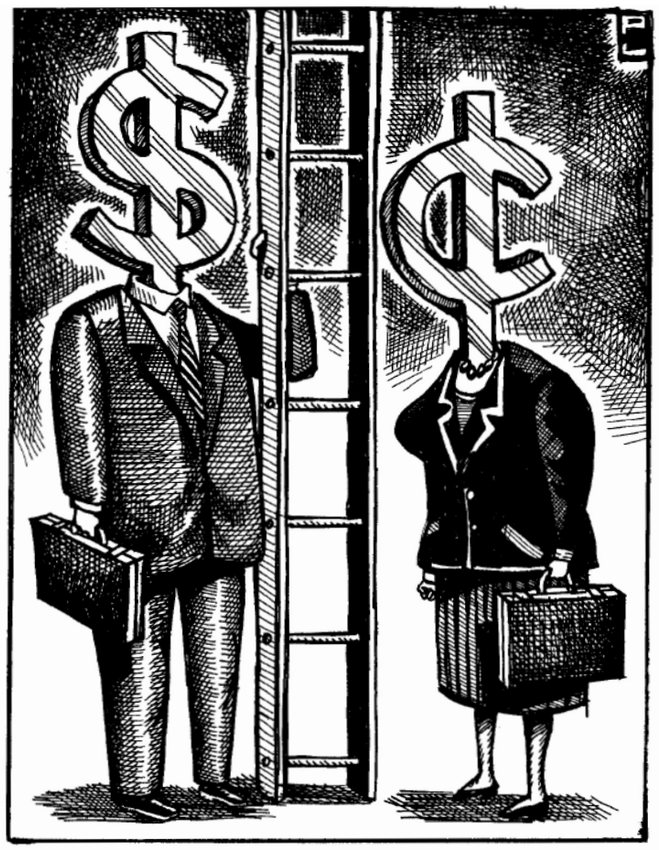
WAGE WAR

By Charlotte Fishman



In 1979 Lily Ledbetter became a manager at Goodyear Tire Company's Gadsden, Ala. plant. She was so excited that her family held a party, complete with a balloon in the shape of a Goodyear Blimp. For the next 19 years she played by the rules, undeterred by sexual propositions or openly expressed gender hostility, willing to take on any job. She considered herself a success.

That changed in 1998, when she learned from an anonymous well-wisher that her salary was thousands of dollars less than that of male managers doing the same job. Once again, Ledbetter played by the rules. She filed a timely charge of discrimination with the Equal Employment Opportunity Commission, hired a lawyer and tried her case before a jury. The facts were compelling, and the jury awarded her $3.8 million (later reduced by the judge to $60,000 for back pay and $300,000 in damages, in conformity with Title VII limits).

Goodyear appealed to the 11th Circuit, which overturned the jury verdict. With characteristic persistence, Ledbetter petitioned the Supreme Court to take her case and it did. The result was astonishing: Not only did the Supreme Court rule against her, it ruled against its own past precedent, the majority consensus of the federal courts of appeal, the legislative history of the statute, the Equal Employment Opportunity Commission's enforcement guidelines and common sense.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), the court held that to be timely, a pay discrimination claim must be brought within 180 days of the initial decision to discriminate or lost forever. It is not an overstatement to observe that the *Ledbetter* decision renders Title VII virtually useless as a tool for combating pay discrimination.

Consider the situation of a recently hired employee. It's unlikely that she will learn how her compensation stacks up against that of similarly situated male co-workers in time to meet the 180-day deadline. Even if she did learn of a discrepancy and suspected discrimination, it would be unusual for her to possess the institutional knowledge necessary to prove her claim. As career moves go, she'd be better off trying to prove her worth through redoubled effort than trotting off to the Equal Employment Opportunity Commission to file a claim.

That's exactly the strategy Ledbetter chose. She rebuffed early sexual harassment and endured "pervasive discrimination against women managers" for years before filing a charge with the commission. But she didn't dilly-dally on the way to the courthouse, either. After she learned the bitter truth, she promptly filed with the commission, seeking redress for current and continuing pay discrimination. This is hardly a case of someone sleeping on her rights.

Writing for the slimmest possible majority (5-4), Justice Samuel Alito rejected the well-established and intuitively obvious "paycheck accrual" rule first announced by a unanimous Supreme Court in B*azemore v. Friday*, 478 U.S. 385 (1986): "Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII." *Bazemore* has been widely understood to permit employees to challenge ongoing pay discrimination, regardless of how far back the decision to discriminate was made. Alito's opinion replaces it with a Kafka-esque scenario that bears little relationship to 21st century working conditions in America.

Stressing the need to "identify with care the specific employment practice at issue," Alito concludes it is not the pay check, but the pay decision that starts the clock starts ticking. In Alito's world, an employee who is told six months in advance that she will receive a 5 percent raise had better rush to the Equal Employment Opportunity Commission before she sees her first paycheck. If she doesn't, she's out of luck, even if she later finds out that similarly performing male co-workers received 10 percent raises.

Two obvious defects in this approach have been widely criticized: First, learning what one's pay will be doesn't put an employee on notice of discrimination unless the pay of others doing the same job is also provided. But most employers, including Goodyear, keep pay information confidential.

Second, this approach permits unchallenged pay discrimination to continue in perpetuity. Subsequent pay decisions, even raises calculated as a percentage of base pay, wipe the slate clean. This creates both an ever-widening pay gap for the affected employee and a disincentive for the employer to fix it voluntarily.

What is less obvious, but even more insidious, is that the *Ledbetter* majority opinion imposes a test for discrimination that is virtually impossible to meet, even when the charge is timely filed. Alito's definition of disparate treatment requires the aggrieved employee to prove that the employer had a "specific intent to discriminate" at the time of the most recent pay decision. While this may look like a straightforward requirement, it's an invitation to a wild goose chase.

In large organizations, compensation is typically the result of a complex multi-actor decision-making process. In that context, what counts as a "specific intent to discriminate"? Establishing "intent" involves presenting evidence from which an inference may be drawn that gender (or other protected status) was a factor affecting the decision-making process.

To be sure, there have been instances in which a "decider" at the top of the management chain made overtly biased decisions at a particular point in time, but such cases are rare in today's workplace. More commonly, stereotypes and other manifestations of hidden bias affect how employee behavior is perceived and interpreted by superiors (e.g., "He left early today — he must be meeting an important client" versus "She left early today — she must be having child care problems"). This leads to biased judgments (e.g., "He's a real go-getter" versus "She's not really committed to her job") that result in lower performance evaluations that are used to make pay-setting decisions.

Further difficulty arises in determining when and by whom a pay decision is "made." Is it when the biased on-site supervisor submits the performance evaluation? Or when the district manager ranks employees under a rating system based on the review? When the regional manager compares employees in several groups in accordance with a formula developed by the national vice president for human resources? When the computer runs the program that calculates the individual salaries? Forcing courts to grapple with these "angels dancing on the head of a pin" questions is not an efficient way to eliminate discrimination in the workplace.

Why would the court reject a clear, well-functioning paycheck accrual rule in favor of this strained and unworkable definition of when pay discrimination occurs?

Sadly, I believe that *Ledbetter* signals the Supreme Court's readiness to undercut enforcement of Title VII. In Alito's world, the interest of employers to be free of "stale" claims trumps the interest of the employees to be free of ongoing wage discrimination. This is not what Congress intended when it passed the Civil Rights Act of 1964.

Justice Ruth Bader Ginsburg's impassioned dissent issued a call to Congress "to correct this Court's parsimonious reading of Title VII." Last summer, the House passed the Lily Ledbetter Fair Pay Act of 2007 (H.R. 2831). The Senate Health, Education, Labor and Pension Committee held a hearing on the Fair Pay Restoration Act (S.1843) on Jan. 24, 2008. The proposed amendments reject the holding of the Ledbetter decision and restore the paycheck accrual rule. They reaffirm pre-existing Congressional intent to make pay discrimination actionable whenever it occurs, "including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision."

The Fair Pay Restoration Act reestablishes a pre-existing balance of rights, honors the weight of judicial and administrative precedent and restores Title VII's promise of equal employment opportunity. It deserves to be passed and signed without delay.

Charlotte Fishman is a San Francisco employment attorney and a regular columnist on women's issues. She participated in an amici curiae brief filed in support of petitioner Lily Ledbetter in the United States Supreme Court.