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Testimony of Wade Henderson President and CEO Leadership Conference on Civil Rights Submitted to the House Judiciary Committee on "The Impact of *Ledbetter v. Goodyear* on the Effective Enforcement of *Civil Rights Laws*"

June 28, 2007

"Equality In a Free, Plural, Democratic Society"



Good Morning. My name is Wade Henderson and I am the President of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957. The Leadership Conference's nearly 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Distinguished members of the Committee, I am here this afternoon to call on Congress to act. To restore the ability of victims of pay discrimination to obtain effective remedies, and to end the inequality of remedies across classes of victims.

Lilly Ledbetter, a supervisor at Goodyear Tire & Rubber in Gadsden, Alabama, sued her employer for paying her less than its male supervisors and a jury found that Goodyear intentionally paid Ms. Ledbetter less than her male counterparts for more than 15 years, in violation of Title VII of the Civil Rights Act of 1964. Week after week, year after year, she was paid less. Significantly less. And this disparity was because of her sex. The jury also found Goodyear's conduct to be bad enough to warrant an award of compensatory and punitive damages totaling \$3 million.

On its face, it looked like Ms. Ledbetter had won. That she had finally received compensation for the years of discrimination, including the impact on her pension and retirement benefits. But that was before the Title VII damages cap and the Supreme Court intervened.

After the jury awarded Ms. Ledbetter her \$3 million, the court was required by law



to reduce her award to \$300,000. Why? In 1991, Congress set damages caps in Title VII, which apply to gender, age and disability claims only, at \$300,000. That amounts to ten percent of what the jury believed Ms. Ledbetter should receive, and a drop in the bucket to a corporation like Goodyear.

Two weeks ago, the second shoe dropped. The Supreme Court issued an opinion in *Ledbetter v. Goodyear Tire & Rubber*¹ which prevented Ms. Ledbetter from recovering *anything* to remedy the discrimination that she endured. According to the Court's new rule, Ms. Ledbetter filed her discrimination complaint too late. A 5-4 Court held that Title VII's requirement that employees file their complaints within 180 days of "the alleged unlawful employment practice,"² means that the complaint must be filed within 180 days from the day Goodyear first started to pay Ms. Ledbetter differently, rather than – as many courts had previously held -- from the day she received her last discriminatory paycheck.

The Court's ruling on the statute of limitations in *Ledbetter* is fundamentally unfair to victims of pay discrimination. First, by immunizing employers from accountability for their discrimination once 180 days have passed from the initial pay decision, the Supreme Court has taken away victims' recourse against continuing discrimination.

Moreover, the Court's decision in *Ledbetter* ignores the realities of the workplace. Employees typically don't know much about what their co-workers earn, or how pay decisions are made, making it difficult to satisfy the Court's new rule.

As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding

¹ Slip op. No. 05-1074 (U.S. Supreme Court)

² 42 U.S.C. 2000e et seq.

salary information in the United States. It is common practice for many employers to withhold comparative pay information from employees. One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers, and a significant number of other employers have more informal expectations that employees do not discuss their salaries. Only one in ten employers has adopted a pay openness policy.³

Workers know immediately when they are fired, refused employment, or denied a promotion or transfer, but norms of secrecy and confidentiality prevent employees from obtaining compensation information. As Justice Ginsberg's dissent points out, it is not unusual for businesses to decline to publish employee pay levels, or for employees to keep private their own salaries.

The reality is that every time an employee receives a paycheck that is lessened by discrimination, it is an act of discrimination by the employer. The harm is ongoing; the remedy should be too.

In addition, the impact of the Title VII caps on Ms. Ledbetter clearly illustrates the need to eliminate this arbitrary provision from the law.

Under current law, individuals who prove that they have been the victims of intentional discrimination based on sex, disability or religion are only able to recover compensatory and punitive damages up to a cap of \$300,000. This is true no matter how egregious the conduct of the discriminator, nor how long the discrimination continued. The caps create an artificial ceiling on damages awards that does not exist for individuals whose discrimination was based on race or national origin. If a person

³ Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004).



who was discriminated against on the basis of sex suffers the same adverse employment consequences as a person discriminated against on the basis of race or national origin, why should one be eligible to receive more damages than another?

Moreover, often it is the most severe cases of discrimination that are affected by the damages caps. Damages caps, effectively, protect the worst offenders while denying relief to those who were harmed the most.

Caps also minimize the deterrent effect of Title VII. If the potential liability for sex discrimination is capped, it is manageable for corporations. More like a cost of doing business. However, uncapped damages, at a minimum, create more of an incentive for employers to ensure that their workplaces are free from discrimination. Compensatory damages are designed to make the victim whole. If the economic harms suffered by the victim of discrimination are greater than the statutory cap, it should not be the discrimination victim who is left with less.

Finally, in employment discrimination cases based on race or national origin – where there are no damages caps -- we have not seen runaway verdicts. This is, in part, due to the numerous existing limitations in the current law that guard against improperly high verdicts. Courts can use their *remitter* power to reduce or vacate excessive damage awards, and there are constitutional limitations on punitive damages.⁴

The impact of the Court's decision in *Ledbetter* will be widespread, affecting pay discrimination cases under Title VII affecting women and racial and ethnic minorities, as well as cases under the Age Discrimination in Employment Act⁵ involving discrimination

⁴ BMW of Northern America, Inc. v. Gore, 517 U.S. 559 (1996)

⁵ 29 U.S.C. 621 et seq.



based on age and under the Americans with Disabilities Act⁶ involving discrimination against individuals with disabilities.

Here is an example. Imagine you have worked for a company for 30 years. You are a good worker. You do a good job. Unknown to you, the company puts workers who are 50 or older on a different salary track; lower than the younger workers who do the same work. At 60, you learn that for the last 10 years, you have been earning less – tens of thousands of dollars less than colleagues doing comparable work.

How do you feel?

Imagine you are this worker. How do you feel?

Even more, how do you feel when you learn that 180 days after you turned 50 – six months after you started getting paid less – you also lost your right to redress for the hundreds of discriminatory paychecks.

The decision in *Ledbetter* will have a broad real world impact. The following are just two examples of recent pay discrimination cases that would have come out very differently if the Court's new rule had been in effect.

In *Reese v. Ice Cream Specialties, Inc.*⁷ the plaintiff, an African-American man, never received the raise he was promised after six months of work. He did not realize his raise had never been awarded until three and a half years later, when he requested a copy of his payroll records for an unrelated investigation.⁸ The employee filed a charge of race discrimination with the EEOC, and the court initially granted summary judgment to the employer. On appeal, the employee argued that his claim was timely under the continuing violation theory, and the court concluded that the relevant

⁶ 42 U.S.C. 12101 et seq.

⁷ 347 F.3d 1007 (7th Cir. 2003)

⁸ *Id.* at 1007

precedents compelled the conclusion that each paycheck constituted a fresh act of discrimination, and thus his suit was timely.⁹ If the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to seek relief.

In *Goodwin v. General Motors Corp.*¹⁰, an African-American woman was promoted to a labor representative position, with a salary that was between \$300 and \$500 less than other similarly-situated white employees.¹¹ Over time, Goodwin's salary disparity grew larger until she was being paid \$547 less per month than the next lowest paid representative, while at the same time pay disparities among the other three labor representatives shrank from over \$200 per month to only \$82.¹² Due to GM's confidentiality policy, Goodwin did not discover the disparity until a printout of the 1997 salaries "somehow appeared on Goodwin's desk."¹³ She then brought a race discrimination action against her employer under Title VII. The district court dismissed the action, but the Tenth Circuit reversed and remanded, holding that discriminatory salary payments constituted fresh violations of Title VII, and each action of pay-based discrimination was independent for purposes of statutory time limitations. Again, if the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to obtain relief.

Pay discrimination is a type of hidden discrimination that continues to be an important issue in the United States. In the fiscal year 2006, individuals filed over 800 charges of unlawful, sex-based pay discrimination with the EEOC. Unfortunately, under the *Ledbetter* rationale, many meritorious claims will never be adjudicated.

⁹ *Id.* at 1013

¹⁰ 275 F.3d 1005 (10th Cir. 2002)

¹¹ *Id.* at 1008

¹² *Id.*

¹³ *Id.* at 1008

While today we are focused on the immediate problem of the *Ledbetter* decision, it is also important to understand that this decision is part of the Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination. The Court's decisions have weakened the basic protections in ways that Congress never intended by Congress.

Under the Supreme Court's recent rulings, older workers can no longer recover money damages for employment discrimination based on age if they are employed by the state¹⁴, state workers can no longer recover money damages if their employers violate minimum wage and overtime laws¹⁵; there is no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964¹⁶; and workers can now be *required* to give up their right to sue in court for discrimination as a condition of employment.¹⁷ In many of these cases, as in *Ledbetter*, the Court is acting as a legislature, making its own policy while acting directly contrary to Congress's intent.

For opponents of civil rights, there is no need to repeal Title VII. Instead you can substantially weaken its protections by chipping away at bedrock interpretations. Or, you can instead make it difficult or impossible for plaintiffs to bring and win employment discrimination cases. Or if you make the remedies meaningless.

As Justice Ginsburg pointed out in her dissent, Congress has stepped in on other occasions to correct the Court's "cramped" interpretation of Title VII. The Civil Rights Act of 1991 overturned several Supreme Court decisions that eroded the power of Title

¹⁴ *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)

¹⁵ *Alden v. Maine*, 527 U.S. 706 (1999)

¹⁶ *Alexander v. Sandoval*, 532 U.S. 275 (2001)

¹⁷ *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)



VII, including *Wards Cove Packing Co. v. Atonio*¹⁸, which made it more difficult for employees to prove that an employer's personnel practices, neutral on their face, had an unlawful disparate impact on them, and *Price Waterhouse v. Hopkins*¹⁹, which held that once an employee had proved that an unlawful consideration had played a part in the employer's personnel decision, the burden shifted to the employer to prove that it would have made the same decision if it had not been motivated by that unlawful factor, but that such proof by the employer would constitute a complete defense. As Justice Ginsburg sees it, “[o]nce again, the ball is in Congress’ court.”

We agree.

We also reiterate the need to end the disparity in employment discrimination law by removing the damages caps that apply to women, individuals with disabilities and older Americans under current law. The caps undercut enforcement, are unnecessary, and reward the most egregious discriminators with a substantial limitation on liability for their intentional discriminatory acts.

The issues in this case are not academic. The fallout will have a real impact on the lives of people across America.

People like Lily Ledbetter.

Members of the Committee, today you begin the process of responding to Justice Ginsburg’s call. A process that will reaffirm that civil rights have legally enforceable remedies.

Thank you.

¹⁸ 490 U.S. 642 (1989)

¹⁹ 490 U.S. 228 (1989)