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Full Length Research Paper

Gender Pay Inequality: An Examination of the Lilly Ledbetter Fair Pay Act Six Years Later

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The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed into law by President Barack Obama in January of 2009. This legislation enables an employee to sue more easily for wage discrimination under Title VII of the Civil Rights Act of 1964. In this article, we examine the impact that the Lilly Ledbetter Fair Pay Act has had on gender pay equity discrimination complaints and on how the lower courts have interpreted it since it was signed into law in January of 2009. First, we will provide a brief background about the passage of the Lilly Ledbetter Fair Pay Act and a description of the legislation itself. Then we will examine any changes in discrimination complaints since its passage, and we will analyze how lower courts have interpreted the legislation. We conclude by arguing that passage of the Lilly Ledbetter Fair Pay Act has offered little redress for gender wage discrimination since its passage six years ago.

Keywords: gender discrimination, equal pay complaints, Lilly Ledbetter Fair Pay Act

Introduction

The Lilly Ledbetter Fair Pay Act was the first piece of legislation signed into law under President Barack Obama in January of 2009. This legislation enables an employee to sue more easily for wage discrimination under Title VII of the Civil Rights Act of 1964. The law makes a discriminatory compensation decision illegal each time it occurs, such as with every paycheck received, as opposed to when the discriminatory decision is first made. The Lilly Ledbetter Fair Pay Act of 2009 (Lilly Ledbetter Fair Pay Act) was passed in response to a 2007 Supreme Court decision that made it more difficult for employees to sue their employers for discriminatory pay. Opponents of the Lilly Ledbetter Fair Pay Act have argued that it is not fair to sue businesses for past discrimination. They feared that the number of lawsuits for pay discrimination would increase dramatically as a result of the law. Although a great deal was written about the Lilly Ledbetter Fair Pay Act prior to and directly after its passage, little has been written about it since. What effect has the law had on pay discrimination claims? Have such claims increased dramatically since the passage of the law as critics feared?

In this article, we examine wage discrimination complaints since the passage of the Lilly Ledbetter Fair Pay Act, and we examine how the lower courts have interpreted it since it was signed into law in January of 2009. First, we will provide a brief background about the passage of the Lilly Ledbetter Fair Pay Act and a description of the legislation itself. Then we will examine any changes in the receipt of discrimination complaints since its passage. Lastly, we will analyze how lower courts have interpreted the legislation. We conclude that passage of the Lilly Ledbetter Fair Pay Act has done little to redress wage discrimination, and we examine other possible avenues to achieve that goal.

Background

In order to understand Congress's motivation in passing the Lilly Ledbetter Fair Pay Act, it is helpful to understand how lawsuits for employment discrimination are litigated in the United States. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, race, religion, color and national origin (Civil Rights Act, 1964). The law requires that all claims for employment discrimination initiate with a charge of discrimination that must be filed with the Equal Employment Opportunity Commission (EEOC). The statute of limitations for filing a charge is quite short-anywhere from 180 to 300 days from the date that the discriminatory act occurred, depending upon the state in which the claim arises. Failure to initiate a charge within this timeframe prevents an employee from pursuing the matter later.

The passage of the Lilly Ledbetter Fair Pay Act was prompted by Ledbetter's gender discrimination suit against Goodyear Tire Company, which was originally filed in 1999. Lilly Ledbetter was employed by Goodyear Tire Company in Gadson, Alabama from 1979-1998. In 1998, Lilly Ledbetter received an anonymous note in her locker at Goodyear. The note contained Ledbetter's salary information in comparison to that of her male counterparts (Ledbetter, 2012). Ledbetter sued Goodyear under Title VII of the Civil Rights Act of 1964, alleging gender discrimination. In the trial that followed, Ledbetter discovered that she was making less than all of her male colleagues, even those with less seniority and those who received lower performance reviews than she did. Goodyear argued that Ledbetter's salary was directly related to poor performance reviews rather than gender discrimination. The lower court ruled in Ledbetter's favor, but Goodyear appealed the decision - arguing that under Title VII, all discrimination complaints must be filed within 180 days of the discriminatory action. Thus, only the most recent salary review was subject to challenge according to Goodyear. The U.S. Circuit Court of Appeals for the Eleventh Circuit ruled in favor of Goodyear and dismissed Ledbetter's complaint, finding no discrimination within the 180 day review period. This decision was not consistent with other decisions in the Federal Court of Appeals, which had followed the precedent of the paycheck accrual rule. According to this rule, it is acceptable to bring forth a wage based discrimination claim as long as one paycheck reflecting the alleged discriminatory pay was received during the 180 day statute of limitations (*Ledbetter*, 2007).

Ultimately, the case was appealed to the Supreme Court of the United States. The primary question before the Supreme Court was not about gender-based wage discrimination. Rather, the question before the Court was whether or not Ledbetter had a right to sue under Title VII since she had not filed her claim with the EEOC within 180 days of the *initial* discriminatory act. According to Ledbetter, that initial act occurred in 1981 when Goodyear made a pay-setting decision by adopting a pay-for-performance system (House of Representatives, 2007).

In reaching its decision, the *Ledbetter* Court relied heavily on precedent established in several cases: *United Airlines v. Evans*, (1977), *Delaware State College v. Ricks*, (1980), *Lorance v. AT&T*, (1989), and *National Railroad Passenger Corporation v. Morgan* (2002). In each of those cases, the Court determined that the EEOC charging period is triggered by a discrete unlawful employment practice. As the Court explained, "a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." (*Ledbetter*, 2007, p. 628).

Ultimately, the Ledbetter Court was divided on the interpretation of the "discrete act" of discrimination. Those in the majority argued that Ledbetter did not have a timely claim because the discrete act of discrimination--the alleged discriminatory pay-setting decision which led to the pay inequity--occurred outside of the 180-day filing period. Those in the minority, however, argued that it is often impossible to know when the discrete act of discrimination first takes place since salary information is often confidential. For that reason, the minority argued that the discrete act of discrimination was renewed with the receipt of every paycheck resulting from the initial pay-setting decision.

In a 5-4 decision, the Court ruled that Lilly Ledbetter did not have the right to sue Goodyear since she had not filed her claim within the 180 day statute of limitations. Even though discriminatory pay had occurred within the 180 day statute of limitations period, the initial decision that resulted in disparate pay had not. Rather, that decision had occurred much earlier in Ledbetter's career.

Voting in the majority were John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. Dissenting were Ruth Bader Ginsberg, John Paul Stevens, David Souter, and Stephen Breyer. Justice Ginsberg read her dissenting opinion from the bench, criticizing what she called "a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose" (*Ledbetter*, 2007, p. 661).

Lilly Ledbetter Fair Pay Act of 2009

The *Ledbetter* decision prompted the passage of the Lilly Ledbetter Fair Pay Act. After the Supreme Court's verdict was announced on May 29, 2007, dissatisfaction with the decision led Democrat Representative George Miller and several other members of Congress to co-sponsor a bill to prevent a similar occurrence from happening in the future. Congress began committee hearings on June 12, 2007. Ledbetter and other interested parties testified in both the House and Senate committee hearings.

The Lilly Ledbetter Fair Pay Act amended Title VII of the Civil Right Act of 1964. According to the law, a compensation decision that discriminates against a person is illegal each time the act occurs – as with receipt of a paycheck—and not just when the initial pay decision is made. This legislation overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company,* as is clear from the statutory language. In Section 2, the act states that the Ledbetter decision "undermines…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" and "ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended." (Lilly Ledbetter Fair Pay Act, 2009, § 2).

Consequences of the Lilly Ledbetter Fair Pay Act

Opponents of the Lilly Ledbetter Fair Pay Act claimed that there would be an increase in pay discrimination cases (Editorial, 2009; Hulse 2008; Will Fair Pay 2009). Senator Mitch McConnnell of Kentucky was quoted by the *New York*

Times, saying "We think that this bill is primarily designed to create a massive amount of new litigation in our country" (Quoted in Hulse 2008). Opponents also predicted that the Lilly Ledbetter Fair Pay Act would increase costs for businesses not only because of an increase in the number of lawsuits, but also because employers would be forced to maintain employee personnel files for longer time periods in order to protect themselves against lawsuits.

In addition to the law's critics, some legal scholars also opined that the effect of the act would be far-reaching, extending the statute of limitations not just for disparate pay claims, but for all decisions related to pay, such as promotions and demotions (Sorock, 2010; Sullivan, 2010).

Although some legal analysts predicted that claims for gender-based wage and other types of discrimination would increase significantly in the wake of successful passage of the Lilly Ledbetter Fair Pay Act, EEOC statistics do not bear that out. A review of the number of charges of gender-based wage discrimination claims filed with the EEOC from the five-year period of 2010-2014 shows a slight overall decline in gender-based wage claims, with the exception of 2012. That apparent anomaly can be explained by the fact that in May of 2012, 1,975 women pursued class-action claims against the Wal-Mart Corporation, alleging gender-based discrimination in both pay and promotion decisions (Hines, 2012, June 6). The number of gender-based wage charges is as follows:

Table 1:

Gender Based Wage Claims Filed with the EEOC, FY 2010-2014

Year	Number of Claims
2014:	1,880
2013:	1,963
2012:	3,777*
2011:	1,985
2010:	2,073

We also examined the number of Equal Pay Act Charges filed with the EEOC, including any concurrent charges with Title VII. Although Equal Pay Act claims are not required to proceed through the EEOC, Equal Pay Act claims may - and often are - brought concurrently with Title VII claims for gender-based wage discrimination. For that reason, examination of concurrent Equal Pay Act charges filed with the EEOC is useful for determining the number of Title VII gender-based wage discrimination claims.

The mean number of charges that the EEOC received from Fiscal Years 1997 to 2014 was 1,041. The line in the middle of Figure 1 represents the mean number of charges, and the dotted lines above and below the mean represent one standard deviation from the mean. The only years that show receipts higher than the mean and greater than one standard deviation away are in 2000, 2001, and 2002 – all before the passage of the Lilly Ledbetter Fair Pay Act in 2009. While charge receipts increased slightly in 2010, it was well within one standard deviation of the mean, and the number of charges went back down in 2011. Therefore, a cursory glance indicates that the EEOC has not received significantly more wage discrimination charges, either under Title VII or under the Equal Pay Act.

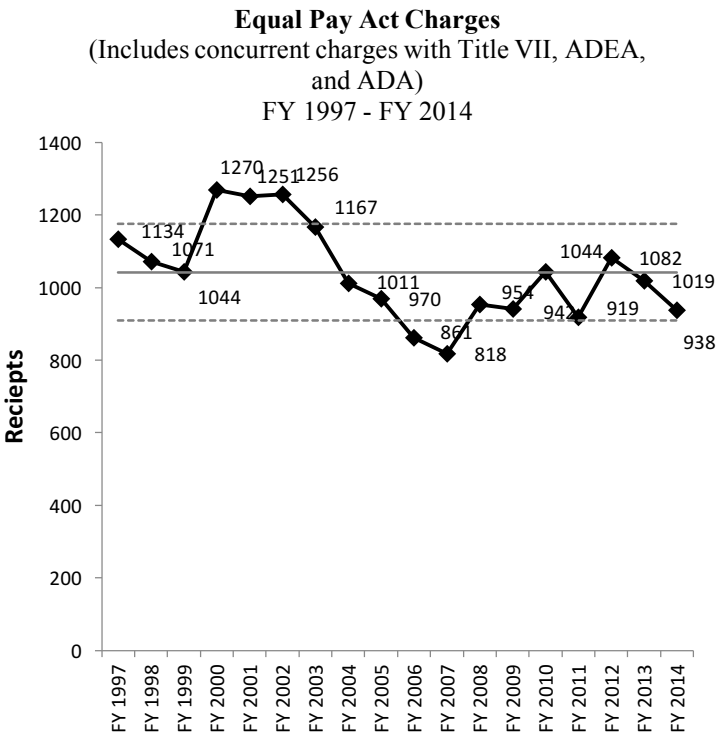

Figure 1. Equal Pay Act Charges

According to an Institute of Management Administration survey in 2010, the majority of employees in the human resource field did not feel that the law "affected their organization directly" ("What Has Changed," 2010). Larger companies were the mostly likely to report that the law had affected their organization and reported those effects were primarily confined to the maintenance of records such as performance reviews and historic salary information.

Lower Court Interpretations of the Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act amends Title VII and provides, in relevant part, that an "unlawful employment practice" occurs: (a) "when a discriminatory compensation decision or **other practice** is adopted," (b) "when an individual becomes subject to a discriminatory compensation decision or **other practice**," and (c) "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**." (Civil Rights Act of 1964, §

2000e-5(e)(3)(A) (**emphasis supplied**). Immediately after passage of the Lilly Ledbetter Fair Pay Act, legal scholars began debating the law's scope and predicted that the statute's language—especially the "other practices" phrase—would enlarge the statute of limitations for all sorts of discrimination claims, including failure-to-promote claims that only tangentially impacted compensation (Siniscalco, 2014; Sorock, 2010; Sullivan, 2010). In reality, lower courts have been reluctant to adopt such a broad reading (Jacobs, 2010). In fact, while there were a few early district court cases that adopted a more liberal reading of the statute, (for example, *Gentry v. Jackson State University* (2009) appellate courts have been virtually unanimous in reading the Lilly Ledbetter Fair Pay Act very narrowly to apply only to those cases in which plaintiffs can demonstrate evidence of unequal pay for equal work. Those decisions are reviewed below.

The District of Columbia Circuit Court of Appeals was one of the first appellate courts to weigh in on the breadth and scope of the Lilly Ledbetter Fair Pay Act in the case of *Schuler v. Pricewaterhouse Coopers, LLP* (2010). In 1999 and again in 2000, Harold Schuler, then 55, was passed over for a partnership position at Pricewaterhouse Coopers, LLC, (PWC), a global accounting firm with more than 20,000 employees. PWC offered the partnership position to a 37 year-old employee who became partner in 2000. In 2001, Schuler filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that PWC failed to consider him for the partnership position due to age. In 2002, Schuler, along with another male employee, sued PWC for age discrimination pursuant to the Age Discrimination in Employment Act ("ADEA"). The District Court dismissed the case as untimely, claiming that Schuler failed to file his administrative charge of discrimination within 300 days of the 2000 partnership decision, as required by the ADEA. In 2005, after the employees filed new lawsuits alleging ongoing age discrimination, the District Court consolidated the new claims with the claims in the former lawsuits, and once again dismissed Schuler's claims as untimely.

Schuler appealed, claiming that his 1999 and 2000 claims under the ADEA were made timely by passage of the Lilly Ledbetter Fair Pay Act of 2009. The Circuit Court, in a case of first impression, rejected Schuler's broad reading of the statute, stating that he misquoted the statute by arguing that "the decision not to promote him was an 'other act[]…intertwined with a discriminatory compensation decision' because as a result of that decision he received significantly less remuneration that he would have done as a partner" (*Schuler v. PWC*, 2010, p. 374). Agreeing with PWC, the Court interpreted the statutory language "discrimination in compensation" to mean "paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position" (*Schuler v. PWC,* 2010, p. 374). Moreover, the Court noted that employees who sue for "failure to promote" do not have to demonstrate wage disparity, but merely must show that they were rejected for the promotion and that someone outside of the protected class filled the position. Accordingly, it concluded that the decision whether to promote an employee to a higher paying position is not a "compensation decision or other practice" under the Lilly Ledbetter Fair Pay Act.

The *Schuler* case has been cited frequently for the proposition that the Lilly Ledbetter Fair Pay Act does not extend to failure-to-promote cases in which there is no evidence of compensation discrimination. In *Noel v. The Boeing Company* (2010), the Third Circuit Court of Appeals relied on *Schuler* to hold that the Lilly Ledbetter Fair Pay Act did not preserve the employee's failure-to-promote claim where there was no evidence that the employee suffered lower pay than his counterparts. Emmanuel Noel, a black Haitian national, worked for Boeing as a Chinook helicopter repairman. In May 2002, Noel applied for an offsite assignment at Boeing's Amarillo, Texas facility. Temporary offsite assignments resulted in a pay grade increase. Noel was not assigned offsite until November 2002, at which time he received a salary increase. At the same time, two white employees were also assigned to the Amarillo facility with similar pay grade increases. After a few months, the two white employees were promoted again, resulting in another pay grade increase, while Noel remained in the lower paying position. Noel complained to Boeing, yet received no response. On March 25, 2005, he filed a formal charge with the EEOC alleging discrimination based on race and national origin against Boeing.

On June 6, 2006, Noel filed a lawsuit against Boeing alleging race and national origin discrimination when it failed to assign him to the offsite facility in May, 2002 and when he was not promoted along with the other white employees in 2003. The District Court granted judgment in favor of Boeing, finding that Noel's claim was time-barred because he filed his EEOC charge more than 300 days after the decision not to promote him.

Noel appealed the District Court's decision, asserting that Boeing's failure to promote him caused him to receive less pay than his white co-workers throughout his time at the off-site facility. He argued that, under the Lilly Ledbetter Fair Pay Act, "an unlawful employment practice occurs each time an individual is affected by application of a discriminatory compensation decision." Accordingly, "each paycheck he received started the administrative clock anew" (*Noel v. Boeing*, 2010, p. 270).

The Third Circuit Court of Appeals affirmed the District Court's holding, and found that the Lilly Ledbetter Fair Pay Act did not extend to preserve claims such as Noel's. The Court reasoned that Noel's claim was simply a failure-to-promote claim and did not assert any claims of unequal pay for performance of the same job. Relying on the reasoning in the *Schuler* case, the Court found that the plain language of the Lilly Ledbetter Fair Pay Act does not apply to failure-to-promote claims: "Thus, the plain language of the [Fair Pay Act]

covers compensation decisions and not other discrete employment decisions. []To maintain a pay disparity claim, a plaintiff must demonstrate that 'employees …were paid differently for performing "equal work"-work of substantially equal skill, effort and responsibility, under similar working conditions'" (*Noel v. Boeing*, 2010, p. 274). The Court further opined that the purpose of the Lilly Ledbetter Fair Pay Act was to preserve claims for compensation decisions which are often cloaked in secrecy and not discovered until long after the administrative period has expired. This was not the case here, as Noel knew in 2003 that he was not being promoted, and therefore his statute of limitations began to run from that discrete date. To interpret the Lilly Ledbetter Fair Pay Act too broadly "would potentially sweep all employment decisions under the 'other practice' rubric" of the law and would have the effect of weakening Title VII's administrative filing requirement (*Noel v. Boeing*, 2010, p. 275).

In contrast to its decision in the *Noel* case, the Third Circuit found in favor of the plaintiff's Lilly Ledbetter Fair Pay Act claim in the case of *Mary Lou Mikula v. Allegheny County of PA* (2009). Mary Lou Mikula was hired in March 2001 as grants coordinator for Allegheny County police department. In 2004, she sent a memo to the police superintendent requesting a salary increase to reflect the salary of a similarly situated male employee who earned approximately $7,000.00 more than she earned. Mikula never received a response from anyone in the police department regarding her request.

In 2006, Mikula filed a complaint with the County Human Resources department in which she explicitly raised her objection to being paid less than a comparative male employee. She also filed a lawsuit under the Equal Pay Act at that time. Finally, on April 17, 2007, she filed a charge of discrimination with the EEOC claiming that she was paid less than a male in her position would receive. Shortly thereafter, she amended her lawsuit to include a Title VII claim for gender discrimination alleging that she was paid substantially less compensation for equal work performed by similarly situated male employees.

The District Court granted the County's motion for summary judgment, finding that Mikula's Title VII claim was time-barred because she learned of the disparate pay in 2004, but failed to file a charge until 2007. In the interim, Congress passed the Lilly Ledbetter Fair Pay Act, and Mikula appealed the District Court's decision. The Third Circuit Court of Appeals reversed the lower court's ruling and held that the County's failure to answer Mikula's request for a raise in 2004 constituted a "compensation decision and other practice" within the meaning of the statute. Accordingly, Mikula's Title VII claim was not time-barred as to that request.

While the Third Circuit's decision in *Mikula* may appear to be a more expansive reading of the statute, in reality, the Court's reasoning in the case is consistent with its reasoning in the *Noel* case. In both circumstances, the Plaintiffs asserted clear claims of unequal pay for equal work. A similar reading of the Lilly Ledbetter Fair Pay Act was reached in the more recent Tenth Circuit case of *Almond v. Unified School District* (2011). The employees in *Almond* were informed in 2003 and 2004 that the district planned to eliminate their maintenance positions due to budgetary cuts. In *lieu* of termination, the district offered to transfer the employees to lower paying jobs, while promising to pay their current salaries for a period of two years. Plaintiffs agreed to the transfer, then filed charges of age discrimination with the EEOC in 2006, claiming that their transfer and demotion was a result of age discrimination.

The District Court ruled that plaintiffs' charges were time-barred because, under the well-established discovery rule, plaintiffs had 300 days from the date of discovery of the adverse action to file a charge with the EEOC. Plaintiffs appealed, arguing that each new paycheck that reflected the pay demotion renewed the statute of limitations. While their appeal was pending, Congress enacted the Lilly Ledbetter Fair Pay Act. The parties agreed to withdraw the appeal to allow the District Court to consider whether the Lilly Ledbetter Fair Pay Act rescued the plaintiffs' claims. On reconsideration of the case, the District Court ruled that the Lilly Ledbetter Fair Pay Act did not apply to the case at hand. The Plaintiffs then filed the appeal to the Circuit Court, arguing that the decision to demote them and reduce their pay was discriminatory, and hence affected every paycheck thereafter.

The Circuit Court, adopting both *Noel v. Boeing* and *Schuler*, narrowly read the Lilly Ledbetter Fair Pay Act, stating that it "governs the accrual only of discrimination in compensation (unequal pay for equal work) claims in violation of § 623(a)(1) -- nothing more, nothing less" (*Almond v. Unified School District*, 2011, p. 1183). In a thorough review of both the statutory language of the Lilly Ledbetter Fair Pay Act as well as the legislative history of the act, the Court dismissed arguments that a broader interpretation of the statute was warranted based on the language of the statute that an "unlawful employment practice" occurs "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" (Civil Rights Act of 1964, § 2000e-5(e)(3)(A) (**emphasis supplied**). The Court stated:

> [I]t isn't enough for an employee to show that a discriminatory practice somehow affected his or her pay. Instead, the employee must show a discriminatory *pay disparity* between himself or herself and similarly situated but younger employees. *See, e.g., MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (proof of "discrimination in compensation" under ADEA requires showing "similarly situated persons outside the protected age group received higher wages"); *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 374-75, 389 U.S. App. D.C. 213 (D.C. Cir. 2010). In other words, "discrimination in compensation" requires not just *any* effect on pay, but one of a particular kind: unequal pay for

equal work. (*Almond v. Unified School District*, 2011, p. 1181)

The Court ultimately found that plaintiffs' claim failed because neither alleged disparity in pay—to the contrary, both acknowledged that they were being paid at a higher rate than other similarly situated employees for the first two years in the position, until their pay was brought in line with everyone else in their pay scale. The Court's decision in *Almond* was more recently affirmed in *Daniels v. UPS* (2012). There, the Court again rejected a failure-to-promote claim as falling within the protection of the Lilly Ledbetter Fair Pay Act unless the claim was rooted in unequal compensation for equal work:

> As we recognized in *Almond*, the **Fair Pay Act** did not create a "limitations revolution for any claim somehow touching on **pay."** Examining Justice Ginsburg's dissent in *Ledbetter*, which the court found Congress followed when drafting and passing the **Fair Pay Act**, *Almond* concluded that "hiring, firing, *promotion*, demotion, and transfer decisions, though often touching on **pay,** should and do accrue as soon as they are announced.'…. The argument Daniels advances would "potentially sweep all employment decisions under the 'other practice' rubric." *Noel v. Boeing Co*., 622 F.3d 266, 275 (3d Cir. 2010) (*Daniels v. UPS*, 2012, p. 631) (internal citations omitted)

Most of the other Circuit Courts of Appeal have weighed in on the scope of the Lilly Ledbetter Fair Pay Act as well, each construing the law narrowly to apply only where plaintiffs have demonstrated evidence of unequal pay for equal work. (*See*, for example, *Hylind v. Xerox Corp*. (2012) (affirming *Noel* and *Schuler* and finding that lower court properly dismissed hostile environment claim as untimely); see also *Tarmas v. Secretary of the Navy* (2011) (finding that statute of limitations for single and discreet acts of discrimination are not altered by the Act); *Groesch v. City of Springfield* (2011) (reviving police officers' Title VII claims for unequal pay for similar position under the Act); *Tillman v. Southern Wood Preserving* (2010) (holding that Lilly Ledbetter Fair Pay Act did not apply to discrete acts of discrimination such as reprimand or failure to receive pay increase due to performance); *Miller v. Kempthorne* (2009) (holding plaintiff's claim timely where employer improperly assigned him to lower pay grade, but declaring as untimely claim that he was denied permanent employee status); *Oniyah v. St. Cloud State University* (2012) (finding that Lilly Ledbetter Fair Pay Act does not change the burden of proof for salary discrimination under Title VII or ADEA).

One of the most recent circuit cases to address the issue of the breadth of the Lilly Ledbetter Fair Pay Act was decided by the Fifth Circuit Court of Appeals in *Niwayama v. Texas Tech University* (2014). In that case, Plaintiff sued the employer for both denial of tenure and for pay disparity claims. Plaintiff argued that the decision to deny tenure had consequences for her compensation, and accordingly, her otherwise time-barred claim should be timely under the Lilly Ledbetter Fair Pay Act. The Court rejected that argument:

> In Niwayama's view, because the Provost's decision to deny her tenure had consequences for her compensation, the Provost's decision constituted a "discriminatory compensation decision" under the Ledbetter Act. Accordingly, Niwayama argues, a new Title VII claim for denial of tenure accrued each time she received a paycheck that was affected "in whole or in part" by the Provost's allegedly discriminatory decision. As authority, Niwayama cites only to *Gentry v. Jackson State University*, 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009). Niwayama acknowledges, however, that this district court's decision stands for "a minority view."
>
> Indeed, Niwayama's argument is contrary to the overwhelming weight of authority on this issue. Specifically, the Tenth Circuit explained that under the Ledbetter Act "hiring, firing, promotion, demotion, and transfer decisions, though often touching on pay, should and do accrue as soon as they are announced." (Citation omitted). Similarly, the District of Columbia Circuit held that the Ledbetter Act's use of "the phrase 'discrimination in compensation' means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position." The Third Circuit also rejected an argument similar to Niwayama's because a more "expansive interpretation of 'other practice' . . . would potentially sweep all employment decisions under the 'other practice' rubric" set forth in the Ledbetter Act. Finally, this Court in an unpublished opinion held that the Ledbetter Act does not apply to "discrete acts" by employers such as "termination, failure to promote, denial of transfer, and refusal to hire." (*Niwayama*, 2014, p. 356) (internal citations omitted)

Thus, the Fifth Circuit concluded that the district court had correctly dismissed the tenure denial claim as untimely under Title VII. However, the court held that the "pay disparity claim falls under the Ledbetter Act and therefore is not time barred. The Ledbetter Act explicitly…makes each paycheck at an allegedly discriminatory rate a separate, discrete act of discrimination, effectively resetting the statute of limitations for filing an EEOC charge." (*Niwayama*, 2014, p. 356). Once again, this reasoning is consistent with the other appellate cases cited above.

Conclusion

Since the passage of the Lilly Ledbetter Fair Pay Act in 2009, little has been written about the impact the decision has had on subsequent court decisions and implications for human resource managers. Only time will tell what impact the Lilly Ledbetter Fair Pay Act will have on litigation in employment discrimination cases, but so far the effects seem relatively small. While it is true that employers will need to document all promotion and compensation decisions, many businesses were already doing this. There does not appear to be a surge in Title VII complaints of sex discrimination pay claims with the

EEOC, and businesses themselves report the primary effect of an added administrative burden, not an increase in lawsuits.

Lower court interpretations have limited the reach of the Lilly Ledbetter Fair Pay Act, and EEOC charge statistics since the law's passage corroborate that conclusion, all of which suggests that the Lilly Ledbetter Fair Pay Act did little to effectuate real change for women seeking redress for gender-based compensation claims. As Sara Lyons has suggested, merely extending the time in which to bring a claim for gender pay discrimination does nothing for those who never become aware of gender-based discrepancies in the first place (Lyons, 2013). Lyons argues that the strong societal norm of pay secrecy undermines any potential benefits made by the Lilly Ledbetter Fair Pay Act. She concludes that real change will require 1) passage of the Paycheck Fairness Act (PFA), proposed legislation that would prohibit pay secrecy rules in the workplace, and 2) affirmative disclosure of salary information to employees. While such an approach seems radical, there is some merit to the argument. Research shows that the wage gap is smaller where employers promote pay transparency, such as in federal government and union jobs. According to a study conducted by the Institute for Women's Policy Research, 62% of private sector female workers and 60% of private sector male workers report that discussion of salary is discouraged or prohibited and could lead to punishment (Institute for Women's Policy Research, 2014, January). That number is dramatically lower for public sector workers, with only 18% of women who work in the public sector reporting pay secrecy rules, and only 11% of men. Not surprisingly, the wage gap for the federal workforce, where pay transparency is very high, is only about 13%, much lower than the national average of about 30%. (Covert, 2014, April 14). Similarly, in unionized workforces where salaries are disclosed in a collective bargaining agreement, the wage gap for unionized workers is only about 9% (Covert, 2014, January 27). Moreover, Gowri Ramachandran has argued for the use of pay transparency policies as a legal affirmative defense to wage disparity claims, thereby further incentivizing an employer's use of such policies (Ramachandran, 2012). Unfortunately, systemic change to pay secrecy rules face an uphill battle, as proponents of the Fair Pay Act can attest.

While passage of the Lilly Ledbetter Fair Pay Act has not resulted in an increase in charges of wage discrimination, it may have caused some employers to examine pay practices to avoid claims for wage discrimination (Siniscalco, Livingston, Cousins, Tran & Phillips, 2010). This is a modest gain at best. Nevertheless, until there is a cultural shift towards pay transparency in the workplace, the Lilly Ledbetter Fair Pay Act offers an incremental legal tool in the fight for full gender-wage equality.

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