
Joseph M. Aldridge
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol86/iss4/5

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Pay-Setting Decisions as Discrete Acts: The Court Sharpens its Focus on Intent in Title VII Actions in

TABLE OF CONTENTS

I. Introduction ............................................. 956
II. Background .............................................. 957
   A. Overview of Employment Discrimination Law Under Title VII ............................................. 957
      1. Disparate Impact Theory ............................... 958
      2. Disparate Treatment Theory ......................... 959
      3. Discriminatory Pattern-or-Practice Cases ...... 960
   B. Relevant Supreme Court Title VII Cases Leading Up to Ledbetter .................................. 960
      1. United Airlines Inc. v. Evans and the Requirement of Present Intent in Disparate Treatment Cases ............................................. 961
         a. The Court's Treatment of Intent in Discrimination Cases ............................................. 962
      2. Bazemore v. Friday and Discriminatory Pay Structures ............................................. 964
      3. National Railroad Passenger Corp. v. Morgan and the Constraining of the Continuing Violations Theory ............................................. 965
   C. Between Disparate Treatment and Disparate Impact ............................................. 967
III. Ledbetter v. Goodyear Tire and Rubber Co., Inc. ...... 969

© Copyright held by the NEBRASKA LAW REVIEW.
* Joseph M. Aldridge, B.A. Business Administration 2005, Bellevue University; J.D. May 2008, University of Nebraska College of Law. I would like to thank my wife, Charity, and my parents, Michael and Sherie, for all of their support and patience. I would also like to thank Josh Norton and Anneliese Wright for their advice regarding the organization of this Note.
I. INTRODUCTION

Discriminatory pay-setting decisions can present unique challenges to both employees and employers. One of the chief problems created by such decisions is delay: the cumulative and often secretive nature of discriminatory pay-setting decisions can cause large lapses of time between the decision and when employees begin to feel they are being treated unfairly. This lapse of time can also cause unfair prejudice to employers, who may no longer have sufficient access to the facts and knowledge of the circumstances necessary to mount a defense.

Facially neutral "merit-based" compensation systems can often be subjective, leaving plenty of room for employer bias and prejudice to manifest itself in the form of discriminatory pay-setting decisions. One isolated discriminatory pay-setting decision made early in an employee's career may set the basis from which all subsequent non-discriminatory compensation decisions are made. Therefore, one isolated decision can continue to adversely affect an employee's compensation for years thereafter. Particularly in the context of large institutions, the passage of time from the initial discriminatory decision can undermine the ability of present employers—who may feel no discriminatory animus towards the employee—to detect the past wrong.

In Ledbetter v. Goodyear Tire and Rubber Co., the United States Supreme Court held in a 5-4 decision that plaintiffs bringing claims under Title VII of the Civil Rights Act of 1964 may not impute intent

---

from past discriminatory pay-setting decisions in order to make the present effects of such decisions independently actionable.3 Ledbetter had alleged that a series of discriminatory pay-setting decisions spanning her 19 year career had resulted in her being paid considerably less than her male counterparts.4 The Court held that pay-setting decisions are properly characterized as “discrete acts” as defined by National Railroad Passenger Corp. v. Morgan,5 and must therefore be reported to the Equal Employment Opportunity Commission (EEOC) within the statutory filing period, which is 180 days.6

If indeed the Court in Ledbetter made a zero-sum classification of pay setting decisions as discrete acts, it misinterpreted the subtle command of Morgan, which was that a court should find that an act of discrimination is discreet when an employee is capable of identifying the conduct as discriminatory and actionable. This Note will show the reader that, depending on the circumstances in which they arise, pay-setting decisions may be properly characterized as either actionable “discrete acts” or “hostile work environment” claims under Morgan. Part II will provide the necessary background for this assertion, beginning with a brief overview of Title VII and then addressing the Court’s use of intent in Title VII and other areas. Part II will also highlight the important implications of the Court’s Title VII cases leading up to Ledbetter. Part III will lay out the procedural background of Ledbetter and then set forth the holdings of the Supreme Court, noting the arguments of both the majority and the dissent. Finally, Part IV will examine the consequences of a shift in Title VII jurisprudence that took place after Ledbetter brought her claim, but before the Supreme Court granted certiorari. Also in Part IV, the precise language of the holdings in Ledbetter will be contrasted with the Court’s precedent in order to determine if the door has indeed been closed on plaintiffs who wish to bring Title VII discrimination actions for pay-setting decisions that span careers of several years.

II. BACKGROUND

A. Overview of Employment Discrimination Law Under Title VII

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, prohibits employment discrimination on the basis of race, color, sex, religion or national origin.7 The statute prohibits

3. Ledbetter, 127 S. Ct. at 2167.
4. Id. at 2165.
   (a) It shall be an unlawful employment practice for an employer—
acts of intentional discrimination as well as facially neutral employment practices or actions that have a disparate impact.\(^8\) An employee alleging a violation of Title VII must exhaust administrative remedies before filing a suit against an employer.\(^9\) This exhaustion-of-remedies requirement reflects Title VII's function as a remedial measure that "seeks to remedy discrimination through conciliation and cooperation."\(^10\) To provide the necessary background for understanding the Court's decision in \textit{Ledbetter}, this section will address the Title VII concepts of disparate impact theory, disparate treatment theory, and discriminatory pattern-or-practice claims.

1. \textit{Disparate Impact Theory}

The disparate impact theory was first recognized by the Supreme Court in \textit{Griggs v. Duke Power Co.}\(^{11}\) Disparate impact theory addresses facially neutral employment practices that have a disproportionately adverse effect on members of protected groups,\(^{12}\) and permits a finding of discrimination regardless of intent.\(^{13}\) For a plaintiff to prove disparate impact discrimination, it is not sufficient to merely point to a statistical disparity in an employer's workforce. Instead, the plaintiff must identify the particular employment practice that is being challenged as responsible for the alleged disparity.\(^{14}\) The

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; or
2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


9. Generally, employees have 180 days after the alleged discriminatory act has occurred in which to file a charge under Title VII with the EEOC. If the employee institutes proceedings with a state or local agency, however, the time limit for filing is extended to 300 days. Once a charge is filed with a state or local agency, no charge may be filed with the EEOC until 60 days have elapsed unless the state or local agency's proceedings have been earlier terminated. After receiving a right-to-sue letter, an employee has 90 days in which to bring suit against an employer. \textit{See Center for Education & Employment Law, Federal Laws Prohibiting Employment Discrimination} at 343 (8th ed. 2004).

10. \textit{Id}.


13. \textit{See id}. at 432.

14. \textit{See Center for Education & Employment Law, supra} note 9, at 344.
employer must then show that a business necessity justifies the challenged practice in order to escape liability.\textsuperscript{15}

2. \textit{Disparate Treatment Theory}

Disparate treatment, on the other hand, refers to an employer's actions against an individual because of the individual's membership in a protected class and requires a showing of discriminatory intent.\textsuperscript{16} To prove intentional disparate treatment under Title VII, an employee or applicant must first establish the minimal requirements of a prima facie case, as set forth in the seminal disparate treatment cases \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{17} and \textit{Texas Department of Community Affairs v. Burdine}.\textsuperscript{18} To prove a prima facie case, an employee must show 1) that the plaintiff belongs to a protected class; 2) that he or she applied and was qualified for the position or benefit; 3) that despite being qualified, he or she was fired, not hired, not promoted, etc. with respect to the position; and 4) that the position thereafter remained open and was ultimately filled by, or the benefit conferred to, someone outside the protected class.\textsuperscript{19} Once the court finds that the plaintiff has established a prima facie case, the employer then must rebut the plaintiff's prima facie case by producing a legitimate, non-discriminatory explanation for the adverse employment action.\textsuperscript{20} At this point in order to prevail, the employee or applicant must show that the employer's proffered reason for the adverse action was a pretext for unlawful discrimination.\textsuperscript{21} The Supreme Court's decision in \textit{St. Mary's Honor Center v. Hicks}\textsuperscript{22} further refined the \textit{McDonnell Douglas} factors by holding that, because the burden of persuasion never shifts, the plaintiff in a Title VII action must still persuade the trier of fact that the employer acted out of an intent to discriminate, even after showing that the employer's proffered reason was pretextual.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} \textit{Id}.
\item \textsuperscript{17} 411 U.S. 792 (1973).
\item \textsuperscript{18} 450 U.S. 248 (1980). The \textit{Burdine} Court first reiterated the basic allocation of evidentiary burdens announced in \textit{McDonnell Douglas}. \textit{Id}. at 253. Then the Court proceeded to elaborate on the nature of the burden shifting requirements. \textit{Id}. at 253–54. The Court held that the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. \textit{Id}. at 256.
\item \textsuperscript{19} \textit{McDonnell Douglas}, 411 U.S. at 792.
\item \textsuperscript{20} \textit{Burdine}, 450 U.S. at 254.
\item \textsuperscript{21} \textit{Id}. at 256.
\item \textsuperscript{22} 509 U.S. 502 (1993).
\item \textsuperscript{23} \textit{Id}. at 507–09.
\end{itemize}
3. Discriminatory Pattern-or-Practice Cases

In a pattern-or-practice case, the individual plaintiff or plaintiffs usually allege individual disparate treatment claims, but then bring a class action lawsuit alleging that the employer's disparate treatment of the plaintiffs is the result of an organization-wide "pattern-or-practice" of intentionally discriminatory treatment toward members of the plaintiffs' protected class. There are fundamental differences between pattern-or-practice cases and "other kinds of systemic discrimination such as formal policies of discrimination or facially neutral policies with discriminatory adverse impact[s] on protected groups." Most notably, "[u]nlike a formal policy of discrimination or a facially neutral policy with [a discriminatory] adverse impact on a protected group, a pattern or practice of discrimination is an employer's unannounced standard operating procedure of intentional discrimination."

As will be further discussed in the analysis section of this Note, the Court has declined to rule on the applicability of certain portions of its Title VII pronouncements to pattern-or-practice cases, making this theory potentially useful for plaintiffs whose claims may be in conflict with the Court's recent Title VII rulings.

B. Relevant Supreme Court Title VII Cases Leading Up to Ledbetter

In deciding Ledbetter, the majority drew principally from three of the Court's previous Title VII cases: United Airlines, Inc. v. Evans,29

---

25. "A formal policy of discrimination is a facially discriminatory policy regarding employment decisions" that the employer has explicitly announced. Id. at 1433 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978)). In Manhart, the Court held that an employer's formal policy of requiring women to make larger contributions to the company benefit pension plan, since women as a class live longer than men, violated section 703(a)(1) of Title VII, which prohibits employers from treating an individual solely on the basis of the individual's common class characteristics such as sex and race. Manhart, 435 U.S. at 711.
26. See Cheng, supra note 24, at 1433 ("A facially neutral formal policy may be unlawful if it is determined to have a significant adverse impact on a protected group.") (citing Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971)). According to Cheng, in Griggs, an "employer was prohibited from using two [employee] screening devices when the devices were not significantly related to job performance but operated to disqualify blacks at a substantially higher rate than whites." Cheng, supra note 24, at 1433 n. 94.
28. See infra subsection IV.B.2.
Bazemore v. Friday,30 and National Railroad Passenger Corp. v. Morgan.31 It was from these cases and their progeny32 that the Court discerned the legal principle that allegedly controlled Ledbetter. Although Justice Ginsburg differed fundamentally in her interpretation of some of the cases' implications, her dissenting opinion relied heavily upon Evans, Bazemore, and Morgan as well, agreeing at least that these cases controlled the issue.33

1. United Airlines, Inc. v. Evans and the Requirement of Present Intent in Disparate Treatment Cases

In United Airlines, Inc. v. Evans,34 respondent Evans, a recently married flight attendant, had been terminated by United pursuant to a policy that did not allow female flight attendants to be married.35 Sometime after Evans' termination, United discontinued this policy.36 Approximately four years after Evans' initial termination, she was rehired as a new employee.37

Although Evans retained the same number on her personnel file that she had been given during her previous term of employment, Evans was treated as though she had no prior service for purposes of calculating her seniority.38 Evans sued United for gender discrimination, claiming that her initial termination was unlawful and that the seniority system gave "present effect to the past illegal act," thereby perpetuating the "consequences of forbidden discrimination."39

In rejecting Evans' claim, the Court held that "United was entitled to treat that past act as lawful after . . . [Evans] failed to file a charge of discrimination within the 90 days allowed by § 706(d) [of Title VII]."40 In the decision, Justice Stevens wrote that "[a] discriminatory act which is not made the basis for a timely charge is . . . merely an unfortunate event in history which has no present legal consequences."41 Because the seniority system was facially neutral, the

32. The decision also cited Lorance v. AT & T Techs., Inc., 490 U.S. 900 (1989), and Del. State Coll. v. Ricks, 449 U.S. 250 (1980), in support of the Court's interpretation of Evans. See Ledbetter, 127 S. Ct. at 2169. See also infra note 44 (summarizing Ricks and Lorance).
33. See Ledbetter, 127 S. Ct. at 2179–2188 (Ginsburg, J., dissenting).
35. Id. at 554.
36. Id. at 555.
37. Id.
38. Id.
39. Id. at 557.
40. Id. at 558.
41. Id. Justice Stevens, in the decision, equated the legal effects of a time-barred discriminatory act with the legal effects of a discriminatory act that occurred before the passage of Title VII. Id. Such an act "may constitute relevant back-
past discriminatory act, and not the present application of the seniority system was joined with the requisite intent to discriminate.

a. The Court's Treatment of Intent in Discrimination Cases

*Evans* is also significant because it illustrates the starting point of the Court's approach to the intent requirement in Title VII cases. In the past, the Court had entertained the idea of interpreting anti-discrimination laws as capable of providing remedies to wronged plaintiffs even in the absence of clearly culpable institutional decision-making.42 *Evans* provides an example of how the Court began to alter its course43 in a number of significant cases44 by "adjudicat[ing] in a language of individualism [that] . . . imputes both motive and intent to institutions like police departments and corporations."45

Claims of discrimination brought against institutions often present unique conceptual challenges to appropriating blame.46 In the context of large-scale industries and governmental bureaucracies, wrongs that are recognizable as such may arise without a single, clearly blameworthy individual at which to point the finger.47 Nevertheless, while the


43. See Denise G. Réaume, *Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination*, 2 THEORETICAL INQUIRIES L. 349, 350 (2001) ("[A]lthough the American courts led the way in introducing the adverse effect or disparate impact idea, they have since confined its application to a relatively narrow set of cases, reverting elsewhere to a narrow intention-based test of liability.").

44. In addition to *Evans*, see *Lorance v. AT & T Techs.*, Inc., 490 U.S. 900, 911 (1989) (holding that charging period began when new seniority system was adopted, not when its discriminatory effects were felt) and *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980) (holding that statute of limitations periods commenced to run at the time when college professor was denied tenure, not at the time he was discharged one year later). Non-Title VII examples include *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding that discriminatory motive is a necessary element of constitutional employment discrimination actions challenging government employers), and *Patterson v. McLean Credit Union*, 491 U.S. 164, 188–89 (1989) (holding that the scope of 42 U.S.C. § 1981 is limited to discrimination at the time of contract formation, and that the statute does not proscribe racial discrimination in all aspects of contractual relations).


46. See discussion *infra* note 51.

47. See Ruth Gana Ogedij, *Status Rules: Doctrine as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 71 (1998) ("Discrimination can be a passive moral state that exists in the heart without any conscious awareness of its existence or how or when it may manifest in specific acts, speech or decisions."). *See also* Eckstein, *supra* note 45, at 849 (holding that in an institutional context such as the workplace, "injury can stem from corruption and inertia, independent
Civil Rights Act of 1991\textsuperscript{48} made it clear that evidence of the intent to discriminate is not essential to prove a disparate impact claim,\textsuperscript{49} intent has remained a crucial element of disparate treatment claims.\textsuperscript{50} \textit{Evans} is illustrative of how the Court begins its disparate treatment analysis from the standpoint of the individual motive of the employer.\textsuperscript{51}

---


\textsuperscript{49} Id. ("For purposes of this section, 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.").


\textsuperscript{51} Because the functions of complex organizations are rarely attributable to the will or intent of a single person, it is perhaps not surprising that the requirement of present intent to prove discrimination has come under significant scholarly attack. See, for example, Eckstein, \textit{supra} note 45, in which the author observes a Rawlsian liberalism driving the Court's intent jurisprudence. \textit{Id.} at 889–92. Professor Eckstein identified liberalism as "a deontological ethic, which emphasizes individual rights and duties that override public concerns and collective ends." \textit{Id.} at 884 n.6. Professor Eckstein then made the following observations (over the course of five pages) regarding the compatibility of liberalistic formulations of intent with the realities of institutional harms:

The Court perceives institutions as the sum of their individual parts, as collections of autonomous beings, who, according to the liberal ethic, are mutually disinterested and owe very little to one another. . . . [T]he Court's approach is impoverished because it ignores important aspects of our social lives. . . . The centrality of individual motive in the Court's jurisprudence is a reflection of an emphasis on the private, on individualism, and on autonomy. A liberal vision presumes that individuals are responsible primarily for themselves and their intentions, not the systemic problems of their institutions. . . . [I]n the context of institutions, like the workplace, the municipality, and the market, an emphasis on individualism is at best incomplete, because institutions exhibit structural problems unattributable to individual motive, problems to which the Court's narrow vision of responsibility does not speak. . . . In its analysis of discrimination and corruption, the Court treats institutions as if they were human beings. . . . Corporations and municipalities cannot think, feel, and intend like people. However, because the Court adjudicates in a language of individualism, it distorts institutional behavior . . . . Thus, the Court arrives at very narrow definitions of responsibility, imputing liability only when an injury was consciously chosen by a personified or individualized defendant.

\textit{Id.} at 845, 847–49.

Professor Eckstein's essay was published in 1991—the same year that Congress amended Title VII to codify the disparate impact theory recognized in \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971), in which intent was held not to be an essential element. Thus, to the extent Eckstein is referring to the motive or intent requirement that had begun to make its way into the Court's disparate
An exhaustive discussion of the well-documented and extensively analyzed conceptual shortcomings of the Court's treatment of intent in its discrimination jurisprudence is beyond the scope of this Note. Yet the Court's treatment of intent in Evans hints at the inevitability of the Court's result in Ledbetter. Ledbetter's failure to anticipate the Court's retreat away from structural discrimination claims and towards the requirement of a morally culpable individual wrongdoer would prove to be a fatal oversight.

2. Bazemore v. Friday and Discriminatory Pay Structures

The principle announced in Evans, that Title VII was powerless to address compensation systems that give present effect to past acts of discrimination, was rendered uncertain by the Court in Bazemore v. Friday. Bazemore involved the claims of black workers that had been subjected to segregated services and pay structures prior to the enactment of Title VII. After the statute became law, the employer desegregated in 1965. The plaintiffs in Bazemore claimed that the salary disparities continued on afterwards. The Supreme Court held in a per curiam opinion that the employer was under an affirmative obligation to eradicate the pay disparities that had taken hold in the pre-Title VII era.

Justice Brennan wrote a concurring opinion in Bazemore that was joined by all other Justices in part. Characterizing the error of the Fourth Circuit as "too obvious to warrant extended discussion" the Court held that the fact that the employer discriminated with respect to salaries prior to the time it was covered by Title VII did not excuse continued discrimination after the employer had become subject to the statute. In declaring that Bazemore's holding was consistent with the Court's prior Title VII cases, the Court explained that the critical question in Evans had been whether any present violation existed.

impact jurisprudence via cases such as Ward's Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), her concerns may have been allayed. The same problems of institutional intent can arise in disparate treatment cases, however, as was arguably the case in Ledbetter. In such instances, it is not the system itself that causes the harm, but rather the collective judgments and beliefs of decision makers charged with employing the system that over time may evince a discriminatory treatment of an employee, even in the absence of a specific intent to discriminate.

52. 478 U.S. 385 (1986).
53. Id. at 390 (Brennan, J., concurring).
54. Id. at 390–91.
55. Id. at 391.
56. Id. at 397.
57. Id. at 389.
58. Id. at 395.
59. Id.
60. Id. at 396 n.6.
The Court concluded that the present violation in *Bazemore* was the continuing application of the discriminatory pay structure.\(^{61}\)

The Court thus held that under a discriminatory pay structure, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."\(^{62}\) In light of this determination, the Court held that the employer had an obligation to eliminate the pre-Act discriminatory pay differences. As will be discussed in Part III, both the parties and the Court in *Ledbetter* would dispute the effect that *Bazemore* had on the Court's analysis of intent in Title VII disparate pay cases.

3. **National Railroad Passenger Corp. v. Morgan and the Constraining of the Continuing Violations Theory**

The Supreme Court granted certiorari in *National Railroad Passenger Corp. v. Morgan*\(^{63}\) due to a lack of uniformity among circuits in applying a Title VII theory known as the "continuing violation" theory.\(^{64}\) The continuing violation theory is a procedural theory that was widely used prior to *Morgan* that provided an exception to the statute of limitations in Title VII cases. The Court explained that this "theory allows courts to toll or extend the limitations period so that plaintiffs may recover in part based on defendants' discriminatory conduct occurring before that period."\(^{65}\) The results in *Morgan* changed the way courts may apply the continuing violation theory by dividing the world of disparate treatment into two distinct parts.\(^{66}\) Plaintiffs bringing disparate treatment claims after *Morgan* must now choose between seeking recovery for "discrete acts" of discrimination or recovery for a single "hostile work environment" claim comprised of several component discriminatory acts.\(^{67}\)

---

61. *Id.* at 397 n.6 ("Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* . . . focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.").

62. *Id.* at 395.


64. See Cheng, *supra* note 24, at 1421–22, noting:

Prior to *National Railroad Passenger Corp. v. Morgan*, where the Supreme Court addressed for the first time the scope and application of the continuing violation theory, the Court's employment discrimination law jurisprudence not only provided scant guidance on, but also caused confusion about, the procedural theory. The paucity and inadequacy of judicial guidance from the Supreme Court contributed to divergent interpretations of the procedural theory among the courts of appeals.


67. See *id.*
In Morgan, a black man sued National Railroad Passenger Corp. in federal district court alleging that throughout his employment with Amtrak he had been subjected to discriminatory and retaliatory acts and had endured a racially hostile work environment. The Ninth Circuit held that Morgan had alleged pre-limitations and post-limitations violations that were sufficiently related to invoke the continuing violation theory.

In an opinion written by Justice Thomas, the Supreme Court delivered a blow to the continuing violation theory by holding that discrete discriminatory and retaliatory acts that fall outside of Title VII’s statute of limitations are forever time-barred. The continuing violation theory was allowed to live on, however, in the context of hostile work environment claims. A divided Court held that because such claims allege a series of incidents, some of which may be difficult to identify and are not independently actionable, such claims collectively formed a single allegation of an offensive or intimidating atmosphere.

In distinguishing between actions that are discrete and actions that make up a hostile work environment, the Court noted that Title VII “explains in great detail the sorts of actions that qualify as ‘[u]nlawful employment practices’ and includes among such practices numerous discrete acts.” Justice Thomas offered “[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire” as examples of employment actions that are “easy to iden-
tify" and therefore must be charged within either 180 or 300 days of when they "occur." By contrast, the individual acts that make up a hostile work environment claim are harder to identify, and are thus viewed collectively as component parts of a single violation. Component incidents occurring outside of the charging period may be considered for purposes of liability in hostile work environment claims. Still, to bring a timely hostile work environment claim, at least one of the component acts must have occurred within the charging period.

Morgan was the Court's attempt to identify conclusively the circumstances under which a court may look to discriminatory acts occurring prior to the EEOC charging period for purposes of assigning liability. The facts and procedural background of Ledbetter, however, highlight the latent ambiguities lurking within the holdings of Morgan.

C. Between Disparate Treatment and Disparate Impact

In Ledbetter v. Goodyear Tire and Rubber Co., the Court determined that Evans, Bazemore, and Morgan define the contours of disparate treatment theory. Some commentators have argued that the Court's treatment of disparate impact and disparate treatment has constrained the two theories' respective abilities to reach certain types of discrimination. Disparate impact theory may assuage the hardships of proving intent, but as a theory it presents its own problems of proving disproportionately adverse impacts brought about by the

75. Morgan, 536 U.S. at 114.
76. See discussion supra note 9.
77. In a footnote, Thomas cited two definitions of "occur"; "WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1561 (1993), defines 'occur' as 'to present itself: to come to pass: take place: HAPPEN.' See also BLACK'S LAW DICTIONARY 1080 (6th ed. 1990) (defining '[o]ccur' as '[t]o happen; ... to take place; to arise')." Morgan, 536 U.S. at 110 n.5.
78. Morgan, 536 U.S. at 114.
79. Id. at 117.
80. Morgan, 536 U.S. at 117. The decision explained:
   It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for purposes of determining liability.
   Id.
82. See supra section II.B.
83. See Joseph A Seiner, Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach, 25 YALE L. & POL'Y REV. 95, 98 (2006). In the article, Seiner critiqued the current tendency of U.S. courts to treat disparate impact and disparate treatment claims as "analytically distinct." Id. He also noted that "[p]laintiffs have lost viable claims of unintentional discrimination by failing to separately plead a disparate impact theory." Id.
facially neutral practices themselves. Conversely, claims of disparate treatment will only lie when a discriminatory employment practice is linked with a specific intent to discriminate.\textsuperscript{84} Untouched are acts of discrimination that, while not attributable to any particular practice itself, reflect the unintended biases and stereotypes that manifest themselves over time.\textsuperscript{85} Also beyond reach are the lingering discriminatory effects of time-barred acts of intentional discrimination.\textsuperscript{86} Such scenarios may be thought of not as discriminatory acts but rather as discriminatory situations existing somewhere in the gray area between disparate impact and disparate treatment claims.

\textit{Ledbetter v. Goodyear Tire & Rubber Co.},\textsuperscript{87} provided the Court with an opportunity to allow Title VII to expand its remedial potential by reaching into this gray area. Lilly Ledbetter's challenge was to navigate the "blurry legal landscape of disparate impact and disparate treatment cases"\textsuperscript{88} and proceed in such a way as would allow the Court to redress the gross disparities between her salary and those of her male counterparts without disturbing settled precedents. Ledbetter chose to proceed on a theory that would require the Court to either impute intent from discriminatory decisions made outside of the limitations period, or hold that intent was not an essential element when the effects are felt within the charging period.\textsuperscript{89}

\textsuperscript{84} See discussion \textit{supra} Part II.B.1.a.

\textsuperscript{85} As one commentator noted:

\begin{quote}
[T]he comment, "I see why they used blacks as slaves—they are so strong," made by a friend while I was lifting a suitcase may not indicate intent in the conscious sense. However, there is certainly a manifestation of discrimination if I am later asked to lift the heaviest of several cases because "I am the strongest." . . . There is no doubt in my mind that my friend did not \textit{intend} to offend me, but she nevertheless made a judgment about my ability based on nothing more than my race. The assignment of tasks based on her belief would be useful as evidence of discrimination only because she had verbally expressed herself earlier, and so the causal element by law could have been established. Assume she assigned tasks with this in mind but made no comment, or made a comment but no act reflecting her conviction—discrimination, albeit unintended, still exists. Yet, under the framework for proving discrimination, the case in the last two scenarios would have been difficult, if not impossible, to establish.
\end{quote}

Okediji \textit{supra} note 47, at 71–72.

\textsuperscript{86} The Court refers to such discriminatory acts which are not made the basis for timely charges as "merely an unfortunate event in history which has no present legal consequences." \textit{Ledbetter}, 127 S. Ct. at 2168 (quoting United Airlines, Inc. v. Evans 431 U.S. 553, 558 (1977)). \textit{See also id.} at 2178 (Ginsburg, J., dissenting) ("Any annual pay decision not contested immediately (within 180 days), the Court affirms, becomes grandfathered, a \textit{fait accompli} beyond the province of Title VII ever to repair.").

\textsuperscript{87} 127 S. Ct. 2162 (2007).

\textsuperscript{88} Seiner, \textit{supra} note 83 at 97.

\textsuperscript{89} In her petition for certiorari, Ledbetter presented the following question to the Court:
III. LEDBETTER V. GOODYEAR TIRE AND RUBBER CO., INC.

In many respects, the Court's treatment of Title VII in Evans, Bazemore, and Morgan created more questions than it answered. Various courts of appeals and the EEOC were interpreting Bazemore in ways that appeared contradictory to the holdings of Evans. The Morgan Court declined to comment on the applicability of its "discrete act" rule to pattern-or-practice cases, and did not make clear whether employment actions denominated "discrete" in one context could still be considered component acts of a hostile work environment claim in another context. Ledbetter provided the Court with the opportunity to address some of these questions.

A. Facts, Holdings, and Procedural Background of Ledbetter v. Goodyear

Lilly Ledbetter worked at the Goodyear Tire & Rubber Company from 1979 to 1998, first as a supervisor and subsequently as an area manager. Ledbetter began her employment at the same salary as male supervisors, but over the course of her career, several managers made annual pay setting decisions that eventually made Ledbetter the lowest paid area manager. Near the end of her career, Ledbetter was the only woman working as an area manager and was making $559 less per month than the lowest paid male area manager.

In 1998, Ledbetter went to the EEOC and filed a questionnaire in March and a formal charge of discrimination in July, alleging that she had received a discriminatorily low salary as an area manager because of her sex. In August, Ledbetter accepted an offer of early retirement in the face of massive lay-offs, and retired effective November 1, 1998.
In February 1999, Ledbetter filed a lawsuit against Goodyear and alleged, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963. On several of Ledbetter’s claims, including her Equal Pay Act claim, the district court granted summary judgment in favor of Goodyear. Ledbetter’s Title VII pay discrimination claim, however, was allowed to proceed to trial. At trial, Ledbetter introduced evidence that some of her past supervisors had given her poor evaluations because of her sex and that the discriminatory evaluations resulted in smaller pay increases for Ledbetter than for her male counterparts. Ledbetter asserted that the discriminatory pay setting decisions continued to affect her salary throughout her employment and were responsible for the considerable disparity between Ledbetter’s salary and the salaries of male area managers at the time of her retirement. At the close of evidence at trial, the district court granted judgment as a matter of law in favor of Goodyear on several of Ledbetter’s remaining claims, but allowed the disparate pay claim to go to the jury. The jury found that Goodyear had discriminated against Ledbetter in this regard.

On appeal, Goodyear argued that the statute of limitations barred all claims of discrimination based on pay decisions made 180 days or more prior to the filing of Ledbetter’s EEOC questionnaire. Good-year further argued that no discriminatory act relating to Ledbetter’s pay occurred after that date. The Eleventh Circuit agreed, holding:

[At least in cases in which the employer has a system for periodically review- ing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee’s pay immediately preceding the start of the limitations period.]

The Eleventh Circuit then held that there was not legally sufficient evidence to support a claim of intentional discrimination in the 1997 and 1998 pay setting decisions, which were the only two decisions to occur within the above-mentioned period. Because Ledbetter did not present the trial court with evidence sufficient to permit a reasonable jury to find that the 1997 and 1998 pay decisions were discriminatory, the Eleventh Circuit concluded that the district court should

---

97. Id. at 1175 n.7 ("Ledbetter’s complaint presented multiple claims of age discrimination, sex discrimination, and retaliation in violation of Title VII . . . the Equal Pay Act . . . and the Age Discrimination in Employment Act . . . ").
98. 29 U.S.C. § 206(d) (2000). The Equal Pay Act prohibits paying unequal wages for equal work because of sex, and was enacted contemporaneously with Title VII.
100. See id.
101. See infra note 112.
102. Ledbetter, 127 S. Ct. at 2166.
103. Id.
104. Ledbetter, 421 F.3d at 1183.
105. Id. at 1189–90.
have granted Goodyear judgment as a matter of law, and therefore reversed.\textsuperscript{106}

B. The United States Supreme Court Decision

The Court granted certiorari in \textit{Ledbetter} due to the lack of agreement among the courts of appeals as to the proper application of the limitations period in Title VII disparate pay cases.\textsuperscript{107} In her petition for writ of certiorari, Ledbetter did not seek or obtain review of the Eleventh Circuit’s finding that there was insufficient evidence of intentional discrimination during the charging period.\textsuperscript{108} Instead, Ledbetter presented the following question for review:

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.\textsuperscript{109}

As an initial matter, it is significant that Ledbetter chose to bring her complaint under a disparate treatment theory.\textsuperscript{110} While styling her claim as one of disparate impact might have avoided Ledbetter’s problems of having to prove present intent, there were several practical obstacles that likely precluded her from doing so. Goodyear’s performance-based pay system appeared facially neutral and unsusceptible to claims that it adversely affected members of protected groups.\textsuperscript{111} In addition, “[t]he lack of a clear, uniform theoretical basis for disparate impact in the United States has left courts

\textsuperscript{106} Id.

\textsuperscript{107} \textit{Ledbetter}, 127 S. Ct. at 2166 (comparing the Eleventh Circuit’s holding in \textit{Ledbetter} with Forsyth v. Fed’n Employment & Guidance Serv., 409 F.3d 565 (2d Cir. 2005) and Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005)).

\textsuperscript{108} Brief of Respondent, supra note 92, at 11; \textit{See Ledbetter}, 127 S. Ct. at 2166.

\textsuperscript{109} \textit{Ledbetter}, 127 S. Ct. at 2166 (citation omitted).

\textsuperscript{110} \textit{See id.} at 2167 ("Ledbetter asserted disparate treatment, the central element of which is discriminatory intent.").

\textsuperscript{111} \textit{Id.} at 2174.

In 1982, Goodyear implemented a merit-based compensation program. Under the “Pay for Performance” program, each “Business Center Manager” within a plant became responsible for determining annual merit increases for the salaried employees under his or her supervision. In doing so, the Business Center Manager was required to take each employee’s existing salary at the time as a given starting point; the manager was to focus only on appropriate salary increases. In that regard, the manager was also to take into account each employee’s performance ranking for the year; where the employee’s existing salary stood within the salary range for his or her position; and the amount and timing of the employee’s most recent increase. Each employee’s annual increase could not exceed a specified maximum percentage, and the total amount of increases awarded in each Business Center could not exceed a set budget.

Brief of Respondent, supra note 92, at 1–2, (citations omitted).
confused and often unwilling to accept such claims."\(^{112}\) Perhaps most importantly, compensatory and punitive damages are available only for claims brought under a disparate treatment theory, not a disparate impact theory.\(^{113}\)

Ledbetter was not successful in her attempt to prove a disparate treatment claim because she could not show that her employer had made a discriminatory decision paired with discriminatory intent within the statute of limitations. In the opening paragraph of the majority opinion, Justice Alito, stated flatly that a pay-setting decision is a discrete act that occurs at a particular point in time.\(^{114}\) Citing Morgan, the Court concluded that because pay-setting decisions are discrete acts, the time for filing a charge with the EEOC begins to run as soon as the employer makes the discriminatory decision.\(^{115}\) Because the pay-setting decisions alleged by Ledbetter as discriminatory occurred outside of the limitations period, the majority affirmed the Eleventh Circuit's reversal of Ledbetter's disparate pay victory.\(^{116}\) Thus, Ledbetter's disparate treatment claim was doomed to failure because the Court refused to consider the employer's intent outside of the statutory period.

The decision identified intent as the "defining element"\(^{117}\) of disparate treatment challenges and asserted that in United Airlines Inc. v. Evans,\(^{118}\) the Court had rejected an argument that was "basically the same" as Ledbetter's.\(^{119}\) Relying on Evans' conclusion that the continuing effects of discriminatory acts that take place in the pre-charging period cannot make out a present violation, Justice Alito's majority opinion echoed Justice Stevens' characterization of such acts as "merely an unfortunate event in history which has no present legal consequences."\(^{120}\) The majority cited Delaware State College v. Ricks\(^{121}\) and Lorance v. AT & T Technologies, Inc.\(^{122}\) in support of

\(^{112}\) Seiner, supra note 83, at 97 (footnote omitted).

\(^{113}\) 42 U.S.C. § 1981(a)(1) (2000) (allowing for compensatory and punitive damages to be sought against an employer "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)"). At trial, the jury awarded Ledbetter $223,776 in back pay, $4,662 in damages for mental anguish, and $3,285,976 in punitive damages. The trial court remitted the award to $360,000, including $300,000 in compensatory and punitive damages and $60,000 in back pay. Brief of Respondent, supra note 92, at 6-7.

\(^{114}\) Ledbetter, 127 S. Ct. at 2165.

\(^{115}\) Id.

\(^{116}\) Id.

\(^{117}\) Id. at 2166–67.

\(^{118}\) 431 U.S. 553 (1977).

\(^{119}\) Ledbetter, 127 S. Ct. at 2167.

\(^{120}\) Id. at 2168 (quoting Evans, 431 U.S. at 558).

\(^{121}\) 449 U.S. 250 (1980).

\(^{122}\) 490 U.S. 900 (1989).
Evans’ requirement of a present intent to discriminate during the charging period.\textsuperscript{123}

The majority then turned its focus to Morgan, where the Court explained that Title VII’s use of the term “employment practice”\textsuperscript{124} generally refers to a discrete act or single “occurrence” that takes place at a particular time.\textsuperscript{125} After noting that the opinion in Morgan had pointed to acts such as termination, failure to promote, denial of transfer, and refusal to hire as examples of discrete acts, Alito concluded that Ledbetter had alleged discrete discriminatory pay-setting acts that needed to be challenged within the EEOC charging period.\textsuperscript{126}

Noting that “[a] disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent,”\textsuperscript{127} the majority concluded that to shift the motive of the time-barred act to a later act performed without discriminatory bias would impose liability in the absence of the requisite intent, and would distort Title VII’s “integrated multistep enforcement procedure.”\textsuperscript{128}

The majority rejected Ledbetter’s reliance on the Court’s decision in Bazemore for the proposition that decisions relating to pay are different. Ledbetter had argued that Bazemore “necessarily decided the central question presented here: in a disparate pay case, ‘[w]hat constitutes an ‘unlawful employment practice’ and when has that practice ‘occurred’?”\textsuperscript{129} According to Ledbetter, the Court in Bazemore had “conclude[d] that the present execution of a past discriminatory pay decision was itself a present and independent violation of Title VII.”\textsuperscript{130} Ledbetter attempted to focus the Court’s attention on what she believed to be the pivotal statement of the holding in Bazemore, namely that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective

\textsuperscript{123} Ledbetter, 127 S. Ct. at 2168.

\begin{quote}
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or other-
wise to discriminate against any individual with respect to his compen-
sation, terms, conditions, or privileges of employment, because of such
individual’s race, color, religion, sex, or national origin . . . .
\end{quote}
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 2171.
\textsuperscript{128} Id. 2170 (quoting Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 359 (1977)).
\textsuperscript{129} Reply Brief of Petitioner, at 3–4, Ledbetter, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 3336479 (citing Morgan, 536 U.S. at 113).
\textsuperscript{130} Id. at 4.
The dissent\textsuperscript{132} agreed with Ledbetter and stated the following: "Paychecks perpetuating past discrimination, we thus recognized \textit{in Bazemore}, are actionable not simply because they are \textquoteleft related\textquoteright{} to a decision made outside the charge-filing period, but because they discriminate anew each time they issue.\textsuperscript{133}

Goodyear argued that the United States did not claim in \textit{Bazemore} that unlawful pay discrimination could be established wholly by reference to allegedly discriminatory acts occurring outside of an applicable limitations period . . . . Rather, the United States asserted in \textit{Bazemore} that the challenged pay practices reflected ongoing intentional discrimination by the Extension Service itself.\textsuperscript{134}

In response, Ledbetter claimed that there was no mention of a requirement of present intent in \textit{Bazemore} and that Goodyear was inappropriately attempting to read a missing piece into the decision.\textsuperscript{135}

The question thus became whether \textit{Bazemore} recognized a requirement of a present intent to discriminate at the time the unlawful employment practice allegedly occurred and, if so, where in \textit{Bazemore} this requirement could be found. It is worth noting that Ledbetter was far from alone in her interpretation of the meaning of \textit{Bazemore}. As noted by the dissent, most of the courts of appeals had adopted a similar interpretation,\textsuperscript{136} and "the EEOC—the federal agency respon-

\begin{itemize}
\item \textsuperscript{131} Id. (quoting \textit{Bazemore} v. Friday, 478 U.S. 385, 395–96) (1986)).
\item \textsuperscript{132} Ginsburg, Stevens, Souter & Breyer were the dissenting judges. \textit{Ledbetter}, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).
\item \textsuperscript{133} Id. at 2180 (citation omitted).
\item \textsuperscript{134} Brief of Respondent, \textit{supra} note 92, at 28.
\item \textsuperscript{135} See Reply Brief of Petitioner, \textit{supra} note 129, at 4, stating:
\begin{quote}
Respondent asserts that the Court's explanation of its holding and rationale in \textit{Bazemore} was incomplete, and that the Court really relied on an additional fact never explicitly mentioned in the opinion itself: that the Extension Service made a conscious decision, at some point after the effective date of the Act, to maintain the prior disparate pay levels for the purpose of discrimination against its black employees.
\end{quote}
\textit{Id.} (citation omitted).
\item \textsuperscript{136} As Justice Ginsburg noted:
\begin{quote}
[T]he [c]ourts of [a]ppeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination: Each paycheck less than the amount payable had the employer adhered to a nondiscriminatory compensation regime, courts have held, constitutes a cognizable harm. \textit{See}, \textit{e.g.}, Forsyth v. Federation Employment and Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) ("Any paycheck given within the charge-filing period . . . would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); Shea v. Rice, 409 F.3d 448, 452–53 (D.C. Cir. 2005) ("[A]n employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason" (citing \textit{Bazemore}, 478 U.S. at 396); Goodwin v. General Motors Corp., 275 F.3d 1005, 1009–10 (10th Cir. 2002) ("[T]he \textit{Bazemore} has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation . . . . [E]ach race-based discrimi-
\end{quote}
\end{itemize}
sible for enforcing Title VII—has interpreted the Act to permit employees to challenge disparate pay each time it is received.”

According to the majority, where Ledbetter, the EEOC, and various courts of appeals erred in their interpretation of Bazemore was in their reliance on some admittedly confusing language taken from Justice Brennan’s concurrence, as well as their failure to heed Justice Brennan’s own admonition that Bazemore was not inconsistent with, and therefore should be read in light of, prior Title VII cases in which the Court had held that time-barred acts of discrimination did not constitute a present violation when their effects are later felt.

Distinguishing the facts of Bazemore from those alleged by Ledbetter, the majority asserted that the defendants in Bazemore had adopted and intentionally retained a facially discriminatory pay structure. It was thus held that Bazemore stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. This understanding of Bazemore, the majority assured, was consistent with the Court’s prior precedents.

Justice Alito concluded his analysis by declaring that “[b]ecause Ledbetter has not adduced evidence that Goodyear initially adopted its performance based pay system in order to discriminate on the basis of sex or
that it later applied this system to her within the charging period with any discriminatory animus, Bazemore is of no help to her."  

In a final and comparatively small portion of the opinion, the majority briefly addressed Ledbetter's reliance on "analogies to other statutory regimes and on extra-statutory policy arguments." Ledbetter had pointed out that under the Equal Pay Act, it was common for lower courts to hear claims that challenged pay disparities that originated outside of the limitations period. Ledbetter also referenced the Fair Labor Standards Act of 1938, noting that for purposes of the minimum wage and overtime provisions of that statute, the limitations period begins to run anew whenever a paycheck is issued. With scant analysis, the Court found the functions of the Equal Pay Act and the overtime provisions of the Fair Labor Standards Act distinguishable from Title VII largely due to the absence of a requirement of present discriminatory intent in either the EPA or the FLSA. The Court did concede that cases arising under the National Labor Relations Act were analogous to Title VII cases, but concluded that the NLRA cases supported, rather than contradicted, the majority's result in Ledbetter. The Court cited Local Lodge No. 1424, International Ass'n of Machinists v. NLRB for the proposition that, under the NLRA, unfair labor practices occurring before the charging period are not actionable, but rather provide relevant background evidence for timely charges. With regard to the reasons outlined by Ledbetter for treating pay-setting decisions differently, the Court concluded that it was "not in a position to evaluate Ledbetter's policy arguments." Justice Alito declared that such arguments

143. Id. at 2174.
144. Id. at 2176.
145. 29 U.S.C. § 206(d) (2000). The EPA was enacted at the same time as Title VII, and prohibits unequal wages for equal work because of sex.
146. Ledbetter, 127 S. Ct. at 2176.
148. Ledbetter, 127 S. Ct. at 2176.
149. Although Ledbetter had argued that lower courts hear EPA claims that address pay disparities that first arose outside of the limitations period, the majority found the EPA distinguishable because the statute "does not require the filing of a charge with the EEOC or proof of intentional discrimination." Ledbetter, 127 S. Ct. at 2176. The majority dismissed Ledbetter's reliance on the FLSA for the same reasons. Id.
150. In Justice Alito's words, Ledbetter is on firmer ground in suggesting that we look to cases arising under the [NLRA] since the NLRA provided a model for Title VII's remedial provisions and, like Title VII, requires the filing of a timely administrative charge (with the National Labor Relations Board) before suit may be maintained. Id. at 2177 (citing Lorance v. AT & T Techs., Inc., 490 U.S. 900, 909 (1989); Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982)).
152. Ledbetter, 127 S. Ct. at 2177.
"find no support in the statute" and that the Court would "apply the statute as written."153

The dissent, written by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer, made a compelling argument that pay setting decisions are different from discrete acts such as failure to hire and failure to promote.154 The dissent agreed with Ledbetter's assertion that the Court in Bazemore had recognized the unique nature of disparate pay cases and had therefore treated them differently.155 Justice Ginsburg drew support for this conclusion from the fact that the EEOC and many of the courts of appeals had held that paychecks that reflect discrimination violate Title VII anew each time they issue.156

The dissent also relied on Morgan for the proposition that pay-setting decisions are more like hostile work environment claims than discrete act claims because the adverse pay decisions can be hard to identify and the plaintiff may initially consider them insignificant and not immediately actionable.157 In defending their understanding of Bazemore and Morgan, the dissent characterized the majority's concern for employers who face liability for past acts as unfounded, noting that equitable doctrines such as laches and estoppel would preclude employees from bringing suits that would unfairly prejudice employers.158

IV. ANALYSIS

Ledbetter's case hinged on the Court's willingness to recognize a timely-charged act of intentional discrimination. Because Ledbetter could not impute the intent of past acts, she had no timely acts of intentional discrimination that could bring her case within the purview of Title VII under either available theory.159 As such, the Court had no occasion to decide whether pay-setting decisions are more properly characterized as "discrete acts" or "hostile environment" claims. It did so anyway.

If indeed the Court in Ledbetter made a zero-sum classification of pay setting decisions as discrete acts, it misinterpreted the subtle command of Morgan. Depending on the circumstances in which they arise, pay-setting decisions may be properly characterized as actionable "discrete acts" or "hostile environment" claims.

153. Id. at 2177.
154. Id. at 2180–81 (Ginsburg, J., dissenting). See infra note 165.
156. Id. at 2184–85. See supra notes 135–36.
158. Id. at 2186.
159. See supra subsection II.B.3 (discussing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)).
A. Pay Setting Decisions: Discrete Acts or Repeated Conduct?

The landscape of Title VII disparate impact claims changed significantly from the time Lilly Ledbetter first brought her suit in federal district court in November 1999\textsuperscript{160} to the time the Supreme Court decided her case in May 2007. When Ledbetter initially brought her suit, the prevalence of the "continuing violation" theory may have emboldened Ledbetter with the belief that liability could attach to all related instances in which she could prove discrimination. As mentioned in subsection II.B.3, however, in 2002 the \textit{Morgan} decision altered the status of the continuing violations theory in a way that had important ramifications for Ledbetter.

1. How Morgan Changed the Field of Play

The Court's decision in \textit{National R.R. Passenger Corp. v. Morgan}\textsuperscript{161} meant that Ledbetter would have to conform her theory of recovery to the newly christened Title VII dichotomy. As mentioned in subsection II.B.3, the \textit{Morgan} Court had held that discrete acts of discrimination must be alleged within the EEOC charging period in order for liability to attach.\textsuperscript{162} The Court explained that acts \textit{outside} of the charging period may provide background evidence for a timely charge, but are not themselves actionable if time-barred.\textsuperscript{163} \textit{Morgan} thus constrained the continuing violation theory to hostile work environment claims and further held that this theory would only apply if at least one of the component acts contributing to the hostile environment occurred within the charging period.\textsuperscript{164}

No longer able to allege a continuing "serial"\textsuperscript{165} violation, Ledbetter faced a hurdle that had arguably not confronted her when she originally brought her suit. She would either have to claim that each paycheck she received that reflected past acts of discrimination was itself a discrete act that reset the clock for purposes of filing a claim within the charging period, or argue that discriminatory pay-setting

\textsuperscript{160}. Brief for the United States as Amicus Curiae Supporting Respondent at 3, \textit{Ledbetter}, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 3095442.
\textsuperscript{161}. 536 U.S. 101 (2002).
\textsuperscript{162}. \textit{Id.} at 113.
\textsuperscript{163}. \textit{Id.}
\textsuperscript{164}. \textit{Id.} at 115-17.
\textsuperscript{165}. \textit{See Ledbetter}, 127 S. Ct. at 2175 ("\textit{Morgan} is perfectly clear that when an employee alleges 'serial violations,' i.e., a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation.") (citing \textit{Morgan}, 536 U.S. at 113). Prior to \textit{Morgan}, various circuit courts recognized that certain species of "serial violation" claims fall within the limitation-tolling auspices of the continuing violation theory. Examples from the Ninth Circuit include Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999); Green v. L.A. County Superintendent of Sch., 883 F.2d 1472 (9th Cir. 1989).
decisions are more like the cumulative acts that make up a hostile work environment claim.

2. Failings of “Discrete Acts” as Static Classifications

Some commentators have noted that the Court’s use of discrete acts to determine whether to apply Title VII’s statute of limitations is patently flawed. The theory of this Note, however, is that it is not the classifications themselves that create the problem, but the Court’s potential reluctance to recognize that the same act might correctly be thought of as discrete in some instances but not in others.

To the extent the Court has held that a discrete discriminatory act that is easily identifiable and independently actionable must be brought within the charging period proscribed by Title VII, it remains faithful to the statute. However, the Court unnecessarily constrains the remedial purpose of Title VII when it places discriminatory acts into static classifications, and then looks at the classifications themselves rather than the factual context of the case in order to determine whether the act is indeed “discrete.” This approach prevents courts from having the flexibility to apply Title VII in a way that would allow them to remedy many more incidences of discrimination.

_Ledbetter_ provides a good framework for analyzing the failings of discrete acts as static classifications. The dissent presented compelling policy reasons for treating pay setting decisions as related acts comprising essentially a single claim of a hostile pay environment rather than discrete acts. These included the fact that discrimina-

166. See, e.g., 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, 1148 (2004) (“Since the Court in Morgan spent its time simplifying the concept of a discrete act, employees are left with no guidance as to which act in a series of seemingly discriminatory acts is ‘independently discriminatory’ such that it will start the filing clock.”). See also Leading Cases III, Federal Statutes and Regulations B. Civil Rights Act, 116 HARv. L. REV. 352, 359-60 (2002) (“[T]he Court failed to justify persuasively its refusal to allow plaintiffs to invoke the continuing violations doctrine when they bring serial violations claims that allege only discrete (but related) acts of discrimination or retaliation.”).

167. As Justice Ginsburg noted:

The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts “easy to identify.” A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries. See, e.g., Goodwin v. General Motors Corp., 275 F.3d 1005,
tory pay setting decisions can be harder to identify than discrete acts such as denial of promotion; even if a female employee learns that she received a smaller raise than her male counterparts, she may not suspect that she is being discriminated against until the smaller pay increases develop into a pattern. The majority, however, determined that under _Morgan_, pay setting decisions are discrete acts because they occurred on a given day. The next subsection will explain that both sides can be right, depending on the circumstances.

a. Did _Morgan_ Preclude a "Hostile Pay Environment" Claim?

_Morgan_ should not be understood to create an all-or-nothing world in which employment actions are given labels such as "failure to promote" and then irrevocably cast as discrete or component actions. Instead, courts deciding disparate pay claims that span careers should focus on the two tests that are discernable from _Morgan_: 1) the ease

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); McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper). Tellingly, as the record in this case bears out, Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings.

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity. Even if an employee suspects that the reason for a comparatively low raise is not performance but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable.

_Ledbetter_, 127 S. Ct. at 2181–82 (Ginsburg, J., dissenting) (citation omitted) (footnote omitted).

168. _Id._ at 2165 (majority opinion).

169. Those who disagree might argue that once a court determines that an action such as a pay setting decision "occurs" as the term was defined in _Morgan_ on a given day, that case requires that the action always be treated as discrete. This argument reflects a fundamental misunderstanding of _Morgan_. It was the claim itself, and not the component acts, that Justice Thomas declared could not be said to "occur" on a given date. See _Morgan_, 536 U.S. at 114. Clearly, each component act that makes up a hostile environment "occurred" at a specific time, even if the act itself was subtle or insignificant.
with which the unlawful action can be identified,\textsuperscript{170} and 2) whether or not the discriminatory act is actionable on its own.\textsuperscript{171}

Care should be taken at this point to stress that both of these tests are best thought of as \textit{subjective} in nature, and should therefore be addressed \textit{from the plaintiff's perspective}. They are essentially tests of notice: (1) when did (or should) the employee identify the employment action, and (2) when did (or should) the employee recognize the incident to be actionable on its own?\textsuperscript{172} Under this case-specific understanding of \textit{Morgan}, pay-setting decisions and even actions such as failure to promote\textsuperscript{173} can escape classification as "discrete" if the facts so warrant.\textsuperscript{174} Furthermore, this understanding is not a mere reversion back to the pre-\textit{Morgan} "serial violation" structure because past acts of discrimination \textit{identifiable as such} will still be classified as discrete and, therefore, cannot be considered for purposes of liability even if related to timely acts.

**B. Disparate Pay in the Post-Ledbetter Era**

The Court in \textit{Ledbetter} did not confine its opinion to an intent analysis, but expressly referred to pay-setting decisions as discrete acts.\textsuperscript{175} The question thus becomes whether in doing so, the Court in \textit{Ledbetter} foreclosed the possibility of alleging pay setting decisions as components of a hostile pay environment claim.

As mentioned in section II.C of this Note, the Court's current treatment of Title VII claims constitutes a judicial compromise that has created certain gray areas that reflect discriminatory situations not

\textsuperscript{170} \textit{See id.} ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify.").

\textsuperscript{171} \textit{Id.} at 115 ("Hostile environment claims are different in kind from discrete acts. . . . The 'unlawful employment practice' . . . 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.") (citations omitted).

\textsuperscript{172} The Court has never squarely addressed the application of the discovery rule to discrete acts of discrimination, although Justice O'Connor stated in her concurring and dissenting opinion in \textit{Morgan} that she believes "that some version of the discovery rule applies to discrete act claims." \textit{Morgan}, 536 U.S. at 123 (O'Connor, J., concurring in part and dissenting in part). The thesis of this Note is that the majority opinion in \textit{Morgan} did recognize a "version of the discovery rule" if the classification of discriminatory acts are thought of as fluid, rather than static.

\textsuperscript{173} \textit{See} \textit{Rendon v. AT & T Techs.}, 883 F.2d 388, 396 (5th Cir. 1989) ("[P]romotion systems, unlike hiring systems, produce . . . effects that may not manifest themselves as individually discriminatory except in culmination over a period of time."); \textit{Trevino v. Celanese Corp.}, 701 F.2d 397, 402 (5th Cir. 1983) (explaining that failure to promote "invariably arises during a lengthy period of time").

\textsuperscript{174} However, certain employment actions such as failure to hire may necessarily always be classified as discrete acts because it would appear that one cannot allege a hostile work environment if one was denied access to the environment in the first place.

\textsuperscript{175} \textit{See supra} text accompanying notes 166 and 167.
easily reached by the remedial standards articulated in the Court’s Title VII precedent. Because disparate pay claims that span lengthy careers fall within this gray area, attorneys who wish to bring such claims on behalf of clients must carefully navigate the pitfalls that abound in order to avoid having large portions a client’s cause of action time barred. This subsection will provide a roadmap for bringing such claims.

Like Justice Brennan’s now-infamous “paycheck accrual” quote in Bazemore, Justice Alito’s pronouncement in Ledbetter that “a pay-setting decision is a discrete act that occurs at a particular point in time” is highly susceptible to misinterpretation if read in a vacuum. Potential litigants may assume that, to the extent components of their discrimination claim involve past pay-setting decisions, these decisions will be automatically and unequivocally time-barred. This was not the holding in Ledbetter, however. Like Bazemore, context must be added in order to gain an accurate understanding. Read together, Morgan and Ledbetter leave open the possibility of a “hostile pay environment” claim.

1. Hostile Pay Environment: The Individual Plaintiff

Morgan provides a framework for classifying disparate treatment claims for purposes of calculating Title VII’s limitations period, but nothing in Morgan compels a finding that if a discriminatory act is discrete in one context, it can never be considered as a component part of a hostile work environment claim in another context. Ledbetter was not to the contrary. As the Court pointed out, Ledbetter alleged that the payment of each paycheck constituted a separate violation of Title VII. Although the dissent argued as an afterthought that pay-setting decisions were more like hostile work environment claims, Ledbetter failed to commit fully to this theory in her brief to the Court. Additionally, Ledbetter’s failure to allege a timely act of intentional discrimination effectively precluded her from prevailing on a hostile work environment theory even if Ledbetter had zealously pursued such a claim. Therefore, Justice Alito’s statement that “a pay setting decision is a discrete act that occurs at a particular point in time” must be read in the context of his subsequent observation that “what Ledbetter alleged was not a single wrong consisting of a succes-

176. See supra note 138.
177. Ledbetter, 127 S. Ct. at 2165.
178. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). Morgan provides examples of discrete actions as noted in subsection II.B.3, but the language of the opinion does not indicate that the list is either exhaustive or static. Because the examples listed were not directly before the Court in Morgan, they are perhaps best thought of as dicta.
179. Ledbetter, 127 S. Ct. at 2175.
180. See Reply Brief for the Petitioner, supra note 129.
sion of acts . . . [instead, she alleged a series of discrete discriminatory acts . . . each of which was independently identifiable and actionable . . . .]¹⁸¹

Thus, the majority in Ledbetter did not hold that an individual plaintiff could never bring a hostile pay environment claim. They simply held that Ledbetter had not alleged such a claim. In other words, while it is arguable that Ledbetter may have refined the holding of Morgan by holding that discriminatory acts recognizable as discrete cannot make up the component parts of a hostile work environment claim,¹⁸² neither Morgan nor Ledbetter directly held that an act identifiable as discrete in one factual context must always be characterized as discrete in other factual contexts.

Future plaintiffs wishing to bring hostile pay environment claims should therefore track the language of the two Morgan tests faithfully in their pleadings, taking care to allege that the component pay decisions were not easily identifiable as either discriminatory or actionable until their repetitious nature made them so. The plaintiff must also be certain that at least one of the component pay-setting decisions occurred within the charging period.

2. Hostile Pay Environment: Pattern-or-Practice Claims

Attentive attorneys who wish to bring hostile pay environment claims on behalf of their client may agree that the door has not been expressly closed by Ledbetter, yet still perceive a pattern in the Court's treatment of Title VII that makes them justifiably hesitant about

¹⁸¹. Ledbetter, 127 S. Ct. at 2175.
¹⁸². This question had been left open by Morgan, as one commentator noted:

The . . . majority's decision [in Morgan] to let individuals invoke the continuing violations doctrine for hostile environment claims will simply lead employees to couch their claims in hostile environment terms. This will often be possible because the dichotomy that the Court creates between hostile environment claims and discrete acts claims is a false one, in that the two are often intertwined. Plaintiffs, that is, frequently contend that discrete acts of discrimination or retaliation contributed to the hostile environment . . . Unless the courts are prepared to bar plaintiffs who allege hostile environment from pointing to discrete acts of discrimination, the actual result of . . . [Morgan] may thus be the approval of the continuing violations theory in most or all serial violation cases.

Leading Cases III, supra note 166, at 360–61 (footnotes omitted). While Ledbetter may have appeared to resolve this question, it is again noteworthy that the majority in Ledbetter determined that a hostile environment claim was not before them. As such, there is at least a good argument that discrete acts can be considered as component parts of a hostile environment claim. Further support for this idea comes from the fact that in Morgan, the Ninth Circuit relied on many of the discrete acts alleged by Morgan in determining that the continuing violations theory applied to Morgan's hostile environment claim, and the Supreme Court affirmed that Morgan's hostile environment claim was timely. See id. n.77.
their client's chances of success. Such an attorney may wish to proceed on a pattern-or-practice theory; for, as will be shown, the Court has already implicitly (and perhaps unwittingly) approved of hostile pay environment pattern-or-practice claims.

As mentioned in subsection II.A.3 of this Note, in a pattern-or-practice case, the individual plaintiff or plaintiffs usually allege individual disparate treatment claims, but then bring a class action asserting that the employer's disparate treatment of the plaintiffs is the result of an organization-wide "pattern-or-practice" of intentional discriminatory treatment. When the Morgan Court split the world of Title VII cases in two, it expressly declined to determine whether the rule it announced applied to pattern-or-practice claims brought by private litigants. Thus, the question as to whether the continuing violation theory applied to pattern-or-practice cases remained an open issue at the time Ledbetter was decided.

Ledbetter did not decide the issue directly because the claim brought was not styled as a pattern-or-practice claim. However, the Court in Ledbetter did give a nod of approval to its prior decision in Bazemore. As previously mentioned, Bazemore was a disparate pay action wherein the petitioners alleged that the respondents had developed and continued a pattern of paying blacks less than whites. The petitioner, the United States, further argued "that the continued intentional payment of discriminatory salaries to blacks constitutes a continuing violation of Title VII".

183. As Bob Dylan would say, "You don't need a weatherman to know which way the wind blows." BOB DYLAN, Subterranean Homesick Blues, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

184. Morgan, 536 U.S. 101, 115 n.9 (2002) ("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.").

185. See supra subsection II.B.2.


We argue simply that the continued intentional payment of discriminatory salaries to blacks constitutes a continuing violation of Title VII. If amici AFL-CIO intend to suggest that a racially neutral policy (dealing, for example, with promotions or incentive bonuses), consistently applied since the enactment of Title VII, constitutes a "present violation" of the Act, simply because policies previously followed placed blacks in a less advantageous position and they have failed to "catch up," we seriously disagree. Such an analysis would be directly contrary to the rule that Title VII imposes on the employer no responsibility to eliminate a practice which "gives present effect to a past act of discrimination." United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). For, if a nondiscriminatory failure to correct the continuing effects of pre-Act discrimination constituted a "present violation" of Title VII, then the employer who discriminated on the basis of sex before 1972 in Evans would have committed a "present violation" by refusing to alter the "victim's" seniority, and the employer in Hazelwood who discriminated in hiring before the Act
In a post-Morgan world, the Ledbetter Court’s approval of Bazemore can mean one of two things. First, it could mean that the dichotomy announced in Morgan has no application to pattern-or-practice claims. Indeed, because plaintiffs in pattern-or-practice cases seek to impose liability by claiming that the practice of discrimination is an employer’s unannounced standard operating procedure, it would make little sense to bar from consideration untimely discrete acts that merely act as components of the claim.

However, the Ledbetter Court’s approval of Bazemore could be interpreted under the assumption that the dichotomy announced in Morgan applies to pattern-or-practice cases in the same way it applies to all other Title VII disparate treatment actions. If this is the case, however, then Ledbetter’s apparent approval of the application of the continuing violation theory in Bazemore implicitly recognizes a “hostile pay environment claim,” because a continuing violation theory can only be recognized in claims of hostile work environment in the post-Morgan era.\textsuperscript{187}

Thus, plaintiffs who feel they have been subjected to discriminatory pay setting decisions throughout their careers must style their claims carefully in order to have the entire discriminatory period considered. To increase their chances of success, they should allege that the discriminatory pay setting decisions represent a practice that did not manifest itself in a way that was identifiable or actionable until enough pay setting decisions passed for a discernable pattern to emerge. They should also allege that component discriminatory decisions were made within the charging period. If possible, other members of the plaintiff’s protected class should be joined, or certified as a class, in order to bolster proof of a firm-wide pattern-or-practice.

V. CONCLUSION

The Supreme Court held in Ledbetter that time-barred past acts of intentional discrimination do not become actionable each time their effects are felt. Thus, the decision to offer a discriminatory wage, and not the actual payment of the wage by a facially neutral pay system, determines when the action occurs for purposes of Title VII. This is so because to hold otherwise would thwart the Court’s present-intent requirement in disparate treatment cases. Although the Court could have disposed of Ledbetter’s case without determining how pay-setting decisions should be classified after Morgan, the Court held that such acts are properly characterized as discrete acts that must be

\textsuperscript{187.} See supra subsections II.B.3, IV.A.1.
brought within the EEOC charging period. To the extent the Court in *Ledbetter* made a static classification of pay setting decisions as discrete acts, its interpretation of *Morgan* was unnecessarily narrow and offensive to the remedial purpose of Title VII.

However, a close reading of *Ledbetter* indicates that the Court may have confined this holding to the particular facts and allegations of the case, leaving open the possibility that pay-setting decisions that span careers can still be challenged for liability purposes under a hostile pay environment theory. Such hostile pay environment claims have not been expressly foreclosed by any of the Court's Title VII cases and have been implicitly recognized in pattern-or-practice cases. Furthermore, if determined on a case-by-case basis, such claims could overcome unnecessary judicial constraints and allow Title VII to reach its full remedial potential.

*Joseph M. Aldridge*