

Lilly Ledbetter Fair Pay Act

Legislative Background

Congressional leaders are taking action to enact a legislative remedy to restore important Title VII protections eliminated as a result of the Supreme Court's decision in the *Ledbetter* case. The *Ledbetter Fair Pay Act of 2007* (HR 2831) passed the House earlier this year. Unfortunately, on April 23, 2008, a minority of the U.S. Senate filibustered the bill, blocking it from receiving an up-or-down vote. However, Majority Leader Senator Harry Reid has signaled that he will bring this legislation up again, as soon as we have the three additional votes needed to end the filibuster. **Senator Sherrod Brown (D-OH) is a cosponsor of the legislation, but Senator George Voinovich (R-OH) voted for the filibuster.**

The *Lilly Ledbetter Fair Pay Act* will restore critical civil rights protections for American workers that were lost as a result of the Supreme Court's recent controversial decision in *Ledbetter v. Goodyear Tire & Rubber*. Voting against the legislation sends a signal that it is acceptable for employers to pay people differently as a result of their gender, race, religion, age, or disability. Such discrimination cannot be tolerated in our work places or in Congress.

The Supreme Court's Decision

In *Ledbetter*, the Supreme Court held that employees cannot challenge ongoing compensation discrimination if the employer's original discriminatory decision occurred more than 180 days before, even when the employee continues to receive paychecks that have been discriminatorily reduced.

Lilly Ledbetter was one of just a handful of female supervisors in the Goodyear tire plant in Gadsden, Alabama. For years, she endured insults from her male bosses because she was a woman in a traditionally male job. She worked 12 hour shifts – which often stretched to 18 hours or more when another supervisor was absent. Late in her career with the company, Lilly discovered that Goodyear paid her male counterparts 20% to 40% more than she earned for doing the same job. The jury awarded Ms. Ledbetter full damages, but the Supreme Court said she was entitled to nothing because she was too late in filing her claim.

The Decision's Effect

The *Ledbetter* decision undermines the Congressional goal of eliminating discrimination in the workplace, enables employers to benefit from discrimination, and ignores fundamental workplace realities. In fact, the law under *Ledbetter* provides an incentive for employers to conceal, rather than correct, compensation discrimination. **In Ohio, on average, a woman with a college degree makes only 73 cents for every dollar a man with a college degree earns.**

The Court's *Ledbetter* decision reversed decades of precedent in the courts of appeals. It also overturned the policy of the EEOC under both Democratic and Republican administrations. In the year since the decision was released, it has already been cited in over 200 cases.

The Legislative Response

The *Lilly Ledbetter Fair Pay Act* will allow workers to file a pay discrimination claim within 180 days of a discriminatory paycheck. It only makes sense that as long as the discrimination continues, a workers' ability to challenge it should continue also.

This legislation would simply restore the law to what it was in almost every state in the country the day before the *Ledbetter* decision. We know it's workable and fair – it was the law of the land for decades.

Proposed Compromise is Not Acceptable

In response to criticism of his vote to filibuster the *Lilly Ledbetter Fair Pay Act*, Senator Voinovich has recently introduced a substitute bill. In contrast to the bipartisan *Lilly Ledbetter Fair Pair Act*, which would reinstate the longstanding paycheck accrual rule, Senator Voinovich's proposed compromise bill (S. 2945) would codify the "discovery rule," starting the 180-day clock when the employee "knew or should have known" that they were being affected by pay discrimination. There are three major reasons why this new proposal is not a sufficient or appropriate response to the *Ledbetter* decision:

- Senator Voinovich's bill would start the 180-day clock when an employee knew or reasonably should have known about the *injury*, i.e. the pay disparity. Once an person knows (or potentially should have known) that they are being paid less than similarly situated co-workers, the clock starts ticking, even if the person doesn't yet know that his or her pay is lower *a result of discrimination* by race, gender, religion, national origin, age, or disability.
- Pay discrimination is uniquely incremental. Usually, pay disparities start small and widen, as a result of accumulating smaller raises based on percentages of the original salary, or due to further discrimination in determinations of wages or benefits. Senator Voinovich's bill would start the clock ticking once an employee knows (or should have known) of the disparity, even if that disparity is small. If the pay differential widens over time, the 180-day clock does not restart.
- The discovery rule puts the focus in the wrong place. It turns a trial into a question of when the employee "should have known" of the pay disparity, placing the attention on whether the employee's response was reasonable, instead of focusing on whether the employer was discriminating, and adding to the length and expense of litigation.

The *Lilly Ledbetter Fair Pay Act* is a reasonable and practical response to the *Ledbetter* decision. It puts the law back where it had been the day before the decision, reinstating a fair and realistic rule that functioned well for decades. The House has already passed the legislation, and the Senate should act quickly to follow its lead.

Local Support

Toledo Blade

April 29, 2008

Editorial: Business as usual

IN A YEAR when a woman is running for president, you might think that the U.S. Senate would be sensitive to correcting an injustice to women workers perpetrated in 2007 by the Supreme Court. But to some Republicans, there are some things more obvious than an obvious unfairness. Last Wednesday, the Senate failed to advance the Lilly Ledbetter Fair Pay Act (HR 2831), which passed the House last year, to a full debate and vote. It required 60 votes to move the bill but it got only 56, thanks to Republican opposition.

One of the 42 no votes was from Ohio Sen. George Voinovich. Most Republicans should have been ashamed but instead some complained about the political nature of the vote. Indeed, Majority Leader Harry Reid of Nevada delayed the vote so Democratic presidential candidates Sens. Hillary Clinton and Barack Obama could return and make a statement. The certain Republican nominee, Sen. John McCain, stayed in Louisiana where he was campaigning but indicated he would have voted with the 42 who opposed a vote. If this was political theater, it deserved to be, because this was a clarifying issue. A 5-4 Supreme Court majority last year did Lilly Ledbetter a great injustice, and did it based on a technicality that it was not in her power to avoid. Ms. Ledbetter, who worked from 1979 until 1998 at a Goodyear Tire and Rubber Co. plant in Gadsden, Ala., was the unknowing victim of years of gender-based pay discrimination. But the Supreme Court insisted she had to file her claim within 180 days of an act of discrimination that began years before, which she did not know about at the time and which cumulatively built up to affect all her later pay checks. The reason the Republicans opposed closing this newly opened loophole allowing discrimination was that it supposedly would lead to more lawsuits and encourage litigation over outdated cases. But Congress should be on the side of the people - not those who would deny them their rights. If women are facing discrimination on the basis of gender, they should have a legal remedy. Fortunately, those who care about fairness have another remedy: Remember in November.

Toledo Blade

April 22, 2008

Editorial: Restore justice on pay

TO HEAR conservatives talk, you would think that the dreaded activist judges of their waking nightmares are all liberals. But that's not so, and the Supreme Court proved it beyond all doubt last year.

The case was Ledbetter vs. Goodyear. Lilly Ledbetter worked from 1979 until 1998 at Goodyear Tire and Rubber Co. in Gadsden, Ala., and was paid less than male workers. After finally finding out about it, she sued as a victim of gender discrimination and justice seemed to be done. Although the company tried to say her unequal pay was due to performance evaluations, a jury ruled in her favor and awarded her damages and back pay.

Justice was undone when the company appealed and a federal appeals court overturned the award and the U.S. Supreme Court agreed. Ms. Ledbetter, deserving and sympathetic plaintiff, found out why she could not prevail: She did not have extra-sensory perception, she could not read minds, and she did not have the x-ray vision necessary to pierce closed doors and see that her male colleagues were being paid more than she was.

That's what it amounts to anyway. The coldly legalistic reason was that the law said she had to file a claim within 180 days of an act of discrimination, which in her case had started many years before with cumulative effect.

In the Supreme Court, the usual conservative suspects in the 5-4 majority came up with a perfectly ridiculous Catch-22 that confounded the intent of Congress: If you are a woman who doesn't know you are being discriminated against, you can't make a complaint later because you aren't making a complaint now, even if past discrimination leaves you with a legacy of disadvantage.

They didn't have to rule as they did. With just a smidgen of common sense added to their constipated reading of the law, with a tiny dash of understanding for the reality of workplaces where workers frequently don't know their colleagues' pay scales, the justices might have come up with a decision that was not, as Justice Ruth Bader Ginsburg put it in her biting dissent, "parsimonious."

Fortunately, Congress can have the last word on this display of conservative judicial activism. Last July, the House of Representatives passed the Lilly Ledbetter Fair Pay Act, HR 2831, which would correct the alleged defect in the law the justices identified. This week, it is likely to be considered by the Senate.

In the year when a woman is running for president, we hope that a majority of both parties in the Senate will strike a blow against the 19th-century thinking that prevailed in this case. It won't help Ms. Ledbetter but it will help other Lilly Ledbetters avoid similar unfair treatment.

Toledo Blade

June 5, 2007

Editorial: Unequal pay, unequal justice

THE U.S. Supreme Court may have effectively sanctioned past cases of pay discrimination against women. The decision, in a case called Ledbetter vs. Goodyear Tire and Rubber, severely limits the ability of workers to sue for pay disparity.

By a 5-4 majority, the court upheld a federal law setting a 180-day deadline for employees to claim they are being paid less because of gender, race, religion, or national origin. It was a narrow ruling based on a technical definition of the law, and it

underscores how out of touch five justices - including both Bush appointees - are with real-life issues that most people face.

The high court basically removed the teeth from the federal Equal Opportunity Employment Commission when it said that the only woman supervisor among 16 men at the Goodyear Tire plant in Gadsden, Ala., waited too long to file her lawsuit.

Lilly Ledbetter worked 19 years at the plant. She earned \$45,000 a year, \$6,500 less than the lowest-paid male supervisor. But because she waited to file suit until her retirement in 1998, the high court essentially said, "tough luck, lady."

Justice Clarence Thomas once again failed to shed his reputation of indifference to those less fortunate. This is a man who for eight years was chairman of the EEOC and the main enforcer of workers' rights in the statute central to the Ledbetter case.

Left unanswered by this unsatisfactory ruling is one obvious question:

How are workers supposed to know when they are not getting the same pay for the same work?

The court's decision puts the burden on employees to know if they are being had. But in most workplaces, employees are often unlikely to know what others earn unless salaries are set by an announced schedule and classification.

The court's insistence on a time line to file suit is neither sensible nor fair. The EEOC's long-standing interpretation of the 180-day statute didn't keep it from backing Ms. Ledbetter. Instead, the agency actively supported her case.

Although she was awarded \$3 million in back pay and compensatory and punitive damages by the Federal District Court in Birmingham, Ala., the trial judge reduced that to \$360,000. Then the 11th Circuit Court of Appeals in Atlanta completely did away with the verdict on the basis that Ms. Ledbetter couldn't prove she was intentionally discriminated against in the six months before filing her complaint.

The Supreme Court upheld that ruling. Now, she's left with nothing, and the ruling paves the way for systematic discrimination by businesses that choose to do so.

So troubled was Justice Ruth Bader Ginsburg by the ruling that she took the unusual step of reading her dissent from the bench. The decision, she said, does not take into consideration a female or minority who is "trying to succeed in a nontraditional environment" yet wants to avoid "making waves."

Obviously, Ms. Ledbetter knew that filing a lawsuit while working would be risky, so she waited.

This is a ruling that will remind Americans how much they lost, and how much things changed, when Samuel Alito, who wrote the majority opinion, replaced Sandra Day O'Connor last year.

Akron Beacon Journal

May 31, 2007

Editorial: Wages of restraint

The Supreme Court applies the law in pay discrimination. Now Congress has the task of repairing the law.

Justice Samuel Alito of the U.S. Supreme Court practiced a brand of judicial restraint this week in writing for the 5-4 majority in a case involving the ability of workers to sue companies for pay discrimination. He indicated the decision wasn't difficult, the majority following the law "as written," in this instance, the 1964 Civil Rights Act.

The case involved a lone female supervisor at the Goodyear tire plant in Gadsden, Ala. She took the company to court arguing that she had been treated unfairly in view of her salary falling significantly short of the pay received by 16 males at the same management level. The pay gap was striking, as much as 40 percent. The law requires that employees make their charge of discrimination within 180 days "after the alleged unlawful employment practice occurred." Alito and his colleagues held that the female supervisor did not meet the deadline.

"Current effects alone cannot breathe life into prior, uncharged discrimination," they reasoned.

The majority applied the law.

It also rejected the longstanding view of the Equal Employment Opportunity Commission, the federal agency that enforces the statute.

The commission (like so many federal offices) must contend with imprecise congressional language. What is meant by "after the alleged unlawful employment practice occurred"? When does the 180-day countdown begin? Ideally, the commission reflects the larger purpose of the law in seeking clarity. In matters of pay discrimination, the commission has argued the clock resets with each paycheck.

In a passionate dissent, Justice Ruth Bader Ginsburg supplied the context for the commission's thinking. She noted that pay differs from other realms of discrimination such as refusing to hire or promote. Pay discrimination is less likely to involve a single act. It often develops subtly, cumulatively. Thus, the 180-day deadline clashes with a certain ambiguity and the time required to suspect strongly enough discrimination at work.

Add the stakes involved (as Ginsburg did), a reluctance to sue for fear of jeopardizing employment, and the reasoning of the minority resonates. Ginsburg argued that "the court does not comprehend, or is indifferent to, the insidious way in which women can be the victims of pay discrimination."

One consequence of the court ruling may be a tendency on the part of employees to move more quickly to sue, leading to a raft of claims eventually found unworthy. With that and other factors in mind, Congress would do well to take Justice Ginsburg's advice and repair the law. Sen. Hillary Rodham Clinton already has pledged to introduce legislation.

A more effective law would avoid an undue burden on employers. There must be a deadline. The federal Equal Pay Act allows for three years. Most important, any changes must reflect the realities of pay discrimination. Perhaps that can be achieved through viewing pay discrimination as akin to the gradual development of a "hostile work environment." The point is, Congress should act.

Dayton Daily News

June 2, 2007

Editorial: Pay lawsuits shouldn't be impossible to win

It's not just about Lilly M. Ledbetter, now 69. It's about all the others in her shoes, who, on account of a U.S. Supreme Court ruling this week, are likely to be out of luck should they sue their employer.

Ms. Ledbetter sued Goodyear Tire & Rubber Co. after she retired in 1998. Soon after she quit, someone sent her an anonymous letter laying out pay discrepancies between her and the 16 male supervisors at her level. A jury decided that Ms. Ledbetter had been treated unfairly compared to the men.

When she left, she was earning \$3,727 per month; the lowest-paid man was getting \$4,286. After 19 years with the company, she had more seniority than many of her male peers.

Outraged jurors awarded Ms. Ledbetter more than \$3 million, but the trial court judge reduced the amount to \$360,000, the maximum allowable under the law.

Now the Supreme Court, in a 5-4 decision, has decided that Ms. Ledbetter shouldn't have been allowed to sue, because she didn't file her complaint within 180 days after she was first discriminated against.

The law does, indeed, require certain discrimination complaints to be filed within six months of the supposed discriminatory act. But it's a little hard to determine, in cases like this, exactly when the discrimination began. Awareness of pay discrimination can grow gradually, unlike cases, say, involving promotion.

For many people, pay raises aren't announced publicly, and workers don't ever know what other people are making.

Recognizing these realities, some courts and the Equal Employment Opportunity Commission have operated on the assumption that each paycheck a person receives is potentially a "fresh act" of discrimination. Called the "paycheck accrual rule," this allowed people like Ms. Ledbetter to get in the courthouse door even if the alleged discrimination had been going on for longer than 180 days.

Some people will say this was stretching the law.

Surely, Congress did not set out to encourage workers to run to the EEOC or to court at the slightest hint of unfair treatment - say, if one worker got a 50-cent-per-hour raise and another only got 35 cents.

But if the same thing happens year after year, and for no apparent reason, that's different.

Some members of Congress are saying the Supreme Court ruling is too literal. They're vowing to liberalize the rules. That's the tidiest way to remove any ambiguity.

But if there's any doubt that the law, as the court interpreted it, is unfair, consider this exchange from arguments at the Supreme Court:

Goodyear's lawyer said the Civil Rights Act required proof of intentional discrimination and that "no one at Goodyear took Ms. Ledbetter's sex into account" in determining what she was paid in the six months before she filed her complaint. He said the law does not permit the accusation "that there is discrimination today merely because there was discrimination yesterday." He added that if the sixmonth window passes, an employer can "treat that past act as if it was a lawful act." Justice David H. Souter asked, "Is that so even if they know it was in fact originally an unlawful act?" "Yes," the lawyer said. That's not good - or right.

Plain Dealer

April 28, 2008

Editorial: Partisanship trumps equity

When a sharply divided U.S. Supreme Court threw out Lilly Ledbetter's pay discrimination suit against the Goodyear Tire & Rubber Co. last spring, even the majority conceded that she may have been treated unjustly. The problem, said the court's five most conservative members, was technical: Ledbetter hadn't filed her action in a timely fashion as established under Title VII of the 1964 Civil Rights Act. But if it chooses, they added, Congress can easily fix that.

The Senate tried last week, but those who wanted a more reasonable time frame to initiate pay equity actions fell four votes shy of the 60 needed to bring the bill to the floor. Every opponent was a Republican - including Ohio's George V. Voinovich.

Justice shouldn't be a partisan matter. And allowing an employee a decent interval to realize she is being paid unfairly - no easy task - is a simple matter of justice.

Senate Democrats and the six Republicans who joined them need to bring this matter up again. And if fails once more, voters should start the clock toward replacing its opponents.

The Cincinnati Post

August 2, 2007

Congress Should Overturn Court's Employment Ruling

By Paul H. Tobias

Imagine you've worked for a company for 30 years. You're a good worker. You do a good job. Unbeknownst to you, the company puts workers 50 years or older on a lower salary track than younger workers who do the same work.

At 60, you learn that for the last 10 years, you have been earning less -- tens of thousands of dollars less -- than colleagues doing exactly the same work.

Think you've got grounds for a suit? Think again.

The Supreme Court on May 29 ruled 5-4 in *Ledbetter v. Goodyear Tire & Rubber Co.* that workers don't have the right to sue their employers for pay discrimination if they don't file a claim within 180 days -- or six months -- after the decision is made to pay them less.

Lilly Ledbetter found this out to her chagrin when she filed a sex discrimination suit with the Equal Employment Opportunity Commission when she discovered late in her career as a supervisor at the Goodyear Tire & Rubber Co. in Gadsden, Ala., that she was being paid less than her male counterparts. Though her salary started out comparable to male supervisors, her raises were always smaller until, eventually, she was earning \$3,727 a month while her lowest paid male colleague was being paid \$4,286 for doing the same job.

A Birmingham jury was outraged enough to award Ledbetter \$3 million after finding that Goodyear had violated Ledbetter's rights under Title VII of the Civil Rights Act of 1964.

A federal trial judge cut the award to \$360,000. Then an appellate court reversed the jury's decision altogether and cut away the \$360,000.

Then in the strangest cut of all, the Supreme Court made a bizarre interpretation of Title VII, completely out of line with legal precedent and sided with Goodyear, arguing that Ledbetter filed her complaint too late since Title VII requires employees to file within 180 days of "the alleged unlawful employment practice."

The fact that Goodyear was still underpaying Ledbetter compared to her male colleagues when she filed the suit didn't come into play for the Supreme Court. Instead, calculating the time based on the date Ledbetter received her first discriminatory paycheck, it ruled that she had missed the deadline for redress.

In her dissent, Justice Ruth Bader Ginsberg, the only woman on the Supreme Court, took the unusual step of reading her opinion aloud to the court. She noted that the original jury heard testimony that a supervisor who evaluated Ledbetter in 1997 -- an evaluation that led to denying her a pay raise -- was "openly biased against women."

In addition, Ginsberg wrote:

"And two women who had previously worked as managers at the plant told the jury they had been subject to pervasive discrimination and were paid less than their male counterparts. One was paid less than the men she supervised -- Ledbetter herself testified about the discriminatory animus conveyed to her by plant officials. Toward the end of her career, for instance, the plant manager told Ledbetter that the "plant did not need women, that (women) didn't help it, (and) caused problems."

Substitute any category of worker for "women" -- seniors, young people, African-Americans, Latinos, Asian-Americans, Native Americans, gays, disabled, Catholics, Protestants, Muslims, etc. -- and you can see the impact that results from the court gutting this key civil rights protection.

Now Congress is set to redress this miscarriage of justice before the August recess with the Lilly Ledbetter Fair Pay Act. This will right a wrong perpetrated by our nation's highest court that will have a profound impact on the working lives, and livelihoods, of Americans across the country.

While workers' and civil rights groups are lauding the Ledbetter Act, the bill has met opposition from the pro-business lobby. Neal Mellon from the U.S. Chamber of Commerce said that many business owners didn't want to open themselves up to the liability of employees filing suits "decades later." Lilly Ledbetter's story demonstrates that filing these suits decades after the initial discriminatory paycheck is often unavoidable. Each paycheck that she received was an act of discrimination, regardless of the amount of time that passed.

How many workers know what their colleagues make? Fully one-third of private sector employers have specific rules prohibiting employees from discussing their wages with co-workers, while a significant number of other employers have more informal expectations that employees not discuss their salaries.

In other words, unless Congress rights this wrong, the Supreme Court -- and Congress -- will let employers get away with discrimination so long as they can just make it to day 181.

Paul H. Tobias is a partner of the law firm of Tobias, Kraus & Torchia in Cincinnati, and the founder of the National Employment Lawyers Association, the country's largest professional organization of lawyers who represent workers in disputes with their employers.