JUSTICE DENIED? THE IMPLICATIONS OF THE SUPREME COURT'S LEDBETTER V. GOODYEAR EMPLOYMENT DISCRIMINATION DECISION

HEARING

BEFORE THE

COMMITTEE ON
EDUCATION AND LABOR

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ONE HUNDRED TENTH CONGRESS

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JUSTICE DENIED? THE IMPLICATIONS OF THE SUPREME COURT'S LEDBETTER V. GOODYEAR EMPLOYMENT DISCRIMINATION DECISION

Tuesday, June 12, 2007
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 1:35 p.m., in Room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Payne, Andrews, Scott, Woolsey, McCarthy, Tierney, Kucinich, Wu, Davis of California, Bishop of New York, Loebsack, Hirono, Yarmuth, Hare, Clarke, Shea-Porter, McKeon, Petri, Platts, Keller, Wilson, Kline, Marchant, Foxx, Davis of Tennessee, and Walberg.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Lynn Dondis, Policy Advisor for Subcommittee on Workforce Protections; Carlos Fenwick, Policy Advisor for Subcommittee on Health, Employment, Labor and Pensions; Michael Gaffin, Staff Assistant, Labor; Brian Kennedy, General Counsel; Megan O'Reilly, Labor Policy Advisor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, General Counsel; Cameron Coursen, Assistant Communications Director; Steve Forde, Communications Director; Ed Gilroy, Director of Workforce Policy; Rob Gregg, Legislative Assistant; Richard Hoar, Professional Staff Member; Victor Klatt, Staff Director; Jim Paretti, Workforce Policy Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Ken Serafin, Professional Staff Member; Linda Stevens, Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Professional Staff Member.

Chairman MILLER [presiding]. The Committee on Education and Labor will come to order for the purposes of holding a hearing on "Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision."

The Supreme Court's ruling in the Ledbetter v. Goodyear is a painful step backward for civil rights in this country. It makes it more difficult for workers to stand up for their basic rights at work. This is unacceptable.

Title VII of the Civil Rights Act was intended to protect the civil rights of every American. When employers violate their employees'

civil rights, the Civil Rights Act sought to ensure that those employers would be held accountable.

Nondiscrimination in the workplace is an inviolable American principle. Yet, today, in the 21st century, more than 40 years after the passage of the Civil Rights Act of 1964, we have seen a devastating attempt to turn back the clock by the current Supreme Court.

Lilly Ledbetter worked at Goodyear over 19 years. While it appears that her salary at the start of her career was comparable to what her male colleagues were earning, her salary slipped over time. When she retired as a supervisor in 1998, her salary was 20 percent lower than that of the lowest-paid male supervisor.

Not only was Ms. Ledbetter earning nearly $400 per month less than her male colleagues, she also retired with a substantially smaller pension, and she will now have less economic security in retirement.

A jury found that Goodyear discriminated against Ms. Ledbetter. She was awarded $3.8 million in back pay and damages. This amount was reduced to $360,000, the Title VII damage cap.

Despite the fact that the jury found Goodyear guilty of discrimination, a sharply divided Supreme Court, in a 5-4 opinion, decided that, while Ms. Ledbetter had been discriminated against, her claim was made too late.

Title VII requires that employees file an Equal Employment Opportunity Commission charge within the 180 days of the unlawful employment practice. Ms. Ledbetter filed within 180 days of receiving the discriminatory pay from Goodyear, but a slim majority of the Supreme Court found that because Ms. Ledbetter did not file within 180 days of a discriminatory decision to write those discriminatory paychecks, her time had run out. She could not recover anything; Goodyear owed her nothing.

A slim majority of the Supreme Court shunned reason in order to satisfy its own narrow, ideological agenda. Reason and justice, however, demand a different result.

Discrimination does not just occur when the initial decision to discriminate is made. You may not know when the decision to discriminate against you is made. You may not recognize it when it was made.

Discrimination occurs both when the employer decides to discriminate and then when the employer actually discriminates by, for example, paying you less because you are a woman, an African-American, or older than other employees.

Ms. Ledbetter was discriminated against with nearly every paycheck she received.

The impact of the court's decision extends far beyond Ms. Ledbetter's case. It has far-reaching implications for an individual's right to receive equal pay for equal work.

Victims of pay discrimination often do not realize that they have been discriminated against for a long time. The reality of the workplace is that most workers don't know what their co-workers are making. Many employers, as Goodyear did, prohibit employees from discussing their pay with others. And social norms also keep employees from asking the question.

In addition, employers hold significant power over the employees. So even if an employee suspects discrimination, they will likely wait to sue until they know for sure.

With the Ledbetter decision, the court is telling employers that to escape responsibility, all they need do is keep the discrimination hidden and run out the clock. Employers with a history of pay discrimination will be allowed to lawfully continue to discriminate against employees in protected categories, including sex, race, religion and national origin.

If the employee missed the deadline to sue when the employer made the decision, according to this Supreme Court the employee must live with the pay discrimination for the rest of her tenure with that employer.

This case is a clear indication that the court does not understand pay discrimination, nor does it reflect what the Congress intended when we passed the Civil Rights Act in 1964 or its amendments in 1991.

Women have made great strides in the workplace. They are leaders in business, government and academia. And for the first time in history, a woman is serving as the speaker of House of Representatives.

Yet despite this progress that women have made, they continue to be held back by wage discrimination. We know that women are earning only 77 cents for every dollar earned by men. On average, women's wages constitute more than one-third of their family's income.

Women still have a steep hill to climb for pay parity. Thanks to this misguided Supreme Court decision, that hill just got a lot steeper.

Justice Ginsberg issued a strong dissent in the Ledbetter case and stated that, "The court does not comprehend, or is indifferent to, the insidious ways in which women can be victims of pay discrimination." And she is right.

As Justice Ginsberg suggests, the ball has now fallen into Congress's court. And make no mistake: Congress intends to act to correct the Supreme Court's grievous insult to American workers.

Today's hearing is the first step in our efforts to address the issues raised by the court in the Ledbetter case and to clarify our intent that the discriminatory pay is never immunized.

Victims of pay discrimination on the basis of race, sex, color, religion, national origin, disability or age are entitled to justice with each paycheck.

Ms. Ledbetter, I want to thank you for your courage you have shown in bringing this battle from the shop floor all the way to the Supreme Court and now to the Congress of the United States. We look forward to your testimony today, and we pledge to work with you to correct the Supreme Court's injustice.

And with that, I would like to recognize the senior Republican on the committee, Mr. McKeon of California.

[The prepared statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor

The Supreme Court's ruling in Ledbetter v. Goodyear is a painful step backwards for civil rights in this country. It makes it more difficult for workers to stand up for their basic rights at work. That is unacceptable.

Title VII of the Civil Rights Act is intended to protect the civil rights of every American. When employers violate their employees' civil rights, the Civil Rights Act sought to ensure that those employers be held accountable.

Nondiscrimination in the workplace is an inviolable American principle. Yet today, in the 21st Century, more than 40 years after the passage of the Civil Rights Act of 1964, we have seen a devastating attempt to turn back the clock by the current Supreme Court.

Lilly Ledbetter worked for Goodyear for over 19 years. While it appears that her salary at the start of her career there was comparable to what her male colleagues were earning, her salary slipped over time.

When she retired as a supervisor in 1998, her salary was up to 20 percent lower than that of the lowest-paid male supervisor.

Not only was Ms. Ledbetter earning nearly $400 less per month than her male colleagues, she also retired with a substantially smaller pension. She will now have less economic security in retirement.

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Title VII requires an employee to file an Equal Employment Opportunity Commission charge within 180 days of the unlawful employment practice. Ms. Ledbetter filed within 180 days of receiving discriminatory pay from Goodyear.

But a slim majority of the Supreme Court found that, because Ms. Ledbetter did not file within 180 days of a discriminatory decision to write those discriminatory paychecks, her time had run out. She could not recover anything. Goodyear owed her nothing.

A slim majority of the Supreme Court shunned reason in order to satisfy its own narrow ideological agenda.

Reason—and justice—demand a different result.

Discrimination does not just occur when the initial decision to discriminate is made. You may not know when the decision to discriminate against you was made. You may not recognize it when it is made.

Discrimination occurs both when an employer decides to discriminate and then when the employer actually discriminates—by, for example, paying you less because you are a woman, or African American, or older than the other employees.

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Speaker of the House of Representatives. Yet despite the progress that women have made, they continue to be held back by wage discrimination.

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Ms. Ledbetter, I want to thank you for the courage you have shown in bringing this battle from the shop floor all the way to the Supreme Court and the Congress.

We look forward to your testimony today and we pledge to work with you to correct the Supreme Court's injustice.

Thank you.

Mr. MCKEON. Thank you, Chairman Miller, for convening today's hearing.

And thank you to our witnesses for joining us this afternoon. I look forward to your testimony, as this committee considers which steps, if any, should be taken in the wake of last month's Supreme Court ruling.

At issue is Title VII of the 1964 Civil Rights Act, which makes it unlawful to discriminate on the basis of gender with respect to compensation. This is a principle upon which all of us agree, without a doubt.

At the same time, the law provides that an individual wishing to challenge an employment practice under this provision must first file a charge with the Equal Employment Opportunity Commission.

This challenge must be filed within either 180 or 300 days, depending on his or her state of employment, after the alleged unlawful employment practice occurred. If an employee does not do so, he or she may not challenge that practice in court.

This is the crux of why the Supreme Court delivered the ruling it did.

In their dissenting opinion, Justice Ruth Bader Ginsberg and others urged Congress to conduct a "parsimonious reading" of Title VII. Today begins that process.

So, Mr. Chairman, I am pleased we are taking the time to do so here in committee through regular order.

In high-profile and emotionally charged cases such as this one, members of Congress often are tempted to find a quick fix and a quick headline, overreaching in the process and setting into motion a series of unintended consequences that may do more harm than good in the long run. I sincerely hope this is not one of those times, and beginning this process with an honest and straightforward hearing of the facts is a logical and responsible start.

The fact is, what we are setting out to do is not an easy task. To simply put in place a policy that would overturn Ms. Ledbetter's

case is one matter. However, the impact of our actions, if we take any, will extend far beyond that.

Our task is to determine whether current law provides enough balance to treat employees and job providers fairly with respect to discrimination claims.

And if we reach the conclusion that it does not—a conclusion that I believe remains an open question—we are faced with the challenge of ensuring that a legislative fix does not tip that balance too far in one direction or another.

As I noted, no one in this committee room agrees with gender discrimination. Less than 2 months ago, I said as much during a hearing on legislation purportedly introduced to ensure pay equity for both men and women.

At the same time, however, I hope no one in this room believes that we should put in place legislation that would keep employers indefinitely on the hook for employee claims of discrimination. Such legislation would be ripe for abuse, in my opinion, effectively allowing an employee to bring a claim against an employer decades after the alleged initial act of discrimination occurred.

Under such circumstances, the employee could have received wages and benefits for dozens of years while the employer's senior leadership could have changed numerous times during that same period. At the end of the day, such a loophole conceivably could allow a retiring employee to seek damages against a company now led by executives who had nothing to do with the initial act of discrimination.

That, in my opinion, represents the type of unintended consequences I warned against a few minutes ago.

Under current law, aside from actions under the Civil Rights Act, there are other remedies for clear gender discrimination violations. Under the Equal Pay Act Amendment to the Fair Labor Standards Act, for example, the person found having been discriminated against can obtain back pay for any wages unlawfully withheld as a result of pay inequality, and twice that amount for a willful violation.

Therefore, I will be interested in hearing from our witnesses how the application of this law, coupled with the potential tweaks to the Civil Rights Act, could strike the right balance without tipping it too far toward employers and employees.

Mr. Chairman, the question before us is not a matter of tinkering around the edges, but rather a fundamental question of overhauling longstanding labor law. As such, I thank you for the opportunity to discuss it in an open and deliberative way with afternoon. As you discuss potentially introducing legislation, I hope such an approach continues.

Thank you.

[The prepared statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

Thank you, Chairman Miller, for convening today's hearing. And thank you to our witnesses for joining us this afternoon. I look forward to your testimony, as this Committee considers which steps—if any—should be taken in the wake of last month's Supreme Court ruling.

At issue is Title VII of the 1964 Civil Rights Act, which makes it unlawful to discriminate on the basis of gender with respect to compensation. This is a principle upon which all of us agree, without a doubt. At the same time, the law provides that an individual wishing to challenge an employment practice under this provision must first file a charge with the Equal Employment Opportunity Commission. This challenge must be filed within either 180 or 300 days, depending on his or her state of employment, after the alleged unlawful employment practice occurred. If an employee does not do so, he or she may not challenge that practice in court. This is the crux of why the Supreme Court delivered the ruling it did.

In their dissenting opinion, Justice Ruth Bader Ginsburg and others urged Congress to conduct a—quote—"parsimonious reading"—unquote—of Title VII. Today begins that process, and Mr. Chairman, I am pleased we are taking the time to do so here in Committee, through regular order. In high-profile and emotionally-charged cases such as this one, Members of Congress often are tempted to find a quick fix and a quick headline, over-reaching in the process and setting into motion a series of unintended consequences that may do more harm than good in the long run. I sincerely hope this is not one of those times, and beginning this process with an honest and straightforward hearing of the facts is a logical and responsible start.

The fact is, what we are setting out to do is not an easy task. To simply put in place a policy that would overturn Ms. Ledbetter's case is one matter. However, the impact of our actions—if we take any—will extend far beyond that. Our task is to determine whether current law provides enough balance to treat employees and job providers fairly with respect to discrimination claims. And if we reach the conclusion that it does not—a conclusion that I believe remains an open question—we're faced with the challenge of ensuring that a legislative fix does not tip that balance too far in one direction or another.

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Mr. Chairman, the question before us is not a matter of tinkering around the edges, but rather a fundamental question of overhauling long-standing labor law. As such, I thank you for the opportunity to discuss it in an open and deliberative way this afternoon. As you discuss potentially introducing legislation, I hope such an approach continues.

Chairman MILLER. I thank the gentleman.

And I ask unanimous consent that the gentleman from New Jersey, Mr. Andrews, the chairman of the Subcommittee on Health, Employment, Labor and Pensions, be permitted to give an opening statement. And my understanding is the minority has no objection.

Mr. Andrews, you are recognized for 5 minutes.

Mr. ANDREWS. I thank the chairman.

I thank the minority for its cooperation.

I thank the chairman for calling this hearing today. I wish it were not necessary.

Make no mistake about it: The question before us today is not the grave personal injustice that was done to Ms. Ledbetter. It is the systemic injustice that I believe will be done to Americans across the board if this ruling is permitted to stand.

Americans understand what is wrong with what happened to Ms. Ledbetter. She was hired at a comparable rate of pay to her male colleagues. Over a 19-year period of time, she was a valued employee of her employer. In 1996, she was awarded with a special award from her employer for excellence in her job.

Because of the nature of her employer's policies, she did not know what her salary was in relation to her male counterparts. She was one of the few women to work in a supervisory position among 80 or so people in the plant in which she worked.

During that period of time, she suffered egregious incidences of harassment and discrimination, involving inappropriate language, inappropriate behavior toward her as a woman. She sought redress and received a measure of redress when the offending supervisor was removed from her immediate chain of supervision.

At the end of her 19-year tenure with the company, she finally discovered that her pay was about 20 percent lower, on average, than her male counterparts. She made far less than the least paid of her male counterparts.

She took her grievances to the Equal Employment Opportunity Commission. The commission agreed with her. The commission then took the matter—she took the matter to the United States District Court.

The employer defended the claim and said that the real reason Ms. Ledbetter was compensated so much less than her male colleagues was she wasn't as good at her job as they were.

A jury of her peers listened to that defense and rejected it, found in her favor, found that the real reason she was egregiously underpaid was because she was a woman, and the company had in fact practiced gender discrimination. A jury of her peers awarded her a substantial judgment, including a substantial punitive damages award to rectify the situation.

The case was litigated up through the court of appeals, eventually to the United States Supreme Court. The United States Supreme Court ruled that even though the EEOC had agreed with Ms. Ledbetter, even though a jury of her peers had heard a full defense of the claims made by her, that she should recover nothing. And the reason she should recover nothing is she didn't file her claim soon enough. She had a 6-month period to file her claim.

The basis of her claim was that she made less than the men who worked there because she was a woman. But the policy of her employer was she wasn't allowed to know or ask how much men that worked next to her made. I assume that her remedy was to conduct a seance and determine what the men who worked next to her made and file a suit on that basis. [Laughter.]

Ms. Ledbetter is an impressive woman. She has a lot of energy and a lot of power. But her powers, unfortunately, do not extend to the psychic realm. [Laughter.]

So she was unable to have this piece of information she would have needed at the time she received her last evaluation. And she did not file her claim until later on.

This is wrong. The work of this committee is to understand why this is wrong and what we should do about it.

I am appreciative of the chairman calling this hearing. I think each of the witnesses have something to offer us. And I hope that Republicans and Democrats can work together to redress this situation.

As I said, just a few minutes ago, to Ms. Ledbetter, I regret the fact that her case will not be remedied, because of the nature of our separation of powers. But I believe her cause will be won, because it is just and it is right.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you very much.

We have some wonderful witnesses today, and we are going to begin with Lilly Ledbetter, who is a lifelong resident of Jacksonville, Alabama, where she lives with her husband, her son and daughter and her four grandchildren.

For 19 years, Ms. Ledbetter worked, as we have heard, at the Goodyear Tire production plant in Gadsden, Alabama. After discovering that Goodyear was paying her less than her male colleagues, Ms. Ledbetter brought a claim of pay discrimination under Title VII of the Civil Right Act of 1964.

It is the Supreme Court's May 29th decision in Ms. Ledbetter's discrimination case that is the center of our hearing today.

Next we will hear from Wade Henderson, who is the president and the CEO of the Leadership Conference on Civil Rights, counselor to the Leadership Conference on Civil Rights Education Fund. Mr. Henderson serves as the Joseph Rauh professor of public interest law at the David A. Clarke School of Law, University of District of Columbia. And he is a graduate of Howard University and Rutgers University Law School.

The cheering section is up here for Rutgers. [Laughter.]

Neal Mollen is a partner with the law firm of Paul Hastings and is here today representing the Chamber of Commerce. Mr. Mollen is the local office chair of the Employment Department in Washington, D.C., co-chair of the firm's appellate practice group. And he received his law degree from the School of Law at the University of Richmond.

Deborah L. Brake is the associate professor of law at the University of Pittsburgh School of Law. Professor Brake was formerly employed at the National Women's Law Center, where she litigated cases challenging sex discrimination in education, employment, housing and prisons, and worked on policy issues affecting women in Congress and administrative agencies. She is a graduate of Stanford University and Harvard Law School.

Welcome to all of you.

Ms. Ledbetter, we are going to begin with you.

And there are lights on in front of you. The green light will go on when you begin to testify. An orange light will suggest that you might want to start wrapping up. And the red light is when your time is out. But feel free to finish your sentences, your paragraphs and your thoughts.

You proceed in the manner in which you are most comfortable. And welcome to the committee. We look forward to your testimony.

STATEMENT OF LILLY LEDBETTER, PLAINTIFF IN LEDBETTER V. GOODYEAR, FORMER GOODYEAR EMPLOYEE

Ms. LEDBETTER. Good afternoon. Thank you, Mr. Chairman and Mr. Ranking Member, for inviting me. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work.

I wish my story had a happy ending, but it doesn't. I hope that this committee can do whatever is necessary to make sure that in the future what happened to me does not happen to other people who suffer discrimination like I did.

I would like to give a shortened statement, but I respectfully request that my entire statement be submitted to the record.

My story began in 1979, when Goodyear hired me to work as supervisor in the tire plant in Gadsden, Alabama.

Toward the end of my career, I got the feeling that maybe I wasn't getting paid as much as I should, or as much as the men. But there was no way to know for sure, because pay levels were kept strictly confidential.

I only started to get some hard evidence of discrimination when someone anonymously left a piece of paper in my mailbox at work showing what I got paid and what three other male managers were getting paid.

When I later complained to EEOC, just before I retired, I found out that while I was earning about $3,700 hundred per month, all the men were earning $4,300 to $5,200 per month. This happened because, time and again, I got smaller raises than the men. And over the years, those little differences added up and multiplied.

At the trial, the jury found that Goodyear had discriminated against me in violation of Title VII. The jury awarded me more than $3 million in back pay and punitive damages, but the law required the court to reduce my award to $360,000.

The Supreme Court took it all away. They said I should have complained every time I got a smaller raise than the men, even if I didn't know what the men were getting paid and even if I had no way to prove the decision was discrimination.

They said that once 180 days passes after the pay decision is made, the worker is stuck with unequal pay for the rest of her career, and that there is nothing illegal about that under Title VII.

Justice Ginsberg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their coworkers how much they are making.

Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Especially when you work at a place like I did, where you are the only woman in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along.

It was only after I got paid less than men again and again, without any good excuse, that I had a case that I could realistically bring to EEOC or to the court.

Every paycheck I received I got less than what I was entitled to under the law. The Supreme Court said that this didn't count as illegal discrimination, but it sure feels like discrimination when you are on the receiving end of the smaller paycheck and you are

trying to support your family with less money than what the men are getting for doing the same job.

According to the Supreme Court, if you don't figure things out right away, the company can treat you like a second-class citizen for the rest of your career. And that is not right.

The truth is, Goodyear continues to treat me like a second-class worker to this day because my pension and my Social Security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

My case is over, and it is too bad that the Supreme Court decided the way that it did. I hope, though, that Congress won't let this happen to anyone else. I would feel that this long fight was worthwhile if at least at the end of it I knew that I played a part in getting the law fixed so that it can provide real protection to real people in the real world.

Thank you.

[The statement of Ms. Ledbetter follows:]

Prepared Statement of Lilly Ledbetter, Plaintiff in Ledbetter v. Goodyear, Former Goodyear Employee

Good afternoon. Thank you, Mr. Chairman and Mr. Ranking Member for inviting me. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work. I wish my story had a happy ending. But it doesn't. I hope that this Committee can do whatever is necessary to make sure that in the future, what happened to me does not happen to other people who suffer discrimination like I did.

Experience At Goodyear

My story began in 1979, when Goodyear hired me to work as supervisor in their tire production plant in Gadsden, Alabama. I worked there for nineteen years. During that time, there must have been eighty or so other people who held the same position as me, but only a handful of them were women. But I tried to fit in and to do my job. It wasn't easy. The plant manager flat out said that women shouldn't be working in a tire factory because women just made trouble. One of my supervisors asked me to go down to a local hotel with him and promised if I did, I would get good evaluations. He said if I didn't, I would get put at the bottom of the list. I didn't say anything at first because I wanted to try to work it out and fit in without making waves. But it got so bad that I finally complained to the company. The manager I complained to refused to do anything to protect me and instead told me I was just being a troublemaker. So I complained to the EEOC. The company worked out a deal with the EEOC so that supervisor would no longer manage me. But after that, the company treated me badly. They tried to isolate me. People refused to talk to me. They left me out of important management meetings so I sometimes didn't know what was going on, which made it harder to do my job. So I got a taste of what happens when you try to complain about discrimination.

When I started at Goodyear, all the managers got the same pay, so I knew I was getting as much as the men. But then Goodyear switched to a new pay system based on performance. After that, people doing the same jobs could get paid differently. Goodyear kept what everyone got paid confidential. No one was supposed to know. Over the following years, sometimes I got raises, sometimes I didn't. Some of the raises seemed pretty good, percentage-wise, but I didn't know if they were as good as the raises other people were getting. I got laid off during general layoffs a couple of times when business was bad, but they brought me back and I worked hard and did a good job. I got a "Top Performance Award" in 1996.

Over time, I got the feeling that maybe I wasn't getting paid as much as I should, or as much as the men. I had heard rumors that some of the men were getting up to $20,000 a year extra for overtime work. However, I volunteered to work as much overtime as any of them, but I did not get anywhere near that much pay in overtime. I figured their salaries must be higher than mine, but I didn't have any proof—just rumors.

Eventually one of my managers even told me that I was, in fact, getting paid less than the mandatory minimum salary level put out in the Goodyear rules. So I started asking my supervisors to raise my pay to get me up to Goodyear's mandatory

minimum salary levels. And after that, I got some good raises percentage-wise, but it turned out that even then, those raises were smaller in dollar amounts than what Goodyear was giving to the men, even to the men who were not performing as well as I was.

I only started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three other male managers were getting paid. Shortly after that, I filed another complaint of discrimination with the EEOC in 1998, when I got transferred from my management job to a job doing manual labor, requiring me to lift 80 pound tires all shift long. A little while after I filed my EEOC complaint, someone sent me an anonymous package showing what the other male managers were getting paid compared to me.

Pay Discrepancies

After I filed my EEOC complaint and then filed a lawsuit, I was finally able to get the whole picture on my pay compared to the men's. It turned out that I ended up getting paid what I did because of the accumulated effect of pay raise decisions over the years. In any given year, the difference wasn't that big, nothing to make a huge fuss about all by itself. Some years I got no raise, when others got a raise. Some years I got a raise that seemed ok at the time, but it turned out that the men got bigger percentage raises. And sometimes, I got a pretty big percentage raise, but because my pay was already low, that amounted to a smaller dollar raise than the men were getting.

For example, in 1993, I got a 5.28 percent raise, which sounds pretty decent. But it was the lowest raise in dollars that year because it was 5.28 percent of a salary that was already a lot less than the men's because of discrimination. So the gap in my pay grew wider that year. Without knowing what the other men were getting paid, I had no way of knowing whether that raise was potentially discriminatory or not. All I knew was that I got a raise.

The result was that at the end of my career, I was earning $3,727 per month. The lowest paid male was getting $4,286 per month for the same work. The highest paid male was making $5,236. So, I was actually earning twenty-percent less than the lowest paid male supervisor in the same position. There were lots of men with less seniority than me who were paid much more than I was.

Court Proceedings

When we went to court, Goodyear acknowledged that it was paying me a lot less than the men doing the same work. But they said that it was because I was a poor performer and consequently got smaller raises than all the men who did better. That wasn't true and the jury didn't believe it. At the trial, two other women managers took the stand and explained how they were also discriminated against. One of them was a secretary who got promoted to manager, but only paid a secretary's salary. They kept telling her they would give her a raise, but they never did and she got fed up with that and went back to being a secretary. The other woman was also paid less than Goodyear's mandatory minimum wages.

At the end of the trial, the jury found that Goodyear had discriminated against me in violation of Title VII. The jury awarded me backpay as well as $4,662 for mental anguish and $3,285,979 in punitive damages. Although the trial judge agreed that the jury's verdict was amply supported by the evidence at trial, he had to reduce the punitive damages and mental anguish award to the $300,000 statutory cap.

The Supreme Court took it all away, even the backpay. They said I should have complained every time I got a smaller raise than the men, even if I didn't know what the men were getting paid and even if I had no way to prove that the decision was discrimination. They said that once 180 days passes after the pay decision is made, the worker is stuck with unequal pay for equal work under Title VII for the rest of her career and there is nothing illegal about that under the statute.

Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their coworkers how much money they're making. At a lot of places, that could get you fired. And nobody wants to be asked those kinds of questions anyway.

Plus, even if you know some people are getting paid a little more than you, that's no reason to suspect discrimination right away. Pay can go up and down and you want to believe that your employer is doing the right thing and that it will all even out down the road. Especially when you work at a place like I did, where you are one of the only women in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along. As I found out all too well, calling something "discrimination" isn't appreciated—I suffered the consequences

when I went to the EEOC with proof of sexual harassment. Without proof, I would never go to the EEOC because it might cost me my job.

Anyway, the little amount of money at issue early on isn't worth fighting over at first. No lawyer is going to take a case to fight over an extra $100 a month and most people can't afford to pay a lawyer out of their own pockets. It would have been hard to demonstrate to the EEOC or a jury that the first $100 pay difference was discrimination. It was only after I got paid less than men again and again, without any good excuse, that I had a case that I could realistically bring to the EEOC or to court.

Consequences

What happened to me is not only an insult to my dignity, but it had real consequences for my ability to care for my family. Every paycheck I received, I got less than what I was entitled to under the law. The Supreme Court said that this didn't count as illegal discrimination, but it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family with less money than the men are getting for doing the same job. And according to the Court, if you don't figure things out right away, the company can treat you like a second-class citizen for the rest of your career. That isn't right.

The truth is, Goodyear continues to treat me like a second-class worker to this day because my pension and social security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

As you may know, making ends meet during retirement is not easy for a lot of seniors like me, even under the best of circumstances. It shouldn't be harder just because you are a woman who was discriminated against during your career.

Conclusion

My case is over and it is too bad that the Supreme Court decided the way that it did. I hope, though, that Congress won't let this happen to anyone else. I would feel that this long fight was worthwhile if, at least at the end of it, I knew that I played a part in getting the law fixed so that it can provide real protection to real people in the real world.

Thank you.

Chairman MILLER. Thank you.

Mr. Henderson? Wade, welcome to the committee.

STATEMENT OF WADE HENDERSON, PRESIDENT AND CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Good afternoon, Mr. Chairman, members of the committee. It is a privilege to represent the civil rights community in addressing the committee today.

My name is Wade Henderson. I am the president of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's leading civil and human rights coalition, with over 200 national organizations working to build an America as good as its ideals.

I am here this afternoon to call on Congress to act to right a wrong perpetrated by our nation's highest court that will have a profound impact on the working lives and livelihoods of Americans across the country.

As we have just heard from the courageous Lilly Ledbetter, the U.S. Supreme Court issued a 5-4 decision 2 weeks ago in Ledbetter v. Goodyear Tire & Rubber, which severely limits the ability of victims of pay discrimination to successfully sue under Title VII.

As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding salary information in the United States.

For example, one-third of private-sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers. And a significant number of other employers have more informal expectations that employees do not discuss their salaries.

Workers knows immediately when they are fired, refused employment or denied a promotional transfer. But norms of secrecy and confidentiality make it difficult for employees to obtain compensation information.

However, just because you don't know about it doesn't mean the discrimination isn't happening. Every time an employee receives a paycheck that is lessened by discrimination, it is a discriminatory act by the employer. The harm is ongoing. The remedy should be as well.

The rule articulated by the Ledbetter court just doesn't make sense. There is no reason to put the burden on employees to know what their colleagues earn. In fact, the rule creates an incentive for employers to hide pay information in order to insulate themselves from liability.

The rule in Ledbetter looks more like an arbitrary way of depriving victims of discrimination of the ability to obtain a remedy. It is a protection program for employers that discriminate.

The impact of the court's decision in Ledbetter will be widespread, affecting pay discrimination cases until Title VII involving women and racial and ethnic minorities, as well as cases under the Age Discrimination and Employment Act and the Americans with Disabilities Act.

Here is an example: Imagine you have worked for a company for 30 years. You are a good worker. You do a good job. Unknown to you, the company puts workers who are 50 or older on a different salary track, lower than the younger workers who do the same work.

At 60, you learn that for the last 10 years you have been earning less, tens of thousands of dollars less, than colleagues doing comparable work. How do you feel? Imagine you are this worker. How would you feel?

Even more, how do you feel when you learn that 180 days after you turned 50, 6 months after you started getting paid less, you also lost your right to redress for the hundreds of discriminatory paychecks?

While today we are focused on the immediate problem in the Ledbetter decision, it is also important to understand that this decision is part of the Supreme Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination.

The court's decisions have weakened the basic protections in ways that Congress never intended. For example, under the Supreme Court's recent rulings, older workers can no longer recover money damages for age discrimination if they are employed by the state. State workers can no longer recover money damages if their employers violate minimum-wage and overtime laws.

There is no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964. And workers can now be required to give up their right to sue in court for dis-

crimination as a condition for employment. And many plaintiffs remain subject to the damage caps in Title VII, which drastically limit possible recovery for plaintiffs who manage to win their cases in court.

In many of these instances, as in Ledbetter, the court is acting as a legislature, making its own policy while acting directly contrary to Congress's intent.

For opponents of civil rights, there is no need to repeal Title VII. Instead, you can substantially weaken its protections by chipping away at bedrock interpretations. Or you can make it difficult or impossible for plaintiffs to bring and win employment discrimination cases. Or you can make the remedies meaningless.

For years, we in the civil rights community have watched as the Supreme Court has rolled back the ability of victims of discrimination to obtain meaningful remedies. But watching is over. It is time, past time, to take action.

Justice Ginsberg pointed out in her dissent that Congress has stepped in on other occasions to correct the court's interpretation of Title VII. The Civil Rights Act of 1991 overturned several Supreme Court decisions that eroded the power of Title VII. And as Justice Ginsberg sees it, "Once again, the ball is in Congress's court."

We agree. The issues in this case are not academic. The fallout will have a real impact on the lives of people across America, people like Lilly Ledbetter.

And members of the committee, today you begin the process of responding to Justice Ginsberg's call, a process that we will reaffirm that civil rights laws have legally enforceable remedies and that it is for Congress, not the courts, to decide the rules of the game.

Thank you very much.

[The statement of Mr. Henderson follows:]

Prepared Statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights

Good Afternoon. My name is Wade Henderson and I am the President of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957. The Leadership Conference's nearly 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Distinguished members of the Committee, I am here this afternoon to call on Congress to act. To right a wrong perpetrated by our nation's highest court that will have a tremendous impact on the working lives, and livelihoods, of Americans across the county.

Two weeks ago, the Supreme Court issued an opinion in Ledbetter v. Goodyear Tire & Rubber,[1] which severely limits the ability of victims of pay discrimination to successfully sue under Title VII. In this case, the plaintiff, Lilly Ledbetter, a supervisor at Goodyear in Gadsden, Alabama, sued her employer for paying her less than its male supervisors and a jury found that Goodyear violated her rights under Title VII of the Civil Rights Act of 1964.

Goodyear argued that Ms. Ledbetter filed her complaint too late and, by a 5-4 margin, the Supreme Court agreed. Title VII requires employees to file within 180 days of "the alleged unlawful employment practice."[2] The court calculated the deadline from the day Goodyear first started to pay Ms. Ledbetter differently, rather than—as many courts had previously held—from the day she received her last discriminatory paycheck. As a result, Ms. Ledbetter was unable to challenge or receive

compensation for any of Goodyear's salary discrimination, even though the discrimination continued unabated for more than 15 years.

In this decision, the Court got it wrong. A narrow majority, led by Justice Alito, set aside the clear intent of Congress in favor of its own policy preferences.

The outcome in Ledbetter is fundamentally unfair to victims of pay discrimination. By immunizing employers from accountability for their discrimination once 180 days have passed from the initial pay decision, the Supreme Court has taken away victims' recourse against continuing discrimination.

Moreover, the Court's decision in Ledbetter ignores the realities of the workplace. Employees typically don't know much about what their co-workers earn, or how pay decisions are made, making it difficult to satisfy the Court's new rule.

As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding salary information in the United States. It is common practice for many employers to withhold comparative pay information from employees. One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers, and a significant number of other employers have more informal expectations that employees do not discuss their salaries. Only one in ten employers has adopted a pay openness policy.[3]

Workers know immediately when they are fired, refused employment, or denied a promotion or transfer, but norms of secrecy and confidentiality prevent employees from obtaining compensation information. As Justice Ginsberg's dissent points out, it is not unusual for businesses to decline to publish employee pay levels, or for employees to keep private their own salaries.

The reality is that every time an employee receives a paycheck that is lessened by discrimination, it is an act of discrimination by the employer. The harm is ongoing; the remedy should be too.

The impact of the Court's decision in Ledbetter will be widespread, affecting pay discrimination cases under Title VII affecting women and racial and ethnic minorities, as well as cases under the Age Discrimination in Employment Act[4] involving discrimination based on age and under the Americans with Disabilities Act[5] involving discrimination against individuals with disabilities.

Here is an example. Imagine you have worked for a company for 30 years. You are a good worker. You do a good job. Unknown to you, the company puts workers who are 50 or older on a different salary track ; lower than the younger workers who do the same work. At 60, you learn that for the last 10 years, you have been earning less—tens of thousands of dollars less than colleagues doing comparable work.

How do you feel?

Imagine you are this worker. How do you feel?

Even more, how do you feel when you learn that 180 days after you turned 50—six months after you started getting paid less—you also lost your right to redress for the hundreds of discriminatory paychecks.

The decision in Ledbetter will have a broad real world impact. The following are just two examples of recent pay discrimination cases that would have come out very differently if the Court's new rule had been in effect.

In Reese v. Ice Cream Specialties, Inc.[6] the plaintiff, an African-American man, never received the raise he was promised after six months of work. He did not realize his raise had never been awarded until three and a half years later, when he requested a copy of his payroll records for an unrelated investigation.[7] The employee filed a charge of race discrimination with the EEOC, and the court initially granted summary judgment to the employer. On appeal, the employee argued that his claim was timely under the continuing violation theory, and the court concluded that the relevant precedents compelled the conclusion that each paycheck constituted a fresh act of discrimination, and thus his suit was timely.[8] If the rule in Ledbetter had been in effect, the plaintiff would not have been able to seek relief.

In Goodwin v. General Motors Corp.,[9] an African-American woman was promoted to a labor representative position, with a salary that was between $300 and $500 less than other similarly-situated white employees.[10] Over time, Goodwin's salary disparity grew larger until she was being paid $547 less per month than the next lowest paid representative, while at the same time pay disparities among the other three labor representatives shrank from over $200 per month to only $82.[11] Due to GM's confidentiality policy, Goodwin did not discover the disparity until a printout of the 1997 salaries "somehow appeared on Goodwin's desk."[12] She then brought a race discrimination action against her employer under Title VII. The district court dismissed the action, but the Tenth Circuit reversed and remanded, holding that discriminatory salary payments constituted fresh violations of Title VII, and each

action of pay-based discrimination was independent for purposes of statutory time limitations. Again, if the rule in Ledbetter had been in effect, the plaintiff would not have been able to obtain relief.

Pay discrimination is a type of hidden discrimination that continues to be an important issue in the United States. In the fiscal year 2006, individuals filed over 800 charges of unlawful, sex-based pay discrimination with the EEOC. Unfortunately, under the Ledbetter rationale, many meritorious claims will never be adjudicated.

While today we are focused on the immediate problem of the Ledbetter decision, it is also important to understand that this decision is part of the Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination. The Court's decisions have weakened the basic protections in ways that Congress never intended by Congress.

Under the Supreme Court's recent rulings, older workers can no longer recover money damages for employment discrimination based on age if they are employed by the state,[13] state workers can no longer recover money damages if their employers violate minimum wage and overtime laws;[14] there is no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964;[15] and workers can now be required to give up their right to sue in court for discrimination as a condition of employment.[16] In many of these cases, as in Ledbetter, the Court is acting as a legislature, making its own policy while acting directly contrary to Congress's intent.

For opponents of civil rights, there is no need to repeal Title VII. Instead you can substantially weaken its protections by chipping away at bedrock interpretations. Or, you can instead make it difficult or impossible for plaintiffs to bring and win employment discrimination cases. Or if you make the remedies meaningless.

For years, we in the civil rights community have watched as the Supreme Court has rolled back the ability of victims of discrimination to obtain meaningful remedies. But the watching is over. It is time—past time—to take action.

As Justice Ginsburg pointed out in her dissent, Congress has stepped in on other occasions to correct the Court's "cramped" interpretation of Title VII. The Civil Rights Act of 1991 overturned several Supreme Court decisions that eroded the power of Title VII, including Wards Cove Packing Co. v. Atonio,[17] which made it more difficult for employees to prove that an employer's personnel practices, neutral on their face, had an unlawful disparate impact on them, and Price Waterhouse v. Hopkins,[18] which held that once an employee had proved that an unlawful consideration had played a part in the employer's personnel decision, the burden shifted to the employer to prove that it would have made the same decision if it had not been motivated by that unlawful factor, but that such proof by the employer would constitute a complete defense. As Justice Ginsburg sees it, "[o]nce again, the ball is in Congress' court."

We agree.

The issues in this case are not academic. The fallout will have a real impact on the lives of people across America.

People like Lily Ledbetter.

Members of the Committee, today you begin the process of responding to Justice Ginsburg's call. A process that will reaffirm that civil rights have legally enforceable remedies. And that it is for Congress, not the courts, to decide the rules of the game.

Thank you.

ENDNOTES

[1] Slip op. No. 05-1074 (U.S. Supreme Court)
[2] 42 U.S.C. 2000e et seq.
[3] Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004).
[4] 29 U.S.C. 621 et seq.
[5] 42 U.S.C. 12101 et seq.
[6] 347 F.3d 1007 (7th Cir. 2003)
[7] Id. at 1007
[8] Id. at 1013
[9] 275 F.3d 1005 (10th Cir. 2002)
[10] Id. at 1008
[11] Id.
[12] Id. at 1008
[13] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)
[14] Alden v. Maine, 527 U.S. 706 (1999)
[15] Alexander v. Sandoval, 532 U.S. 275 (2001)
[16] Circuit City Stores v. Adams, 532 U.S. 105 (2001)
[17] 490 U.S. 642 (1989)
[18] 490 U.S. 228 (1989)

Chairman MILLER. Thank you.

Mr. Mollen, welcome to the committee.

STATEMENT OF NEAL D. MOLLEN,
U.S. CHAMBER OF COMMERCE

Mr. MOLLEN. Thank you, Mr. Chairman, Ranking Member McKeon and members of the committee. Thank you for inviting me here today, giving me this opportunity to testify.

My name is Neal Mollen. I am here today to testify on behalf of the Chamber of Commerce of the United States of America about proposed legislation that would reverse the Supreme Court's Ledbetter decision.

I had the privilege of serving as counsel of record for the Chamber and for the National Federation of Independent Business in the Ledbetter case.

The Chamber unequivocally supports equal employment opportunities for all. It also promotes the implementation of fair and appropriate mechanisms to achieve that important goal.

When Congress passed Title VII, it selected cooperation and voluntary compliance as the preferred means for achieving that end, with vigorous enforcement by private parties and the EEOC when those voluntary efforts failed.

It seems to me self-evident that Congress's chosen enforcement scheme has been vindicated over the following 43 years. The Ledbetter decision emphatically endorsed this statutory process.

The rule emanating from Ledbetter is simple: If an employee believes that he or she has been treated discriminatorily by an employer, that matter should be raised internally and then with the EEOC, or a similar state agency, promptly.

Only in this way can the processes of investigation, voluntary cooperation and conciliation be expected to work. When disagreements and disputes fester in the workplace and potential damage amounts increase, compromise and cooperation become far more difficult.

Now, Ms. Ledbetter claimed in this case that the period of limitation was renewed every time she received a paycheck, and thus that she was entitled to wait until she decided to retire to raise her bias claims. Such a rule would have utterly frustrated Congress's design for attempting to resolve such matters, at least in the first instance, without litigation.

Moreover, and perhaps more fundamentally, the Ledbetter decision recognized the profound unfairness inherent in a limitations rule that would permit an individual to wait for years or even decades before raising a claim of discrimination.

To defend itself against a claim of discrimination, an employer has to be in a position to explain, first to the charging party and to the EEOC and then perhaps later to a jury, the reasons that it did what it did. To do so, it has to rely on documents and the memories of individuals, and neither or those is permanent.

If a disappointed employee can wait for many years before raising a claim of discrimination, as Ms. Ledbetter did in this case, he or she can wait out the employer; that is, ensure that the employer is effectively unable to offer any meaningful defense to the claim.

Ledbetter simply recognizes that it doesn't serve Congress's goal of eliminating discrimination to substitute a game of "gotcha" for the investigation and conciliation that Congress envisioned.

That is precisely what happened in this case. The trial testimony showed that Ms. Ledbetter firmly believed as early as 1992 that she had been the victim of pay discrimination and that, by 1994, she knew exactly what her coworkers made. But she didn't file a charge of discrimination until she had decided to retire in 1998. By the time the case went to trial, the manager she accused of bias had died of cancer and was unable to deny the charges.

Now, we have heard today and heard elsewhere from other critics of Ledbetter that workers often don't have sufficient information to conclude that discrimination has occurred in time to meet the statues for filing deadlines. And I believe this concern is misplaced for several reasons.

First, it is not common, in my experience in 21 years of litigating these cases, for an employee to claim that he or she worked for years on end without any inkling that discrimination had occurred. And that plainly was not the case here. This, it seems to me, is the far more common scenario.

Second, the courts have developed a number of very effective tolling rules that can mitigate the impact of filing deadlines in those few cases in which the employer is engaged in some sort of affirmative misconduct or has misled the employee into allowing the limitations period to lapse.

Finally, and most importantly, Ledbetter critics seem to be confusing the threshold standard for filing a lawsuit with the much lower standard for filing a charge of discrimination.

To file a lawsuit in federal court, one must attest that after reasonable inquiry, the allegations contained in the complaint have evidentiary support. This threshold requirement does not apply to administrative charges before the EEOC. As a practical matter, the charging party need only have a good-faith belief, an inkling of unfair treatment.

The charge does not initiate litigation. The charge initiates a fact-finding process in which the EEOC, on behalf of the charging party, goes to the employer for precisely the comparative pay information to which the employee may not have access. Through this process, the truth usually comes out and the parties are able to mediate their dispute.

Voluntary compliance and conciliation, that is the process that Congress envisioned, at least in the first instance, when it enacted Title VII. In the ensuing decades, it has proved to be remarkably successful. That process simply cannot work if the employee sits on the sidelines for years or even decades before raising a complaint.

Statutes of limitations are an expression of society's principled collective judgment that it is unfair to call upon a defendant to answer serious charges years after the fact. A rule that refreshes the period of limitations with every paycheck cannot be squared with this important social value.

Accordingly, the Chamber does not support proposals that would reverse or limit the decision handed down in Ledbetter.

Thank you, Mr. Chairman.

[The statement of Mr. Mollen follows:]

Prepared Statement of Neal D. Mollen, Paul, Hastings, Janofsky & Walker LLP, on Behalf of the U.S. Chamber of Commerce

I am here today to testify, on behalf of the United States Chamber of Commerce (Chamber), about proposed legislation that would reverse the Supreme Court's decision in Ledbettter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. ____ (2007). I had the privilege of serving as counsel of record for the Chamber in the Ledbetter case. I am a practitioner in the area of employment law, handling issues and matters across the broad span of employment discrimination and personnel practices. I have counseled and defended employers with respect to such issues for the past 21 years. I am coeditor of the American Bar Association/Bureau of National Affairs treatise Employment Discrimination Law (4th and 5th eds.), and the Equal Employment Law Update (BNA 7th ed. Fall 1999). For three years, I served as an Adjunct Professor of Labor Law at the Georgetown University Law Center. I currently serve as the chair of the Washington, D.C. Employment Law Department of Paul, Hastings, Janofsky &Walker LLP.[1] Paul Hastings has over 1,100 attorneys internationally and 130 attorneys in our Washington office.

I am testifying today on behalf of the United States Chamber of Commerce (Chamber). The Chamber is the world's largest business federation, representing more than three million businesses of every size, industry sector, and geographic region.

The Chamber strongly supports equal employment opportunity for all and appropriate mechanisms to achieve that important goal. When Congress passed Title VII, it selected "[c]ooperation and voluntary compliance * * * as the preferred means for achieving" that goal,[2] with vigorous enforcement by private parties and the Equal Employment Opportunity Commission when those efforts fail. The Chamber believes that Congress' chosen enforcement scheme—voluntary compliance and conciliation first, litigation thereafter when necessary—has been vindicated over the intervening 43 years. Without question, discrimination remains a problem in society as a whole, but the enormous progress made by employers in assuring nondiscrimination is undeniable, and stands as a testament to the efficacy of the enforcement tools selected by Congress.

The Ledbetter decision emphatically endorsed these methods of voluntary cooperation and conciliation. The rule emanating from Ledbetter is simple; if an employee believes that he or she has been treated discriminatorily by an employer, that matter should be raised internally and then with the EEOC (or similar state agency) promptly and confronted forthrightly. Only in this way can the processes of investigation and voluntary cooperation and conciliation be expected to work. When disagreements and disputes in the workplace fester and potential damage amounts increase, compromise and cooperation become far more difficult.

Ms. Ledbetter claimed, however, that she was entitled by a special "paycheck rule" applicable only to claims of alleged pay discrimination, to sleep on her rights for decades before raising her concerns with the EEOC. This "paycheck" limitations rule, soundly and expressly rejected in Ledbetter, would have utterly frustrated Congress' design for attempting to resolve such matters, at least in the first instance, without litigation.

Moreover, in order to embrace this "paycheck" rule, the Supreme Court would have been required to renounce a rule announced in a long line of wellunderstood cases regarding the application of rules of limitation under Title VII. The Court had repeatedly held that the statute's limitations period begins to run when the alleged discriminatory decision is made and communicated, not when the complainant feels the consequences of that decision.[3] For the Court to overrule this precedent or for the Congress to supersede this settled law with legislation would promote instability and confusion in the law.

Finally and perhaps most importantly, the Ledbetter decision recognized the profound unfairness inherent in a limitations rule that would permit an individual to sleep on his or her rights for years, or even decades, before raising a claim of discrimination. To defend itself against a claim of discrimination, an employer must be in a position to explain—first to the EEOC and the charging party, and perhaps later to a jury—the reasons it had for making the challenged decisions. To do so, it must rely on the existence of documents and the memories of people, neither of which is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination, as Ms. Ledbetter did in this case, he or she can "wait out" the employer, i.e., ensure that the employer is effectively unable to offer any meaningful defense to the claim. That, the Court properly held, is patently unfair. It does not serve Congress' goal—eliminating discrimination—to substitute a game of "gotcha" for the investigation and conciliation Congress envisioned.

Statutes of limitation are an expression of society's principled, collective judgment that is it is unfair to call upon a defendant to answer serious charges when placed at such a disadvantage. A rule that "refreshes" the period of limitations with every paycheck received to permit a challenge to every decision that contributed to current pay cannot be squared with this important societal value.

I would like to expand briefly on some of these observations:

1. Congress's Design In Creating Title VII's ChargeFiling Period Was Based On Fundamental Fairness To Employees And Employers Alike. Limitations periods "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974). A period of limitation represents a balance between competing interests: it "afford[s] plaintiffs with what the legislature deems a reasonable time to present their claims, [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. 111, 117 (1979).

The interest in repose is particularly compelling in the employment setting. To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged decision, and to do so convincingly. In an employment discrimination case, the employer attempts to show at trial that it had good reason for treating the plaintiff in the way it did, and the plaintiff tries to show that the employer's explanation is unworthy of credence; the jury must decide whom to believe. In many, if not most, trials, the testimony devolves to a "he said/she said" battle of recollections, and the most vivid rendition of events usually prevails.

An employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no "opportunity to gather and preserve the evidence with which to sustain [itself]. * * *" Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)). That is precisely why Congress wisely selected relatively brief periods of limitation for filing administrative charges under Title VII.

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, expansions, acquisitions, reductions in force, divestitures and reorganizations. When a dispute in the workplace is raised promptly as Congress intended, most or all of the decisionmakers, witnesses, and human resources representatives an employer will need to consult and to tell its story convincingly are likely to still be working for the defendantemployer at the time of a trial, or at least the employer will usually be able to locate them. The employer's ability to muster a defense dwindles, however, as the challenged decision recedes into the past. The American workforce currently has a median job tenure of only four years.[4] This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties. Id. It also varies by job category. For example, employees in "administrative and support services" and "accommodation and food services" have median tenures of only 1.9 and 1.6 years respectively. Id. Thus, when an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.

The Ledbetter case is a perfect example. At her trial, Ms. Ledbetter challenged every one of her employee evaluations (and associated pay increases) back to 1979, when she started at Goodyear. Most of her complaints centered on the actions of a single manager; she claimed that this man had retaliated against her when she refused to go out with him on a date. By the time the case went to trial, however, the manager had died of cancer and was unavailable to tell the jury that he had never asked Ms. Ledbetter on a date or that he never made a biased compensation decision. Goodyear was effectively unable to counter Ms. Ledbetter's inperson testimony in front of the jury and, not surprisingly, the jury returned a verdict for her. As the Ledbetter Court recognized, "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." Op. at 12.

The fact that an employer may keep some employment records documenting decisions affecting pay is of little comfort. First, in practice, employers rarely record detailed explanations on paper as to why one employee might have received an incrementally lower or higher pay increase than his or her coworker. Unlike terminations, which are relatively rare and therefore are usually documented thoroughly

at the time, most employers make compensation decisions about every one of their employees every year. The employer can hardly be expected to write extended narratives explaining the rationale for every one of those decisions for every employee, or record comparisons between and among all of the other similarly situated employees—i.e., why Employee A got a 3.5% increase and Employee B got 4%.

Second, even if this kind of documentation existed, the "story line" of an employment decision cannot be told at trial solely with a few pieces of paper. Few defendants are likely to prevail at a trial—even when the challenged decision was entirely biasfree—by meeting the live, detailed, and often emotional testimony of the plaintiff with a few words recorded on a document.

It is important to note that the Equal Employment Opportunity Commission requires employers to keep only certain specified employment records (including those relating to "rates of pay or other terms of compensation"), and then only requires that the records be kept for one year. See 29 C.F.R. § 1602.14. The agency selected one year as the appropriate period "so that there [would be] no possibility that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added). But when an EEOC charge has been filed, the employer is obligated to keep all records related to the substance of the charge until the matter has been resolved. If Title VII is amended to reverse Ledbetter, employers would be obligated to keep these records, not for one year, but in perpetuity.

Thus, the limitations periods selected by Congress in enacting Title VII are rooted in notions of fundamental fairness that are the hallmarks of our American system of justice. The American people are fair. They want individuals to have an opportunity to raise their concerns and, where their legal rights have been invaded, a process through which they can seek redress.

But they also believe—correctly—that an injured party has to act with reasonable dispatch in pressing his or her claims. It violates the most basic notions of justice to allow an individual—even one who may have been subjected to discrimination—to wait until the employer is essentially defenseless to raise the allegation. Ms. Ledbetter waited nearly 20 years to raise her claims, and by that time there was no real chance that Goodyear could defend itself. The Court rightly concluded that this sort of delay is unacceptable. That decision should be embraced, not reversed.

2. The Outcome In Ledbetter Was Compelled By A Long Line Of Supreme Court Cases. Those criticizing the Ledbetter decision have suggested that it is a departure from prior precedent. Nothing could be further from the truth. The Supreme Court's cases in this area have always emphasized the distinction between decisions and consequences. For example, in United Airlines v. Evans, 431 U.S. 553 (1977), the plaintiff challenged the downstream, seniorityrelated consequences of her discriminatory termination; the Court held that the employer's actionable conduct occurred at the time of discharge, not when she felt the consequences in her comparative seniority when she was rehired. In Delaware State College v. Ricks, 449 U.S. 250, 25254, 258 (1980), the plaintiff was a college professor who was informed that he had been denied tenure and that, when the coming school year ended, so would his employment. Instead of filing a charge when notified of the decision, he waited until he was actually terminated before filing a charge of discrimination. This, the Court held, was too late.

Ledbetter is merely a relatively straightforward application of this longrecognized distinction. Ms. Ledbetter should have complained to the EEOC when she was informed of her evaluation results; waiting until her retirement—decades after some of these decisions—was unfair.

The Ledbetter critics have suggested that a special rule should be created for pay cases. The distinction they seek to make is a false one. Nearly every form of adverse employment action has an impact on compensation—denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline—they all have the potential to affect pay. In this case, Ms. Ledbetter complained that her low salary could be attributed to low evaluations she received over the years. She complained about the consequences of those evaluations rather than the evaluations themselves.

The compensation consequences of any of these otherwise discrete employment decisions will appear in an employee's paychecks as long as that employee is with the same employer. If there were a separate rule of limitations for "pay" cases, every Title VII case would become a "pay" case, including those that previously have been characterized as denialofpromotion or discipline cases. Employers would, undoubtedly, be forced to defend outoftime claims challenging discrete actions because those discrete decisions ultimately led to paycheck disparity.

3. Title VII's ChargeFiling Period Was Intended To Foster Conciliation And Resolution; These Goals Become Much Less Attainable As Time Passes. Finally, I believe

that much of the criticism recently leveled at the Ledbetter decision reflects a fundamental misunderstanding of the chargefiling process mandated by Title VII and the manner in which the process begins. Critics, including Justice Ginsburg, have suggested that it is often unfair to expect a worker to possess sufficient information to conclude that discrimination has occurred in time to meet the statute's filing deadlines. I believe this concern is misplaced for several reasons.

First, one need only look at this case to recognize that the concern is vastly overstated.

Ms. Ledbetter knew every year what her evaluation results were, and understood the relationship between those results and her pay—low evaluation scores inevitably resulted in low pay increases. She also complained to her coworkers at the time that she believed she was being treated unfairly. This is not a case, then, where the alleged victim was ignorant of her potential claim. She simply failed to do anything about it until she had decided to retire.

Second, the courts have developed a number of special rules that can mitigate the impact of the filing deadlines in those few cases in which the employer has in some fashion misled the employee into allowing the period of limitations to lapse or otherwise prevented the employee from gaining access to the administrative process.[5] In those circumstances, strict adherence to the statute's limitations provisions would be unfair, but legislative action is unnecessary to achieve justice because the law already provides a mechanism for avoiding harsh results.

Third, and most importantly, Ledbetter critics seem to be confusing the threshold standard for filing a lawsuit with the much lower standard for filing a charge of discrimination. To file a lawsuit in federal court, one must attest that, after reasonable inquiry, the allegations contained in the complaint "have evidentiary support." Fed. R. Civ. P. 11(b)(3). No similar threshold requirement exists for filing a charge of discrimination. The charging party need not have "evidentiary support" to go to the agency for help, merely an inkling of unfair treatment.[6]

"[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is 'reasonable cause' to believe that the employer has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding." EEOC v. Shell Oil Co., 466 US. 54, 68 (1984).

That is, the purpose of the charge is to begin the factfinding process. Once filed, the charge arms the EEOC with the authority to go to the employer and ask for precisely the sort of detailed information the Ledbetter critics seem to assume a charging party must have before going to the agency. That is simply not the case.

Once the charging party has shared his or her suspicions with the EEOC, and an investigation has commenced, the truth usually comes out. The charging party sometimes realizes that her concerns were unfounded. The employer sometimes realizes that it (or one of its supervisors) made a mistake or even a biased decision. Whatever the facts reveal, the parties then sit together with an agent of the EEOC and discuss the possibility of compromise—of an arrangement that resolves the employee's concerns in a manner acceptable to the employer. That is precisely the process Congress envisioned when it enacted Title VII, and in the ensuing decades, it has produced remarkable results.

Only if this Congressionally mandated process of voluntary cooperation and conciliation fails to result in an acceptable compromise does the case end up in court, and if it does, the complainant is then armed with the evidence divulged during the agency process to support the much higher pleading standard applicable in federal court.

In order for the conciliation process to work as Congress intended, allegations must be presented to an employer in a timely fashion. If allowed to fester over years—or decades—instead of being addressed when the employee first believes a problem might exist, it is much less likely that conciliation will work. As time passes, the parties may become more and more entrenched in their positions, potential "fixes" for the employee's problems become more difficult to arrange, and potential damages escalate. Simply put, the process envisioned by Congress cannot work if disappointed employees are allowed to wait years before filing a charge.

Every statute of limitations reflects a legislative compromise among competing societal goals. Congress has provided a mechanism through which employees can raise allegations of bias and have them addressed, and it has judged that this process will work best if those allegations are raised, and, one hopes, resolved promptly. The system works.

But that system cannot work effectively to eradicate discrimination, and employers will not be treated fairly, if Congress turns its back on the important societal goal underlying Title VII's period of limitations. Accordingly, the Chamber does not support proposals that would reverse or limit the decision handed down in Ledbettter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. ____ (2007).

Thank you for the opportunity to discuss these important issues with the Committee. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

ENDNOTES

[1] The views expressed in this paper are my own and those of the Chamber and not necessarily those of the Firm.

[2] Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355 (1977), quoting Alexander v. Gardner Denver Co., 415 U.S. 36 (1974).

[3] See United Airlines, Inc. v. Evans, 431 U.S. 553, 55458 (1977); Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980); Lorance v. AT&T Tech., Inc., 490 U.S. 900, 912 n.5 (1989) (superseded by statute on other grounds).

[4] See Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, *www.bls.gov/news.release/tenure.nr0.htm* (last viewed on 6/6/07).

[5] See, e.g., Nunnally v. MacCausland, 996 F.2d 1, 4 (1st Cir. 1993) ("relief from limitations periods through equitable tolling * * * remains subject to careful casebycase scrutiny."); English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987) (equitable tolling may apply "when defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" and equitable estoppel may apply when, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.").

[6] "[L]oose pleading" is permitted before the EEOC." Deravin v. Kerik, 335 F.3d 195, 202 (2d Cir. 2003); Alvarado v. Bd. of Tr. of Montgomery Cmty. Coll., 848 F.2d 457, 460 (4th Cir.1988) ("precise pleading is not required for Title VII exhaustion purposes").

Chairman MILLER. Thank you.

Professor Brake?

STATEMENT OF DEBORAH BRAKE, PROFESSOR, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Ms. BRAKE. Chairman Miller, Ranking Member McKeon and members of the committee, I thank you for the opportunity to discuss the problems created by the Ledbetter decision.

My reasons for urging Congress to overturn this decision are detailed in my written testimony, and I will highlight some of them in my time before you today.

First, the court's decision can only exacerbate the gender wage gap. By categorizing pay decisions as discrete, the court's ruling is blind to the realities of pay discrimination. Discriminatory pay decisions are not separate and distinct from the paychecks that follow. Left uncorrected, even a relatively minor disparity will expand exponentially over the course of a career.

To illustrate, a study by researchers at Carnegie Mellon University gives the example of a 22-year-old man earning a starting salary of $30,000 and an equally qualified 22-year-old woman earning $25,000. Assuming each receives a 3 percent annual raise, this $5,000 gap would widen to $15,000 by the time the workers reached age 60, with a total pay difference of over $360,000 over their employment lives.

If the man earned 3 percent annual interest on the difference, the disparity would total a staggering $568,000, enough to fund a secure retirement or a college education for several children.

Under the Ledbetter rule, the young woman in this example must bring a Title VII claim within 180 days of when the initial discriminatory pay decision was made and communicated. Failing that, Title VII provides no legal recourse. As Justice Ginsberg rec-

ognized, the effect of the court's decision is to render such discriminatory pay decisions "grandfathered, a fait accompli beyond the province of Title VII ever to repair."

The implications of the court's ruling for the gender wage gap are stark.

Second, employees are not likely to be able to challenge decisions within the timeframe allowed. It is very difficult to know if you have experienced pay discrimination. People rarely know what their colleagues earn, much less what raises are received at each and every salary review.

At least with hiring, firing, promotion and demotion decisions, the affected employee knows she has experienced an adverse action. She can search out an explanation, evaluate it for pretext, observe any comments suggestive of bias, and easily identify comparators.

Pay decisions, in contrast, are rarely accompanied by an explanation from the employer, comparing salaries. And unlike job decisions such as hiring and promotion, where an employee can get some picture of how women fare generally in such decisions, a typical employee has no way of knowing how women, overall, are paid in comparison to men.

Often, women's pay starts out even with men, but gradually and almost imperceptibly, declines over time in relation to men's. These women are likely to find their Title VII claims foreclosed.

Even if an employee is aware of a modest discrepancy, a relatively minor disparity is likely to go unquestioned for some time, until it becomes too large to ignore.

Women who are subjected to pay discrimination at the time they are hired face their own set of difficulties. A new employee is unlikely to have the kind of connections necessary to find out about pay discrimination or the kind of support and established work record it takes to have the courage to challenge it.

Fourth, employers do not need the protection of the Ledbetter rule. There are already strong incentives on employees not to delay filing.

First, the employee has the burden of proof. And it is the employee who is likely to be disadvantaged by delay. If the jury can't figure out what happened because the evidence is stale and memories have faded, the employee loses.

Second, plaintiffs who engage in unreasonable delay in filing are barred from doing so by the defense of latches.

Third, since employees may only recover back pay for a maximum of 2 years prior to filing the EEOC charge, they have a strong incentive to quickly challenge pay discrimination that has gone on for more than 2 years because the employer can keep the windfall from any discriminatory pay that falls out of that 2-year limit.

Only the employer is in a position to know about and evaluate disparities in salaries. But under the court's ruling, employers have no incentive to proactively examine pay equity, and they get a virtual pass to continue pay discrimination that is older than 180 days.

In the long run, even employers are not well-served by the Ledbetter rule. The ruling encourages hypervigilance on the part of

employees; a formal, adversarial approach to the slightest pay discrepancy; and a concerted effort to search out information about the salaries and raises of their colleagues—not a recipe for a collegial workplace or a high level of trust between management and employees.

Until the Ledbetter case, lower courts across the country, as well as the EEOC, had allowed employees to challenge discriminatory paychecks received within the limitations period. I urge Congress to restore the paycheck accrual rule that was widely understood to be the correct interpretation of Title VII until the Supreme Court just recently opted for a different course.

[The statement of Ms. Brake follows:]

Prepared Statement of Deborah Brake, Professor, University of Pittsburgh School of Law

Chairman Miller, Ranking Member McKeon, and members of the Committee, I appreciate the opportunity to come before you today to discuss the problems recently created for working women by the Supreme Court's decision this Term in Ledbetter v. Goodyear Tire & Rubber Co., Inc.[1] As you know, that decision rejected the so-called pay-check accrual rule that has been applied in the lower courts for many years and replaced it with a rule requiring an employee to challenge each and every discriminatory pay decision within Title VII's short statutory limitations period (typically 180 days, or a modestly longer 300 days in states with fair employment agencies), or lose forever the ability to challenge ongoing pay discrimination that is traceable to an earlier decision. The Court's rule is untenable for many reasons and can only exacerbate the gender wage gap. My reasons for urging Congress to act to overturn this decision and fix the gap it created in our civil rights laws are detailed below.

1. Pay Discrimination is Carried Forward and Compounded Over Time; It is Anything But "Discrete"

By categorizing discriminatory pay decisions as "discrete," the Court's ruling is blind to the realities of how pay discrimination is implemented. Discriminatory pay decisions are not separate and distinct from the paychecks that follow them. A discriminatory pay decision is likely to create a permanent sex-based disparity in pay because annual reviews and salary adjustments typically carry forward the prior salary as a baseline. Worse still, a discriminatory pay deficit is likely to be magnified by future salary adjustments, which typically take the form of percentage-based raises. As a result, left uncorrected, even a relatively minor initial pay disparity will expand exponentially over the course of an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion.

A study by researchers at Carnegie Mellon University shows how a discriminatory pay decision can continue to produce an ever-widening pay disparity throughout an employee's career.[2] This study found that male students who graduated with a master's degree earned starting salaries 7.6% higher than their female counterparts, for an average annual salary difference of almost $4,000. To illustrate the long-term consequences of gender-based wage disparities that start out at modest levels, the study authors give an example of a 22-year old man who earns a starting salary of $30,000 and an equally qualified 22-year old woman with a starting salary of $25,000. Assuming each receives identical 3% annual raises, this pay gap would widen to $15,000 by the time these workers reached age 60, with a sum total difference of $361,171 over their employment lives. Assuming the man earned 3% annual interest on the difference, the disparity would total an even more staggering $568, 834.[3] Such a substantial difference in pay could make a tremendous difference in a person's life, amounting to the ability to purchase a second home, secure financial stability in retirement, or pay for a college education for multiple children. The implications of such a pay gap extend into retirement, affecting employer pension plans, percentage-based employer contributions to retirement savings plans, and even social security.

Under the rule announced in Ledbetter, the young woman in this example must bring any Title VII pay discrimination claim within 180 days of when the initial discriminatory salary decision was made and communicated. Failing that, Title VII will provide no legal recourse for the salary discrimination that persists and compounds throughout her career. The effect of the Court's decision is, as Justice Ginsburg rec-

ognized, to render discriminatory pay decisions left unchallenged for 180 days "grandfathered, a fait accompli beyond the province of Title VII ever to repair."[4]

The implications of the Ledbetter ruling for the gender wage gap are stark.[5] Because of the tremendous difficulties employees face in quickly recognizing and challenging pay discrimination, detailed below, the Court's decision renders Title VII little more than hollow rhetoric when it comes to the law's promise of nondiscrimination in compensation. The realities of the workplace and employee compensation make it exceedingly unlikely that any discriminatory pay decision will be challenged within Title VII's extremely short statutory limitations period.

2. The Unrealistic Burden on Employees to Quickly Perceive and Challenge Discriminatory Pay Decisions

By requiring employees to quickly challenge each and every pay decision they suspect is discriminatory, the Ledbetter ruling imposes an untenable burden on employees. The Court's decision could not be more at odds with the realities of how employees perceive and respond to pay discrimination. The Court apparently assumes that employees have little difficulty discerning discriminatory pay decisions. In actuality, there are many obstacles to perceiving and challenging pay discrimination within the short window of time allowed employees by the Ledbetter decision.

Under real-world conditions, it is very difficult for women and people of color to recognize when they have experienced discrimination.[6] Various social-psychological hurdles create a resistance to seeing oneself as a victim of discrimination, and limited access to information and the limits of how people process information combine to make it very difficult for employees to quickly perceive discrimination.

While perceiving discrimination is difficult in general, the problems are greatly exacerbated for pay discrimination. Employees are highly unlikely to have access to the kind of information necessary to raise a suspicion of pay discrimination. Employers rarely disclose company-wide salary information and workplace norms often discourage frank and open conversations among employees about salaries.[7] As a result, employees rarely know what their colleagues earn, much less what raises and adjustments are given out to other employees at each and every salary review. An employee who learns that she will receive a 5% raise, for example, will have no reason to suspect pay discrimination without knowing at the very least the percentile raises others receive and the reasons for any disparities. Indeed, a discriminatory pay gap may begin with no change in a female employee's pay, but with a decision to increase the pay of a male colleague while leaving her pay unchanged for a discriminatory reason.

As these examples illustrate, unlike discriminatory actions such as hiring, firing, promotion or demotion decisions, there is no clearly "adverse" employment event that occurs with a discriminatory pay decision. Unless it implements a pay cut, a pay-setting decision is unlikely to be experienced as adverse at all, much less suggestive of discrimination. Pay discrimination is particularly difficult to perceive because it is rarely accompanied by circumstances suggestive of bias. At least with discriminatory hiring, firing, promotion or demotion decisions, the affected employee immediately knows that she has experienced an adverse employment action. She can search out an explanation from the employer, evaluate it for pretext, and note any comments suggestive of stereotyping or bias. In making sense of the employer's explanation, she will have less difficulty identifying comparators (the person who got the promotion, the colleagues who were not fired, etc.). Pay decisions, in contrast, are rarely accompanied by any explanation from the employer comparing other employees' salaries or any discernible signs of prejudice. And unlike job decisions with respect to hiring, firing, promotion, transfer and demotion, where an employee can usually get some picture of how women generally fare in such decisions, an employee typically has no way of knowing how women overall are paid compared to men. Without aggregate data showing comparisons between men and women as a group, it is very difficult to perceive discrimination on an individual basis. For all of these reasons, pay discrimination is especially difficult to detect.[8]

Working women whose pay gradually and imperceptibly declines in relation to their male colleagues, so as to produce an ever-widening gender wage gap over time, are likely to find their Title VII claims foreclosed by the Ledbetter rule. Each pay decision typically builds on the prior one, and unless corrected, discriminatory pay decisions are perpetuated and magnified by subsequent percentage-based adjustments. In this way, even if an employee is aware of a modest disparity between her pay and that of her colleagues, relatively minor disparities are likely to go unquestioned for some time, until the disparity becomes too large to ignore. By that time, however, under the Court's ruling, the employee will have lost long ago the right to complain under Title VII.

Women who are subjected to pay discrimination in their starting salary at the time they are first hired face their own set of problems under the Court's ruling.[9] An employee is especially unlikely to be in a position to perceive and challenge pay discrimination soon after she is hired. As Justice Ginsburg recognized in her dissent, case law demonstrates that it is not unusual for employees to work for an employer for quite some time before learning of a gender disparity in pay.[10] New employees are unlikely to have the kinds of informal networks and connections necessary to find out information that would lead them to suspect pay discrimination. And even if they suspect pay discrimination, new employees are in a particularly precarious position when it comes to challenging it. A new employee is especially vulnerable to retaliation, the foremost concern of any employee who is considering whether to challenge perceived discrimination, and the number one reason for choosing not to do so.[11] Without the benefit of an established work record, a recently hired employee will have little to fall back on if called upon to prove that an adverse action resulted from retaliation as opposed to job performance.[12] And with less of an opportunity to develop strong connections and support from colleagues and supervisors in the workplace, a new employee may be less willing to risk retaliation by challenging a discriminatory pay decision.[13] Yet, as illustrated in the example of the male and female workers discussed in the first section, pay discrimination that begins in a starting salary may follow a woman throughout her career, adding up to a tremendous discrimination-deficit over the course of her working life and even following her into retirement.

In light of these realities, the Court's rule seems calculated to immunize employers from Title VII liability for any discrimination in pay.

3. The Catch 22 of When to Complain: Complain Immediately—But Not Too Soon!

One of the more troublesome aspects of the Court's ruling in Ledbetter is the dilemma it creates for employees who face pressures at both ends of the clock in timing a Title VII challenge to suspected pay discrimination. Under the Court's ruling, an employee must quickly complain of suspected pay discrimination within 180 days of when the discriminatory decision was made and communicated, or lose forever the right to challenge the resulting pay discrimination. However, in a cruel Catch-22, an employee who complains to her employer too soon, without an adequate factual and legal foundation for doing so, could find herself in an even worse position. If the employee quickly brings the suspected pay discrimination to the attention of her employer, and in the unfortunate event that the employer responds with retaliation, the employee could find herself out of a job and with no legal recourse.

Under prior Supreme Court precedent, an employee who opposes what she believes to be unlawful discrimination is protected from retaliation only if she had a "reasonable belief" that the practice she opposed in fact violates Title VII. The Court adopted this standard in a 2001 decision, Clark County School District v. Breeden.[14] In that case, the plaintiff, a female employee, was present in a meeting when her male coworker and male supervisor exchanged a laugh over a sexual reference. Soon after the meeting, the plaintiff complained to a supervisor that the sexual remark was offensive and sexually harassing. She was subsequently assigned to less desirable job duties and relieved of her supervisory responsibilities.

The plaintiff in Breeden sued under Title VII, alleging that she was retaliated against for opposing sexually offensive conduct that contributed to a hostile environment. The Supreme Court rejected her retaliation claim, ruling that even if she had experienced retaliation in response to her complaint, no reasonable employee could have believed that the brief and isolated sexual dialogue that occurred would in itself, without more, create a hostile environment in violation of Title VII. In effect, she complained too soon, well before enough sexually offensive incidents had accumulated so as to lead a reasonable person to perceive a hostile environment. This standard leaves employees unprotected from retaliation if they oppose an employment practice too soon, without a reasonable basis for believing that the challenged conduct actually violates Title VII. Lower courts have applied this standard harshly, leaving plaintiffs unprotected for acting on their subjective beliefs that certain employer conduct is discriminatory without sufficient factual and legal support for proving an actual violation of Title VII under existing case law.[15]

The dilemma for pay discrimination claimants is poignant: it may take a pattern of substantial pay disparities and time to investigate the relevant facts in order to establish a legally sufficient inference that the gap in pay is attributable to gender bias, rather than to some legitimate nondiscriminatory reason such as performance or experience.[16] An employee who complains to her employer at the first sign of a pay gap may lack an adequate foundation for a "reasonable belief" that the gap is attributable to gender discrimination, thus leaving her vulnerable to and unprotected from any retaliation she might experience in response to her complaint. The

Breeden standard thus creates serious legal risks for an employee who complains too soon. But on the other hand, if the employee waits more than 180 days after she first suspects an initial discriminatory pay decision, so as to be sure that she has an adequate legal and factual basis for alleging pay discrimination, she loses her ability to challenge the continuing discrimination in pay under Title VII, even if the discriminatory pay gap continues to suppress her pay and increases over time. Thus, Ledbetter punishes an employee for waiting too long to challenge pay discrimination.

The only way out of this dilemma is for the employee to immediately file a formal Title VII charge at her very first suspicion of pay discrimination, without saying a word to her employer or anyone else in the workplace. This would solve the gap in Title VII's protection from retaliation because Breeden's reasonable belief standard applies only to forms of employee "opposition" to discrimination that fall short of participating in the formal EEOC charge-filing process.[17] Filing a formal EEOC charge triggers full protection from retaliation without regard to the reasonableness of the employee's belief in an underlying Title VII violation.

Of course, most employees would prefer to informally challenge or question suspected discrimination—such as, by complaining to management about a pay disparity or filing an internal grievance—well before resorting to the filing an official EEOC charge. And for good reason: it is not in anyone's best interests, employees or employers, for employees to jump the gun too quickly and invoke the formal machinery of Title VII if the perceived problems result from a misunderstanding or could be resolved informally and in a conciliatory fashion. Nor is such a trigger-happy response good for the EEOC, which already faces a severe backlog of claims. One of the stranger results of the Ledbetter-Breeden dilemma is to encourage employees to avoid precisely the kind of informal, conciliatory resolution of disputes that the majority in Ledbetter insists that Title VII promotes.

4. Employers Do Not Need the Protection of the Ledbetter Rule and Are Not Well-Served by the Court's Decision

The Court's opinion reflects an emphasis on protecting "innocent" employers—that is, employers who unknowingly continue to give effect to biased salary recommendations from long ago—from stale claims. The Court's concerns are overblown and misplaced. Employers who comply with Title VII are not well-served by the Ledbetter rule.

The concern that an employee will consciously wait to bring a pay discrimination claim until witnesses leave and memories fade ignores the strong disincentives on Title VII plaintiffs not to delay in filing. First and foremost, it is the employee, not the employer, who is likely to be disadvantaged by excessive delay in suing. Title VII places the burden of proof on the plaintiff to demonstrate intentional discrimination by proving that the pay disparity was motivated by the plaintiff's gender. This is a difficult standard to meet under the best of circumstances.[18] Delay that renders evidence "stale" and the facts difficult to uncover works to the disadvantage of the plaintiff, who bears the burden of convincing the jury that her account of what happened is the more likely one. If the jury is not convinced that an ongoing disparity in pay is traceable to intentional discrimination, the plaintiff loses.

Second, the ability of courts to apply equitable principles to bar plaintiffs from suing if they have engaged in unreasonable delay strongly encourages plaintiffs to file Title VII claims promptly. As the Supreme Court has recognized, plaintiffs who unreasonably delay filing a Title VII claim may be barred from ever doing so by the defense of laches.[19] Lower courts have applied the defense of laches to cut off plaintiffs' right to sue where the employee has delayed unreasonably in filing her claim, with prejudice to the employer, even if the employee has met the filing requirements for Title VII.[20]

A third reason why plaintiffs are best-served by filing as soon as they know they have a claim is that the statute includes an explicit two year limitation on back pay. Title VII limits employees to a maximum of two years' back pay from the date the charge was filed.[21] This provision encourages employees to file an EEOC charge as soon as they find out that they have been subjected to pay discrimination that has gone on for more than two years, since the employer can keep any discrepancy in back pay that falls outside of that two-year limit. The two year back pay limitation also protects employers from excess liability by setting a two year cap on back pay, regardless of how long the pay discrimination has gone on.

In fact, the two-year back pay limit itself suggests that when it enacted Title VII, Congress intended to allow employees to challenge pay discrimination resulting from discriminatory decisions older than 180 days. Under the Court's interpretation in Ledbetter, the two-year back pay limit makes no sense because the plaintiff can only recover back pay under that decision for the 180 days prior to filing the charge.

Under this rule, it is difficult to imagine how the two-year back pay limit would ever come into play. Unfortunately, some lower courts, in addition to the majority in Ledbetter, seem to have forgotten that the two-year back provision exists, and have effectively read it out of existence. That is why it is important for Congress to reiterate that pay discrimination claimants can recover up to two years' back pay for pay discrimination that began before and extends into the limitations period

Finally, the concern with employer "innocence" in cases where an employee continues to receive a truncated paycheck because of her sex is itself misplaced. Only the employer is in a position to know and evaluate the fairness of salaries across the workforce. Employers, much more so than employees, can identify gender gaps in pay and evaluate whether they are justified. An employer who continues to pay a woman less for her work is not "innocent" even if the discriminatory decision that started the pay gap was made long ago. In Lilly Ledbetter's case, for instance, Goodyear had plenty of reason to be concerned about its potential Title VII liability, given that the only female manager in the plant earned substantially less than each and every one of the fifteen male managers.

Unfortunately, the Court's ruling offers absolutely no encouragement to employers to proactively evaluate employee wages and ensure pay equity in the workplace. Instead, the rule adopted by the Court leaves victims of pay discrimination out in the cold, while employers—who are in the best position to find out about and correct pay discrimination—get an effective license to continue any pay discrimination that is more than 180 days old. Far from being "innocent," such employers are enriched at the employee's expense.

Employers would be hard-pressed to complain that overturning the Ledbetter ruling would place excessive burdens on employers, since employers have lived with the paycheck accrual rule until this very decision. Until the Ledbetter case, lower courts across the country had allowed plaintiffs to challenge discriminatory paychecks received within the limitations period, regardless of when the discriminatory pay decision was first made.[22] Likewise, the EEOC, the federal agency charged with enforcing Title VII, has interpreted and applied Title VII to permit an employee to challenge continuing pay discrimination as long as one paycheck that pays the employee less because of sex falls within the limitations period.[23] Overturning the Court's ruling in Ledbetter would simply restore the paycheck accrual rule that was widely understood to be the correct interpretation of Title VII until the Supreme Court decided to take a different course.

Even though the Court's opinion is "employer-friendly" to the extreme, it is not clear that in the long run employers are well-served by the rule adopted in Ledbetter. As explained above, the Court's ruling creates a strong incentive for employees to file charges with the EEOC at the very first suspicion of a discriminatory pay decision, and not wait for further clarification or subsequent explanations that might dispel such suspicion. The incentive is for hyper-vigilance on the part of employees and a formal, adversarial approach to the slightest pay discrepancy or disappointment. There is also an incentive on employees to ferret out whatever information they can about their colleagues' pay, in order to make sure they do not lose their right to challenge pay discrimination in the future. These incentives are not likely to promote a collegial workplace, nor a high level of trust and conciliatory relations between management and employees.[24] Enlightened employers who care about employee morale and management-employee relations should not be too quick to celebrate the Court's decision.

5. The Implications of the Decision for Victims of Pay Discrimination

Women who are affected by pay discrimination that is more than 180 days old can take some comfort in the existence of the Equal Pay Act of 1963,[25] which may enable them to challenge some forms of pay discrimination under a different tolling rule than the Court adopted in Ledbetter for Title VII claims. The Equal Pay Act requires employers to pay men and women equally if they do substantially the same job, with possible defenses for pay disparities resulting from merit-based systems, seniority systems or any factor other than sex. The Equal Pay Act is not governed by the tolling rule adopted for Title VII pay claims in Ledbetter. A plaintiff may challenge an ongoing violation of the Equal Pay Act at any time and seek recovery for the prior two years of discrimination—three years, if the violation is "willful."

However, the existence of an alternative statutory remedy for some instances of gender inequality in pay does not begin to solve the problems created by the Ledbetter ruling. First, as Justice Ginsburg observed in her dissent, the Equal Pay Act offers no help to other protected classes covered by Title VII. The Equal Pay Act covers only certain specified instances of pay inequality between men and women. Victims of pay discrimination on the basis of race, color, national origin and religion are left with Title VII, and they are stuck with the Court's untenable filing

rule for their pay discrimination claims. The inequity is apparent: in workplaces where there is a man in a similar job performing similar work, a woman can challenge ongoing pay discrimination under the Equal Pay Act at any time, and recover for the prior two (and possibly three) years of discrimination. However, victims of other forms of pay discrimination covered by Title VII have no recourse if their claims are more than 180 days old. It is hard to conceive of a rational explanation for this kind of inequity.

Women of color, in particular, who already have considerable difficulty carving up their claims to sort out the "race" elements from the "sex" elements, will have a particularly tough road to navigate, given the very different approach to filing now taken by Title VII and the Equal Pay Act. For example, an African American woman might bring a timely Equal Pay Act claim based on the higher salary of a male colleague who does similar work. However, if the difference in pay turns out to be attributable to her race rather than her sex, and the discriminatory decision behind the disparity was older than 180 days, any Title VII claim she might have would be time-barred. Our civil rights laws should not leave such gaps in protecting all workers from the pay discrimination that Congress has sought to prohibit.

Second, the existence of the Equal Pay Act does not even solve the problems Ledbetter creates for women who are harmed by pay discrimination on the basis of sex. Not all sex discrimination in pay that violates Title VII also violates the Equal Pay Act.[26]

The Equal Pay Act is limited to cases where the plaintiff can point to a comparator of the opposite sex who does the same work in the same job for more money. That standard has been construed harshly, in ways that make it difficult for plaintiffs to identify comparators.[27] Title VII is broader than the Equal Pay Act because it reaches all claims of intentional pay discrimination, regardless of whether there is an opposite-sex comparator in the workplace who earns more money than the plaintiff for doing the same job. For example, a woman who holds a unique job, or a job that is not equivalent to any job performed in that workplace by a higher-earning man, will have no claim under the Equal Pay Act. However, such an employee might nevertheless prove that her salary is negatively affected by gender bias—perhaps, for example, because it is based on discriminatory and biased evaluations of her work performance. Hence, some instances of pay discrimination will violate Title VII but not the Equal Pay Act. In addition, the Equal Pay Act offers more limited remedies for pay discrimination than Title VII, permitting liquidated (fixed and limited) damages and back pay, but not compensatory or punitive damages.

The unfortunate consequence of the Court's ruling in Ledbetter is to effectively nullify Title VII's broader reach by imposing a harsh and unrealistic filing deadline, leaving women who experience sex discrimination in compensation only the protection of the narrower Equal Pay Act. This is an odd result, given that Title VII was enacted one year after the Equal Pay Act and was intended to broaden the protection from sex discrimination then available under existing law.

6. Lorance Revisited

In 1991, Congress enacted legislation to overturn and correct a spate of Supreme Court decisions that had adopted stingy readings and narrow interpretations of Title VII and other civil rights statutes. One of the decisions overturned by the 1991 Act, Lorance v. AT&T Technologies, Inc.,[28] took a near-identical approach to Ledbetter in construing Title VII's filing requirements to bar challenges to the application of an intentionally discriminatory seniority system within the limitations period when the seniority system was first adopted outside the limitations period.

In that case, the Court required employees to challenge a discriminatory seniority system soon after it was first adopted, and ruled that employees could not wait to file a discrimination charge until the seniority system was applied to them. In reasoning virtually identical to that used by the majority in Ledbetter, the Court in Lorance reasoned that the unlawful employment practice occurs, for purposes of triggering Title VII's timely filing requirements, when the discriminatory decision was first made and not when its effects are felt by employees.[29]

Overturning Lorance in the Civil Rights Act of 1991, Congress railed against the injustice of barring employees from challenging discrimination that was perpetuated and given effect within the limitations period each time the previously adopted system was applied and implemented to disadvantage a female employee. In response to the Lorance ruling, Congress passed an amendment to Title VII clarifying that:

For purposes of [Title VII's timely filing requirements], an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority sys-

tem, or when a person aggrieved is injured by the application of the seniority system or provision of the system.[30]

Although the specific language overturning Lorance was directed to the filing requirements for challenging seniority systems, Congress expressed its disapproval of the Court's decision in more general terms. In enacting this provision, Congress clearly stated its intention to ensure that the reasoning of Lorance would never again bar employees from challenging ongoing practices that perpetuate discrimination.[31] Indeed, in explaining this provision, Congress even explicitly endorsed the very paycheck accrual rule rejected by the Court in Ledbetter. As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, carefully explained:

[T]he provision concerns employer rules and decisions of on-going application which were adopted with an invidious motive. Where, as alleged in Lorance, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In Bazemore * * *, for example, * * * the Supreme Court properly held that each application of that racially motivated salary structure, i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in Bazemore.[32]

Remarkably, the Court in Ledbetter not only flouted Congress' intention to reject the kind of reasoning relied on in Lorance, but it even cited Lorance with approval in support of its decision in Ledbetter. As Justice Ginsburg pointed out in her dissent in Ledbetter, until now, the Court has "not once relied upon Lorance" in the "more than 15 years" since Congress passed the 1991 Act, and "[i]t is mistaken to do so now."[33] The Ledbetter majority's failure to learn the lessons of the 1991 Act suggests a need for Congress to revisit the teachings of the 1991 Act and restore the paycheck accrual rule, permitting employees to challenge pay discrimination that extends into the filing period regardless of when it first began.

Congress should correct this stingy decision and give employees a fair chance at challenging unlawful pay discrimination. As Congress previously recognized in passing the 1991 Act, the paramount goals of Title VII are to prevent discrimination and provide make-whole relief to the individuals harmed by it—not to protect employers from "stale" challenges to ongoing discrimination.

7. Congress Should Act to End the Inequity in our Civil Rights Laws that Bars Women from Fully Recovering Damages for Intentional Discrimination

In her dissenting opinion in Ledbetter, Justice Ginsburg noted the problem that arises from the non-uniformity of our civil rights laws in providing different coverage for sex discrimination in pay for women under the Equal Pay Act than for other kinds of pay discrimination covered by Title VII.[34] As she explained, although women may be able to seek redress under the Equal Pay Act for sex discrimination in pay, and avoid the Court's harsh rule in Ledbetter, victims of other forms of pay discrimination covered by Title VII will not.

There is another kind of inequity resulting from the non-uniformity of our Nation's civil rights laws that is blatantly apparent from the Ledbetter case. Because the discrimination in Ledbetter involved a claim for sex discrimination under Title VII, the plaintiff's recovery of damages was capped by the statutory limit of $300,000 for combined compensatory and punitive damages, applicable to large employers such as Goodyear.[35] As a result, the plaintiff's jury award of over $3.5 million, reflecting the jury's decision to award punitive damages to punish Goodyear for its gross misconduct, was reduced to $360,000, the maximum allowable combined compensatory and punitive damages plus an award of $60,000 back pay.

As a case challenging sex discrimination in pay, no federal employment statute would have allowed the plaintiff in this case full recovery. As noted above, the Equal Pay Act does not permit compensatory or punitive damages at all. In contrast, claims for pay discrimination on the basis of race might fall within Section 1981's prohibition on race discrimination in the making of contracts (including employment contracts), which does not have a statutory cap on damages. This inequity in remedies for the kinds of employment discrimination Congress has judged to be intolerable is not justified by any principle of fairness or justice.

Congress should lift the statutory cap on damages in Title VII so as to permit plaintiffs full recovery for intentional employment discrimination and impose sufficient incentives on employers to deter discrimination in the first place.

ENDNOTES

[1] Slip Opinion, No. 05-1074 (May 29, 2007).

[2] See Linda Babcock & Sara Laschever, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1(2003).

[3] Id. at 1-5. See also Virginia Valian, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN 3 (1998) ("Very small differences in treatment can, as they pile up, result in large disparities in salary, promotion, and prestige. ").

[4] Slip Opinion at 2 (Ginsburg, J., dissenting).

[5] Although researchers disagree about the size and causes of the gender-wage gap in the United States, there is broad agreement that a significant gender wage gap exists. See, e.g., Bureau of Labor Statistics, U.S. Dep't of Labor, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2003, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (reporting that women's median weekly earnings were 79.5% of men's in 2003, but only 73.6% for college graduates); Michael Selmi, Family Leave and the Gender Wage Gap, 78 N.C. L. Rev. 707, 715 (2000) (explaining that, although the gender wage gap today is narrower than it was in the 1970s, the bulk of the change occurred during the 1980s, with little additional progress since 1990); Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 7 (May 2004) (documenting a gender wage gap at every level of earnings); Francine D. Blau et al., THE ECONOMICS OF WOMEN, MEN, AND WORK 150 (5th ed. 2006) (explaining that "women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age). Although there is no consensus about the cause of this gap, wage discrimination is at least partly to blame. See Selmi, supra, at 719-43 (reviewing data showing that nondiscriminatory reasons, even in the aggregate, do not explain the gender wage gap); U.S. Gen. Acct. Office, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS, GAO-04-35 at 2 (Oct. 2003) (women in 2000 earned only 80% of what men earned even after accounting for differing work patterns and other "key factors "); Council of Econ. Advisers, EXPLAINING TRENDS IN THE GENDER WAGE GAP 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs).

[6] See Deborah L. Brake, Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias, 16 Columbia J. of Gender & Law (forthcoming 2007) (on file with author) (summarizing social psychology research documenting the extensive barriers women and people of color face in perceiving discrimination). See also Deborah L. Brake, Retaliation, 90 Minn. L. Rev. 18, 25-28 (2005) (discussing social science research documenting a "minimization bias" in which targets of discrimination resist perceiving and acknowledging it as such, even when they experience behavior that objectively qualifies as discrimination).

[7] See Leonard Bierman & Rafael Gely, Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004) (noting that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries and that many more communicate informally an expectation of confidentiality with respect to employee salaries).

[8] See Brenda Major & Cheryl R. Kaiser, Perceiving and Claiming Discrimination, in THE HANDBOOK OF RESEARCH ON EMPLOYMENT DISCRIMINATION: RIGHTS AND REALITIES 279, 289-90 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005) (discussing research showing that people are better able to perceive discrimination when it is accompanied by overt indicators of prejudice); Cheryl R. Kaiser & Brenda Major, A Social Psychological Perspective on Perceiving and Reporting Discrimination, 31 Law & Social Inquiry 801, 805 (2006) (discussing the difficulty of perceiving discrimination on a individual, case-by-case basis).

[9] The time of hiring is a common departure point for salary discrimination. See, e.g., Barry Gerhart, Gender Discrimination in Current and Starting Salaries: The Role of Performance, College Major and Job Title, 43 Indus. & Lab. Rel. Rev. 418, 427 (1990) ("even with a comprehensive group of control variables, the analysis shows that women had significantly lower starting and current salaries than men "); Kostas G. Mavromaras & Helmut Rudolph, Wage Discrimination in the Reemployment Process, 32 J. of Hum. Resources 812, 813-14 (1997) (explaining that supervisors often have more discretion in setting a starting salary than they do in later salary reviews). The use of an employee's prior salary to set entry level salary with a new employer can also usher in pay discrimination at the time of hiring. Cf. Jeanne M. Hamburg, Note, When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act, 89 Colum. L. Rev. 1085, 1108 (1989) (contending that employers should have the burden of justifying use of prior salary when it results in unequal pay).

[10] Slip Opinion at 8 (Ginsburg, J., dissenting); see also Mavromaras & Rudolph, supra note 9, at 813-14 (explaining that job announcements typically indicate a broad salary range rather than a specific salary, so that new employees are unlikely to know if they are paid less than other entry-level hires).

[11] See Brake, Retaliation, supra note 6, at 28-37; Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law, 26 Harv. Women's L. J. 3, 25-26 (2003) (discussing research showing that, even in the harassment context, where discrimination is more obvious and blatant, filing a complaint is a last resort, after other strategies have failed).

[12] Cf. 2 Arthur Larson, Employment Discrimination § 35.01, at 35-3 (2d ed. 2006) (explaining that a defendant may rebut a prima facie case of retaliation by offering a nondiscriminatory reason for its action, shifting the burden back to the plaintiff to prove that the proffered reason was pretextual).

[13] See Major & Kaiser, supra note 8, at 295-96 (discussing the importance of social support as a factor influencing the decision to report discrimination); see also Brake, Retaliation, supra note 6, at 39-40 (citing research showing that persons relatively lower in an organizational hierarchy are particularly vulnerable to retaliation).

[14] 532 U.S. 268 (2001).

[15] For a sampling and critique of some of the lower court rulings applying this standard, see Brake, Retaliation, supra note 6, at 82-102.

[16] See Slip Opinion at 8 (Ginsburg., J., dissenting) ("Even if an employee suspects that the reason for a comparatively low raise is not performance, but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable. "); see also Bierman & Gely, supra note 7, at 178 ("Employees observe wage differentials without the full information necessary to evaluate the justifications for differing wages. ").

[17] Two distinct clauses in Title VII extend protection from retaliation to persons who complain of discrimination, depending on what form their challenge takes. Retaliation against an employee for filing a charge with the EEOC or a complaint in court falls under Title VII's "participation clause," which protects against retaliation because an employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (2000). A different clause, known as the "opposition clause," makes it unlawful to retaliate against an employee "because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." Id. This clause extends protection to employees who complain of discrimination informally, short of invoking the formal legal machinery of Title VII. Protection under the opposition clause is essential to promote Title VII's policies favoring the early and informal resolution of dispute, and because charges of discrimination rarely reach the EEOC or a court without some higher level person first learning of the employee's grievance. However, only the participation clause offers full protection from retaliation regardless of the merits of the underlying discrimination charge. The opposition clause protects employees from retaliation for challenging discrimination only if they have a reasonable belief that the employment practice they opposed actually violated Title VII. For a more thorough discussion of the interaction of these two clauses, see Brake, Retaliation, supra note 6, at 76-82.

[18] See, e.g., Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 La. L. Rev. 555 (2001) (examining lower court decisions in employment discrimination cases and insurance cases and finding that plaintiffs fare much worse in employment discrimination cases).

[19] See National RR Pass. Corp. v. Morgan, 536 U.S. 101, 121 (2002) ("In addition to other equitable defenses, therefore, an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant. ").

[20] See, e.g., Smith v. Caterpillar, Inc., 338 F.3d 730 (7th Cir. 2003) (applying defense of laches to bar plaintiff's Title VII claim where plaintiff engaged in inexcusable delay in pursuing state employment process for eight and a half years before terminating state process and filing with the EEOC).

[21] 42 U.S.C. § 2000e-5(g)(1) (2000) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. ").

[22] See, e.g., Forsythe v. Fed'n Empl. & Guidance Serv., 409 F.3d 565 (2d Cir. 2005); Cardenas v. Massey, 269 F.3d 251 (3d Cir. 2001); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994); Merrill v. S. Methodist Univ., 806 F.2d 600 (5th Cir. 1986); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995) (en banc); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396 (9th Cir. 1986); Goodwin v. GMC, 275 F.3d 1005 (10th Cir. 2002); Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005); Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999).

[23] 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, and n. 183 (2006). See also Slip Opinion at 14-15 (Ginsburg, J., dissenting) (citing EEOC administrative rulings and litigation positions permitting employees to challenge any discriminatory paychecks received within the limitations period).

[24] See, e.g., Bierman & Gely, supra note 7, at 177-78 (noting that employee efforts to find out their colleagues' salaries tend to generate conflict among employees and undermine workplace morale).

[25] 29 U.S.C. § 206(d)(1).

[26] See County of Washington v. Gunther, 452 U.S. 161 (1981) (in Title VII suit by women hired to guard female prisoners, challenging county's practice of paying them less than men hired to guard male prisoners, plaintiffs could proceed with their suit even though differences in jobs foreclosed a violation of the Equal Pay Act since they alleged intentional discrimination in the setting of salaries).

[27] See Katharine T. Bartlett & Deborah L. Rhode, GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY 50 (4th ed. 2006) ("Successful Equal Pay Act cases, however, are relatively rare, particularly in cases involving upper-level employees. The main problem with administrative and executive positions is the difficulty of finding a close enough comparison employee. ").

[28] 490 U.S. 900 (1989).

[29] Id. at 908-09.

[30] 42 U.S.C. § 2000e-5(e)(2) (2000).

[31] See 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) ("This legislation should be interpreted as disapproving the extension of this decision rule [in Lorance] to contexts outside of seniority systems. ").

[32] Civil Rights Act of 1990, S. Rep. No. 101-315, at 54 (1990).

[33] Slip Opinion at 12 (Ginsburg, J., dissenting).

[34] Id. at 16-17.

[35] The limit for smaller employers is even lower, set at $50,000 for employers with 15-100 employees, $100,000 for employers with 101-200 employees, $200,000 for employers with between 200 and 500 employees, and $300,000 for all employers with more than 500 employees.

Chairman MILLER. Thank you very much.

And thank you all for your testimony.

Mr. Mollen, so your theory is that workers sit back and they calculate this and they calculate the level of discrimination, and then at some point they make a decision to strike and file a suit?

Mr. MOLLEN. Well, I think, Mr. Chairman, that there are certainly some that do. I think that most do not.

I think, though, that the lesson to take from Ledbetter is that the process Congress devised works reasonably well when individuals go first to the employer and ask a simple question. I mean, I think that common sense tells you that is probably the first place to go.

Chairman MILLER. Mr. Mollen, that is not a simple question in a lot of workplaces.

Mr. MOLLEN. That may be true, Mr. Chairman. And I am not saying that it would work in every instance. But I do think most employers would be receptive, particularly when we are talking about relatively small differences in pay, that a question to the employer in the vast majority of circumstances is going to be received and acted upon in some manner. It may not be ultimately to the satisfaction of the employee——

Chairman MILLER. You know, when you look at some of the other court documents that were filed in Ms. Ledbetter's case—and we are not here to try the case—but when you look at it, this didn't look like the friendliest workplace for women that you might walk into.

And, you know, I find it kind of interesting that the defense is, not knowing whether I am going to get hit by a truck tomorrow, whether I am going to die of cancer, whether I am going to get fired or anything else that is going to happen to my family, I am going to calculate to take a couple hundred dollars a week less because someday I can strike and get the mother lode. And I got a 2-year limitation on what I can recover.

I mean, we know we all need more sort of financial education, economic education, but that one doesn't quite make sense to me.

Mr. MOLLEN. Well, first of all, Mr. Chairman, the limitation of 2 years only applies to back pay. Liability can extend, under the paycheck rule, back into the dim, dark recesses of time. What I am suggesting, it may not——

Chairman MILLER. But in this case, it only went to 2 years.

Mr. MOLLEN. Well, of back pay, but there were also compensatory——

Chairman MILLER. Yes, right. Right. So this calculation that you have Ms. Ledbetter making over a period of 8 or 9 years doesn't make sense.

Mr. MOLLEN. I am sorry, Mr. Chairman. Perhaps I was misunderstood. What I meant to say, what I meant to point out, was that the undisputed, I believe, testimony at trial was that, as early as 1992, Ms. Ledbetter testified that she believed that she was the victim of discrimination, and that a couple of years——

Chairman MILLER. That may very well be accurate. Whether you can act on that belief or not is open to question.

Mr. MOLLEN. At that point, Mr. Chairman, the statute requires that individuals take their claim to the EEOC and begin the investigative and conciliatory processes that that statute contemplates.

Chairman MILLER. Ms. Brake, is this, sort of, the ordinary behavior of people?

Ms. BRAKE. I don't believe so, Mr. Chairman.

And if it is not out of order, I would like to respond to something that Mr. Mollen had said about the incentive schemes here. Mr. Mollen said that the incentive here is for the employee to quickly go to the employer and try to work it out.

Emphatically, after the Ledbetter rule, that is not the incentive of an employee. In fact, an employee, after Ledbetter, is under time pressure at both ends of the clock because Ledbetter says, "Complain right away. You are going to lose your right to ever do so if you wait more than 180 days." But at the other side of the clock is a decision that I have explained in my written testimony, known as the Breeden decision, which says, if you complain too soon, and you are retaliated against, you could be fired with no legal recourse.

If you complain too soon before you have a reasonable foundation of proving a discrimination claim, if your employer retaliates against you, you are out of luck under Title VII laws.

The only way out of that dilemma is to go straight to the EEOC. Don't say a word to your employer, or else you are at risk for too soon opposing perceived discrimination without enough of a foundation to prove it.

So, in fact, the incentive is not conciliation. The incentive is formal, adversarial, file with the EEOC—an already backlogged, overburdened agency.

And that is why I say, in the long run, I think some forward-looking general counsel of employers have said, "We are not sure we like this rule."

Chairman MILLER. Mr. Henderson?

Mr. HENDERSON. Mr. Chairman, I am, of course, not surprised that the Chamber of Commerce would support the court's cramped interpretation of Title VII. I am surprised, however, that the characterization of the traditional culture, customs and practices of the workplace would be distorted in the manner that we have heard here today.

And here is what I mean: It is quite clear that a process of conciliation and voluntary compliance can work where there is transparency on the part of employers with regard to crucial information that allows employees to make these decisions.

As you pointed out, Ms. Ledbetter worked in an environment that was a male-dominated environment, that was not necessarily the most conducive to allowing women to achieve their full potential in the workplace.

To assume that such an environment would encourage the kind of challenge to employer practices that Mr. Mollen's scenario would suggest, it seems to me it is a bit unrealistic.

Certainly, while Ms. Ledbetter may have had some inkling that she was not being treated fairly in the workplace, no employee who seeks to hold onto a job, a supervisory job in an area of responsi-

bility, is going to openly confront an employer without adequate information about the practices that they are challenging.

And to recognize that the company does not maintain the kind of transparency that would be necessary to do that, it seems to me it is disingenuous to suggest that employees can assume that burden and carry it out effectively. That is really the purpose of trying to restructure the playing field after Ledbetter.

Chairman MILLER. Ms. Ledbetter, do you have a comment?

Ms. LEDBETTER. Yes, sir. Yes, sir, I do.

What Mr. Mollen said would be all and well good if your employer would listen. I went to them, my superior, my immediate boss, on numerous occasions, and even during evaluations. When I would get one, I would ask, "How do I rank, even with my peers?" I was not even told if I ranked A, B, C, D or E.

Only occasionally did they tell me that I was on the bottom when I would pursue asking about a raise. I never knew. There were many years that I did not even know when Goodyear adjusted their minimum and maximum on pay structure for area managers. I didn't even know what the minimum and the maximum was. And oftentimes, when I did find out what the minimum was, I would learn that I am way below it.

And it is just not a practical suggestion to say, "Go to your employer." For example, at that particular time, I had two children in college, which I was paying their tuition and their living expenses. And if I went to my employer and really made a fuss, I would lose my job, and there was no doubt about it.

And there were only two other women in that workforce, in the area managers during that time. One was in the same boat I was. She was a divorced mother with a handicapped child, and she was afraid to ask for a raise because they would dismiss her or move her somewhere that she would have to quit, which later she did. She later sold her service and left the company, and she testified at my trial.

Also, there was another lady who had worked for the company for a lot of years. And she was an area manager, and she asked to be in a secretary's position while her children were small. Later, they asked her to go back to being an area manager, and she did. But they did not raise her pay. And she went to the plant manager's office and asked for a raise. And they never gave her one. In fact, the plant manager said emphatically, "We are not going to give you any more money." She said, "In that case, I will go back to being a secretary." And she testified at my trial.

And the women just didn't have the opportunities that they should. And there may be some companies that will listen, but the people that I worked for would not. And I needed my job. And I needed to support my family.

Chairman MILLER. Thank you.

Mr. McKeon?

Mr. MCKEON. Thank you, Mr. Chairman.

Mr. Mollen, would you like to respond to any of those last three comments?

Mr. MOLLEN. Thank you, Congressman McKeon.

I certainly would not contend that every employer in the United States is hospitable to a complaint of discrimination, and I didn't

mean to suggest that they were. I do think that the vast majority of employers, when approached about something like that, ultimately it may not work out to the satisfaction of the employee, but I think that they would be receptive to the concern.

But that is what the EEOC is there for. The process that Congress envisioned was to receive a claim from a disappointed employee and investigate it on behalf of that employee, to go to the employer, ask the employer for the comparative pay information that the employee doesn't have access to, and that once that material is received, once that information has been digested, the parties sit down with an agent of the EEOC and they attempt to work things out.

It usually works, not always. And when it doesn't work out, Title VII has teeth. There is a private course of action. The disappointed individual can take it to court.

But I think that some of the critics of Ledbetter see this as a litigation-only process. And I think when a chairman asks a table full of lawyers about the right response, and the response is, "Well, people are going to sue; people are going to sue immediately"—to those who only have a hammer, everything looks like a nail. Every lawyer thinks that the only solution is to file a lawsuit. I really think that that is a vast overstatement of the consequence of the Ledbetter decision.

Mr. MCKEON. Thank you.

You know, in listening to the testimony, in listening to Ms. Ledbetter, it sounds like to me there was pretty evident discrimination.

But what I am trying to understand here is—and I am not a lawyer. So I am sure I don't understand all the nuances of the law. But it seems to me that the court's duty is to read the law and rule on the law.

Is it not in the law that you have 180 days to file a complaint? Are there different feelings on that?

Mr. HENDERSON. May I respond, Mr. McKeon?

Mr. MCKEON. Sure.

Mr. HENDERSON. That is certainly a correct statement, in as far as it goes, although let me back up for just a minute.

Mr. Mollen began his remarks by suggesting that Congress constructed a system with Title VII that supported efforts of voluntary compliance, conciliation and mediation.

Nothing that we have suggested here today would suggest that we oppose that. In fact, we embrace it. We think that it would be wonderful if employee complaints and grievances were resolved in a way that could be worked out without litigation in some instances.

The problem in this instance, though, is that the Ledbetter decision in the Supreme Court has created a rule that insulates employers from the very acts that we are seeking to challenge. Employers are encouraged, by virtue of this decision, to withhold information that might enable an employee who has a grievance to determine the legitimacy of the charge that they seek to bring.

Mr. MCKEON. I understand. We are going to have to try to sift through this. But can I get back to the basic question? Is the law that you are required to file your grievance within 180 days?

Mr. HENDERSON. But interpreted in the following manner: It depends on when your grievance occurs. You are correct in assuming that you are required to do it in 180 days. But if, in fact——

Mr. MCKEON. I am just trying to clarify——

Mr. HENDERSON. No, no, I understand.

Mr. MCKEON. [continuing]. What the current law is. Because I understand our job here is to write the laws. And I think we can probably find problems with about every law we write, which is then discussed in the courts and refined. And then, I guess, we have reauthorizations which we go back and do.

But I just want to know, is there agreement that the law states that you must file your claim within 180 days?

Mr. HENDERSON. It depends on when the grievance occurs.

Ms. BRAKE. Mr. McKeon, if I might——

Mr. MCKEON. There might be some differences as to when it occurs, but does the law state that it is 180 days from when you file your——

Ms. BRAKE. Mr. McKeon, it is from the unlawful employment practice. And until this Ledbetter decision, a 1986 Supreme Court decision had said the unlawful practice happens when each discriminatory paycheck pays someone less because of race. That was the court's determination.

Mr. MCKEON. And whenever that is done, is it 180 days that you have——

Ms. BRAKE. Yes. And that is the rule we are arguing for here: When the discriminatory paycheck pays someone less on the basis of race, sex or any other Title VII practice, that is when the clock should start ticking. That is the rule the EEOC has applied.

Mr. MCKEON. I guess this is why we have a 5-4 decision rather than a 9-0 decision, because when you have nine lawyers in a room, the best you can hope for is maybe 6-3, and then when you throw in politics and other problems with it, it gets tougher.

But——

Mr. MOLLEN. If I can, Congressman McKeon, it actually is——

Mr. MCKEON. My time has run out. But the chairman went a little bit over.

Will you indulge——

Chairman MILLER. Go ahead, Mr. Mollen.

Mr. MOLLEN. Just a point of clarification. It is actually 300 days for the vast majority of American employees.

Mr. MCKEON. That was going to be my next question, 180 to 300. I was trying to get to 180.

Mr. MOLLEN. It is only 180 days in a very small number of jurisdictions in which there are no state fair employment practice agencies.

Mr. MCKEON. See, I think we could probably argue—and probably what we should be talking about is, is this correct? Should we be extending that? Should we be changing that law? Should we make it more definitive? You know, that is what I think we should really be——

Chairman MILLER. This and other questions will be answered when we return from a vote. We have a vote on now. We are going to be gone about 20, 25 minutes, unfortunately.

I think that includes—yes, because we are about out of time on this vote. So put on your running shoes.

We will be right back. Thank you.

[Recess.]

Chairman MILLER. The committee is going to go ahead and reconvene. I don't want to keep witnesses longer than we have to.

And we will begin with Mr. Andrews.

We will let you get back in your chairs, though, before he starts asking you questions.

Mr. Andrews is recognized for 5 minutes.

Mr. ANDREWS. Thank you, Mr. Chairman.

I thank the witnesses for their testimony, as well.

Mr. Mollen, I wanted to ask you about the Chamber's position embracing this decision and ask you the following question: Let's assume that we have an employee who has worked at a place for a couple years and everything seems to be reasonably all right.

And on January 2nd, she gets her employment evaluation. The employer says, "You know, you are struggling a little bit. You are not doing very well. So no raise this year."

And the company has a policy, which indicates that the company does not disclose the compensation of other employees to a given employee. And, further, the company has a policy which prohibits employees from asking each other how much they make. And this individual honors that policy. She doesn't ask any of her coworkers what they make. And she doesn't hear it from the employer.

She goes on, and she is at an event on July 10th—this is in a 180-day state. This is an event on July 10th, outside the 180 days. She is at a retirement dinner for one of the fellow employees. And the employees, they have a couple drinks after the dinner. And the employee says, "Listen, I have always liked you. And I wonder why you stay here." And she says, "What do you mean?" The employee says, "Well, you know, you are only making, like, three-quarters of what everybody else is. You are only making three-quarters of what all the men are in your job."

Should her claim be outside the statute of limitations?

Mr. MOLLEN. I think that if I understand the hypothetical correctly, I think it is quite likely that when that claim gets to court, the court will say that equitable tolling applies, because the employer's policy that prohibits employees from discussing their compensation is likely unlawful.

Mr. ANDREWS. Is there any authority which says that equitable tolling extends to that kind of case?

What you said in your written testimony is that tolling takes place if the employer has affirmatively acted to bar information from these employees. What if—and I think it is common—what if an employer says in their employee handbook, "Look, it just promotes disharmony in the workplace. We just don't want people talking about this"? Is that an affirmative action that would bring in equitable tolling?

Mr. MOLLEN. Congressman Andrews, I wish I could give you a case name right now. But I think it is quite likely that a court would say that an affirmative rule that prohibits employees from discussing that kind of information——

Mr. ANDREWS. But, no, no, that is not what it says. The employee handbook says, "In the interest of harmony, it is our practice not to talk about each other's compensation." It doesn't say you get fired if you do it; they are not that stupid. But it says, "We discourage people from doing that."

Or, if this woman were your client and said, "Well, I assume I can file my claim, right, because it has been equitably tolled," do you think she is able to get passed the statute of limitations?

Mr. MOLLEN. As I say, I believe that it is likely that she would.

Mr. ANDREWS. What if the employee handbook is silent about this?

Mr. MOLLEN. Closer question.

Mr. ANDREWS. Okay. Now, let me ask you not what the law is, but what it should be: Do you think that is a just result? If the court were to come out and say, "Well, the employee handbook is silent, and so there is no equitable tolling in the statute of limitations," do you think that is a fair result?

Mr. MOLLEN. Well, I think that if the employee has an inkling that——

Mr. ANDREWS. She has no inkling.

Mr. MOLLEN. I am sorry?

Mr. ANDREWS. This employee has no inkling. As a matter of fact, she understands, because around the workplace, people start asking around about the management of the company are kind of frowned on. So she just goes to her job every day, does her job.

Do you think that is a just result?

Mr. MOLLEN. Well, I think, Congressman Andrews, that you have put your finger on a question that was noted by the court in Ledbetter——

Mr. ANDREWS. I am not talking about Ms. Ledbetter's case. I am asking the Chamber's position on whether that is a just result or unjust.

Mr. MOLLEN. You know what? I would have to discuss the Chamber's decision with the Chamber.

Mr. ANDREWS. What is your position? Do you personally think it is just or unjust?

Mr. MOLLEN. I think that it is just to have a rule that requires a charging party or the employee to act promptly with dispatch when the facts are such that the employee has a reason to file a charge.

Mr. ANDREWS. In my fact pattern, does the employee have any reason to file a charge?

Mr. MOLLEN. It is very difficult to tell on the sparse facts that you have given me. I mean, it is really hard for me to say——

Mr. ANDREWS. But on the facts that I have given you—I have made it real complicated. On those facts, do you think the employee has an inkling that would justify filing an EEOC claim and get past the barrier of the Breeden case to have a reasonable grounds to do that?

Mr. MOLLEN. The Breeden case was an entirely different question.

Mr. ANDREWS. Would you answer my question? Do you think it is a just result or not?

Mr. MOLLEN. I can't answer your question in the context of Breeden because it was a retaliation——

Mr. ANDREWS. Can you answer in the context of my facts that I gave you? Is it just or unjust? What do you think?

Mr. MOLLEN. What I think is that, if I were in your seat, I would want to study that issue more closely. I don't make policy decisions.

Mr. ANDREWS. No, but you are a citizen and a voter. What do you think? Do you think that is a just result or not?

Mr. MOLLEN. If the facts are that this individual has absolutely no way of knowing that an adverse employment action has occurred——

Mr. ANDREWS. Right.

Mr. MOLLEN. [continuing]. I would say that it was likely that a result that denied that individual the right to file a charge would be—I wouldn't be comfortable with that.

Mr. ANDREWS. So you think it is unjust.

So then, okay, then the question becomes, how much information does the employee have to have before they have this inkling? How much do they have to have?

I mean, in Breeden what happened, if I recall, is that a woman is at a meeting and there are some inappropriate sexual references made in a joke at the meeting, and she files a complaint, and she is punished for filing the complaint. And the Supreme Court says that is not an inkling, that is not enough, that she doesn't have a reasonable basis, so she is not protected by whistleblower.

How much is enough?

Chairman MILLER. My apologies for the microphones. They are working on them.

Mr. MOLLEN. I don't know how to answer that question, Congressman. There is no commonly accepted——

Mr. ANDREWS. That is right. And, Mr. Mollen, that is exactly my point. I don't know how to answer it, and millions of employees around the country don't know how to answer it either.

But now they have to live under it, because—yes, they do—because if they don't game the system correct on the timing, and if they wait too long beyond this 180 days and just take an educated guess that they got an inkling and they are not protected by the Breeden decision, they get fired and they have no protection.

So if you can't figure it out, you are an expert, how is some employee supposed to figure it out?

Chairman MILLER. Ten seconds or less.

Mr. MOLLEN. Congressman, I don't believe that that is an accurate characterization of Breeden or the plight that this employee would be in. Breeden was the specific context of a harassment claim. Harassment claims are serial violations, and with one joke, no reasonable individual——

Mr. ANDREWS. I would say that so is giving someone a paycheck every week that results from discrimination is serial violation.

Chairman MILLER. The gentleman's time has expired. We are going to have to continue this discussion elsewhere.

Mr. Keller?

Mr. KELLER. Thank you, Mr. Chairman.

Chairman MILLER. If anybody who is not speaking, if you would turn your mikes off, let's see if that——

Mr. KELLER. All right.

Mr. Mollen, you testified that, in your view, if Congress adopted a paycheck rule, then every charge of discrimination, be it demotion, promotion, transfer or otherwise, would become a paycheck case.

Can you expand on that, please, and explain to me in greater detail what your concern is here?

Mr. MOLLEN. I would be happy to, Congressman. The problem is that the vast majority of adverse employment actions about which an individual can file a charge have economic consequences.

In this case, what Ms. Ledbetter's complaint really centered around, the contents of her evaluation, those evaluations had downstream economic consequences. And it was those consequences that led her to argue that the paycheck rule also applied.

But there are economic consequences to a denied promotion. Every paycheck that doesn't reflect the amount of the increased responsibility, increased pay that comes with the promotion also has the same feature that was identified by Ms. Ledbetter.

Chairman MILLER. My apologies. I am going to interrupt you here. I am told that we have to turn the mikes off and reboot them, which is not going to be helpful to the recording of this, but if we will all just turn our mikes off for a minute and then I can tell you when——

[Audio gap.]

Chairman MILLER. The good news is the mikes are back on. The bad news is they are only on for the members of Congress. [Laughter.]

Mr. Marchant, you are recognized for 5 minutes.

Mr. MARCHANT. Thank you, Mr. Chairman.

Mr. Mollen, are there any additional comments you would like to make about the previous question?

Mr. MOLLEN. Yes, there are. [Off-mike] to testify that he never asked her out, that this never happened, and that there was a bona fide reason for the evaluations that he gave.

Pay disparities do not yield necessarily intentional discrimination. And so the fact that a payroll record would show that Ms. Ledbetter makes less than her peers does not mean that there was discrimination or that there was a violation of Title VII.

It is merely a distinction. It may be a distinction that is worth investigating, that the EEOC would want to ask questions about. But it does not yield a violation of the statute.

And I think it is very important to keep in mind the limitation of the Ledbetter decision. It does not apply to adverse impact cases, because there you are talking about the application of a rule or a policy that has an adverse impact on members of a protected class. That sort of case has a very different sort of limitations period.

Mr. MARCHANT. We have heard testimony this afternoon that the deadline for filing a charge is 180 days, and that is unreasonably short.

Comments about that, Mr. Mollen?

Mr. MOLLEN. Well, first of all, for most individuals it is 300 days, not 180 days. When Congress devised Title VII, it said that in those states that established a fair employment practice agency that meets certain criteria, the limitations period would be 300

days to file a charge with the EEOC. But in those states that have no such agency, it would be 180.

At the time Congress, of course, could not know how many states would create such agencies. Well, as a practical matter, most states have them. The vast majority of Americans work in states where those agencies exist. So, in reality, it is closer to a year.

But I think that the nut here is whether Congress made the correct judgment when they passed Title VII that these are claims that need to be dealt with with dispatch. Congress advisedly selected a brief limitations period; whether it is 180 days or 300 days, that is a relatively brief period. Congress selected that advisedly. And they did so because these are the kinds of disputes that need to be dealt with with dispatch.

The paycheck rule says not only do they not have to be dealt with with dispatch, but they can wait until the end of the career. And that is fundamentally unfair to the employer, who is put to the task of reconstructing why a decision made in 1979 when an individual was hired was made.

And that is the fundamental bedrock fairness that is represented by the Ledbetter decision and the patent unfairness that the paycheck rule presents.

Mr. MARCHANT. Does the 300 days meet the reasonable dispatch rule?

Mr. MOLLEN. I believe it does.

Mr. MARCHANT. But would you say that the 180 days does?

Mr. MOLLEN. I am speaking only for myself now. I think that you could make a rational argument that the 180-day rule is perhaps too brief. I believe that many employers would either acquiesce or may even support a move from 180 days to 300 days. You know, I haven't taken a canvass, I couldn't tell you.

But I think that most employers have accommodated themselves to the fact that in most instances the limitations period for Title VII is 300 days. Ms. Ledbetter happened to be working in one of the few states that doesn't have a fair employment practices agency, and so she was subjected to the shorter rule.

And I think that that is something that deserves some study, whether that distinction continues to be rational or realistic.

Mr. MARCHANT. Mr. Chairman, I yield back my time.

Chairman MILLER. Thank you.

Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

I agree with Mr. Henderson, and I agree with Professor Brake. This decision just doesn't make sense in the real world.

I was a human resources professional for 20 years, and while you were going on and talking about some of the evidence that Ms. Ledbetter—in her evaluations, the least productive of all of her colleagues, 79 others did better than she. I can't in all my life understand why would an employer keep an employee that was at the bottom—a management employee, a widget maker, any employee?

So you have to ask yourself that question, because that management did not consider Ms. Ledbetter the bottom. They just put her there so they could pay her less, and we know it, or could say that.

And when we say nobody knew that Ms. Ledbetter earned far less than her male counterparts—uh-huh, her managers knew.

Their managers knew. It was not a secret in that company. Shame on them. Shame on the Supreme Court. And shame on us if we don't do something about it.

So I would like, Professor Brake, if Congress doesn't fix the Ledbetter decision, what advice would you give a woman seeking to bring a claim of unequal pay?

Ms. BRAKE. Well, it is an excellent question, Congresswoman, because, frankly, as a lawyer, I would have to advise employees that they truly are in a bind in many respects. Again, complaining too soon, especially if you start out in a conciliatory way, going through your employer's internal grievance process, leaves you at great risk. So that is the frank reality.

Now, Mr. Mollen talks about the Breeden decision and says it is limited to harassment. I am afraid it is not limited to harassment. I have done a lot of research on how the lower courts apply the Breeden standard, and I have written a very lengthy article about retaliation and how that standard is applied. It is applied across the board to any type of discrimination.

If you complain internally, without going to the EEOC, too soon, without a reasonable foundation for proving your case, and if you are unlucky enough to experience retaliation, you have no legal recourse.

I would have to advise the woman that. And so, I would have to advise her, then, that inasmuch as it might make you persona non grata with your employer for all time, file with the EEOC. Are they going to pay attention to it? Possibly not, if it is too early to have any evidence.

If you have the slightest suspicion, though, and I mean the slightest suspicion, Ledbetter forces you to file immediately.

Of course, the great difficulty with Ledbetter is the question that a number of the congressmen were getting at: How do you know when a reasonable person should know that they have experienced pay discrimination?

And the reason, I think, that Mr. Mollen and the rest of us have such difficulty talking about, well, what would the lower courts do, is they have never had to decide before. They have never have to decide before if there even is a discovery rule for pay claims, because across the country, until this very decision, we had the paycheck accrual rule. The EEOC applied it. If you had any discriminatory paycheck within the limitations period, you were not time-barred. And that is why we don't have a lot of case law on how the discovery rule would apply to pay claims.

Now, I will say, the case law that I have studied that has equitable tolling and the discovery rule in other contexts does not give me great comfort. In many jurisdictions, short of active concealment—that is, fraudulent behavior on the part of an employer, lying to the employee—short of active concealment, the clock starts ticking from the time you know of your injury, not from the time you might know of discrimination. That is not a good rule for employees.

So in all honesty, it is very hard to advise a woman, because the options are few and far between, unless she has perfect knowledge. And it is almost never the case that an employee has perfect knowledge going to a pay claim.

Ms. WOOLSEY. Well, thank you.

And, Mr. Henderson, given the environment of that employer, the environment of that business, given that, probably, I am sure, Ms. Ledbetter wasn't able to get any information from her male colleagues on what they earned, why would they risk their jobs to tell her what they earned? How in the world does Mr. Mollen, do you think, think that she should have gone into the payroll office and asked for the payroll?

Mr. HENDERSON. That is a question, Ms. Woolsey, that I can't honestly answer.

I thought Mr. Hare raised a question in his presentation about a utopian vision of how employers and employees coexist in the workplace. Realistically, of course, I wish it were true. It is not.

And I think that the context in which Ms. Ledbetter talked about her case is a great example. She was one of three women, as I mentioned before, working to hold onto a job under great difficulty. This is a woman who obviously had concerns.

And as Mr. Mollen himself properly pointed out, we are talking an instance here of intentional discrimination, where a spurned supervisor decides to, if you will, retaliate by setting a lower level of wage compensation for this employee.

She is in turn then forced to do one of two things. And under the Ledbetter rule, she is forced at the immediate speculation that she may have been treated unfairly to file a charge with an agency—in this instance, EEOC—that is incapable of handling the volume of cases they get now, much less the surge that may come in a post-Ledbetter period. It is unrealistic.

And what it seems to us to have done—and this, perhaps, was unintentional on the part of the court—but it provides even further insulation for employers who may have been inclined at one point to do the right thing, but now see that the cost of doing business is better protected when they withhold essential information that might otherwise give an employee the kind of knowledge they need to file a genuine case.

That is not what Congress intended. The paycheck accrual rule has been in place now for almost 20 years. It does seem to have become an established custom and practice of the business community. While it may have been challenged on the part of a few employers, Congress has never been confronted year after year after year with bills introduced for purposes of repealing that rule to establish a rule now articulated under the Ledbetter case.

What we are saying is that the business community had come to accept this, even though obviously they were not entirely happy with some of its consequences.

But the businesses, the employers, have all of the advantages. For the most part, they have all of the advantages. They have the information, they have the evaluations that they make of employees, and they have the context of being able to use both official rules and informal practices to reaffirm their posture.

I think it is unfair to ask anyone like Ms. Ledbetter to take on that kind of challenge. She is courageous enough to have filed a complaint. I think it is unrealistic to expect employees to do more under these circumstances.

Ms. WOOLSEY. Thank you.

Mr. WU [presiding]. The gentlelady's time has expired.

Mr. Davis is recognized for 5 minutes.

Mr. DAVIS OF TENNESSEE. Thank you, Mr. Chairman.

Mr. Mollen, would you like to respond to anything you have just heard, with the employers having all the advantages or any of the last comments?

Mr. MOLLEN. Thank you, Congressman.

They have none of the advantages in a litigation structure in which the individual making the charge can wait for years or decades to make allegations of discrimination.

I would hope that we could all agree that it would be unfair to have a system in which there effectively was no limitations period. That is what the paycheck rule means.

In the compensation area—and as I testified earlier, what is a compensation case is very dicey, because of the economic consequences of nearly every adverse employment action.

But what this rule would hold is that every time a paycheck is issued it renews the limitations period. That means that there is effectively no limitations period and an employer can be called upon to defend a decision by managers who haven't worked there in years, have retired, died, moved away, records have been destroyed.

I mean, the EEOC only requires that employers keep papers of this sort, records of this sort for a year, unless there has been a charge of discrimination. Once the charge of discrimination has been filed, the employer is obligated to keep those records until the matter is resolved.

So once the charge is on file, both parties will have access to the information necessary to sort things out. When the charge isn't filed, when the charge is delayed in this fashion, the employer is at a distinct disadvantage.

Mr. DAVIS OF TENNESSEE. Thank you.

We have heard a number of times today that employers are promulgating rules to prohibit rank-and-file employees from discussing their pay, their wages and other benefits with one another.

But it is my understanding that it is already prohibited by law, specifically under the National Labor Relations Act. Is that correct?

Mr. MOLLEN. That is correct, Congressman. It is unlawful specifically for an employer to have a rule that prohibits employees from engaging in concerted activity. The National Labor Relations Board has consistently interpreted that to mean that you can't have a rule that prohibits employees from discussing their pay.

Mr. DAVIS OF TENNESSEE. We have also heard testimony today that employers may be actively misleading employees or keeping the facts from them. And that is unfair, to bar his or her suit, if the employer kept in the dark, as it were. What is your response to that?

Mr. MOLLEN. I agree completely. It is unfair to deny someone the opportunity to litigate a case in those circumstances.

But there already is an existing doctrine of law that permits district courts to protect plaintiffs who have been subjected to that kind of treatment by their employer. We had some testimony about that earlier.

That sort of equitable tolling occurs with some regularity—not all the time. It doesn't happen all that commonly because employers don't engage in that kind of conduct very often, thankfully. But when that conduct does occur, courts are empowered to deal with it.

Mr. DAVIS OF TENNESSEE. Do you think the Supreme Court dealt with this issue in the Ledbetter case?

Mr. MOLLEN. Well, the Supreme Court did not deal with tolling. It did not deal with the discovery rule. Because those issues weren't before the court.

But one issue that was before the court was an individual who knew from 1992 on that there was a pay disparity and didn't file a charge until 1998. On those facts, the decision of the court seems unexceptional to me. And, in fact, I don't know how it could have come out any different.

Mr. DAVIS OF TENNESSEE. Thank you. I yield back.

Mr. MOLLEN. Thank you, Congressman.

Mr. WU. The gentleman's time——

Ms. LEDBETTER. May I respond?

Mr. WU. Yes. No, Ms. Ledbetter, please do respond.

Ms. LEDBETTER. Number one, to let Mr. Mollen know that he needs to look at the trial transcript again. I was not asked out on a date. I was told to go over to the local motel and I would be rated number one, or I would go to the bottom of the list. I politely got up, excused myself and left the office.

The next day when I went back to talk with my employer, the same man who did the bad evaluations later down the line; he wouldn't talk to me. He refused to talk to me, shut the door, said, "You had your chance."

Now, he is the same one who evaluated me. Prior to the last evaluation that I got, he was the auditor on the floor.

Now, at trial I don't believe that I remember that their lawyers asked for any opportunity to do anything about him being deceased. But he was alive when I filed my charge. And when I filed my charge, Goodyear was required by law to keep all of those records. But at trial, they could not produce not one record.

I have one other point that I would like—I beg your pardon—I need to clear up. They keep talking, some people do, about why I didn't file a charge and why did I wait until the last minute.

It would have benefited me, early 1980s, to have had a good raise and been up there. Because we area managers at Goodyear were paid time-and-a-half, double-time and triple-time, if it so warranted. I would have been making a lot more money in those days, when I had two children in college and I was a married woman and I did not want any motel dates with my supervisor.

Also, the EEOC—I had gone, early on, to them, when I really suspected that I was being paid less. But I didn't have anything to prove it, and they couldn't help me.

But then they told me that, if I would get one other person to sign for an investigation into Goodyear's pay system, that they would come in and do a full-fledged audit.

I could not get anyone to sign because it took two signatures, is what I was told, to get the audit. And the other female said, "I must have my job." And I said, "Well, we don't have to reveal our

name. EEOC won't." She said, "You know Goodyear will know who filed the charge, and they will retaliate against us, and we will be sorry."

I filed a charge in the early 1980s, when all this other sexual harassment started. I didn't want to, but I got pushed in a corner and I didn't have any choice to keep my job. And when I filed that charge, I paid for it for the next 17 years of my career.

Thank you. I appreciate it.

Mr. WU. Thank you, Ms. Ledbetter.

And as temporary chair, I am going to exercise one small prerogative which will guarantee that Chairman Miller will never let me sit here again. [Laughter.]

And without prejudice to all the principled employers out there—and there are a lot of principled employers—Ms. Ledbetter, let me say to you that I think that it takes a lot of courage to be in your position, to have taken the position that you have.

And I am going to ask Mr. Henderson, Ms. Mollen and Professor Brake to comment. In my days of practice, we sometimes represented employers and sometimes represented employees, which kind of meant that we were not very good at this particular area of law. [Laughter.]

But, Ms. Ledbetter, I do admire your courage, because the advice that we typically gave an employee who was thinking about bringing legal action was, "Think about this very, very carefully. And it is highly likely that if you do bring this claim, you will not be working for this employer, you will not be working for any employer in this particular field. And there will be a broad crater. In essence, you will be looking for a new career."

So, I do admire your courage, Ms. Ledbetter.

Mr. Henderson, was our advice, way back when, good, bad or indifferent, in terms of the cautionary aspects of that advice?

Mr. HENDERSON. Mr. Chairman, I think it is wise, always, to provide prospective employees, and in this instance employers as well, about cautions necessary to encourage a workplace in which both employers and employees are treated with fairness.

Title VII is over 40 years old, Mr. Chairman. It has helped to create a regime which, indeed, has encouraged a level of activity within the marketplace that has both encouraged employers to do the right thing. And, certainly, from the perspective of an advocate of the civil rights community, we don't condemn all employers. We, in fact, believe that many employers would like to follow the rules. And I think there is much evidence to suggest that.

But there are instances where the playing field is still dramatically not leveled. I think what Ms. Ledbetter has done is shown a light, if you will, on one aspect of our employment practice that we thought had been settled.

I think Professor Brake talked about the paycheck accrual rule that has been in place now for about 20 years. That certainly had established a level of expectation on behalf of both employees and employers. The Ledbetter decision has now unsettled it; it has turned it on its head. And it has put employees at a dramatic, profound disadvantage.

And I think circumstances like those of Ms. Ledbetter are likely to be repeated time and again, not by employers who are prepared

to honor every aspect of the employment practice, including, again, of practices in the breach, but employers who, rather, are seeking to cut corners, are seeking not to monitor the effective staff behavior that we think is important, will certainly use the Ledbetter decision to worsen that.

And without Congress making some requirement that employers have an obligation to make compensation information transparent and readily available to employees, it will be virtually impossible to root out the long-term problems that I think the Ledbetter decision has encouraged.

It is an employer protection act that creates a practice that does not work to the advantage of a marketplace that is governed by a set of rules and expectations that we think are important.

So I think your cautions are well-taken.

Mr. WU. Mr. Mollen, was our advice good, bad or indifferent?

Mr. MOLLEN. I think it is always good advice to tell someone contemplating litigation that they should think long and hard about it.

I also think that you would have to be blind not to see that retaliation cases do happen, that employers do sometimes retaliate. I think there would be disagreement, perhaps, at this table about the regularity with which it happens. I happen to believe that the vast majority of employers want to comply with the statute and treat these issues very sensitively and very fairly.

But I think that it proves too much to say that we have to eliminate the limitations period in pay cases because there is a potential for retaliation. Retaliation is unlawful. Congress has made it so. It has made it subject to punitive and compensatory damages.

We have to trust in the process that Congress created to work. The answer to the problem is not to say that we should allow an individual to file a suit years or decades later because we can't expect them to do otherwise because of the fear of retaliation. This issue has come up repeatedly in litigation in every circuit, and in every circuit it has been repudiated. One has to trust in the mechanism that Congress invented.

By and large, I would say that that mechanism has worked extraordinarily well, and that employees and employers are both well-served by it. But I don't believe that it is any answer to say that we have to abolish the limitations rule that is present in Title VII and in every other context that Congress legislates in simply because the potential for retaliation exists.

Mr. WU. Professor Brake, your comments?

Ms. BRAKE. Yes, thank you.

I think your advice was excellent in that——

Mr. WU. Thank you. [Laughter.]

Ms. BRAKE. [continuing]. Absolutely, the fear of retaliation is the number-one reason why people do not file complaints. It is well-founded. I am afraid it happens probably a terribly often amount of the time.

And I don't have the data right in front of me, but when I did the research, it was a surprising number of charges—I want to say the majority; it was very close to that—where if you had a discrimination charge filed, you also had a retaliation charge filed. It is terribly common.

Mr. Mollen mentioned that there are enough incentives to avoid if there are punitive and compensatory damages. And perhaps this is a good time to mention that because of the cap on Title VII damages, the combined punitive and compensatory damages are limited to $300,000. I would like to know how that deters a large employer like Goodyear.

Back in 1991, when the caps were put into Title VII, it was in my view ill-conceived then. Now, 17 years later, it is that much more problematic to say that there is adequate incentive on employers not to discriminate when we are capping compensatory and punitive damages at $300,000 for our nation's largest employers.

Incentives are very important to talk about. We are talking about voluntary compliance. One of the major purposes behind Title VII is to encourage voluntary compliance.

That is part of why I find the Ledbetter ruling so troubling. An employer like Goodyear should have an incentive to not wait for a charge to be filed. Look at your pay scheme. We have a persistent gender wage gap in this country. As the chairman noted previously, women earn 77 cents on the dollar for what men earn.

Economists have thought to study every possible reason for that gap. Nothing they have studied explains it—not education, hours worked, experience, occupation, job, health. We can only conclude that a good bit of it results from discrimination.

Employers should be looking at their pay records, looking at a situation like Ms. Ledbetter's and saying, "Wait a minute. We don't need to wait for a charge to be filed. Something is wrong here. Our only female manager makes less than each and every one of the other 15 male managers. We need to take a hard look at this. This seems fishy. Let's make sure, absolutely sure, we have a non-discriminatory reason that can justify this."

And you can bet that employer can get the same evidence that that jury in Alabama saw and said, "You don't have a non-discriminatory reason."

So we need to take a hard look at our incentives, because we have got to get rid of this gender wage gap.

Mr. WU. Thank you, Professor.

I thank the entire committee for its forbearance.

The gentleman from Iowa, Mr. Loebsack?

Mr. LOEBSACK. Thank you, Mr. Chair.

As is often the case, I am among the last of the questioners. And as a new member, once again I am learning a lot at this hearing. And I really appreciate all of you being here.

And I do want to commend Ms. Ledbetter for her courage coming today as well.

And I think we all know that it goes even beyond this kind of discrimination. It affects families as well, even middle-class, I would argue, here in the United States. And this kind of discrimination occurs.

Mr. Henderson, you looked as though you wanted to respond to Mr. Mollen's last few comments. Go ahead, please.

Mr. HENDERSON. Thank you, Mr. Loebsack. I did. I wanted to make one observation.

I think Mr. Mollen referred a couple of times to efforts at promoting legislation as removing the limitation in pay cases. And that is simply not right. That is simply unfair.

We are talking about restoring the status quo ante, a process that had been in place now for over 20 years that allowed employers and employees to understand how charges of pay discrimination would be brought. It is simply not right to suggest that we are removing limitations in pay cases and thus opening the flood gates to an assortment of cases, many both fair and specious.

What we are doing is restoring the status quo ante. We are restoring a procedure that both employees and employers had come to expect.

And I guess one last point. If employers had found this rule so burdensome, so threatening to the productivity of their businesses, the effort to legislate a different rule would have happened year after year after year. We never saw that.

I guess the argument is that employers had come to expect and establish their own human resources practices around these established principles. And we want to do is to restore those principles.

Mr. LOEBSACK. I want to make one comment too. This is conjecture on my part; I don't have the evidence for it. And I am one of those who often complains when folks don't have the numbers to back up their arguments.

But one of the things I suspect—and I thank Mr. Hare for making his comments about the utopia that supposedly is out there that isn't out there.

One of my concerns is that in this increasingly globalized economy in which we find ourselves here in the United States in particular, and where companies are competing on a global basis and they often use that as an excuse for what I would consider to be less than adequate practices with respect to their employees, I have a lot of concerns about how that will have an effect also on the very issues that we are talking about here.

I am not saying it is going to make matters worse. But I have a concern that it might. Because they may say in the future, "Well, you know, we are competing globally"—they won't say that necessarily in a court of law, obviously—"and that is why we discriminated." But I have a real concern that that, in fact, may happen increasingly down the line.

And, Mr. Mollen, when you talked about the employer being at a distinct disadvantage under certain rules, I don't understand that. Because it isn't the case, is it, that an employer is presumed guilty in any of these cases? How is it that an employer is at a distinct disadvantage? I don't understand that.

Mr. MOLLEN. I think this is a perfect example—that is, the piece of litigation we are here talking about.

The testimony at trial was that Ms. Ledbetter knew as early as 1992, or believed, that she had been the victim of pay bias, and that she had information about what other people made as of 1994, and yet she waited until 1998 to file the charge.

And again, she testified as to statements, practices, occurrences, incidents that occurred at trial. And there was no one there to contradict that testimony.

It is fundamentally unfair, as we recognize in criminal law, as we recognize in nearly every area of civil law. We have these statutes of limitations for a reason.

And what the paycheck rule does is it suggests that, every time the mechanical process of cutting a check occurs, that it is an evergreen limitations period; it never ends, until the individual leaves the workplace.

Now, you also asked whether there are consequences stemming from globalization and corporate reorganizations and that sort of thing. I think that there are. And they have to do with the tenure with which the average American works for a given employer.

I mean, we are a highly mobile society. What that means for an employer is, if it doesn't get noticed, a potential discrimination claim, early, the chances that the people the employer needs to put on a full defense will actually be around by the time the case gets litigated are very small. Because people quit. They take different jobs. Companies reorganize. They spin off entities. There are all kinds of corporate transactions that will occur that will distance the defendant at trial from the individuals that it needs to defend the case.

This is just one example, but it happens all the time.

Thank you.

Mr. LOEBSACK. My time is up. Thank you.

Mr. WU. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Well, thank you, Mr. Chairman.

Mr. Mollen, is it your understanding that, after this case, there is a 180-day rule? Is it still 180 days from the act, or 180 days from discovery?

Mr. MOLLEN. It is 180 days from the discriminatory employment practice which the court defined as the decision being communicated to the individual.

Mr. SCOTT. Okay, now——

Mr. MOLLEN. And it is 300 days in most jurisdictions.

Mr. SCOTT. Well, okay, let's get to the 300 days. If, under this 300-day rule, do you have to file it with the state within their state rules?

Mr. MOLLEN. The universal practice—I say universal; I believe that it is universal practice for those charges to be cross-filed instantaneously, so that, if you filed with the Virginia fair employment practices agency, it would automatically be cross-filed with the EEOC.

So yes, effectively, it is 300 days.

Mr. SCOTT. Well, maybe, if Virginia has the 60-day rule and you miss that, have you messed up your federal rule? You can skip the entire Virginia process and go straight to the federal?

Mr. MOLLEN. Correct. You can always go to the——

Mr. SCOTT. Is that your understanding, Ms. Brake?

Mr. MOLLEN. You can always go to the EEOC.

Mr. SCOTT. Even though you skipped the state process?

Mr. MOLLEN. They are going to do it for you, Congressman. The EEOC is going to cross-file it with the state agency.

Mr. SCOTT. If you forget to file in the state, you have 300 days with the EEOC?

Mr. MOLLEN. As I understand it, yes, Congressman, the EEOC is going to take care of that for you.

Mr. SCOTT. Is that your understanding, Ms. Brake?

Ms. BRAKE. It is terribly complicated. I believe to get the benefit of the 300 days, you would have to file in both, with the state also.

Mr. SCOTT. And if you miss the state deadline, can you still file within the 300 days with the EEOC?

Ms. BRAKE. [Off-mike.]

Mr. SCOTT. Okay, well, let's get back to the——

Mr. WU. We are going to have to ask you to use the mike, Professor.

Mr. SCOTT. Whatever the deadline is, if you haven't discovered within the 180 days that you have been discriminated against, by the time you find out, it is too late.

Is that right, Ms. Brake?

Ms. BRAKE. Congressman, that is exactly the problem. We do not know how a discovery rule would apply here. The court's decision simply said——

Mr. SCOTT. Well, he said it is the act, so we are not even talking about discovery.

Ms. BRAKE. [continuing]. When the decision is made and communicated. The Supreme Court's opinion does not even say what has to be communicated. It may well be all that has to be——

Mr. SCOTT. You got your paycheck.

Ms. BRAKE. Yes. Here is your raise, 5 percent.

Mr. SCOTT. Okay, now, Ms. Ledbetter is a supervisor. Is there a difference in your right to discuss your wages with your fellow employees if you are a supervisor or an hourly wage worker? Is there a difference in your right to get salary information from your colleagues?

Chairman MILLER [presiding]. We need to bring the mike down to Ms. Ledbetter.

Oh, I am sorry, were you asking Ms. Brake?

Mr. SCOTT. Yes.

Chairman MILLER. Professor Brake?

I am sorry, I thought you were asking Ms. Ledbetter.

Ms. BRAKE. Congressman, I must confess that I do not know the intricacies of the National Labor Relations Act. I do believe it is correct, as Mr. Mollen said, that that act does bar employer rules that ban at least wage-level employees discussing their salaries.

I would note, however, that there have been studies showing that one-third of private-sector employees nevertheless by policy forbid employees from discussing wages.

Mr. SCOTT. Okay.

Mr. Mollen, is there any question in your mind that this decision would affect not only gender cases, but race, religion and national origin?

Mr. MOLLEN. I do believe that the court's opinion is going to be applied across the board, correct.

Mr. SCOTT. And if you get past that the employees didn't figure out that all the whites got raises, none of the blacks got raises within 180 days, that they could continue that practice and Title VII couldn't cure it in the future?

Mr. MOLLEN. I am not sure I follow the question, Congressman.

Mr. SCOTT. If all the whites got raises, none of the blacks got raises, and the blacks didn't figure it out for 181 days, or 301 days, whatever it is, that they can't bring a suit under Title VII?

Mr. MOLLEN. Ledbetter does not decide that question. I think you are getting at the——

Mr. SCOTT. What does it decide?

Mr. MOLLEN. I think that you are getting at the discovery rule.

Mr. SCOTT. Right.

Mr. MOLLEN. And what the majority opinion says is, we have no occasion to discuss the discovery rule or whether it would apply in this context.

Mr. SCOTT. Okay. So my first question was whether it was 180 days from the discriminatory act or the 180 days from discovery. You said the act. Now you are back to discovery.

Mr. MOLLEN. Again, the court can only decide the case that is before it. The facts before the court indicated that the complainant in this case knew about the disparities and didn't file within the statutory timeframe.

The court noted the possibility that in another case, that knowledge would have been lacking, and said, "It is not before us today. We have noted it in the past. We have no occasion here today to say whether this discovery rule applies."

Mr. SCOTT. And it was never an issue, as Ms. Brake indicated, because the paycheck would renew the act.

But if there is not a discovery rule, and you figured out—well, let me just say with the discovery rule or not, so you discovered it, didn't do anything about it. The next year you are continuing to have all the whites being paid more than all the blacks. Are you telling me that there is no way to prospectively cure that under Title VII?

Mr. MOLLEN. Well, first of all, there are a lot of different questions sort of bundled together there. If there were——

Mr. SCOTT. They decide to give all the blacks one salary, all the whites another. Three hundred days go by. What can you do under Title VII under this?

Mr. MOLLEN. Undoubtedly, there would be new employees who would be in a position to challenge that subsequent decision. So——

Mr. SCOTT. Those employees could not challenge it under your interpretation of this—is that your feeling, Ms. Brake?

I think she understands what the question is.

You are sitting up there with a policy where all the blacks are getting paid less than all the whites, and they let 300 days go by, and there is nothing they can do about it under Title VII?

Ms. BRAKE. Congressman, I do believe that that is the implication of the Ledbetter decision.

Mr. MOLLEN. If I might, Mr. Chairman, the same point could be made with respect to nearly every civil action in which Congress has legislated. If you have a personal injury case and you know about the injury and you don't bring your lawsuit within the requisite period of time, you are not able to, even though the damage or the effects of that action will——

Mr. SCOTT. Yes, but you are not continuing the injury with every paycheck. They are not continuing to discriminate against you

every week, paying all the whites more than all the blacks, week after week after week.

Mr. MOLLEN. You are coming very close, Congressman, to describing the Bazemore case. And the Bazemore case is a special rule. And I think what the Ledbetter court said is that Bazemore is good law. And when you have that sort of facially discriminatory compensation system, it is discriminatory every time it is applied.

Chairman MILLER. The gentleman's time has expired.

Ms. LEDBETTER. Mr. Chairman, may I respond?

Chairman MILLER. Yes, Ms. Ledbetter, responding to Mr. Scott?

Ms. LEDBETTER. Mr. Mollen said that I knew back in 1992. I want to clarify this, once and for all. I did not know, in 1992, that I made less money. I suspected I did, but I had no way of knowing.

And then, in 1994, I didn't know for sure until I got that note. And I didn't know for sure then. Somebody just scribbled me a note.

And then, later, it was brought out at trial that I was mailed an evaluation form that applied to my department, with my other peers, where we were evaluated and given the money and the rate. And I had never seen one of those before.

But I just wanted to clarify that I did not know.

And to wait for 19 years to file a suit, it wouldn't be a good idea, because it would be much more to my advantage to have filed early on in my career and try to correct something. But I didn't know at the time that it was so far out of balance.

And I believe that a company like Goodyear, as large as they are and with the resources they have, they should be in compliance with every federal regulation. Because, for one thing, they are a government supplier. They should be in compliance, and then they wouldn't have to worry about anyone.

And this is not an easy thing to do, to bring this before you.

Chairman MILLER. Thank you.

Mr. Hare?

Mr. HARE. Thank you, Mr. Chairman, for indulging me another 5 minutes here.

Ms. Ledbetter, we keep hearing about the Supreme Court case. But the lower courts ruled in your favor, am I correct?

Ms. LEDBETTER. Yes, sir.

Mr. HARE. Okay. And, you know, you have been hearing a lot of this. And it is interesting. We know that the experts and people asking questions—but this had to have cost you thousands of dollars, I am assuming, thousands of dollars over this period of years.

Ms. LEDBETTER. Yes, sir. It has been a long haul and 9 years to pursue this. It is very taxing on one to have to go through this. And most people don't want to do this. They just want to fit in, do their job to the best of their ability and go forward.

Mr. HARE. Well, I just want to say, first of all, I commend you for your courage. I think it is a sad day for this country when we have discrimination that the lower courts said happened, you went through the process, and then we get the Supreme Court saying you didn't file in a timely fashion, when you didn't even know until you got it in an anonymous note handed to you.

But the bottom line, it seems to me—and I just would be interested in, you know, Professor Brake, your opinion on this—I mean,

this is nothing new here. There are hundreds of cases, if not thousands of cases, of discrimination on the part of employers against women and against minorities.

If we don't pass this law and we don't do something to correct what happened to Ms. Ledbetter, are we not just saying to the companies, you know, "Recess has just begun, so go out and here is the playing field"? I mean, how, in heaven's name, if we don't do this, aren't we really just asking to make the situation much worse than it already is?

And I guess the question is, is it as bad as I think it is? Because I think it is pretty bad, from what I have been hearing not just today but what we have been seeing for years and years.

Ms. BRAKE. Congressman, I have to agree with you. It is a terrible situation we are left with, with this ruling, unless Congress steps in to act.

It is crucial that we have strong pay discrimination laws in this country. We know we have a gender wage gap. We know there is pay discrimination out there not just on the basis on sex, but also on the basis of race, age, of course, disability—all of these other laws that are tied to Title VII filing requirements and will be stuck with the Ledbetter problem as well.

And I would note that—something that did come up in the ranking member's comments at the beginning—there is another statute out there, the Equal Pay Act. And yet, as I have detailed in my written testimony, we cannot assume that everything is still going to be okay just because the Equal Pay Act is out there.

The Equal Pay Act operates based on a paycheck accrual rule. It is not stuck with the Ledbetter ruling. But it is very narrow in its coverage for sex-based discrimination in pay. I point out the problems with just being stuck with that act in my written testimony.

And, of course, it does not even cover race-based discrimination in pay or the other kinds of discrimination that the Ledbetter ruling leaves us with unless Congress acts.

And so there is a real sense of deja vu here, I think, in terms of what Congress is being asked to do. Because this is almost identical to the Lorance decision, which Congress overturned in 1991.

You know, Mr. Mollen keeps saying, "Well, there will be no statute of limitations." That is simply not what we are urging Congress to do. Of course there will be a statute of limitations.

But as with Lorance, apparently Congress needs to again tell the court that when you have a discriminatory decision that came maybe a while back but it is being reapplied into the present and re-effectuated with present actions by the employer, as with the application of a discriminatory seniority system and as with paychecks that keep incorporating pay discrimination, presently paying a woman less because of her sex, Congress apparently needs to tell the court again, such claims are not time-barred. We are talking about a plaintiff proving that, "Right now, currently, I am making less because I am a woman."

Mr. HARE. Well, just in conclusion, I certainly hope that we—and I know that we are a much better country, that will allow people to have the opportunity for due process.

And with all due respect to Mr. Mollen, what happened to you is happening to people as we speak. It is going to continue to happen.

And I certainly think taking and doing what some companies—not all—what some companies are doing to people and then playing the end-run game by running the statute of limitations, and then blaming the employee—"It is the employee's fault that they lost the case from being discriminated against"—I think not only is it wrong, it is insulting to the person that filed the claim.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Professor Brake, I would like to follow up on your response to Mr. Hare for a second. And I think we have all, sort of, talked around this point, and I just want to see if we have some clarity here.

One of the questions here is, with this 180 days—we don't dispute 180 days or we don't dispute 300 days, but the question is, the court seemed to say that it runs from the time of the discriminatory act, the decision made here, whether it was because of the work evaluation or whether it was the setting of the pay scale, what have you.

If you don't discover it, you are gone. I mean, you have 180 days to figure out that you might be being treated differently, in this case because you are a woman.

Ms. BRAKE. Sir, I would say that is correct, with the caveat that we don't know the lower courts will start doing now, if at anything, with the discovery rule in terms of when someone figures it out.

Chairman MILLER. No, but I mean——

Ms. BRAKE. We don't know, but, yes, there is certainly a risk. The Supreme Court hasn't even said there is a discovery rule. It is applied in many jurisdictions very strictly, so that what you said may well be an accurate statement of the law, post-Ledbetter; that 180 days, the raise comes down, the time expires, you can never challenge it. That may well be the case, even if there is absolutely no way that you could have known that you had experienced pay discrimination.

Chairman MILLER. I mean, you know, there are a lot of situations, it seems to me—and I think Justice Ginsberg, sort of, touched on it—there are a lot of situations where people are really, you know, happier that they got the job.

And they may work for a considerable period of time not knowing that they might have been even been hired at a differential pay scale for whatever, because they are a woman, because they are African-American or what have you. And they really don't have the ability or the wherewithal to ask these kinds of questions.

If you are a single parent, if you are the only wage in the household—people come to the workplace with all different situations: Ms. Ledbetter talked about having a handicapped child, taking care of a parent, trying to struggle with their family, their divorce. All of these situations impact people, and it impacts their standing to raise objections or to work off a sense, an intuition that, "I may be being treated differently, but I don't want to risk the job."

So I think the idea that the burden falls on you to discover the initial act and decipher it in terms of your own situation, and then

to act in a timely fashion—you know, I just don't think—I mean, I don't know what these justices did before they got to the Supreme Court, but I worked in a lot of refineries. I worked on a lot of merchant ships. I worked in a lot of environments where, with all due respect, "You don't like our way; try the highway."

I never asked those questions when I was young and working and raising a family. I needed those jobs.

Mr. SCOTT. Would the gentleman yield?

Chairman MILLER. So I just don't quite get how the average employee is supposed to put all this at risk, or even decipher it in the first 180 days. They may be the victims of a policy they had no way of knowing.

And maybe everybody else at the workplace is in on the game. It would not be unusual, in my circumstance in California, that Mexican-Americans would be hired at lower wages and everybody, kind of, knows it because they don't have status. Everybody else is in on the game, but nobody is saying a damn thing. But I am supposed to figure it out.

Yes, I yield to the gentleman.

Mr. SCOTT. You are really asking two questions there. One, how are you going to find out? And two, if you are in that situation, need the job, and have found out——

Chairman MILLER. What do you do?

Mr. SCOTT. And so you start working, you know they are paying you less, and you just put up with it. Three years from now, you just say, "I am not going to put with this. You all are paying me less than everybody else, just because of my race." What? You can never bring a case again? I mean, you have got to put up with——

Chairman MILLER. Well, that is what we have to wrestle with. I mean, you raise——

Mr. SCOTT. So there are two questions. One is, how do you find out? And, two, after you found out, do you have to continue working for lower wages forever?

Mr. ANDREWS. Will the chairman yield?

Chairman MILLER. I yield to the gentleman from New Jersey.

Mr. ANDREWS. Another point which Mr. Scott's comments bring to mind is that very often, under the discovery rule, the issue is whether the plaintiff knew or should have known that they had the claim.

And you have put yourself in a very difficult situation here, where a court might say that the employee should have exercised more due diligence and found out that they were the victim of a discriminatory act, which is an awfully heavy burden to put on someone who is already at a position of disadvantage.

So, frankly, I think the paycheck-to-paycheck doctrine is a lot stronger in protecting the rights of people to make a claim.

Ms. WOOLSEY. Would the gentleman yield to me, just for a minute?

Mr. ANDREWS. Yes.

Ms. WOOLSEY. We also have to remember that when Ms. Ledbetter retired, she is continuing to be discriminated against because her Social Security, her pension, if they even have one, is all based on her earnings as a worker. And that is that much less than her peers who are going to retire at a higher rate, anyway.

So this goes on and on for her. We have got to fix it.

Chairman MILLER. Thank you.

Mr. Keller?

Mr. KELLER. Well, thank you.

I just want to thank all the witnesses, Ms. Ledbetter especially, for being here.

I represented many very large employers in employment-related cases, and I can tell you, having seen it firsthand, there are many people—most, in fact, have an absolutely zero tolerance for the type of conduct that you are describing.

As you know, in our law of sexual harassment, there are two kinds. There is the hostile environment: Someone tells an inappropriate dirty joke, for example. And there is the quid pro quo: "Go down to the hotel with me or else you are going to be placed at the bottom of the pile." And that is, by far, the most egregious and the most offensive.

And the whole reason behind the statutes of limitations are, we want people to bring these claims in a timely manner before witnesses' memories fade. And in this case, the key witness is dead. And so, it is an example of why we need to have appropriate statutes of limitations, whatever they are.

We have had a hearing today on a pretty narrow issue, as to when that statute of limitations begins to run, when it is appropriately told.

But, Ms. Ledbetter, I think the biggest concern I have with reading your testimony is the issue of sexual harassment. And even though getting paid slightly less when you feel deserved more is certainly very important, the fact that you were a victim of the most egregious kind of sexual harassment is the thing most concerning to me.

And so, I know that you were here to testify about a narrow issue, but, as someone who has been through the experience, as we look at the employment laws, do you have any advice to us, within the realm of sexual harassment, as to how we might write the laws to be fairer to people who are put in a position such as you?

Ms. LEDBETTER. Yes, sir, I would. The sexual harassment that started in the early 1980s, that I testified to, about "go down to the motel," not a date, I tried to work through that. I exited the manager's office, and I tried to continue doing my job and stay out of their way, keep my head down and keep working.

But I worked in a very hostile environment. And I was blamed for causing trouble. Even the plant manager told me, he said, "You are a troublemaker, and we don't want women in this plant." He said, in fact, "A tire factory is not a place for a woman."

And that environment is very difficult to work in. And when you start trying to prove, as the only female at the time working there, that you have been sexually harassed, it is very difficult.

In fact, when I filed the charge on another deal in the early 1980s, they said, "You go home. We will let you know when you can come back to work." And "You are nothing but a troublemaker," was what my boss told me. And I said, "Are you sending the gentleman home too?" He said, "Oh, no." He said, "He has been working here, and he has done a good job, and he can't lose his job because of something you have charged him with."

But I had witnesses at the time. But by the time they started the investigation, somehow those witnesses had disappeared. In other words, they no longer wanted to testify.

Mr. KELLER. And when you first filed your EEOC complaint, was that in the early 1980s, about the hotel remark?

Ms. LEDBETTER. That was about sexual harassment on the floor, and "You have got to go to bed with me or you won't keep working here."

Mr. KELLER. The timeframe, though, that was roughly the early 1980s?

Ms. LEDBETTER. "I will get your job."

And then, I called the EEOC from a payphone, and I talked to a manager or whoever I spoke with into putting my case on file, because I knew that they were going to fire me, for whatever unknown reason, if I didn't stop it.

Mr. KELLER. And as you sit here, as someone who has had all these life experiences, as you look back, when you first heard the offensive comment about "go to the hotel with me," if you had it to do all over again, would you have pursued a sexual harassment claim then, as opposed to just merely going back to work with the agreement that that guy wouldn't be your supervisor anymore?

Ms. LEDBETTER. Well, basically, that is what I asked for at the EEOC, was to give me my manager's job back, and I would not be working for that gentleman. I was told I had a case, and they gave me the right to sue. But at the time, I did not want to sue anybody. I didn't want to do it this time. So when you get backed into a corner, sometimes you have to do things that you don't want to do.

And I would like to point out, too, that what Ms. Woolsey said a while ago, about my retirement, my contributory retirement that I participated in, my 401(k), the bonuses, the overtime, all go back to in the 1980s when I was shorted on my money and I never knew that I was so low-paid.

My money would have been much greater, like the men, if I had known that. And I certainly wouldn't have sat on it for 17 years, especially as hard as I was struggling, because I worked every hour of overtime that I possibly could work.

And at the trial, I would like to bring up, too, there were three of my three previous managers that directly supervised me, testified in court—and they couldn't say that I was that bad. It is like somebody brought up here today, why would you keep an employee for 19 years if they are that bad?

Mr. KELLER. Well, thank you very much for being here, and thank you for your testimony.

Ms. LEDBETTER. Thank you. I appreciate the privilege to respond to you. Thank you, sir.

Mr. KELLER. You bet.

Chairman MILLER. Thank you.

I don't mean to keep you here longer, but just on this one question, I mean, in this case, the jury found discrimination. And the suggestion is that somehow the statute of limitations, the finding of the court is that this is right, because otherwise you can hang on. And in this case, a supervisor died.

By the same token, the employer can hold on to the discrimination, keep it secret, and the employee quits; the employee gets hit by a truck.

I mean, I don't quite get why, you know, the suggestion is here that the court is right because, as you suggested, Mr. Mollen, that people die and memories fade and the rest of that. Well, it seems the advantage runs the other direction as well.

Mr. MOLLEN. Well——

Chairman MILLER. So if we can make a discriminatory decision, we can keep it secret, chances are we can get away with it. There is a turnover in the workforce, then we have got our unit costs down, so to speak.

Mr. MOLLEN. Well, there are a couple of comments.

First of all, the Supreme Court didn't have anything to say with the merits of the case. I mean, we are only talking about the statute of limitations.

Chairman MILLER. I understand that.

Mr. MOLLEN. Okay.

Second of all, whether we would have had the same jury verdict had all of the witnesses and all of the documents been available and fresh, we just don't know.

Chairman MILLER. So that would be true if we had all of the workers who might have been discriminated against, who had gone on and left and moved across the country and couldn't find for discovery and all the rest of that.

Mr. MOLLEN. There is no question that the unavailability of evidence can work to the disadvantage of both litigants. And I think that is why Congress wisely chose a brief limitations period.

In this particular case, though—and I think it typically works to the disadvantage of the employer, for reasons that are amply demonstrated by this particular case.

Ms. Ledbetter testified, I am quite sure, with rather compelling detail, about conversations she had about incidents that occurred as to which there were no other witnesses available to testify. And so that testimony essentially went in unrebutted. I don't think, under those circumstances, it can be very surprising that the jury returned a verdict for her.

Now, they may have returned a verdict for her anyway. You know, I don't know——

Chairman MILLER. Yes, but we can Monday-morning-quarterback every jury verdict in the country. And we do. [Laughter.]

Mr. MOLLEN. Well, we can't know, sitting here today, what the trial would have looked like or what a jury would have concluded if this case had been prosecuted as Congress intended with respect to the limitations period. We just don't know.

But I think what we do know, and what Congress has said, sort of, as policy matter, regarding Title VII and all kinds of other civil actions, is that we know, as a fact, that memories fade and that the availability of evidence diminishes with time. And that is why we have these limitations periods.

Now, it has been suggested that I am wrong when I suggest that the paycheck rule effectively eliminates the statute of limitations. But it is hard for me to look at it any other way. Because, basically, what you are saying is that, as long as a paycheck is cut and

you file a charge within 300 days of that last paycheck, it is a timely suit. And effectively, that means that there is limitations period.

Mr. SCOTT. Well, Mr. Chairman?

Chairman MILLER. Yes?

Mr. SCOTT. Can I follow up?

Chairman MILLER. Mr. Scott?

Mr. SCOTT. There is a limitation of 2 years. Is that right, Ms. Brake?

Ms. BRAKE. On back pay, that is correct.

Mr. MOLLEN. Not on liability, compensatory or punitive damages; only with respect to back pay.

Mr. SCOTT. Well, if you are continuing your—I mean, but it is not—you filed within 180 or 300 days or continuing discrimination, which you have to show, that the paycheck represented a continuation of the discrimination. Is that right?

Mr. MOLLEN. Well, it is the continuation of the distinction. But what the court had said in Ledbetter——

Mr. SCOTT. The distinction being that you are getting paid less solely because of your race?

Mr. MOLLEN. Well, what the court said in Ledbetter—and, Congressman, I understand that you and I are just going to disagree about this, but Ledbetter——

Mr. SCOTT. Well, I am not sure we are disagreeing. I am just trying to find out what you are saying.

Mr. MOLLEN. What Ledbetter said is that the discriminatory act is the decision to pay less, not the cutting of a paycheck. And just like virtually any other cause of action——

Chairman MILLER. But if I don't know that that act has taken place, but I am subject to the reduced pay, and I don't find out within 180 days, I am out of luck, under this decision.

Mr. MOLLEN. But the courts expressly said it wasn't reaching the discovery rule question because it didn't have to in this case; because, in this case, there was sufficient information available to Ms. Ledbetter to require her, in the court's view, to go to the EEOC.

The court expressly said there may be a case out there in which the individual doesn't know, and there may be an occasion for us to decide whether the discovery rule or something like it applies in that context.

But the Supreme Court can only decide the cases that are before it. And it would have been an advisory opinion for the court to reach out and offer an opinion on whether the discovery rule applies to Title VII cases. It simply wasn't before them.

Chairman MILLER. Professor Brake, you look like you——

Mr. SCOTT. Well, while she is getting her mike—so we are doing this piece by piece. First of all, you knock this out; the next time you come back with a no discovery rule, and then you would have solved all your problems.

Ms. BRAKE. Well, if I could just say, the discovery rule is no answer to this problem. The last thing we want, in every single pay case, is to have a mini-trial, in every pay case, about what the plaintiff knew and when, and whether that would have been enough to make a reasonable person know that they had a pay claim.

That would be great billable hours for lawyers on both sides of the case, but that is a terrible rule in terms of how workable it is and in terms of the EEOC applying that rule every single time.

Mr. SCOTT. And there are two questions. One, whether or not you knew and whether that statute ran; but if you knew and just put up with it for 300 days and you will be continually paid at the reduced rate, and there is nothing that Title VII can ever to get you straight.

Ms. BRAKE. Yes, that is exactly right.

Mr. SCOTT. Is that right, Mr. Mollen?

Mr. MOLLEN. Again, that is precisely what happens in virtually every other context. If you have been injured by——

Mr. SCOTT. And you said that you tried to get some situation where you could—if there is some facial discrimination, you can prove that blacks are being discriminated against but are not being facial, then there is still that class of employees that cannot do anything because they knew they were getting underpaid for more than 300 days.

Mr. MOLLEN. Congressman, maybe if you could indulge me for 30 seconds, a hypothetical.

If your neighbor built a fence on your property and you knew that he had encroached on your property and you didn't act promptly enough, you don't have a cause of action. In other words, you had a cause of action, you slept on your rights, you didn't file suit in time.

The fact that it continues to be on your property may be a continuing injury to you, but the cause of action accrues from the time that the individual built the fence.

So what the Ledbetter rule does is treat discrimination cases like the——

Mr. SCOTT. But I don't think that is right. If it is on my land, I can get rid of that fence.

Mr. MOLLEN. If you act promptly. If you don't——

Mr. SCOTT. No, no, no. If you don't, then it becomes his land.

Mr. MOLLEN. Exactly.

Mr. SCOTT. Okay. If it is his land, then it is his fence on his land. So long as it is my land, I can get rid of that fence. [Laughter.]

Mr. HENDERSON. Mr. Scott, you know, for Mr. Mollen to say, sort of, adverse possession as a basis for doing a comparable analysis to employer-employee rights is simply not right.

This is really more akin to a contract of adhesion. An employee who is at a disadvantage has gotten a job; in this instance, as the case of Ms. Ledbetter, wants to hold onto the job. She is doing everything she can to do that.

This is not a situation where you are dealing with parties of equal basis, with equal resources and an ability to use established practices to best advantage. That is number one.

Number two, Ledbetter is not riding on a whole-cloth circumstance for the first time, a case of first impression. This is changing an established rule of law that had been in place for over 20 years, that both employees and employers had come to rely upon as a basis for engaging in action in the workplace. This decision represents a dramatic change to that established rule.

Mr. Mollen would like to characterize this as, you know, an open process in which a flood gate of lawsuits will come about. There is no evidence of that.

Nor is there any evidence that the pre-existing rule was so burdensome to employers that they sought relief by coming to Congress to get you to change the paycheck accrual rule year after year after year since Title VII was enacted. That is certainly not the case over the past 20 years. Mr. Mollen knows that.

This really does represent a dramatic change. We are trying to restore the status quo ante. We think it is the only way to give employees some legitimate basis to compete effectively in the workplace against the kind of discrimination that unfortunately Ms. Ledbetter suffered from.

Mr. SCOTT. Well, Mr. Chairman, I think we can sum this up by just agreeing, Mr. Mollen, that if people in a worksite know that they are being underpaid and figure they need their jobs desperately and don't want to risk it and sleep through 180 or 300 days and you get to the 301st day, that group of employees can forever be underpaid solely because of their race.

Is that your understanding, unless we fix this?

Mr. MOLLEN. If the employees know that their legal rights have been invaded and don't act upon them, they will lose the right to sue on it, just like they will in virtually every other civil context.

Mr. SCOTT. Okay. Let's say that we just want to make sure everybody knows what is going on here. And so there is no recourse under Title VII for that group of African-American employees to ever rectify the fact that all the blacks are being underpaid and that they have provable cases of discrimination. Once they let that 300th day go, they will forever be underpaid, and there is no recourse under Title VII?

Mr. MOLLEN. I have to disagree with that, Congressman. Because that is the Bazemore case, which was reaffirmed——

Mr. SCOTT. If you have a provable case of discrimination that is ongoing, you get another paycheck——

Mr. MOLLEN. If you have a facially discriminatory——

Mr. SCOTT. Not facial. You can prove the discrimination. They don't say it, but that is just the way it is. All of those employees have been underpaid because of their race, or you can prove that they have been discriminated against. As long as they work there, there is no recourse under Title VII.

Mr. MOLLEN. You are positing a circumstance that is difficult to imagine—that is, that it is not facially discriminatory, but it is——

Mr. SCOTT. Well, Ledbetter, she was ongoing, and she found out—let's assume she knew and didn't file. She would have to stay there for years on end underpaid; nothing you can do.

Mr. MOLLEN. That is correct, Congressman. I agree with that.

But the circumstance you posited was all blacks being treated in one way, all whites being treated in a superior way. In that context, I think it would be hard to imagine a context in which——

Mr. SCOTT. Okay. Suppose they didn't discriminate against all the blacks, and the half can show they were underpaid. Anybody——

Chairman MILLER. Okay. We are going to stop the hypotheticals here for a second because Professor Brake wants to jump in here.

Ms. BRAKE. I do. Thank you. I am still stuck on the neighbor putting a fence on your yard. I just can't let it go.

I have to say that is nothing like a discriminatory pay decision. It is visible. It is in the open. You see when it goes up. Perhaps then you could be accused of sitting on your rights.

Under the court's decision in Ledbetter, if you get a 3 percent raise every year and your male colleagues get a 4 percent raise every year—and let's assume that you know that, the unusual situation where that is disclosed—but let's say you know it. You are getting a 3 percent raise, your male colleagues are getting a 4 percent raise. Under the court's decision in Ledbetter, you would have to challenge every single 3 percent raise every 180 days after you learn that that is your raise.

That is a rule that is a recipe for the gender-based wage gap. Because that difference in 3 and 4 percent piles up. It is compounded. It is not the same fence on your lawn every day. It changes every year. The gap grows between your salary and your male colleagues'.

And it may well be a sensible, reasonable employee who decides, "I am not going to court over a 3 percent versus a 4 percent raise. I have got to keep my job." But after 10 years of that, you look at your salary and you see a $10,000 gap with your male colleagues that is not explained by any non-discriminatory reason.

Under the Ledbetter ruling, too bad; you are stuck with that. And that is a terrible result, as a matter of policy.

And I will say one last thing: In response to all of this hardship on employees that you all have been talking about, the hardship of learning about the discrimination and the hardship of challenging it, and all of the same things Justice Ginsberg talked about in her dissent, Justice Alito's only response to that is to say, "Well, that is a matter of policy."

There is the one place where I might agree with him, in that opinion, when he says then—of course, I believe that legally, all of that was clearly decided the wrong way—but the one place where I agree with him in that decision, insofar as it is a matter of policy, he is right that it is for Congress to look at that.

Congress needs to look at these policies and decide if that is the result that they want.

Chairman MILLER. And that is where we will leave it.

Thank you very much for your time. You have been very generous with your time here this afternoon. I want to thank all of you for your contributions to our better understanding, and my colleagues for sticking it out. Thank you.

With that, the committee will stand adjourned.

But we will give the members 14 days to submit additional materials for the hearing record. And if members do have follow-up questions in writing, we will send them to the witnesses and ask that you might respond.

Thank you.

[The prepared statement of Mr. Altmire follows:]

Prepared Statement of Hon. Jason Altmire, a Representative in Congress From the State of Pennsylvania

Thank you, Mr. Chairman, for holding this hearing on the Supreme Court's decision in Ledbetter v. Goodyear, and possible congressional action in response to that decision.

In the Ledbetter v. Goodyear decision the Supreme Court held that the 180-day statute of limitation, found in Title VII of the Civil Rights Act of 1964, begins on the date of the employer's discriminatory pay decision. Thus, the court dismissed Lilly Ledbetter's claim because she did not file a complaint with the Equal Employment Opportunity Commission within 180 days of Goodyear's first decision to pay her less based on her gender.

Writing for the four justices who dissented from the majority, Justice Ginsburg argued that the majority decision was seriously flawed. She stated that each paycheck that is affected by the original discriminatory decision perpetuates that discrimination. Therefore, she concluded that each paycheck Ms. Ledbetter received from Goodyear violated Title VII anew, and that the 180-day statute of limitation should have begun when Ms. Ledbetter received her final pay check from Goodyear.

Furthermore, Justice Ginsburg argued that the majority's decision did not recognize the realities of pay discrimination. In particular, Justice Ginsburg pointed out that there was no way for Ms. Ledbetter to know she had been discriminated against when the discriminatory decision was first made, because she was not aware what her coworkers were being paid. In fact, Ms. Ledbetter was not aware she had been discriminated against for several years. Thus, beginning the 180-day statute of limitation on the date of the discriminatory decision effectively prevented her from ever being able to make a claim.

It is crucial that Congress ensure that all people who experience pay discrimination are provided with recourse through our legal system. However, we must also ensure that some reasonable statute of limitation is in place, so that employers can effectively defend themselves against pay discrimination claims. As this committee considers possible legislative action on this issue, I look forward to working with members on both sides of the aisle to determine the appropriate balance of these concerns.

Thank you again, Mr. Chairman, I yield back the balance of my time.

[Whereupon, at 4:43 p.m., the committee was adjourned.]