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WAGE DISCRIMINATION AND THE DIFFICULTY OF PROOF

by JASON LEWIS

Do you know the salary of your fellow co-workers? If not, could you find out? If you learned that a co-worker in a similar position made twice as much as you, who could you tell and when?

The recent U.S. Supreme Court decision of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, limits employee claims of wage discrimination to 180 days prior to filing a charge with the U.S. Equal Employment Opportunity Commission (EEOC) and has many commentators asking these same questions.¹

In fact, less than one month after the decision was made, the U.S. House of Representatives led by Sen. Edward Kennedy (D-MA) introduced and passed

H.R. 2831, The Ledbetter Fair Pay Act of 2007, which aims to remedy perceived problems with the decision.²

For employees, the question now is: How can an employee file a charge or even suspect she has a charge of wage discrimination if salary information of most employers is confidential?

THE *LEDBETTER* DECISION

The U.S. Supreme Court decided *Ledbetter* on May 29, 2007 in a 5-4 majority opinion. The plaintiff, Lilly Ledbetter, worked at the Goodyear Tire & Rubber Company in Alabama.³ During her employment at the company, salaried employees were given or denied raises based on their supervisors' evaluation of their performance.⁴ Though her male peers received average raises, Ledbetter consistently received small or no raises over the course of her career.⁵ In March of 1998, Ledbetter filed charges of pay discrimination with the EEOC⁶ under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.⁷

The jury found for Ledbetter and awarded nearly \$4 million⁸ in back pay and damages.⁹

"I was just as good as any of my peers," Ledbetter said shortly after the verdict was handed down. "I kept believing they would recognize the job performance as it really was and the right thing would be done."¹⁰

Ledbetter's win, however, was short lived. The Eleventh Circuit reversed, concluding that "Ledbetter can state a timely cause of action for disparate pay only to the extent that the 'discrete acts of discrimination' of which she complains occurred within the limitations period created by her EEOC questionnaire. Any acts of discrimination affecting her salary occurring before then are time-barred."¹¹

Ledbetter's lawyer, Kevin K. Russell, disagreed with the Circuit Court's narrow time limitation.

"It's only when the disparity persists," Russell said, "when the different treatment accrues again and again and the overall disparity in the wages increases,

that the employee has some reasonable basis to think that it's not natural variation in the pay decisions but actually intentional discrimination."¹²

Ledbetter appealed, and argued before the U.S. Supreme Court that "each paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period."¹³

However, the U.S. Supreme Court rejected Ledbetter's arguments. It reasoned that "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."¹⁴

The Court also denied Ledbetter's policy-based arguments that pay discrimination claims are "harder to detect" than other discriminatory practices.¹⁵ It stated that "[w]e are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the prompt processing of all charges of employment discrimination."¹⁶

In her dissent, Justice Ginsburg said that the majority opinion "overlooks common characteristics of pay discrimination."¹⁷ She opined that because comparative pay information is often hidden from the aggrieved employee's view, the employee would not know within the filing period that she had received lower raises.¹⁸

WHAT DOES *LEDBETTER* MEAN FOR THE CURRENT WORKFORCE?

According to the U.S. Department of Labor, of the 117 million women age 16 years and over in the United States, 69 million (almost 60 percent) were labor force participants — i.e. working or looking for work.¹⁹

Meanwhile, the median weekly earnings of women who were full-time wage and salary workers was \$585, or 81 percent of men's \$722.²⁰ With more than 4.5 million people employed in the greater Chicago area,²¹ the recent case holding will most likely adversely affect urban women in a disproportionate manner compared to urban men.

Gordon Waldron, a trial attorney with the EEOC, states that disparate pay along gender lines played a major role in Congress' enactment of the Equal Pay Act (EPA).²² Congress enacted the EPA in 1963, and it "prohibits sex-based wage discrimination between men and women in the same establishment who are performing under similar working conditions."²³

"Pay discrimination may be more hidden today than it was some 40 years ago," said Waldron. "Before, a man and a woman might have different titles for doing the exact same position. For instance, in a motel setting, whereas a woman might have received the title of 'housekeeper,' a man doing the same job would receive a title of 'janitor.' By that justification, the employer might deliberately pay the man more money."²⁴

On average, according to Waldron, women file more pay discrimination charges under the EPA and Title VII than men.²⁵ Yet, claims of pay discrimination make up a small fraction of the EEOC's yearly charge statistics. In the Fiscal Year of 2006, the EEOC received 861 charges of compensation discrimination.²⁶ That same year, it received 75,768 charges in total.²⁷ Some of the other charges the EEOC receives include race, age and religious discrimination.²⁸

Waldron has had only two pay cases in his career. He cites the increased burden on the plaintiff as the reason: "One, it's harder to discover pay differences, and two, it's hard for a party to prove that [pay disparity] is related to discrimination."²⁹

Defenses to pay discrimination claims, notes Waldron, often take two forms: 1) the better-compensated employee is a "better worker" than the plaintiff, and/or 2) the better-compensated employee has more experience than the plaintiff.³⁰

Waldron says the *Ledbetter* decision makes it more difficult for a person to file a charge.³¹

"In pay cases, a person may not know that they are receiving less pay than other employees because pay is oftentimes confidential. The employee may not have reason to suspect pay discrimination until very late."³²

Tom Luetkemeyer, a labor and employment attorney, states that the decision was legally appropriate.

“Courts had to make a rule that was a bright-line test: you must bring a discrimination claim within the statutory period, not when you feel the effect,” said Luetkemeyer. “Otherwise, plaintiffs could come in many years after the fact. If there was no rule, how long would we let employees bring these claims?”³³

Employer-advocate groups praised the decision for its fairness to businesses.

The National Chamber Litigation Center of the U.S. Chamber of Commerce,³⁴ an organization that represents businesses in commercial-related litigation, stated that “if the court ruled the opposite way, employers could have been hauled into court on decades-old claims of discrimination. [The decision] eliminates a potential wind-fall against employers by employees trying to dredge up stale pay claims.”³⁵

Luetkemeyer believes that there are ways for employees to learn about others’ salaries.

“Finding out another employee’s pay on a practical level may be difficult,” Luetkemeyer acknowledged, but he pointed to section 7 of the National Labor Relations Act (NLRA) as allowing employees to discuss their salaries with each other in the workplace.³⁶ He also said section 8(a)(1) of the NLRA prohibits an employer from prohibiting discussion of salaries between employees.³⁷

Waldron notes, however, that oftentimes there is an unwritten rule that compensation is a personal matter.

“While there are exceptions like public school salaries and informal workplaces, another employee’s salary is not usually public knowledge,” said Waldron.³⁸

In light of *Ledbetter*, Waldron suggested that parties that have a reasonable suspicion of discrimination should file charges early.

“There is no penalty for a person filing a charge early,” Waldron said. “If an employee files a charge early and it turns out there is no basis for it, the employer may think less of him. If the employer then takes adverse action against

him because he filed the charge of discrimination with the EEOC, that would be illegal retaliation.”³⁹

WHAT DOES THE FUTURE HOLD?

The long-term impact of *Ledbetter* may actually be decided in the near future.

The Ledbetter Fair Pay Act of 2007 passed in the House on July 31, 2007 by a vote of 225-199.⁴⁰ The bill seeks to address how “[t]he limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination.”⁴¹ The bill proposes to amend the definition of unlawful practice to include when a person feels the effect of the practice:

“[A]n unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.” (Emphasis added)⁴²

The Senate introduced its companion legislation, The Fair Pay Restoration Act, on July 20, 2007, which is currently pending in Congress.⁴³

The American Civil Liberties Union (ACLU) said it supported the legislation.

“This legislation will ensure employers do not profit from years of discrimination simply because their employees were unaware of it,” said members of the ACLU in a joint letter to members of the House Education and Labor Committee. “It reaffirms the fundamental principle that our civil rights protections are intended to have a broad remedial purpose.”⁴⁴

Waldron believes that *Ledbetter* may be lost under other issues.

“There are other issues such as subprime mortgages and minimum wage laws that will receive more national attention than [the *Ledbetter* decision.] It will be lawyers that advocate for the law’s change.”⁴⁵

Luetkemeyer, however, believes the decision may come down to the political climate.

“The decision is well-grounded on a legal basis, but the policy behind the decision is a question of politics,” said Luetkemeyer. “It will depend on who controls Congress, and also who is in office.”⁴⁶

The question remains, in the absence of published salaries, will employees have to take it upon themselves to ask their fellow workers about their salaries, or will federal legislation provide some assistance to afflicted workers?

NOTES

1 Linda Greenhouse, *Justices Limit Discrimination Suits Over Pay*, THE N.Y. TIMES, May 29, 2007, available at http://www.nytimes.com/2007/05/29/washington/30scotuscnd.html?_r=1. Title VII of the Civil Rights Act of 1964 requires filing the charge within 180 days, except where a state or local agency also has jurisdiction over such charges, in which case the charge may be filed within 300 days. 42 U.S.C. 2000e-5(e).

2 H.R. 2831, 110th Cong. (1997), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831>.

3 127 S.Ct. at 2165.

4 *Id.*

5 *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169, 1171-75 (11th Cir. 2005).

6 The U.S. Equal Employment Opportunity Commission (“EEOC”) is a federal agency that enforces federal discrimination laws, including Title VII of the Civil Rights Act of 1964 (Equal Pay Act of 1963 (EPA)). In order for an individual to seek relief under these discrimination statutes, she must first file a charge with the EEOC. Federal Equal Employment Opportunity (EEO) Laws, available at http://www.eeoc.gov/abouteco/overview_laws.html

7 127 S.Ct. at 2166.

8 The judge subsequently decreased the award to \$360,000. *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 2003 WL 25507253 (N.D. Ala. Sept. 24, 2003).

9 *Id.* at 2165.

10 Valerie Dowdle, *Ledbetter, Lilly v. Goodyear Tire & Rubber Co.*, Medill News Service, June 26, 2006, available at <http://docket.medill.northwestern.edu/archives/003741.php>

11 421 F.3d at 1180.

12 Linda Greenhouse, *Court Explores Complexities in Job Discrimination Case*, THE N.Y. TIMES, November 28, 2006, available at <http://www.nytimes.com/2006/11/28/washington/28scotus.html>.

13 127 S.Ct. at 2167.

14 *Id.*

15 *Id.* at 2177.

16 *Id.*

17 *Id.* at 2178.

18 *Id.* at 2179.

- 19 U.S. Department of Labor, Women's Bureau, Women in the Labor Force in 2005, *available at* <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm>
- 20 *Id.*
- 21 Press Release, U.S. Department of Labor, Bureau of Labor Statistics, Chicago Metropolitan Area Job Count in July 2007 Rose by 49,700 Over the Year (Sept. 20, 2007), *available at* <http://www.bls.gov/ro5/ceschi.htm>
- 22 Interview with Gordon Waldron, Trial Attorney, U.S. Equal Employment Opportunity Commission, in Chicago, Ill. (Sept. 25, 2007).
- 23 Equal Employment Opportunity Commission, *The Equal Pay Act of 1963*, *available at* <http://www.eeoc.gov/policy/epa.html>.
- 24 Interview with Gordon Waldron, *supra* note 22.
- 25 *Id.*
- 26 Equal Employment Opportunity Commission, Equal Pay and Compensation Discrimination, *available at* <http://www.eeoc.gov/types/epa.html>
- 27 Charge Statistics FY 1997 Through FY 2006, *available at* <http://www.eeoc.gov/stats/charges.html>
- 28 Equal Employment Opportunity Commission, Federal Equal Employment Opportunity (EEO) Laws, *available at* http://www.eeoc.gov/abouteeo/overview_laws.html.
- 29 Interview with Gordon Waldron, *supra* note 22.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*
- 33 Telephone Interview with Tom Luetkemeyer, Trial Attorney, Hinshaw & Culbertson LLP (Oct. 2, 2007).
- 34 "NCLC, the public policy law firm of the U.S. Chamber of Commerce, is a membership organization that advocates fair treatment of business in the courts and before regulatory agencies. The U.S. Chamber of Commerce is the world's largest business federation representing more than 3 million businesses and organizations of every size, sector, and region." http://www.uschamber.com/nclc/news/070529_press_statement.htm.
- 35 Press Release, U.S. Chamber of Commerce, National Chamber Litigation Center, Chamber Applauds Supreme Court Decision in Goodyear Pay Discrimination Case (May 29, 2007), *available at* http://www.uschamber.com/nclc/news/070529_press_statement.htm.
- 36 Sec. 7. [§ 157.] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]." National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).
- 37 Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]" 29 U.S.C. § 158 (2000).
- 38 Interview with Gordon Waldron, *supra* note 22.
- 39 *Id.*
- 40 H.R. 2831, 110th Cong. (1997), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831>.
- 41 *Id.*
- 42 H.R. 2831, 110th Cong. (1997), § (3)(a) *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-2831>.

43 S. 1843, 110th Cong.(2007), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s110-1843>

44 Letter to The Honorable George Miller Chairman, House Education and Labor Committee, American Civil Liberties Union, ACLU Letter Supporting the Ledbetter Fair Pay Act of 2007, *available at* <http://www.civilrights.org/library/advocacy-letters/aclu-letter-supporting-the.html>

45 Interview with Gordon Waldron, *supra* note 22.

46 Telephone Interview with Tom Luetkemeyer, *supra* note 33.