

William & Mary Journal of Race, Gender, and Social Justice

Volume 16 (2009-2010)
Issue 1 *William & Mary Journal of Women and
the Law*

Article 2

October 2009

Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle

Nancy Zisk

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle*, 16 Wm. & Mary J. Women & L. 1 (2009), <https://scholarship.law.wm.edu/wmjowl/vol16/iss1/2>

Copyright c 2009 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

LILLY LEDBETTER, TAKE TWO: THE LILLY LEDBETTER
FAIR PAY ACT OF 2009 AND THE DISCOVERY RULE'S
PLACE IN THE PAY DISCRIMINATION PUZZLE

NANCY ZISK*

INTRODUCTION

- I. STATUTES OF LIMITATIONS: THE PROTECTIONS THEY AFFORD
AND THE PROBLEMS THEY CREATE WHEN UNLAWFUL CONDUCT
IS HARD TO DISCERN
 - II. THE LILLY LEDBETTER FAIR PAY ACT AND THE SUPREME
COURT'S DECISION THAT IT OVERRULED
 - III. THE LEDBETTER FAIR PAY ACT APPLIED
 - IV. THE DISCOVERY RULE IS APPLIED WITHOUT COMPROMISING
THE PROTECTION AGAINST THE LITIGATION OF STALE CLAIMS
- CONCLUSION

INTRODUCTION

When a victim of a Title VII violation files a charge of discrimination six months and one day from the date on which the discriminatory practice occurred, an otherwise illegal discriminatory act becomes “merely an unfortunate event in history which has no present legal consequences.”¹ The short deadlines for filing a claim serve the important purpose of avoiding the litigation of stale claims, where “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.”² Indeed, “the right to be free of stale claims” is so important that “in time [it] comes to prevail over the right to prosecute them.”³ In its zeal to protect this very

* J.D., Duke University, B.A., Duke University, Associate Professor of Law, Charleston School of Law. The author wishes to thank Brian Macho for his research assistance.

1. *Harris v. City of Fresno*, No. 1:07-CV-01210-OWW-SMS, 2009 WL 1460822, at *10 (E.D. Cal. May 26, 2009) (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). Title VII requires that discrimination claims be filed with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the date on which the alleged discriminatory practice occurred. 42 U.S.C. § 2000e-5(e)(1) (2006). If the claimant first institutes proceedings with a state agency that enforces its own discrimination laws, however, then the period for filing claims with the EEOC is extended to 300 days. *Id.* See also *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999) (“Charging parties have the benefit of the 300-day time limit for filing their federal claims even when they have missed the state’s filing deadline for submitting those claims to the state deferral agency.”).

2. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

3. *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)); see also *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007) (noting that

important interest, the United States Supreme Court made it virtually impossible for certain victims of pay discrimination in violation of Title VII of the Civil Rights Act⁴ to bring their claims.⁵ In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court dismissed a lawsuit for pay discrimination under Title VII of the Civil Rights Act on statute of limitations grounds, holding that discriminatory pay decisions trigger the running of a limitations period, whether or not an affected employee knew or should have known that the pay decision in question was discriminatory or whether it would lead to a pay differential.⁶ The *Ledbetter* case involved a claim of discrimination in pay based on sex, but its holding had broader implications under the statute and would have applied to all claims based on a protected characteristic, including race, color, national origin, and religion.⁷ There was an immediate outcry over its implications and its reach to other discrimination laws.⁸

the EEOC filing deadline “protect[s] employers from the burden of defending claims arising from employment decisions that are long past” (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980)), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

4. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

5. *See Ledbetter*, 550 U.S. at 632 (holding that a lawful employment practice that occurred within the limitations period and which gives effect to “an intentional discriminatory act that occurred outside the charging period” is not enough to give rise to liability); *cf. id.* at 645-46, 649 (Ginsburg, J., dissenting) (pointing out that the “realit[y] of the workplace” would make it difficult for a person to identify discriminatory pay practices within the statute of limitations period).

6. *Id.* at 628, 632 (majority opinion).

7. *See* 42 U.S.C. § 2000e-2(a) (2006) (stating that it is illegal to fire or refuse to hire someone, or to discriminate against them regarding employment pay, conditions, terms or privileges because of race, national origin, gender, color, or religion).

8. The laws that would have been affected include Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (2006) (prohibiting discrimination in employment based upon race, color, religion, sex, or national origin); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2006) (prohibiting discrimination in employment based upon age); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) (prohibiting discrimination based on disability); and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2006) (prohibiting discrimination based on disability by federal government agencies). *See Justice Denied? The Implications of the Supreme Court’s Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. On Education and Labor*, 110th Cong. 14 (2007) (statement of Wade Henderson, President and CEO, Leadership Conference on Civil Rights) (“The impact of the court’s decision in *Ledbetter* will be widespread, affecting pay discrimination cases until [sic] 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.”). The decision was rendered on May 29, 2007, and editorials were published two days later. *See, e.g.*, Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18 (pointing out that it would be difficult after the *Ledbetter* ruling for pay discrimination victims to sue under Title VII); Editorial, *Life vs. the Law*, L.A. TIMES, May 31, 2007, at A26 (discussing the difficulty of discovering most instances of pay disparity within the required 180-day time limit); Editorial, *Sterile Thinking on Pay Equity*, CHI. TRIB., June 4, 2007, at 18 (quoting Justice Ginsburg’s dissent, where she stated that race-based pay discrimination claims would also be affected

In response to the outcry over the decision, Congress enacted legislation to overrule the case, and on January 29, 2009, just nine days after he was sworn into office, President Obama signed the legislation, his first bill, into law.⁹ The new law, named the Lilly Ledbetter Fair Pay Act (the “Ledbetter Fair Pay Act” or the “Ledbetter Act”) after the female employee who was the victim of pay discrimination with no hope for redress, extended the time allowed for an employee to bring a claim by allowing each new paycheck to trigger the running of the limitations period under Title VII.¹⁰ It does not, however, address the real problem facing employees, which is the difficulty of discovering that pay discrimination exists in the first place.¹¹ As Justice Ginsburg noted in her dissent in *Ledbetter*, “[c]ompensation disparities . . . are often hidden from sight. It is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries.”¹² Given these “realities of

by the *Ledbetter* decision); see also Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 353 n.4, 354 (2008) (citing editorials and other commentaries warning of the decision’s import and suggesting that “*Ledbetter* is part of a much deeper and more potentially devastating conceptual shift that is taking hold in employment discrimination law”).

9. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)). The Act is retroactive and applies “to all claims of discrimination in compensation under title [sic] VII . . . that are pending on or after” May 28, 2007, the date of the Supreme Court’s *Ledbetter* decision. *Id.* § 6.

10. *Id.* § 3(A). The Ledbetter Act also amends the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. *Id.* §§ 4-5. The Ledbetter Act defines the accrual of a pay discrimination claim as “each time wages, benefits, or other compensation is paid.” *Id.* §3(A). It does not address the timeliness of discrimination claims based on a pattern or practice of unlawful acts or those based on termination or failure to hire, transfer or promote. See *Leach v. Baylor Coll. of Med.*, No. H-07-0921, 2009 WL 385450, at *17 (S.D. Tex. Feb. 17, 2009) (“The rule set out in *Ledbetter* . . . — that ‘current effects alone cannot breathe new life into prior uncharged discrimination’ — is still binding law for Title VII disparate treatment cases involving discrete acts other than pay.”); see also Jason R. Bent, *What the Lilly Ledbetter Fair Pay Act Doesn’t Do: “Discrete Acts” and the Future of Pattern or Practice Litigation*, 33 RUTGERS L. REV. 31, 32-33 (2009) (pointing out that the Ledbetter Act only addresses filing deadlines for pay discrimination, and does not address the timeliness of other discrimination charges, “such as termination, failure to hire, failure to transfer, or failure to promote”). The Supreme Court decisions on these issues, therefore, are unaffected by this legislation. *Leach*, 2009 WL 385450, at *17 (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006), is another avenue of redress for victims of pay discrimination and allows each new paycheck to retrigger the applicable limitations period. *Ledbetter*, 550 U.S. at 658 n.8 (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act § 3. The Equal Pay Act, however, “provides no relief when the pay discrimination charged is based on race, religion, national origin, age, or disability.” *Ledbetter*, 550 U.S. at 658 (Ginsburg, J., dissenting).

11. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

12. *Id.* at 649-50.

the workplace,”¹³ the law needs to incorporate a rule that allows a limitations period to begin when the discrimination is, or should be, discovered.¹⁴ Despite a proposal to do so, Congress did not explicitly incorporate the discovery rule in the Ledbetter Act but, importantly, it did not preclude its application either.¹⁵ By its terms, the Act allows the receipt of each paycheck to begin anew the running of the limitations period, but it is silent on how a victim’s inability to discover discrimination may affect the claim.¹⁶ This silence allows and even invites application of the discovery rule.¹⁷

This article, therefore, proposes that the discovery rule be incorporated into Title VII pay discrimination claims and concludes that incorporating the rule will effectuate the purposes of Title VII without compromising the protections afforded by the statute’s limitations period.¹⁸ Section I reviews the reasons for limitations periods in

13. *Id.* at 649.

14. *See Ricks*, 449 U.S. at 258 (holding that the statute of limitations began to run “at the time the [allegedly discriminatory] tenure decision was made *and communicated*”) (emphasis added); *see also* Nancy Zisk, *In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule to Determine the Start of the Limitations Period For Pay Discrimination Claims*, 16 DUKE J. GENDER L. & POL’Y 137, 144 (2009) (stating that because it can take such a long time for employees to become aware of pay disparities, “the limitations period . . . should be analyzed in reference to these claims” instead of by each specific discriminatory act); Alyssa B. Minsky, Note, *Employment Discrimination Law in the Wake of Ledbetter: A Recommended Approach*, 42 SUFFOLK U. L. REV. 239, 255 (2008) (explaining that a discovery rule would only start the Title VII statute of limitations when “the plaintiff became aware, or reasonably should have become aware, of the facts that gave use to the cause of action”).

15. *See* 155 CONG. REC. S401, 588 (daily ed. Jan. 15, 2009) (reflecting failed Amendment No. 25, the “Title VII Fairness Act,” presented by Senator Hutchison proposing to incorporate a “discovery rule” into the Lilly Ledbetter Fair Pay Act of 2009). Congress’s failure to include any language regarding the discovery rule opens the door for its application here. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (holding that the discovery rule “is read into statutes of limitations in federal-question cases . . . in the absence of a contrary directive from Congress”).

16. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

17. *See Cada*, 920 F.2d at 450 (“[T]he discovery rule of federal common law . . . is read into statutes of limitations in federal question cases . . . in the absence of a contrary directive from Congress.”).

18. *See, e.g., Ricks*, 449 U.S. at 256-57 (implicitly applying the discovery rule to Title VII claim while noting that the statute’s limitations period guarantees “the protection of the civil rights laws to those who promptly assert their rights [and] protect[s] employers from the burden of defending claims arising from employment decisions that are long past”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (“The primary purpose of Title VII was ‘to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices . . .’”) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (“It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (applying the discovery rule to Title VII

general and specifically as defined by Title VII and the problems that arise when a wrongful act is hard to discern. Section II examines the Lilly Ledbetter Fair Pay Act and the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* that it overruled.¹⁹ Section III reviews the cases that have already considered the reach of the Ledbetter Act and, while none were confronted with a discovery issue, neither did they foreclose the application of the discovery rule. Section IV reviews the decisions that have applied the discovery rule to discrimination cases and offers an example where Congress amended a statute to include the discovery rule in cases of identity theft, where the wrong is difficult to discover. The final section concludes that the Ledbetter Act does not foreclose the application of the discovery rule to pay discrimination cases and that Title VII's goals will be best served when the discovery rule is consistently applied to these claims.

I. STATUTES OF LIMITATIONS: THE PROTECTIONS THEY AFFORD AND THE PROBLEMS THEY CREATE WHEN UNLAWFUL CONDUCT IS HARD TO DISCERN

Statutes of limitations serve the important purpose of encouraging “the prompt presentation of claims.”²⁰ A statute of limitations was described by the Supreme Court in 1828 as “a wise and beneficial law . . . to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.”²¹ Specifically applied to employment claims, “limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.”²² Congress defined a very short limitations period for claims brought under Title VII.²³ In order to bring a Title VII claim in federal district

claim while acknowledging the need for plaintiff's “reasonable diligence” in discovering the wrong).

19. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act § 3.

20. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

21. *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828).

22. *Ricks*, 449 U.S. at 256-57; accord Kara M. Farina, Comment, *When Does Discrimination “Occur?”: The Supreme Court's Limitation on an Employee's Ability to Challenge Discriminatory Pay Under Title VII*, 38 GOLDEN GATE UNIV. L. REV. 249, 279 n.193 (2008) (noting that “[s]tatutes of limitations are primarily designed to assure fairness to defendants”).

23. 42 U.S.C. § 2000e-5(e)(1) (2006).

court, a plaintiff must first file a charge of discrimination with the EEOC within 180 days from the date of the unlawful employment practice, or 300 days in states that have human rights agencies.²⁴ A discrimination claim “is time barred if it is not filed within these time limits.”²⁵

Recognizing Congress’s definition of the very short limitations period governing Title VII claims, the Supreme Court noted: “[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.”²⁶ The Court has also noted that the short deadlines reflect “Congress’ strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.”²⁷ Although noble goals, “conciliation and cooperation” may be impossible, given the “realities of the workplace,” where employees have no idea how their salaries compare to the salaries of their coworkers.²⁸

In much of corporate America, it is considered bad taste for American employees to discuss how much they earn.²⁹ In some workplaces, in fact, it is against company policy for employees to share salary information with each other, and a breach of this policy is grounds for termination.³⁰ Even where there is no formal policy against discussing salaries, “[i]t is not unusual . . . for management to decline

24. *Id.*; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (noting that to meet “the jurisdictional prerequisites to a federal action” one must “timely [file] charges of employment discrimination with the Commission”); see also *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (“[I]n a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days.”); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999) (acknowledging that “[c]harging parties have the benefit of the 300-day time limit for filing their federal claims even when they have missed the state’s filing deadline for submitting those claims to the state deferral agency”); accord *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir. 1994).

25. *Morgan*, 536 U.S. at 109.

26. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

27. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

28. *Id.* at 649-50 (Ginsburg, J., dissenting); see also Leonard Bierman & Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004) (discussing the fact that individuals in the United States are averse to revealing their salaries as a result of American social norms).

29. Bierman & Gely, *supra* note 28, at 168.

30. See *id.* at 171 (citing results of a study finding that one-third of private sector employers have adopted rules against employee salary discussions); see also 155 CONG. REC. S673, 694 (daily ed. Jan. 21, 2009) (statement of Sen. Leahy) (contending that pay discrimination is often intentionally concealed).

to publish employee pay levels, or for employees to keep private their own salaries.”³¹ There are many reasons why employers, as well as employees, may want to keep salary information private, and these reasons can be “quite complex.”³² Privacy rules and expectations may serve a number of legitimate purposes for both employers and employees,³³ but, regardless of the reasons, expectations of privacy make certain one thing: employees often have no idea what any other employee in his or her workplace earns.³⁴

Accordingly, when an employer pays members of a protected class lower salaries than it pays their coworkers, it is likely that the victims of the discrimination will be unaware of it, and it is precisely this ignorance that perpetuates the kind of pay discrimination that Title VII was intended to correct.³⁵ The plaintiff in *Ledbetter* had the opportunity to litigate the issue of whether the limitations period can begin to run before a victim is aware of, or should be aware of, the discriminatory action, but she did not raise it.³⁶ Congress had the opportunity to amend the law to take into account the difficulty of discovering an employer’s discriminatory practices, and, despite considering its adoption, it did not include it in the recently enacted legislation.³⁷ The following section will examine Congress’s attempt to “restore the law [as it existed]”³⁸ before the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, and the facts facing the plaintiff in that case.³⁹

II. THE LILLY LEDBETTER FAIR PAY ACT AND THE SUPREME COURT’S DECISION THAT IT OVERRULED

In the Ledbetter Fair Pay Act of 2009, Congress defined the trigger of Title VII’s limitations period as the receipt of each new

31. *Ledbetter*, 550 U.S. at 649-50 (Ginsburg, J., dissenting) (citing *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002)) (discussing employee who discovered pay disparity seven years after a pay-setting decision was made, and only by finding the information in a printout left on her desk); see *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (discussing employee who learned of pay disparity from a newspaper report).

32. Bierman & Gely, *supra* note 28, at 176 n.71.

33. See, e.g., *id.* at 177-78 (discussing the idea that pay secrecy rules may help limit workplace conflict).

34. See *id.* at 175 (acknowledging the “code of silence” in the United States regarding pay levels).

35. *Ledbetter*, 550 U.S. at 647 (Ginsburg, J., dissenting).

36. *Id.* at 623 (majority opinion).

37. 155 CONG. REC. S401, 588 (daily ed. Jan. 15, 2009) (statement of Sen. Hutchison); see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. §2000e-5(e)(3)) (failing to adopt Sen. Hutchison’s amendment).

38. 155 CONG. REC. S401, 557 (daily ed. Jan. 15, 2009) (statement of Sen. Mikulski, cosponsor of the Lilly Ledbetter Fair Pay Act).

39. *Ledbetter*, 550 U.S. 518.

paycheck issued pursuant to a discriminatory pay-setting decision.⁴⁰ The Act identifies certain “unlawful employment practice[s]” to clarify what triggers the limitations periods under the discrimination statutes.⁴¹ These practices include:

when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.⁴²

With these provisions, Congress overruled the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.* in an effort to reestablish “the robust application of the civil rights law that Congress intended.”⁴³

By its terms, the new law grants a plaintiff like Lilly Ledbetter more time to discover that discrimination has occurred, and allows that plaintiff to sue if she discovers the discrimination when she compares her paycheck to a coworker’s paycheck, but it ignores the “realities of wage discrimination,”⁴⁴ where an employee may have no idea how her paycheck compares with those of her coworkers.⁴⁵ The plaintiff in the *Ledbetter* case “was a supervisor at Goodyear Tire and Rubber’s plant in Gadsden, Alabama, from 1979 until her retirement in 1998.”⁴⁶ She worked for the latter part of her career as an area manager, “a position largely occupied by men.”⁴⁷ When she began as a manager, her salary was commensurate with the salaries earned by men in the same jobs, but over time, “her pay slipped in comparison to the pay of male area managers with equal or less seniority.”⁴⁸ She claimed she received poor performance evaluations “because

40. Lilly Ledbetter Fair Pay Act § 3(A). The Act also amends other discrimination statutes. See *supra* notes 8, 10 for a list of the affected statutes.

41. Lilly Ledbetter Fair Pay Act § 3(A).

42. *Id.* This amendment to Title VII is retroactive to May 28, 2007, *id.* § 6, the date of the Supreme Court’s decision in *Ledbetter*, 550 U.S. 618.

43. Lilly Ledbetter Fair Pay Act § 2(2); see also *Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp. 2d 994, 1040 n.4 (N.D. Cal. 2009) (citing the Ledbetter Act and quoting Congress’s intent to restore the “robust application of the civil rights law”).

44. *Ledbetter*, 550 U.S. at 654 (Ginsburg, J., dissenting).

45. *Id.* at 649-50.

46. *Id.* at 643. The recitation of the facts of the case, *infra* notes 47-60 and accompanying text, comes from the author’s earlier article addressing the Court’s decision. See *Zisk*, *supra* note 14, at 144-46.

47. *Ledbetter v. Goodyear*, 550 U.S. at 643 (Ginsburg, J., dissenting).

48. *Id.*

of her sex” and that “as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly.”⁴⁹

The discrepancy between Ledbetter’s pay and the pay of others took years to grow.⁵⁰ This alone might have made it difficult for Ledbetter to identify a triggering point for the limitations period to begin to run.⁵¹ A bigger impediment to identifying that she had been discriminated against or that her period for filing a claim had begun, however, may have been that, even after receiving negative performance evaluations, she continued to receive pay increases.⁵² As explained by the Eleventh Circuit Court of Appeals, with one exception, her supervisor “consistently ranked Ledbetter at or near the bottom of her co-workers in terms of performance.”⁵³ Despite these negative evaluations, however, her supervisor “suggested, and she received, a 5.28% increase over her existing salary, the largest percentage increase given to any Area Manager.”⁵⁴ Thus, it would be easy to miss that these evaluations amounted to “acts” or “occurrences” that have triggered a limitations period.⁵⁵

In addition to the pay increases she received, Ledbetter also got mixed messages from her supervisors about the reasons for the salary decisions that were made. When she did not receive a raise one year, she was told that her performance was “sub-standard,”⁵⁶ but there was no indication that the negative evaluation was based on her sex.⁵⁷ Moreover, her denial of a pay raise was in the midst of employee layoffs, which included a “long list” of people in departments all over the plant” and she was encouraged just to be able to retain her employment.⁵⁸ Far from a “diminution in job status” that is required to start the running of a limitations period, Ledbetter might well have thought her job status was secure.⁵⁹

49. *Id.* at 622 (majority opinion).

50. *Ledbetter v. Goodyear Tire & Rubber Co. Inc. (Ledbetter I)*, 421 F.3d 1169, 1173-74 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

51. *See Ledbetter*, 550 U.S. at 643, 645 (Ginsburg, J., dissenting) (discussing the difficulty in recognizing the triggering point in pay disparity cases).

52. *See Ledbetter I*, 421 F.3d at 1173 (noting Ledbetter’s receipt of pay increases despite receiving negative performance evaluations).

53. *Id.*

54. *Id.*

55. *See Ledbetter*, 550 U.S. at 650 (Ginsburg, J., dissenting) (discussing the likelihood that Ledbetter was unaware of the discrimination she faced).

56. *Ledbetter I*, 421 F.3d at 1174.

57. *Id.*

58. *Id.*

59. *See id.* (discussing that only one day after Ledbetter was told she would be laid off, a supervisor informed her that she would continue working as a substitute manager).

Only after Ledbetter became aware that she was receiving paychecks that were smaller than those of her male counterparts did she file a claim for discriminatory pay disparity.⁶⁰ The district court, over the objections of the defendant employer based on the timing of her charge, allowed Ledbetter's Title VII claim to proceed to trial, at which the jury returned a verdict in favor of the plaintiff, finding that it was "more likely than not that Defendant paid Plaintiff an unequal salary because of her sex."⁶¹ The Court of Appeals for the Eleventh Circuit reversed the district court's decision not to grant the defendant judgment as a matter of law, finding that the evidence was insufficient to prove that discriminatory intent motivated the only two pay decisions that were made within the limitations period.⁶² On appeal to the Supreme Court, the plaintiff did not contest the Court of Appeals' holding that there was no discriminatory intent when the paychecks were issued, but relied on the receipt of disparate pay to justify her claims and bring them within the limitations period.⁶³ The Supreme Court rejected the plaintiff's argument that each paycheck gave rise to a new claim.⁶⁴

Despite the difficulty Lilly Ledbetter faced in discovering the pay differential between her and her male coworkers, the Court expressly refused to consider whether the *National Railroad Passenger Corp. v. Morgan*⁶⁵ discovery rule would apply to a Title VII case.⁶⁶ It did not clarify what the precise "pay-setting decision" had been or how that decision would have been understood by the plaintiff, because the question was not before it.⁶⁷ The question was clearly articulated, however, by the Court's dissenting Justices⁶⁸ and raised by commentators after the decision was rendered.⁶⁹ Congress took action almost immediately to overturn the Supreme Court's decision

60. *Id.* at 1175.

61. *Id.* at 1176 (quoting jury's special verdict form).

62. *Id.* at 1189-90.

63. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623 (2007) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

64. *Id.* at 637.

65. 536 U.S. 101 (2002).

66. *Ledbetter*, 550 U.S. at 642 n.10.

67. *Id.* at 637.

68. Justices Stevens, Souter, and Breyer joined in the dissent, written by Justice Ginsburg, which focused in large part on the "problem of concealed pay discrimination." *Id.* at 643, 650 (Ginsburg, J., dissenting).

69. *See, e.g., Zisk, supra* note 14, at 146 (questioning what the court meant by "pay-setting decision"); Minsky, *supra* note 14, at 250 (noting the Court's acknowledgment that "Ledbetter did not initially realize she was the victim of discrimination").

in this case,⁷⁰ but it responded only to the very narrow issue addressed by the Court.⁷¹

Congress could have gone further.⁷² Because “specific and discrete acts of wage-based discrimination may be very difficult to detect within the 180-day filing period provided under title [sic] VII,”⁷³ Senator Hutchison proposed language that would have incorporated the discovery rule into Title VII.⁷⁴ Under an ordinary discovery rule, “the statute of limitations will not begin to run until the plaintiff knows or reasonably should have known of the injury and the connection between the injury and the defendant’s conduct.”⁷⁵ Consistent with this definition, Senator Hutchison’s amendment would have allowed a victim of discrimination to bring a claim within the applicable 180 days or 300 days from the time that “the person aggrieved has, or should be expected to have, enough information to support a reasonable suspicion of such discrimination.”⁷⁶

70. H.R. 2831, 110th Cong. (2007) (as introduced to the House of Representatives, June 22, 2007).

71. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. §2000e-5(e)(3)) (signed by President Obama on January 29, 2009). The bill declared as congressional findings that:

The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.* significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

Id. § 2(1) (citations omitted); see 155 CONG. REC. S401, 558 (daily ed. Jan. 15, 2009) (statement of Sen. Mikulski, cosponsor of the Lilly Ledbetter Fair Pay Act) (“We want to be sure we keep the courthouse door open. What we do is simply restore the law as it existed before the recent Supreme Court decision so that we make sure the statute of limitations runs from the date of the actual payment of a discriminatory wage, not just from the time of hiring.”); 155 CONG. REC. S673, 695 (daily ed. Jan. 21, 2009) (statement of Sen. Leahy, Chair, Sen. Comm. on the Judiciary) (“Congress passed title [sic] VII of the Civil Rights Act to protect employees against discrimination with respect to compensation because of an individual’s race, color, religion, sex or national origin but the Supreme Court’s *Ledbetter* decision goes against both the spirit and clear intent of our antidiscrimination laws.”).

72. See 155 CONG. REC. S401, 588 (daily ed. Jan. 15, 2009) (statement of Sen. Hutchison) (proposing to incorporate a discovery rule into the Lilly Ledbetter Fair Pay Act of 2009).

73. 155 CONG. REC. S673, 695 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich).

74. 155 CONG. REC. S401, 588 (daily ed. Jan. 15, 2009) (statement of Sen. Hutchison).

75. Minsky, *supra* note 14, at 243 n.34; see *Hamilton v. Smith*, 773 F.2d 461, 464 (2d Cir. 1985) (citing Connecticut law equating “injury” with “actionable harm” and holding that the applicable limitations period begins to run “when the plaintiff discovers both that he has suffered physical harm and the causal connection between that harm and the alleged negligent conduct of the defendant”).

76. 155 CONG. REC. S401, 588 (daily ed. Jan. 15, 2009) (statement of Sen. Hutchison).

Congress did not adopt this amendment, but the language ultimately passed contains nothing that prohibits the application of the discovery rule to pay discrimination claims.⁷⁷ Because there is no “contrary directive from Congress,” the discovery rule can be, and should be, applied to pay discrimination claims.⁷⁸ The next section reviews the cases that have already considered the reach of the Ledbetter Act and, while none were confronted with a discovery issue, none foreclosed the application of the discovery rule.

III. THE LEDBETTER FAIR PAY ACT APPLIED

Immediately after the enactment of the Ledbetter Act, the Supreme Court considered its effect.⁷⁹ While it could have remanded the case to give the lower court a chance to consider the effect of the new law,⁸⁰ the Court reviewed the legislation and limited its reach.⁸¹ In *AT&T Corp. v. Hulteen*, the Supreme Court was faced with the question whether pension plans based on a seniority system which granted less service credit for pregnancy-related leave than it did for other medical leave violated Title VII.⁸² Even though the plaintiffs, who took leave for pregnancy-related conditions, received pension payments that were lower than those of their coworkers who missed work for other medical conditions,⁸³ the Court held that there was no claim under Title VII, even as amended.⁸⁴ Because the seniority systems were not illegal when they were put in place, the Court concluded that the plaintiffs were not “affected by application of a discriminatory compensation decision or other practice,” thereby making the Ledbetter Act inapplicable.⁸⁵

In *Hulteen*, the employees complained about the way AT&T treated pregnancy leave in awarding pension benefits.⁸⁶ Prior to

77. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

78. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (holding that the discovery rule is “read into statutes of limitations in federal-question cases . . . in the absence of a contrary directive from Congress”).

79. See *AT&T Corp. v. Hulteen*, 556 U.S. ___, 129 S.Ct. 1962, 1972-73 (2009) (accepting supplemental briefing to consider the effect of the recent amendment).

80. Neal D. Mollen & Dara H. Freling, *Supreme Court Trims Reach of Lilly Ledbetter Fair Pay Act of 2009 and Reaffirms Settled Law on Retroactive Application of Statutes*, STAY CURRENT (Paul, Hastings, Janofsky & Walter LLP, Washington, D.C.), May 2009 at 1, available at <http://www.paulhastings.com/publicationDetail.aspx?PublicationId=1318>.

81. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1972-73.

82. *Id.* at 1966.

83. *Id.* at 1967.

84. *Id.* at 1973.

85. *Id.*

86. *Id.* at 1967.

Title VII's amendment making discrimination based on pregnancy-related conditions unlawful, AT&T treated leave for pregnancy as personal, rather than disability, leave.⁸⁷ Because the company gave full service credit for disability leave and only a maximum of thirty days for personal leave, employees who missed work for pregnancy-related conditions received fewer seniority credits for pension benefits than those who missed work for other health-related reasons.⁸⁸ This was legal before the Pregnancy Discrimination Act (PDA) amended Title VII.⁸⁹

In 1978, Congress amended Title VII by passing the PDA.⁹⁰ The PDA made "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."⁹¹ With the enactment of the PDA, AT&T changed its practice and gave women who took maternity leave the same seniority credits as it gave to employees who took other medical leave, but the company did not "make any retroactive adjustments to the service credit calculations of women who had been subject to the pre-PDA personnel policies."⁹² As a result, women who had missed work for pregnancy-related conditions prior to the passage of the PDA accrued less time toward their pensions than those who missed work for other medical conditions and, accordingly, received lower retirement benefits than the other employees who had taken non-maternity medical leave.⁹³

Four of these women "filed charges of discrimination with the [EEOC], alleging discrimination on the basis of sex and pregnancy in violation of Title VII."⁹⁴ The EEOC determined that there was

reasonable cause to believe that AT&T had discriminated against respondent Hulteen and "a class of other similarly-situated female employees whose adjusted [commencement of service] date has been used to determine eligibility for a service or disability pension, the amount of pension benefits, and eligibility for certain other benefits and programs, including early retirement offerings."⁹⁵

The EEOC issued a right to sue letter, and Hulteen subsequently brought suit in the United States District Court for the Northern

87. *Id.* at 1966-67.

88. *Id.* at 1967.

89. *Id.*

90. Pregnancy Discrimination Act of 1978, S. 995, 95th Cong. (2nd Sess. 1978) (current version at 42 U.S.C. § 2000e(k) (2006)).

91. AT&T Corp. v. Hulteen, 556 U.S. ___, 129 S.Ct. 1962, 1967 (2009) (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983)).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (citation omitted).

District of California.⁹⁶ Based on a prior Ninth Circuit decision,⁹⁷ the District Court held, and the Ninth Circuit affirmed, that Title VII is violated “where post-PDA retirement eligibility calculations incorporated pre-PDA accrual rules that differentiated on the basis of pregnancy.”⁹⁸ Noting a conflict in the circuits, the Supreme Court granted certiorari “in order to resolve this split.”⁹⁹ Relying on the fact that AT&T’s seniority system was “bona fide”¹⁰⁰ and that Title VII insulates these systems from challenge,¹⁰¹ the Court held that no violation occurred.¹⁰²

While this case was pending, Congress passed the Ledbetter Fair Pay Act.¹⁰³ The Court accepted supplemental briefing on the case, even after oral arguments had been held, to consider “the possible effect on this case of the recent amendment to” Title VII.¹⁰⁴ The plaintiff Hulteen argued that each time she was paid a pension benefit, she was “affected by application of a discriminatory compensation decision or other practice,” as defined by the Ledbetter Act.¹⁰⁵ It is noteworthy that the Court considered this issue at all.¹⁰⁶ Because the

96. *Id.*

97. *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991).

98. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1967-68. The Ninth Circuit had earlier affirmed the District Court’s holding en banc and held that its decision in *Pallas*, that “calculation of service credit excluding time spent on pregnancy leave violates Title VII,” was correct. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1003 (9th Cir. 2007), *rev’d*, 556 U.S. ___, 129 S.Ct. 1962 (2009).

99. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1968 (noting a circuit split in the Ninth, Sixth, and Seventh circuits); *cf.* *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007) (holding claim barred by statute of limitations, as well as by the seniority provision of Title VII); *Ameritech Benefit Plan Comm. v. Comm’n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000) (finding no Title VII violation given the existence of a bona fide seniority system); *Pallas*, 940 F.2d at 1324 (finding plaintiff’s complaint stated valid cause of action under Title VII).

100. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1970 (defining a “bona fide” system as having “no discriminatory terms”).

101. Section 703(h) of Title VII of the Civil Rights Act of 1964 provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges or employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(h) (2006).

102. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1973.

103. President Obama signed the legislation on January 29, 2009. *See supra* notes 9-10 and accompanying text.

104. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1972.

105. *Id.* at 1973 (quoting the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)(A))).

106. *See Mollen & Freling, supra* note 80 (noting that “[t]he Court is not typically eager to become the first appellate court to reach important questions of statutory

Ledbetter Act was passed while the *Hulteen* case was pending, the Court could have remanded the case to allow the lower court to consider the Act's reach.¹⁰⁷ The Court retained the case, however, and refused to extend the Act's reach to the facts, holding that "AT&T's pre-PDA decision not to award [her] service credit for pregnancy leave was not discriminatory" and, therefore, the plaintiff was not "affected by application of a discriminatory compensation decision or other practice."¹⁰⁸ Accordingly, even though the plaintiff's pension payments were lower than the pension payments received by other employees who missed work for other medical conditions, arguably just like the salary payments Lilly Ledbetter received that were lower than her coworkers', Title VII afforded no relief.¹⁰⁹

A number of federal district courts have also considered the scope of the Ledbetter Act, and some of them have similarly construed the Act narrowly.¹¹⁰ Others, however, have interpreted the Act to save claims that would have failed under the old statutory regime.¹¹¹ In

construction").

107. *Id.*

108. *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1973 (quoting the Lilly Ledbetter Fair Pay Act § 3(A)). The Court noted, however, that if AT&T had left its discriminatory policy in place after the passage of the Pregnancy Discrimination Act, the Ledbetter Act may then have allowed the plaintiffs to recover at least for two years before they filed their EEOC charges. *Id.* at 1968, 1972.

109. *Id.* at 1967, 1971-72.

110. *See, e.g., Mikula v. Allegheny County*, 320 F. App'x 134, 137 n.1 (3d Cir. 2009) (distinguishing a request for a raise in pay from the adoption of a discriminatory compensation practice), *rev'd on reh'g*, No. 07-4023, 2009 WL 2889742 (3d Cir. Sept. 10, 2009); *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867, 876 (N.D. Iowa 2009) (limiting reach of the Ledbetter Act to those circumstances enumerated in the statutory language and concluding that the Ledbetter Act had no relevance to claims of sexual harassment); *Hines v. N. W. Va. Operations*, No. 1:08CV144, 2009 WL 1228305, at *3 (N.D. W. Va. May 1, 2009) (holding Ledbetter Fair Pay Act inapplicable to a claim over an arbitration process where the "last discriminatory act" alleged by plaintiff occurred after the limitations period expired); *Leach v. Baylor Coll. of Med.*, No. H-07-0921, 2009 WL 385450, at *19 (S.D. Tex. Feb. 17, 2009) (Ledbetter Act did not apply to a race discrimination claim in which plaintiff alleged discriminatory assignment of job responsibilities with no assertion that the discrimination affected pay); *see also Maher v. Int'l Paper Co.*, 600 F. Supp. 2d 940, 950 n.5 (W.D. Mich. 2009) (describing the Act's reach as limited to "the timeliness of discriminatory compensation claims" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006); the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2006); and not extended to claims under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006)); *Siri v. Princeton Club of N.Y.*, 874 N.Y.S.2d 408, 409 (N.Y. App. Div. 2009) (noting that Ledbetter Act does not apply to a claim of a continuing practice of discrimination in the assignment of banquet work).

111. *See, e.g., Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 566-67 (S.D. Miss. 2009) (noting that lower salary related to a denial of tenure that was outside the limitations period was a violation under Title VII, as amended by the Ledbetter Fair Pay Act); *Shockley v. Minner*, No. 06-478 JJF, 2009 WL 866792, at *1 (D. Del. Mar. 31, 2009)

those cases where the courts have decided the Act does not apply, the courts have noted either that no disparity in pay was alleged,¹¹² or that the alleged discrimination was a continuing violation or sexual harassment, rather than a “discrete act.”¹¹³

In a case with facts similar to facts in a case that was dismissed by the Supreme Court before the Ledbetter Act was passed,¹¹⁴ a federal district court relied on the Ledbetter Act to allow the claim.¹¹⁵ In *Gentry v. Jackson State University*, the plaintiff claimed that she “was denied tenure and a related salary increase because of her gender, in violation of Title VII.”¹¹⁶ The defendant moved for summary judgment based on statute of limitations grounds because the plaintiff was denied tenure in 2004, but waited until 2006 to file a charge of discrimination with the EEOC, well after the 180 day limit provided

(denying defendant’s motion to dismiss plaintiff’s § 1983 claim because Ledbetter Fair Pay Act “explicitly overruled the decision and logic of the *Ledbetter* decision”); *Knox v. Centric Group, LLC*, No. 3:06-CV-555-RAM, 2009 WL 875513, at *4 (D. Nev. Mar. 30, 2009) (plaintiff’s claim that bonus program instituted outside the limitations period that continued to pay female employees less than male employees was timely filed under the Ledbetter Fair Pay Act); *Bush v. Orange County Corr. Dep’t*, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009) (noting that Ledbetter Act saves plaintiffs’ claims of pay discrimination based on race and gender that would “plainly be barred” under the *Ledbetter* decision). The court in *Knox* also noted that the plaintiff’s claim challenged a pay system that was administered during the statutory period and was “facially discriminatory.” *Knox*, 2009 WL 875513, at *4. The court found that “[i]t is a well-settled proposition that ‘an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.’” *Id.* (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 637 (2007)). The court concluded, therefore, that “regardless of the passage of the Act, [the] [p]laintiff’s disparate pay claims are not time-barred.” *Id.* See also *Aspilair v. Wyeth Pharm. Inc.*, 612 F. Supp. 2d 289, 303 (S.D.N.Y. 2009) (granting defendant’s motion for summary judgment on § 1981 claim, but assuming that plaintiff’s claim that she was not paid at the proper rate was timely “because the decision not to pay plaintiff at the [proper rate], which decision was made prior to the statutory period, affected the amount of plaintiff’s paychecks during the statutory period”); *Vuong v. N.Y. Life Ins. Co.*, No. 03 Civ. 1075(TPG), 2009 WL 306391, at *8 (S.D.N.Y. Feb. 6, 2009) (“The issue of when the unlawful employment practice occurs with respect to compensation is the subject of legislation, which became effective only a few days ago . . .”).

112. See *Hines*, 2009 WL 1228305, at *2 n.9 (finding that Ledbetter Act does not apply to a claim of racial discrimination with no claim of discriminatory compensation); *Leach*, 2009 WL 385450, at *17-*18 (finding that Ledbetter Act did not apply to a race discrimination claim in which plaintiff alleged discriminatory assignment of job responsibilities with no assertion that the discrimination affected pay). *But see Vuong*, 2009 WL 306391, at *8-*9 (dismissing a claim over a failure to promote but allowing a claim for discriminatory pay practice).

113. See *CRST Van Expedited, Inc.*, 615 F. Supp. 2d at 876 (limiting reach of the Ledbetter Act to those circumstances enumerated in the statutory language and concluding that the Ledbetter Act had no relevance to claims of sexual harassment); *Siri*, 874 N.Y.S.2d at 409 n.10, 410 (noting that Ledbetter Act does not apply to a claim of a continuing practice of discrimination in the assignment of banquet work).

114. *Del. State Coll. v. Ricks*, 449 U.S. 250, 252-56 (1980).

115. *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 566-67 (S.D. Miss. 2009).

116. *Id.* at 565.

by Title VII.¹¹⁷ Notably, the court decided that the employee's claim could withstand the statute of limitations defense.¹¹⁸ This holding is notable, because it is in direct contrast with the Supreme Court's decision in *Delaware State College v. Ricks*,¹¹⁹ decided prior to the passage of the Ledbetter Act and barring the employee's claim.¹²⁰ In *Ricks*, a college librarian alleged that he had been discharged because of his national origin.¹²¹ The college denied tenure to Ricks, but offered him a one-year, nonrenewable contract that expired a little over a year after his tenure was denied.¹²² Ricks filed a charge with the EEOC almost a year after the denial of his tenure, when his finite contract was about to expire.¹²³ He argued that the EEOC charging period ran from the date of his actual termination rather than from the date when tenure was denied.¹²⁴ The Court rejected his argument, holding that the limitations period began to run when "the tenure decision was made and communicated to" the employee.¹²⁵

Although it made no mention of the *Ricks* case and did not try to distinguish it, the *Gentry* court came to the opposite result.¹²⁶ Despite its seemingly expansive reading of the Ledbetter Act, the *Gentry* court did acknowledge the limits of it, stating that "[t]he rule set out in *Ledbetter* and prior cases — that 'current effects alone cannot breathe new life into prior uncharged discrimination' — is still binding law for Title VII disparate treatment cases involving discrete acts other than pay."¹²⁷ The court distinguished the case before it from cases involving other discrete acts, noting that "the Supreme Court's *Ledbetter* decision continues to provide the applicable rule for discrete discriminatory acts 'other than pay,'" but nonetheless "is not helpful in this case."¹²⁸ The court acknowledged that the plaintiff's denial of tenure was a "discrete" act, but emphasized that the plaintiff "asserted that the denial of tenure also denied her a salary increase and hence was a compensation decision."¹²⁹

117. *Id.* at 566.

118. *Id.* at 566-67.

119. 449 U.S. 250.

120. *Id.* at 258.

121. *Id.* at 254.

122. *Id.* at 252-53.

123. *Id.* at 254.

124. *Id.* at 257.

125. *Id.* at 258.

126. *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 566-67 (S.D. Miss. 2009).

127. *Id.* at 566 (quoting *Leach v. Baylor Coll. of Med.*, No. H-07-0921, 2009 WL 385450, at *17 (S.D. Tex. Feb. 17, 2009)).

128. *Id.* (citing *Leach*, 2009 WL 385450, at *17).

129. *Id.* at 567.

*Leach v. Baylor College of Medicine*¹³⁰ is an example to the contrary. In that case, the plaintiff complained that he was discriminated against because of his race. The plaintiff was an African American physician who alleged that he was expected to satisfy certain requirements that were not required of any other Baylor faculty member.¹³¹ Because the plaintiff's claims were not over discrete discriminatory acts that related to pay, the court concluded that the Ledbetter Fair Pay Act did not control.¹³² Similarly, in *Vuong v. New York Life Insurance Company*,¹³³ the United States District Court for the Southern District of New York held that an employee's charge of discrimination filed over four years after an employer's failure to promote him was untimely because the failure to promote was a "discrete" act, and "plaintiff knew what was occurring at that time."¹³⁴

In *Vuong*, the plaintiff, who was Chinese, began working for the defendant employer as an agent selling life insurance.¹³⁵ He was promoted to Sales Manager, then to Associate General Manager, and subsequently to co-Managing Partner of a large, regional office.¹³⁶ Plaintiff claimed that a promise was made to him that the co-managing arrangement was temporary and that he would "take the office as a whole," but that change was never made.¹³⁷ Plaintiff claimed that the company's failure to appoint him as Managing Partner and his subsequent termination were discriminatory because of his race and national origin.¹³⁸ He also alleged that he was paid less than a Caucasian employee who held the same position he held.¹³⁹

The plaintiff, however, waited over three years to file a charge of discrimination, which was well beyond the 300-day limitations period that applied to his claim.¹⁴⁰ Relying on the Supreme Court's

130. *Leach*, 2009 WL 385450.

131. *Id.* at *15. According to the plaintiff's claims, he was the "only . . . faculty member expected to devote 35 or more hours per week at the VA Medical Center, develop a clinical practice, and obtain research funding." *Id.* He also claimed that a comment directed at him about "Michael Jackson" was "direct evidence of racial discrimination." *Id.*

132. *Id.* at *17; accord *Mikula v. Allegheny County*, 320 F. App'x 134, 137 n.1 (3d Cir. 2009) (distinguishing a request for a raise in pay from the adoption of a discriminatory compensation practice); *Rowland v. Certainteed Corp.*, No. 08-3671, 2009 WL 1444413, at *6 (E.D. Pa. May 31, 2009) (holding that "failure to promote" claim is not saved by the Ledbetter Act); *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867, 869 (N.D. Iowa 2009) (limiting reach of the Ledbetter Act to those circumstances enumerated in the statutory language and concluding that the Ledbetter Act had no relevance to claims of sexual harassment).

133. No. 03 Civ. 1075(TPG), 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009).

134. *Id.* at *8.

135. *Id.* at *1.

136. *Id.* at *1.*2.

137. *Id.* at *2, *4.

138. *Id.* at *1.

139. *Id.* at *1, *3.

140. *See id.* at *7 (explaining that California's Department of Fair Employment and

definition of a failure to promote as a “discrete” act,¹⁴¹ but also noting that the “plaintiff knew what was occurring at that time,”¹⁴² the district court concluded that the 300-day limitations period began to run when the company failed to promote the plaintiff and, therefore, that the plaintiff’s failure-to-promote claim was time-barred.¹⁴³

The court separately considered the plaintiff’s claim that the allocation of pay between himself and a Caucasian employee was discriminatory.¹⁴⁴ Because the claim was “with respect to compensation,” the court noted the passage of the Ledbetter Act and the fact that it “clearly governs the compensation claim in the instant case.”¹⁴⁵ Although the employer’s decision to allocate the plaintiff’s pay and the pay of his coworker was made outside of the limitations period, the “[p]laintiff claim[ed] that the paychecks he received during the charging period would have been larger if [his employer] had not made the discriminatory decision.”¹⁴⁶ Accordingly, based on the Ledbetter Fair Pay Act, the court allowed that claim to survive the defendant employer’s motion for summary judgment.¹⁴⁷

In the cases already decided under the Ledbetter Act, there was no issue about when the discriminatory conduct occurred or whether the plaintiff could have reasonably discovered it.¹⁴⁸ Although discovery of the discriminatory practice was not at issue in *Vuong*, the court addressed it nevertheless.¹⁴⁹ Deciding that the plaintiff’s failure to promote claim was time-barred, the court noted that when he was not promoted, the “plaintiff knew what was occurring at that time.”¹⁵⁰ Given the facts before it, the court did not have to consider whether the limitations period would be triggered if the plaintiff was unaware of the discriminatory act but suggested that the limitations

Housing, the agency with the authority to handle employment discrimination claims, has a work-sharing agreement with the EEOC, under which “a charge filed with the EEOC will automatically be deemed filed” with the state agency and that based on this agreement, the court determined the limitations period to be 300 days).

141. *Id.* (citing Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

142. *Id.* at *8.

143. *Id.*

144. *Id.* at *2, *8.

145. *Id.* at *8.*9.

146. *Id.* at *9.

147. *See id.* (declaring that the Ledbetter Fair Pay Act makes such a claim timely).

148. *See, e.g.,* Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 565, 567 (S.D. Miss. 2009) (explaining that the plaintiff knew that her employer denied her tenure and a related salary increase); *cf. Vuong v. N.Y. Life Ins. Co.*, No. 03 Civ. 1075(TPG), 2009 WL 306391, at *7-*8 (S.D.N.Y. Feb. 6, 2009) (explaining that plaintiff knew that his employer was treating him differently when employer failed to promote plaintiff as the sole Managing Partner).

149. *Vuong*, 2009 WL 306391, at *8.

150. *Id.*

period would not, in fact, begin to run.¹⁵¹ Specifically, the court stated: “[i]ndeed, there are circumstances where a plaintiff is unaware for some time that his employer acted with discriminatory intent in taking an adverse employment action.”¹⁵² Under these circumstances, the claim would accrue “from the date the employee ‘knows or has reason to know of the injury which is the basis of his action.’”¹⁵³ Nothing in the Ledbetter Act forecloses this result, and, since Congress had the opportunity to prohibit the application of the discovery rule but did not, the rule can, and should, apply.¹⁵⁴ The cases that have already applied the rule are therefore instructive and their reasoning is considered below.

IV. THE DISCOVERY RULE IS APPLIED WITHOUT COMPROMISING THE PROTECTION AGAINST THE LITIGATION OF STALE CLAIMS

A number of courts have considered the timing of the accrual of discrimination claims, and the Supreme Court has implicitly acknowledged the application of the discovery rule in *Delaware State College v. Ricks*.¹⁵⁵ The Court in *Ricks* held that the act of alleged discrimination occurred, and the limitations period began to run, “at the time the tenure decision was made *and communicated*” to the affected employee.¹⁵⁶ Lower courts have similarly defined the accrual of a claim

151. *See id.* at *7 (discussing the possibility that a plaintiff may not initially be aware of discriminatory practices).

152. *Id.*

153. *Id.* (quoting *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994)) (decided under sections 1983 and 1985 of the Civil Rights Act of 1964, 42 U.S.C. §§ 1983, 1985 (1988) (current version at 42 U.S.C. §§ 1983, 1985 (2006))).

154. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (explaining that the discovery rule “is read into statutes of limitations in federal-question cases” absent a contrary Congressional directive).

155. 449 U.S. 250 (1980).

156. *Id.* at 258 (emphasis added); *see also Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390-91 (3d Cir. 1994) (applying discovery rule to a Title VII claim and holding that limitations period began to run when employer informed plaintiff of her discharge); *Cada*, 920 F.2d at 450, 452 (applying discovery rule to an age discrimination claim and holding that limitations period triggered when employee discovered he had been replaced by young and inexperienced person); *McWilliams v. Escambia County Sch. Bd.*, 658 F.2d 326, 328 (5th Cir. 1981) (applying discovery rule to Title VII claim and holding that a teacher’s transfer and demotion triggered the limitations period in Title VII case); *Ohemeng v. Del. State Coll.*, 643 F. Supp. 1575, 1580-81 (D. Del. 1986) (applying discovery rule to Title VII claim and finding an issue of fact as to the timing of plaintiff’s discovery that a discriminatory act occurred because of the conflicting representations made by defendant employer); *cf. Braxton v. Erie County Dist. Att’y*, No. 06-CV-311A, 2008 WL 4426021, at *5-*6 (W.D.N.Y. Sept. 25, 2008) (noting the applicability of discovery rule in Title VII claim but deciding there was “no need to resolve the question of whether a discovery rule is applicable to plaintiff’s claim” in the absence of a fully-

to be “when the plaintiff knows or reasonably should know that the discriminatory act has occurred.”¹⁵⁷ The “discriminatory act” could be a denial of tenure as it was in *Ricks*,¹⁵⁸ a termination,¹⁵⁹ or a transfer and demotion.¹⁶⁰

Awareness of the act without more, however, may not be enough to trigger the running of the limitations period.¹⁶¹ Where an employee is given mixed signals about the reasons for an employer’s actions related to that employee, a cause of action does not necessarily accrue.¹⁶² The point is illustrated by the facts in *Ledbetter*: the plaintiff received pay increases even after receiving negative performance evaluations.¹⁶³ As more fully discussed above,¹⁶⁴ Ledbetter received mixed messages from her supervisors about how her salary compared to her coworkers’ and the reasons for the employer’s salary decisions.¹⁶⁵ Ledbetter also had a reasonable belief that she was being treated fairly and was even lucky to retain her job amidst other company layoffs.¹⁶⁶

The impact of these mixed signals was not at issue before the Supreme Court in *Ledbetter* because the plaintiff did not argue that application of the discovery rule “would change the outcome in her case.”¹⁶⁷ At least one court has noted, however, that mixed signals of this type raise a question of fact as to whether the limitations period for a Title VII claim has begun to run.¹⁶⁸ In *Ohemeng v. Delaware State College*, the plaintiff, a black naturalized American assistant

developed factual record).

157. *Ohemeng*, 643 F. Supp. at 1580 (quoting *McWilliams*, 658 F.2d at 330); accord *Oshiver*, 38 F.3d at 1386.

158. 449 U.S. at 257.

159. See, e.g., *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554-55 (1977) (finding cause of action accrued when employee was forced to resign when she got married).

160. See, e.g., *McWilliams v. Escambia County Sch. Bd.*, 658 F.2d 326, 328 (5th Cir. 1981) (finding cause of action accrued when teacher was transferred and demoted).

161. *Ohemeng*, 643 F. Supp. at 1580.

162. See *id.* (noting the existence of a question of fact as to plaintiff’s knowledge of discrimination).

163. *Ledbetter v. Goodyear Tire & Rubber Co., Inc. (Ledbetter I)*, 421 F.3d 1169, 1173-74 (11th Cir. 2005), *aff’d*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

164. See *supra* notes 46-59 and accompanying text (presenting the background facts of the *Ledbetter* case).

165. *Ledbetter I*, 421 F.3d at 1173-74.

166. *Id.* at 1174-75.

167. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.10 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

168. See *Ohemeng v. Del. State Coll.*, 643 F. Supp. 1575, 1580 (D. Del. 1986) (applying discovery rule to Title VII claim and finding an issue of fact as to the timing of plaintiff’s discovery that a discriminatory act occurred because of the conflicting representations made by defendant employer).

professor at a state college, was terminated and informed that his termination was because of the college's plan to "upgrade its teaching staff."¹⁶⁹ Prior to his termination, Ohemeng had been given "excellent" performance evaluations and renewed appointments for two consecutive academic years.¹⁷⁰ Despite a clause in his contract that made it a terminal one-year contract, the college reassured Ohemeng that he did not have to worry about termination.¹⁷¹ The college informed Ohemeng that he "needed to acquire an additional degree" to be eligible for promotion and additional years of teaching "before he could be considered for tenure."¹⁷²

Upon his termination, Ohemeng was told that his dismissal was "because he did not have a doctoral degree" and, therefore, "did not meet the long term needs of the college."¹⁷³ Several months later, however, the college advertised for assistant professors with the same qualifications as Ohemeng and, seeing the advertisement, Ohemeng realized for the first time that the actions taken by the college may have been due to his race.¹⁷⁴ Ohemeng maintained he was the subject of derogatory racial slurs during his tenure at the college.¹⁷⁵ Distinguishing the case from *Ricks*, where the plaintiff was given "an unbroken array of negative decisions" prior to being notified of his termination,¹⁷⁶ the *Ohemeng* court held that the plaintiff's discovery of the discrimination, and not simply notice of his termination, could trigger the running of the limitations period.¹⁷⁷ In light of "defendants' seesaw representations to Ohemeng about his teaching future with the college," the court concluded that there was the possibility "that he did not know he was being discriminated against" until he saw the advertisement for his replacement.¹⁷⁸ Accordingly, the court rejected the defendants' argument as a matter of law that the statute of limitations had been triggered earlier.¹⁷⁹

Implicit in this holding is the recognition that it is difficult for victims of workplace discrimination to discover the discrimina-

169. *Id.* at 1576, 1580.

170. *Id.* at 1576-77.

171. *Id.* at 1577.

172. *Id.*

173. *Id.*

174. *Id.* at 1577-78.

175. *Id.* at 1578.

176. *Id.* at 1580 (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 (1980)).

177. *Id.* at 1580-81.

178. *Id.*; accord *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (holding that limitations period may be triggered when employee discovers he has been replaced by young and inexperienced person).

179. *Ohemeng*, 643 F. Supp. at 1580.

tion.¹⁸⁰ Even an opponent to the inclusion of the discovery rule in the Ledbetter Fair Pay Act had to concede that:

The reality is, many employers do not allow their employees to learn how their compensation compares to their coworkers'. They can hide it and hide it and hide it until these women finally retire, pray that they never find out how they were discriminated against, and then say when they are found out: Oh, my goodness gracious, you should have filed suit earlier.¹⁸¹

Not incorporating the discovery rule “could lead to situations in which an employer escapes liability simply because the person did not know that a discriminatory act took place.”¹⁸²

Allowing the discovery of discrimination to trigger the start of the limitations period protects victims of discrimination, but it does not mean that statutes of limitations will become meaningless or that claims will be viable forever.¹⁸³ By defining an objective rule that requires that the plaintiff “should” have discovered the wrong, rather than proof that the plaintiff actually discovered it, courts avoid open-ended liability and the litigation of stale claims.¹⁸⁴ A discovery rule based on an objective standard “requires the plaintiff to take reasonable measures to uncover the existence of injury.”¹⁸⁵ Victims of dis-

180. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting) (noting that compensation discrimination is more difficult to identify than discrimination relating to public events such as “promotions, transfers, hirings, and firings”), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

181. 155 CONG. REC. S673, 694 (daily ed. Jan. 21, 2009) (statement of Sen. Leahy, Chair, Sen. Comm. on the Judiciary). See discussion *infra* notes 191-201 and accompanying text for the arguments against the application of the discovery rule and the responses to those arguments.

182. 155 CONG. REC. S673, 695 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich).

183. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (construing the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (1970) (current version at 28 U.S.C. § 2401(b) (2006)) and describing the statute of limitations defense as a “meritorious defense, in itself serving a public interest” (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938)); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386-87 (3d Cir. 1994) (finding awareness of actual injury, as distinguished from legal injury, sufficient to trigger the statutory period); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1127 (3d Cir. 1988) (applying the discovery rule to a case under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1982) (current version at 18 U.S.C. § 1964(c) (2006)), and noting need for “diligence” on the part of potential claimant to discover discrimination and bring claim), *vacated*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

184. See *Houghton*, 863 F.2d at 1127 (stating that “[a] different rule would require insufficient diligence on the part of potential claimants”).

185. *Oshiver*, 38 F.3d at 1390; *accord Houghton*, 863 F.2d at 1127.

crimination who act with insufficient diligence to discover the discrimination will be prevented from vindicating their rights.¹⁸⁶

The discovery rule, in this way, functions to delay the initial running of the statutory limitations period, but only until the plaintiff “has discovered or, by exercising reasonable diligence, should have discovered” the wrong.¹⁸⁷ Even the Supreme Court has acknowledged that the discovery rule can apply without compromising the purposes of Title VII’s limitations period.¹⁸⁸ These rules, according to the Court, “while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.”¹⁸⁹ The discovery rule, therefore, offers a “sensible compromise” that respects the purposes of a limitations period and balances it against the rights of victims of discrimination to vindicate their rights.¹⁹⁰

Opponents of the application of the discovery rule argue that its application will introduce uncertainty and inconsistency into the litigation of claims.¹⁹¹ In addition to the protections afforded by the objective standard that should overcome these arguments, employers have additional protections against stale claims that include “various defenses” in cases where plaintiffs have not been diligent or where there is “unreasonable or prejudicial delay.”¹⁹² In response to the con-

186. *Oshiver*, 38 F.3d at 1390.

187. *Id.* at 1386.

188. *See* *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-67 (1980) (noting that the dual purpose of the Title VII limitations period is to protect employees’ civil rights assertions while limiting employers’ stale defense burdens).

189. *Id.*

190. 155 CONG. REC. S673, 696 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich). Testifying in support of Sen. Hutchison’s proposed amendment to the Lilly Ledbetter Act, Sen. Voinovich explained:

Because she recognizes that paycheck discrimination may not be obvious in the modern workplace and that a bad actor should not benefit from hiding such discrimination, Senator Hutchison crafted a sensible compromise. Under the Hutchison amendment, a person could bring a claim under title [sic] VII within 180 days after obtaining knowledge or information that the person is the victim of discriminatory conduct. In other words, you don’t start the 180-day statute of limitations until the person knows or has reasonable suspicion that she is subject to a discriminatory wage. But once you know you have been discriminated against, then it is your obligation to bring that to the attention of the EEOC and start the process to obtain relief.

Id.

191. *See id.* at 699 (daily ed. Jan. 21, 2009) (statement by Sen. Murkowski) (presenting reasons against the application of the discovery rule).

192. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 657 (2007) (Ginsburg, J., dissenting) (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2001)), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (to be codified at 42 U.S.C. § 2000e-5(e)(3)).

cern over the litigation of stale claims in connection with a hostile work environment claim, the Supreme Court has noted that application of the discovery rule will not “leave employers defenseless against employees” who bring stale claims.¹⁹³ Defendants have always had, and will continue to have, “recourse when a plaintiff unreasonably delays filing a charge.”¹⁹⁴ As Justice Ginsburg stated in *Ledbetter*, “[d]octrines such as ‘waiver, estoppel, and equitable tolling’ ‘allow us to honor Title VII’s remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.’”¹⁹⁵ Employers are additionally protected against open-ended liability because the amount of lost income an employee can recover is limited to that that could have been earned in the two years prior to the filing of the discrimination claim, even if the discriminatory decision was made years earlier.¹⁹⁶

Laches offers employers further protection against the litigation of stale claims.¹⁹⁷ According to the Supreme Court, “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.”¹⁹⁸ Implicating the availability of the laches defense to a Title VII claim, one federal district court nonetheless allowed a claim that was filed after a ninety-day EEOC limitations period had expired, finding that the defendant employer failed to demonstrate how it had “been prejudiced by lack of access to [the employee’s] EEOC file.”¹⁹⁹ Although the EEOC claimed it had sent the plaintiff a right-to-sue letter indicating she had ninety days in which to bring a complaint, the plaintiff claimed she never received it.²⁰⁰ Observing that the “[p]laintiff was diligent in keeping the office apprised of her change

193. *Morgan*, 536 U.S. at 121.

194. *Id.*

195. *Ledbetter*, 550 U.S. at 657 (Ginsburg, J., dissenting) (quoting *Morgan*, 536 U.S. at 121); see also *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (“By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”).

196. See 42 U.S.C. § 2000e-5(g)(1) (2006) (discussing the limitation of damages for suits filed under 42 U.S.C. § 2000e-2, -3 (2006)); see also *Ledbetter*, 550 U.S. at 654 (Ginsburg, J., dissenting) (discussing Title VII’s back pay liability provision).

197. *Morgan*, 536 U.S. at 121; cf. *Zipes*, 455 U.S. at 398 (noting the importance of “prompt notice to the employer” in filing a suit under Title VII).

198. *Morgan*, 536 U.S. at 121.

199. *Knox v. Centric Group, LLC*, No. 3:06-CV-555-RAM, 2009 WL 875513, at *3 (D. Nev. Mar. 30, 2009).

200. *Id.*

of address and inquiring about the status of her claim through telephone calls and letters," the court allowed her claim.²⁰¹

In the course of the debate over the Ledbetter Act, one Senator noted an example in which Congress was faced with a similar problem: that of victims finding themselves unable to vindicate their rights against identity theft without the help of a discovery rule.²⁰² In *TRW Inc. v. Andrews*,²⁰³ the Supreme Court interpreted the two-year statute of limitations provision of the Fair Credit Reporting Act (FCRA) in effect at that time.²⁰⁴ Under the FCRA, as it existed when the Court considered *Andrews*, the statute indicated that an action to enforce any liability created by the FCRA may be brought "within two years from the date on which the liability arises."²⁰⁵ There was an exception to this limitations period in cases where there had been a "willful misrepresentation of 'any information required under [the Act] to be disclosed to [the plaintiff].'"²⁰⁶ According to the Court, "[w]hen such a representation is material to a claim under the Act, suit may be brought 'within two years after [the plaintiff's] discovery . . . of the misrepresentation.'"²⁰⁷ The case did not involve any allegations of misrepresentation of information, but the Ninth Circuit Court of Appeals nevertheless applied the discovery rule exception to the limitations period, holding that the limitations period commenced to run on the plaintiff's claim only upon her discovery of the defendant's alleged violations of the Act.²⁰⁸

The Supreme Court reversed the Ninth Circuit's decision, noting that § 1681p "explicitly delineates the exceptional case in which discovery triggers the two-year limitation."²⁰⁹ Because the facts did not suggest that "exceptional case," the Court decided it was "not at liberty to make Congress' explicit exception the general rule as well."²¹⁰ Recognizing that "this [decision] could unduly penalize victims of iden-

201. *Id.*

202. 155 CONG. REC. S673, 695-96 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich). Sen. Voinovich incorrectly referred to the lawsuit as "TRW v. Adelaide" when, in fact, the suit is captioned "TRW Inc. v. Andrews, 534 U.S. 19 (2001)."

203. 534 U.S. 19 (2001).

204. 15 U.S.C. § 1681p (1994) (current version at 15 U.S.C. § 1681p (2006)); *see also Andrews*, 534 U.S. at 22 n.1 (noting that Congress had changed the FCRA since the time that plaintiff filed suit in October, 1996, but that Congress had not changed the sections relevant to the instant case).

205. 15 U.S.C. § 1681p (1994) (current version at 15 U.S.C. § 1681p (2006)).

206. *Andrews*, 534 U.S. at 22 (quoting 15 U.S.C. § 1681p (1994) (current version at 15 U.S.C. § 1681p (2006))).

207. *Id.* (quoting 15 U.S.C. § 1681p (1994) (current version at 15 U.S.C. § 1681p (2006))).

208. *Andrews v. TRW, Inc. (Andrews I)*, 225 F.3d 1063, 1066-67 (9th Cir. 2000), *rev'd*, 534 U.S. 19 (2001).

209. *Andrews*, 534 U.S. at 22-23.

210. *Id.* at 23.

tity theft,”²¹¹ Congress changed the law.²¹² Extending the discovery rule to apply to all impermissible conduct, the FCRA now provides that “[a]n action to enforce any liability created under this subchapter may be brought . . . [two] years after the date of discovery by the plaintiff of the violation that is the basis for such liability.”²¹³ Congress guarded against the possibility of “open-ended legal liability” that might otherwise sound the death knell for discovery rules of this sort,²¹⁴ by requiring a plaintiff to bring a claim “not later than . . . [five] years after the date on which the violation that is the basis for such liability occurs.”²¹⁵

The FCRA’s incorporation of the discovery rule as the “general rule,” together with its five year limit for bringing a claim without regard to discovery by a plaintiff, responds to the realities of identity theft and the difficulties of its discovery, while at the same time avoiding the threat of endless exposure to liability.²¹⁶ This offers a model for what Congress could have done with the Ledbetter Act, and what the courts are still free to do given the absence of any directive in the Act with regard to the discovery rule.²¹⁷

CONCLUSION

In light of Congress’s silence on the issue in its recent amendment to Title VII and the need to protect individuals against pay discrimination that is hard to discover, the time has come to incorporate the discovery rule into Title VII pay discrimination claims. As emphasized by the courts that have already done so, the incorporation of the rule will effectuate the purposes of Title VII without compromising the protections afforded by the statute’s limitations period.

211. 155 CONG. REC. S673, 696 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich).

212. 15 U.S.C. § 1681p(1) (2006) (amending 15 U.S.C. § 1681p (2000)).

213. *Id.*

214. 155 CONG. REC. S673, 696 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich).

215. 15 U.S.C. § 1681p(2) (2006).

216. *Id.*

217. *See* *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (noting the application of the discovery rule in federal question cases absent “a contrary directive from Congress”).