IN THE WAKE OF *LEDBETTER V. GOODYEAR TIRE & RUBBER COMPANY*: APPLYING THE DISCOVERY RULE TO DETERMINE THE START OF THE LIMITATIONS PERIOD FOR PAY DISCRIMINATION CLAIMS

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I. INTRODUCTION

Congratulations. You have been offered a renewal of your employment contract and, with it, a salary increase. You wonder if anyone else has received a raise, but you are afraid to ask. While at lunch with your co-workers, you feel compelled to inquire whether anyone else received a raise, even though you know it is not polite.[1] If you do not ask, you may run the risk of losing the right to bring a pay discrimination claim challenging your employer's decision to give you a lower raise than it gave your male co-workers doing substantially similar work. This is at least how it seems after the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co*.[2]

In *Ledbetter*, the Court held that a female employee's complaint of pay discrimination was time-barred when she did not file her claim within a 180 day period, because she discovered that her paychecks were lower than those of her male co-workers in substantially similar jobs much later.[3] In so holding, the Court appeared to place an employee in the untenable position of having to see what is "often hidden from sight"[4] to bring a timely claim under Title VII of the Civil Rights Act of 1964.[5] Indeed, when Title VII's short limitations period[6] collides with the prevailing "social norms" and employers' rules that prohibit or discourage employees from discussing or comparing their salaries,[7] employees may lose the opportunity to vindicate their rights under Title VII.[8] Immediately

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1. Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 *2004).

2. *See* 127 S. Ct. 2162 (2007).

3. *Id.* at 2181 (Ginsburg, J., dissenting).

4. *Id.*

5. *See generally* 42 U.S.C. § 2000e-1 to e-17 (2008).

6. Under Title VII, a charge must be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged unfair employment practice unless the complainant has first instituted proceedings with a state or local agency, in which case the period is extended to a maximum of 300 days. 42 U.S.C. § 2000e-5(e).

7. Bierman & Gely, *supra* note 1, at 168.

8. *See* 42 U.S.C. § 2000e-5.

after the decision was rendered, commentators warned of its implications and Congress moved to limit its reach.[9]

The initial reaction to the decision, however, may have been unwarranted. This article examines whether *Ledbetter*, in fact, requires an employee to violate the "social norm" by asking co-workers how much they make to preserve his or her right to challenge pay disparity.[10] When read closely, the decision should not lead to a major shift, if any shift at all, in the law as it existed before, and in this regard the lower court rulings are consistent.[11] It may be read, instead, as a case lacking either in proof of discrimination or a plaintiff's failure to litigate the case to prove discrimination.[12] While over 1300 courts have cited the *Ledbetter* decision in some capacity since its publication, its impact appears to be limited

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9. The decision was rendered on May 29, 2007, and editorials were published two days later. *See*, *e.g.*, Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18; Editorial, *Sterile Thinking on Pay Equity*, CHI. TRIB., June 4, 2007, at C18; Editorial, *Life vs. The Law: by Reading Statutes Too Rigidly in Rendering Opinions, The Supreme Court Can Be in Denial of Reality*, L.A. TIMES, May 31, 2007, at A26. On July 31, 2007, the House of Representatives passed a bill known as the Lilly Ledbetter Fair Pay Act, which, if it becomes law, would amend Title VII and provide that "an unlawful employment practice occurs, with respect to discrimination in compensation . . . when an individual is affected by application of a discriminatory compensation decision or other practice . . . ." H.R. 2831, 110th Cong. § 3 (as passed by House, July 31, 2007). This language responds to Congress' concern that the Ledbetter decision "undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress." *Id*. § 2. The Senate introduced a similar bill, the Fair Pay Act of 2008, which is currently pending. S. 2945, 110th Cong. (2008). *See also* Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 353 n. 4, 354 (2008) (citing editorials and other commentaries warning of the decision's import and suggesting that "Ledbetter is part of a much deeper and more potentially devastating conceptual shift that is taking hold in employment discrimination law"). More recent decisions, however, portend a more favorable environment for the protection of employees' rights. *See*, *e.g.*, CBOCS W. Inc. v. Humphries, 128 S. Ct.1951 (2008) (interpreting a Reconstruction-era statute known as Section 1981, which bars racial discrimination in employment, to include protection against retaliation); Gómez-Pérez v. Potter, 128 S. Ct. 1931 (2008) (holding by a vote of six to three that the section of the Age Discrimination in Employment Act that applies to federal government employees gives them protection against retaliation for complaining about age discrimination); Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008) (ruling that if an employer claims that a "reasonable factor other than age" accounts for the disproportionately negative impact that a layoff or other action has on older workers, it is up to the employer to prove it, rather than up to the employees to disprove the validity of the defense); Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008) (holding that failure to file the proper form to make a complaint with the EEOC does not deprive an employee of the ability to go into court later and file a lawsuit); Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2008) (rejecting the employer's argument that testimony of non-parties regarding the discrimination was never relevant and should always be excluded).

10. Bierman &Gely, *supra* note 1, at 170.

11. *See*, *e.g.*, Fed. Ins. Co. v. Albertson's Inc., No. C 06-04000 MHP, 2007 WL 2701915 (N.D. Cal. Sept. 13, 2007) (distinguishing *Ledbetter* and suggesting that decision will not be followed by other California courts).

12. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007). Ledbetter did not contest the lower court's ruling that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within the statutorily prescribed time period. The *Ledbetter* Court observed that the plaintiff made "no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions occurring before that period were not communicated to her." *Id.* at 2169.

by its very specific facts. This article examines the state of the law before and after *Ledbetter* and concludes that the limitations period for any discrimination claim should start only after the victim is or should be aware of the existence and source of an injury; a determination which must be made on a case-by-case basis.[13] Section II examines the requirements for filing a timely claim of pay discrimination and reviews *Ledbetter's* analysis of what kind of an act or occurrence starts the running of the limitations period. Section III examines the difficulty in identifying the discrete act that triggers the limitations period for a pay discrimination claim under Title VII and the limited reach of the Supreme Court's decision in *Ledbetter*. Section IV reviews the lower courts' application of *Ledbetter* and, based on that review and the realities of the workplace, Section V proposes a case-by-case application of the discovery rule for identifying when the limitations period is triggered in a pay discrimination claim. In Section VII, this article concludes that the limitations period for a pay discrimination claim should be triggered when an employee discovers or should discover a disparity in pay that violates Title VII, whether the act that leads to that discovery is a decision to award raises or set salaries or when employees are talking at lunch and someone mentions the size of his or another co-worker's paycheck.

II. THE REQUIREMENTS FOR FILING A TIMELY CLAIM OF PAY DISCRIMINATION

A. The Statutory Regime

Congress enacted a series of statutes "to address the pervasive problems of employment discrimination."[14] These laws include Title VII of the Civil Rights Act of 1964,[15] Section 1981 of the Civil War Reconstruction statutes,[16] the Age Discrimination in Employment Act of 1967 (ADEA),[17] the Equal Pay Act (EPA),[18] and the Americans with Disabilities Act of 1990 (ADA).[19] While the statutes define different types of discrimination, each addresses discrimination in employment and defines a limitations period in which an employee can bring a

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13. *See* Oshiver v. Levin, Fishbein, Sedren & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) (noting the application of the discovery rule to a Title VII claim and defining accrual of such a claim "as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury").

14. MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 1 (7th ed. 2008)

15. 42 U.S.C. § 2000e-2 (2000) (prohibiting discrimination in employment based upon race, color, religion, sex, or national origin).

16. 42 U.S.C. § 1981 (2000) (ensuring that all persons have the same right to make and enforce contracts, including the making, performance, modification, and termination of employment contracts).

17. 29 U.S.C.§ 621 (2000) (prohibiting discrimination in employment based upon age). *Accord* 29 U.S.C. § 623(a)(1) (2000).

18. 29 U.S.C. § 206(d)(1) (2000) (prohibiting gender-based discrimination in compensation). The EPA does not protect other classifications, like race or national origin, like Title VII does. *See* § 2000e-2 (prohibiting discrimination in employment based upon race, color, religion, sex, or national origin).

19. 42 U.S.C. § 12101 (2000).

claim.[20] With Title VII defining the "paradigm," the first step in determining whether a claim is timely under any statute is determining when the discriminatory act takes place.[21] To do that, one must "identify with care the specific employment practice that is at issue."[22] Once identified, the determination of when the employment practice "occurs" will define the time for filing a charge of employment discrimination.[23] Eluding precise definition, the Supreme Court has explained that an act occurs "on the day that it 'happened.'"[24] Similarly imprecise is a lower court's suggestion that a discrete act of discrimination occurs when it "takes place."[25] This imprecision may allow for the necessary flexibility when faced with the various ways and the differing contexts in which employment discrimination arises. Indeed, the Supreme Court affirmed this when addressing the question of when a discriminatory act "occurs:" "The answer varies with the practice."[26] Therefore, a factual analysis of any case will be critically important in determining when a limitations period begins.[27]

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20. Under Title VII, a charge must be filed with the EEOC within 180 days of the alleged unfair employment practice unless the complainant has first instituted proceedings with a state or local agency, in which case the period is extended to a maximum of 300 days. 42 U.S.C. § 2000e-5(e) (2000). The EEOC may then investigate the claim and either pursue the claim or issue a right to sue letter, which entitles a complainant to file suit in federal district court. *Id. See also* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2166–67 (2007). The ADEA and the ADA, like Title VII, require a plaintiff to file a charge with the EEOC as a prerequisite to bringing suit in federal district court. *See* 29 U.S.C. § 626(d) (2000); 42 U.S.C. § 12117(a) (2000). Title I of the ADA incorporates the other requirements of Title VII, 42 U.S.C. § 12117(a), but the ADEA permits a complainant to file suit after sixty days without first receiving a right to sue letter from the EEOC. 29 U.S.C § 626(d)(2) (2000). *See*, *e.g.*, Hodge v. N.Y. Coll. of Podiatric Med., 157 F.3d 164, 168–69 (2d Cir. 1998). The EPA does not require a plaintiff first to file an administrative complaint and has a two-year statute of limitations for violations that are not "willful" and a three-year period for violations that are "willful." 29 U.S.C. § 216 (2000) (applying the statute of limitations defined in 29 U.S.C. § 255(a) (2000)).

21. MICHAEL J.ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 595 (7th ed. 2008).

22. *Ledbetter*, 127 S. Ct. at 2167 (citing Nat'l R.R Passenger Corp. v. Morgan, 536 U.S. 101, 110–11 (2002)). *See also* Lorance v. AT&T Tech., Inc., 490 U.S. 900, 904 (1989) ("Assessing timeliness therefore 'requires us to identify precisely the "unlawful employment practice" of which [petitioners] complai[n].'") (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980)).

23. *Ledbetter*, 127 S. Ct. at 2165. To challenge an employment practice, Title VII requires an employee to file a charge within either 180 or 300 days "after the alleged unlawful employment practice occurred . . . ." 42 U.S.C. § 2000e–5(e)(1). If an employee fails to submit a timely charge, the employee will be barred from challenging the alleged discriminatory conduct in court. *Ledbetter*, 127 S. Ct. at 2165. Other discrimination statutes have limitations periods of other lengths, but all require a complainant to file a charge within a certain time period or be barred from bringing the claim. *See*, *e.g.*, Goodman v. Lukens Steel Co., 777 F.2d 113, 117–18 (3d Cir. 1985), *aff'd*, 482 U.S. 656, (1987) ("Because there is no specified federal statute of limitations applicable to § 1981 cases, the district court was required to use the state limitations period most analogous to the civil rights cause of action."). *See also* Wilson v. Garcia, 471 U.S. 261, 268 (1985) (selecting the "most analogous state statue of limitations" to apply to a 42 U.S.C. § 1983 claim) (internal citation omitted).

24. *Morgan*, 536 U.S. at 110 (quotes in original).

25. Brantley v. Muscogee County Sch. Dist., No. 4:06-CV-89, 2008 WL 794778, at *6 (M.D. Ga. Mar. 20, 2008).

26. *Morgan*, 536 U.S. at 110, 122.

27. *Id.*

B. Identifying the "Act" or "Occurrence" that Triggers the Start of the Limitations Period

In some cases, certain discriminatory acts are "easy to identify."[28] They include acts "such as termination, failure to promote, denial of transfer or refusal to hire."[29] Other acts, in contrast, may be difficult to discern. Specifically, an "act" of pay discrimination, like the one at issue in *Ledbetter*, may be particularly hard for an employee to identify.[30] Despite the factual difference from a pay disparity case, the *Ledbetter* Court relied on cases involving obvious acts like termination or a denial of tenure without analyzing how one rule for all cases will affect victims of pay discrimination.[31]

In *United Air Lines, Inc. v. Evans*,[32] the employee, as described by the *Ledbetter* Court, "was forced to resign because the airline refused to employ married flight attendants, but she did not file an EEOC charge regarding her termination. Some years later, the airline rehired her but treated her as a new employee for seniority purposes."[33] The employee sued, recognizing that any suit based on the original discrimination was time-barred but arguing that the airline's refusal to give her credit for her prior service gave "present effect to the past illegal act and thereby perpetuate[d] the consequences of forbidden discrimination."[34] The Court noted that the airline's "seniority system [did] indeed have a continuing impact on her pay and fringe benefits,"[35] but held that the discriminatory act was the employee's forced termination, which occurred outside the limitations period.[36] Despite the difference between a forced termination and the pay disparity that grew gradually over a term of years, the *Ledbetter* Court described the *Evans* precedent as speaking "directly" to the point.[37]

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28. *Id.* at 114. S*ee*, *e.g.*, Smithers v. Wynne, No. 07-11945, 2008 WL 53245, at *2 (11th Cir. Jan. 4, 2008) (claims of being passed over for promotion are allegations of discrete acts).

29. Nat'l R.R Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002). *See also* 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . "). S*ee also Smithers*, 2008 WL 53245, at *2 (plaintiff's claims of being passed over for promotion are allegations of discrete acts); Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, No. 2-03-02591, 2007 WL 3046034 (E.D. Cal. Oct. 18, 2007) (holding that being excluded from a wrestling team is akin to a claim of termination and failure to hire or promote and thus appropriately characterized as discrete acts).

30. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct 2162, 2178–79 (2007) (Ginsburg, J., dissenting) ("Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time."). The difficulty of discerning when pay discrimination occurs is discussed more fully below. *See infra* Part III.

31. *See* Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989); Del. State Coll. v. Ricks, 449 U.S. 250 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

32. *Evans*, 431 U.S. at 553.

33. *Ledbetter*, 127 S. Ct. at 2167(citing *Evans,* 431 U.S. at 554–55).

34. *Evans*, 431 U.S. at 557.

35. *Id.* at 558.

36. *Id.*

37. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2168 (2007).

The *Ledbetter* Court also relied on *Del. State Coll. v. Ricks*,[38] with facts distinguishable from *Ledbetter*, but which the Court found "[e]qually instructive."[39] In that case, a college librarian, Ricks, alleged that he had been discharged because of his national origin.[40] At some point outside the limitations period, Ricks was denied tenure but was given a final, nonrenewable one-year contract that expired a little over a year after his tenure was denied.[41] He delayed filing a charge with the EEOC until almost a year after the denial of his tenure, but he argued that the EEOC charging period ran from the date of his actual termination rather than from the date when tenure was denied.[42] Holding that the limitations period began to run when the "tenure decision was made and communicated," the Court held that the employee's claim was out of time.[43] Unlike the plaintiffs in *Evans* and *Ricks*, the plaintiff in *Ledbetter* did not suffer constructive termination or denial of tenure—things that she would have understood to be adverse job action. She did not even suffer a reduction in pay. Indeed, in some of the years in which she received negative evaluations that, according to the appellate court and affirmed by the Supreme Court, triggered the limitations period, she still received a raise in pay.[44] Her negative performance evaluations only gradually led to the differential in pay and her loss was only obvious when she compared her pay with the salaries of men in similar jobs.[45] It took years, in fact, for the differential to become obvious.[46]

The *Ledbetter* Court also relied on *Lorance v. AT & T Technologies, Inc*.[47] There, the defendant employer changed the way in which seniority was calculated under a collective bargaining agreement.[48] Before the change, all employees at the plant in question accrued seniority based simply on years of employment at the plant.[49] Under the new agreement, as described in *Ledbetter*, "seniority for workers in the more highly paid (and traditionally male) position of 'tester' depended on time spent in that position alone and not in other positions in the plant."[50] This affected female testers several years later when, during an economic downturn, they were laid off due to low seniority as calculated under the revised agreement.[51] Their layoffs prompted their claims alleging that the changes in the collective bargaining agreement had been adopted with discriminatory intent "'to protect incumbent male testers and to

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38. Del. State Coll. v. Ricks, 449 U.S. 250 (1980).

39. *Ledbetter*, 127 S. Ct. at 2168.

40. *Ricks*, 449 U.S. at 254.

41. *Id.* at 252–53.

42. *Id.* at 254.

43. *Id.* at 258.

44. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162 (2007).

45. *Id.* at 1173–74 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162 (2007).

46. *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting). *See infra* Part III.

47. Lorance v. AT & T Tech., Inc., 490 U.S. 900 (1989).

48. *Id.* at 902.

49. *Id.* at 901–02.

50. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2168 (2007) (citing *Lorance*, 490 U.S. at 902).

51. *Lorance*, 490 U.S. at 902.

discourage women from promoting into the traditionally-male tester jobs,' and that '[t]he purpose and the effect of this manipulation of seniority rules has been to protect male testers from the effects of the female testers' greater plant seniority and to discourage women from entering the traditionally-male tester jobs.'"[52] Here again, the "one-time discrete act"[53] is easily distinguished from Ledbetter's gradual loss of pay when compared with her male counterparts.[54] In *Lorance*, it was apparent to the employees that "each petitioner had earned the right to receive a favorable position in the hierarchy of seniority among testers . . . and respondents eliminated those rights" when the defendant employer changed the seniority system in the collective bargaining agreement.[55] It was this "diminution in employment status" of which the employees were fully aware, and missing from the *Ledbetter* decision, that started the running of the limitations period.[56]

The Court also noted *Nat'l R.R. Passenger Corp. v. Morgan*.[57] There the employee was faced with a number of discrete acts, each separately discriminatory, and each "a separate actionable 'unlawful employment practice.'"[58] Some of the acts were challenged within the statutory limitations period and others were not, and the Court made clear that only the discrete acts that "occurred" within the appropriate time period could be grounds for complaint.[59] The Court distinguished the employee's claims of hostile work environment as "different in kind from discrete acts. Their very nature involves repeated conduct."[60] Accordingly, the Court concluded that the "'unlawful employment practice' . . . cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[61]

Pay discrimination claims may be more like the hostile environment claims than the claims in *Evans*, *Ricks* and *Lorance*.[62] Indeed, the facts in *Ledbetter* are more similar to those found in a case like *Morgan* and its description of a hostile environment claim, which is created "over a series of days or perhaps years."[63] Like the gradual creation of a hostile working environment, pay discrimination may take years to develop and may take longer than that before the affected

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52. *Id.* at 903 (quoting plaintiffs' complaint).

53. *Ledbetter*, 127 S. Ct. at 2183 (Ginsburg, J., dissenting).

54. *Id.* (Ginsburg, J., dissenting).

55. Lorance v. AT & T Tech., Inc., 490 U.S. 900, 905–06 (1989).

56. *Id.* at 906. The *Lorance* decision is no longer effective, repudiated by Congress' amendment to the Civil Rights Act. 42 U.S.C. § 2000e-5(e)(2) (2000). In that amendment, Congress made explicit that "an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." *Id.*

57. 536 U.S. 101 (2002).

58. *Id.* at 114 (quoting 42 U.S.C. § 2000e-2).

59. *Id.* at 115.

60. *Id.* (internal citation omitted).

61. *Id.*

62. *See* Del. State Coll. v. Ricks, 449 U.S. 250 (1980); Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

63. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002).

employees are aware of that disparity.[64] Therefore, the limitations period, and the triggering of it, should be analyzed in reference to these claims, rather than to the more discrete termination, denial of tenure or other more obvious "diminution in job status."[65] The problem grows even thornier for the employee faced with pay decisions that are not shared among employees, as is often the case.[66] The facts in *Ledbetter* illustrate the difficulty in identifying the triggering act.[67]

III. THE DIFFICULTY IN IDENTIFYING THE DISCRETE ACT OR OCCURRENCE IS ILLUSTRATED BY THE FACTS IN *LEDBETTER*

A. The *Ledbetter* Facts

In *Ledbetter*, the plaintiff sued her employer for pay discrimination.[68] The plaintiff was a supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama, from 1979 until her retirement in 1998.[69] She worked for the latter part of her career as an area manager, "a position largely occupied by men."[70] When she began as a manager, her salary was commensurate with the salaries earned by men in the same jobs, but over time, "her pay slipped in comparison to the pay of male area managers with equal or less seniority."[71] She claimed she received poor performance evaluations "because of her sex" and that "as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly."[72]

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64. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2181 (2007) (Ginsburg, J., dissenting).

65. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174, *aff'd*, 127 S. Ct. 2162, 2181 (2007).

66. *See* Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004).

67. *Ledbetter*, 127 S. Ct. at 2166. The identification of the triggering act was not before the Court in *Ledbetter.* The plaintiff did not raise the issue of when the statute of limitations actually began to run or should have begun to run, despite evidence suggesting that she did not discover—and could not have discovered—the discrimination until years after the discrimination had occurred. As noted by the dissent: "Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time." *Id.* at 2178–79 (Ginsberg, J., dissenting). The record in *Ledbetter* also reflected that the plaintiff "had only limited access to information regarding [her] colleagues' earnings," making it even more difficult to know of the discriminatory disparity in pay. *Id.* at 2182.

68. *Id.* at 2165. The plaintiff made several claims, under both the EPA and Title VII. The trial court granted summary judgment in favor of the defendant on the EPA claims but allowed the claims under Title VII to proceed to trial. *Id.* Under the EPA, the plaintiff's claim might have survived a motion for summary judgment on statute of limitations grounds because, under the EPA, "each alleged discriminatory paycheck may be considered a new, discreet discriminatory action." Delima v. Home Depot U.S.A., Inc., No. 06-328-JE, 2008 WL 1882842 at *20 (D. Or. Apr. 23, 2008) (internal citations omitted). The plaintiff did not pursue this issue on appeal, so the Supreme Court did not address it. *Ledbetter*, 127 S. Ct. at 2165.

69. *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.* at 2166 (majority opinion).

The discrepancy between Lilly Ledbetter's pay and the pay of others took years to grow.[73] This alone might have made it difficult for Ledbetter to identify a triggering point for the limitations period to begin to run.[74] However, a bigger impediment to identifying the discrimination and recognizing that the period for filing a claim had begun may have been due to the fact that she continued to receive pay increases even after receiving negative performance evaluations.[75] As explained by the Eleventh Circuit Court of Appeals, with one exception, her supervisor "consistently ranked Ledbetter at or near the bottom of her co-workers in terms of performance."[76] Despite these negative evaluations, however, her supervisor "suggested, and she received, a 5.28% increase over her existing salary, the largest percentage increase given to any Area Manager . . . ."[77] Thus, it would be difficult to recognize that these evaluations amounted to "acts" or "occurrences" triggering the limitations period.[78]

In addition to the pay increases she received, Ledbetter also got mixed messages from her supervisors about the reasons for their salary decisions. When she did not receive a raise one year, she was told that her performance was "sub-standard"[79] and there was no indication that the negative evaluation was based on her sex.[80] Moreover, her denial of a pay raise occurred in the midst of employee layoffs, which included a "long list" of people in departments all over the plant, so she was encouraged simply to retain her employment.[81] Far from a "diminution in job status" required to start the running of a limitations period, Ledbetter might well have thought that her status was secure.[82]

B. The Litigation and What the Court Did Not Decide

After several years had passed, when Ledbetter was receiving paychecks that were smaller than those of her male counterparts, she filed a claim for discriminatory pay disparity. The district court, over the objections of the defendant employer, allowed Ledbetter's Title VII claim to proceed to trial.[83] The jury returned a verdict in favor of the plaintiff, finding, that it was "more likely than not that Defendant paid Plaintiff an unequal salary because of her sex."[84] Based on its conclusion, the jury recommended damages for back pay, mental

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73. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173–74 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162 (2007).

74. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2178–79 (2007) (Ginsburg, J., dissenting).

75. *Ledbetter*, 421 F. 3d at 1173–74 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162, 2178 (2007).

76. *Id.*

77. *Id.*

78. *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting).

79. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162, 2178 (2007).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1175.

84. *Id.* at 1176 (quoting jury's special verdict form).

anguish and punitive damages.[85] In response to the defendant's argument that the claim was time-barred, the court said simply that the "jury's finding that Plaintiff was subjected to a gender disparate salary is abundantly supported by the evidence . . . ."[86]

The Court of Appeals for the Eleventh Circuit reversed the district court's decision not to grant the defendant judgment as a matter of law, finding that the evidence was insufficient to prove that discriminatory intent motivated the only two pay decisions that were made within the limitations period.[87] Importantly, the plaintiff did not seek review of this holding on appeal.[88] She relied, instead, on the receipt of disparate pay to justify her claims and to bring them within the limitations period.[89] The question before the Supreme Court was limited to: "Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period."[90]

In response, the Supreme Court held that Ledbetter's claim was untimely because the "pay-setting decision," rather than the receipt of the paychecks resulting from that decision, is the discrete act that started the running of the limitations period.[91] However, the Court did not clarify what the precise "pay-setting decision" had been, or how that decision would have been understood by the plaintiff, since these questions were not before the Court.[92] The Court, therefore, did not have to decide whether pay-setting decisions that were within the limitations period were, in fact, discriminatory or were, for that matter, even the kinds of "acts" or "occurrences" that would start the limitations period running. The plaintiff conceded that no discrimination took place during the limitations period and that ended the matter for the Court: "Because Ledbetter did not file timely EEOC charges relating to her employer's discriminatory pay decisions in the past, she cannot maintain a suit based on that past discrimination at this time."[93]

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85. *Id.* The district court denied Goodyear's motion for judgment as a matter of law but remitted the entire award to $360,000, including the statutory maximum of $300,000 in compensatory and punitive damages and $60,000 in back pay.

86. *Id.*

87. *Id.* at 1189.

88. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2166 (2007).

89. *Id.*

90. *Id.* (quoting plaintiff's Petition for Certiorari).

91. *Id.* at 2165.

92. *Id.*

93. *Id.* at 2176.

IV. *LEDBETTER'S* IMPACT ON LOWER COURT DECISIONS

A. *Ledbetter's* Application to Cases Involving Discrete Acts

Over 1300 courts have cited the *Ledbetter* holding.[94] Many relied on it to dismiss claims where the plaintiff failed to file the claim within the appropriate limitations period triggered by a "discrete act" of discrimination.[95] Although many of the cases did not concern issues of pay discrimination but more obvious "discrete acts" of discrimination, other courts did address pay discrimination claims. In these cases the courts directly applied *Ledbetter's* holding when there were "discrete acts" to trigger the limitations period. For example, the District Court in the District of Columbia recently considered whether a complaint was timely filed under the ADEA.[96] In that case, the plaintiffs' complaint arose in connection with a change from one pay system to another. Under the new system, each employee was categorized into a particular "pay band," which defined a salary range for which each employee in the category would be eligible, and the employer was able to adjust that range on an annual basis.[97] The employees who were entitled to raises received them in different packages, either over the course of the year or in a lump sum. Based on these differences, the plaintiffs alleged that the older employees were compensated less favorably, and the employer intended this result.[98] Although the employees argued that the limitations period began when they first began receiving their pay raises, the court relied on *Ledbetter* to hold that the limitations period started when the pay bands were set.[99]

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94. *See*, *e.g.*, Carter v. Wash. Metro. Area Transit Auth., 503 F.3d 143 (D.C. Cir. 2007) (holding that plaintiff's filing an EEOC questionnaire within 180 days of alleged sexual discrimination provided the defendant adequate notice of claim and was timely filed); Vollemans v. Town of Wallingford, 928 A.2d 586 (Conn. App. 2007) (concluding that the time for filing an age discrimination claim begins on the day of actual termination and not on the day defendants provided plaintiff notice of his termination).

95. *See*, *e.g.*, Smithers v. Wynne, 2008 WL 3245 (11th Cir. 2008) (holding, as a matter of law, that non-promotion claims are allegations of discrete acts and are time-barred if not brought within the statutory limitations period); Dela Cruz v. Piccari Press, 521 F. Supp. 2d 424 (Ed. Pa. 2007) (holding that a plaintiff may not assert a retaliation allegation not mentioned in the timely filed EEOC complaint because the defendants were not put on notice of the retaliation allegation).

96. Coghlan v. Peters, 555 F. Supp. 2d 187 (D.D.C. 2008). The ADEA "provides a federal government employee two alternative avenues to judicial redress." *Id.* Like under Title VII, an employee may bring his claim directly to federal court "so long as, within 180 days of the allegedly discriminatory act, he provides the [EEOC] with notice of his intent to sue at least 30 days before commencing suit." 29 U.S.C. § 633a(c)–(d) (2000). Alternatively, an employee may choose to pursue his claims administratively in the first instance and then file suit in federal court if he is dissatisfied with the results of the administrative process. 29 U.S.C. § 633a(b)–(c). As the C*oghlan* court explained, under the second alternative, employees must contact an EEOC counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." *Coghlan*, 555 F.Supp. 2d at 191 (quoting 29 C.F.R. § 1614.105(a)(1)). Accordingly, if an employee's complaint relies on "conduct that occurred more than 45 days prior to the initiation of administrative action," it will be time-barred. *Coghlan*, 555 F. Supp. 2d at 191 (quoting Velikonja v. Ashcroft, 355 F. Supp. 2d 197, 204 (D.D.C. 2005).

97. *Coghlan*, 555 F. Supp. 2d at 192–93.

98. *Id.* at 193.

99. *Id.* at 198.

Adhering to the Supreme Court's directive, the district court "drew a sharp distinction between discriminatory pay-setting decisions" that are "intentional acts that 'consummate' a discriminatory pay practice—and 'subsequent nondiscriminatory acts that [merely] entail adverse effects resulting from' those decisions."[100] In contrast to the *Ledbetter* Court, which did not consider whether the "pay-setting decisions" actually put the employee on notice that the limitations period for her claim had begun to run, the court in *Coghlan* squarely addressed the issue. Looking for the "intentional acts that 'consummate' a discriminatory pay practice,"[101] the district court concluded that they were the employer's annual decisions that set the pay ranges because, after those decisions were made, "it was a *foregone conclusion*" what the employees' salaries would be.[102] The court concluded, therefore, that any claim made after the limitations period had expired from the date of those decisions were time-barred.[103] These facts contrast sharply with the facts in *Ledbetter* where, at the time of her performance evaluations, it was not a "foregone conclusion" that her pay would be less than male employees with similar jobs. To the contrary, after at least one negative evaluation, she received a raise.[104]

B. Avoiding Ledbetter's Application in Cases Where the Triggering Act is Hard to Discern

In cases where an employer's acts and the discriminatory nature of them are harder to discern, courts have been reluctant to apply *Ledbetter*. Indeed, one California court described the holding as a "rather cramped interpretation of pay discrimination" and refused to apply it, suggesting that other California courts will not follow it either.[105] In *Fed. Ins. Co. v. Albertson's Inc.*,[106] the court decided that the *Ledbetter* decision did not apply to the facts before it. It could have limited its discussion of the case to just that, but instead, the court noted that "there is no authority as of this date that California courts will adopt this rather cramped interpretation of pay discrimination, given the sharp dissent of four members of the Court."[107] Careful to limit its observation to state courts only, the court noted that "California courts have not adopted or applied *Ledbetter* to cases

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100. *Id.* (quoting Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2169–70 (2007)).

101. *Id.*

102. *Id.* (emphasis added).

103. *Id.* at 199–200. *See also* Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (charging period runs from the date when "the *operative decision* was made—and notice given—in advance of a designated date on which" adverse consequences would occur) (emphasis added) (relying on Del. State Coll. v. Ricks, 449 U.S. 250 (1980)); Denman v. Youngstown State Univ., 545 F. Supp. 2d 671 (N.D. Ohio 2008) (employee alleging facts fundamentally distinguishable from those in *Ledbetter*, because employer's decision to deny Denman's raise and non-renew her contract are clearly discrete acts).

104. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1173 (11th Cir. 2005), *aff'd*, 127 S. Ct. 2162 (2007). *See Chardon*, 454 U.S. at 8 (charging period runs from the date when "the *operative decision* was made—and notice given—in advance of a designated date on which" adverse consequences would occur) (emphasis added).

105. Fed. Ins. Co. v. Albertson's Inc., No. 06-04000, 2007 WL 2701915, at *4 n.3 (N.D. Cal. 2007).

106. *Id.*

107. *Id.* at *4 n.3.

arising under state law. Thus, it may well be that even on facts similar to those in *Ledbetter* the California courts would rule differently."[108]

While not explicitly refusing to follow *Ledbetter*, one court of appeal in California refused to apply it and went to great lengths to distinguish the facts of the case before it from the facts in *Ledbetter*. In *Hammond v. County of L.A.*,[109] the plaintiff had been a nursing instructor with the Los Angeles County Sheriff's Department who claimed that a new supervisor discriminated against her on the basis of her race and age.[110] The employee alleged that this supervisor replaced her as an instructor in the classroom with "new people and young people."[111] She also alleged that her supervisor made derogatory racial remarks and retaliated against plaintiff for telling the supervisor's supervisor about these problems.[112] The record reflected that there was "ongoing harassment and discrimination" against the plaintiff.[113]

The defendant contended that the plaintiff's claims were barred by the statute of limitations under the state's Fair Employment and Housing Act.[114] Under that statute, a complainant has one year "from the date upon which the alleged unlawful practice or refusal to cooperate occurred."[115] To interpret the statute, the California court looked to interpretations of Title VII.[116] It considered the Supreme Court's decision in *Ledbetter* but did not apply it to the facts before it.[117] In an effort to distinguish *Ledbetter*, the *Hammond* court noted that "[u]nlike the supervisors in *Ledbetter*," the supervisor in the case before it "did not just make a single decision based on age or race outside the limitations period that continued to affect plaintiff adversely during the limitations period."[118] In contrast, said the court, the supervisor in *Hammond* "initially removed plaintiff from the classroom in early 2002, but then allowed her to teach classes on a sporadic basis . . . ."[119]

The California court could have decided that the supervisor's initial decision to take the employee out of the classroom was the same type of decision made by the *Ledbetter* supervisor to evaluate her poorly for discriminatory reasons. If the court had done so, the employee's claims would have been time-barred.[120] To avoid that result, the court instead decided that,

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108. *Id.*

109. 71 Cal. Rptr. 3d 386 (Cal. Ct. App. 2008).

110. *Id.*

111. *Id.* at 390.

112. *Id.*

113. *Id.* at 392.

114. CAL. GOV'T CODE § 12900 (West 2008).

115. CAL. GOV'T CODE § 12960(d) (West 2008).

116. Hammond v. County of L.A., 71 Cal. Rptr. 3d 386, 398 (Cal. Ct. App. 2008) ("Our courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 . . . for assistance in interpreting the FEHA and its prohibition against sexual harassment.") (citations omitted).

117. *Id.* at 399–400.

118. *Id.* at 400.

119. *Id.*

120. *Id.*

despite the supervisor's decision to demote the employee, the supervisor's continued actions supported the employee's claims.[121]

Other courts have also avoided the result in *Ledbetter*, finding a variety of ways to distinguish the facts in the cases before them.[122] In *O'Grady v. Middle Country Sch. Dist. No. 11*, the court considered an employee's claim that every time she received a payment of her health benefit costs under an employment retirement plan, her former employer discriminated against her on the basis of her age.[123] She brought suit under the ADEA, which has a limitations period similar to the one in Title VII.[124] The defendant employer argued that the plaintiff's claim was time-barred, based on the fact that the retirement plan had been adopted years before the plaintiff filed suit and the employee filed suit over eight years after she retired.[125] In response, the plaintiff argued that every time she received payment from the retirement plan, a new cause of action accrued.[126] The plaintiff in *O'Grady*, unlike the *Ledbetter* plaintiff, argued and proved that the retirement plan was itself discriminatory.[127] Distinguished in this way from *Ledbetter*, the plaintiff's claim survived the defendant's argument to bar the claim.[128] In its holding, the court relied on the Supreme Court's suggestion that "Ledbetter's paychecks may have retriggered the limitations period if her employer had issued paychecks using a discriminatory pay structure" but that issue was not before the *Ledbetter* Court.[129] By relying on the "discriminatory pay structure" that was defined by the Supreme Court in *Bazemore v. Friday*,[130] the *O'Grady* court limited *Ledbetter's* reach.[131] Other courts have done the same, convinced that "*Bazemore* is more applicable to this case than *Ledbetter*," saving the plaintiff's claim.[132] Indeed, the Supreme Court was careful to explain that its holding in *Ledbetter* "was not intended to overturn *Bazemore v. Friday*, which was distinguished on the grounds that it involved an

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121. *Id.*

122. O'Grady v. Middle Country Sch. Dist No. 11, 556 F. Supp. 2d 196, 199–200 (E.D.N.Y 2008).

123. *Id.*

124. Age Discrimination in Employment Act, 29 U.S.C. § 621 (2000). *See* Ruhling v. Tribune Co., No. CV 04-2430, 2007 U.S. Dist. LEXIS 116, at *24 (E.D.N.Y. Jan. 3, 2007) ("Under Title VII and the ADEA, a plaintiff must file an administrative charge . . . within 300 days after a claim accrues.").

125. *O'Grady*, 556 F. Supp. 2d at 199.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 199–200 (quoting Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2175 (2007)).

130. 478 U.S. 385 (*per curiam*) (holding that the receipt of paychecks based on a discriminatory pay structure does retrigger the limitations period).

131. O'Grady v. Middle Country Sch. Dist No. 11, 556 F. Supp. 2d 196, 200 (E.D.N.Y 2008).

132. Mavrinac v. Emergency Med. Assoc., No. 04-1880, 2007 WL 2908007 at *9 (W.D. Pa. Oct. 2, 2007) (concluding that "*Bazemore* is more applicable to this case than *Ledbetter*"). *Accord* Hulteen v. AT & T Corp., 498 F.3d 1001 n.5 (9th Cir. 2007) (considering the effects of an allegedly discriminatory retirement plan, holding "*Ledbetter,* as the Court's most recent pronouncement on Title VII, is relevant, but does not control this appeal."). *See also* Pat Huval Rest. & Oyster Bar, Inc. v. United States, 547 F. Supp. 2d 1352, 1361–62 (Ct. Int'l Trade 2008) (new cause of action accrued every time payments were made pursuant to "a facially discriminatory . . . statutory scheme").

employer's adoption and intentional retention of a facially discriminatory pay structure."[133]

The District Court of Connecticut found yet another way to reject an employer's argument that *Ledbetter* required dismissal of a disparate pay claim before it.[134] In *Osborn v. Home Depot U.S.A., Inc.*, as in *Ledbetter*, the plaintiff complained that she was being paid less than male employees doing similar work.[135] There was no question that the employee was aware of the employer's decision to allow the disparity because she had repeatedly complained about it.[136] Therefore, on the strength of *Ledbetter*, the court could have decided that the plaintiff should have filed her claim the first time she received disparate pay.[137] Following *Ledbetter's* directive that the limitations period begins to run at the time of the "pay-setting decision," the *Osborn* court could have decided that Osborn's claim was barred.[138] The *Osborn* court refused to apply *Ledbetter*, however, holding that the employer's continued adherence to the pay-setting decision, made outside the limitations period, was proof enough of "discriminatory conduct," thereby saving the plaintiff's claim.[139]

Like the *O'Grady* court had done, the *Osborn* court suggested that if Ledbetter had litigated her claim differently, it might have survived: There, the plaintiff "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period," but rather "argue[d] simply that [defendant's] present conduct during the charging period gave present effect to discriminatory conduct outside of that period."[140] These cases suggest that on facts similar to the *Ledbetter* facts, with proof of discriminatory actions taken either inside or outside the limitations period, a plaintiff can state a timely claim. Discrimination, however, may be difficult to prove, given "the realities of the workplace," which is why the "act" or "occurrence" that triggers the start of a limitations period must be determined according to the facts of each case.[141]

V. THE "REALITIES OF THE WORKPLACE" DEMAND THE APPLICATION OF THE DISCOVERY RULE TO DETERMINE THE STATE OF A LIMITATIONS PERIOD

"A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. . . . When an employer makes a decision of such open and definitive character, an employee can immediately seek out an

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133. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2174 (2007). *See also* Brantley v. Muscogee County Sch. Dist., No. 4:06-89, 2008 WL 794778, at *6 (M.D. Ga. Mar. 20, 2008) (holding that because the plaintiff did not rely on a "pay structure that was facially discriminatory," he could not rely on when he received the paychecks from that structure to save his claim on limitations grounds).

134. Osborn v. Home Depot U.S.A., Inc., 518 F. Supp. 2d 377 (D. Conn. 2007).

135. *Id.* at 382–83.

136. *Id.* at 389.

137. *Ledbetter*, 127 S. Ct. at 2169 ("Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her.").

138. *Id.* at 2165.

139. *Osborn*, 518 F. Supp. 2d at 389.

140. *Id.* (citing Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2169 (2007)).

141. *Ledbetter*, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).

explanation and evaluate it for pretext."[142] It is harder, though, for an employee to know of compensation disparities because they "are often hidden from sight."[143] Moreover, as made clear by the facts that the *Ledbetter* plaintiff faced, it is often the case that an employee may receive a pay raise but, unknown to her, her male counterparts receive a higher one.[144] Indeed, even if an employee suspects that she is being paid a lower salary than she deserves, or that it is lower than her male counterparts, "the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable."[145]

Employees do not ordinarily know what each other earns, because employees do not usually discuss their salaries.[146] In addition, while it is the rare case where an employer will lie to an employee about what others make, it is often the case that employers do not share salary information with its employees.[147] The plaintiff in *Ledbetter* did not raise the issue of whether or how she could have known that her employer discriminated against her when she received her performance evaluations and the Court did note: "We have previously declined to address whether Title VII suits are amenable to a discovery rule."[148] However, two circuit courts of appeals have adopted that rule in age discrimination claims, and at least one district court has applied it to a Title VII claim.[149]

Both the Third and the Seventh Circuits have noted that the Supreme Court in *Del. State Coll. v. Ricks*[150] implicitly acknowledged the application of the discovery rule to discrimination claims by noting that the statute of limitations began to run "at the time the [alleged discriminatory] tenure decision was made *and communicated to* Ricks."[151] Thus, the facts of each case should determine each outcome. As stated by the two circuit courts of appeal: "There will, of course, be times when the aggrieved person learns of the alleged unlawful employment

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142. *Id.*

143. *Id.*

144. *Id.* at 2182.

145. *Id.*

146. *Id.* at 2181. *See also* Bierman & Gely, *supra* note 1, at 168.

147. *See* Mavrinac v. Emergency Med. Assoc. of Pittsburgh, No. 04-1880, 2007 WL 2908007 (W.D. Pa. Oct. 2, 2007) (plaintiff argued that she was entitled to equitable tolling because defendants misrepresented her eligibility to receive a salary increase for additional emergency medicine certification and failed to disclose that the policy was not uniformly applied); Dodd v. Dyke Indus., Inc., 518 F. Supp. 2d 970 (W.D. Ky. 2007) (plaintiff's cause of action accrued when he discovered the fraud in the performance of a compensation agreement). *Compare* Goodwin v. General Motors Corp., 275 F.3d 1005, 1008–09 (10th Cir. 2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries) (cited in *Ledbetter*, 127 S. Ct. at 2181); McMillan v. Mass. Soc. for the Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) (cited in *Ledbetter*, 127 S. Ct. at 2181) (noting that plaintiff worked for employer for years before discovering pay disparity only when a newspaper published the salaries of positions like hers).

148. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2177 (2007).

149. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994); Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990); Ohemeng v. Del. State Coll., 643 F. Supp. 1575, 1580 (D. Del. 1986) (applying discovery rule in Title VII setting).

150. 449 U.S. 250 (1980).

151. *Oshiver*, 38 F.3d at 1386 n.5 (emphasis in original); *Cada*, 920 F.2d at 450.

practice, for example, at the very moment the unlawful employment practice occurs; in such cases the statutory period begins to run upon the occurrence of the alleged unlawful employment practice. However, there will also be occasions when an aggrieved person does not discover the occurrence of the alleged unlawful employment practice until some time after it occurred. The discovery rule functions in this latter scenario to postpone the beginning of the statutory limitations period from the date when the alleged unlawful employment practice occurred, to the date when the plaintiff actually discovered he or she had been injured."[152]

Rather than applying the rule announced in *Ledbetter* that a pay discrimination claim accrues "when the pay-setting decision" is made, without regard to when the employee actually knows of the disparity or the discriminatory reason behind it, the discovery rule must be part of any analysis of these claims. "Typically in a federal question case, and in the absence of any contrary directive from Congress, courts employ the federal 'discovery rule' to determine when the federal claim accrues for limitations purposes."[153] Under this rule, a claim will accrue when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.[154] The rule should be the same for discrimination claims and all other federal causes of action: "A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury.[155] This rule should be the next step after *Ledbetter* in the evolution of pay discrimination law and could be applied to any pay discrimination claim where the facts support an employee's claim that she did not and could not have discovered that her pay was below what others in similar positions were making and that the reason for this disparity was discrimination.

VI. CONCLUSION

As the Supreme Court in *Ricks* made clear, a decision that will adversely affect the employee must be "made and communicated" to the employee to trigger the limitations period.[156] This rule will allow for consistency and fairness to all employees given the realities of the workplace. Where a discriminatory pay-setting decision is made, but the employee has no way of knowing that it is discriminatory because she actually receives a raise pursuant to that decision or the employer offers other reasons for denying her one, *Ledbetter's* holding

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152. *Oshiver*, 38 F.3d at 1386; *Cada*, 920 F.2d at 450.

153. Romero v. Allstate Corp., 404 F.3d 212, 222 (3d Cir. 2005) (citations omitted).

154. *Id. See also* Podobnik v. U.S. Postal Serv., 409 F.3d 584, 590 (3d Cir. 2005) (the discovery rule delays the initial running of the statute of limitations, but only until the plaintiff has discovered: (1) that he has been injured, and (2) that this injury has been caused by another party's conduct) (citations omitted).

155. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) (citing Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1127 (3d Cir. 1988)) (stating this general proposition in the context of determining the accrual date of a RICO cause of action).

156. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

should not control and the limitations period should not start to run.[157] The limitations period should be triggered when an employee discovers or should discover the disparity in pay, whether the "act" that leads to that discovery is a decision to award raises, or set salaries, or when employees are talking at lunch and someone mentions the size of his or his co-worker's paycheck. When it becomes a "foregone conclusion" that an employee in a protected class will receive less pay than an employee outside of that class, performing similar work, and thus, the employee is aware or should be aware of that disparity and the reasons for it, then *Ledbetter* controls.[158]

157. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2182 (2007) (Ginsburg, J., dissenting) ("Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision.").

158. Coghlan v. Peters, 555 F. Supp. 2d 187, 199 (D.D.C. 2008).