



DAMAGE DONE: THE STARTLING IMPACT OF LEDBETTER

Last term, in a 5-4 decision written by Justice Alito, the Roberts Court held that victims of discrimination who do not immediately challenge pay disparities have no recourse, even if they were in no position to file a complaint and even though the pay disparity continues into the present. The *Ledbetter v. Goodyear Tire & Rubber Co.* decision disregarded long-standing precedent and severely limits the ability of workers who have experienced pay discrimination to seek redress under Title VII of the Civil Rights Act of 1964.

The impact of this ruling on American workers around the country is undeniable, and legislative correction in the form of the Fair Pay Restoration Act is vitally needed. In only ten months, *Ledbetter* has been cited by the federal courts of appeals in 12 of 13 circuits, the U.S. Court of International Trade, the Occupational Safety and Health Review Commission, numerous district courts in every circuit, the bankruptcy court for the Southern District of New York, three state appellate courts, the appellate court for the District of Columbia, and the Pennsylvania Commonwealth Court. What follows are descriptions of ten of those 267¹ cases.

<i>Ledbetter By The Numbers</i>			
Circuit	Number of Cases Citing to <i>Ledbetter</i> *		
	District Court	Court of Appeals	Total
1 st	3	1	4
2 nd	55	3	58
3 rd	21	1	22
4 th	12	2	14
5 th	15	3	18
6 th	20	3	23
7 th	24	8	32
8 th	10	0	10
9 th	25	5	30
10 th	8	3	11
11 th	14	5	19
D.C.	9	2	11
Federal	1	1	2
Total Federal	217	37	254
Other Decisions	13		
Total Overall			267

**Data current as of July 16, 2008*

***Groesch v. City of Springfield:*²**

Police officers had left their employment with the city’s police department and later returned, but when they came back, their salary and benefits did not reflect prior years of service. The officers filed a reverse discrimination claim based on a city ordinance that specifically enabled an African-American officer to return to the police department with his previous level of seniority. The court, in an earlier decision, initially agreed to let the officer’s claim go forward because Seventh Circuit case law at that time supported the Plaintiffs’ contention that every paycheck the City paid each Plaintiff was a separate, discrete, potentially discriminatory act. The court, however, stayed its decision pending the Supreme Court’s decision in *Ledbetter*. Following *Ledbetter*, in which the Supreme Court rejected the “paycheck accrual rule,” the court dismissed the claims as time-barred. The court held that the paychecks were not issued using a discriminatory pay structure, so the paychecks did not constitute a new violation.

¹ As of July 16, 2008.

² 2007 U.S. Dist. LEXIS 50009 (C.D. Ill. July 11, 2007).

Garcia v. Brockway:³

A disabled individual attempting to rent an apartment and a “tester” from the Disabled Rights Action Committee (DRAC) examining a separate apartment complex for accessibility claimed that the buildings were not designed and constructed in accordance with Fair Housing Act (FHA) standards. Following *Ledbetter*, the court found that the individuals were required to bring their claims within two years of the completion of the construction phase, despite the fact that that date passed years before either plaintiff attempted to occupy or test the premises. The court used *Ledbetter* to reject the theory that the failure to comply with FHA standards was a continuing violation that did not end until the building defects were cured. As a result, disabled persons were stripped of their ability to enforce the FHA's most important protection and instead were forced to make “reasonable modifications” at their own expense. In contrast, real estate developers and landlords who ignore the FHA's design requirements will receive a free pass once two years have elapsed since a defective building's construction.

Mansourian v. Board of Regents:⁴

Several female wrestlers chose to attend the University of California, Davis (UCD) because of the opportunities available to participate in wrestling while in college and the athletic scholarships they had been offered. After they had enrolled, the school enacted its “No Females Directive,” eliminating wrestling opportunities for women. The school repealed its ban the following year, but insisted that the women compete on a mixed sex team and against men in their weight class under men's collegiate-style rules. It also replaced the head coach (who had been supportive of the female wrestlers) with one who was unsupportive of female wrestlers and refused to coach them. The school ignored the women's complaints, and, at the time the women filed a lawsuit alleging violations of Title IX, women were not even allowed to compete in UCD wrestling. The court used *Ledbetter* to deny the women's claim of failure to provide equal opportunities, saying that when the women filed the complaint they were not suffering from the continuing violation of not being allowed to wrestle, but instead had only suffered from “discrete acts” of discrimination, the “effects” of which were not actionable. The court analogized the school's ban on female wrestling to the failure to rehire an employee, which *Ledbetter* reaffirmed as a “discrete act.” The court held that the wrestlers' Title IX claims for unequal treatment, failing to provide equal athletic financial assistance, and retaliation were time barred because they were not filed within one year of the last “discrete act.”

Grant v. Teacher's Ret. Sys.:⁵

After 37 years of service, Dr. Richard Grant applied for retirement, ultimately listing June 30, 2001, as his retirement date. Grant had deliberately worked an extra year at the NYC Department of Education in order to qualify for pension “bonus credits” based on the number of years of his employment, and these bonus credits would substantially increase his pension. The Teacher's Retirement System of the City of New York (TRS) granted his retirement but failed to inform him that the bonus credits were only available to those retiring on or after July 1, 2001. Grant was not aware of his mistake until TRS sent him a calculation of his pension benefits on November 5, 2001. TRS rejected Grant's protest to the calculation and his efforts to modify his retirement date by one day. Grant filed a charge of age discrimination with the EEOC, alleging that TRS was obligated but failed to notify him in advance of his retirement that he should change his retirement date to be eligible for the additional credit, and that TRS then discriminatorily declined his request to modify his retirement date after he had retired. Among other rationales, the court applied *Ledbetter* to dismiss Grant's claim (“Unfortunately for Grant, the Supreme Court recently rejected just such a claim in *Ledbetter v. Goodyear Tire & Rubber Co.*”) holding that “claims of discriminatory decisions that affect an employee's rate of pay must be based, for purposes of the limitations period, on the discrete acts of discrimination that caused the lower pay, and may not be perpetuated by the ‘adverse effects’ stemming from the continuation of the resulting lower pay rate.” Thus, Grant only had 300 days from the time TRS calculated his pension payment to file a claim, and the lower pension payments Grant continued to receive did not “revive or extend his claim.” Grant was left with no recourse to recover the thousands of dollars of pension payments he lost when he accidentally retired one day too soon.

³ 503 F.3d 1092 (9th Cir. 2007). This case is pending re-hearing *en banc*.

⁴ 2007 U.S. Dist. LEXIS 77534 (E.D. Cal. Oct. 18, 2007).

⁵ 2007 U.S. Dist. LEXIS 79462 (S.D.N.Y. Oct. 25, 2007, revised Oct. 29, 2007).

Algie v. Northern Kentucky University:⁶

Algie alleged that he was repeatedly denied opportunities for promotion that were offered to female employees. When he was hired, he was required to do lower-level work that was not required of female employees holding the same position. Despite having less education and experience than Algie, both female employees were promoted to graphic design positions, and Algie was told he would not have the same opportunity. When more graphic designers were needed, the University hired outside individuals and denied Algie the opportunity for advancement. Algie sued and, relying partially on *Ledbetter*, the court found that his claim of a pattern of discrimination was time-barred because the promotion of the two women occurred more than 300 days before he filed his claim with the EEOC, and he could not rely upon alleged past conduct to buttress a claim of present discrimination. Thus, Algie could not use the fact that female employees had been provided promotion opportunities over the years while he had not.

Plant v. Deutsche Bank Secs., Inc.:⁷

Deutsche Bank, Gerard Plant's employer, drastically reduced Plant's bonus and slowly revoked his job responsibilities, until his employment became untenable and he was fired. Plant sued, saying these changes were made because of his age. He cited negative statements made to him by his supervisors about his age (57) and public statements made by the bank's senior management that "The whole 'grey hair' premium in this business is zero," and "[r]eplacing those people with bright talent coming out of business schools is just very value creating." The court applied *Ledbetter* – among other cases – to find that the slow revocation of Plant's job duties were each "discrete acts" and could not be construed as a "continuing violation" because he had not filed a hostile work environment claim. Therefore, Plant could recover only for his allegedly wrongful termination, and not the slow erosion of his job responsibilities that took place over time and culminated in his termination.

Mikula v. Allegheny County:⁸

Mikula alleged that she was being paid less for similar work than a male employee in an equal position. She requested a pay raise and was denied. A year and a half later, she filed a written complaint with the Allegheny County Department of Human Resources, and five months later her employer again denied her request for a pay raise. Eight months later, she filed a Title VII claim. Relying on *Ledbetter*, the court held that Mikula's claim was time-barred, even though the county's denial of her written second request for a pay raise fell within the statute of limitations. Rather, the court found that the statute of limitations began to run after the county's *first* denial of a pay raise, and could not be predicated on any subsequent denial of a pay raise or subsequent paychecks. Two paragraphs later, the court wrote that Mikula's Equal Pay Act (EPA) claim *was* timely filed because the Third Circuit "specifically found that EPA claims are continuing in nature and each paycheck issued constitutes a new violation of the EPA" (the court found that her EPA claim failed on the merits, however). This incongruous result was reached by the District Court in the instant case because *Ledbetter* dealt with only Title VII claims and not EPA claims. Had Ms. Ledbetter pursued both claims in her sex discrimination case, however, it is possible that the U.S. Supreme Court would have similarly restricted the statute of limitations in EPA claims as well.

Brown v. Illinois Department of Natural Resources:⁹

Brown alleged that his employer, the Illinois Department of Natural Resources, discriminated against him because of his race in declining to promote him to a higher payroll level and retaliated against him for filing a discrimination complaint. Brown's performance evaluations revealed that there might have been legitimate reasons for the Department's refusal to promote him, but the 7th Circuit Court of Appeals did not even allow Brown to get to the merits of most of his claims. Although Brown cited a number of times where he had been denied a promotion, the court held that Brown could not bring claims based on those denials that occurred more than 300 days before he filed his EEOC claim. The court noted that *Ledbetter* "rejected the so-called 'serial' or 'series' violation approach, stating that 'if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place *when each act* is committed'" (emphasis original). The court barred Brown from bringing claims that his employer had engaged in a pattern of racial discrimination against him,

⁶ No. 06-23-JGW, 2007 U.S. Dist. LEXIS 53347 (E.D. Ky. July 23, 2007).

⁷ 2007 U.S. Dist. LEXIS 55100 (S.D.N.Y. July 23, 2007).

⁸ 2007 U.S. Dist. LEXIS 70510, at *11 (W.D. Pa. Sept. 24, 2007).

⁹ 499 F.3d 675 (7th Cir. 2007).

even though it might have been impractical for Brown to file an EEOC claim based on any one of those promotion denials alone.

Barbaro v. Fed. Bureau of Prisons:¹⁰

Barbaro suffered major injuries in an automobile accident before becoming a federal prisoner in 1998. Once he arrived at the prison, he filed over 100 requests for medical treatment for his injuries, and all of his requests were refused. When Barbaro finally saw a radiologist after being released from prison in 2003, the doctor noted significant permanent deterioration of Barbaro's cervical spine as a result of the lack of treatment. Having begun to suffer from partial paralysis, Barbaro sued the prison. Though the court held that Barbaro did show the prison's failure to provide care in the two years prior to the lawsuit – the time within the statute of limitations – they rejected his “continuing violation” theory and held that his claims against the prison for the first four years of their neglect were time-barred. Following *Ledbetter*, the court stated that Barbaro was complaining not of a continuing violation, but of “a series of discrete, albeit connected, wrongful acts.” Thus, the statute of limitations “[ran] anew from each discrete act of intentional denial of treatment.” Barbaro pointed to several decisions where courts “treated deliberate indifference claims based upon a prison's failure to provide medical treatment as continuing violations,” but the court rejected these cases – some because they predated *Ledbetter*, which the court said disallowed the use of “a continuing violation doctrine to allow a plaintiff to seek recovery for wrongful acts that occurred before the statute of limitations period.”

Smithers v. Wynne:¹¹

Smithers brought a suit claiming age and gender discrimination after he was passed over for two promotions. Smithers claimed that his supervisors repeatedly harassed him by giving him lower than deserved scores on annual performance appraisals, failing to recognize his accomplishments, and speaking poorly of him to other supervisors, all of which contributed to his eventual non-selection for several promotions. The court ruled that Smithers' claims that he was denied promotions due to his age and gender did not meet the requirements of the “continuing violation” doctrine because his subsequent paychecks could not be classified as new violations. Since Smithers' was overlooked for promotion more than 2 years ago, the court held that Smithers' claims were time-barred, stating, “Smithers' non-promotion claims are similar to the disparate pay claim made in *Ledbetter*, because he asserted that his pay would be higher but for the past discrete instances of discrimination. Thus, we conclude that Smithers's [sic] paychecks are not continuing violations of the alleged past acts of discrimination and retaliation.”

¹⁰ 521 F. Supp. 2d 276 (S. D. N. Y. 2007).

¹¹ 2008 U.S. App. LEXIS 167, at *6 (11th Cir. Jan. 4, 2008).