Say When: An Analysis of Post-*Ledbetter* Continuing Violations

Roger B. Jacobs

This article examines the continuing violation doctrine and its historical foundations. It also revisits Ledbetter v. Goodyear Tire & Rubber Co. *and the relevant amendments of the Fair Pay Act. An analysis of the Act and post-*Ledbetter *case law suggest that although the doctrine of continuing violations is still variably applied, tolling of Title VII claims is not automatic, even in light of Congress's actions.*

Although having a rocky start, the continuing violation doctrine has facilitated plaintiffs to amalgamate claims not otherwise timely. As early as *Ricks v. Delaware State College*, the United States Supreme Court ruled that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."[1] However, the Supreme Court has established that a discriminatory practice that continues into the present may be actionable. The continuing effects of a past discriminatory practice, though, are not actionable and cannot benefit from the doctrine.

Lilly Ledbetter probably represented both high and low points for the continuing violation doctrine. In its rejection of a continuing violation theory in *Ledbetter v. Goodyear Tire & Rubber Co.*,[2] the Supreme Court ruled that the doctrine did not apply on each paycheck that the plaintiff attempted to link together to show that she had been discriminated against because of her gender to make the acts current for tolling purposes. Instead, the Court declared that she either knew or had to have known that her pay was discriminatory at the time she received the checks. The dilemma, of course, was that Lilly Ledbetter stated that she had no idea what her comparators were being paid until after the fact in litigation. Justice Samuel Alito, writing for the majority, rejected that plea and said that the continuing violation doctrine could not be used to keep alive stale claims.

As a direct reaction, the Democratic majority in Congress enacted the Ledbetter Fair Pay Act of 2009 which, in effect, overruled the Supreme Court's determination and said that discrete acts could, in

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fact, be lumped together under certain circumstances to toll applicable limitations periods. The Fair Pay Act allows aggrieved employees to bring a Title VII claim when the effect of a discriminatory practice is felt, and not only when the practice or decision occurs.[3]

While some jurisdictions have begun applying the Fair Pay Act's amendments others, such as New Jersey, have ignored the revisions to date. This article examines the continuing violation doctrine and its historical foundations. It revisits *Ledbetter* and the relevant amendments of the Fair Pay Act. An analysis of the Act and post-*Ledbetter* case law suggests that though the doctrine of continuing violations is still variably applied, tolling of Title VII claims is not automatic, even in light of Congress's actions. Without explicit action by individual state legislatures and courts to adopt and apply the Fair Pay Act, Congress's amendments may continue to be ignored in some jurisdictions.

HISTORICAL FOUNDATIONS OF THE CONTINUING VIOLATION DOCTRINE

United Airlines v. Evans

One of the Supreme Court's first decisions barring a continuing violation claim was *United Airlines v. Evans.* The Court decreed that the doctrine was not applicable where a plaintiff sought to recover from the present effects of a time-barred, past discriminatory act.[4]

Evans, a female, had been a flight attendant. She worked for United Airlines for two years until she was forced to resign upon becoming married. She was subsequently rehired after the discriminatory policy (against employing married women) was repealed. For seniority purposes Evans was not credited her prior two years of service. As a consequence of her diminished seniority, her salary was the same as a starting flight attendant. Evans sought to invoke the continuing violation doctrine in her lawsuit arguing that the denial of seniority credit effectively perpetuated the airline's past discriminatory conduct.

The Supreme Court rejected Evans's continuing violation claim. The emphasis of a plaintiff's claim "should not be placed on mere continuity," the Court said, but rather on whether an employer currently had in place a discriminatory act or decision.[5] Evans had never filed a claim regarding her resignation, and was time barred from doing so. Likewise, she had not asserted that male employees who had been fired or resigned and then rehired received seniority credit. The Court agreed—that the seniority system gave present effect to past discrimination, but United Airlines was allowed to treat the "non marriage" requirement as lawful because her claim was time barred. Thus, the Supreme Court found that a continuing violation did not exist where there was no present discrimination claim.[6]

Ricks v. Delaware State College

The Supreme Court analyzed the appropriate time period for bringing a Title VII claim, again, in *Ricks v. Delaware State College*. The Court focused on the denial of tenure for Columbus Ricks, a black Liberian. He had joined the faculty at Delaware State College in 1970. In February 1973, the Faculty Committee on Promotions and Tenure recommended that Ricks not receive a tenured position in the education department. The Committee agreed to reconsider its decision the following year.

Upon reconsideration in February 1974, the decision was affirmed. The following month the Faculty Senate voted to support the tenure denial and on March 13, 1974, the Board of Trustees formally voted to deny tenure. Ricks filed a grievance with the Board's Educational Policy Committee but the College administration continued to plan for Ricks's eventual termination. Consistent with the practice of other colleges, Delaware State had a policy of not discharging immediately a junior faculty member not receiving tenure. Rather, such a person was offered a "terminal" contract to teach one additional year. On June 26, 1974, the Trustees told Ricks he would be offered a one-year terminal contract expiring June 30, 1975. Ricks signed the contract without objection on September 4, 1974. On September 12, 1974, the Board of Trustees notified Ricks that it had denied his grievance.

Ricks filed an administrative complaint at the appropriate Delaware state agency and eventually received a "right to sue" letter from the Equal Employment Opportunity Commission (EEOC). He filed his lawsuit in federal court on September 9, 1977.

Ricks argued that his discrimination claim did not commence until the expiration of his terminal contract. The Supreme Court rejected this argument based upon the mere continuity of his employment. The Court stated that in order to extend or modify the effective date he would have needed to show that he was treated differently from other professors who received the same one year terminal contract. Thus, the Court concluded that the limitations period began to run when the tenure decision was made and Ricks was notified of it.

The Court sorted through three potential dates for the effective date (of the limitation period) and concluded the logical date had to be when Ricks was notified of the denial of his tenure. The Court also opined that the filing of a grievance does not change or toll the running of the limitations period. In a footnote, the Supreme Court mentioned that some unusual incidents did occur during his terminal year including a physical attack by the education department chairman. However, none of these events tolled the limitations period. Despite a spirited group of dissenting opinions, the majority's holding in *Ricks* established that the mere continuity of employment is not sufficient to toll limitations periods and that claimants must file suit based upon the date upon which they knew or should have known of a decision, *e.g.*, termination.

Lorance v. AT&T Technologies

Shortly following *Ricks*, the Supreme Court readdressed a continuing violation theory in *Lorance v. AT&T Technologies*.[7] In 1983, a group of female AT&T employees had claimed a continuing violation based on the present effects of a 1979 collective bargaining agreement. The 1979 agreement altered AT&T's previous seniority system based on number of years of service at the plant. From 1979 on, seniority for "tester" employees was determined by the number of years in that position. The plaintiffs argued that the new system sought to secure incumbent male employees in the "tester" position, (a position traditionally held by men) by preferentially demoting female "testers."

The Supreme Court ruled the female employees' claims were time barred. Like *Evans*, the *Lorance* plaintiffs "asserted a claim that [was] wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation."[8] The female employees' claim was rooted in a 1979 act, but they did not file a charge until four years later in 1983, well beyond the maximum 300-day statute of limitations. The Court opined that in determining the timeliness of a Title VII discrimination claim, "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful."[9]

Lorance reaffirmed *Evans*'s emphasis on the time of discriminatory acts, and not their consequences. While rejecting the continuing violation claim in *Lorance*, the Supreme Court did not reject the doctrine outright. Rather, the continuing violation theory was not applicable due to previous holdings in *Ricks* and *Evans*.[10] The weakness in the *Lorance* plaintiffs' claim was their reliance on a discriminatory decision outside of the charging period. Thus, in affirming these decisions, *Lorance* stands for the principle that a continuing violation does not exist where a claim "is wholly dependent on discriminatory conduct occurring well outside the period of limitations."[11]

National Railroad Passenger Corp v. Morgan

Thirteen years later, the Supreme Court rejected another continuing violation claim in *National Railroad Passenger Corp v. Morgan*.[12] Similar to *Lorance*, the Court rejected the present application of the continuing violation doctrine, but did not foreclose its use in other scenarios.[13] The Court relied on the inherent differences between discrete acts and other discriminatory acts such as hostile work environment claims in *Morgan*.

The Court reasoned that discrete acts are discriminatory practices such as "termination, failure to promote, denial of transfer, or refusal to hire [that] are easy to identify."[14] Each discrete act "constitutes a separate actionable" discriminatory practice.[15] Since discrete acts are easily noticeable and separately actionable, they occur on the day they happen. In other words, a party must file a charge within the applicable charging period, or the claim will be time barred.

Since hostile work environment claims are comprised of repeated acts, they are not always easily noticeable the Supreme Court declared. An unlawful act can occur over a series of days, months, or even years. Therefore, an employer can be potentially liable for all acts that are a part of the single claim. Accordingly, a plaintiff only needs to "file a charge within 180 or 300 days of *any* act that is part of the hostile work environment."[16]

Restating previous case law, *Morgan* held that timely filed discrete claims do not make untimely acts timely, even if such acts are related.[17] The Court declared that a claim of discrete discrimination must be filed within the appropriate statutory filing period.[18] In other words, discrete acts cannot be linked together simply because they may be related in order to avoid the applicable limitations period.

The Supreme Court stated in *Morgan* that the "time period for filing a charge is subject to equitable doctrines such as tolling or estoppel. Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly."[19] Curiously, in both *Lorance* and *Morgan*, the Supreme Court declined to define what circumstances would support application of the continuing violation doctrine.

The Ledbetter *Decision as a Starting Point for Change*

Lilly Ledbetter probably represented both high and low points for the continuing violation doctrine. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court considered a continuing violation claim in the context of disparate pay. Ledbetter, a Goodyear employee, asserted that the issuance of paychecks from 1979 to 1998 created a continuing violation. During this period, raises were awarded based on supervisors' work evaluations of salaried employees.

Ledbetter alleged that she had received poor work evaluations because of her sex, and that as a result of these discriminatory evaluations, her pay was not increased as much as it would have been had she been fairly evaluated. She claimed that each paycheck gave present effect to past discriminatory work evaluations where she was rated unfairly because of her gender. Essentially, her argument was that the issuance of each paycheck constituted a new Title VII violation triggering a new statutory charging period. Ledbetter argued that the statute of limitations was tolled for her discriminatory pay claims, permitting her to proceed with otherwise untimely claims.

Justice Samuel Alito, writing for the majority of the United States Supreme Court, rejected that plea and said that the continuing violation doctrine could not be used to keep alive stale claims. The Supreme Court ruled that the doctrine did not apply to each paycheck that plaintiff attempted to link together. The Court opined that precedent "foreclosed" the assertion that each issued paycheck was a separate violation regardless of whether it "implements a prior discriminatory decision made outside the limitations period."[20]

Justice Alito found that *Evans*, *Ricks*, *Lorance*, and *Morgan* provided that "the EEOC charging period [was] triggered" when a discrete discriminatory act occurs.[21] New violations do not occur, he opined, and "a new charging period does not commence" when the effects of the past discrimination are experienced.[22] The Court found that Ledbetter's arguments could not be reconciled with prior case law since Ledbetter did not claim discriminatory "conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her," no tolling could be justified.[23]

The plaintiff sought to establish a disparate treatment claim. In order to prevail, Ledbetter had to show that she either knew or had to have known that her pay was discriminatory at the time she received the checks. Lilly Ledbetter stated that she had no idea what her comparators were being paid until *after* the fact in litigation. Thus, a proof dilemma arose for Ledbetter. She argued that pay discrimination was harder to notice than other discrete discriminatory acts and public policy required pay discrimination to be treated differently from other discrete acts in the workplace.

The Supreme Court had "previously declined to address whether Title VII suits are amenable to the discovery rule" in *Morgan*.[24] Since Ledbetter did not argue that application of the rule would alter the outcome of her case, the Court found "no occasion to address the issue" on appeal.[25] Thus, there was no reason to consider Ledbetter's inability to discover her pay discrimination earlier.

Likewise, the Court declined to consider Ledbetter's policy argument supporting her inability to logically discover her pay discrimination within the strict procedural timelines. The Supreme Court refused to consider public policy arguments finding them beyond the appropriate scope of the Supreme Court's inquiry. Justice Alito stated: "it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination.'"[26]

Ironically, despite rejecting Ledbetter's public policy reasons supporting her continuing violation claim, Justice Alito discussed the public policy behind strictly enforcing the statutory charging timelines. Permitting Ledbetter to bring her discriminatory pay claim would effectively allow an aggrieved employee to shift the discriminatory intent of past acts to a later act lacking discriminatory intent, he wrote.[27] To shift intent would thereby "eliminate the defining element" of disparate treatment claims, ignoring Title VII's prescribed discriminatory motive.[28] Thus, the Supreme Court refused to impose liability without the requisite intent.[29]

Allowing Ledbetter's continuing violation claim, Justice Alito wrote, would not only improperly shift intent, (ignoring the statutory motive), but also "distort Title VII's 'integrated, multistep enforcement procedure.'"[30] He explained that out of respect to the legislative process, the Court was bound to strictly apply the procedural timelines for filing.[31] Since Congress had already balanced the diverse interests and circumstances surrounding Title VII discrimination claims, he reasoned there was no need to consider Ledbetter's public policy arguments. Instead, the Supreme Court found that the "best guarantee of evenhanded administration of the law" is "strict adherence to the procedural requirements specified by the legislature."[32]

However, by refusing to consider Ledbetter's public policy arguments, the Court essentially ignored one of the potential proof dilemmas in pay discrimination claims. The majority's rejection of those facts in *Ledbetter* prompted a passionate dissent from Justice Ginsburg. She criticized what she viewed as the majority's "cramped interpretation of Title VII."[33]

Contrary to the majority, Justice Ginsburg opined that Ledbetter's pay disparity claim was subject to tolling due to its analogous nature to hostile work environment claims. Ginsburg stated that hostile work environment claims were separate from discrete acts because they involved the "cumulative effect of individual acts.[34] Hostile work environment claims also, by nature, involved repeated conduct that is not always easily noticeable she argued. Thus, she concluded that as long as one of the alleged acts of hostile work environment falls within the appropriate filing period, an entire period of hostile work acts can be considered, even if some fall outside the statutory time period.[35]

Dissent

An essential argument of the plaintiff, accepted by the minority, was that the discrimination underlying the issuance of each check was not easy to identify like that of a discrete claim, but was repeated over time. Lilly Ledbetter's disparate pay claim had "charged insidious discrimination building up slowly but steadily."[36] Justice Ginsburg concluded that even though some of the alleged acts were time barred, the issuance of each new check "contributed incrementally to the accumulating harm."[37] Due to the parallels between disparate pay and hostile work environment claims, Justice Ginsburg asserted that disparate pay claims should not be subject to the strict procedural filing dates as discrete claims. Following this analysis the dissent found Ledbetter's claim to be a continuing violation subject to tolling of the statute of limitations.

The Internal Debate

Justice Alito rejected the dissent saying it overlooked the "critical conceptual distinction" between hostile work environment and disparate pay claims.[38] The majority opinion explained that Ledbetter was not alleging a single wrong encompassed in a series of acts, but rather a series of discrete discriminatory acts. Each act was an independent and separately actionable violation the majority found. Thus, Ledbetter's pay disparity claim was time barred since serial violations "must be filed with respect to each discrete alleged violation."[39]

Justice Ginsburg urged that an employee becomes immediately aware of promotions and terminations and has the opportunity to immediately seek an explanation for those acts. However, compensation disparities are different because coworkers' salaries and underlying discriminatory payment decisions are often "hidden from sight."[40]

The majority again rejected this argument. Justice Alito acknowledged that Ledbetter's claims were unique because she was unaware of her pay discrimination. The majority was unwilling to carve out a special rule where employees with disparate pay claims are unaware of discriminatory pay decisions. Justice Alito concluded that the dissent essentially proposed that the court create a "special rule for pay cases based on the particular characteristics" of Ledbetter's situation.[41] The majority declined to do so. Justice Alito explained that the facts of the *Ledbetter* case were so atypical of the majority of disparate pay claims that it would be inappropriate to treat disparate pay claims as anything other than discrete acts.

In ignoring the importance of an employee's inability to discover discriminatory pay decisions, the majority validated Justice Ginsburg's criticism that the court failed to appreciate workplace realities. Inability to discover pay discrimination may prevent aggrieved employees from timely filing. Disregarding such an obstacle, Justice Ginsburg explained, demonstrates how much the *Ledbetter* decision strayed from Title VII's core purpose.[42]

Justice Ginsburg urged that the majority view was "completely at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."[43] She opined that her colleagues permitted employers to treat discriminatory acts as lawful conduct.[44] The purpose of Title VII was to eliminate discriminatory practices in the workplace and make aggrieved employees whole.[45] In pronouncing Ledbetter's claim as time barred, the majority effectively ignored the spirit and intent of Title VII's protections.

The decision in *Ledbetter* established the principle that disparate pay decisions are discrete acts. The ongoing, cumulative effects of discrete acts do not toll the statutory charging period. Accordingly, the statute of limitations for filing a disparate pay claim begins to run on the day the discrete act occurs. Dissatisfied with this holding, Justice Ginsburg charged Congress to act in order to correct the Supreme Court's "parsimonious" application of Title VII.[46] And it did.

CONGRESSIONAL RESPONSE TO *LEDBETTER*: THE LILLY LEDBETTER FAIR PAY ACT OF 2009

As a direct reaction, the Democratic majority in Congress enacted the Ledbetter Fair Pay Act of 2009 which, in effect, overruled the Supreme Court's decision in *Ledbetter*. The Act rejected the principle established in *Ledbetter* that the statutory charging period for disparate pay decisions began to run on the day the decision was made, and not when the effects of the decisions are felt. The Act's purpose is to save untimely discrimination claims in the compensation context. The Amendment also provides that nothing in the Civil Rights Act of 1964 is to limit an aggrieved employee's "right to introduce evidence of an unlawful employment practice" occurring outside the appropriate statutory filing period.[47] The Act provided that discrete acts could, in fact, be lumped together under certain circumstances to toll applicable limitations periods.

The Lilly Ledbetter Fair Pay Act of 2009 established that an unlawful employment practice violating Title VII occurs if and when all of the following occur:

> … 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.[48]

Congress thereby provided that the EEOC's statutory charging period begins not solely when the discriminatory act or decision occurs but also whenever its effects on an aggrieved employee are felt. Thus, an actionable, discriminatory act occurs each time a payment or other benefit is paid, causing the aggrieved to feel the effects of the discriminatory practice. The effect of the discriminatory act is viewed as a fresh violation, so the EEOC tolling period is reset on the date the violation is recognized, and does not continue to run from the original date of the first violation.

In introducing the Act, Congress's intent was to clarify when a discriminatory pay decision or act occurred and "to provide more effective remedies to victims of discrimination in payment of wages. …"[49] Congress intended the Fair Pay Act to rectify what it viewed as the Supreme Court's "significant impair[ment of] statutory protections against discrimination" in *Ledbetter*.[50]

Congress found the Supreme Court "unduly" and unrealistically "restrict[ed] the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices" in *Ledbetter*.[51] In passing the Act, Congress attempted to halt the application of *Ledbetter*'s interpretation of the statutory filing period for compensation discrimination claims. Likewise, the Fair Pay Act emphasized that nothing in the Civil Rights Act of 1964 was intended to limit an employee's ability to introduce evidence of a discriminatory practice occurring outside the statutory filing period.[52]

EFFECTS OF THE LEDBETTER FAIR PAY ACT OF 2009

It is difficult to fully discern at this early date the impact of the Ledbetter Fair Pay Act. However, two recent decisions in New Jersey seem to be in stark contrast and perhaps almost in open rebellion. In *Alexander v. Seton Hall University*, the appellate court decided to follow the Supreme Court's earlier guidance in *Ledbetter*, despite the Act.[53]

In *Alexander*, three longtime female Seton Hall University professors alleged age and sex discrimination by the University in violation of the New Jersey Law Against Discrimination.[54] The female professors essentially argued the same point made in *Ledbetter*. They claimed that though the discriminatory pay decision was made outside the statute of limitations, the continuing violation doctrine permitted the claim to proceed based on the present effects of the issuance of paychecks to them.[55] The plaintiffs were not sure of the precise date the discriminatory pay decision was made but they argued that disparate pay continued into the statutory charging period. Like Goodyear in *Ledbetter*, Seton Hall urged that only discrete acts would govern and that the continuing violation doctrine was inapplicable.

Surprisingly, despite Congress's enactment of the Lilly Ledbetter Fair Pay Act of 2009, the trial court found the Supreme Court's ruling in *Ledbetter* applicable.[56] The Act specifically stated that an unlawful employment practice occurs "when an individual is affected by application of a discriminatory compensation decision … including each time wages" are paid.[57] Congress further stated that the Supreme Court's holding in *Ledbetter* was contrary to Congressional intent and the purpose of Title VII's protection.[58] But, in *Alexander*, the New Jersey trial court chose to ignore Congress's clear intent to overrule *Ledbetter* and followed it.

The trial court dismissed Alexander's claims as discrete acts occurring outside of the statute of limitations. The court found no presently actionable violation and gave no weight to the present effects of the original, time barred pay decision.[59]

In adopting the United States Supreme Court's pay discrimination approach from *Ledbetter*, the appellate division in *Alexander v. SHU* noted that the New Jersey Supreme Court had often followed Title VII jurisprudence in interpreting "our LAD."[60] The appellate court offered several explanations for adopting the Supreme Court's findings in *Ledbetter*:

- Treating each new paycheck as creating a new violation would undermine the importance of statutes of limitations;
- The Alexander plaintiffs also failed to either allege discrete acts within the limitations period, or allege facial or intentional discrimination; and
- Most importantly though, the Appellate Division found that even the Lilly Ledbetter Fair Pay Act of 2009 did not make Alexander's claims timely.

The court admitted that even though the plaintiffs' complaints were premised on the LAD and the claims might have been aided by the federal Fair Pay Act, the Act "did not exist when the complaint was dismissed."[61] The court acknowledged that "there is some merit for the proposition that we should not follow *Ledbetter*" because some of New Jersey's own pre-*Ledbetter* cases supported Alexander's claims.[62] Apparently aware of the Fair Pay Act's amendments and current applicability, the appellate court unexpectedly decided to follow *Ledbetter* nonetheless.

The appellate court concluded that the better course was to follow *Ledbetter* "particularly in the absence of a post-*Ledbetter* amendment to LAD."[63] The New Jersey Legislature had not adopted a similar amendment to its own LAD after the Fair Pay Act's enactment. No amendments had been made to the LAD or previous case law that would have "affected [their] construction at the time *Ledbetter* was decided."[64] Thus, in the interests of remaining "faithful to...state jurisprudence" and the present LAD "as [they] stood at all relevant times," the appellate court adopted *Ledbetter*.[65]

The court's decision in *Alexander* is significant and presents itself at a curious time in New Jersey. With a new Governor whose thoughts on this subject are unknown, it is possible that a *Ledbetter*-type amendment may be adopted by the Legislature. However, such a bill could be the subject of a veto. A chess game may ensue in Trenton to resolve this question.

Roa v. Roa

Following *Alexander* by only six months, a unanimous New Jersey Supreme Court again rejected a continuing violation theory in *Roa v. Roa*,[66] without addressing the application of the Fair Pay Act at all. The court's decision in *Roa* was a mixed message and neither a strong rebuke nor an endorsement of the doctrine. The Supreme Court ruled that the continuing violation theory permits the:

> aggregation of acts, each of which, in itself, might not have alerted the employee of the existence of a claim, but which together show a pattern of discrimination. In those circumstances, the last act is said to sweep in otherwise untimely prior non-discrete acts.[67]

The court noted that the continuing violation doctrine does not resuscitate a retaliatory conduct claim where a plaintiff knew or should have known that the defendant was engaged in retaliatory conduct. The court allowed a retaliation claim to proceed in *Roa* under a discovery rule analysis and rejected the lower court's utilization of the continuing violation doctrine. The court declared that the doctrine "cannot be applied to sweep in an otherwise time-barred discrete act."[68]

Roa *Facts*

The plaintiffs in *Roa*, Fernando and Liliana Roa, asserted retaliatory discrimination by Marino Roa, their supervisor at Gonzalez and Tapanes Foods, Inc. (G&T). The alleged conduct arose from Fernando Roa informing Marino Roa's wife that he was having affairs with female subordinates. The allegation continued that Marino responded by harassing the couple and they were eventually terminated.

Liliana was terminated on or about August 24, 2003. She did not receive her unemployment benefits until February 2004 due to complications with G&T. Fernando was terminated on or about October 3, 2003, but his health insurance was terminated effective September 30, 2003. He alleged that he did not discover this fact until he received a letter dated November 11, 2003, from his insurance provider, informing him that it would not cover Liliana's October 2, 2003 surgery. Her claim was eventually paid by the carrier but the plaintiffs filed a complaint alleging unlawful retaliation in violation of the New Jersey LAD on November 3, 2005.

Liliana's claims were rejected by the court since her ongoing harassment put her on notice that her termination might have been retaliatory. By itself her termination was a discrete act, thus her claim was time barred. The more critical claim was Fernando's assertion that the early cancellation of his insurance was "the last in a series of retaliatory acts under the continuing violation theory."[69]

Roa *Analysis*

The New Jersey Supreme Court stated that New Jersey recognized the continuing violation theory to toll the statute of limitations for anti-discrimination cases where conduct is "continuous, cumulative, [and] synergistic [in] nature."[70] Fernando Roa was terminated October 3, 2003, more than two years prior to the filing of his complaint. Without application of the doctrine of continuing violation, his retaliatory discharge claim would have been time barred.

The continuing violation doctrine, Justice Virginia Long explained, allowed the aggregation of acts which show a pattern of discrimination in order to "sweep in otherwise untimely prior non-discrete acts."[71] The court declared that the doctrine "does not permit the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable."[72]

Like Liliana Roa, or Columbus Ricks, Fernando Roa knew or should have known that he was the "subject" of the defendant's discrimination.[73] The court directed that once the plaintiff had notice of the defendant's retaliatory conduct he should have filed his complaint within the applicable statutory charging period. Since Roa did not file in a timely manner, his wrongful termination claim was lost. By this analysis the court ruled that the continuing violations doctrine was not applicable.

However, the inapplicability of the continuing violation doctrine in *Roa* did not end the New Jersey Supreme Court's inquiry. The court opined that the discovery rule saved Fernando Roa's post-discharge retaliation claim. His claim was allowed to proceed because the discovery rule "permitted him to prove that 'he did not know, or could not have reasonably known, about the cancellation at an earlier date.'"[74] The court found that the plaintiffs could introduce time barred retaliatory discharge claims as evidence in the pursuit of the post-discharge retaliation claim.[75]

The *Roa* holding provided a mixed message: The New Jersey Supreme Court recognized again the continuing violation doctrine, but this decision provided little guidance regarding its current application in New Jersey. Instead, the court permitted the discovery doctrine to serve a similar purpose in equitably tolling the statute of limitations due to "fundamental unfairness."[76]

In *Ledbetter*, the United States Supreme Court also declined to address the application of the discovery rule.[77] Thus, it is axiomatic that the Court did not give weight to Ledbetter's inability to discover her pay discrimination earlier.[78]

EFFECTS OF THE LEDBETTER FAIR PAY ACT ACROSS THE UNITED STATES

President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 into law in January 2009. There is limited case law addressing the impact of the amendment on the continuing violation doctrine to date, and the application of equitable tolling to Title VII discrimination claims. The developing trend across the United States is the adoption and application of the Fair Pay Act for tolling the statute of limitations for compensation claims. Where other discrete acts directly relate to compensation, some states, like New York, Mississippi, and Colorado have even allowed tolling of the statute of limitations.[79]

A Few Examples

New York has embraced the Fair Pay Act and applied it in finding otherwise time barred compensation claims timely. In *Vuong v. New York Life Insurance Co.*,[80] the US District Court found the Act tolled the statute of limitations for a disparate pay claim. A Chinese insurance agent, Pheng Vuong, accused New York Life Insurance Co. of five counts of racial discrimination.[81] The charges included failure to promote and disparate pay claims. Though Vuong filed a charge with the EEOC in August of 2002, his allegations included acts from 1998 which were obviously untimely.

Vuong's promotion claim was dismissed by the court as time barred as a discrete act following *Morgan*.[82] New York Life Insurance was subsequently granted summary judgment for the remaining disparate pay claim. The district court, however, found that the otherwise untimely compensation claim by Vuong was made timely by the Fair Pay Act.[83] Thus, had the compensation claim been found to have merit, the court would have allowed an otherwise untimely claim to proceed based on the Fair Pay Act. In contrast to *Alexander* in New Jersey, the district court in New York gave no weight to the Supreme Court's decision in *Ledbetter*.

Similarly, in Mississippi, an otherwise time barred disparate pay claim was found timely in *Gentry v. Jackson State University*.[84] In *Gentry*, Dr. Laverne Gentry claimed that Jackson State University (JSU) denied her tenure and a related salary increase in 2004 because of her gender. Since JSU's tenure decision directly affected her salary, it "qualif[ied] as a 'compensation decision' or 'other practice' affecting compensation within in the recently enacted" Fair Pay Act.[85] The federal court in Mississippi applied the Fair Pay Act and also relied upon *Vuong* as persuasive authority.

Colorado also applied the Fair Pay Act to permit a continuing violation claim to proceed in *Tomlinson v. El Paso Corp.*[86] Tomlinson, an El Paso Corp. employee, alleged age discrimination in the adoption of a new pension calculation plan. The new plan based a retiree's monthly pension payment on the amount of years of service credited, while the old plan considered years of service and an average of salaries. The new plan permitted an employee to adopt either pension arrangement, but the older plan's benefits would be "frozen" at the employee's earned benefits as of December 31, 2001.[87]

The district judge had originally granted El Paso Corp. summary judgment on the grounds that Tomlinson's claim was not timely filed. But Tomlinson moved for reconsideration of the judgment in light of the Fair Pay Act. Tomlinson had alleged that a discriminatory act occurred each time benefits were calculated pursuant to the new plan. Therefore, each new calculation, he asserted, tolled the statute of limitations for his filing. El Paso Corp. argued that not only was Tomlinson's charge untimely, but that the Fair Pay Act was inapplicable to pension distributions.

While the Act does not apply to pension distributions, Tomlinson's charge concerned the rate of accrual benefits for pension based on current compensation. The US District Court in Colorado found that the Fair Pay Act provided that a discriminatory act occurred when an employee is "'affected' by the application of a discriminatory compensation decision or practice."[88] El Paso Corp.'s new pension calculation plan affected employees since salary changes were not considered after December 2001 for those employees opting into the old pension plan. Tomlinson received a pay credit that did not result in any increase to his pension benefit. As a consequence, he was affected by the discriminatory pay decision.[89] Since he was affected by a discriminatory pay practice, the Colorado court found the Fair Pay Act applicable, and allowed Tomlinson's otherwise untimely compensation claim to proceed.[90]

Federal cases in New York, Mississippi, and Colorado, so far, have all applied the Fair Pay Act to toll the statute of limitations where there is a discriminatory compensation claim.[91] It remains to be seen, however, how state courts will respond. The court in Mississippi permitted untimely claims to proceed because of their discriminatory impact on compensation.[92] But, where the alleged discriminatory act is an untimely filed, discrete claim, not addressing compensation, many jurisdictions do not find the Act applicable.[93] These jurisdictions pay little attention to the Congressional finding that "nothing in this act is intended to limit an aggrieved person's right to introduce evidence of an unlawful" untimely employment practice.[94]

An apparent trend across jurisdictions to date is to apply the Act only to discriminatory compensation decisions. While there have been some variations, *e.g.*, the pension benefits in *Tomlinson*, the district courts have confined Ledbetter Act flexibility to pay claims.

In *Tomlinson*, Judge Walker D. Miller, US Senior District Judge, discussed at length the distinction on the facts regarding a *Ledbetter* claim. There was a concern that the case was about pension, particularly since it was brought for plan payments. The court noted prior Supreme Court authority[95] and the court had initially rejected the plaintiff's claim based on the Supreme Court decision in *Ledbetter*. After further study of the review, the court stated that "my reliance on the *Ledbetter* decision may have been misplaced. The legislative history of the Ledbetter Act … demonstrates the differences between pension and paycheck cases." The court noted that in *Long* the Supreme Court refused to apply a continuing violation principle to a pension plan and the court further noted that the Ledbetter Act "expressly provides that it is not 'intended to change current law treatment of when pension distributions are considered paid.'"

Judge Walker concluded, however, that this case "does not concern payment of retirement benefits pursuant to a retirement plan, which was the focus of *Long*, but rather the rate of accrual of benefits." Thus, from the court's analysis the plain language of the Ledbetter Act might apply.

Fair Pay Act Not Applicable

In *Low v. Chu*,[96] the Oklahoma district court found the Fair Pay Act inapplicable to a gender discrimination claim. In *Low*, the plaintiff alleged that she was unable to apply for her supervisor's position due to gender discrimination. The Oklahoma District Court found the Fair Pay Act inapplicable to Low's case because she "made no allegations of discrimination in compensation."[97]

A similar approach was taken in Michigan. The US District Court refused to allow equitable tolling under the Act in *Maher v. International Paper Co.*[98] Maher had alleged that International Paper Co. violated the Family and Medical Leave Act when it refused to grant her intermittent leave to care for her terminally ill father and then to recover from a miscarriage.[99] In addressing her claim, the Michigan district court declared that:

> The Fair Pay Act of 2009 only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims. The more general rule announced in *Ledbetter*—that the charging period is triggered when a discrete unlawful practice takes place—reaffirmed the principles in *Ricks*...and *Morgan*.[100]

In *Maher*, Judge Paul L. Maloney, a Chief US District Judge for the Western District of Michigan, relied in part on Judge Rosenthal's comments in *Leach v. Baylor College of Medicine* regarding the application of the Fair Pay Act. The court in *Maher* found that the Fair Pay Act overruled *Ledbetter* "for some claims" but stated that "in any event, the law does not change the *Ledbetter* accrual/limitations rule for FMLA claims." As the Senate bill's proponents explained:

> S. 181 would apply retroactively to May 28, 2007—the day before the Ledbetter decision—for all claims of pay discrimination made under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Title I and Section 503 of the Americans with Disabilities Act of 1990, and Sections 501 and 504 of the Rehabilitation Act of 1973 that are pending on or after that date.

The court in *Maher*, citing *Vuong v. New York Life Insurance Co.*, and also noting that a fellow district court in Michigan had recently applied *Ledbetter* to determine when claims under the ADA accrued,[101] concluded that the Fair Pay Act does not overrule *Ledbetter* with respect to FMLA claims so it does not affect the court's analysis of whether Maher's claims were timely. The court firmly noted that "*Ledbetter* remains persuasive authority except where overruled by statute, and this court finds its reasoning cogent and appropriate for application in the FMLA context." Thus, a note for practitioners that the Supreme Court's decision in *Ledbetter* is still firm guidance in many decisions and the Fair Pay Act should be carefully analyzed before an axiomatic assumption is made that violations continue regardless of claims.

Similarly, in *Vuong v. New York Life Insurance Co.*, Judge Thomas P. Griesa found the Fair Pay Act applicable governing the compensation claim in *Vuong*. He noted that the defense had originally relied upon *Ledbetter* in arguing that there had been no tolling. He stated clearly "this argument is foreclosed by the new legislation" and concluded that "[t]his type of claim is expressly declared to be timely by virtue of the recently enacted law." In other words, a specific analysis of the claims made, as Judge Griesa has suggested in *Vuong*, is critical when asserting and analyzing the applicability of the Fair Pay Act vis-à-vis *Ledbetter v. Goodyear Tire*.

Additionally, in *Low v. Chu*, District Judge Claire V. Eagan noted that the failure to reference to the Fair Pay Act was not dispositive as defendant had suggested. She concluded to the contrary that "the act is simply not relevant to Low's case, as she has made no allegations of discrimination in compensation." In other words, again, the claims must specifically track the compensation theme articulated by the Congress in the Fair Pay Amendments, otherwise the Act is inapplicable.

In *Leach v. Baylor College of Medicine*,[102] a Texas court also declined to permit equitable tolling under the Fair Pay Act. The plaintiff in *Leach* asserted a claim of race discrimination. The Texas district court found that the "Fair Pay Act of 2009 only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims."[103] Consequently, the continuing violation doctrine survives in the context of disparate pay cases.

CONCLUSION

The Lilly Ledbetter Fair Pay Act sought to overrule the Supreme Court's holding in *Ledbetter* that the statute of limitations for filing a disparate pay claim began to run on the day the discrete act occurred.[104] The Act's purpose was to save untimely discrimination claims in the compensation context.[105] In enacting the amendment, Congress provided that discrete acts, constituting a continuing violation, could be lumped together to toll applicable limitations periods.

There appear to be a few trend lines emerging regarding the continuing violations doctrine. Some state courts, like in New Jersey, have not abandoned the Supreme Court's holdings in *Ledbetter* and have clearly signaled that they are waiting for further direction from the Legislature in the state. The various court decisions referenced from New Jersey suggest that the continuing violations doctrine will be applied but that further clarification in the Garden State will need to come from the Legislature before the ultimate direction post-*Ledbetter* is known.

Federal courts, on the other hand, seem to be clear and nearly uniform in the application of the Ledbetter Fair Act to pay cases. Perhaps the denomination as "pay" cases is the critical element. For example, the decisions we reviewed in *Vuong v. New York Life Insurance Co.*, *Gentry v. Jackson State University*, and *Tomlinson v. El Paso Corp.* all clearly followed the Act and permitted pay claims to continue which would have otherwise been barred. Those courts followed and understood Congress's intent in overruling the Supreme Court's split opinion in *Ledbetter*. The Ledbetter Act itself has been construed narrowly by other district courts; the decisions by federal courts in Oklahoma, Michigan, and Texas, for example. These courts have suggested a narrower reading of the Ledbetter Fair Pay Amendments and said that for the purposes of disparate pay cases the continuing violations doctrine continues.

Thus, the cross currents which resulted in the overturning of the Supreme Court's decision in *Ledbetter* appear to be clear and consistent: federal law has been amended so that pay events like weekly paychecks referenced in *Ledbetter*, for example, by the Supreme Court, may form the basis for claims not barred by a limitations period looking to discrete acts. State courts, however, may wait for directions from their individual legislatures with regard to the application of state law.[106]

An obvious conflict needs to be resolved with regard to the extent of the Congressional amendment. Congress noted in the Fair Pay Act nothing in the Civil Rights Act of 1964 was "intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice" occurring outside the statutory charging period.[107] If Congress had intended the Fair Pay Act to permit equitable tolling for all unlawful employment practices the statute may need further explication or we may need to await further discussion in the various district courts.

Perhaps the best reflection on the implications of the Fair Pay Act was stated by Judge Lee Rosenthal in *Leach v. Baylor College of Med.* He characterized the limits and stated that the Fair Pay Act "only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims." The judge continued that:

> [t]he more general rule announced in *Ledbetter*—that the charging period is triggered when a discrete unlawful practice takes place—reaffirmed the principles set forth in *Ricks*, *449 U.S. at 258*, and *Morgan*, *536 U.S. at 113*. Courts have applied this rule, as well as the rule that a plaintiff may not sue for a prior discriminatory act outside the charging period based on the continuing effects of that act into the charging period, to other types of discrimination claims not involving compensation. *See, e.g., Jackson v. City of Chicago, 552 F.3d 619, 624 (7th Cir. 2009)* (applying *Ledbetter* to a failure to promote claim); *Bennett v. Chatham County Sheriff Dept., 315*

> *Fed. Appx. 152, 2008 U.S. App. LEXIS 23897, 2008 WL 4787139, at 7 (11th Cir. Nov. 4, 2009)* [51] (applying *Ledbetter* to failure to promote claim). The 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.[108]

In other words, following Judge Rosenthal, *Leach* opines that *Ledbetter* is still good law in Title VII cases, except those involving pay. His interpretation remains to be seen as other courts work through the full context of the Fair Pay Act. At least at this moment it would appear that his reading may be somewhat narrower than other judges have opined. Only time will tell.

The direction regarding continuing violations is clear: Congress has specifically and clearly overturned a split decision by the Supreme Court in *Ledbetter*. The purpose of the Act is to overturn the Court's narrow reading regarding claims that might otherwise be barred in the pay context. The Act does not limit its finding to the pay context. Thus, despite a few early bumps in the road where district courts are fine tuning the analysis of the Act, it seems likely that the continuing violations doctrine will ultimately be vibrant and continue to be applied to different circumstances in the workplace.

NOTES

1. Ricks v. Delaware State College, 449 U.S. 250, 257 (1980).

2. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

3. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, (2009) (current version at 42 U.S.C. § 2000e-5(e)(3) (2010).

4. United Airlines v. Evans, 431 U.S. 553, 558 (1977).

5. *Id.* at 558.

6. *Id.* at 558.

7. Lorance v. AT&T Technologies, 490 U.S. 900 (1989).

8. *Id.* at 908.

9. *Id.* at 907. Under Title VII, an aggrieved employee must file his or her claim for employment discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the day on which the unlawful practice occurred, or within 300 if the complaint was originally filed with a State or local agency with the proper authority. 42 U.S.C. § 2000e-5(e)(1)(2010). Consequently, the procedural concerns of continuing violation claims under Title VII surround the establishment of the date when the unlawful practice occurred, when the statute of limitations for filing a charge began to run, and finally if acts occurring outside of the charging period are actionable.

10. *Lorance,* 490 U.S. at 906.

11. *Id.* at 908.

12. National Railroad Passenger Corp v. Morgan, 536 U.S. 101 (2002).

13. *See Id.* at 113.

14. *Id.* at 114.

15. *Id.* at 114.

16. *Id.* at 118.

17. *Id.* at 113.

18. *Id.* at 122.

19. *Id.* at 113.

20. *Ledbetter*, 550 U.S. at 625.

21. *Id.* at 628.

22. *Id.* at 628.

23. *Id.* at 628.

24. *Id.* at 642.

25. *Id.* at 642.

26. *Id.* at 642.

27. *Id.* at 629.

28. *Id.* at 629.

29. *Id.* at 629.

30. *Id.* at 629.

31. *Id.* at 630.

32. *Id.* at 633.

33. *Id.* at 661 (Ginsburg, J., dissenting).

34. *Id.* at 648.

35. *See Morgan*, 536 U.S. at 117.

36. *Ledbetter*, 550 U.S. at 648–649.

37. *Id.* at 649.

38. *Id.* at 638 (majority opinion).

39. *Morgan*, 536 U.S. 101, 113 (2002).

40. *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting).

41. *Id.* at 639–640 (majority opinion).

42. *Id.* at 660 (Ginsburg, J., dissenting).

43. *Id.* at 660.

44. *Id.* at 660.

45. *Id.* at 660–661.

46. *Id.* at 661.

47. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, (2009) (current version at 42 U.S.C. § 2000e-5(e)(3)(2010).

48. 42 U.S.C. 2000e-5(e)(3)(A) (2010).

49. Lilly Ledbetter Fair Pay Act of 2009 § 3.

50. Lilly Ledbetter Fair Pay Act of 2009 § 3.

51. Lilly Ledbetter Fair Pay Act of 2009 § 3.

52. Lilly Ledbetter Fair Pay Act of 2009 § 3.

53. Alexander v. Seton Hall University, 410 N.J. Super. 574, 588 (Super. Ct. App. Div, 2009).

54. *See id.* at 577; *see also* New Jersey Law Against Discrimination N.J.S.A. 10:5-1.

55. Alexander, *supra* n.53 at 578.

56. *Id.* at 579.

57. 42 U.S.C. § 2000e-5(e)(3)(2010).

58. Lilly Ledbetter Fair Pay Act of 2009 § 3.

59. *Alexander, supra* n.53 at 580.

60. *Id.* at 587.

61. *Id.* at 588.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. Roa v. Roa, 200 N.J. 555 (N.J. 2010).

67. *Id.* at 569.

68. *Id.* at 569.

69. *Id.* at 565.

70. *Id.* at 566.

71. *Id.* at 569.

72. *Id.* at 569.

73. *Id.* at 570.

74. *Id.* at 572.

75. *Id.* at 576.

76. *Id.* at 571. The United States Supreme Court has previously refrained from addressing the role of the discovery rule in tolling the statute of limitations for discrimination claims. The Court declined to address the discovery rule's impact on claims based on discrete discriminatory acts in *Morgan* because the fact pattern did not create a situation where the discovery rule needed to be fully investigated. *Morgan, supra* n.12 at 115.

77. *Ledbetter,* 550 U.S. at 642.

78. *See id.* at 642.

79. *See* Vuong v. New York Life Insurance Co., No. 03 Civ. 1075, 2009 U.S. Dist. LEXIS 9320, at *1 (S.D.N.Y. Feb. 6, 2009). *See also* Gentry v. Jackson State University, 610 F. Supp. 2d 564 (S.D. Miss. 2009); Tomlinson v. El Paso Corp., 2009 U.S. Dist. LEXIS 77341, at *1 (D. Colo. Aug. 28, 2009).

80. *Vuong, supra* n.79.

81. *Id.* at *1.

82. *Id.* at *19.

83. *Id.* at *25.

84. *Gentry, supra* n.79.

85. *Id.* at 566.

86. *Tomlinson, supra* n.79.

87. *Id.* at *3.

88. *Id.* at *9–10.

89. *Id.* at *10.

90. *Id.* at *9.

91. *See Vuong, supra* n.79. *See also* Gentry, *supra* n.79; Tomlinson, *supra* n.79.

92. *See Gentry, supra*, n.79.

93. *See* Low v. Chu, 2009 U.S. Dist. LEXIS 111623, at *1 (N.D. Okla. Dec. 1, 2009). *See also* Maher v. International Paper Co., 600 F. Supp. 2d 940 (W.D. Mich. 2009); Leach v. Baylor College of Medicine, 2009 U.S. Dist. LEXIS 11845, at *1 (S.D. Tex. Feb. 17, 2009).

94. Lilly Ledbetter Fair Pay Act of 2009 § 3.

95. *See* Florida v. Long, 487 U.S. 223 (1988).

96. *Low, supra* n.93.

97. *Id.* at *25.

98. Maher, *supra* n.93.

99. *Id.* at 943.

100. *Id.* at 951.

101. *See* Kesler v. Barris, Sott, Denn & Driker, PLLC, No. 04-40235, 2008 U.S. LEXIS 31577, at *1 (E.D. Mich. Apr. 17, 2008).

102. *Leach, supra* n.93.

103. *Id.* at *17.

104. Lilly Ledbetter Fair Pay Act of 2009 § 3.

105. Lilly Ledbetter Fair Pay Act of 2009 § 3.

106. Curiously, however, states like New Jersey and most others specifically adopt and follow decisions of the federal courts in interpreting legislation like Title VII and other applicable discrimination statutes. Following such an analysis, should those courts need to wait for action and guidance by the legislatures?

107. Lilly Ledbetter Fair Pay Act of 2009 § 3.

108. *Leach, supra* n.93.