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COMMENT

Ledbetter in Congress: The Limits of a Narrow Legislative Override

INTRODUCTION

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that an employee was barred from suing her employer for pay discrimination under Title VII.[1] The plaintiff, Lilly Ledbetter, was a twenty-year employee of Goodyear who, over the course of her employment, repeatedly received lower raises than her male counterparts because supervisors had given her negative evaluations due to her sex.[2] By the end of her employment at Goodyear, Ledbetter's salary was significantly lower than those of any of her male peers.[3] The Supreme Court, however, held that Ledbetter could not recover because she failed to comply with the Equal Employment Opportunity Commission (EEOC) charge provision, which requires that plaintiffs file claims of employment discrimination with the EEOC within 180 days of the discriminatory act before they may sue under Title VII.[4] The Court held that only the initial pay-setting decisions themselves constituted discrete acts of discrimination; subsequent paychecks were merely "adverse effects" lacking the intent required to establish disparate treatment.[5]

1. 127 S. Ct. 2162 (2007).
2. *Id.* at 2165-66.
3. *Id.* at 2178 (Ginsburg, J., dissenting) ("Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236." (citing Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005); Brief for the Petitioner at 4, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 2610990)).
4. *Ledbetter*, 127 S. Ct. at 2172; *see also* 42 U.S.C. § 2000e-5(e)(1) (2000).
5. *Ledbetter*, 127 S. Ct. at 2169.

In response, Congress is considering legislation to override the *Ledbetter* decision by clarifying that under Title VII, a discrete discriminatory act occurs each time an employee is affected by a discriminatory compensation decision. The Lilly Ledbetter Fair Pay Act of 2007 ("Fair Pay Act") passed the House on July 31, 2007, and provides in part that "an unlawful employment practice occurs, with respect to discrimination in compensation . . . when an individual is affected by application of a discriminatory compensation decision or other practice . . . ."[6] A substantively similar bill, the Fair Pay Act of 2007, has been introduced in the Senate and is currently being considered by the Committee on Health, Education, Labor, and Pensions.[7] While this Comment discusses the Fair Pay Act as passed by the House, its analysis applies to both versions of the bill, which would have similar effect.

This Comment argues that amending Title VII only with respect to pay discrimination will hinder future plaintiffs in bringing nonwage discrimination claims and will promote future narrowing of the doctrine interpreting Title VII's EEOC charge provision. These consequences contravene both Congress's purpose in enacting the override legislation and past congressional understandings of Title VII.[8] Congress should therefore expand the scope of its legislative override to make clear that each application of a discriminatory policy, whether or not related to compensation, constitutes an unlawful employment practice.

The Fair Pay Act's limitations are symptomatic of a broader flaw in congressional overrides of judicial decisions: when Congress passes legislation focused too narrowly on the factual context of the judicial decision it is designed to override, it may have adverse consequences. For example, future courts may interpret a partial override to signal that Congress endorses the holding except with regard to one specific factual context. Courts may consequently continue to apply the holding in other factual contexts and as a precedent for future development of the doctrine. To avoid these consequences, Congress should better anticipate the way in which future courts will apply a proposed legislative override to other factual contexts and future doctrinal development.

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6. H.R. 2831, 110th Cong. § 3 (as passed by House, July 31, 2007).

7. S. 1087, 110th Cong. (2007).

8. *See infra* notes 27-29, 32-33 and accompanying text.

I. THE FAIR PAY ACT'S EFFECT ON FUTURE TITLE VII PLAINTIFFS

The text of the Fair Pay Act leaves intact *Ledbetter*'s essential holding that "[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."[9] Future courts, reading the Fair Pay Act to repudiate the principles of *Ledbetter* only with respect to pay discrimination, likely will continue to bar relief to similarly situated Title VII plaintiffs with non-wage-related claims. For example, plaintiffs affected by non-wage-related intentionally discriminatory policies will still be unable to sue under Title VII unless they file an EEOC charge within 180 or 300 days of the adoption of the policy.[10]

Several courts have already cited *Ledbetter* as a bar to suits that do not involve pay discrimination claims.[11] For example, in a contraceptive equity case in the Eighth Circuit, a class of plaintiffs sued AT&T under Title VII for failure to provide contraceptive benefits to its employees.[12] The named plaintiff filed a charge with the EEOC after being denied insurance coverage for contraceptives, but not within three hundred days of the initial adoption of the policy excluding contraceptive coverage from all employee health benefits packages.[13] Although the district court initially found for the plaintiff, when AT&T filed a motion to reconsider summary judgment following another

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9. *Ledbetter*, 127 S. Ct. at 2169.

10. If the claim is also covered by a state or local antidiscrimination law, the filing deadline is extended to three hundred days. 42 U.S.C. § 2000e-5(e)(1) (2000).

11. Garcia v. Brockway, 503 F.3d 1092, 1097-98, 1097 n.5 (9th Cir. 2007) (applying *Ledbetter*'s reasoning to find time-barred a design-and-construction claim under the Fair Housing Act, 42 U.S.C. § 3601-3619 (2000)); Walker v. Hoppe, 239 Fed. App'x 998, 999 (6th Cir. 2007) (barring plaintiff's claim for wrongful termination because the charge period ran from the date she was notified of her termination, not the date of the termination itself, and barring a hostile work environment claim because plaintiff "failed to specifically identify any intentionally discriminatory act by defendant that occurred within 300 days prior to the filing of her EEOC charge"); Mansourian v. Bd. of Regents of the Univ. of Cal., No. 03-02591, 2007 U.S. Dist. LEXIS 77534, at *14-15 (E.D. Cal. Oct. 18, 2007) (applying *Ledbetter*'s reasoning to bar female wrestlers' suit against a university for "blatantly exclud[ing] them from the wrestling program and then fail[ing] to give them a fair opportunity to obtain a position on the team by requiring them to compete against men, using men's rules"); Algie v. N. Ky. Univ., No. 06-23-JGW, 2007 U.S. Dist. LEXIS 53347, at *13-19 (E.D. Ky. July 23, 2007) (relying on *Ledbetter* to bar a male employee's claim that female employees had received promotion opportunities while he had not).

12. Stocking v. AT&T Corp., 436 F. Supp. 2d 1014, 1015 (W.D. Mo. 2006), *vacated*, No. 03-0421-HFS, 2007 U.S. Dist. LEXIS 78188 (W.D. Mo. Oct. 22, 2007).

13. *Id.* at 1017.

major contraceptive equity decision,[14] it also argued that plaintiffs failed to file a timely EEOC charge under *Ledbetter*, which had been decided after the district court's initial ruling.[15] Even though the EEOC charge provision was ultimately not dispositive in the case,[16] this type of case, hinging on the application of an intentionally discriminatory policy, will continue to be particularly vulnerable to *Ledbetter*'s reach after the passage of the Fair Pay Act.

The Fair Pay Act's narrow language will not prevent courts from finding these types of suits to be barred under *Ledbetter*. Courts likely will follow the same pattern as they have after other narrow legislative overrides of Title VII decisions. In 1989, the Court considered discriminatory seniority systems in *Lorance v. AT&T Technologies, Inc.* and held that discriminatory seniority systems trigger the charge period only on the date of the adoption of the system, rather than when individual employees are harmed by its application.[17] In 1991, Congress amended Title VII to override that decision, clarifying that discriminatory seniority systems constitute unlawful employment practices both at the time of adoption and the time of application.[18] Nevertheless, lower courts subsequently held that *Lorance* continued to bar as untimely Title VII claims that an unlawful employment practice occurred at the time of a policy's application.[19]

Moreover, the Fair Pay Act could be counterproductive. Courts applying standard modes of statutory interpretation may be more likely to apply the *Ledbetter* standard to nonwage discrimination plaintiffs than if Congress had never acted. Courts may assume that because Congress reconsidered the issue decided in *Ledbetter* and did not abrogate parts of the Court's decision, it intended to acquiesce to the Court's interpretation in the portions of the decision that were not overridden specifically. In a number of cases, courts have found Congress's decision to amend part of a statute without completely overriding an existing judicial interpretation of the statute to be "evidence that

14. *See In re* Union Pac. R.R. Employment Practices Litig., 479 F.3d 936 (8th Cir. 2007).

15. Defendant AT&T Corp.'s Motion To Reconsider Summary Judgment and Class Certification and Suggestions in Support at 11, *Stocking*, 2007 U.S. Dist. LEXIS 78188 (No. 3-0421-HFS), 2007 U.S. Dist. Ct. Motions LEXIS 22848.

16. The court granted summary judgment to AT&T on other grounds and mentioned in dicta that plaintiff's disparate-impact cause of action remained viable because *Ledbetter* does not reach disparate impact claims. *Stocking*, 2007 U.S. Dist. LEXIS 78188, at *3-4.

17. 490 U.S. 900, 909 (1989).

18. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078-79 (codified at 42 U.S.C. § 2000e-5(e)(2) (2000)).

19. *See, e.g.*, Barnett v. Gonzales, No. 05-58-IMK-JSK, 2006 U.S. Dist LEXIS 70085, at *11-12 (N.D. W. Va. Sept. 27, 2006).

Congress affirmatively intended to preserve [the Court's interpretation]."[20] A court inclined to read Title VII's procedural provisions narrowly might invoke this "acquiescence rule"[21] to hold that Congress's passage of the Fair Pay Act constituted acquiescence to the general rule laid down in *Ledbetter* that applications of discriminatory policy do not constitute actionable unlawful employment practices.

While courts do not invoke acquiescence in all cases to which it may apply,[22] it is particularly likely that a court would give weight to Congress's acquiescence when enacting the Fair Pay Act. The doctrine is most likely to be invoked in cases, such as this one, where Congress was aware of a specific issue, deliberated about it,[23] and amended the statute to override the judicial decision only partially.[24] As Jeb Barnes has shown empirically, judges are more likely to exploit ambiguities to resist congressional oversight after overrides of decisions involving individual rights and contested issues such as civil rights.[25] Given the politically salient nature of antidiscrimination legislation, it is likely that some judges would claim that the Fair Pay Act enhances *Ledbetter*'s authority.

II. THE FAIR PAY ACT'S EFFECT ON DOCTRINAL DEVELOPMENT

In addition to its effects on individual Title VII plaintiffs, a narrow override also may endorse interpretive shifts in doctrine in a direction that contravenes Congress's policy intent. Over the last thirty years, the Supreme Court has

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20. Merrill Lynch v. Curran, 456 U.S. 353, 381-82 (1982).

21. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 74-76 (1988).

22. *See, e.g.*, Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 n.5 (2001) ("Absent . . . overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.").

23. Eskridge, *supra* note 21, at 71; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157-58 (2000) (stating that Congress ratified the FDA's interpretation that it lacked the authority to regulate tobacco products because it enacted statutes indicating its awareness of and acquiescence to the FDA interpretation).

24. For example, Congress amended Title VII in the Civil Rights Act of 1991 to override a number of Supreme Court decisions, but did not override *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986). In *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court interpreted this omission as ratifying the *Meritor* decision. *Id.* at 804 n.4.

25. JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 171 (2004) (hypothesizing that judges are disinclined to defer to Congress on these issues because judges are accustomed to scrutinizing legislation affecting suspect classes under the Equal Protection Clause).

progressively narrowed its interpretation of Title VII's EEOC charge provision to impose more formidable procedural hurdles on plaintiffs filing employment discrimination suits.[26]

The legislative history of the Fair Pay Act indicates that Congress opposes *Ledbetter*'s reasoning in general, not solely in the context of wage discrimination. Representative George Miller, the sponsor of the bill, noted:

> Discrimination does not just occur when the initial decision to discriminate is made. You may not know when the decision to discriminate against you was made. You may not recognize it when it is made. Discrimination occurs both when an employer decides to discriminate and then when the employer actually discriminates—by, for example, paying you less because you are a woman, or African American, or older than the other employees.[27]

Many similar statements made in support of the Fair Pay Act during the floor debates demonstrate that representatives supported the Act because they believed that employers should not be able to avoid liability for a discriminatory policy merely because employees are not aware of the policy until six months after it is adopted.[28]

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26. Over time, the Court has limited which discriminatory practices constitute "continuing violations" (practices that are cumulative and may occur over a long period of time) and instead has characterized most challenged practices as discrete discriminatory acts. For example, in its initial rulings on the provision, the Court held that where an employee was impermissibly terminated due to her race or gender, the charge period ran from the date of termination (regardless of any subsequent employment relationship). Del. State Coll. v. Ricks, 449 U.S. 250 (1980) (holding that the EEOC charge period ran from the date tenure was denied, not the date of final termination, where a librarian was denied tenure allegedly due to his national origin but was given a nonrenewable one-year contract); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) (barring a flight attendant, who was terminated discriminatorily and later rehired but treated as a new employee for seniority purposes, from suing because she failed to file within ninety days of the initial termination). The Court later held in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), that facially neutral seniority systems allegedly adopted with discriminatory intent were actionable only on their date of adoption, not upon their application to individual employees. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court further restricted the scope of continuing violations, stating in dicta that the category only clearly applied to hostile work environment claims. *Id.* at 115.

27. *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear *Employment Discrimination Decision: Hearing on H.R. 2831 Before the H. Comm. on Education and Labor*, 110th Cong. 2 (2007) (statement of Rep. George Miller, Chairman, H. Comm. on Education and Labor).

28. *E.g.*, 153 CONG. REC. H8946 (daily ed. July 30, 2007) (statement of Rep. Nadler) ("[A]nyone who says that discrimination in employment should be illegal but should not be

The House committee report provides the clearest statement that Congress opposes the Court's reasoning in *Ledbetter* in contexts beyond wage discrimination. The report states that the Fair Pay Act is intended to serve as

> yet another disapproval of the approach used by the Court in both Lorance, which has already been reversed by Congress, and Ledbetter, which is reversed with this bill. The Committee cannot envision every fact pattern in which charges might be brought within 180/300 days of an act that effectuates a past decision to discriminate. Application of the seniority system in Lorance was one; paycheck issuance in Ledbetter was another. By rejecting the Court's holdings in these cases, the Congress rejects the Court's underlying idea that the statute of limitations starts to run upon the mere decision to discriminate and not also upon the employer's effectuation of that discriminatory decision.[29]

Congress's intent that the reasoning of the Fair Pay Act apply to discrimination in contexts beyond compensation decisions will likely be disregarded, however, because it is not written into the text of the statute.[30] In the past, the doctrinal development of the interpretation of the EEOC charge provision has not been consistent with the manifest intent of Congress. Context-specific legislative overrides have contributed to this increasingly narrow interpretation of the EEOC charge provision. Congress's override of *Lorance* in the Civil Rights Act of 1991 carved out an exception only for discriminatory seniority systems, permitting employees to file a charge with the EEOC at the time of adoption and application of intentionally discriminatory seniority systems.[31] It is clear from legislative history, however, that Congress intended to broaden the scope of the EEOC charge provision as applied to *all* discriminatory policies, not just

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enforceable if the employer can hide the discrimination for 6 months is really saying let the discrimination go on forever."); *id.* at H8949 (statement of Rep. Wasserman Schultz) ("In the real world, discrimination is subtle and takes years to become evident. However, Justice Alito ruled that victims have only 180 days after a discriminatory decision has been made to file suit even if that employee would have no way of knowing about it. This standard is impossible to meet.").

29. H.R. REP. NO. 110-237, at 17 (2007).

30. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 6-7 (1994) ("[G]iven ample evidence that Congress today is more than willing to override Supreme Court decisions by enacting new or modified statutory language, one might question how much weight, if any, should be given to an expression of disapproval from Congress other than an override contained in precise statutory text." (citation omitted)).

31. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-5(e)(2) (2000)).

seniority systems. The Senate report on the override for the Civil Rights Act of 1990—a nearly identical precursor to the Civil Rights Act of 1991—stated: "Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law."[32] Further, the sponsors of the amendment stated in an interpretive memorandum that "[t]his legislation should be interpreted as disapproving the extension of [*Lorance*] to contexts outside of seniority systems."[33] Despite these statements of broad legislative purpose, Congress's failure to write this intent into the text of the statute allowed the Court to interpret the partial override of *Lorance* as acquiescing in the Court's narrowing of Title VII doctrine.

The *Ledbetter* Court relied on *Lorance* as a justification for further narrowing the interpretation of the EEOC charge provision. The Court explicitly noted that Congress only reversed the *Lorance* opinion with regard to discriminatory seniority systems:

> After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. . . . For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination.[34]

The Court, ignoring clear legislative history to the contrary, supported its doctrinal narrowing in *Ledbetter* by relying in part on Congress's fact-specific override of *Lorance* to argue that Congress did not expand access to plaintiffs outside of the seniority system context. Despite the intent of the enacting Congress, the Fair Pay Act may have consequences similar to the 1991 Act, preserving and perhaps even enhancing *Ledbetter*'s future authority as a precedent for constricting access to Title VII's protections. Future courts may look to the Fair Pay Act as evidence that Congress acquiesced in the Court's holding that the effects of discriminatory policies do not constitute actionable, unlawful employment practices in all contexts other than wage discrimination, and they may continue to narrow the doctrine and further limit access to Title

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32. S. REP. NO. 101-315, at 54 (1990). No relevant language changed between the two versions of the bill, and there was no Senate report submitted with the Civil Rights Act of 1991. H.R. REP. NO. 102-40, pt. I, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 549. For these reasons, the 1990 Senate report has been considered an authoritative indication of legislative intent for the 1991 Act. *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2183 n.5 (2007) (Ginsburg, J., dissenting).

33. 137 CONG. REC. 29,046, 29,047 (1991).

34. *Ledbetter*, 127 S. Ct. at 2169 n.2 (citations omitted).

VII relief. Moreover, the failure of the *Lorance* override also makes clear that legislative history indicating that Congress intended the amendment to have broader application is insufficient and will not serve other Title VII plaintiffs or shape the direction of future doctrinal development. Mere inclusion of a broader purpose in the legislative history likely will be insufficient to induce courts to read the Fair Pay Act as applying to discriminatory policies other than those that affect compensation. If Congress intends for the statute to apply to other contexts and hopes to avoid a future decision employing the *Ledbetter* standard to further limit opportunities for victims of discrimination to gain relief under Title VII, it must anticipate the way that future courts will interpret the statute and write a broader override into the text of the statute.

CONCLUSION

This case study of the Fair Pay Act suggests that when overriding a judicial interpretation of federal statutes, Congress should not narrowly focus on the factual elements of the judicial interpretation, but instead broadly consider the way in which, according to established methods of statutory interpretation, future courts will interpret its actions.

Since the late 1970s, Congress repeatedly has overridden conservative judicial interpretations of federal civil rights statutes,[35] and legislative history has suggested that Congress is not content with the development of Title VII doctrine. Congress has incentives to "pass vague overrides that allow credit-claiming but pass the buck to the courts"[36] because civil rights legislation provides diffuse benefits to marginalized groups and imposes concentrated costs on private employers. However, the way that Congress has overridden judicial holdings that did not comport with congressional intent has not stemmed the increasingly cramped Title VII doctrine and has allowed courts to continue developing Title VII doctrine in a conservative direction. If Congress is serious about stopping the Court from turning back the clock on access to Title VII remedies, it should eschew piecemeal, fact-specific amendments and consider an unambiguous future-oriented approach that anticipates the judicial application of the legislation across a range of factual settings.

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35. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 375 (1991).

36. BARNES, *supra* note 25, at 179.