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What the Lilly Ledbetter Fair Pay Act Doesn't Do: "Discrete Acts" and the Future of Pattern or Practice Litigation

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Title VII of the Civil Rights Act requires a plaintiff to file a charge of discrimination against an employer within 180 days (or in some states, 300 days) "after the alleged unlawful employment practice occurred."¹ The application of this seemingly simple requirement has been the subject of much controversy, litigation, judicial disagreement, and even multiple legislative amendments. Most recently, the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act") was signed into law on January 29, 2009, to address one particular application of the charge filing requirement.²

The Ledbetter Act provides that, for purposes of determining when the charge filing period begins to run, an "unlawful employment practice occurs, with respect to discrimination in compensation . . . each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision," regardless of when the employee's compensation was originally set at a discriminatory rate.³ The Ledbetter Act directly repudiates the U.S. Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the majority of a sharply divided Court held that the time period for filing a charge of discrimination based on an allegedly discriminatory compensation policy begins to run on the date when the "allegedly discriminatory pay decision was made and communicated to [Plaintiff]" – not every time that the employee receives a paycheck or otherwise feels the effects of that decision.⁴

The Ledbetter Act overrides what Justice Ginsburg referred to in her dissent as the majority's "cramped" reading of the charge filing requirement in pay discrimination suits.⁵ But it is important to consider what the Ledbetter Act *does not* do for potential plaintiffs in employment

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¹ 42 U.S.C.A. § 2000e-5(e)(1) (2009).

² 111 Bill Tracking S. 181 (2009).

³ 42 U.S.C.A. § 2000e-5(e)(3)(A) (2009).

⁴ 550 U.S. 618, 628 (2007).

⁵ *Id.* at 661 (Ginsburg, J., dissenting).

discrimination cases. The Ledbetter Act addresses only the narrow question of when *compensation* discrimination occurs for purposes of the charge filing period. It does not speak to the timeliness of any other charges of discrimination – such as termination, failure to hire, failure to transfer, or failure to promote. Nor does the Ledbetter Act address the key underlying Supreme Court opinion upon which much of the majority’s reasoning in *Ledbetter* was founded: *National Railroad Passenger Corp. v. Morgan*.⁶ The *Morgan* opinion reaches beyond compensation discrimination to affect other types of employment discrimination, and the Ledbetter Act does nothing to reign in those effects.

In *Morgan*, the Court addressed the rules regarding Title VII’s charge filing requirement for all types of discrimination and rebuffed the “continuing violation” doctrine that lower courts had developed.⁷ The full implications of *Morgan* on Title VII’s charge filing requirement are not yet settled. The Court in *Morgan* expressly left some issues open, and provided only ambiguous guidance on other points. The *Ledbetter* ruling and the subsequent Ledbetter Act are just one example of how differing interpretations of *Morgan* could lead to vastly different results in the application of the charge filing requirement.

This Essay examines one important question that *Morgan* expressly left open and that the Ledbetter Act does not address: When, if ever, does the charge filing period begin to run in cases where the plaintiff alleges that defendant engaged in a “pattern or practice” of unlawful “discrete acts” of discrimination?

Part I of this Essay reviews the *Morgan* Court’s characterization and treatment of “discrete acts” of discrimination and the Court’s express acknowledgement that it was not deciding the question posed in this Essay. Part II, briefly reviews the current state of pattern or practice jurisprudence. Part III, examines the competing interests of employers and potential plaintiffs that are at stake in determining the answer to the question posed in this Essay. Finally, Part IV explores some of the possible legislative alternatives for settling the issue of timeliness in pattern or practice cases. I conclude that the determination of how the charge filing requirement is applied to pattern or practice cases will become increasingly important in the developing wake of *Morgan*, and that an optimal legislative solution must involve compromising, to some degree, the interests of both employers and potential plaintiffs.

I. *Morgan*: “Discrete Acts” of Discrimination

In *Morgan*, the Court drew a bright-line distinction between hostile work environment claims and all other types of employment discrimination, which the Court referred to as “discrete acts” of discrimination, for purposes of determining the charge filing period.⁸ The Court explained as follows: “[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable ‘unlawful employment practice.’”⁹ The Court continued: “[h]ostile environment claims are different in kind from discrete acts. [T]heir very nature involves repeated conduct The ‘unlawful employment practice’ therefore cannot be said to occur on any particular day.”¹⁰

⁶ 536 U.S. 101, 113 (2002).

⁷ *Id.* at 108.

⁸ *Id.* at 114.

⁹ *Id.*

¹⁰ *Id.* at 115 (quoting 42 U.S.C. § 2000e-5(e)(1)) (citations omitted).

For discrete acts of discrimination, the charge filing period begins on the day that the act “happened.”¹¹ For example, the filing period for a charge of discriminatory termination would begin to run from the date on which the employee was terminated.¹² In cases of failure to hire, the filing period would begin on the date on which the prospective employee was informed that he would not be hired.¹³ For hostile work environment claims, however, the Court ruled that an employer could be held liable for all acts comprising that environment – even if some of them fell outside the 180 day (or 300 day) period preceding the filing of the charge – so long as the charge of discrimination is filed “within 180 days or 300 days of any act that is part of the hostile work environment.”¹⁴

In setting out these standards, the *Morgan* Court disapproved of the lower courts’ various and somewhat divergent applications of the continuing violation doctrine.¹⁵ The Court made it clear that any discrete acts that had been time barred could not be saved by connecting them with other acts falling within the filing period:

[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred.¹⁶

Thus, the continuing violation doctrine can no longer be utilized to connect related discrete acts of discrimination to bring past violations within the filing period – at least as to *individual* claims of discrimination. But the *Morgan* Court expressly left open the question of whether related discrete acts can be connected for purposes of timeliness in pattern or practice cases. In a footnote, the Court acknowledged the open question: “We have no occasion here to consider the timely filing question with respect to ‘pattern-or-practice’ claims brought by private litigants as none are at issue here.”¹⁷

Buried beneath the surface of this one sentence footnote are a number of unresolved issues that, once settled, will have a dramatic impact on employment discrimination litigants. I turn now to examine those issues.

II. Pattern or Practice Jurisprudence

A pattern or practice case involves allegations that an employer *systematically* discriminates against individuals on the basis of their sex, race, religion, national origin, or other protected grounds. The leading pattern or practice case is the Supreme Court’s decision in *International Brotherhood of Teamsters v. United States*.¹⁸

¹¹ *Id.* at 110.

¹² *See id.*

¹³ *See id.*

¹⁴ *Id.* at 118.

¹⁵ *Id.* at 108 (“While the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute.”).

¹⁶ *Id.* at 113.

¹⁷ *Id.* at 115 n.9.

¹⁸ 431 U.S. 324 (1977).

In *Teamsters*, the Supreme Court set out a two-phase burden-shifting framework for pattern or practice cases.¹⁹ In the first phase, the class of plaintiffs has the burden to prove the existence of a pattern or practice of discrimination by the employer.²⁰ If the plaintiffs succeed in establishing the existence of a pattern or practice of discrimination in the first phase, then it creates a rebuttable presumption that all employment decisions were made in furtherance of that discriminatory pattern or practice.²¹ In the second phase, the employer has the burden to rebut this presumption as to each individual person claiming to be a victim of that pattern or practice by proving that it did not discriminate as to that particular plaintiff.²²

In the first phase, plaintiffs frequently rely upon statistical evidence, buttressed with individual testimony, to establish the existence of systemic discrimination by the employer. Macroscopic statistics can be used to directly compare the employer's record of hiring, firing, or promoting individuals within the protected class to the employer's record of hiring, firing, or promoting individuals outside of the protected class.²³ The *Teamsters* Court noted that statistical analyses "serve an important role" in cases where there is a dispute about the existence of discrimination, and that statistical evidence of an imbalance "is often a telltale sign of purposeful discrimination."²⁴

Pattern or practice cases may be brought by the U.S. Equal Employment Opportunity Commission ("EEOC") pursuant to specific statutory authorization in Section 707 of Title VII.²⁵ In those cases, it is not clear whether the charge filing requirement set forth at the outset of this Essay,²⁶ which is located in Section 706 of Title VII, is applicable to the EEOC's pattern or practice claims at all.²⁷ Lower courts have divided on the question.²⁸

¹⁹ See *id.* at 360-62.

²⁰ The *Teamsters* Court described the standard for determining the existence of a pattern or practice at Phase I as follows: "[Plaintiff's] initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Id.* at 360. In other words, the plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336. It must show that "discrimination was the company's standard operating procedure." *Id.*

²¹ *Id.* at 362.

²² *Id.*

²³ *Id.* at 339-40 (approving the Government's use of statistics in order to meet its initial burden of establishing that the defendants had engaged in a pattern or practice of discrimination).

²⁴ *Id.* at 340 n.20.

²⁵ 42 U.S.C. § 2000e-6(a) (2006). This authorization was initially given to the U.S. Attorney General, but was subsequently transferred to the EEOC in 1972. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107 (codified as amended at 42 U.S.C. §§ 2000e-6(c)-(e) (2006)).

²⁶ See 42 U.S.C.A. § 2000e-5(e)(1) (2009).

²⁷ While the charge filing requirement is found in Section 706, the final subsection of Section 707 provides: "[T]he Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in [Section 706] of this title." 42 U.S.C. § 2000e-6(e). The ambiguity of this subsection has greatly contributed to the confusion about questions of timeliness in pattern or practice cases.

²⁸ Compare *EEOC v. Optical Cable*, 169 F. Supp. 2d 539, 546 (W.D. Va. 2001) (finding that Section 707(e) clearly incorporates the timely filed charge requirement found in Section 706(e)(1)) with *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007) (disagreeing with *Optical Cable*).

In addition to EEOC actions under Section 707, the Supreme Court has also implicitly approved the use of the pattern or practice framework in private class actions brought pursuant to Section 706.²⁹ Thus, where a class of private plaintiffs obtains class certification under Rule 23 of the Federal Rules of Civil Procedure, courts have permitted the plaintiffs to use the *Teamsters* burden-shifting framework.³⁰ However, in private non-class suits, the question of whether individual plaintiffs may use the *Teamsters* pattern or practice burden-shifting framework is another issue that has divided the courts.³¹ The majority of federal circuit courts of appeals have held that the *Teamsters* pattern or practice framework may not be used in individual, non-class claims, while a minority of circuits have suggested that the *Teamsters* method of proof may be applied to individual claims.³²

In private cases (whether individual or class actions), the requirement of a timely filed charge must somehow apply to pattern or practice cases. Section 706(e) makes no exception for cases utilizing the pattern or practice method of proof.³³ But it is not clear just how the timely filed charge requirement should be applied in a pattern or practice case, and the *Morgan* Court carefully avoided that question.³⁴

Thus, the questions left open after *Morgan* include at least the following: (1) Does the timely filed charge requirement of Section 706(e)(1) apply to EEOC pattern or practice actions brought under Section 707? (2) Can a private individual pursue a pattern or practice theory outside of the class action context, or is that method of proof limited to EEOC actions and private class actions? And finally, the question posed in this Essay, (3) when, if ever, does the charge filing period begin to run in cases where the plaintiff(s) allege that defendant engaged in a “pattern or practice” of unlawful “discrete acts” of discrimination?

The Ledbetter Act may have changed the analysis for compensation discrimination, but it did nothing to answer these questions as they relate to other types of discrete act discrimination. This Essay focuses only on the third question, which must be answered regardless of how the first two questions come out. However, the first two open questions highlight the potential importance of the third question. If the timeliness requirement applies to EEOC Section 707 enforcement actions, and particularly if private individuals can pursue pattern or practice methods of proof in non-class cases, then the resolution of the third question will take on even greater importance.

²⁹ In setting out the pattern or practice framework, the *Teamsters* Court drew heavily from the Supreme Court’s earlier opinion in *Franks v. Bowman Transp. Co.*, in which a private class of plaintiffs alleged that defendant “had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees.” *Teamsters*, 431 U.S. at 358-59 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 751 (1976)). See also Melissa Hart, *Will Employment Class Actions Survive?*, 37 AKRON L. REV. 813, 816-17 n.13 (2004).

³⁰ See, e.g., *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1237 (11th Cir. 2000) (“It is clear that *Teamsters* applies in private class actions alleging systemic disparate treatment in employment.”); *Thompson v. Sawyer*, 678 F.2d 257, 284 (D.C. Cir. 1982) (applying *Teamsters* framework in a private class action).

³¹ See David J. Bross, *The Use of Pattern-And-Practice By Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 796 (2004) (describing the split in the federal circuits).

³² *Id.* at 796-97 (noting that five federal circuits have limited the *Teamsters* method of proof to class actions, while two federal circuits have “indicate[d] a willingness” to apply *Teamsters* in individual, non-class suits).

³³ 42 U.S.C. § 2000e-5(e) (2006).

³⁴ *Nat’l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 115 n.9 (2002).

III. Competing Interests

1. Employers: Evidence Preservation and Repose

Employers may seek to extend the reasoning in *Morgan* to pattern or practice cases. Some employers will argue that the clock for filing a charge as to any particular discrete act of discrimination that is part of a larger discriminatory pattern or practice begins to run on the day that the particular discrete act in question occurred.³⁵ This would protect employers' legitimate interests in obtaining repose from suits involving alleged conduct taking place years, or even decades, before the filing of a charge of discrimination. The Supreme Court has repeatedly recognized repose as a legitimate concern.³⁶ The Court appears unwilling to force employers to defend against allegations of discriminatory conduct with effectively no time limit at all, recognizing that employers should be able to gather and preserve the evidence necessary to defend against discrimination claims.³⁷ Indeed, as the Court has noted, the prompt resolution of employment discrimination claims was the legislative purpose for the short filing deadline.³⁸

Employers' legitimate interest in repose was nicely illustrated in the *Ledbetter* case, where the supervisor, whose allegedly discriminatory conduct led to a poor performance evaluation in 1997, died before *Ledbetter's* case got to trial.³⁹ If a discrete act of discrimination taking place years ago, which would be time-barred as an individual claim, is nevertheless timely when alleged to be part of a larger pattern or practice of discrimination, then employers will face difficulty in gathering, preserving, and presenting the evidence necessary to defend against such claims.

2. Potential Plaintiffs: Discovering the Discriminatory Nature of the Discrete Act

Plaintiffs may counter that this reading of *Morgan* would eviscerate *Teamsters* and the pattern or practice method of proof altogether and therefore must be rejected. If a pattern or practice showing at the first phase of a *Teamsters* analysis requires macroscopic statistical evidence to show a discriminatory pattern in the employer's hiring, promotion, or discharge record over time, then how can the individual victims (especially those first affected by the pattern) possibly have the evidence to assert their claims within the short filing period? The earliest victims of the pattern or practice may not have had any reason to believe that the decision affecting them was discriminatory unless and until statistical evidence developed over time reveals the "telltale sign" of discrimination.⁴⁰ Plaintiffs in pattern or practice cases will argue that they should at least be given the opportunity to learn of the discriminatory nature of their treatment before the clock starts ticking on their claims.

³⁵ See Vincent Cheng, *National Railroad Passenger Corporation v. Morgan: A Problematic Formulation of the Continuing Violation Theory*, 91 CAL. L. REV. 1417, 1451 (2003); Amanda J. Zaremba, *National Railroad Passenger Corp. v. Morgan: The Filing Quandary for Legally Ill-Equipped Employees and Eternally Liable Employers*, 72 U. CIN. L. REV. 1129, 1152-53 (2004).

³⁶ See *Morgan*, 536 U.S. at 109; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007).

³⁷ *Ledbetter*, 550 U.S. at 630.

³⁸ *Morgan*, 536 U.S. at 109 (noting that by "choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.") (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)); *Ledbetter*, 550 U.S. at 630 (stating the same notion and quoting the same language as in *Morgan*).

³⁹ *Ledbetter*, 550 U.S. at 621-22.

⁴⁰ See *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 340 n.20 (1977).

This is essentially the same policy argument that won the day, as to compensation discrimination, with the passage of the Ledbetter Act. Proponents of the Ledbetter Act argued that victims of pay discrimination must be given an opportunity to learn of the discriminatory nature of their pay by allowing them time to gather comparative information about the pay of their peers outside of the protected class.⁴¹ Likewise, potential plaintiffs could argue that in order to present their pattern or practice claims, victims of other types of discrete act discrimination should be given the opportunity to obtain comparative information about the employer's decisions in hiring, firing, promoting, and transferring employees.

IV. Some Potential Legislative Solutions

Whether the Supreme Court will have the opportunity to directly address the specific question posed in this Essay remains to be seen. Like the Ledbetter Act, legislation may be a better course to resolve this issue. A legislative solution should try to strike an appropriate balance between the legitimate interests of employers in obtaining reasonable repose from stale claims and the competing interests of plaintiffs in having a reasonable opportunity to learn of the discriminatory nature of the employment decision that affected them. Although a complete analysis of each potential legislative response to the issue is beyond the scope of this Essay, I offer below some legislative alternatives for further debate and consideration by practitioners, lawmakers, and commentators.

1. Treat Pattern or Practice Claims Like Hostile Work Environment Claims

The most pro-plaintiff option is to enact legislation clarifying that pattern or practice cases are to be treated like hostile work environment claims under *Morgan* for purposes of timeliness. This legislation would provide that for claims alleging the employer engaged in a discriminatory pattern or practice of discrimination, the unlawful employment practice is, by nature, the entire pattern or practice and not a collection of discrete acts. As long as one act falls within the filing period, all other acts comprising the same unlawful pattern or practice will be timely. This option, however, does little to protect employers' interests in repose because the unlawful pattern or practice might be alleged to reach back decades.⁴² Employers could be permitted to rely on a laches defense in extreme cases,⁴³ but that would likely provide insufficient relief to employers.

⁴¹ See e.g., 155 CONG. REC. S698 (daily ed. Jan. 21, 2009) (statement of Sen. Durbin) (stating that "common sense and life experience would tell you that most people at work don't know what their fellow employee is being paid. Lilly Ledbetter didn't know. She didn't know for 19 years that the men working right next to her were being paid more than she.").

⁴² Indeed, the lack of repose would be a bigger problem in pattern or practice cases than in individual compensation discrimination cases under the Ledbetter Act, or individual hostile work environment cases under *Morgan*. In compensation cases, the liability period begins to run, at the latest, when the individual receives his or her final paycheck. In hostile work environment cases, the liability would begin to run, at the latest, on the employee's last day working in the unlawful environment. Thus, the decisions in question will at least be tied to the individual's employment period. In the pattern or practice context, however, discrete act decisions relating to long-departed employees could subject the employer to liability, virtually eliminating any repose for employers.

⁴³ See, e.g., *Morgan*, 536 U.S. at 121-22 (discussing the availability of the laches defense for employers as to hostile work environment claims).

2. Legislate an Effective Discovery Rule for Pattern or Practice Cases

A second option is to legislate a broad discovery rule for pattern or practice cases. The judicially created discovery rule, as applied to employment discrimination cases, has no significant effect. Courts applying the judicial discovery rule have held that the filing period begins to run when the plaintiff discovers the employment decision itself (i.e., when the plaintiff learns that he was terminated or that he was not hired).⁴⁴ As applied by the courts, the discovery rule does not delay the start of the filing period until the discriminatory nature of that decision is discovered.⁴⁵

The legislature could create a more effective statutory discovery rule providing that in pattern or practice cases the filing period does not begin to run until the plaintiff discovers, or reasonably should have discovered, the discriminatory nature of the adverse employment decision.⁴⁶ This would allow courts to consider, on a case-by-case basis, whether and when each individual plaintiff in a pattern or practice case had enough information to start the clock for filing a charge of discrimination. The potential drawback of this option, however, would be the uncertainty it creates. Potential plaintiffs will not be able to definitively discern a deadline for filing their charges of discrimination. And employers may lose the benefit of any meaningful repose if they are required to litigate the timeliness of charges on a case-by-case basis.

3. Enact a Statute of Repose for Pattern or Practice Claims

Congress could choose to enact a simple statute of repose for pattern or practice claims, perhaps in combination with either of the above suggestions. This legislation would provide an absolute cut-off for claims that are based on adverse employment decisions that occurred more than a selected number of years ago. While the length of the statute of repose would be somewhat arbitrary, that is the inherent nature of statutes of repose. This option might cut-off claims that would otherwise be meritorious and timely, but it would have the benefit of offering employers some certainty that they will not be called upon to defend employment decisions that took place many years or decades ago.

4. Prohibit Monetary Recovery for Time-Barred Discrete Acts

The most pro-employer option is to enact legislation providing that in pattern or practice cases, monetary damages can be sought only for those discrete acts falling within the filing period. This option would clarify that the *Morgan* reasoning applies to pattern or practice cases, and that discrete acts falling outside the filing period cannot subject employers to liability.

Under this option, evidence of time-barred discrete acts could still be offered as evidence for purposes of determining whether an employer maintained an unlawful pattern or practice in Phase I of the *Teamsters* framework, but recovery of damages for the time-barred discrete acts would not be

⁴⁴ See, e.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). See also Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 877-78 (2008) (discussing the narrow application of the discovery rule in employment discrimination cases).

⁴⁵ See Brake & Grossman, *supra* note 44, at 877-78.

⁴⁶ Senate Republicans had previously offered an alternative to the Ledbetter Act along these lines. See Title VII Fairness Act, S. 3209, 110th Cong. (2nd Sess. 2008).

allowed in Phase II.⁴⁷ This option would cut-off the possibility of compensatory damages for early victims of a pattern or practice, but it would protect employers from monetary liability for employment decisions that took place years ago.

Conclusion

The Ledbetter Act addresses only compensation discrimination, leaving several unresolved issues under the Supreme Court's ruling in *Morgan*. In particular, determining how the timely filed charge requirement should be applied to pattern or practice cases will be critical. As demonstrated in this Essay, a legislative solution will need to strike an appropriate balance between the competing interests of employers and potential plaintiffs.

⁴⁷ This approach would be generally consistent with the Court's statement in *Morgan* that the statute does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *See Morgan*, 536 U.S. at 113.