CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION: WHAT *LEDBETTER* MEANS FOR EMPLOYEES FACING GENDER-BASED PAY DISCRIMINATION

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

I. FACTS

Lilly Ledbetter was employed by Goodyear Tire & Rubber Co. in Gadsden, Alabama.[1] Ledbetter worked as an area manager, supervising a group of tire builders.[2] One of four business center managers supervised the area managers.[3] Early each year, the business center managers recommended salary increases for each of the salaried employees supervised, including the area managers.[4] Each business center manager completed a worksheet, called a merit increase plan, using performance rankings and guidelines regarding the size and frequency of merit-based salary increases.[5] These merit increase plans required approval from upper-level management before they went into effect.[6]

Ledbetter began her career at the Gadsden plant in 1979, when she was forty years old.[7] The plant laid her off twice, once in 1986 and again in 1989.[8] In 1992, Ledbetter began working in the Radial Light Truck section of the Tire Assembly business center, which produced radial tires for sport utility vehicles and light trucks.[9] Her business center manager, Mike Tucker, consistently ranked her performance at or near the bottom of the employees he supervised.[10]

In 1993, she was ranked third out of four area managers in her department and fifth out of six salaried employees.[11] That year, Tucker suggested that she receive a 5.28% salary increase, which was the largest increase among the area managers by percentage but the smallest in absolute

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1. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2165 (2007).
2. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1172 (11th Cir. 2005).
3. *Id.* at 1171.
4. *Id.* at 1172.
5. *Id.*
6. *Id.*
7. *Id.* at 1173.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

dollars.[12] In 1994, Ledbetter was ranked last among area managers and salaried employees.[13] She received a 5% salary increase, the smallest of any salaried employee.[14] In 1995, however, Ledbetter earned a higher performance rating.[15] She received an individual performance award and a top performance award, which resulted in a 7.85% salary increase.[16] In 1996, she was unable to receive a salary increase because of a time restriction related to the date on which she received her 1995 increase.[17] However, her performance rankings were low once again.[18] Tucker ranked her fifteenth out of sixteen area managers and twenty-third out of twenty-four salaried employees.[19]

In 1997, Ledbetter was making $3727 per month, which was 15% lower than the lowest paid male area manager and 40% lower than the highest paid male area manager.[20] Her business center manager, Mike Tucker, was replaced by Kelly Owen.[21] Owen ranked her performance as twenty-third out of twenty-four salaried employees and fifteenth out of sixteen area managers. Owen denied her a raise.[22]

Ledbetter complained of sexual harassment and sex discrimination.[23] Prior to 1998, she complained of treatment she received from a supervisor, Mike Maudsley.[24] Ledbetter claimed that Maudsley threatened to give her a bad performance evaluation if she was not receptive to his sexual advances.[25] Maudsley later allegedly falsified Ledbetter's performance audits.[26] Ledbetter continued to spurn Maudsley's advances, and her evaluation rating became progressively worse.[27] The audits conducted by Mike Maudsley were the basis of the denial of a raise for Ledbetter in

12. *Id*. Ledbetter's increase was lowest in absolute dollars because the male area managers obtained higher salaries. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*. at 1173-74.
18. *Id*. at 1174.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. at 1175.
23. Brief of Petitioner-Appellant at 4, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074).
24. *Id*.
25. *Id*. at 16.
26. *Id*.
27. *Id*.

1997.[28] Ledbetter believed these actions constituted unlawful discrimination on the basis of sex.[29]

In 1998, Ledbetter took a non-supervisory position as a technology engineer.[30] On March 25 of that year, she filed a questionnaire with the Equal Employment Opportunity Commission (EEOC), stating that she had received disparate treatment in her new department on account of her sex and had been forced to take a technology engineer position.[31] In July of 1998, she filed a formal discrimination charge with the EEOC, which included her earlier complaints, as well as a complaint that she had received a lower salary as an area manager on account of her sex.[32]

In August of 1998, Goodyear announced that it would be downsizing the Gadsden plant and gave employees the option to choose early retirement rather than be laid off.[33] Ledbetter opted for early retirement and retired on November 1, 1998.[34] She filed suit against Goodyear over one year later.[35]

On November 24, 1999, Ledbetter filed multiple claims in the Northern District of Alabama against Goodyear for violations of Title VII of the Civil Rights Act of 1964, the Equal Pay Act (EPA), and the Age Discrimination in Employment Act.[36] The jury considered four claims, one of disparate pay based on gender and three of age discrimination related to her transfer to the Technology Engineer position.[37] The jury found for Goodyear on the age discrimination claims and for Ledbetter on the disparate pay claim.[38] The court awarded Ledbetter $223,776 in back pay, $4662 for mental anguish, and $3,285,979 in punitive damages.[39] The district court denied a motion for judgment as a matter of law from Goodyear, but reduced the jury award to $360,000, which consisted of $300,000 in compensatory and punitive damages and $60,000 in back pay, plus attorneys' fees and costs.[40] Goodyear appealed to the United States Court of Appeals for the Eleventh Circuit.[41]

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28. *Id*.
29. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1175 (11th Cir. 2005).
30. *Id*. at 1174.
31. *Id*. at 1175.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*. at 1175 n.7 (citing 29 U.S.C. §§ 206(d), 621-34 (2000); 42 U.S.C. §§ 2000e to 2000e-17 (2000)).
37. *Id*. at 1175.
38. *Id*. at 1175-76.
39. *Id*. at 1176.
40. *Id*.
41. *Id*.

The Eleventh Circuit reversed the district court's denial of judgment as a matter of law in favor of Goodyear.[42] The Eleventh Circuit held that *National R.R. Passenger Corp. v. Morgan*[43] governed the issue, and that Ledbetter's disparate pay claim was a claim alleging a discrete act of discrimination.[44] Because EEOC charges are time-sensitive, Ledbetter could only challenge discrete acts of discrimination that took place within 180 days before the filing of her EEOC questionnaire on March 25, 1998.[45] The only pay decision during this period was Ledbetter's denial of a raise by Kelly Owen, based on her 1997 performance review.[46] The Eleventh Circuit found that no reasonable jury could find that this act was discriminatory.[47] The Eleventh Circuit rejected Ledbetter's argument, holding that issuing paychecks based on prior discrimination does not constitute a continuing act of discrimination.[48] Because the pay decisions that took place within 180 days before the filing of the EEOC questionnaire were not discriminatory, the Eleventh Circuit dismissed her complaint with prejudice.[49]

Ledbetter then filed a petition for a writ of certiorari to the United States Supreme Court.[50] The Supreme Court granted certiorari to decide whether a plaintiff could bring a Title VII pay discrimination claim when the disparate pay was received during the statutory charging period, but was the result of discriminatory pay decisions that were made outside the charging period.[51] The Supreme Court affirmed, holding that Ledbetter's claims were time-barred.[52]

II. LEGAL BACKGROUND

The Supreme Court considered Ledbetter's claim under Title VII of the Civil Rights Act of 1964.[53] Ledbetter analogized her Title VII claim to claims under a number of other statutes, including the Equal Pay Act

42. *Id.* at 1189-90.
43. 536 U.S. 101 (2002) [hereinafter Amtrak v. Morgan].
44. *Ledbetter*, 421 F.3d at 1179-80.
45. *Id.* at 1178.
46. *Id.* at 1180.
47. *Id.* at 1184.
48. *Id.* at 1182.
49. *Id.* at 1189-90.
50. Brief of Ledbetter at *8-9, Ledbetter v. Goodyear Tire & Rubber Co., 126 S. Ct. 2965 (2006) (No. 05-1074), 2006 WL 448515.
51. Ledbetter v. Goodyear Tire & Rubber Co., 126 S. Ct. 2965, 2965 (2006), *cert. granted*, 74 U.S.L.W. 3713 (June 26, 2006) (No. 05-1074).
52. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2177 (2007).
53. *Id.* at 2165.

(EPA), the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA).[54] A greater understanding of the statutes cited in *Ledbetter v. Goodyear Tire & Rubber Co.*[55] may be helpful to understand the Court's decision.[56] The Supreme Court has also previously addressed legal concepts considered by the *Ledbetter* Court, including discrete acts of discrimination, unlawful employment practices, and the EEOC charging period.[57] Knowledge of these decisions is essential to understanding the decision of the *Ledbetter* Court.

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

On July 2, 1964, Congress enacted the Civil Rights Act of 1964.[58] The purpose of the act was:

> To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.[59]

Title VII of the Civil Rights Act of 1964 made employment discrimination on the basis of sex illegal, including discrimination related to compensation.[60] Title VII also created the EEOC.[61]

The EEOC is charged with investigating and redressing claims of employment discrimination.[62] Title VII originally mandated that a charge of employment discrimination be filed with the EEOC within ninety days of its occurrence.[63] If the employer has not complied with the EEOC's efforts to end the discrimination within thirty days of the filing of an EEOC

54. *Id.* at 2176-77.
55. 127 S. Ct. 2162 (2007).
56. *See Ledbetter*, 127 S. Ct. at 2166-67 (discussing Title VII).
57. *See, e.g.*, Amtrak v. Morgan, 536 U.S. 101, 114 (2002) (listing discrete acts of discrimination); Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring) (identifying each paycheck issued under a racially discriminatory system as an actionable instance of employment discrimination).
58. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241 (1964).
59. *Id.*
60. *Id.* § 703(a)(1), 78 Stat. at 255.
61. *Id.* § 705, 78 Stat. at 258.
62. *Id.* § 706(a), 78 Stat. at 259.
63. *Id.* § 706(d), 78 Stat. at 260.

charge, the claimant may then file suit.[64] In 1972, Title VII was amended to extend the 90 day filing period to 180 days.[65] The Equal Employment Opportunity Act of 1972 also amended the Title VII section dealing with the remedies available to the EEOC.[66] These remedies include enjoining the employer from engaging in the unlawful employment practice, reinstating the employee with or without back pay, and any other equitable relief the court sees fit.[67] The time for which an employee can receive back pay is limited to two years before the filing of the charge with the EEOC.[68] Employee wages are also regulated by the FLSA.[69]

B. THE FAIR LABOR STANDARDS ACT OF 1938

The FLSA, passed as part of President Franklin Roosevelt's New Deal legislation, was enacted on June 25, 1938.[70] Its purpose was to establish "fair labor standards in employments in and affecting interstate commerce."[71] The FLSA regulates employee wages.[72] The FLSA mandates the minimum wages employees must be paid and maximum hours that they may work.[73] Unlike Title VII, employees seeking to state a claim under the FLSA face a two year statute of limitations.[74] The FLSA did not originally bar gender-based pay discrimination, but it was later amended to do so.[75]

C. THE EQUAL PAY ACT OF 1963

Congress amended the FLSA when it passed the EPA on June 10, 1963.[76] Its purpose was to "prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."[77] The EPA bars gender-based pay discrimination.[78] The EPA prohibited employers engaged in interstate commerce

64. *Id.* § 706(e), 78 Stat. at 260.
65. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 105 (1972). The filing period is 300 days if there is a state agency that also has jurisdiction over the claim. *Id.*
66. *Id.* § 706(g), 86 Stat. at 107.
67. *Id.*
68. *Id.*
69. Pub. L. No. 75-718, 52 Stat. 1060 (1938).
70. *Id.*
71. *Id.*
72. 29 U.S.C. § 207 (2000).
73. *Id.*
74. *Id.* § 255.
75. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 56 (1963).
76. *Id.*
77. *Id.*
78. *Id.*

from discriminating between employees on the basis of sex by paying employees of one sex lower wages than employees of the opposite sex for equal work.[79] The EPA provided exceptions for differences in wages based on a seniority system, merit system, commission system, or a factor other than sex.[80] Unlike Title VII, the EPA did not require that a claim be filed with an agency before action could be taken in court.[81] Claims under the EPA do not face a statute of limitations as limited as claims under Title VII.[82] Title VII bears more similarities to the NLRA.[83]

D. THE NATIONAL LABOR RELATIONS ACT

On July 5, 1935, Congress passed another piece of New Deal legislation, the NLRA.[84] The purpose of the act was to "diminish the causes of labor burdening or obstructing interstate and foreign commerce" and to create the National Labor Relations Board (NLRB).[85] Similar to Title VII, the NLRA created an agency to address disputes between employers and employees.[86] The NLRA granted employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[87] The NLRB is charged with effectuating these rights by promulgating rules and investigating and adjudicating disputes.[88] Parties that are dissatisfied with the NLRB's decision can appeal to the court of appeals of the circuit in which the unfair labor practice took place.[89] Besides adjudicating disputes over agency decisions, the courts have defined the parameters and procedures of challenges to unlawful employment acts.[90]

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79. *Id*. at 56-57.

80. *Id*. at 57.

81. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 260 (1964).

82. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 105 (1972) (mandating that claims be filed with the EEOC within 180 days); *see also* 29 U.S.C. § 255(a) (2000) (mandating a two-year statute of limitations for violations, three years for willful violations).

83. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

84. 49 Stat. at 449.

85. *Id*.

86. *Id*. § 3(a), 49 Stat. at 451; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 258 (1964).

87. *Id*. § 7, 49 Stat. at 452.

88. *Id*. §§ 6(a), 10(b), 11, 49 Stat. at 452, 453, 455-57.

89. *Id*. §§ 10(e)-(f), 49 Stat. at 454-55.

90. *See, e.g*., United Air Lines, Inc. v. Evans, 431 U.S. 553, 554-55 (1977) (mandating that a charge be filed within ninety days).

E. SUPREME COURT DECISIONS DEFINING UNLAWFUL EMPLOYMENT PRACTICES AND APPLYING THE EEOC LIMITATIONS PERIOD

The United States Supreme Court has played a role in defining how employment practices, including wage decisions, are regulated.[91] The Court has decided when particular claims must be filed in order to comply with EEOC requirements.[92] The Court has explained when the EEOC charging period begins to run.[93] It has also defined exactly what does and does not constitute a discriminatory employment act.[94] First, in *United Air Lines, Inc. v. Evans*,[95] the Court considered the EEOC charging period.[96]

1. United Air Lines, Inc. v. Evans

In *Evans*, an employee could not challenge a current denial of seniority based on a previous forced resignation.[97] Evans was employed by United Air Lines (United) as a flight attendant.[98] United forced her to resign in 1968 because she got married, and at that time United had a policy against employing married flight attendants.[99] This policy was later found to be unconstitutional by the Seventh Circuit Court of Appeals, and United rehired Evans in 1972.[100] However, United treated Evans as a new employee in terms of seniority and benefits.[101] Evans filed suit against United, but the Supreme Court time-barred her claim.[102] The Court held that the seniority system was not being operated in a discriminatory way.[103] Also, Evans lost her opportunity to challenge her forced resignation in 1968 because she did not file a charge with the EEOC within the ninety day time period.[104] The fact that Evans still suffered the effects of her previous

91. *See id*. (setting guidelines for filing an EEOC charge).

92. *Id*.

93. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980) (holding that the EEOC charging period began to run when the plaintiff was denied tenure, and not when he was terminated).

94. *See* Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring) (including the issuance of paychecks under a discriminatory wage system as a discriminatory employment act); *see also* Lorance v. AT&T Techs., Inc., 490 U.S. 900, 906 (1989) (holding that the adoption of discriminatory seniority rules may be challenged, but not the application of those rules).

95. 431 U.S. 553 (1977).

96. *Evans*, 431 U.S. at 554-55.

97. *Id*. at 557.

98. *Id*. at 554.

99. *Id*.

100. *Id*. at 554-55 (citing Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971)).

101. *Id*. at 555.

102. *Id*. at 556-57.

103. *Id*. at 555.

104. *Id*. at 559.

forced resignation was irrelevant.[105] The previous discrimination may provide useful background information, but it has no present legal effect.[106] Next, the Supreme Court decided when the EEOC charging period would begin.[107]

2. Delaware State College v. Ricks

In *Delaware State College v. Ricks*,[108] the Court faced another distinction between a discriminatory act and its effects.[109] Columbus Ricks, who emigrated from Liberia, was a professor at Delaware State College (DSC).[110] DSC denied Ricks tenure in March of 1974.[111] Instead, DSC offered him a one year "terminal" contract, which he signed on September 4, 1974.[112] Ricks failed to achieve redress through the internal grievance process and the state employment discrimination system.[113] He then filed a charge with the EEOC on April 28, 1975, for discrimination on the basis of national origin.[114]

In a decision that was later affirmed by the Supreme Court, the district court time-barred Ricks's claim because he did not file a charge with the EEOC within 180 days of his denied tenure.[115] Ricks argued that his termination on June 30, 1975, at the end of his "terminal" contract along with the denial of tenure, was a discriminatory act.[116] The Court disagreed, however, concluding that the termination was merely an effect of the potentially discriminatory denial of tenure.[117] The Court also concluded that the EEOC charging period begins to run when the discriminatory act takes place, not when its effects are suffered.[118] Ricks's Title VII claim was time-barred because he did not file an EEOC charge within 180 days of when the discriminatory act, the denial of tenure, took place.[119] The Supreme Court next defined what constitutes a discriminatory employment act.[120]

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105. *Id*. at 558.
106. *Id*.
107. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).
108. 449 U.S. 250 (1980).
109. *Ricks*, 449 U.S. at 258.
110. *Id*. at 252.
111. *Id*.
112. *Id*. at 253-54.
113. *Id*. at 254.
114. *Id*.
115. *Id*. at 254-55.
116. *Id*. at 257.
117. *Id*. at 258.
118. *Id*.
119. *Id*. at 256.
120. Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring).

3. Bazemore v. Friday

In *Bazemore v. Friday*,[121] employees of the North Carolina Agricultural Extension Service challenged race-based pay discrimination.[122] Before 1965, the Extension Service operated two branches: a "white branch" and a "Negro branch."[123] The African-American employees were paid less than the white employees.[124] This pay disparity continued after the branches were combined in 1965.[125] In 1972, Title VII was made applicable to state governments as employers.[126] The Court held that even though the pre-1972 acts of discrimination were not actionable, liability could be imposed for discrimination that was perpetuated after 1972.[127] Justice Brennan explained, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[128] Thus, even though the pay discrimination began before Title VII was applicable to the Extension Service, the discrimination that continued after 1972 was actionable.[129] The Court later narrowed its view of actionable employment decisions.[130]

4. Lorance v. AT&T Technologies, Inc.

In *Lorance v. AT&T Technologies, Inc.*,[131] employees challenged the provisions of a seniority system.[132] Until 1979, all hourly workers at AT&T's Montgomery Works plant earned seniority based on the number of years worked at the plant.[133] A worker that was promoted to the position of "tester" retained the seniority she had previously earned.[134] However, in 1979 the company changed the rules for earning seniority.[135] Under the new rules, testers earned seniority based on the amount of time in that

121. 478 U.S. 385 (1986) (per curiam).
122. *Bazemore*, 478 U.S. at 386 (per curiam).
123. *Id.* at 394 (Brennan, J., concurring).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 395.
128. *Id.* at 395-96.
129. *Id.* at 396.
130. Lorance v. AT&T Techs., Inc., 490 U.S. 900, 906 (1989).
131. 490 U.S. 900 (1989).
132. *Lorance*, 490 U.S. at 902.
133. *Id.* at 901.
134. *Id.* at 902.
135. *Id.*

position, not the amount of time worked at the plant.[136] At that time, more women were being promoted to tester positions.[137] The women that had recently been promoted alleged that the new seniority rules were discriminatory.[138] Some female testers filed a complaint with the EEOC in 1983.[139] The Court time-barred the claim, because the adoption of the new seniority rules was the actionable employment act, and this took place outside the EEOC charging period.[140] The Court thus rejected another claim of a continuing violation of Title VII.[141]

Congress reacted to this decision.[142] Congress amended Title VII in the Civil Rights Act of 1991.[143] The amendment classified the following as unlawful employment practices: when a discriminatory seniority system is adopted, when an individual becomes subject to it, and when a person is injured by its application.[144] This, in effect, overruled the Court's holding in *Lorance* that only the adoption of the discriminatory seniority system could be challenged.[145] Finally, the Court categorized discriminatory employment acts.[146]

5. Amtrak v. Morgan

In *Amtrak v. Morgan*, Abner Morgan, Jr., allegedly suffered discrimination when Amtrak refused to allow him to participate in an apprenticeship program, censured him for absenteeism, used racial epithets against him, and terminated him for refusing to follow orders.[147] Morgan filed claims with the California Department of Fair Employment and Housing and the EEOC, and sued Amtrak for violating Title VII.[148] Morgan alleged that he suffered both discrete acts of discrimination and a hostile work environment.[149] The Court held that when challenging a discrete act of discrimination, an EEOC charge must be filed within 180 or 300 days of the

136. *Id.*
137. *Id.*
138. *Id.* at 903.
139. *Id.* at 906.
140. *Id.*
141. *Id.*
142. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071, 1078-79 (1991) (amending Title VII to include provisions related to discriminatory seniority systems).
143. *Id.*
144. 42 U.S.C. § 2000-e5(e)(2) (2008).
145. *Lorance*, 490 U.S. at 906.
146. Amtrak v. Morgan, 536 U.S. 101, 110, 115 (2002).
147. *Id.* at 105-06 n.1.
148. *Id.* at 104, 105.
149. *Id.* at 104.

occurrence of the act.[150] The proper charging period is easily determined because a discrete act occurs on a particular day.[151] These discrete acts include such decisions as "termination, failure to promote, denial of transfer, or refusal to hire."[152] A hostile environment, on the other hand, does not occur on any particular day.[153] It can occur over a long period of time and can be comprised of a number of acts, not all of which are actionable.[154]

When determining whether a hostile work environment exists, courts look at the totality of the circumstances, including the frequency of the conduct; the severity of the conduct; the degree of threat or humiliation; and whether the interference with the employee's performance was unreasonable.[155] A hostile work environment is actionable as long as one of the acts that contributes to it takes place during the EEOC charging period.[156] The Court also held that employers could use equitable doctrines such as waiver, estoppel, equitable tolling, and laches to combat a hostile work environment claim.[157] The Court ultimately remanded Morgan's claim for further proceedings.[158] In a number of other cases, the Supreme Court described the elements necessary to make out a claim of disparate treatment.[159]

F. SUPREME COURT DECISIONS DEFINING THE ELEMENTS OF A CLAIM OF DISPARATE TREATMENT

The Court has stated that discriminatory intent is an essential element behind a claim of employment discrimination.[160] In *International Brotherhood of Teamsters v. United States*,[161] African-American and Latino workers claimed that their employer and their union discriminated against them in hiring, promotion, wages, and seniority.[162] The claim was a disparate treatment claim, that African-Americans and Latinos were treated

150. *Id.* at 110. The EEOC charge must be filed within 300 days if a state agency also has jurisdiction over the discrimination claim. *Id.*

151. *Id.*

152. *Id.* at 114.

153. *Id.* at 115.

154. *Id.*

155. *Id.* at 116.

156. *Id.* at 117.

157. *Id.* at 121.

158. *Id.* at 122.

159. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that "[p]roof of discriminatory motive is critical").

160. *Id.*

161. 431 U.S. 324 (1977).

162. *Teamsters*, 431 U.S. at 329.

disparate from whites.[163] According to the majority, this is "the most easily understood type of discrimination."[164] The employees had to prove that their employer and the union acted with the intent to discriminate.[165] The majority contrasted disparate treatment claims with disparate impact claims.[166] In a disparate impact claim, the claimant does not have to prove discriminatory intent.[167] These claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[168] The Supreme Court vacated and remanded the appellate court's decision for the employees.[169]

In *Watson v. Fort Worth Bank & Trust*,[170] the Court considered another disparate treatment claim.[171] An African-American bank employee filed a discrimination claim after being rejected for several promotions.[172] The Court held that to make out such a claim, the employee had to prove that her employer intended to discriminate.[173] The appellate court's decision was reversed and remanded.[174] The district court was directed to review statistical evidence of discrimination to consider the employee's claim under disparate impact theory.[175]

Thus, in the line of cases preceding *Ledbetter*, the Supreme Court decided that an EEOC charge must be filed within the statutory limitations period following the date of the act itself, not when its effects were suffered.[176] An actionable discriminatory employment act can be described as either a discrete act, which occurs on a particular day, or a hostile work environment, which occurs over a period of time.[177] Discriminatory pay has been treated somewhat differently, with each paycheck issued under a discriminatory pay system beginning its own EEOC charging period.[178]

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163. *Id.* at 335.
164. *Id.* at 335 n.15.
165. *Id.* (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977)).
166. *Id.* at 336 n.15.
167. *Id.*
168. *Id.*
169. *Id.* at 376-77.
170. 487 U.S. 977 (1988).
171. *Watson*, 487 U.S. at 984.
172. *Id.* at 982.
173. *Id.* at 986 (citing *Teamsters*, 431 U.S. at 335 n.15).
174. *Id.* at 1000.
175. *Id.* at 999-1000.
176. Lorance v. AT&T Techs. Inc., 490 U.S. 900, 906 (1989); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 559 (1977).
177. Amtrak v. Morgan, 536 U.S. 101, 110, 115 (2002).
178. Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J. concurring).

III. ANALYSIS

In *Ledbetter v. Goodyear Tire & Rubber Co.*, Justice Alito wrote the majority opinion for a closely divided Court, joined by Chief Justice Roberts, Justices Scalia, Kennedy, and Thomas.[179] The majority held that nondiscriminatory acts, such as issuing a paycheck that put prior discriminatory pay decisions into effect, do not begin a new EEOC charging period.[180] Thus, Ledbetter's claims were not timely.[181] Justice Ginsburg wrote a dissenting opinion, which was joined by Justices Stevens, Souter, and Breyer.[182]

A. THE MAJORITY OPINION

The question before the Court was:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.[183]

To answer this question, the majority cited *Evans*, *Ricks*, and *Lorance* for the proposition that an EEOC charging period begins when the discrete act of discrimination occurs, not when the effects of this act are felt.[184] In addition, a discriminatory act requires not only disparate impact, but also discriminatory intent.[185] Because the allegedly discriminatory pay decisions took place outside of the EEOC charging period, Ledbetter's claims were time-barred.[186] In making its decision, the majority first discussed whether the discriminatory intent behind one act can be imputed to a later act.[187] Next, it examined whether pay decisions should be treated

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

180. *Id.* at 2170 (citing Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980)).

181. *Id.* at 2172 (citing *Morgan*, 536 U.S. at 109).

182. *Id.* at 2165.

183. Brief of Ledbetter at *i, Ledbetter v. Goodyear Tire & Rubber Co., 26 S. Ct. 2965 (2006) (No. 05-1074), 2006 WL 448515. *See Ledbetter*, 127 S. Ct. at 2166 (listing the questions before the Court).

184. *Ledbetter*, 127 S. Ct. at 2167-69 (citing Lorance v. AT&T Techs., Inc., 490 U.S. 900, 902-03, 905, 907-08, 911 (1989); Del. State Coll. v. Ricks, 449 U.S. 250, 252-54, 257-58 (1980); United Air Lines v. Evans, 431 U.S. 553, 554-55, 557-58 (1977)).

185. *Id.* at 2171.

186. *Id.* at 2172 (citing *Morgan*, 536 U.S. at 109).

187. *Id.* at 2167-68 (citing *Evans*, 431 U.S. at 557-58).

differently from other employment actions under Title VII.[188] Finally, the majority discussed *Ledbetter's* policy arguments and analogies to other statutes.[189]

1. *Prior Discriminatory Intent Cannot be Imputed to a Subsequent Act*

The majority reiterated Title VII's requirements that to challenge employment discrimination on the basis of sex, a charge must be filed with the EEOC within 180 days of the discriminatory act.[190] If a charge is not filed with the EEOC during this time period, then the discriminatory act cannot be challenged in court.[191] The first step in analyzing an employment discrimination claim is to specifically identify the employment practices in question.[192]

Ledbetter asserted that each of the paychecks she was issued during the 180 days prior to the filing of her charge with the EEOC constituted a separate act of discrimination.[193] She also argued that the 1998 decision to deny her a raise was discriminatory because it propagated a pay disparity that was based on prior discriminatory acts.[194] The majority asserted that these acts lack the "central element" of disparate treatment, however, which is discriminatory intent.[195] It also rejected Ledbetter's contention that prior discrimination can be "carried forward" by later non-discriminatory acts that cause the employee to suffer the effects of the prior discrimination.[196] In making this determination, the majority found the Court's prior decisions in *Evans*, *Ricks*, and *Lorance* instructive.[197]

The plaintiffs in *Evans*, *Ricks*, and *Lorance* argued that because they suffered discrimination during the EEOC charging period, their claims were timely.[198] The *Ledbetter* Court disagreed and rejected such "continuing

188. *Id.* at 2172. *See* Bazemore v. Friday, 478 U.S. 385, 386-87 (1986) (holding that pay discrimination that took place before the EEOC charging period could be challenged).

189. *See Ledbetter*, 127 S. Ct. at 2176-77 (discussing analogies to other statutes).

190. *Id.* at 2166 (citing 42 U.S.C. §§ 2000e-2(a)(1), 2000e-5(e)(1) ((2000)).

191. *Id.* at 2166-67 (citing 42 U.S.C. § 2000e-5(f)(1) (2000)).

192. *Id.* at 2167 (citing *Morgan*, 536 U.S. at 110-11).

193. *Id.*

194. *Id.*

195. *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1002 (1998); Chardon v. Fernandez, 454 U.S. 6, 8 (1981); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

196. *Id.* at 2169 (citing *Morgan*, 536 U.S. at 113).

197. *Id.* at 2167-68 (citing Lorance v. AT&T Techs., Inc., 490 U.S. 900, 907-08 (1989); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980); United Air Lines v. Evans, 431 U.S. 553, 558 (1977)).

198. *Id.* (citing *Lorance*, 490 U.S. at 906; *Ricks*, 449 U.S. at 257; *Evans*, 431 U.S. at 577-78).

discrimination" arguments in each case.[199] In *Evans*, the discriminatory intent behind the plaintiff's termination, which took place prior to the EEOC charging period, could not be imputed to her denial of seniority.[200] In *Ricks*, the discriminatory intent behind the denial of the plaintiff's tenure could not be carried over to his termination.[201] In *Lorance*, the discriminatory intent behind the adoption of a new seniority system could not be connected to benefits that were issued during the EEOC charging period.[202] These decisions show that the proper inquiry in deciding whether an employment discrimination claim has been timely filed is not when the effects of discrimination were felt, but when the intentionally discriminatory act took place.[203]

The majority then looked to a more recent case, *Morgan*, to determine what may constitute a discriminatory act in regard to employment.[204] A discrete act that can be challenged as discriminatory is a "single 'occurrence' that takes place at a particular point in time," such as "termination, failure to promote, denial of transfer, and refusal to hire."[205] Ledbetter never claimed that any such discriminatory employment act occurred during the 180 days prior to the filing of her EEOC charge, including her denial of a raise in 1998.[206] The majority objected to Ledbetter's attempt to impute the alleged discriminatory intent associated with prior pay decisions to the 1998 decision.[207] Allowing this transferring of intent would impose liability without the presence of the essential element of discriminatory intent.[208] This would eliminate discriminatory intent as an element of a disparate treatment claim.[209] The majority did not remove this element, nor would it circumvent the statutory limitation period chosen by Congress when it enacted Title VII.[210]

The 180 day charging period required by Title VII serves a policy of repose.[211] It protects employers from having to defend against discrimination claims regarding decisions that were made in the past, perhaps after the

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199. *Id*.
200. *Id*. (citing *Evans*, 431 U.S. at 578).
201. *Id*. at 2168 (citing *Ricks*, 449 U.S. at 257).
202. *Id*. (citing *Lorance*, 490 U.S. at 906).
203. *Id*. at 2169 (citing *Lorance*, 490 U.S. at 906; *Ricks*, 449 U.S. at 257; *Evans*, 431 U.S. at 577-78).
204. *Id*.
205. *Id*. (citing Amtrak v. Morgan, 536 U.S. 101, 110-11, 114 (2002)).
206. *Id*.
207. *Id*. at 2170.
208. *Id*.
209. *Id*.
210. *Id*. (citing 42 U.S.C. § 2000e-5-(e)(1) (2000)).
211. *Id*. (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974)).

departure of those that made the decisions.[212] The discriminatory intent element of a disparate pay claim makes timely filing all the more crucial.[213] The intent of the employer will often, if not always, be the most disputed element of the claim.[214] Evidence of intent is likely to disappear quickly as witnesses become unavailable and memories fade.[215] The majority asserted that Congress intentionally chose a short deadline, and the Court will give deference to this legislative decision.[216] The fact that Congress chose such a short deadline refuted Ledbetter's argument that the doctrine of laches provides proper protection to employers.[217] Congress did not force employers to rely on this doctrine, but instead instituted a short deadline for the filing of claims.[218]

The majority held that *Evans*, *Ricks*, *Lorance*, and *Morgan* controlled.[219] The *Ledbetter* Court rejected Ledbetter's assertion that an employment practice committed with no improper purpose and no discriminatory intent is still unlawful because it gives some effect to an intentional discriminatory act that occurred before the charging period.[220] The majority ruled that Ledbetter's disparate pay claim was untimely for these reasons.[221] The majority then turned to Ledbetter's argument that *Bazemore v. Friday* is controlling and that the "paycheck accrual rule" should be used in this case.[222]

2. *Pay Decisions Are Not to Be Treated Differently Than Other Employment Decisions*

Ledbetter argued that *Bazemore*, not *Evans*, *Ricks*, and *Lorance* should be controlling in this case and that pay decisions should be treated differently than other employment decisions.[223] She argued that the *Bazemore* Court held that each paycheck begins a new EEOC charging period that allows any prior discriminatory conduct that affected the amount of the

212. *Id.* (citing Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980)).
213. *Id.* at 2171.
214. *Id.*
215. *Id.*
216. *Id.* at 2170.
217. *Id.* at 2171.
218. *Id.*
219. *Id.* at 2172.
220. *Id.* (citing Amtrak v. Morgan, 536 U.S. 101, 109 (2002); Int'l Union of Elec., Radio, & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236 (1976)).
221. *Id.*
222. *Id.*
223. *Id.* (citing Bazemore v. Friday, 478 U.S. 385, 395 (1986)).

paycheck to be challenged.[224] This is called the "paycheck accrual rule."[225] However, the majority disagreed with this interpretation.[226] According to the majority, *Bazemore* is inapposite to this case because it dealt with an amendment to Title VII.[227] In 1972, Title VII was made applicable to public employees, like the plaintiffs in *Bazemore*.[228] Justice Brennan, in his concurring opinion, asserted that pre-1972 acts of discrimination that were perpetuated after 1972 could be challenged.[229] *Bazemore* dealt with a discriminatory pay structure.[230] Thus, each paycheck issued under a discriminatory pay structure constitutes a new Title VII violation with its own EEOC charging period.[231] Ledbetter's situation is different than the plaintiffs' in *Bazemore*.[232] Ledbetter did not claim that Goodyear ever instituted a discriminatory pay structure.[233] She only argued that particular Goodyear employees discriminated against her individually, but those alleged incidents took place outside of the EEOC charging period.[234] According to the majority, *Bazemore* did not support Ledbetter's claim.[235] The majority then turned to Justice Ginsburg's contention that Ledbetter's pay discrimination claim should be treated differently than other disparate impact claims.[236]

In contrast with the majority's reasoning, Justice Ginsburg asserted in her dissent that Ledbetter's disparate pay claim did not deal with a discrete act of discrimination, but with a hostile work environment.[237] *Morgan* stated that a discrete act of discrimination is one that "constitutes a separate actionable 'unlawful employment practice' and that is temporally distinct."[238] Discrete acts include termination, failure to promote, denial of transfer, or refusal to hire.[239] A hostile work environment is comprised of a

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224. *Id*.
225. *Id*.
226. *Id*.
227. *Id*.
228. *Id*. (citing *Bazemore*, 478 U.S. at 391). This amendment allowed government employees to file employment discrimination claims following the same procedures as employees of private companies. 42 U.S.C. § 2000e-16(a) (2000).
229. *Ledbetter*, 127 S. Ct. at 2173 (citing *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring)).
230. *Id*. at 2172 (citing *Bazemore*, 478 U.S. at 397 n.6 (Brennan, J., concurring)).
231. *Id*. at 2174.
232. *Id*.
233. *Id*.
234. *Id*.
235. *Id*.
236. *Id*. at 2175.
237. *Id*. at 2181 (Ginsburg, J., dissenting).
238. *Id*. at 2175 (citing Amtrak v. Morgan, 536 U.S. 101, 114 (2002)).
239. *Id*. (citing *Morgan*, 536 U.S. at 114).

number of harassing acts which may not be actionable individually.[240] A hostile work environment does not occur on any specific day.[241] The majority objected to this characterization of Ledbetter's claim, however, pointing out that she asserted a claim against each paycheck she received during the EEOC charging period as a discrete discriminatory act.[242] The majority rejected what it claimed to be Justice Ginsburg's attempt to create a special rule for pay discrimination claims such as Ledbetter's.[243] Next, the majority rejected Ledbetter's remaining arguments for the "paycheck accrual rule."[244]

3. *Analogies to Other Statutes and Policy Arguments Are Insufficient to Support the "Paycheck Accrual Rule"*

The EPA prohibits paying unequal wages for equal work on the basis of sex.[245] Ledbetter argued that because the EPA allows claims challenging discriminatory acts outside the EEOC limitations period, the Court should also allow such challenges under Title VII.[246] The majority summarily dismissed this argument, stating that the EPA and Title VII are not the same.[247] Particularly, the EPA does not require the filing of a charge with an administrative agency, as Title VII does.[248] The EPA also does not require proof of intentional discrimination.[249] The majority then considered Ledbetter's analogy to the FLSA.[250]

Ledbetter similarly argued that because the statute of limitations for violations of FLSA's minimum wage and overtime provisions begins to run with each paycheck, so should the limitations period under Title VII.[251] The majority dismissed this argument just as quickly as it dismissed the EPA analogy.[252] The majority explained that an FLSA minimum wage or overtime claim does not require proof of discriminatory intent.[253] The

240. *Id.* (citing *Morgan*, 536 U.S. at 115-16).
241. *Id.*
242. *Id.*
243. *Id.* at 2176.
244. *Id.*
245. *Id.* (citing 29 U.S.C. § 206(d) (2000)).
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* (citing 29 U.S.C. §§ 207, 255(a) (2000)).
252. *Id.*
253. *Id.*

majority took a more favorable view to Ledbetter's analogy to the NLRA.[254]

The NLRA bears more similarity to Title VII than the EPA or the FLSA.[255] Similar to Title VII, it requires the filing of a charge with an administrative agency (the National Labor Relations Board).[256] Because the NLRA's statute of limitations begins to run with each new paycheck, Ledbetter argued that Title VII's limitations period should be similarly considered.[257] However, the majority countered, the rule under NLRA is similar to the rule under Title VII.[258] Claimants under the NLRA cannot challenge acts that took place prior to its six-month statute of limitations, just as claimants under Title VII cannot challenge acts that took place prior to the 180 day EEOC charging period.[259] Ledbetter's analogy to the NLRA did not support her claim, similar to her analogies to the EPA and the FLSA.[260] The majority then confronted Ledbetter's policy argument in favor of the "paycheck accrual rule."[261]

Ledbetter argued that plaintiffs asserting a claim of pay discrimination should have more time to file a charge with the EEOC than that mandated by the statute, because pay discrimination is more difficult to detect than other forms of discrimination.[262] The majority was not swayed by this argument, however, and refused to address the issue.[263] The majority found no support for Ledbetter's policy argument in statutes or case law.[264] As Justice Alito stated in the majority opinion: "We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute."[265] Thus, the majority rejected Ledbetter's final argument.[266]

The *Ledbetter* Court deemed Ledbetter's claim to be time-barred.[267] It found that an allegedly discriminatory act must be accompanied by discriminatory intent, and Ledbetter conceded that the only pay decisions

254. *Id.* at 2177 (citing 29 U.S.C. § 160(b) (2000)).
255. *Id.* (citing 29 U.S.C. § 160 (2000)).
256. *Id.* (citing 29 U.S.C. § 160(b) (2000)).
257. *Id.*
258. *Id.*
259. *Id.* (citing Machinists v. NLRB, 362 U.S. 411, 416-17 (1960)).
260. *Id.* at 2166-67.
261. *Id.* at 2177.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 2172.

that took place during the 180 day EEOC charging period were not coupled with any discriminatory intent.[268] The Court also refused to adopt the "paycheck accrual rule" and held that the discriminatory intent accompanying an act outside the EEOC charging period cannot be carried forward and attached to an act within the period.[269] The majority rejected Ledbetter's analogies to other statutes and her policy arguments as well.[270] The Supreme Court ultimately upheld the decision of the Court of Appeals for the Eleventh Circuit.[271] The decision was split, however, with Justice Ginsburg writing a dissent joined by Justices Stevens, Souter, and Breyer.[272]

B. JUSTICE GINSBURG'S DISSENTING OPINION, JOINED BY JUSTICES STEVENS, SOUTER, AND BREYER

Justice Ginsburg asserted that the majority erred in a number of respects.[273] First, the majority should not have rejected the "paycheck accrual rule."[274] Second, the majority failed to recognize that pay discrimination is difficult to detect.[275] Finally, it mistakenly relied on *Evans*, *Ricks*, and *Lorance* as controlling precedent.[276] Ginsburg first turned to the question of what constitutes an unlawful employment practice under Title VII.[277]

1. *Unlawful Employment Practices Under Title VII*

Justice Ginsburg explained that in a pay discrimination claim, there are a number of ways to define the crucial employment practice.[278] One view is that each wage-setting decision stands alone as a singular employment practice.[279] If this is the case, each wage-setting decision must be challenged within its own 180 day EEOC charging period.[280] An alternative view is that the wage-setting decision and the issuing of a paycheck with a discriminatorily low wage are both potentially unlawful employment

268. *Id.* at 2167.
269. *Id.* at 2167, 2172.
270. *Id.* at 2176-77.
271. *Id.* at 2178.
272. *Id.*
273. *Id.* at 2179 (Ginsburg, J., dissenting).
274. *Id.*
275. *Id.* at 2181-82.
276. *Id.* at 2183-84.
277. *Id.* at 2179.
278. *Id.*
279. *Id.*
280. *Id.*

practices.[281] Under this view, each paycheck would be actionable, with its own 180 day charging period.[282] While prior discriminatory wage-setting decisions would not be actionable in and of themselves, they would be relevant in any claim related to the issuing of a discriminatory paycheck.[283] The majority followed the first view, but Justice Ginsburg contended that the second view is "more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[284]

a. Categories of Unlawful Practices

Justice Ginsburg cited *Bazemore* as holding that paychecks based on past discrimination are actionable not only because they are related to prior discrimination, but because each paycheck is an instance of new discrimination.[285] This view was refined in *Morgan*, where two categories of employment practices were defined: discrete acts and hostile work environments.[286] Discrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire, occur on a specific date.[287] An EEOC charge must be filed within 180 days of the date on which the discrete act occurred in order to challenge the act in court.[288] A hostile work environment does not occur on any particular day.[289] The acts constituting a hostile work environment can take place over an extended period of time and may not be individually actionable.[290] Justice Ginsburg asserted that the pay discrimination of the type suffered by Ledbetter is more similar to a hostile work environment than a single discrete act of discrimination.[291] Ledbetter alleged, and the jury agreed, that a number of acts combined to result in the receipt of a discriminatorily low wage when compared to her male counterparts.[292] Also, the realities of the workplace make Ledbetter's claim similar to a hostile work environment claim.[293]

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281. *Id*.
282. *Id*.
283. *Id*.
284. *Id*.
285. *Id*. at 2180 (citing Bazemore v. Friday, 478 U.S. 385, 395-96 (1986)).
286. *Id*. (citing Amtrak v. Morgan, 536 U.S. 101, 110, 113-15 (2002)).
287. *Id*. (citing *Morgan*, 536 U.S. at 114).
288. *Id*. (citing 42 U.S.C. § 2000e-5(e)(1) (2000); *Morgan*, 536 U.S. at 110).
289. *Id*. (citing *Morgan*, 536 U.S. at 115).
290. *Id*.
291. *Id*. at 2181.
292. *Id*. *See* Brief of Petitioner-Appellant, *supra* note 23, at 16-20 (describing the discriminatory acts suffered by Ledbetter).
293. *Ledbetter*, 127 S. Ct. at 2181.

b. The Realities of the Workplace

In a section of Justice Ginsburg's dissent based more on practical reality than statutes and precedent, she explained that the nature of the workplace makes a pay discrimination claim more similar to a hostile work environment claim than one of a discrete discriminatory act.[294] Often, an employee does not know that her pay is lower than that of her coworkers.[295] This problem is exacerbated when, as in Ledbetter's case, the employee that is being discriminated against still receives raises, but the raises are lower than those of her male counterparts.[296] She has little reason to investigate whether she has been discriminated against if she has received a raise.[297] In addition, even if an employee is aware of a discrepancy between her pay and that of her coworkers, she may consider the amount not significant enough to complain or file a charge.[298]

On the other hand, Justice Ginsburg asserted that an employee is fully aware of a discrete discriminatory act when it occurs.[299] An employee who is fired or turned down for a promotion may immediately inquire into the reasons behind the decision.[300] If she thinks those decisions are accompanied by discriminatory intent, she can challenge the decisions, whether through internal processes or the EEOC.[301] Discrete acts of discrimination are different from a hostile work environment not only in the experience of the employee, but also in the effect on the employer.[302]

c. The Benefits of Discrimination for Employers

Justice Ginsburg further asserted that employers benefit differently from discrete acts of discrimination than they do from recurring pay discrimination.[303] When an employer chooses to hire a man instead of a woman, a position is still filled with an employee to whom a salary must be paid, and benefits must possibly be given, for example.[304] The same is true when a man is promoted or transferred instead of a woman.[305] However,

294. *Id.*
295. *Id.*
296. *Id.* at 2182.
297. *Id.*
298. *Id.*
299. *Id.* at 2181.
300. *Id.*
301. *Id.* (citing 42 U.S.C. §§ 2000e-(2)(a)(1), 2000e-5(e)(1) (2000)).
302. *Id.* at 2182.
303. *Id.*
304. *Id.*
305. *Id.*

when an employer intentionally pays a woman less than a man because of her sex, the business benefits by saving money on wages.[306] Because of these differences, Justice Ginsburg stated that a pay discrimination claim such as Ledbetter's should not be treated as a discrete act of discrimination.[307] Accordingly, the precedent on which the majority relies is inapposite.[308]

2. *The Majority's Reliance on* Evans, Ricks, *and* Lorance *is Unsound*

The majority relied heavily on *Evans*, *Ricks*, and *Lorance* to assert the point that an EEOC charge needs to be filed within 180 days of when the discriminatory act takes place, not when its effects are felt.[309] Justice Ginsburg contended, however, that these cases are inapposite.[310] Evans did not object to being forced to resign until four years later, when her seniority credit was denied.[311] Ricks did not object to the denial of his tenure until one year later, when his terminal contract ended.[312] These were easily identifiable singular acts of discrimination; not recurring, continuous discriminatory situations as in *Ledbetter*.[313] Justice Ginsburg explained that *Lorance* is similarly inapplicable because its facts are dissimilar to *Ledbetter*, and it has been largely overruled through legislation.[314]

The *Lorance* Court held that the adoption of the discriminatory seniority system was a discrete act of discrimination that had to be challenged within the EEOC charging period.[315] In that sense, it is different from the recurring, hostile work environment-style discrimination of *Ledbetter*, and therefore distinguishable.[316] Justice Ginsburg also stated that the majority's reliance on *Lorance* is "perplexing," since that decision was superseded by the 1991 Civil Rights Act.[317] Congress followed the *Lorance* dissenters and amended Title VII to state that an actionable discriminatory employment act occurs when a discriminatory seniority system

306. *Id*.
307. *Id*.
308. *Id*.
309. *Id*. at 2167-69 (citing Lorance v. AT&T Techs., Inc., 490 U.S. 900, 906 (1989); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 555, 559 (1977)).
310. *Id*. at 2182.
311. *Id*. (citing *Evans*, 431 U.S. at 554-57).
312. *Id*. (citing *Ricks*, 449 U.S. at 253-54, 257-58).
313. *Id*.
314. *Id*. at 2183 (citing 42 U.S.C. § 2000e-5(e)(2) (2000); *Lorance*, 490 U.S. at 902, 905).
315. *Id*. (citing *Lorance*, 490 U.S. at 914).
316. *Id*.
317. *Id*. (citing 42 U.S.C. § 2000e-5(e)(2) (2000)).

is adopted, when someone becomes subject to that system, and when someone is injured by that system.[318] *Lorance*'s lack of precedential value is clarified by the fact that the Supreme Court had not, until *Ledbetter*, relied on it since the adoption of the 1991 Civil Rights Act.[319] Thus, not only is the majority's reasoning based on inapplicable precedent, it also defies the intent behind Title VII, according to Justice Ginsburg.[320]

3. *Title VII's Backpay Provision*

Justice Ginsburg asserted that Congress never intended for the 180 day EEOC charging period to limit the employment acts that could be considered.[321] Title VII allows damages to include backpay for a period of up to two years prior to the date that the charge is filed.[322] According to Justice Ginsburg, this provision shows that Congress contemplated challenges to pay discrimination that began before the 180 day charging period.[323] As the *Morgan* Court stated:

> If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay. And the fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period indicates that the timely filing provision was not meant to serve as a specific limitation either on damages or the conduct that may be considered for the purposes of one actionable hostile work environment claim.[324]

According to Justice Ginsburg, the Court should not have "immunize[d] forever discriminatory pay differentials unchallenged within 180 days of their adoption."[325] Justice Ginsburg next turned to the concerns of employers defending against claims of gender-based pay discrimination.[326]

318. *Id*.
319. *Id*. at 2184.
320. *Id*.
321. *Id*.
322. *Id*. (citing 42 U.S.C. § 2000e-5(g)(1) (2000)).
323. *Id*.
324. Amtrak v. Morgan, 536 U.S. 101, 119 (2002).
325. *Ledbetter*, 127 S. Ct. at 2184.
326. *Id*. at 2185-86.

4. *Protections for Employers*

Justice Ginsburg disagreed with the majority's assertion that its decision was necessary to protect employers from the need to defend against claims of pay discrimination based on decisions made long ago.[327] The discrimination suffered by Ledbetter did not take place long ago.[328] She suffered discrimination each time she received a lower paycheck because of her gender.[329] Also, there are many defenses employers can use in response to these claims.[330] Employers that are disadvantaged by a delay in bringing a claim can assert the defenses of waiver, estoppel, and equitable tolling.[331] Moreover, the equitable doctrine of laches may help employers.[332] Justice Ginsburg also took issue with the majority's assertion that she would allow a pay discrimination claim based on a decision made twenty years ago.[333] No reasonable judge would allow that claim, according to Justice Ginsburg.[334] In addition, an adequate defense against such a claim would be provided to any of the above-mentioned doctrines.[335] Finally, Justice Ginsburg looked at the simple facts to show how the majority had come to a decision in opposition to Title VII's remedial purpose.[336]

5. *Ledbetter Proved That She Had Suffered Discrimination*

Justice Ginsburg reiterated that at trial, Ledbetter proved that she was a member of a protected class, that she had performed work equal to her male coworkers, that she had been paid less for that work, and that the pay disparity was due to gender-based discrimination.[337] Ledbetter showed that she had suffered a long history of discrimination.[338] She also introduced evidence to show that discrimination against women was pervasive at the

327. *Id.* at 2170, 2185.
328. *Id.* at 2185.
329. *Id.* at 2185-86.
330. *Id.* at 2186.
331. *Id.* (citing Amtrak v. Morgan, 536 U.S. 101, 121 (2002)).
332. *Id.*
333. *Id.* at 2175, 2186.
334. *Id.* at 2186.
335. *Id.*
336. *Id.* at 2187.
337. *Id.*
338. *Id.*

Gadsden, Alabama Goodyear plant.[339] However, according to the majority, Title VII provides no remedy for this discrimination.[340] Ledbetter had to challenge each and every pay decision within 180 days of when it was made.[341] It is not unlawful to knowingly carry forward past discrimination.[342] Ledbetter could not receive any compensation for her discriminatorily low pay, nor could she—if she were still employed by Goodyear—receive an injunction forcing the company to stop discriminating against her.[343] Justice Ginsburg asserted that this result is contrary to Congress's intent to enact protection against workplace discrimination through Title VII.[344] For this reason and those described above, Justice Ginsburg would have reversed the decision of the Court of Appeals for the Eleventh Circuit and held that Ledbetter's claim was not time-barred.[345]

IV. IMPACT

Justice Ginsburg foreshadowed the impact of this decision when she asserted, "[o]nce again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[346] Although the decision has received a somewhat favorable reaction in the lower courts,[347] it appears that Congress is acting to reverse the *Ledbetter* Court's ruling.[348]

A. POSITIVE REACTION FROM LOWER COURTS

The Court's decision in *Ledbetter* has been followed in decisions by courts in the Second,[349] Third,[350] Fifth,[351] Sixth,[352] Seventh,[353] Ninth,[354]

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339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 2187-88.
343. *Id.* at 2188.
344. *Id.*
345. *Id.*
346. *Id.*
347. *See, e.g.*, Plant v. Deutsche Bank Secs., Inc., 07 Civ. 3498 (AKH), 2007 U.S. Dist. LEXIS 55100, at *5-10 (S.D.N.Y. July 23, 2007) (holding that a claim of a continuing violation of Title VII is untenable after *Ledbetter*). *But see* Fed. Ins. Co. v. Albertson's, Inc., No. C 06-04000 MHP, 2007 U.S. Dist. LEXIS 67791, at *8 (N.D. Cal. 2007) (explaining that *Ledbetter* merely classified discriminatory pay decisions as discrete acts, as opposed to a hostile work environment).
348. *See* Lilly Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (1st Sess. 2007) (proposing to codify the paycheck accrual rule).
349. *See*, *e.g.*, *Plant*, 2007 U.S. Dist. LEXIS 55100, at *5-10 (rejecting a claim of a continuing violation of Title VII).
350. *See, e.g.*, Mikula v. Allegheny County of Pa., No. 06cv1630, 2007 U.S. Dist. LEXIS 70510, at *7-9 (W.D. Pa. Sept. 24, 2007) (rejecting a Title VII claim because the EEOC charge was filed too late).

Tenth,[355] and Eleventh[356] Circuits. *Ledbetter* has been cited for three reasons.[357] First, *Ledbetter* has been cited for its distinction between discrete acts of discrimination and continuing acts of discrimination.[358] Courts have used *Ledbetter* to reject claims of violations of Title VII that cannot be fixed at one point in time.[359] Second, *Ledbetter* has been cited for the proposition that nondiscriminatory employment acts do not violate Title VII, even if they put into effect discriminatory acts outside of the EEOC charging period.[360] Plaintiffs have not been allowed to carry forward past discriminatory intent to a later employment act.[361] This has also been phrased as a rejection of the "paycheck accrual rule," which contends that each paycheck that is lower because of a past discriminatory act is actionable under Title VII.[362] Third, the *Ledbetter* decision has been used to bar claims of employment discrimination because charges were not timely filed.[363] In addition to these three implications of *Ledbetter*, the decision has also affected how gender-based discrimination claims are made.[364]

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351. *See, e.g.*, Smith v. Murphy & Sons, Inc., No. 2:06cv79, 2007 U.S. Dist. LEXIS 64063, at *29 (N.D. Miss. Aug. 28, 2007) (considering a claim under the Equal Pay Act because the Title VII claim was time-barred).

352. *See, e.g.*, Algie v. N. Ky. Univ., No. 06-23-JGW, 2007 U.S. Dist. LEXIS 53347, at *13-19 (E.D. Ky. July 23, 2007) (granting summary judgment because no discriminatory acts took place during the EEOC charging period).

353. *See, e.g.*, Groesch v. City of Springfield, No. 04-3162, 2007 U.S. Dist. LEXIS 50009, at *6-11 (C.D. Ill. July 11, 2007) (rejecting the "paycheck accrual rule").

354. *See, e.g.*, Davis v. Washington, 245 Fed. App'x 600, 601-02 (9th Cir. 2007) (remanding to reconsider in light of *Ledbetter*).

355. *See, e.g.*, Taher v. Wichita State Univ., No. 06-2132-KHV, 2007 U.S. Dist. LEXIS 90728, at *34-35 (limiting plaintiff's claim to a particular time period).

356. *See, e.g.*, Dixon v. Winter, No. 3:05-cv-1153-J-33HTS, 2007 U.S. Dist. LEXIS 58539, at *7-8 (M.D. Fla. Aug. 10, 2007) (failing to consider a discrete act that took place outside of the EEOC charging period).

357. *Infra* notes 358-62 and accompanying text.

358. *See, e.g.*, Plant v. Deutsche Bank Secs., Inc., 07 Civ. 3498 (AKH), 2007 U.S. Dist. LEXIS 55100, at *6-8 (S.D.N.Y. July 23, 2007) (holding that a claim of a continuing violation of Title VII is untenable after *Ledbetter*).

359. *Id.*

360. *See, e.g.*, Garcia v. Brockway, 503 F.3d 1092, 1098 (9th Cir. 2007) (granting rehearing en banc, and withdrawing opinion by Garcia v. Brockway, No. 05-35647, 2008 U.S. LEXIS 199 (9th Cir. Idaho, Jan. 7, 2008)).

361. *Infra* note 362 and accompanying text.

362. *See, e.g.*, Groesch v. City of Springfield, No. 04-3162, 2007 U.S. Dist. LEXIS 50009, at *6-7 (C.D. Ill. July 11, 2007) (rejecting the "paycheck accrual rule").

363. *See, e.g.*, Algie v. N. Ky. Univ., No. 06-23-JGW, 2007 U.S. Dist. LEXIS 53347, at *13 (E.D. Ky. July 23, 2007) (granting summary judgment because the claim was not timely filed).

364. *Infra* note 365 and accompanying text.

B. A SHIFT FROM TITLE VII TO THE EQUAL PAY ACT

Ledbetter may have signaled a change in the significance of Title VII as it relates to pay discrimination claims based on gender.[365] In *Smith v. Murphy & Sons, Inc.*,[366] the District Court for the Northern District of Mississippi, after time-barring the plaintiff's Title VII claim under *Ledbetter*, still considered the claim under the EPA, which has a two year statute of limitations.[367] Justice Ginsburg foreshadowed this result in her dissent, stating, "[I]n truncating the Title VII rule this Court announced in *Bazemore*, the Court does not disarm female workers from achieving redress for unequal pay, but it does impede racial and other minorities from gaining similar relief," because the EPA covers only gender-based discrimination.[368] Thus, while *Ledbetter* may not preclude remedies for pay discrimination based on gender, it may have a negative effect on minorities who cannot rely on the protection of the EPA.[369]

C. NEGATIVE REACTION FROM LOWER COURTS

The Supreme Court's decision in *Ledbetter* has received negative treatment from courts in the Second,[370] Third,[371] Sixth,[372] Eighth,[373] Ninth,[374] and Tenth[375] Circuits and the D.C. Circuit.[376] Courts have not

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365. *See* Smith v. Murphy & Sons, Inc., No. 2:06cv79, 2007 U.S. Dist. LEXIS 64063, at *29 (N.D. Miss. Aug. 28, 2007) (considering a claim under the Equal Pay Act after the Title VII claim was time-barred).

366. No. 04-3162, 2007 U.S. Dist. LEXIS 64063 (N.D. Miss. Aug. 28, 2007).

367. *Id.* at *29.

368. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2186 (2007) (Ginsburg, J., dissenting).

369. *Id.*

370. *See, e.g.*, Osborn v. Home Depot U.S.A., Inc., No. 05cv1673 (JBA), 2007 U.S. Dist. LEXIS 69996, at *26-27 (D. Conn. Sept. 19, 2007) (holding that *Ledbetter* is inapposite because in this case, discriminatory acts took place during the EEOC charging period).

371. *See, e.g.*, Mavrinac v. Emergency Med. Ass'n of Pittsburgh, No. 04-1880, 2007 U.S. Dist. LEXIS 73526, at *15 (W.D. Penn. Oct. 2, 2007) (explaining that the *Ledbetter* Court did not address whether a Title VII claim could be salvaged by the doctrine of equitable tolling or the discovery rule).

372. *See, e.g.*, Dodd v. Dyke Indus., No. 3:04-cv-226-H, 2007 U.S. Dist. LEXIS 78248, at *13-14 (W.D. Ky. Oct. 19, 2007) (distinguishing *Ledbetter* because the plaintiff claimed that new and discrete discriminatory acts took place each year).

373. *See, e.g.*, Bearden v. Int'l Paper Co., No. 5:06cv0037, 2007 U.S. Dist. LEXIS 69117, at *32-33 (E.D. Ark. Sept. 17, 2007) (considering the plaintiff's claim only under the Equal Pay Act).

374. *See, e.g.*, Fed. Ins. Co. v. Albertson's, Inc., No. C06-0400 MHP, 2007 U.S. Dist. LEXIS 67791, at *10-11 (N.D. Cal. Sept. 13, 2007) (concluding that *Ledbetter* did not directly address the equitable doctrine of continuing violations).

375. *See, e.g.*, Proctor v. UPS, 502 F.3d 1200, 1206-07 (10th Cir. 2007) (holding *Ledbetter* inapposite because it only dealt with discriminatory acts that took place outside the EEOC charging period).

refused to follow *Ledbetter*, but they have found opportunities to distinguish it.[377] The decision has been distinguished when plaintiffs make pay discrimination claims under the Equal Pay Act instead of Title VII.[378] *Ledbetter* is inapplicable to claims that allege discriminatory acts within the EEOC charging period.[379] *Ledbetter*'s impact has also been limited by one court that observed that the decision did not directly address the doctrine of continuing violations; rather, it dealt with discrete acts of discrimination whose effects were felt during the EEOC charging period.[380] The Supreme Court's decision in *Ledbetter* may be limited even more greatly, however, by congressional action.[381]

D. THE LILLY LEDBETTER FAIR PAY ACT

On June 22, 2007, Representative George Miller (D-CA) introduced the Lilly Ledbetter Fair Pay Act of 2007 in the House of Representatives.[382] The bill has ninety-three cosponsors, including North Dakota's Representative Earl Pomeroy (D-ND).[383] The bill seeks to amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973.[384] It most substantively amends Title VII and the Age Discrimination in Employment Act by adding the following provision:

> 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,

376. *See, e.g.*, George Wash. Univ. v. Violand, 932 A.2d 1109, 1117-18 (D.C. Cir. 2007) (distinguishing *Ledbetter* because the university did not make a statute of limitations defense against the pay discrimination claim).

377. *Id.*

378. *See, e.g.*, *Bearden*, 2007 U.S. Dist. LEXIS 69117, at *32-33 (considering the plaintiff's claim only under the Equal Pay Act).

379. *Proctor*, 502 F.3d at 1206-07.

380. *Albertson's, Inc.*, 2007 U.S. Dist. LEXIS 67791, at *10-12.

381. *See* Lilly Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (1st Sess. 2007) (proposing to codify the paycheck accrual rule).

382. *Id.*

383. *Id.*

384. *Id.*

> benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[385]

Thus, Congress is seeking to carry forward the discriminatory nature of the wage-setting decision to the subsequent issuance of paychecks, something that the *Ledbetter* majority refused to do.[386] When asked to respond to this congressional action, Justice Alito, the author of the *Ledbetter* majority opinion, explained that since the Court was just interpreting the law Congress passed, "it's certainly Congress's prerogative" to change it.[387] The bill passed the House by a vote of 225-199 and is awaiting action from the Senate.[388]

E. NORTH DAKOTA IMPACT

North Dakota's employment discrimination laws differ from Title VII's restrictions, so the impact that *Ledbetter* will have on North Dakota is unclear.[389] North Dakota's regulations on equal pay for men and women are contained in North Dakota Century Code Section 34-06.1.[390] The prohibition of gender-based pay discrimination is set forth as follows:

> No employer may discriminate between employees in the same establishment on the basis of gender, by paying wages to any employee in any occupation in this state at a rate less than the rate at which the employer pays any employee of the opposite gender for comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility. . . . No person may cause or attempt to cause an employer to discriminate against any employee in violation of this chapter. No employer may discharge or discriminate against any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this chapter, except when proven that the act of the employee is fraudulent.[391]

This chapter creates a private cause of action for employees that have suffered discrimination.[392] It also allows the Commissioner of Labor, by

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385. *Id.*
386. *Id.*; Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2169 (2007).
387. Robert Barnes, *Newest Justice Tips High Court to Right; Alito Cast Key Votes in Major 5 to 4 Rulings on Abortion and Campaign Finance*, WASH. POST, June 28, 2007, at A15.
388. 153 CONG. REC. H 9226 (2007).
389. *See* N.D. CENT. CODE § 34-06.1 (2007) (prohibiting gender-based pay discrimination).
390. *Id.*
391. *Id.* § 34-06.1-03.
392. *Id.* § 34-06.1-05.

written request of the employee, to sue on the employee's behalf.[393] The Commissioner has other broad powers under this chapter, including the ability to inspect records, examine witnesses, eliminate unlawful practices "by informal methods of conference, conciliation and persuasion," supervise the payment of wages, and enact regulations.[394] Violation of the chapter is a class B misdemeanor, which brings maximum penalties of thirty days in jail and a $1000 fine.[395] The chapter does contain a time-limit provision, but leaves a number of important questions unanswered.[396]

The statute of limitations mandates that court action commence within two years of the claim for relief.[397] It does not state how long an employee may wait to file suit after she suffers gender-based pay discrimination.[398] It also does not answer the central question of *Ledbetter*: Can each paycheck be challenged as discriminatory, or must each discriminatory wage-setting decision be challenged within a certain period of time?[399] The North Dakota Supreme Court did not answer this question in the only case in which it considered North Dakota Century Code Section 34-06.1-03.[400] In *Swenson v. Northern Crop Insurance, Inc.*,[401] the North Dakota Supreme Court reversed a summary judgment order against a female employee on her pay discrimination claim.[402] The court only addressed this issue on procedural grounds, however, leaving questions about the timing and procedure of filing a claim unanswered.[403] Thus, while a North Dakotan that has been paid a discriminatorily low wage on the basis of his or her gender may face a more difficult road asserting a claim under Title VII after the *Ledbetter* decision, he or she may be able to achieve redress through the state process by appealing to the protections contained in the North Dakota Century Code.[404]

393. *Id.*
394. *Id.* § 34-06.1-04(3).
395. *Id.* §§ 12.1-32-01, 34-06.1-09.
396. *Id.* § 34-06.1-06.
397. *Id.*
398. *Id.*
399. *Id.*
400. Swenson v. N. Crop Ins., Inc., 498 N.W.2d 174, 178-80 (N.D. 1993).
401. 498 N.W.2d 174 (N.D. 1993).
402. *Swenson*, 498 N.W.2d at 180.
403. *Id.* at 179.
404. N.D. CENT. CODE § 34-06.1-03 (2007).

V. CONCLUSION

In *Ledbetter*, the United States Supreme Court ruled that issuing a paycheck based on prior discriminatory wage-setting decisions is not itself a discriminatory employment act.[405] The discriminatory intent behind a previous action cannot be imputed to the nondiscriminatory issuing of a paycheck.[406] The Court also held that a claim of gender-based pay discrimination under Title VII must be brought within 180 days of the discriminatory wage-setting decision.[407] A claim that is brought more than 180 days after the discriminatory wage-setting decision is untimely and the courts can offer no relief.[408]

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405. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2172 (2007).
406. *Id.* at 2167.
407. *Id.* at 2162.
408. *Id.*

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