginsburg, "What happened to the Equal Pay Act claim?" Transcript of Oral Argument at *8-9, Ledbetter v. Goodyear Tire & Rubber Company, Inc., No. 05-1074, 2006 WL 3422212 (U.S. Nov. 27, 2006). Petitioner's counsel replied, "We should have objected to the failure to reinstate the Equal Pay Act claim. We didn't; we didn't think it was that important [at] the time because we still had the Title VII claim . . . . It's establishing the same case . . . in each instance. Although the jury has to find intentional discrimination in the Title VII case . . . in both cases, the jury always has to consider the basis of prior decisions that are the cause of the present disparity." *Id.* at *9; *see Ledbetter*, 127 S. Ct at 2176, 2176 n.9 (the majority's discussion of the EPA claim).

80. 421 F.3d 1169 (11th Cir. 2005).

81. 409 F.3d 565 (2d Cir. 2005).

82. 409 F.3d 448 (D.C. Cir. 2005).

83. *Ledbetter*, 127 S. Ct. at 2166 (internal citations omitted); *see also infra* Section IV (discussing *Forsyth* and *Shea*). The Court's description of the circuits' split fails to note that other circuit courts have considered the issue of discriminatory pay (or at least ongoing impact), and probably would have preserved Ledbetter's claim as timely. *See, e.g.*, Connolly v. McCall, 254 F.3d 36, 41 (2d Cir. 2001) (holding that a new § 1983 claim challenging a New York discriminatory pension policy accrued each time the plaintiff was forced to give up accrual of certain pension benefits in his new civil service position in order to retain his NYPD pension). The Court pointed only to two other circuits, in addition to the Eleventh, as illustrative of the circuits' disagreement, but again, the circuits uniformly, with the exception of the Eleventh, had announced law that likely would have allowed Ledbetter's claim. *See infra* Parts III, IV.

cited[84] – *Forsyth*[85] and *Shea*.[86] Instead, the Court recognized its prior decisions, specifically identifying *United Air Lines, Inc. v. Evans*, [87] *Delaware State College v. Ricks*,[88] *Lorance v. AT&T Technologies, Inc.*,[89] and *National Railroad Passenger Corporation v. Morgan*,[90] as necessarily compelling the dismissal of Ledbetter's claim.[91] The Court failed to analyze the various circuits' approaches in more contemporary decisions, particularly after its own decision in *Morgan*[92] (or, for that matter, the cases that preceded it). The salience of *Morgan* for the *Ledbetter* Court prompts a thorough discussion of *Morgan's* influence on the Court's holding.

1. National Railroad Passenger Corp. v. Morgan[93]

The Court's *Morgan* decision was particularly important to *Ledbetter* because *Morgan* concerned whether a claim for employment discrimination may be made when the conduct precipitating that claim occurred beyond Title VII's 180-day limitation.[94] Ledbetter argued that *Morgan* did not prevent her

84. *Ledbetter*, 127 S. Ct. at 2165-78.

85. Forsyth's claim was dismissed for failure to state an issue of triable fact, but the court evaluated the timeliness of Forsyth's claim in dicta. *Forsyth*, 409 F.3d at 566-67.

86. The D.C. Circuit found that each paycheck received within the Title VII statute of limitations period constituted a discrete discriminatory act and therefore the plaintiff's claim was not time-barred. *Shea*, 409 F.3d at 449. The dissent in *Ledbetter*, however, cited both *Forsyth* and *Shea* as examples of circuit court cases that were consistent with holding that Ledbetter's claim was timely. 127 S. Ct. at 2184 (Ginsburg, J., dissenting).

87. 431 U.S. 553 (1977); *see also Ledbetter*, 127 S. Ct. at 2167-68.

88. 449 U.S. 250 (1980); *see also Ledbetter*, 127 S. Ct. at 2168.

89. 490 U.S. 900 (1989); *see also Ledbetter,* 127 S. Ct. at 2168-69.

90. 536 U.S. 101 (2002); *see also Ledbetter*, 127 S. Ct. at 2169.

91. *Ledbetter*, 127 S. Ct. at 2169. The Court also cited to additional cases: *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam); *Ledbetter*, 127 S. Ct. at 2172-74, 2177; Machinists v. NLRB, 362 U.S. 411 (1960).

91. *Ledbetter*, 127 S. Ct. at 2172, 2177.

92. See *infra* Part IV (providing a detailed discussion of *Forsyth*, 409 F.3d 565 (2d Cir. 2005), *Shea*, 409 F.3d 448 (D.C. Cir. 2005), and other circuit court cases).

93. 536 U.S. 101 (2002).

94. *Ledbetter*, 127 S. Ct. at 2169. In *Morgan*, an African American employee claimed that he was subjected to a hostile work environment on the basis of race and that the employer was furthermore guilty of retaliatory acts in violation of Title VII. 536 U.S at 104. The issue before the Court was whether the employee could claim a violation of Title VII even if the discrimination occurred before the time limitation set by the statute. *Id.* at 105. The Court parsed discrete acts of discrimination from acts constituting a hostile work environment. *Id.* at 110-21. The *Morgan* Court held that, for a claim alleging a discrete discriminatory act, "such as termination, failure to promote, denial of transfer, or refusal to hire," the claim must be brought within Title VII's time limitation. *Id.* at 105, 114. For a claim alleging a

claim, but rather, that her situation was consistent with *Morgan*, "[r]ecurring violations of Title VII give rise to recurring claims, each with its own limitations period."[95]

Contrary to Ledbetter's assertion, the Court noted in *Ledbetter* that, "[i]n *Morgan*, we explained that the statutory term "employment practice" generally refers to "a discrete act or single 'occurrence' "that takes place at a particular point in time."[96] *Morgan* distinguished claims for discrete acts of discrimination from claims of a hostile environment.[97] The Court described Ledbetter's pay and Goodyear's associated pay-setting decisions as discrete actions.[98] Because the period for filing charges under Title VII generally begins when the act occurs, the Court understood its prior cases (and its decision not to treat pay discrimination differently from other forms of discrete discriminatory acts) as compelling its conclusion that Ledbetter's claim was not filed on time:[99] "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[100]

According to the *Morgan* Court, the timing of the employer's allegedly discriminatory acts was most important for purposes of determining the employee's ability to sue and recover under Title VII.[101] Morgan asserted "'he was consistently harassed and disciplined more harshly than other employees because of his

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hostile work environment, "consideration of the entire scope of the hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.*

See also Benjamin J. Morris, *A Door Left Open?* Nat'l R.R. Passenger Corp. v. Morgan *and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W. L. REV. 497 (2007) (detailing the post-*Morgan* circuit court split over whether or not the holding in *Morgan* applies to continuing discrete acts of discrimination that occur after the initial filing of a complaint).

95. Brief for the Petitioner, *supra* note 21, at 17.

96. *Ledbetter*, 127 S. Ct. at 2169 (citing *Morgan*, 536 at 110-11).

97. 536 U.S. at 122.

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

99. *Id.* at 2169.

100. *Id.* The Court went on to note, "[b]ut of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. *Id.* The Court cited to *Morgan* for the ability to file based on fresh violations. *Id.*; *Morgan,* 536 U.S. at 113; *see also Ledbetter*, 127 S. Ct. at 2174 (citing *Lorance*, 490 U.S. at 911) (discussing a facially neutral employment structure in *Bazemore*).

101. 536 U.S at 110-11.

race.'"[102] The acts of which Morgan complained occurred both inside and outside the time limitations imposed by Title VII.[103] The *Morgan* Court looked to cases in the Seventh,[104] Ninth,[105] and Fifth[106] Circuits. The Ninth Circuit, where *Morgan* originated, held that courts may "consider conduct that would ordinarily be time barred 'as long as the untimely incidents represent an ongoing unlawful employment practice.'"[107] The *Morgan* Court noted that the Ninth Circuit, thereby, adopted "the continuing violation doctrine."[108]

In concert with its analysis of prior cases involving discriminatory pay, the *Morgan* Court noted its decision in *Bazemore* examining a discriminatory salary structure that, "although the salary discrimination began prior to the date that the act was actionable under Title VII, '[e]ach week's paycheck that deliver[ed] less to a black than to a similarly situated white is a wrong actionable under Title VII . . . .'"[109] Ultimately, the

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102. *Id.* at 106 (quoting Petition for Writ of Certiorari, at 25a n.1).

103. *Id.*

104. *Id.* (citing Galloway v. General Motors Service Parts Operation, 78 F.3d 1164, 1167 (7th Cir. 1996)). The court stated:

> [P]laintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

Id. at 1167.

105. *See Morgan*, 536 U.S. at 106-07 (citing Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1014 (9th Cir. 2000) (the Ninth Circuit's resolution of *Morgan*) (quoting Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999)).

106. *See Morgan*, 536 U.S. at 107 n.3 (quoting Berry v. Bd. of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983)):

> The Fifth Circuit employs a multifactor test, which, among other things, takes into account: (1) whether the alleged acts involve the same type of discrimination; (2) whether the incidents are recurring or independent and isolated events; and (3) whether the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation.

Id.

107. 536 U.S at 107 (citing Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1014 (9th Cir. 2000), (the Ninth Circuit's resolution of *Morgan*) (quoting Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999) (internal citations omitted)).

108. 536 U.S at 107.

109. *Id.* at 112 (quoting *Bazemore*, 478 U.S. at 395). The Court also cited to the following cases to demonstrate that discrete acts that fall outside the statutory time period will bar a Title VII claim and each discrete act starts a new statutory period to file a complaint: *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976) (holding that the date of a "tentative" discharge pending arbitration constituted the discrete discriminatory act); *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (per curiam) (holding that even though salary discrimination began prior to the statutory period, the delivery

Morgan Court concluded that only discriminatory conduct that occurs within the time limitations may support a claim that alleges a prohibited discrete act, stating that, "Each discrete discriminatory act starts a new clock for filing charges alleging that act."[110]

Furthermore, for a hostile environment action, the series of conduct contemplates a single act for purposes of a hostile environment claim,[111] "In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."[112] Because Morgan's charge involved a series of discriminatory acts, including racial jokes, racially derogatory acts and racial epithets,[113] the series indicated a hostile work environment that could support a claim, particularly because at least some of the acts occurred within the time limitations.[114]

One of the most relevant aspects of the *Morgan* Court's decision for purposes of the Court's later consideration in *Ledbetter* came from the *Morgan* Court's statement that: "The existence of past acts and the employer's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing these acts are themselves timely filed."[115] The prior acts, moreover, may be evidentiary "in support of a timely claim."[116]

The *Ledbetter* Court's disinclination to identify the contrary view rested primarily on the Court's opinion that *Morgan* (as well

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of each paycheck that was representative of the discriminatory salary structure constituted an actionable discrete act); *United Airlines v. Evans*, 431 U.S. 553, 558 (1977) (holding that an employee's discharge was the discrete act that began the statute of limitations and the employee was precluded from asserting a continuing violation of Title VII for failure to give her credit for her prior service upon rehire because "United was entitled to treat [Evans's resignation] as lawful after [she] failed to file a charge of discrimination within the charge filing period then allowed by statute."); *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) (holding that an academic institution's failure to grant tenure to a professor based upon national origin could constitute a discrete discriminatory act but that the offer of a "terminal" contract to teach for another year did not breath life into the cause of action as a "continuing violation" that became actionable upon termination). *Morgan*, 536 U.S. at 112-13.

110. 536 U.S at 113.
111. *Id.* at 118.
112. *Id.*
113. *Id.* at 120.
114. *Id.* at 121.
115. *Id.* at 113.
116. *Id.*

as *Lorance*, *Evans* and *Ricks*[117]) eliminated the continuing violations doctrine.[118] As stated in *Morgan*:[119]

> The [Ninth Circuit] Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability.[120] With respect to this holding, therefore, we reverse.[121]

The Court in *Morgan* held that a Title VII action may classify an employer's illegal conduct as either a discrete act of discriminatory treatment or an action claiming a hostile environment, but, even if continuing impact is shown, the claim must fall into one of these two categories:[122]

> There is simply no indication that the term "practice" converts related discrete acts into a single unlawful practice for the purposes of timely filing . . . . We have repeatedly interpreted the term "practice" to apply to a discrete act or single "occurrence," even when it has a connection to other acts.[123]

Despite *Morgan's* treatment of the continuing violations doctrine, several post-*Morgan* opinions delivered by the circuit courts identify *Morgan* as failing to eliminate the spirit of the continuing violation doctrine, even if *Morgan* eliminated the doctrine itself; those circuits held that discriminatory acts involving pay are, if not continuing violations, representative of repeated discrete employment decisions that pose a fresh discriminatory violation of Title VII with each paycheck.[124]

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117. *Lorance*, 490 U.S. at 907-08 (citing Delaware State College v. Ricks, 449 U.S. 250 (1980) and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)) (the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt); *see also infra* Parts III.2, III.3.

118. 127 S. Ct. at 2167-70.

119. 536 U.S. at 112.

120. *Morgan*, 232 F.3d at 1015.

121. *Morgan*, 536 U.S. at 114 (internal citations omitted).

122. *Id.* at 111.

123. *Id.*

124. For example, the Second Circuit in *Forsyth* stated:

> [E]ach repetition of wrongful conduct may, as *Morgan* taught, be the basis of a separate cause of action for which suit must be brought within the limitations period beginning with its occurrence. A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period.

409 F.3d at 573 (quoting *Bazemore*, 478 U.S. at 396 n. 6); *see also* Cardenas v. Massey, 269 F.3d 251, 257 (3d Cir. 2001); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 347-49 (4th Cir. 1994); Hildebrandt v. Ill. Dep't of Natural

Ledbetter similarly, and unsuccessfully, argued that *Morgan* required the Court to find that each paycheck was a discrete act, each one a repeated discriminatory act, and each one established a new claim.[125]

As noted previously, while *Morgan* was important to the Court's *Ledbetter* decision, the *Ledbetter* Court also cited *Evans*,[126] *Ricks*[127] and *Lorance*[128] as establishing a line of cases that demonstrated Ledbetter incorrectly argued that the Court should consider the employer's actions taken prior to the 180-day period.[129] These three cases and their place in the Court's resolution of *Ledbetter* will now be discussed.

2. United Air Lines, Inc. v. Evans[130]

In *Evans*, an employment policy implemented by United Air Lines (United) mandated that all flight attendants be unmarried.[131] Evans, newly married, was forced to resign under the policy.[132] United violated Title VII by maintaining the employment policy,[133] United changed it, and eventually re-hired Evans.[134] Evans's present claim against United, however, was based on United's failure to retroactively grant her credit under its seniority system for the years that Evans had previously been employed under the now-defunct policy.[135] The *Evans* Court held that, while Evans's claim against United for the unlawful seniority system itself was time barred, the circumstances of her prior discriminatory treatment could "constitute relevant background evidence in a proceeding in which the status of a current practice

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Res., 347 F.3d 1014, 1025-29 (7th Cir. 2003); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 167-68 (8th Cir. 1995) (en banc); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1399-1400 (9th Cir. 1986); Goodwin v. General Motors Corp., 275 F.3d 1005, 1009-10 (10th Cir. 2002); Anderson v. Zubieta, 180 F.3d 329, 335 (D.C. Cir. 1999); Shea v. Rice, 409 F.3d 448, 452-53 (D.C. Cir. 2005).

125. Brief for the Petitioner, supra note 21, at 13, 15-17, n.9. The dissent would classify discriminatory pay as a unique form of discrimination, akin to a hostile environment, precisely because of pay's repeated impact, as is the case in a hostile environment where repeated acts pose a continuing violation despite the fact that some of the acts may fall outside of the 180-day period. *Ledbetter*, 127 S. Ct. at 2181.

126. 431 U.S. 553 (1977); *see also Ledbetter*, 127 S. Ct. at 2167-68, 2174.

127. 449 U.S. 250 (1980); *see also Ledbetter*, 127 S. Ct. at 2168.

128. 490 U.S. 900 (1989); *see also Ledbetter*, 127 S. Ct. at 2168-69.

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

130. 431 U.S. 553 (1977).

131. *Id.* at 554.

132. *Id.*

133. *Id.* at 554; Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1972).

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

135. *Id.* at 555-56.

is at issue . . . ."[136] The *Evans* Court stated that Evans's employer was not actively discriminating against her at the time of her lawsuit.[137] Evans endured no present violation, since United's policy had been changed and its seniority system was currently valid.[138] Drawing the distinction among three alternatives, namely: (1) a current violation; (2) a past violation with current consequences; and (3) a remedied, and merely past illegal act, the Court stated that, "a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer."[139]

Returning to the *Ledbetter* decision, the Court noted that in *Evans*, "[w]e concluded that the continuing effects of the precharging period discrimination did not make out a present violation."[140] Ledbetter's argument to the contrary was, therefore, unsuccessful.[141]

3. Delaware State College v. Ricks[142]

Important as well to *Ledbetter* was the Court's holding in *Ricks*.[143] The employee in *Ricks*, a Liberian, claimed a violation of Title VII for national origin discrimination when his employer denied him tenure in the college where he worked.[144] The district court dismissed the action as time-barred, stating in its opinion that the effective period for purposes of the suit was the time between the denial of tenure and the filing of the action by the employee.[145] Because the suit was filed after Title VII's 180-day

136. *Id.* at 558.
137. *Id.*
138. *Id.* at 559-60.
139. *Id.* at 560.
140. *Ledbetter*, 127 S. Ct. at 2168.
141. *Id.* at 2174. *But see Bazemore*, 478 U.S. at 386-88 (holding that salary disparities between African American and white public employees that predated the 1972 amendments to Title VII, which made the law applicable to public employers, could be considered in determining whether or not there was current ongoing discrimination). *See also* Hazelwood School District v. United States, 433 U.S. 299, 301 (1977) (a situation factually similar to *Bazemore*, in which public school district employees claimed pay discrimination that occurred both prior and subsequent to the 1972 amendment of Title VII). Under *Hazelwood*, if the pay rate was discriminatory before and after 1972, the prior discrimination could provide evidence of the employer's discriminatory pattern and practice, even if the pre-1972 conduct was not compensable. 433 U.S. at 309-10 n.15. The Court remanded the matter for a determination of whether or not Hazelwood engaged in a pattern of employment discrimination after the Title VII amendments. *Id.*
142. 449 U.S. 250 (1980).
143. 127 S. Ct. at 2168.
144. 449 U.S. at 252, 255.
145. *Id.* at 254-55.

time limitations had expired, the action was stale.[146] The Third Circuit reversed, holding that the dates relevant to the time limitation were the point at which the employee's one-year employment extension terminated (the extension having been granted during Ricks's appeal of the tenure decision) and the date of the claim, rather than the decision to deny tenure as the point of origin.[147] According to the Third Circuit, because the final tenure decision might be appealed successfully in situations such as that presented by *Ricks*, the plaintiff should not be expected to sue until he or she is ultimately fired.[148]

The Supreme Court reversed, stating:

> In sum, the only alleged discrimination occurred – and the filing limitations period therefore commenced – at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position - did not occur until later.[149]

The *Ricks* Court sought to balance the ability of aggrieved employees to take advantage of the protections afforded by Title VII with the statutory time limits incorporated into the statute.[150] "'[T]he period allowed for instituting the suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'"[151] Despite the argument that the "pendency of the grievance" should toll the statute of limitations[152] (during which the employee initially complained of his tenure decision), the employee was time barred from filing a complaint, and the *Ricks* Court held that the tenure decision itself was the relevant unlawful employment practice under Title VII – "limitations periods normally commence when the employer's decision is made."[153] The *Ledbetter* Court held that Ledbetter's failure to file within the 180-day window, like *Ricks*, prevented Ledbetter as well from filing a timely action.[154]

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146. *Id.* at 255.
147. *Id.*
148. *Id.* at 255-56.
149. *Id.* at 258.
150. *Id.* at 259.
151. *Id.* at 259-60 (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463-64 (1975)).
152. *Id.* at 261.
153. *Id.* (quoting Elec. Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-35 (1976)).
154. 127 S. Ct. at 2168. One should note that, while the defendant's application of its seniority system in *Morgan* to some extent implied an ongoing effect on Morgan's current employment, the denial of tenure in *Ricks* was a discrete event akin to termination.

4. Lorance v. AT&T Technologies, Inc., et al.[155]

Similar in some respects to *Evans*, *Lorance* concerned a seniority system challenged by former employees who claimed unlawful discrimination in violation of Title VII.[156] The seniority system itself was not challenged; the suit concerned the application of the system and its alleged manipulation by the employer, which the Court described as an alteration of contractual rights.[157]

The *Lorance* Court stated that the "allegedly discriminatory *adoption* [of a seniority system that is nondiscriminatory in both form and application]" is the triggering event for the statute of limitations period under Title VII,[158] and each application is nondiscriminatory.[159] The *Lorance* Court drew attention to *Ricks* and *Evans*[160] as establishing the Court's rejection of the continuing violation doctrine: "[w]e recognize, of course, that it is *possible* . . . to regard the employer as having been guilty of a continuing violation which 'occurred,' (for purposes of Title VII) not only when the contractual right was eliminated but also when each of the concrete effects of that elimination was felt."[161] The *Lorance* Court held, however, that, consistent with *Evans* and *Ricks* (as well as with a third case, *Machinists v. NLRB*[162]), the present effect of a decision, even if it was discriminatory, cannot support a claim of a continuing violation if the decision itself occurred outside the time limitations.[163] Regardless of the past act's present effect, the claim was time-barred;[164] at some point, Title VII claims become stale and the law's interest in protecting only valid claims will be, thereby, protected.[165]

The *Lorance* dissent raised objections to the decision similar to those of the dissent in *Evans*, namely, that the present effect of a discriminatory act may give rise to a Title VII claim, both when an employer violates Title VII and when the employer's actions pose a continuing violation:[166] "Under [the] continuing violation theory, each time a discriminatory seniority system is applied, like

155. 490 U.S. 900.
156. *Id.* at 901-03.
157. *Id.* at 905.
158. *Id.* at 911.
159. *Id.* at 912.
160. *Id.* at 906-08.
161. *Id.* at 906 (emphasis added).
162. *See* 362 U.S. 411, 417 (dealing with the timeliness of an unfair labor practice charge under the National Labor Relations Act and determining that the limitations period runs from the time a system is adopted); *see also infra* Part III.5.
163. 490 U.S. at 906-08.
164. *Id.* at 906.
165. *Id.* at 911.
166. *Id.* at 914.

each time a discriminatory salary structure is applied, an independent 'unlawful employment practice' under [Title VII] takes place, triggering the limitations period anew."[167]

The *Lorance* dissent expressed concern for future plaintiffs who attempt to challenge seniority systems as discriminatory, stating, that "employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."[168] Partly in response to the issues raised by the dissent, Congress amended Title VII in 1991 regarding discriminatory seniority systems.[169]

The majority in *Ledbetter* acknowledged that Congress abrogated the *Lorance* holding through the 1991 amendment of Title VII in 42 U.S.C. § 2000-5(e)(2), particularly through the amendment's treatment of seniority systems.[170] According to the majority, because *Lorance* relied on *Evans* and *Ricks*, the *Evans* and *Ricks* holdings standing together, without *Lorance*, justified the Court's ruling.[171] The majority also noted that Congress let the holdings in *Evans* and *Ricks* stand, meaning, in the majority's opinion, that the rule of law announced by *Evans* and *Ricks* is still relevant.[172]

The *Ledbetter* Court identified the application of the seniority system in *Evans*, the tenure decision in *Ricks*, and the calculation of seniority in *Lorance* as discrete discriminatory acts that triggered the time limitations of Title VII.[173] The *Ledbetter* Court then proceeded to analyze how its holding in *Bazemore* is entirely consistent with the *Ledbetter* holding even though Ledbetter relied upon it to establish the fact that each paycheck she received constituted a discrete discriminatory act that refreshed the Title VII statute of limitations.[174]

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167. *Id.* at 915.

168. *Id.* at 919. The dissent pointed to several hurdles, including its statement that, "The majority today continues the process of immunizing seniority systems from the requirements of Title VII . . . employees must now anticipate and initiate suits to prevent future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be." *Id.* (Marshall, J., dissenting).

169. *See* 42 U.S.C. § 2000-5(e)(2).

170. 127 S. Ct. at 2169 n.2.

171. *Id.*

172. *Id.*

173. *Id.* at 2169.

174. *Id.* at 2172-74.

5. Bazemore v. Friday[175]

Decided in 1986, *Bazemore v. Friday*[176] concerned claims of employment discrimination stretching back to 1971.[177] The issues posed by the case included pay disparities between white and African American employees of the North Carolina Agricultural Extension Service (the "Extension Service").[178] The *Bazemore* Court held that, while Title VII did not cover public employers until 1972,[179] the employees filed valid claims of discrimination because:

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.[180]

The employees could not recover damages for discriminatory conduct that occurred prior to 1972, but the employees could recover damages for the discriminatory conduct that occurred subsequent to Title VII's extension to public employees in 1972.[181]

In *Bazemore*, the Court made the statement that: "[e]ach 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."[182] Ledbetter relied upon this statement in her argument,[183]

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175. 478 U.S. 385 (1986) (per curiam).

176. Id.

177. *Id.* at 391.

178. *Id.* at 394. In *Bazemore*, previous to the 1972 amendments to Title VII, the North Carolina Extension Service had openly operated under a two-tier employment system, and the plaintiffs argued that the old, two-tier system currently impacted their wage:

> Prior to August 1, 1965, the Extension Service was divided into two branches: a white branch and a "Negro branch." Only the "Negro branch" had a formal racial designation. The "Negro branch" was composed entirely of black personnel and served only black farmers, homemakers, and youth. The white branch employed no blacks, but did on occasion serve blacks. On August 1, 1965, in response to the Civil Rights Act of 1964, the State merged the two branches of the Extension Service into a single organization.

Id. at 390-91. The change was made in 1965 despite the fact that public employers were not covered by Title VII until 1972. *Id.* at 391.

179. *Id.* at 394. Title VII prohibits employment discrimination by private employers and was extended to public employers through the Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective 1972. 42 U.S.C. § 2000(e)(a),(b),(f),(h).

180. 478 U.S. at 395. The *Bazemore* Court also noted, "the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII." *Id.*

181. *Id.*

182. *Id.* at 396.

but the *Ledbetter* Court ultimately held that the argument was inapplicable.[184] (The 11th Circuit did as well[185]). The *Ledbetter* Court distinguished cases such as *Bazemore* from cases that presented facts that foreclose a timely claim, such as Ledbetter's.[186] The *Ledbetter* Court's analysis of *Bazemore* characterized the *Bazemore* pay structure as discriminatory.[187] The pay structure in Ledbetter's case, however, was described as: "facially nondiscriminatory and neutrally applied. The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period."[188] Because the pay structure was not discriminatory, and because Ledbetter's alleged discrimination flowed from the actions of her employer's agents, namely, the actions of Ledbetter's supervisor, Ledbetter could not rely on *Bazemore*.[189]

The *Ledbetter* Court, thereby, dismissed Ledbetter's argument that the Court should find that she endured discriminatory pay resulting from prior, but ongoing, discrete discriminatory acts with a present effect.[190] Instead, the Court adopted the position that disparate pay may be accomplished through the employer's past discriminatory and discrete acts, about which acts the employee must timely complain or the employee will lose access to the courts.[191] The Court declined to adopt a rule articulating that pay claims are somehow special and should be analogized to hostile environment claims.[192]

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183. *See* Brief for the Petitioner, *supra* note 21, at 19-22.

184. *Ledbetter*, 127 S. Ct. at 2172-73.

185. *Ledbetter*, 421 F.3d at 1184.

186. *Ledbetter*, 127 S. Ct. at 2174.

187. *Id.*

188. *Id.* (quoting *Lorance*, 490 U.S. at 911) (internal quotations omitted). *Bazemore* involved a pay rate premised on the division of employees between a "white" and a "negro" employment structure. 478 U.S. at 390-91. The distinction between a facially neutral pay system and a pay system that is facially discriminatory raises the issue of whether an employer that employs discriminatory agents, for example, agents who pay workers less due to the workers' sex, are somehow appreciably different than employers who institute discriminatory pay schemes that are not identifiably the work of a particular agent, but are nonetheless the product of an illegal employment act. This also raises the issue of whether any employer would be so ruthless or so unintelligent as to use a facially discriminatory pay system.

189. 127 S. Ct. at 2174. *But see* Faragher v. Boca Raton, 524 U.S. 775 (1998), Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Pa. State Police v. Suders, 542 U.S. 129 (2004) (each discussing the employer's liability for discriminatory conduct by the employer's supervisor, an agent of the employer).

190. 127 S. Ct. at 2174.

191. *Id.*

192. *Id.* at 2175-76.

Before moving to a discussion of the dissent, one additional case, identified by the *Ledbetter* Court, should be addressed: *Machinists v. NLRB*.[193]

6. Local Lodge No. 1424, etc., et al. v. National Labor Relations Board (Machinists)[194]

In *Machinists*, several unions were involved in actions under the National Labor Relations Act ("NLRA").[195] The claims pertained to a variety of issues, including the right to organize and the administration of collective bargaining agreements.[196] Previous proceedings had held that the actions were timely filed under Section 10(b) of the NLRA,[197] which, like Title VII, provided a 180-day window for filing complaints based on an unfair labor practice.[198]

More specifically in *Machinists*, a union security clause, contained in the relevant collective bargaining agreement, required all employees to join the union once they were hired.[199] Union security clauses are enforceable when the union represents a majority of the workers covered by the collective bargaining agreement.[200] If the union does not represent a majority of workers, the union security clause is an unfair labor practice and is unlawful under the NLRA.[201] The National Labor Relations Board (the "Board") filed charges for violation of the NLRA, and the claim in *Machinists* ultimately concerned whether inclusion of the clause was a present violation of the NLRA when the union did not represent a majority of the workers when the clause was

193. *Id.* at 2177.
194. 362 U.S. 411 (1960).
195. *Id.* at 411-13; 29 U.S.C. § 157 (2000) (Section 7 of the NLRA); 29 U.S.C. § 158 (2000) (Section 8 of the NLRA).
196. *Machinists*, 362 U.S. at 412.
197. *Id.* at 414.
198. *Id.* at 412; 29 U.S.C. § 160(b) (2000).
199. 362 U.S. at 412.
200. *Id.* at 413-14.
201. *Id.* Although the union subsequently did represent a majority of the employer's workforce, the NLRB characterized the original inclusion in the security clause as an ongoing violation, despite the change in status to majority representation. *Id.* at 415. At the time of the Court's consideration of the case, the clause was not invalid. The dissent in the Board's prior ruling 119 NLRB 502 (1957) stated:

> the circumstances which cause the appeal to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis.

362 U.S. at 423; 119 NLRB at 516.

originally included, but the union subsequently did represent a majority of the workers.[202]

The Board had held that the claim was not time-barred; the clause represented a continuing violation, owing to the collective bargaining agreement's ongoing enforcement.[203] On appeal, the D.C. Circuit affirmed that the suit was timely.[204] In the Supreme Court, the unions argued that the inclusion of the clause was a discrete unfair labor practice, and, since the security clause was now lawfully contained within the current collective bargaining agreement, there was no present violation.[205]

The *Machinists* Court parsed two types of claims under the relevant time limitations found in the NLRA:

> The first is one, where occurrences within the six-month limitations period in and of themselves may constitute as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose [the NLRA] ordinarily does not bar such evidentiary use of anterior events.
>
> The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which is otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.[206]

The *Machinists* Court noted the importance of considering probative evidence that may have occurred outside the six-month period to determine the validity of conduct within the statute of limitations even if standing alone it could not form the basis of a claim.[207] In *Machinists*, the principle did not apply, because the entire basis for the unfair labor claim was the lack of majority status at the time the collective bargaining agreement was signed, and this action was beyond the limitations period.[208] Notwithstanding the Board's characterization of invalid security clauses as ongoing violations, the current workforce was covered validly by a collective bargaining agreement containing a security

202. *Id.* at 415-16.
203. *Id.* at 414.
204. *Id.* at 414; 264 F.2d 575 (D.C. Cir. 1959).
205. 362 U.S. at 415.
206. *Id.* at 416-17.
207. *Id.* at 417.
208. *Id.*

clause, and the union indeed currently represented a majority of the workers.[209]

The *Machinists* Court declined to characterize the presence of the security clause as a continuing violation: "In any real sense . . . the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing *violation* solely by reason of circumstances existing only at the date of execution."[210] The Board previously held:

> The maintaining of such an agreement in force is a continuing violation of the Act, and the 'majority status' of the union at any subsequent date-including the date of execution of any renewals of the original agreement-is immaterial, for it is presumed that subsequent acquisition of a majority status is attributable to the earlier unlawful assistance received from the original agreement.[211]

The *Machinists* Court disagreed and reversed the Board's decision, holding that the unfair labor charges regarding the union security clause were time barred.[212]

Referencing its *Machinists* holding, the *Ledbetter* Court repeated the language in *Machinists*, stating:

> where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice[,]the use of the earlier unfair labor practice [merely] serves to cloak with illegality that which was otherwise lawful." This interpretation corresponds closely to our analysis in *Evans* and *Ricks* and supports our holding in the present case.[213]

The Court had thus completed its analysis of the key cases that the majority identified as a bar to Lilly Ledbetter's filing. If the Court could distinguish *Morgan* and *Bazemore,* and it would not permit a timely charge in *Evans, Ricks, Lorance* or *Machinists,* Ledbetter could not sue.[214]

7. The Court's Response to Two Additional Aspects of the Case

Completing this review's examination of the majority opinion, the *Ledbetter* Court wrestled with two additional issues in the case. First, the *Ledbetter* Court analyzed statutes of limitations in general, stating that they "represent a pervasive legislative

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209. *Id.* at 412, 423.

210. *See id.* at 423 (agreeing with the Board's dissent (119 NLRB 502, 516 (1957))). The application of the contract was legal, since the union then represented a majority of the workers. *Id.* at 414.

211. *Id.*

212. *Id.* at 414-15.

213. *Ledbetter*, 127 S. Ct. at 2177 (quoting 362 U.S. 411, 416-17).

214. None of the decisions that the majority cited as controlling, *Morgan, Evans, Ricks, Lorance,* and *Machinists,* specifically dealt with discriminatory pay. *Bazemore* did address pay and allowed the plaintiffs' claims.

judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'"[215] Specifically addressing the time limitations in Title VII, the Court quoted *Ricks,* stating that the EEOC deadline "protects employers from the burden of defending claims arising from employment decisions that are long past[,]"[216] and "by choosing obviously short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination."[217]

Second, the Court refused to consider the policy reasons offered by Ledbetter that might allow discriminatory pay to be treated differently than other types of discriminatory conduct, such as a termination, particularly in regard to the time requirements applicable to various forms of discrimination.[218] The *Ledbetter* dissent argued that discriminatory pay is different from discrete discriminatory acts, because, by its nature, pay is ongoing, so that discriminatory pay claims resemble the facts implicated in suits that allege a hostile work environment. The dissent indicated that the time requirements should be different for different types of claims;[219] pay discrepancies are cumulative, as are the discriminatory actions endured in a hostile environment, and, furthermore, pay discrepancies may be more difficult to detect than a discrete act, as small differences only become detectable over time.[220] To the extent, in the majority's analysis, that precedent deviated from the Court's treatment of pay as a discrete act, the Court refused to agree.

B. Justice Ginsburg's Dissent

Justice Ginsburg began her dissent by noting the difference between a claim generally involving discriminatory employment actions and a claim alleging discriminatory pay:

> 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. It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely

215. 127 S. Ct. at 2170 (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979) (some internal quotations omitted)).

216. *Id.* (quoting *Ricks*, 449 U.S. at 256-57).

217. *Id.* (quoting Mohasco Corp v. Silver, 447 U.S. 807, 825 (1980)).

218. *Id.* The *Morgan* Court had previously distinguished different time limitations under Title VII for allegations of discrete discriminatory acts and for a hostile environment. 536 U.S. at 118.

219. *Ledbetter*, 127 S. Ct. at 2181.

220. *Id.* at 2182.

> to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.[221]

According to Justice Ginsburg, the manner in which the majority treated Ledbetter's claim characterizes actionable discrimination in compensation as actions that are "discrete from prior and subsequent decisions"[222] rather than the alternate view that would count "both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices."[223] Contrary to the majority's analysis, and because "[i]t is not unusual . . . for management to decline to publish employee pay levels, or for employers to keep private their own salaries," employees in circumstances like Ledbetter's cannot file a claim about a discriminatory act about which, for perhaps years, they did not know.[224] Goodyear's confidentiality policy regarding pay ensured that workers were generally unaware of their coworkers' compensation, and employees may only become aware after the 180-day limitation has expired.[225]

The dissent would classify discriminatory pay as a form of discrimination that more closely resembled a hostile environment case, with a harm (in this case the discriminatory pay) that was ongoing in nature, rather than a discrete act of discrimination.[226] The claim "rested not on one particular paycheck, but on the 'cumulative effect of individual acts.'"[227] As Justice Ginsburg stated:

> The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect

221. *Id.* at 2178-79 (quoting *Morgan*, 536 U.S. at 114).
222. *Ledbetter*, 127 S. Ct. at 2179.
223. *Id.*
224. *Id.* at 2182. In footnote three of the dissent, Ginsburg quotes Bierman and Gely's review: "one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with coworkers; only one in ten employers have adopted a pay openness policy." 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, 168, 171 (2004).
225. *Ledbetter*, 127 S. Ct. at 2181-82; *see also supra* note 25 (concerning the anonymous note that Ledbetter received, through which she became aware of the pay discrepancy).
226. *Ledbetter*, 127 S. Ct. at 2181.
227. *Id.* (quoting *Morgan*, 536 U.S. at 115).

> discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity.[228]

Justice Ginsburg argued that Ledbetter's claim should be analyzed, therefore, under the approach used in cases alleging a hostile work environment.[229]

Justice Ginsburg was also puzzled by the Court's use of *Lorance* in its analysis: "[t]he Court's extensive reliance on *Lorance* . . . is perplexing for that decision is no longer effective: In the 1991 Civil Rights Act, Congress superseded *Lorance*'s holding."[230] Justice Ginsburg cited to the Senate Report that accompanied the precursor to the 1991 amendment.[231] The Senate Report stated:

> Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . . for example . . . the Supreme Court properly held that each application of the racially motivated salary structure, i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2)[232] generalizes the result correctly reached in *Bazemore*.[233]

Justice Ginsburg stated that no Court had cited *Lorance* in support of any decision since the 1991 amendment.[234]

In addition, Justice Ginsburg stated that the Courts of Appeal have "overwhelmingly judged as a present violation"[235] wage payment that is "infected by discrimination."[236] In addition to

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228. *Id.* at 2182; *see also*, L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007) (discussing women's responses to sexual harassing work environments).

229. *Ledbetter*, 127 S. Ct. 2182.

230. *Id.* at 2183.

231. *Id.*

232. *See* 42 U.S.C. § 2000e-5(e)(2) (2000)(codifying the amendment: "For purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.").

233. *Ledbetter*, 127 S. Ct. at 2183 (quoting Civil Rights Act of 1990, S. Rep. No. 101-315 at 54 (1990)). The Civil Rights Act of 1991 was not accompanied by a Senate Report, and Justice Ginsburg stated that the 1991 Act was essentially identical to the act proposed in 1990. *Ledbetter*, 127 S. Ct. at 2183 n.5.

234. *Ledbetter*, 127 S. Ct. 2162, 2184.

235. *Id.*

236. *Id.* at 2184-85. *See, e.g.*, Forsyth v. Fed'n Employment and Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) ("Any paycheck given within the [charge-filing] period . . . would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); Shea v. Rice, 409 F.3d 448, 452-53 (D.C. Cir. 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pays one employee less than another for a discriminatory reason") (citing *Bazemore*, 478 U.S. at 396);

referring to cases in the circuits, Justice Ginsburg also noted that the EEOC has consistently held that Title VII allows employees to challenge discriminatory pay each time it is received.[237] The EEOC Compliance Manual also lends support to this interpretation: "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."[238]

Justice Ginsburg acknowledged the majority's argument regarding the difficulty faced by employers who must defend employment decisions reached long ago.[239] In cases like Ledbetter's that concern discriminatory pay, however, "the discrimination of which Ledbetter complained is *not* long past,"[240] but cumulated with each paycheck.[241] According to the dissent, the *Ledbetter* decision will not only affect female employees claiming discrimination, but all groups protected by Title VII's prohibitions against discrimination:

> For example, under today's decision, if a black supervisor initially received the same salary as his white colleagues, but annually received smaller raises, there would be no right to sue under Title

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Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1009-10 (10th Cir. 2002) ("[*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination-instead it is itself a continually recurring violation . . . . [E]ach race-based discriminatory salary payment constitutes a fresh violation of Title VII." (footnote omitted)); Anderson v. Zubieta, 180 F.3d 329, 335 (D.C. Cir. 1999) ("The Courts of Appeals have repeatedly reached the . . . conclusion" that pay discrimination is "actionable upon receipt of each paycheck"); Hildebrandt v. Ill. Dept. of Natural Res., 347 F.3d 1014, 1025-29 (7th Cir. 2003); Cardenas v. Massey, 269 F.3d 251, 257 (3d Cir. 2001); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 167-68 (8th Cir. 1995) (en banc); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 347-49 (4th Cir. 1994); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1399-1400 (9th Cir. 1986).

237. *Ledbetter*, 127 S. Ct. at 2185.

238. *Id.* (citing 2 EEOC Compliance Manual § 2-IV-C(1)(a), p. 605:0024, p. 605:0024 n.183 (2006)). The majority stated that the EEOC's prior administrative rulings concerning Title VII's time limitations were incorrect and it stated that the Court had previously declined to give deference to the EEOC Compliance Manual or its adjudicatory decisions. *Ledbetter*, 127 S. Ct. at 2177 n.11. The Court emphasized in its explanation:

> The EEOC's views in question are based on its misreading of *Bazemore*. Agencies have no special claim to deference in their interpretation of our decisions. Nor do we see reasonable ambiguity in the statute itself, which makes no distinction between compensation and other sorts of claims and which clearly requires that discrete employment actions alleged to be unlawful be motivated "because of such individual's . . . sex."

Ledbetter, 127 S. Ct. at 2177 n.11 (internal citations omitted).

239. *Id.* at 2185.

240. *Id.*

241. *Id.* at 2186.

> VII outside the 180-day window following each annual salary change, however strong the cumulative evidence of discrimination might be. The Court would thus force plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case. [242]

Justice Ginsburg went on to reiterate the lower court's recognition of Ledbetter's prima facie case of sex discrimination where Ledbetter established: "[s]he was a member of a protected class; she performed work substantially equal to work of the dominant class [men]; she was compensated less for that work; and the disparity was attributable to gender-based discrimination."[243] Ledbetter's pay disparity resulted from "a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular."[244] Justice Ginsburg's dissent presented the employer's series of discriminatory acts in great detail, contrasting markedly with the majority's general failure to discuss the circumstances leading to the pay disparity in its own recitation of the facts.[245]

In conclusion, Justice Ginsburg maintained "the ball is in Congress's court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[246]

IV. THE CIRCUIT COURTS' DECISIONS INVOLVING TITLE VII AND DISCRIMINATORY PAY

The Circuit Courts of Appeal had dealt with several cases involving claims of discriminatory pay and the time limitations under Title VII prior to the Court's decision in *Ledbetter*.[247] The cases can be divided into two categories: cases that were decided after *Morgan*, and cases that pre-date *Morgan*. The cases can be subdivided further, distinguishing those that likely would permit Ledbetter's suit as timely and those that would not. As demonstrated below, while the *Ledbetter* court in the Eleventh Circuit denied Ledbetter's claim,[248] it is the only court, compared with all of the other circuits that would likely reach that result. The circuit cases and their holdings are now analyzed in Section

242. *Id.* at 2186 n.9.
243. *Id.* at 2187.
244. *Id.*
245. *Ledbetter*, 127 S. Ct. at 2178, 2181-82, 2185-88. The majority opinion's sole reference to the facts underlying the claim of discrimination was made in one footnote and in connection with one supervisor's actions. *Id.* at 2171 n.4.
246. *Id.* at 2188 (Justice Ginsburg referred to the 1991 Amendment of Title VII, in response to, among other issues, the Court's decision in *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989)); *see infra* Part VI (detailing actions taken by Congress in response to *Ledbetter*).
247. *See Ledbetter*, 127 S. Ct. at 2178-88 (Ginsburg, J., dissenting).
248. *Ledbetter*, 421 F.3d at 1189-90.

IV. This Section begins with the Eleventh Circuit's treatment of *Ledbetter*.

*A. Post-*Morgan *Decisions in the Circuit Courts of Appeal*

1. The Eleventh Circuit: Ledbetter v. Goodyear Tire and Rubber Co, Inc.[249]

The Eleventh Circuit indicated that Ledbetter had established a prima facie case of sex discrimination by virtue of her pay discrepancy.[250] In rebuttal, Goodyear countered that Ledbetter received the second lowest performance ranking in her performance review compared to other managers in the period immediately preceding her last paycheck, supplying a legitimate, nondiscriminatory reason for its decisions regarding Ledbetter's pay.[251] The Eleventh Circuit concluded: "[i]n this case, Ledbetter does not dispute that Goodyear came forward with legitimate, nondiscriminatory reasons . . . [t]he sole issue therefore is whether a reasonable jury could have found those reasons to be pretexts for intentional sex discrimination. The answer is a clear 'no.'"[252]

Goodyear's explanation for the pay disparity rested on the 1998 performance review (the only employment act within the 180-day period), and Ledbetter was prohibited from introducing evidence of discrimination prior to the 1998 review, therefore, the court found Ledbetter's claim to be time-barred and held in favor of Goodyear.[253]

Title VII limits complaints to charges filed within 180 days "after the alleged unlawful employment practice occurred."[254] After repeating the plain language of the statute, the Eleventh Circuit analyzed the Supreme Court's prior application of Title VII time limitations in *Morgan*.[255] The *Morgan* Court held that "'discrete acts of discrimination' such as 'termination, failure to promote, denial of transfer, or refusal to hire,'"[256] may constitute illegal acts under the statute, but an act that precedes the

249. *Ledbetter*, 421 F.3d 1169.
250. *Id.* at 1186.
251. *Id.*
252. *Id.*
253. *Id.* at 1189. Additional examples of discriminatory animus in the workplace came from the district court, including, for example, a question asked by a former plant manager, "When [are we] going to get rid of the drunk and the damn woman." *Id.* at 1189 n.27. The Eleventh Circuit refused to consider this evidence in connection with the denial of a pay increase in 1997 because it occurred prior to the 180-day limitation period and the court also characterized the statement as hearsay. *Id.*
254. 42 U.S.C. § 2000e-5(e)(1).
255. *Morgan*, 536 U.S. 101.
256. *Ledbetter*, 421 F.3d at 1179 (quoting *Morgan*, 536 U.S. at 114).

limitation period cannot provide the basis for a claim.[257] An act that occurs prior to the limitation period may provide evidence "in support of [the] timely claim,"[258] but cannot support the claim itself.[259] More specifically, the Eleventh Circuit discussed the difference between a hostile environment and a discrete discriminatory act as noted in *Morgan*.[260] When an employee claims that he or she was subjected to a hostile work environment, a series of discriminatory acts, even those falling outside the limitations period, may nonetheless suffice as the basis for a claim under Title VII[261] "so long as an act contributing to that hostile environment takes place within the statutory time period."[262] Echoing *Morgan*, the Eleventh Circuit distinguished the hostile work environment from a discrete act of employment discrimination, stating that, for a hostile work environment claim:

> [t]heir very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years, and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.[263]

The Eleventh Circuit interpreted *Morgan* as holding that a discriminatory pay practice was a discrete discriminatory act, as specified by *Morgan*, rather than a hostile work environment,[264] and, therefore, a paycheck, or a decision that establishes what is paid, constitutes a discrete act for purposes of Title VII's time limitation:[265]

> If an employee is denied a raise, given a pay cut, or hired at a deflated pay grade because of a prohibited consideration, the statute is violated and the employee can file suit the moment the decision is made . . . [s]imilarly, if the act complained of is the issuance of a discrete discriminatory paycheck (or paychecks), then the issuance of the challenged paycheck completes the "alleged unlawful employment practice" for purposes of the timely-filing requirement. Pay claims do not, therefore, have those characteristics that led the Court to devise a separate rule governing the timing of hostile work environment claims . . . . The alleged discriminatory behavior need not accumulate to some critical mass to become actionable.[266]

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257. *Id.*; *Morgan*, 536 U.S. at 113.
258. *Ledbetter*, 421 F.3d at 1179 (quoting *Morgan*, 536 U.S. at 113).
259. *Id.*
260. *Id.*
261. *Morgan*, 536 U.S. at 105.
262. *Ledbetter*, 421 F.3d at 1179 (quoting *Morgan*, 536 U.S. at 105).
263. *Id.* (quoting *Morgan*, 536 U.S. at 115).
264. *Ledbetter*, 421 F.3d at 1179.
265. *Id.* at 1179-80.
266. *Id.*

The Eleventh Circuit reasoned that Ledbetter could only claim one employment action as a platform for her Title VII claim, specifically, the performance review and the associated decisions establishing her pay level prior to her retirement.[267] The court stated that to hold otherwise would allow Ledbetter to expand her damage award and permit Ledbetter's claim to go forward even in the absence of discriminatory intent in the 1998 performance review:[268]

> [W]hat Ledbetter did-what the district court allowed her to do-was to point to the substantial disparity between her salary and those of the male (managers) at the end of her career, put on circumstantial evidence that persons holding control over her pay earlier in her career had discriminatory animus toward women, show that other female (managers) in the plant were paid less than their male co-workers, and then put the onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar of difference between her salary and her male co-workers' salaries.[269]

The structure of Ledbetter's action in the district court permitted Ledbetter to claim that each paycheck constituted a novel and discrete act sufficient to revive her cause of action under the statute.[270] The Eleventh Circuit responded:

> Unless there is a claim that the person – or more likely, today, the computer[271] – who actually issued the paychecks in question did so with intent to discriminate, the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid . . . there must, however, be some limit on how far back the plaintiff can reach.[272]

The district court, in the Eleventh Circuit's estimation, inappropriately reached beyond the 180-day limitation and incorrectly concluded that Goodyear's conduct was, by virtue of the stale acts, actionably discriminatory.[273]

Furthermore, the Eleventh Circuit disagreed with Ledbetter's interpretation of the cases that apply to claims for discriminatory

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267. *Id.* at 1180.

268. *Id. But see* Reese v. Ice Cream Specialties Inc., 347 F.3d 1007, 1010-11 (7th Cir. 2003) (holding that the amount of back-pay recovery under Title VII is limited to the limitations period imposed by the statute even though each discriminatory paycheck could revive a claim for discrimination).

269. *Id.* at 1180-81.

270. *Id.* at 1181.

271. The Eleventh Circuit's passing reference to computer-issued paychecks dryly assumed that the employer was not making or reviewing pay decisions, and there was no computer programmer who carried out these decisions, or at least someone turned the computer on.

272. *Id.* at 1182.

273. *Id.* at 1180.

pay that precede *Morgan*.[274] The court noted that, assuming the cases survived *Morgan* and continued to announce good law, they did not support Ledbetter's claim:

> [T]he cases on which Ledbetter relies hold simply that pay claims are not time-barred if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central requisite element of every successful disparate treatment claim.[275]

The Eleventh Circuit also distinguished its prior decision in *Calloway v. Partners National Health Plans*.[276] *Calloway* concerned an African American employee, Felicia Calloway, who replaced an equally qualified white woman worker.[277] Calloway's employer paid Calloway less in this same position.[278] When Calloway resigned, she was, in turn, replaced by a less credentialed white woman who was paid more than Calloway.[279] The *Calloway* court held that Calloway's claim was not time-barred, as argued by her employer,[280] stating that, "when the claim is one for discriminatory wages, the violation exists every single day the employee works."[281] The employer established the practice of discrimination when it hired Calloway, and it continued to discriminate throughout her employment.[282] The Eleventh Circuit did not find that Ledbetter was similarly situated to Calloway in her claim; Ledbetter underwent annual reviews at which she could have filed suit, or at least registered a complaint regarding her pay.[283] Without an annual review, "*Calloway*

274. *Id.* at 1181. The court noted that in cases preceding *Morgan*, the circuits generally held that a Title VII claim alleging a discriminatory pay claim was not time barred if at least one paycheck implementing the challenged pay rate was issued during the limitations period. *Id.* The pre-*Morgan* cases cited by the Eleventh Circuit included: *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993); *Cardenas v. Massey*, 269 F.3d 258 (3d Cir. 2001); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994); *Hall v. Ledex, Inc.*, 669 F.2d 397 (6th Cir. 1982); *Ashley v. Boyle's Famous Corned Beef*, 66 F.3d 164 (8th Cir. 1995) (en banc), *abrogated on other grounds by Morgan*, 536 U.S. at 101; *Gibbs v. Pierce Count Law Enforcement Support Agency*, 785 F.2d 1396 (9th Cir. 1986); *Goodwin v. General Motors Corp.*, 275 F.3d 1005 (10th Cir. 2002); *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1997).

275. *Ledbetter*, 421 F.3d at 1182.

276. 986 F.2d 446 (11th Cir. 1993).

277. *Id.* at 447.

278. *Id.*

279. *Id.*

280. 986 F.2d at 449.

281. *Ledbetter*, 421 F.3d at 1184, (quoting *Calloway*, 986 F.2d at 449) (citing Bazemore v. Friday, 478 U.S. 385, 396 n.6 (1986)).

282. *Calloway*, 986 F.2d at 449.

283. 421 F.3d at 1184. The court failed to mention, however, that Ledbetter did not know about the pay discrepancy for many years. Practically speaking,

belongs in a different category of pay-related claims and is fully consistent with the rule we announce today."[284] The absence of an annual review, a process that was integrated in pay decisions for Ledbetter, made Calloway's claims fundamentally different to the present court.

The Eleventh Circuit, distinguishing *Calloway*, ultimately dismissed Ledbetter's argument and her lawsuit, and the court ruled in favor of Goodyear.[285] Contrary to the Eleventh Circuit, the other circuit courts that heard claims for discriminatory pay since *Morgan* have held that a plaintiff may file a claim for discriminatory pay, even if the alleged conduct stretched beyond the 180-day limitation.

2. The Second Circuit: Forsyth v. Federated Employment and Guidance Service[286]

The employee, Allison Forsyth, claimed violations of Title VII for race and national origin discrimination in the employer's award of pay and promotions.[287] The Second Circuit dismissed for failure to state genuine issues of triable fact,[288] but the court nevertheless discussed whether the action was time-barred, as held by the district court, or timely.[289] Under Title VII, a plaintiff has 300 (or 180 days depending on the state) from the time of any alleged discriminatory conduct to file an action:[290] "Discrete discriminatory acts are time-barred, notwithstanding the fact 'they are related to acts alleged in timely filed charges,' if they fall outside of the limitations period . . . . At the same time, each discriminatory act starts the clock running again for purposes of filing charges alleging that act."[291]

The Second Circuit cited *Bazemore v. Friday* and *Pollis v. New School for Social Research*[292] as standing for the proposition that discriminatory pay rates are not part of a continuing violation, but instead each paycheck, standing alone, represents a discrete and separable wrong:[293]

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she could not complain about facts that she did not know.

284. *Id.*

285. *Id.* at 1184-85.

286. 409 F.3d 565 (2d Cir. 2005).

287. *Id.* at 566.

288. *Id.* at 566-67 (affirming the district court's dismissal of the suit for failure to state genuine issues of material fact, but announcing, contrary to the district court's opinion, that the claim itself was not time barred).

289. *Id.* at 572-73.

290. *Id.* at 572.

291. *Id.* (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)).

292. Bazemore v. Friday, 478 U.S. 385; Pollis v. New School for Soc. Research, 132 F.3d 115 (2d Cir. 1997).

293. *Forsyth*, 409 F.3d at 573.

> As we explained in *Pollis*, discriminatory pay scales . . . involve a number of individual and separate wrongs rather than one course of wrongful action. And, each repetition of wrongful conduct may, *as Morgan taught*, be the basis of a separate cause of action for which suit must be brought within the limitations period beginning with its occurrence.[294]

Morgan failed to overturn *Bazemore*, because "every paycheck stemming from a discriminatory pay schedule is an actionable discrete act," even though it involves repeated conduct."[295] By virtue of *Morgan*, Title VII did not bar the suit, and, therefore, the *Forsyth* court refused to dismiss the claim on that basis.[296]

3. The D.C. Circuit: Shea v. Rice[297]

William Shea claimed racial discrimination in violation of Title VII.[298] Shea alleged that his non-minority status prevented him from being assigned, in his initial posting, to a pay grade consistent with similarly situated minority coworkers, and that his subsequent salary reflected this lower starting wage.[299]

Looking to *Morgan*, the D.C. Circuit stated that *Morgan* eliminated the continuing violation doctrine in cases "'such as termination, failure to promote, denial of transfer, or refusal to hire,'"[300] and that "discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges."[301] The court held that any discriminatory pay received prior to the limitations period was not recoverable, and the issue was whether the paychecks Shea received after the time limitations nonetheless could be the subject of a claim, despite the ruling in *Morgan*.[302]

The D.C. Circuit noted a distinction between, first, a complaint regarding one's initial assignment, which is a discrete act by the employer, and, second, a claim for discriminatory pay concomitant with that assignment.[303] The D.C. Circuit cited to *Evans*, *Ricks*, and *Lorance* for the proposition that claims involving discrete acts will be time-barred if filed outside the

294. *Id.* (emphasis added) (internal citations omitted).
295. *Id.*
296. *Id.*
297. 409 F.3d 448 (D.C. Cir. 2005).
298. *Id.* Shea claimed that he was the victim of reverse discrimination because he was white and Irish, and his employer's diversity program disadvantaged his racial and national origin status. *Id.*
299. *Id.* at 449-50.
300. *Id.* at 451 (quoting Morgan, 536 U.S. at 113-114).
301. *Shea*, 409 F.3d at 451 (quoting *Morgan*, 536 U.S. at 113).
302. *Id.* at 451-52.
303. *Id.* at 452-53.

statute of limitations.[304] The D.C. Circuit analyzed Shea's claim as one not based in discriminatory assignment, but rather for discriminatory pay that resulted from the assignment, reviving his claim with each new paycheck.[305] Shea's claim was, therefore, more properly addressed by the Supreme Court's holding in *Bazemore*, where "the Court unanimously declared that the employer committed a separate unlawful pay practice each time he paid one employee less than another for a discriminatory reason."[306] The D.C. Circuit's previous ruling in *Anderson v. Zubieta*,[307] similarly drew the distinction between cases alleging a discrete discriminatory act (such as unlawful termination) and a pay system that "'continued to discriminate unlawfully each time it was applied.'"[308]

The D.C. Circuit's language in *Shea* is particularly important; the court analyzed *Morgan* and *Bazemore* and determined that the two holdings actually "dovetail."[309] While the employer in *Shea* argued that *Morgan* overturned *Bazemore*,[310] the D.C. Circuit stated:

> Not so. Granted, *Morgan* restricted the 'continuing violation doctrine' in holding that, while 'a hostile work environment claim . . . will not be time barred so long as all the acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period,'[311] discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. But *Bazemore survives Morgan*; indeed, *Morgan* expressly relied on *Bazemore*. In *Morgan*, the Court offered the *Bazemore* scenario-paychecks delivering less to one group of employees than another-as an example of the type of 'discrete act' that is actionable under Title VII . . . .[312] *[W]hile several sister Circuits have recognized that Morgan scuttled the continuing violation doctrine, none has suggested that, in doing so, the Court abandoned its holding in Bazemore.*[313]

The D.C. Circuit went on to emphasize that:

> Given the holding in *Morgan* relies on the holding in *Bazemore*, it is difficult to see how the application of the latter could 'eviscerate' the former. The two decisions dovetail: *Bazemore* holds that an

304. *Id.* at 452.
305. *Id.*
306. *Id.* at 452-53 (quoting *Bazemore*, 478 U.S. at 395-96).
307. 180 F.3d 329 (D.C. Cir. 1999); *see supra* Part III.A.3.
308. *Shea*, 409 F.3d at 453 (quoting Anderson v. Zubieta 180 F.3d 329, 336 (D.C. Cir. 1999)).
309. *Id.* at 455.
310. *Id.* at 451.
311. *Id.* at 453 (quoting *Morgan*, 536 U.S at 122 (internal citation omitted)).
312. Id.
313. *Id.* at 453-54 (emphasis added) (internal citations omitted).

> employee may recover for discriminatory low pay received within the limitation period because each paycheck constitutes a discrete discriminatory act, and *Morgan* rejects the continuing violation theory 'because discrete discretionary acts are not actionable if time barred, even when they are related to acts alleged in the timely filed charges.[314]

The D.C. Circuit dismissed the lower court's ruling in favor of the employer and remanded the case.[315]

4. The Seventh Circuit

a. *Reese v. Ice Cream Specialties, Inc.*[316]

An African American employee, Charlie Reese, Jr., filed charges against his employer, claiming pay discrimination.[317] Reese failed to get a pay raise that his white coworkers did receive.[318] Reese was unaware for over three years that his employer had implemented the pay raises.[319] When Reese filed charges of employment discrimination with the EEOC, the Commission denied his claim on the basis that it was time-barred.[320] The district court similarly held that the pay disparity failed to constitute a continuing violation under Title VII, and instead was a "sole discriminatory act" and found for the employer.[321]

The Seventh Circuit agreed that the pay structure constituted a discrete discriminatory act "in a series of separate discrete acts,"[322] but held that the claim concerning discriminatory pay was not barred by the time limitations, "because each check that (the employer) paid Reese was potentially a fresh act of discrimination."[323] The employer was, therefore, answerable to the charge of employment discrimination.[324]

The Seventh Circuit's holding in *Reese* was consistent, according to the *Reese* court, with the Third Circuit's decision in *Cardenas v. Massey*,[325] in which a racially discriminatory pay

314. *Shea*, 409 F.3d at 455 (quoting *Morgan*, 536 U.S. at 113) (emphasis added) (internal citation omitted).
315. *Id.* at 456. The district court had initially dismissed Shea's allegations, including his claim of discriminatory pay under Title VII, as time barred. *Id.* at 450.
316. 347 F.3d 1007 (7th Cir. 2003).
317. *Id.* at 1008.
318. *Id.* at 1009.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 1010.
323. *Id.* at 1013.
324. *Id.* at 1014.
325. 629 F.3d 251 (3d Cir. 2001); *see supra* Part III.A.4.a.

structure afforded a new claim for each paycheck when the initial pay rate was discriminatory.[326] The Seventh Circuit also found that its decision was consistent with *Bazemore*,[327] which was reaffirmed in *Morgan*[328] because the *Bazemore* Court stated that each paycheck constituted "'a wrong actionable under Title VII.'"[329] Noting that each paycheck constituted a new violation, the Seventh Circuit quoted the Supreme Court in *Florida v. Long*,[330] in which the Court stated, "[i]n a salary case . . . each week's paycheck is compensation for work previously performed and completed by an employee."[331] The *Reese* court held that pay discrimination posed a unique circumstance amenable to the continuing violation concept which "depend[s] on the cumulative impact of numerous individual acts."[332] The court concluded that its approach applied the continuing violation theory consistent with cases in the Second, Third, Fourth, Eighth, Tenth and the D.C. Circuits.[333] Despite the court's ruling that Reese might recover, the recovery was limited to paychecks received during the statutory time limitation.[334]

b. *Hildebrandt v. Illinois Department of Natural Resources*[335]

In *Hildebrandt*, Reinee Hildebrandt sued her employer claiming, among other charges, discriminatory pay.[335] While her 1993 salary as a new employee began at a comparable or higher rate than her coworkers,[336] three years later Hildebrandt was paid the least among similarly employed workers.[337] During the three-year period, Hildebrandt received performance ratings that ranged from "needs improvement" to "accomplished."[338] Nonetheless, the employer provided her the smallest raises among similarly rated

326. *Reese*, 347 F.3d at 1011.
327. *Bazeman*, 478 U.S. 385 (per curiam).
328. 536 U.S. at 111-12.
329. *Reese*, 347 F.3d at 1010 (quoting *Bazemore*, 478 U.S. at 395).
330. 487 U.S. 223 (1988).
331. *Reese*, 347 F.3d at 1011 (quoting *Long*, 487 U.S. at 239.
332. *Id.* at 1012.
333. *Id.* at 1013. The Seventh Circuit cited to the following cases: *Pollis v. New School for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997); *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-51 (4th Cir. 1994); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) (en banc); *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1011 (10th Cir. 2002), *cert. denied*, 537 U.S. 941; *Anderson v. Zubieta*, 180 F.3d 329, 335-37 (D.C. Cir. 1999).
334. *Reese*, 347 F.3d at 1013.
335. 347 F.3d 1014 (7th Cir. 2003).
335 *Id.* at 1020.
336. *Id.* at 1021.
337. *Id.*
338. *Id.*

employees.[339]

Hildebrandt complained about her salary disparity beginning in 1992.[340] In 1998, she filed a claim with the EEOC, followed by a lawsuit in the district court. The district court dismissed Hildebrandt's Title VII claim as time barred.[341] Hildebrandt appealed, arguing that the continuing violations doctrine allowed the claim against her employer to stand.[342]

The Seventh Circuit cited *Bazemore*[343] and *Morgan*[344] as establishing that disparate pay rates may support a Title VII action involving discrete discriminatory acts.[345] The Seventh Circuit noted, "we . . . have recognized that '[d]rawing the line between something that amounts to a 'fresh act' each day and something that is merely a lingering effect of an earlier, distinct, violation is not always easy.'"[346] Despite the difficulty, because Hildebrandt's pay rate was related to a prior discriminatory act, each paycheck was, in itself, a discrete occurrence, and reliance on the continuing violation doctrine, abrogated by *Morgan*, was unnecessary.[347] The paychecks were not part of a continuing violation,[348] and Hildebrandt's claim alleging discrete discriminatory conduct was, therefore, timely.[349]

For Hildebrandt, the Seventh Circuit's ruling indicated that only those paychecks she received within the time limitations could support a Title VII action.[350] In a footnote, the court stated that its decision was consistent with *Reese*;[351] if the conduct that established the discriminatory pay occurred prior to the statutory time bar, the employee may nonetheless recover for the

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339. *Id.*
340. *Id.* at 1022.
341. *Id.*
342. *Id.* at 1025.
343. 478 U.S. 385 (per curiam).
344. 536 U.S. 101.
345. *Hildebrandt*, 347 F.3d at 1025-27.
346. *Id.* at 1026 (quoting Pitts v. City of Kankakee, 267 F.3d 592, 595 (7th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002)).
347. 347 F.3d at 1028. The court stated:

> *Morgan*'s foreclosure of the continuing violation doctrine for discrete discriminatory acts clearly requires a reevaluation of our earlier interpretation. Using *Morgan* as our guide, therefore, we must conclude that each of Dr. Hildebrandt's paychecks that included discriminatory pay was a discrete discriminatory act, not subject to the continuing violation doctrine.

Id.
348. *Id.*
349. *Id.*
350. *Id.*
351. *See Hildebrandt*, 347 F.3d at 1028 n.9 (noting that the court had reached a similar determination "with respect to *Morgan's* effect of discriminatory pay claims"); *see also* Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007 (7th Cir. 2003)).

discriminatory paychecks received within the time limits.[352]

*B. Pre-*Morgan *Decisions in the Circuit Courts of Appeal*[353]

The circuit courts decided the following cases prior to the Supreme Court's decision in *Morgan*.

1. The Second Circuit:

a. *Pollis v. New School for Social Research*[354]

Pollis involved the claim of Adamantia Pollis, who argued that her salary was below that of her male coworkers in violation of the Equal Pay Act.[355] While the Equal Pay Act limits awards within two or three years, depending on the willfulness of the employer's conduct,[356] the court that first heard her case allowed Pollis to recover for all the years in which she proved discriminatory pay, concluding that the discriminatory paychecks were a continuing violation.[357]

The Second Circuit found, however, that successful plaintiffs could not recover beyond the statutory time limitations.[358] Noting that an employee like Pollis may be uncomfortable in asserting a claim, even as he or she currently works for the allegedly discriminatory employer, this "is not a sufficient reason to exempt [the employee] from the statute of limitations."[359]

Stating that each paycheck constituted a discrete discriminatory act, the Second Circuit held that the time period for filing under the statute began anew with each payment.[360] Recovery would be limited to any pay disparity that occurred

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352. *Hildebrandt*, 347 F.3d at 1028.

353. The Eleventh Circuit believed that, to the extent these cases continued to stand for good law since *Morgan*:

> [T]he cases . . . hold simply that pay claims are not time-barred if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim.

Ledbetter, 421 F.3d at 1182; *see supra* Section III.A.

The Supreme Court in *Ledbetter* similarly found that the pre-*Morgan* decisions were unpersuasive. 127 S. Ct. at 2166. The majority did not discuss any of the pre-*Morgan* circuit decisions, nor did the majority discuss the post-*Morgan* circuit decisions that referenced *Morgan* (providing only a citing reference to *Forsyth* and *Shea*. *Id.*

354. 132 F.3d 115 (2d Cir. 1997).

355. *Id.* at 117-18; *see also* 29 U.S.C. § 206(d) (1988).

356. *Pollis*, 132 F.3d at 118; *see also* 29 U.S.C. § 255(a) (1988).

357. *Pollis*, 132 F.3d at 118.

358. *Id.* at 119.

359. *Id.*

360. *Id.*

within the statutory period:[361] "[w]ith this holding, we join the other circuits to have considered the issue, which have unanimously adopted the reasoning of *Bazemore* and concluded that back pay cannot be recovered under the Equal Pay Act for salary differentials outside the limitations period."[362]

The Second Circuit went on to cite several cases as all reaching the same conclusion regarding discriminatory pay practices.[363]

b. *Connolly v. McCall*[364]

While *Connolly* addressed discrimination in connection with eligibility for pension benefits and associated New York State law, and does not specifically concern discriminatory pay,[365] it concerns a similar type of ongoing violation to that raised in *Ledbetter*. The lower court dismissed the plaintiff's action in *Connolly* as time-barred under the appropriate statutory time limitations.[366] The Second Circuit noted that the pension claim "is most analogous to those involving the repeated application of a discriminatory policy."[367] The court, thereby, categorized *Connolly* as appropriately being controlled by cases such as *Bazemore*[368]:

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361. *Id.* The Second Circuit also referenced two reviews to support its contention that a claim for discriminatory pay is not a continuing violation but a series of individual wrongs. *See* Harvard Law Review Association, *Developments in the Law-Statute of Limitations*, 63 HARV. L. REV. 1177, 1205 (1950) ("each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence"); *see also* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49-Aut LAW & CONTEMP. PROBS. 53, 60 (1986)(stating:

> pay discrimination is a continuing violation. Every pay period, the plaintiff performs new services and gets a new paycheck. If that paycheck is reduced because of race or sex, that is a new act of discrimination. A plaintiff should be able to file a charge at any time, recover back pay for the last 180 days, and obtain an injunction against future violations.)

Pollis, 132 F.3d at 119.

362. *Pollis*, 132 F.3d at 119.

363. The Second Circuit cited to the following cases: *Gandy v. Sullivan County*, 24 F.3d 861, 865 (6th Cir. 1994); *Ashley v. Boyles Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995); *Brinkley-Obu v. Hughes Training Inc.*, 36 F.3d 336, 351 (4th Cir. 1994); *EEOC v. McCarthy*, 768 F.2d 1, 3 n.4 (1st Cir. 1985).

364. 254 F.3d 36 (2d Cir. 2001).

365. *Id.* at 39.

366. *Id.* at 40. Some of Connolly's claims were brought under 42 U.S.C. § 1983 (in tandem with the New York Retirement and Social Security Law), which were governed by New York's three-year statute of limitations for personal injury actions. *Id.* at 40-41.

367. *Id.* at 41.

368. *See* 478 U.S. at 395-96 ("[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII,

> When a plaintiff challenges a policy that gives rise over time to a series of allegedly unlawful acts, it will often be the case that plaintiff might bring his claim after the first such act, and yet the law may render timely a claim brought prior to the expiration of the statute of limitations on the last such act.[369]

The Second Circuit's discussion of timely filing was, however, largely made in *dicta*, because the court went on to rule that the case would be dismissed on the merits.[370] If the action was appropriately filed and was then categorized within a continuing violation framework, the court held that the law would not bar the claim as stale.[371]

2. The Third Circuit: Cardenas v. Massey[372]

Gerard Cardenas claimed that he was subjected to racially motivated disparate pay in violation of Title VII, dating back to the moment of his hire and extending through the six years of his employment.[373] The Third Circuit held that Cardenas made a timely claim under Title VII, even if the disparate pay claim stemmed from his initial paycheck.[374] The Third Circuit stated that the *Bazemore*[375] decision required such a result.[376] The employer's reliance on three other Supreme Court decisions, specifically *Lorance*,[377] *Ricks*,[378] and *Evans*,[379] applied to discrete discriminatory acts outside the limitations period,[380] "[h]owever, this line of cases does not bar claims based on conduct which is alleged to have 'continued to discriminate unlawfully each time it was applied.'"[381]

3. The Fourth Circuit: Brinkley-Obu v. Hughes Training, Inc.[382]

Sharon Brinkley-Obu claimed that her employer violated the Equal Pay Act[383] and Title VII when her employer discriminated

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regardless of the fact that this pattern was begun prior to the effective date of Title VII").

369. *Connolly*, 254 F.3d at 41.
370. *Id.* at 42.
371. *Id.*
372. 269 F.3d 251 (3d Cir. 2001).
373. *Id.* at 253-54.
374. *Id.* at 256.
375. 478 U.S. 385 (per curiam).
376. *Cardenas*, 269 F.3d at 257.
377. 490 U.S. 900, *rev'd by* Civil Rights Act of 1991, § 112.
378. 449 U.S. 250.
379. 431 U.S. 553.
380. *Cardenas*, 269 F.3d at 256.
381. *Id.* at 257 (quoting Anderson v. Zubieta, 180 F.3d 329, 336 (D.C. Cir. 1999)).
382. 36 F.3d 336 (4th Cir. 1994).
383. 29 U.S.C. § 206(d) (1988).

against her through its pay practices and employment structure.[384] Brinkley-Obu faced many difficulties over the years she was employed: she was hired at a lower grade than her education or experience would have indicated for similar workers,[385] and she progressed "fairly rapidly as far as titles and responsibilities were concerned," but her salary remained relatively low due to her initial posting.[386] Brinkley-Obu's troubles continued as, prior to her maternity leave, the employer hired a subordinate at a higher pay than she earned.[387] The subordinate assumed many of the Brinkley-Obu's former responsibilities, and, when she returned from her leave, Brinkley-Obu was told that she must report to him.[388] Brinkley-Obu complained about the pay discrepancy and did not receive a raise, yet she continued to receive less pay "for doing substantially equal work" throughout her employment, compared to male coworkers.[389]

Brinkley-Obu sued and received $27,639 of back pay for her Equal Pay Act claim and $10,000 on her Title VII claim.[390] The employer appealed,[391] arguing that Brinkley-Obu's lawsuit was barred by the respective statute of limitations under the Equal Pay Act[392] and Title VII.[393] The time limitations establish windows for filing suit consisting of two years, under the Equal Pay Act, and 180 days, under Title VII.[394] Both statutes require that the time limitation begin to run when the discriminatory conduct occurs.[395]

At issue in *Brinkley-Obu* was whether the employee could present evidence regarding the unequal pay that included comparisons with former workers who no longer worked for the employer and who had left prior to the statutory period.[396] Brinkley-Obu established the discriminatory pay practices in concert with the continuing violations doctrine,[397] but the employer argued that she could not prove a disparity based on

384. *Brinkley-Obu*, 36 F.3d at 338-41.
385. *Id.* at 339.
386. *Id.* at 340.
387. *Id.*
388. *Id.*
389. *Id.* at 341.
390. *Id.* at 342.
391. *Id.* at 339.
392. 29 U.S.C. § 255(a) (1988).
393. *Brinkley-Obu*, 36 F.3d at 345; 42 U.S.C. § 2000e-5(e) (1988).
394. Title VII, 42 U.S.C. § 2000e-5(e); Equal Pay Act, 29 U.S.C. § 255(a).
395. *Brinkley-Obu*, 36 F.3d at 345; *see also* Title VII, 42 U.S.C. § 2000e-5(e); Equal Pay Act, 29 U.S.C. § 255(a).
396. *Brinkley-Obu*, 36 F.3d at 345.
397. *Id.* at 347. The Fourth Circuit cited to *Nealon v. Stone*, as establishing that "the continuing violations theory applies to both the Equal Pay Act and Title VII claims." *Id.* at 347 (quoting Nealon v. Stone 958 F.2d 584, 590 n.4 (4th Cir.1992)).

evidence that it considered stale.[398] Nonetheless, the Fourth Circuit stated that: "[s]tatutes of limitations do not operate as an evidentiary bar controlling the evidence admissible at the trial of a timely-filed cause of action . . . the statute of limitations does not operate to limit the evidence Brinkley-Obu may introduce regarding her co-workers."[399] The court also noted that, even if there was no bar for the evidence presented, Brinkley-Obu could only recover damages within the statutory time period.[400]

In *Brinkley-Obu* the Fourth Circuit relied on *Bazemore*[401] as establishing the law relevant to pay discrimination,[402] and pointed to the Fourth Circuit's prior cases dealing with the continuing violations doctrine:[403] "each instance of a paycheck to a female employee at a lower wage than that issued to her male counterpart constitutes a new discriminatory action for purposes of the Equal Pay Act limitations accrual . . . . 'This continuing violation theory is equally applicable to Title VII.'"[404] The important date under the statute of limitations for either statute is when the plaintiff's injury occurred.[405] Under the court's analysis, the continuing violation theory established that "each and every refusal to pay a plaintiff's salary equal to that of a similarly situated male" may violate the statutes.[406] As the court stated, the question is, "[d]uring the statutory time period, [was the plaintiff] being paid less on account of her sex?"[407]

The court found for Brinkley-Obu, noting in *dicta* that while it would not order prospective relief that adjusted Brinkley-Obu's future salary, the employer could face new discrimination charges if it failed to voluntarily make the adjustment.[408]

4. The Sixth Circuit

a. *Gandy v. Sullivan County*[409]

Rosemarie Gandy successfully sued her employer when the

398. *Brinkley-Obu*, 36 F.3d at 346.
399. *Id.*
400. *Id.* at n.22.
401. 478 U.S. st 395-96.
402. *Brinkley-Obu*, 36 F.3d at 347.
403. *Id.* (citing Nealon v. Stone, 958 F.2d 584, 590 n.4 (4th Cir. 1992); Brewster v. Barnes, 758 F.2d 985, 993 (4th Cir. 1986); Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980)).
404. *Brinkley-Obu*, 36 F.3d at 347 (quoting Nealon v. Stone, 958 F.2d at 590 n.4 (4th Cir. 1992)).
405. *Brinkley-Obu*, 36 F.3d at 350.
406. *Id.* at 350-51 (citing Brewster v. Barnes, 788 F.2d 985, 993 (4th Cir. 1986).
407. *Id.* at 351.
408. *Id.* at 357.
409. 24 F.3d 861 (6th Cir. 1994).

district court held that her employer had paid her less than the male who preceded her[410] in violation of the Equal Pay Act.[411] Gandy's employer argued on appeal that her lawsuit was barred by the Equal Pay Act, which requires that the conduct underlying the claim must occur within three years of a lawsuit filed when the illegal conduct is willful.[412] The court stated that, "'[i]t is no defense that the unequal payments began prior to the statutory period' . . . the Equal Pay Act is violated each time an employer presents an 'unequal' paycheck to an employee for equal work."[413] If only one paycheck that is tainted by discrimination is received within the time limitations, the claim is timely.[414]

While recognizing the doctrine of a continuing violation, the Sixth Circuit said that it was unnecessary to identify Gandy's claim as being within the doctrine, because the acts of which she complained clearly occurred within the statutory time limits, and the damages she sought were similarly limited to unequal payments made within the statutory time frame.[415]

b. *Hall v. Ledex, Inc.*[416]

Joy Hall received significantly less pay for substantially the same work as the male predecessor in her position.[417] Despite two additional evaluations of her pay grade, her salary was not increased.[418] After Hall successfully sued her employer for discriminatory pay in the district court, the employer appealed the lower court's finding that the employer had discriminated against Hall under Title VII and the Equal Pay Act, and the employer also appealed the lower court's order that Hall's pay be adjusted to redress the discrimination.[419]

The employer argued that Hall's claim was barred by the statute of limitations.[420] The Sixth Circuit disagreed, stating that, "the discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received."[421] The Sixth Circuit cited cases from the Sixth,[422] Eighth,[423] and D.C.[424]

410. *Id.* at 863.
411. 29 U.S.C. § 255(a) (1988).
412. *Gandy*, 24 F.3d at 863.
413. *Id.* at 864 (quoting 29 C.F.R. § 1620.13 (b)(5) (1981)).
414. *Gandy*, 24 F.3d at 864.
415. *Id.*
416. 669 F.2d 397 (6th Cir. 1982).
417. *Id.* at 398. The employer's Personnel Director testified at trial that Hall "later assumed more duties" than her predecessor. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* The case arose in Ohio, a deferral state that requires filing under Title VII within 300 days of the alleged discriminatory conduct. *Id.*
421. *Id.*
422. Hodgson v. Square D Co., 459 F.2d 805 (6th Cir. 1972), *cert. denied*, 409

Circuits as all supporting the court's analysis.[425] In the cases relied upon by the employer,[426] the discriminatory acts involved either "discharged employees [who] waited too long after discriminatory terminations to complain," or "a decision to deny tenure," all of which constituted discrete events rather than an action claiming discriminatory pay.[427] As discussed in *Hall*, the employees in these prior cases waited too long to file charges to trigger liability – Hall did not.[428]

5. The Eighth Circuit: Ashley v. Boyle's Famous Corned Beef Company[429]

The employee, Barbara Ashley, worked for her employer for seven years before being laid off, and sued for sex discrimination in her pay in violation of both Title VII and the Equal Pay Act, among other claims.[430] The Eighth Circuit reversed the lower court's prior dismissal of the suit.[431]

Ashley's case rested on her categorization at work as a non-union worker.[432] Ashley was paid significantly less than male coworkers holding unionized jobs (all of whom were male), who performed essentially the same job as Ashley and her female, non-union coworkers, albeit in a different unit of the company.[433]

The Eighth Circuit first analyzed whether the employee's claims were time-barred under Title VII.[434] The court distinguished between Ashley's claim for discrimination based on job assignment (to a lower-paying, non-union job) and her clam for pay discrimination.[435] Since her initial appointment was made seven years before Ashley's lawsuit was filed, the claim for

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U.S. 967 (1972).

423. Satz v. I.T.T. Fin. Corp., 619 F.2d 738 (8th Cir. 1980).

424. Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

425. *Hall*, 669 F.2d at 398-99.

426. The Sixth Circuit referred to the employer's reliance on *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), *Ricks v. Delaware State College*, 605 F.2d 710 (3d Cir. 1979), *rev'd* 449 U.S. 250 (1980), "and other cases." *Id.* at 399.

427. *Id.*

428. *Id.*

429. 66 F.3d 164 (8th Cir. 1995).

430. *Id.* at 166.

431. *Id.*

432. *Id.*

433. *Id.* The Eighth Circuit also stated that workers in both the union and non-union units flowed between each unit as demand fluctuated and the need arose to make temporary assignments. *Id.* The non-union workers were also the first to be laid off when demand lagged. *Id.* The non-union workers asked to become part of the collective bargaining unit, but were unsuccessful, apparently owing to inaction by both the employer and the union. *Id.*

434. *Id.* at 167. The 300 day limitation period applied in this case. *Id.*; *see also* 42 U.S.C. § 2000e-5(e)(1).

435. *Ashley*, 66 F.3d at 167.

discriminatory assignment was time barred; "'the initial job assignment, like a hiring decision, in no respect constitutes a continuing violation.'"[436] The assignment was, therefore, a discrete discriminatory act subject to the time limitations of Title VII.[437] The pay discrimination claim was, however, still viable because: "[w]hen an employer is accused of an ongoing practice that began prior to the statute of limitations period, the claim may nonetheless be timely filed under the 'continuing violations doctrine' . . . . '[T]he critical question is whether a present violation exists.'"[438]

Because each discriminatory paycheck may establish a new wrong under Title VII and the Equal Pay Act, Ashley's claim was not time-barred.[439] Ashley could, therefore, recover for the differences in pay during the limitations period. [440] As noted by the court, "[r]elief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past."[441]

6. The Ninth Circuit: Gibbs v. Pierce County Law Enforcement Support Agency, City of Tacoma[442]

Five female plaintiffs successfully sued several public agencies (the "employer") for discriminatory pay practices in violation of Title VII.[443] On appeal, the employer claimed that the plaintiffs' suits were time barred, because "[p]laintiffs' current salaries . . . are merely the present effect of an act – the decision to hire plaintiffs at a given salary - that took place more than 180 days prior to the filing of plaintiffs' charge with the EEOC."[444]

The Ninth Circuit disagreed, holding that the relevant discriminatory act was the discriminatory pay: "[t]he policy of paying lower wages to female employees on each payday constitutes a 'continuing violation,'"[445] and, therefore, the plaintiff's actions were timely.[446]

436. *Id.* (quoting Heymann v. Tetra Plastics Corp., 640 F.2d 115, 120 (8th Cir. 1981)).
437. *Id.*
438. *Id.* at 167-68 (quoting United Airlines v. Evans, 431 U.S. 553, 558 (1977) (internal citations omitted)).
439. *Ashley*, 66 F.3d at 168.
440. *Id.*
441. *Id.*
442. 785 F.2d 1396 (9th Cir. 1986).
443. *Id.* at 1398. The employees' union filed on the employees' behalf. *Id.*
444. *Id.* at 1399.
445. *Id.*
446. *Id.* at 1400.

7. The Tenth Circuit: Goodwin v. General Motors Corp.[447]

Pamela Goodwin sued her employer for race discrimination, alleging that it paid her substantially less than white workers who performed similar jobs because she was African American.[448] The Tenth Circuit drew attention to the fact that the employer's confidentiality policy regarding salaries prevented employees from knowing other workers' salaries, and the difficulty this would pose for workers claiming pay discrimination.[449] Goodwin filed charges under Title VII when someone anonymously gave Goodwin a list of her coworkers' salaries.[450]

The Tenth Circuit understood prior case law as requiring that discrete discriminatory acts be treated differently than pay discrimination:[451]

> *Bazemore v. Friday*[452] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation . . . .[453] Under *Bazemore*, then, pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII.[454]

The Tenth Circuit cited several other circuit courts as following this interpretation of pay discrimination,[455] stating, "[t]oday we join those circuits and the Supreme Court in recognizing that each race-based discriminatory salary payment constitutes a fresh violation of Title VII."[456]

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447. 375 F.3d 1005 (10th Cir. 2002)

448. *Id.* at 1007.

449. *Id.* at 1008.

450. *Id.* Goodwin also refused, on three occasions, to sign an agreement proffered by the employer that would have given Goodwin some of the raise she wanted, but required her acknowledgement, on at least two occasions, "that she had received all of the compensation due her." *Id.* at 1009.

451. *Id.*

452. 478 U.S. at 395.

453. *Goodwin*, 375 F.3d at 1009. Interestingly, the Tenth Circuit characterized its own ruling, drawn from *Bazemore*, as echoing a unanimous opinion of the Supreme Court, but, as also acknowledged by the Tenth Circuit, *Bazemore* was a per curium opinion. *Bazemore*, 478 U.S. at 386-88. *Goodwin* drew solely from the per curium opinion, rather than *Bazemore's* associated concurring opinions. *Goodwin*, 375 F.3d at 1010 n.5.

454. *Goodwin*, 375 F.3d at 1010.

455. *Id.* The Tenth Circuit cited to the following cases: *Pollis v. New School for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997); *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); and *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993).

456. *Goodwin*, 375 F.3d at 1010.

In the opinion of the Tenth Circuit, the cases on which the employer relied in its arguments generally failed to involve fact patterns similar to the controversy at issue in *Goodwin*, which concerned discriminatory pay.[457] The only case cited by the employer that did involve pay, *Dasgupta v. University of Wisconsin*,[458] was not applicable to *Goodwin*, since, according to the Tenth Circuit, *Dasgupta* failed to identify why the allegedly lower pay was not a "recurring violation,"[459] which placed *Dasgupta* at odds with *Bazemore*:[460] "[n]o other circuit has discerned the fine-line 'distinction' perceived by the Seventh Circuit in *Dasgupta*, and we find any such approach unpersuasive here."[461] Another case cited by the employer, *Amro v. Boeing Co.*,[462] similarly failed to hold that the discriminatory pay was part of a continuing violation, but owed this conclusion to the district court's opinion that the original salary was not the product of discriminatory intent.[463] Furthermore, the Tenth Circuit repeated the lower court's finding that Goodwin could not have found out about the pay disparity owing to the confidentiality policy.[464] Referring to the lower court's decision in favor of the employer, the Tenth Circuit said, "[i]t makes no sense to suggest that Goodwin should or even could have filed her complaint before she knew about any adverse decisions."[465] Goodwin was successful, but her relief was limited to back pay within the statutory time period.[466]

8. The Eleventh Circuit: Calloway v. Partners National Health Plans[467]

Felicia Calloway claimed pay discrimination in violation of Title VII.[468] Calloway's suit alleged that white male employees were paid more than she, an African American female.[469] The district court dismissed her suit as time-barred, ruling that the discriminatory pay was a discrete act that started the time limitations under Title VII to run when she began working for the employer.[470] Calloway appealed.[471]

457. *Id.*
458. 121 F.3d 1138 (7th Cir. 1997).
459. *Goodwin*, 375 F.3d at 1010.
460. *Id.*
461. *Id.* at 1011.
462. 65 F. Supp. 2d 1170 (D. Kan. 1999).
463. *Goodwin*, 375 F.3d at 1011.
464. *Id.*
465. *Id.* at n.6.
466. *Id.* at 1011.
467. 986 F.2d 446 (11th Cir. 1993).
468. *Id.* at 447; *see also supra* Section IV (detailing the Eleventh Circuit's treatment of *Calloway* in its *Ledbetter* decision).
469. *Calloway*, 986 F.2d at 447.
470. *Id.* at 448.

The Eleventh Circuit considered, "[a]s the Supreme Court emphasized in *Evans*,[472] 'the critical question is whether any present violation exists.'"[473] Finding that disparate pay was part of a continuing violation,[474] the court held that Calloway could file suit against her employer.[475] The court stated: "[The employer] discriminated against Calloway not only on the day it offered her less than her white predecessor, but also on every day of her employment . . . . When the claim is one for discriminatory wages, the violation exists every single day the employee works."[476]

9. The D.C. Circuit: Anderson v. Zubieta[477]

Several Panamanians as well as Hispanic nationals claimed discrimination in compensation based on race and national origin.[478] The employees worked for a United States government corporation, and, as such, enjoyed protection under Title VII.[479] Prior rulings dismissed the employees' actions as time-barred.[480] The D.C. Circuit found, however, that the employees had brought timely claims of discrimination, which established a "continuing violation."[481] The D.C. Circuit cited to *Bazemore*[482] in support of its ruling, as well as several circuit courts' opinions that dealt with discriminatory pay and Title VII.[483]

The employer argued that three Supreme Court cases required the D.C. Circuit to dismiss the suit as time barred:[484] *Evans*,[485] *Ricks*,[486] and *Lorance*.[487] To the contrary, the D.C.

471. *Id.*
472. United Airlines v. Evans, 431 U.S. 553 (1977).
473. *Calloway*, 986 F.2d at 448-49 (quoting *Evans*, 431 U.S. at 558).
474. *Calloway*, 986 F.2d at 449.
475. *Id.* at 448-49.
476. *Id.*
477. 180 F.3d 329 (D.C. Cir. 1999).
478. *Id.* at 333. The court noted that all the plaintiffs became United States citizens. *Id.* at 332.
479. *Id.* at 333.
480. *Id.* at 334-35.
481. *Id.* at 335.
482. 478 U.S. at 395.
483. *Anderson*, 180 F.3d at 335 n.7. The D.C. Circuit cited to the following cases: *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-49 (4th Cir. 1994); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir. 1992); *EEOC v. Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (6th Cir. 1988); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir. 1986). The D.C. Circuit also cited *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 843-44 (3d Cir. 1992) (applying the continuing violation doctrine to unequal pay claims under the Equal Pay Act).
484. *Anderson*, 180 F.3d at 335.
485. 431 U.S. 553.
486. 449 U.S. 250.
487. 490 U.S. 900.

Circuit found that none of those cases prevented a timely filing or supported the employer's defense of its pay structure.[488] The facts were distinguishable in those cases, according to the D.C. Circuit, because *Evans* and *Lorance* concerned discriminatory seniority systems, and *Ricks* involved discriminatory termination.[489] The D.C. Circuit noted that the plaintiffs in *Evans*, *Ricks*, and *Lorance* did not allege discriminatory pay, as was the case in *Bazemore*:

> As *Lorance* explained, *Bazemore* was a case in which plaintiffs contended not just that the pay system was originally adopted for discriminatory reasons, but that it continued to discriminate unlawfully each time it was applied.[490] "There is no doubt," Justice Scalia said, that a system "that treats similarly situated employees differently . . . can be challenged at any time.[491]

The D.C. Circuit continued its discussion of the Supreme Court's holdings in *Evans*, *Ricks*, and *Lorance*, holding that the cases stood for the proposition that the employees in *Anderson* claimed a continuing violation of a discrete act, which was renewed with each paycheck,[492] justifying damages within the statutory time period.[493]

C. A Summary of the Circuit Court Decisions Regarding Discriminatory Pay

With the exception of the Eleventh,[494] the Circuit Courts of Appeal had uniformly held in cases similar to *Ledbetter* that Title VII allowed a timely claim for pay discrimination even when the pay was the product of a discriminatory act that occurred outside of the 180-day window established by Title VII. The Second[495] and Third[496] Circuit rulings prior to *Morgan*, characterized the discriminatory pay as a discrete and repeated discriminatory act. The Fourth,[497] Sixth,[498] Eighth,[499] Ninth,[500] Tenth,[501] and

488. *Anderson*, 180 F.3d at 336.
489. *Id.*
490. *Id.* (summarizing *Lorance*, 490 U.S. at 912 n.5).
491. *Anderson*, 180 F.3d at 336 (quoting *Lorance*, 490 U.S. at 912).
492. *Anderson*, 180 F.3d at 337.
493. *Id.*
494. *See Ledbetter*, 421 F.3d at 1182 (declining to find each paycheck as a discrete discriminatory act and holding that Ledbetter could recover for disparate pay claims only to the extent that she could show intentional discrimination in the one decision affecting her pay scale during the limitations period).
495. Pollis v. New School for Social Research, 132 F.3d 115, 119 (2d Cir. 1997); Connolly v. McCall, 254 F.3d 36, 41 (2d Cir. 2001).
496. Cardenas v. Massey, 269 F.3d 252 (3d Cir. 2001).
497. Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 349 (4th Cir. 1994).
498. Grandy v. Sullivan County, Tennessee, 24 F.3d 861, 865 (6th Cir. 1994); Hall v. Ledex, Inc., 669 F.2d 397, 398-99 (6th Cir. 1982).
499. Ashley v. Boyle's Famous Corned Beef Company, 66 F.3.d 164, 168 (8th Cir. 1995).

Eleventh[502] Circuits held pre-*Morgan* that the ability to timely file the claim was a result of the continuing violations doctrine; the act of discrimination had a continuing effect on current pay, and, therefore, was contemporary with the claim. Post-*Morgan*, the Second,[503] Seventh,[504] and D.C. Circuits,[505] held that the discriminatory conduct was a current violation of a discrete discriminatory act, and, therefore, posed a contemporary Title VII violation. If *Morgan* drove the final nail in the continuing violations doctrine's coffin, the Second, Seventh and D.C. Circuits kept alive the notion of repeated discrete acts for purposes of timely actions claiming discriminatory pay.

V. RECOGNIZING A VIOLATION HAS OCCURRED, MATERIALITY AND THE PRACTICAL CONTEXT OF ACTIONS CLAIMING DISCRIMINATORY PAY

This Article has examined the *Ledbetter* decision, the cases on which it relied, and the circuit court decisions that dealt previously with similar issues of discriminatory pay. Section V now discusses the notions of materiality and the practical context for filing a Title VII action for discriminatory pay.

A. Violation and Materiality

The Supreme Court holds that a plaintiff may establish his or her action under Title VII 42 U.S.C. § 2000e-2(a)(1)[506] by claiming that he or she suffered either a discrete act of discriminatory treatment or a hostile environment premised on discrimination by the employer.[507] "Discrete acts such as termination, failure to

500. Gibbs v. Pierce County Law Enforcement Support Agency, City of Tacoma, 785 F.2d 1396, 1400 (9th Cir. 1986).

501. Goodwin v. General Motors Corp., 275 F.3d 1005, 1011 (10th Cir. 2002).

502. *See* Calloway v. Partners National Health Plans, 986 F.2d 446, 449 (11th Cir. 1993) (a decision reached prior to *Ledbetter* and distinguished by the *Ledbetter* court in the Eleventh Circuit).

503. Forysth v. Federated Employment and Guidance Service, 409 F.3d 565, 573 (2d Cir. 2005).

504. Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007, 1013-14 (7th Cir. 2003); Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1029 (7th Cir. 2003).

505. Shea v. Rice, 409 F.3d 448, 456 (D.C. Cir. 2005). These post-*Morgan* rulings, in the Second, Seventh and D.C. Circuits, are similar to the pre-*Morgan* decisions in Second and Third Circuits.

506. 42 U.S.C. § 2000e-2(a)(1) (2000).

507. *See e.g.*, Morgan, 536 U.S. at 122; Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73, (1986); *see also*, Sara L. Johnson, *When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 U.S.C.A. §§ 2000e et seq.)*, 78 A.L.R. FED. 252 § 2 (updated weekly, originally published in 1986).

promote, denial of transfer, or refusal to hire" [508] constitute, therefore, one type of claim. Discrete acts must be motivated by the employer's intent to discriminate and cause harm.[509] The Court has stated that these claims are "the most easily understood type of discrimination."[510] One clearly knows, for example, if one has been fired.

The second type of claim, for a hostile environment, requires a court to contemplate a series of acts:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . . The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own . . . . Such claims are based on the cumulative effect of individual acts.[511]

The hostile environment must reach a level of material harm sufficient to trigger the employer's liability:[512] "complaints attacking the ordinary tribulations of the workplace such as sporadic use of abusive language, gender-related jokes and occasional teasing" must be filtered out by the courts.[513] In *Oncale v Sundowner Offshore Services*,[514] the Court said:

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

509. *See* Hazen Paper Co. v. Briggs. 507 U.S. 604, 610 (1993) ("[i]n a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employer's decision.").

510. *Id.* at 609.

511. *Morgan*, 536 U.S. at 115 (internal quotations omitted).

512. Another wrinkle to the hostile environment claim was raised in *Burlington Industries, Inc. v. Ellerth*, when the Court considered whether an employer may raise an affirmative defense to discriminatory acts committed by the employer's supervisor. 524 U.S. 742, 753 (1998). The Court discussed the notion of a tangible employment action against which the affirmative defense cannot be raised. *Id.* at 761. The Court stated that tangible employment actions included "hiring, firing, failing to promote, reassignment to significantly different responsibilities, or a decision causing a significant change in benefits," that is, discrete, materially adverse acts. *Id.* The Court extended its analysis of the issue in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148-50 (2004) (holding that constructive discharge is not a tangible employment action). The *Suders* Court distinguished one class of hostile environment claims from the others in order to establish when an affirmative defense may be raised and to call attention to those cases where there exists a discernable difference in the materiality of the harm, the precipitating factor causing that harm, and the ability of the employee to take his or her own action against the harm. *Id.* at 148. Tangible employment actions, such as a termination, pose material harms of the first order, and the affirmative defense is not available. *Id.* If the employee endures no tangible employment action, however, the affirmative defense may be raised. *Id.* The significance of the harm, as well as the ability of employees to take their own action against it, justified the distinction in the Court's view. *Id.*

513. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

514. 523 U.S. 75 (1998).

> As we emphasized in *Meritor*[515] and *Harris*,[516] the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview."[517]

Materiality is also important to the Court when it considers what a plaintiff must establish under Title VII, 42 U.S.C. § 2000e-3(a),[518] when he or she claims that an employer discriminatorily retaliated against the plaintiff:[519] "We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'"[520] With regard specifically to retaliation, the Court held:

> In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"
>
> * * *
>
> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.[521]

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515. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

516. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

517. *Oncale*, 523 U.S. at 81 (1998); (quoting *Harris*, 510 U.S. at 21 (citing *Meritor*, 477 U.S. at 67)).

518. 42 U.S.C. § 2000e-3(a) (2000).

519. *See, e.g.*, Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006) (stating that "the anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm."). An additional question with regard to retaliation is: if an employee asks about pay, does the employer consider questions concerning what coworkers are paid to be a firing offense? Are terminations by the employer only triggered when the employer operates with a specific confidentiality policy about pay? And if the employee is fired for asking about pay, could the employee then claim that he or she is investigating a Title VII act, and the firing is, therefore, an illegal and discriminatory retaliation in violation of Title VII? The difficulty posed here is that a discriminatory treatment case is converted into a retaliation case, committed in the course of the employee's Title VII investigation for the discriminatory treatment.

520. *White*, 126 S. Ct. at 2415 (quoting *Oncale*, 523 U.S. at 80).

521. *Id.* at 2415-16 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

The ability to identify an act as discriminatory and, frequently, the ability to furthermore describe the act as a material harm, underlie the Court's analyses of Title VII.[522]

When the Court classified discriminatory pay as a discrete act, the Court eliminated the need to explicitly evaluate the act as material, as would be the case if discriminatory pay was held to be similar to claims for a hostile environment ("a single act of harassment may not be actionable on its own"[523]) or if the plaintiff claimed retaliation ("we believe it is important to separate significant from trivial harms" [524]). Materiality is not important because the focus lies on the initial act of paying the employee less because of his or her sex, not, as would be true in a hostile environment claim, on the ongoing consequences of that act. Clearly, if the employee is paid less on account of sex, that act, the moment it takes place, poses a harm. Two factors, however, complicate the analysis for purposes of identifying a harm, particularly a harm that is ongoing.

The first factor concerns when the employee discovers the harm. As pointed out by Justice Ginsburg in the *Ledbetter* dissent, an employee may not know, within a six-month period, that he or she actually is receiving less pay relative to coworkers:[525]

> The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet [sic] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making

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522. *Id.* at 2413 (discussing tangible employment actions in the context of a retaliation case):

> *Burlington Industries, Inc. v. Ellerth*, as petitioner notes, speaks of a Title VII requirement that violations involve "tangible employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." But *Ellerth* does so only to "identify a class of [hostile work environment] cases" in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors; see also Pennsylvania State Police v. Suders (explaining holdings in Ellerth and Faragher v. Boca Raton as dividing hostile work environment claims into two categories, one in which the employer is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense).

White, 126 S. Ct. at 2413 (internal citations omitted).

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

524. *White*, 126 S. Ct. at 2415.

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

waves.[526]

Discovering that a harm exists in the first instance is certainly important to filing the claim and asserting that one suffered a harm as contemplated by Title VII. The employee may discover the pay discrepancy, however, more than six months after the initial decision to pay the employee less; under those circumstances, the employee would be unable to file under *Ledbetter*.[527]

The second factor is perhaps even more critical to the practical implications of the *Ledbetter* decision, and it more obviously touches on the issue of materiality: is 180 days enough time to generate an act of pay discrimination? For example, if a woman is discriminatorily denied a raise, or the raise is insubstantial in comparison to male coworkers who do receive a relatively more generous salary increase, when does the difference in pay become an actionable harm? A pay difference that is relatively small may, in time, grow to become a substantial disparity and only when the disparity is substantial will the plaintiff realize that a violation is occurring.[528] These were the facts essentially raised in *Ledbetter*, as noted by the Eleventh Circuit:

> [A]t the end of 1997, [Ledbetter] was still earning $3727 per month, less than all fifteen of the other Area Managers in Tire Assembly. The lowest paid male Area Manager was making $4286, roughly 15% more than Ledbetter; the highest paid was making $5236, roughly 40% more than Ledbetter.[529]

Discrete events are actionable because they are noticeably

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526. *Id.* at 2178-79 (Ginsburg, J., dissenting); *see also id.* at 2186 n.9 (Ginsburg, J., dissenting) (stating: "[t]he Court would thus force plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case").

527. Ledbetter argued that if she knew the relative raises provided to three coworkers in only one year, her particular raise may not have prompted any concern. Transcript of Oral Argument, *supra* note 79 at *5. "It's only if Petitioner had all of the information . . . that she would have known that that pay raise decision increased the overall disparity between her wages and the average wages of men doing the same job." *Id.*

528. The focus of the pay discrepancy examples used in this Article concerns pay discrepancies that develop as the result of raises and the pay package one accumulates over time through those adjustments. One's compensation may also include bonuses, which are perhaps less dependent on prior salary and may be more isolated events. If the bonus relies on one's current salary (for example, the bonus is a percentage of salary) or if future bonuses reference bonuses received in the past, even bonuses may have cumulative effects. As in the case of pay, confidentiality in the award of bonuses may present a problem to an employee who fails to recognize that coworkers are receiving, or have received, more of a bonus than that awarded to the employee.

529. *Ledbetter*, 421 F.3d at 1174.

and materially illegal; a termination, for example, is recognizably illegal, that is, a material, harm. A small difference in pay may not be recognized as an illegal pay discrepancy; employees may suffer "a thousand cuts" before realizing they have been seriously hurt.[530]

The problem with pay decisions is that they are not, by their nature, discrete events. A pay decision is premised on the decisions that preceded it, including the pay rate at the initial hire, and a pay decision is amplified over the years as salary is earned. Justice Ginsburg noted the difficulty when she stated in her dissent:

> It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.[531]

If the employee must bring a claim within six months of a discriminatory pay decision, the employee must recognize that a

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530. At oral argument, Justice Scalia asked how extending the time available to file would affect Ledbetter's claim. Transcript of Oral Argument, *supra* note 79, at *5. Petitioner's counsel stated that it was the pay disparity persisting for, in this case, several years that led Ledbetter to realize that the employer committed a Title VII violation. *Id.* If a snapshot of pay and raises were taken at any one point in the pay process, the disparity may not have revealed itself as discriminatory; the cumulative effect indicated, however, that pay was discriminatorily awarded, and the present effect was the result of discriminatory treatment that occurred years ago. *Id.* at 5-6. It was only by looking at the pay awarded over several years that the plaintiff could see the discrimination. *Id.*

Ledbetter's argument would not excuse an employer who decides to pay its employee less based on sex; that is, the employer violates Title VII at the time of that discriminatory pay decision. The argument runs, however, that the employee may not know of the discrimination if a pay difference is observed at only one point in time. As the pay discrepancy builds, the plaintiff becomes aware that the discrimination occurred. The materiality of the pay disparity's cumulative effect is relevant here as well, since a relatively minor difference in pay period one (i.e., when the employee's yearly salary is determined in the employee's first year), may only reach a material difference in pay period three (i.e., the employee's third year of employment).

Knowledge of one event, when there is one disparity in the wages awarded, would not cause him or her to believe anything was amiss. As argued to the Court, "[w]hen the disparity persists, when the different treatment accrues again and again and the overall disparity in the wages increases, that the employee has some reasonable basis to think that it's not natural variation in the pay decisions but actually intentional discrimination." Transcript of Oral Argument, *supra* note 79 at *6-7.

531. *Ledbetter*, 127 S. Ct. at 2179. *Ledbetter* may be turning the notion of materiality on its head, if small differences in pay (i.e., petty slights) are enough to justify the claim.

discrepancy exists and that the discrepancy was an act of discrimination.[532] Assuming the employee realizes the discrepancy exists, the *Ledbetter* holding necessarily implies that the employee will furthermore classify the discrepancy as an act of discrimination, even if the discrepancy is small compared to the pay earned by coworkers, accruing at most over a six-month period. Two conclusions from this Article's analysis of *Ledbetter* are possible. First, if the employee must bring a claim within six months of the initial act, the claim will be heard despite the fact that only a small difference in pay has accrued. The depth of the harm is irrelevant to the ability to file. Second, if only small differences are visible within a six-month period, then the Court may be classifying these small differences as it would the stray discriminatory remark.[533] A stray remark is not generally sufficient to trigger Title VII liability.[534] Similarly, Title VII would

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532. Recognizing that one is paid less is complicated due to many employers' confidentiality policies regarding pay. *See, e.g.*, Leonard Bierman and Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167 (2004) (discussing how employer pay secrecy / confidentiality rules run contrary to labor laws designed to protect the rights of all employees (cited by the dissent in *Ledbetter*, 127 S. Ct. at 2182) (Ginsburg, J., dissenting)); *see also* Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41 (2005) (analyzing pay secrecy rules in terms of social benefits and the normative legal system)).

533. *See, e.g.*, Walton v. McDonnell Douglas Corp. 167 F.3d 423, 426 (8th Cir. 1999) (positing:

> [S]tatements by persons involved in the decision-making process [may] be viewed as directly reflecting the alleged discriminatory attitude. . . sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision . . . [but] not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference.)

(internal citations omitted); Krohn v. Sedgwick James of Mich., Inc., 624 N.W.2d 212, 219 (Mich. 2001) (trial court properly excluded supervisor's stray remark as irrelevant in matter of liability of the employer); Oest v. Ill. Dep't of Corrections, 240 F.3d 605, 611 (7th Cir. 2001) (discussing whether a remark was related to the decision-making process); Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 896-97 (5th Cir. 2002) (analysis of stray remarks under the Age Discrimination in Employment Act); Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002) (noting the difference between a remark made by a supervisor, i.e., a decision-maker, and a comment by a coworker). *See also* Robert J. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 118-19 (2004) (neither statements made by non-decision-makers nor statements made by decision-makers that are unrelated to the decision-making process can constitute direct evidence of discrimination).

534. *See e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (where Justice O'Connor stated:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its

not be triggered by a small pay difference that only becomes larger and, therefore, recognizable over time. A pay discrepancy that grows will be ignored for purposes of Title VII, despite the ongoing consequences of an initially small difference. The Court has, under this alternative, eliminated the entire class of pay discrimination claims in which small pay differences result in large discrepancies, but only over time.

If the Court is willing to ignore the practical circumstances of pay decisions, then the Court has essentially classified all claims for discriminatory pay, except those claims for obvious and recognizable and significantly different pay, as a trivial harm, because the employee may not perceive a minor pay difference in a six-month period as anything significant, or the employee, owing to pay confidentiality, may not be aware of any difference at all.

B. A Hypothetical Example – The Set of Facts a Court Will Consider in Cases Involving Discriminatory Pay

The *Ledbetter* Court held that discriminatory pay was a discrete act, which must be challenged within 180 days.[535] The logical implications of the Court's analysis take the following form, using a hypothetical example essentially drawn from the facts in *Ledbetter*:

> An employee endures discriminatory acts. The acts end and are not repeated, and the only other evidence of discriminatory conduct is a pervasive, but not precisely identifiable, discriminatory animus in the workplace. Nothing indicates that the employee is being actively and intentionally treated discriminately, as the employee is unaware of any ongoing and actual disparity in treatment. Nonetheless, the original discrimination forms the basis for how the employee is treated as he or she continues to work for the employer. Years pass, and the plaintiff finally discovers that the treatment he or she suffered years ago laid the groundwork for a disparity to which the employee is currently subjected.

The key aspect of the Court's understanding of the preceding example would be that the discriminatory conduct itself was not repeated; only the consequences of the act were felt again and again. The Court rejected an understanding of the facts that would disregard when the original act of discrimination occurred, but, instead, evaluated the circumstances through the employer's current actions, contemporaneous to the lawsuit, or at least within 180 days of it.

> hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.)

(internal citation omitted).

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

Continuing to draw from the example, pay decisions may be unique in the constellation of discriminatory acts that are currently felt, though initiated long ago. One could imagine, however, an employee who is discriminatorily denied the opportunity to participate in training, which then leads to the employee being prevented from participating in subsequent job assignments, thereby compromising the employee's ability to obtain a promotion. Or, the employee might have been discriminatorily denied a work assignment, which led to a lack of job experience, similarly causing the employee to miss future opportunities for advancement. In either case, while he or she may be aware of the denial, the employee is unaware of its ongoing negative impact. The Court would hold that the employee must file suit within the 180-day window (that is, when the training or job assignment were denied), regardless of when or what the employee knew regarding any ongoing impact, if the impact occurred outside of the 180-day limit.[536]

The nexus between a current negative consequence and a prior discriminatory act would be harder to draw for cases involving a denial of training or work assignment than would be the case in claims for pay (as the current negative consequence), because pay is an objectively identifiable fact of employment, and whether, for example, the loss of a promotion was specifically attributable to an act that happened in the past may be unclear; that is, the act of failing to train or promote constitutes the triggering, discriminatory act and its ongoing, enduring impact may be difficult to establish.

If it is revealed that the worker currently is not paid as his or her co-workers are paid, however, the fact of the ongoing discrepancy is clearly known. The employee still has to establish that there was discrimination with regard to pay initially. Having established the original discrimination, the ongoing effect on pay may be easier to relate to the past discriminatory act than would be true in speculating that future job opportunities were foreclosed by the employer's prior discriminatory conduct in denying a promotion or training.

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536. During the oral arguments of *Ledbetter*, Justice Kennedy asked Petitioner's Counsel whether, "the rule for paycheck decisions is different than the rule for other sorts of decisions," for example, the denial of a promotion, in determining discriminatory conduct. Transcript of Oral Argument, *supra* note 79, at *2. Counsel for the Petitioner answered that, "As a practical matter, while it's always the case or almost always the case that somebody knows they have been subject to disparate treatment in a promotions case—they know they didn't get the promotion and somebody else did—it is frequently possible for an employee to be subject to disparate pay without ever knowing that she had been treated differently than anybody else." *Id.* The speculative nature of an ongoing effect triggered, for example, by a prior discriminatory refusal to promote, was not specifically addressed in the oral argument.

In Ledbetter's case, Ledbetter's pay was established through performance evaluations.[537] If the evaluations were inaccurate due to discrimination, it is not improbable that decisions impacting Ledbetter's future pay were tainted by the prior discriminatory conduct.

Ledbetter holds that, in cases like the hypothetical situation previously described, a claim for discrimination may be supported by evidence gathered at the moment training or a promotion are denied, but the claim cannot survive if an ongoing impact of the denial is felt more than 180 days in the future. Again, under a claim involving the denial of training or job assignment, any ongoing impact may be more speculative than an absolute difference in pay, absent a clearly demonstrable intention by the employer to cause future harm.[538] Regardless, discrimination for the denial of training or promotion is the relevant act for filing the claim, rather than its future consequences. The *Ledbetter* Court similarly held that Goodyear's act of discriminatorily setting Ledbetter's pay posed the discrete act, relevant to filing a Title VII

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

538. A clearer intention to cause future harm could be made, for example, if the employee discovered an email, sent by the employee's supervisor to the personnel office two years previous, that stated, "This employee will not receive the training, because girls are never promoted to the jobs that use it," and, as promised in the email, the employee is denied the training and does not receive the promotion. If the training and promotion were denied, and the employee discovers the email more than 180 days after the denial of training, the employee could not file under Title VII; the employee would have an immediate right to sue for the denial itself, as a violation of Title VII, but the right to sue is foreclosed if the suit is not timely. Furthermore, if the employee immediately saw the email, the employee would be on notice that a Title VII violation occurred, and would be compelled to file a Title VII claim within 180 days of the incident.

One could ignore the *Ledbetter* result and stretch the example further: the employee files a Title VII action, and, despite *Ledbetter*, the two-year-old email is considered in evaluating the employee's claim. The employer produces evidence that the failure to promote was based on an objectively valid reason (an allegation made by Ledbetter's employer). In this example, the prior discriminatory statements balanced against the objectively valid reason provide evidence of a mixed motive. The Court dealt previously with the issue of mixed motives in discrimination cases such as *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989) and *Desert Palace, Inc. v. Costa*, 125 S. Ct. 2148 (2003) (regarding mixed motive cases since the 1991 amendment of the Civil Rights Act, 42 U.S.C. § 2000e-(m)). The difference between valid reasons for the respective decisions in the stretched example and in *Ledbetter* is that, in *Ledbetter*, the supervisor's actions affected Ledbetter's future pay, as understood by the jury that considered his conduct in the district court. Goodyear could not provide a legitimate, nondiscriminatory reason for Ledbetter's prior performance reviews and pay, and, indeed, was not required by the Court to provide nondiscriminatory reasons for the supervisor's actions. Goodyear only offered explanations for Ledbetter's performance review and pay contemporaneous with the 180-day deadline.

claim, and the tainted pay's ongoing impact is irrelevant, since it occurred outside the time period.

VI. CONGRESSIONAL ACTION

Within months of the decision, Congress took up Justice Ginsburg's challenge to rectify the *Ledbetter* result.[539] Both the Senate and the House of Representatives introduced bills designed specifically to address *Ledbetter*, and both "take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) . . . that are pending on or after that date."[540] Ledbetter's appeal was decided by the Supreme Court on May 29, 2007.[541]

The House of Representatives version (H.R. 2831, short title, the "Lilly Ledbetter Fair Pay Act of 2007") stated:

> Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(e)) is amended by adding at the end the following:
>
> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.
>
> (B) In addition to any relief authorized by section 1977a of the Revised Statutes (42 U.S.C. § 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.[542]

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539. "[T]he ball is in Congress's court . . . . [T]he Legislature may act to correct this Court's parsimonious reading of Title VII." *Ledbetter*, 127 S. Ct. at 2188.

540. H.R. 2831, 110th Cong. § 6 (2007); S. 1843, 110th Cong. § 6 (2007).

541. *Ledbetter*, 127 S. Ct. at 2162. Both bills also amend other Civil Rights law, including the Americans with Disabilities Act of 1990 (ADA), regarding claims for discriminatory pay brought under the ADA (42 U.S.C. §§ 12111, 12203). H.R. 2831, 110th Cong. § 5 (2007); S. 1843, 110th Cong. § 5 (2007).

542. H.R. 2831, 110th Cong. § 3(A-B) (2007).

The House passed the bill on July 31, 2007.[543]

The Senate bill (S. 1843, short title, the "Fair Pay Restoration Act") was introduced on July 30, 2007,[544] and stated:

> Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(e)) is amended by adding at the end the following:
>
> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.
>
> (B) Liability may accrue and (in addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. § 1981a)), an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to 2 years preceding the filing of the charge, in an action under this title concerning an unlawful employment practice with regard to discrimination in compensation, where the unlawful employment practice that has occurred during the charge filing period is similar or related to an unlawful employment practice with regard to discrimination in compensation that occurred outside the charge filing period.[545]

The Senate version essentially replicated the House bill. Both limit recovery of back pay to a maximum of two years accruing prior to the action.[546] On April 23, 2008, a Senate cloture motion on the bill (a procedural action) foreclosed the Senate's debate and consideration of the bill by a roll call vote, making uncomplicated passage of the bill unlikely.[547]

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543. H.R. 2831, 110th Cong. (2007)

544. S. 1843, 110th Cong. (2007).

545. S. 1843, 110th Cong. § 3(A-B) (2007).

546. H.R. 2831, *amending* 706(e), 42 U.S.C. § 2000e-5(e), *adding* § (3)(B) (2007); S. 1843, *amending* 706(e), 42 U.S.C. § 2000e-5(e), *adding* § (3)(B) (2007).

547. Roll Call Vote of the United States Sentate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00110 (last visited April 28, 2008); *see also* GovTrack.us, http://www.govtrack.us/congress/vote.xpd?vote=s2008-110 (last visited April 28, 2008); Lori Montgomery, Senate Republicans Block Pay Disparity Measure, Wash. Post, April 24, 2008 at A04, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/23/AR2008042301553.html?hpid%3moreheadlines&sub=AR (last visited April 28, 200)) (discussing the cloture motion); CivilRights.org, http://www.civilrights.org/press_room/buzz_clips/civilrights org-storiesedbetter derailed.html?templateName29304 566print=t (last visited April 28, 2008)

President Bush pledged to veto legislation passed in response to *Ledbetter*.[548] The White House issued the following statement on July 27, 2007 (just before the House of Representatives passed its version of the bill):

> H.R. 2831 would allow employees to bring a claim of pay or other employment-related discrimination years or even decades after the alleged discrimination occurred. H.R. 2831 constitutes a major change in, and expanded application of, employment discrimination law. The change would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved . . . . The legislation does not appear to be based on evidence that the current statute of limitations principles have caused any systematic prejudice to the interests of employees, but it is reasonable to expect the bill's vastly expanded statute of limitations would exacerbate the existing heavy burden on the courts by encouraging the filing of stale claims.[549]

Other pledges to fight Congressional action came, for example, from the United States Chamber of Commerce[550] and the National Association of Manufacturers.[551] Contrary to the

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("Forty-two senators used a procedural vote to block the bill from debate. Only 34 votes are needed to block debate on a bill in the Senate, although debate could continue if 60 senators vote to remove the block.").

548. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 2831 – Lilly Ledbetter Fair Pay Act of 2007 (July 27, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf; *see also* Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASH. POST, Sept. 5, 2007, at A19 ("the White House has said it opposes the bill and has threatened a veto."). Note that the bills limit an employer's potential liability to two years for discriminatory pay practices precipitated by acts that occur prior to the 180-day limitation established by Title VII.

549. Lilly Ledbetter Fair Pay Act of 2007, *supra* note 556. The President's concern for "other employment-related discrimination" must stem from the House bill's inclusion of, for example, liability not only under Title VII, but also under actions claimed through the Americans with Disabilities Act, because the discrimination specifically addressed by the bills is pay discrimination.

550. According to the United States Chamber of Commerce, if the bill became law, "it would effectively do away with statutes of limitations." U.S. CHAMBER OF COMMERCE, CHAMBER FIGHTS BILLS TO INCREASE PAY DISCRIMINATION LAWSUITS, *available at* http://www.uschamber.com/publications/weekly/update/070807c.htm (last visited April 30, 2008) (letter opposing the House of Representatives bill (H.R. 2831), July 27, 2007).

551. The National Association of Manufacturers stated "(H.R. 2831) would make it very difficult for employers to rectify cases of discrimination and pave the way to endless litigation against businesses." News Release, National Association of Manufacturers, Fair Pay Act Is Too Broad in Scope (July 31, 2007), *available at* http://www.nam.org/s_nam/doc1.asp?TrackID=&SID=1&DID=239086&CID=98&VID=2&RTID=0&CIDQS=&Taxonomy=False&specialSearch=False (last visited Apr. 30, 2008). "We do not believe removing incentives for prompt resolution of discrimination claims benefits the employee or the employer." Letter from Jay Timmons, Senior Vice President

President and the referenced business organizations, the American Bar Association ("ABA") issued a news release in support of Congress's action, stating: "[T]he ABA urges Congress to ensure that in claims involving discrimination in compensation, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. If adopted by Congress, such a policy would effectively allow employees to sue for pay discrimination at any time it is discovered."[552]

The practical effect of the *Ledbetter* decision ignores claims that only become actionable over time, as pay differences become sufficiently large enough to notice, and *Ledbetter*, furthermore, sets the stage for new employees to initiate, as one of their first acts with a new employer, the filing of a lawsuit if they merely suspect discriminatory pay.[553] The employees must sue, under *Ledbetter*, or they loose the right to sue later. Encouraging lawsuits in general is not the intent of Title VII,[554] nor did the Court likely intend such a result, but if one's right to sue for discriminatory pay lasts for only six months, the suspicion that

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for Policy and Government Relations (July 27, 2007), *available at* http://www.nam.org/s_nam/doc1.asp?TrackID=&SID=1&DID=239072&CID=202688&VID=2&RTID=0&CIDQS=&Taxonomy=False&specialSearch=False.

552. News Release, American Bar Association, Policy Adopted at ABA Meeting Urges Congress to Override Executive Order on Interrogation, Addresses Government State Secrets Claims, Weighs in on Ledbetter Pay Discrimination Case (Aug. 14, 2007), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=167 (last visited April 30, 2008).

553. *See also Lorance*, 490 U.S. at 919 (Marshall, J., dissenting) (discussing the initiation of a lawsuit when the plaintiff merely suspects discrimination involving a seniority system, "employees must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."). Justice Ginsburg also cited in *Ledbetter* to the *Lorance* dissent. 127 S. Ct. at 2183. The *Lorance* decision was ameliorated though Congress's amendment to Title VII:

> For purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2).

554. *See, e.g.*, Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) and Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (discussing the goals of Title VII, "The phrase 'terms, conditions or privileges of employment' evinces a Congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment"). *See also*, Benjamin J. Morris, *A Door Left Open?* Nat'l R.R. Passenger Corp. v. Morgan *and Its Effect on Post-Filing Discrete Acts in Employment Discrimination Suits*, 43 CAL. W. L. REV. 497, 502 (2007) ("The goal of Title VII was to rectify past and prevent future workplace discrimination and to provide a remedy for economically injured employees.").

one's pay is discriminatory will force potential plaintiffs to file.[555] Congress may disrupt this result.

VII. CONCLUSION

The Supreme Court held that Lilly Ledbetter failed to file a timely Title VII action for discriminatory pay. The circuit courts that have heard claims similar to Ledbetter's, with the exception of the Eleventh Circuit, found such claims to be consistent with both Title VII's time limitations and the law governing timely filing announced in the Court's prior cases. Congress has attempted to amend Title VII. The reasoning and the result reached by the Court pose significant challenges to potential plaintiffs who face discriminatory treatment at work based upon their compensation. For plaintiffs like Ledbetter, the need to change the law is critical if the goal of Title VII to eliminate employment discrimination is to be preserved.

555. Rather than fashioning an amendment specific to pay (Title VII had been previously and specifically amended, for example, in response to seniority concerns after *Lorance)*, Congress could have tried to change to the law so that it permitted filing when a potential plaintiff knew or should have known that he or she had been discriminatorily treated, regardless of the specific harm allegedly suffered. If Congress's amendments were phrased in this way, a plaintiff like Ledbetter could file when she discovered the pay discrepancy (and Ledbetter did not know about the discrepancy until late in the game, owing to her employer's confidentiality policy regarding pay). Employers would, however, under this broader approach, be subject to a greater variety of actions, including, for example, a claim that, due to a discriminatory denial of training years ago, the employee was eventually denied a promotion. The speculative nature of the ongoing harm may, however, counsel against such an amendment.