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# CIVIL RIGHTS

## MISCONCEPTIONS ABOUT LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

By Hans Bader

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### Note from the Editor:

This article discusses the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, as well as two subsequent pieces of legislation, the Lilly Ledbetter Fair Pay Act of 2009 and the Paycheck Fairness Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, we offer links below to various materials discussing this topic, and we invite responses from our audience. To join the debate, please e-mail us at [info@fed-soc.org](mailto:info@fed-soc.org).

### Related Links:

- Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007): <http://www.law.cornell.edu/supct/html/05-1074.ZS.html>
  - Testimony of Lilly Ledbetter before the Senate Judiciary Committee on Sept. 23, 2008: [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1411260&wit\\_id=e655f9e2809e5476862f735da1411260-1-1](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1411260&wit_id=e655f9e2809e5476862f735da1411260-1-1)
  - Allison Cimpl-Wiemer, Ledbetter v. Goodyear: *Letting the Air out of the Continuing Violations Doctrine?*, 92 MARQU. L. REV. 355 (2008): <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1310&context=mulr>
  - NATIONAL WOMEN'S LAW CENTER, FACT SHEET: WHAT THE PAYCHECK FAIRNESS ACT WOULD REALLY DO (2012): [http://www.nwlc.org/sites/default/files/pdfs/pfa\\_myths\\_and\\_facts\\_factsheet\\_5.30.12\\_final.pdf](http://www.nwlc.org/sites/default/files/pdfs/pfa_myths_and_facts_factsheet_5.30.12_final.pdf)
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### I. LEDBETTER V. GOODYEAR TIRE & RUBBER CO.

Lilly Ledbetter became famous when she lost her pay-discrimination case in the Supreme Court. Her lawsuit was rejected as untimely in the Supreme Court's 5-4 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), because she filed her complaint with the Equal Employment Opportunity Commission (EEOC) too late. The Supreme Court said that, in most cases, employees should file an EEOC complaint within 180 days of their first discriminatory paycheck, if they want to sue under the federal anti-discrimination law with the shortest deadline, Title VII of the Civil Rights Act.<sup>1</sup> But, it left open the possibility that the deadline could be extended for employees who do not discover the discrimination until later.<sup>2</sup> And it pointed out that she might have fared better had she simply pressed her claim under a different law that has a longer deadline.<sup>3</sup>

Ms. Ledbetter has since repeatedly claimed that she only learned she was paid less than her male co-workers at the end of her career,<sup>4</sup> and then belatedly filed an EEOC complaint. In her testimony before the United States Senate, Ledbetter stated that she "only learned about the discrepancy in [her] pay after nineteen years, and that was with someone leaving me an anonymous note."<sup>5</sup> She later made similar claims in speeches at the Democratic National Conventions in 2008<sup>6</sup> and 2012 (claiming that she did not learn of it until "two decades" after she began working at the company).<sup>7</sup> Her story was widely publicized by the media.<sup>8</sup> However, the factual

record of the *Ledbetter* case is much different than what has been reported.

Ms. Ledbetter worked for the company for nineteen years, from 1979 to 1998.<sup>9</sup> She learned of the pay disparity by 1992, as excerpts from her deposition, filed in the Supreme Court as part of the Joint Appendix, make clear. In response to the question: "So you knew in 1992 that you were being paid less than your peers?" she answered simply "yes, sir."<sup>10</sup> But she only filed a legal complaint over it in July 1998, shortly before her retirement in November 1998.<sup>11</sup> As Stuart Taylor of the *National Journal* pointed out:

Ledbetter admitted in her sworn deposition that "different people that I worked for along the way had always told me that my pay was extremely low" compared to her peers. She testified specifically that a superior had told her in 1992 that her pay was lower than that of other area managers, and that she had learned the amount of the difference by 1994 or 1995. She added that she had told her supervisor in 1995 that "I needed to earn an increase in pay" because "I wanted to get in line with where my peers were, because... at that time I knew definitely that they were all making a thousand [dollars] at least more per month than I was."<sup>12</sup>

Thus, the record shows she was aware of the pay disparity for over five years before filing a legal complaint over it.

By claiming that she learned of the pay disparity just before filing a legal complaint over it, Ledbetter was able to make it sound like the Supreme Court had acted unreasonably in barring her lawsuit as untimely, and created the impression that it had applied the deadline rigidly, without regard to whether she could have learned of the discrimination in time to sue.

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Act, which also prohibits pay discrimination based on sex.<sup>39</sup>

Perhaps anticipating the argument that the Equal Pay Act provided an alternative remedy for female employees, Speaker Pelosi claimed that the *Ledbetter* “decision severely restricted workers’ ability to pursue claims of pay discrimination on the basis of not only sex, but race” and other characteristics as well.<sup>40</sup> But this also led to another major misconception. While it is true that the Equal Pay Act itself only covers sex discrimination, lawsuits alleging intentional racial discrimination or racially unequal treatment can be brought by any employee, public or private, under 42 U.S.C. § 1981, which has a long four-year deadline for suing.<sup>41</sup> Public employees can sue for pay discrimination,<sup>42</sup> including racial, sexual,<sup>43</sup> or religious<sup>44</sup> discrimination, under 42 U.S.C. § 1983, which has a statute of limitations as long as six years in some states.<sup>45</sup>

Moreover, the *Ledbetter* decision itself indicated that the deadline for suing might start running all over again with each new paycheck in cases alleging *unintentional* or “disparate impact” discrimination (rather than the intentional discrimination alleged by Ms. Ledbetter).<sup>46</sup> Indeed, the Supreme Court later ruled unanimously that in such cases, a worker can sue within 180 days of each *application* of a discriminatory policy (like a recently-issued paycheck), rather than having to sue within 180 days after the policy was first *set*, since the focus in unintentional discrimination cases is not the employer’s intent at the time it adopted the policy (which is irrelevant in such cases), but rather any *application* of the policy.<sup>47</sup> Thus, the *Ledbetter* decision did not restrict workers’ ability to pursue those claims of pay discrimination at all, regardless of whether the alleged discrimination was based on race, sex, or religion.

By allowing employers to be sued many years after a worker’s pay is set, simply because the worker is still drawing a paycheck, the Lilly Ledbetter Fair Pay Act may leave some employers unable to defend themselves against meritless charges. The Supreme Court noted that due to Ledbetter’s own delay in suing Goodyear, the supervisor involved in setting her pay had died by the time her case was tried: “Ledbetter’s claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor . . . by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously.”<sup>48</sup> The passage of time thus left the company less able to show that Ledbetter’s lower pay was not the result of sexism or discriminatory intent.<sup>49</sup>

### B. The Paycheck Fairness Act

The notion that the *Ledbetter* decision barred women from suing over pay discrimination even when they could not have discovered it any sooner was also used to press for passage of the Paycheck Fairness Act, a bill that would make changes to the Equal Pay Act.<sup>50</sup>

Backers of the Paycheck Fairness Act relied on other misconceptions as well. House Speaker Pelosi argued that existing law treated victims of sex discrimination worse than other kinds of discrimination, and that the Paycheck Fairness Act was thus needed to put “gender-based discrimination sanctions on equal footing with other forms of wage discrimination by allowing

women to sue for compensatory and punitive damages.”<sup>51</sup>

First, although the Equal Pay Act does not authorize compensatory and punitive damages (it does give employees back pay and liquidated damages), Title VII, which also prohibits pay discrimination based on sex, makes available compensatory and punitive damages up to \$300,000 to employees who prevail in discrimination lawsuits<sup>52</sup> (in addition to providing them with back pay<sup>53</sup> and attorney’s fees).<sup>54</sup>

Under current law, victims of sex discrimination are better off than employees alleging discrimination based on other factors, such as religion. Those employees can sue only under Title VII, not the Equal Pay Act, and thus cannot recover liquidated damages the way that plaintiffs alleging gender discrimination under the Equal Pay Act can.<sup>55</sup>

The Paycheck Fairness Act would give plaintiffs suing over pay discrimination damages unavailable to other kinds of discrimination victims. For example, although compensatory and punitive damages (unlike back pay) are usually unavailable to workers suing over unintentional or “disparate-impact” discrimination,<sup>56</sup> the Paycheck Fairness Act would create an exception for gender-based equal-pay cases, giving such plaintiffs compensatory damages even in cases of unintentional pay discrimination.<sup>57</sup>

Moreover, the Paycheck Fairness Act would completely eliminate the cap on compensatory and punitive damages for one special category of discrimination plaintiff—those alleging gender-based pay discrimination.<sup>58</sup> For most other categories of discrimination, the cap would remain at \$300,000.<sup>59</sup>

Other provisions in the bill would undermine rather than promote equality. As Speaker Pelosi noted, under the Equal Pay Act, “Courts have allowed employers to use any factor other than sex to justify a pay disparity between men and women.” By contrast, “Under the Paycheck Fairness Act, an employer would have to show that the disparity . . . is job-related, and is consistent with business necessity.”<sup>60</sup> So the fact that an employer relied on a “factor other than sex” to set pay would not necessarily be a defense under the Paycheck Fairness Act, which could hold an employer liable even if it was perfectly fair in how it paid its workers.<sup>61</sup>

To this last point, it is worth noting that not all pay disparities between men and women are the product of sexism or discrimination. For example:

Men are far more likely to choose careers that are more dangerous, so they naturally pay more. Top 10 most dangerous jobs (from the U.S. Bureau of Labor Statistics): Fishers, loggers, aircraft pilots, farmers and ranchers, roofers, iron and steel workers, refuse and recyclable material collectors, industrial machinery installation and repair, truck drivers, construction laborers. They’re all male-dominated jobs.<sup>62</sup>

Ninety-two percent of all workers who die on the job are men, even though only a bare majority of all workers are men.<sup>63</sup> Moreover, “Men are far more likely to take work in uncomfortable, isolated, and undesirable locations that pay more. Men work longer hours than women do. The average fulltime working man works six hours per week or fifteen percent longer than the average fulltime working woman.”<sup>64</sup> These examples are at odds with the assumption of many supporters of the Paycheck



Fairness Act and the Ledbetter Act that pay disparities are simply the result of gender bias or sexism.

## Endnotes

- 1 See 42 U.S.C. § 2000e-5(e)(1) (180-day deadline applies in states that do not have “a State or local agency with authority to grant or seek relief” from the alleged discrimination, and 300-day deadline applies in other states).
- 2 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.10 (2007).
- 3 See *id.* at 621.
- 4 *Pay Equity Pioneer Lilly Ledbetter Addresses the DNC*, PBS Newshour, August 26, 2008, available at [www.pbs.org/newshour/bb/politics/july-dec08/ledbetter\\_08-26.html](http://www.pbs.org/newshour/bb/politics/july-dec08/ledbetter_08-26.html).
- 5 See Senate Judiciary Hearing on Elena Kagan’s Nomination to the Supreme Court, July 1, 2008 beginning at the 74 minute mark, available at [www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=judiciary070110&st=xxx](http://www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=judiciary070110&st=xxx).
- 6 *Pay Equity Pioneer Lilly Ledbetter Addresses the DNC*, PBS Newshour, Aug. 26, 2008 (Ledbetter said she learned of the pay disparity from an “anonymous note in my mailbox,” after beginning to suspect it “toward the end of my 19 years at Goodyear”; “our highest court sided with big business. They said I should have filed my complaint within six months of Goodyear’s first decision to pay me less, even though I didn’t know that’s what they were doing.”).
- 7 *Speech by Lilly Ledbetter at Democratic National Convention (Text / Video)*, available at <http://electronicvillage.blogspot.com/2012/09/speech-by-lilly-ledbetter-at-democratic.html>.
- 8 See, e.g., Jim Abrams, Associated Press, *Democrats in House Push Through 2 Pay-Equity Bills*, South Florida Sun-Sentinel, January 10, 2009, at 9A (“Lilly Ledbetter. . . sued the company over pay discrimination when she learned, shortly before retiring after a 19-year career there, that she was paid less than any male supervisor”); Fanny Carrier, *Retired US worker Becomes Champion of Women’s Fair Pay*, Agence France Presse English Wire, January 30, 2008 (“Ten years ago, someone slipped an anonymous note into Lilly Ledbetter’s locker and the tire factory worker learned that she was being paid less than her male counterparts who were doing the same work. . . She immediately” complained to the EEOC, but her case was dismissed as untimely); Ann Friedman, *TAP Talks with Lilly Ledbetter*, THE AMERICAN PROSPECT, April 23, 2008 (In *Ledbetter*, “The justices ruled that employees can only file a wage-discrimination complaint within 180 days of when the payroll decision was made,” “which leaves women and minorities in Ledbetter’s situation with no recourse”; “TAP talked with Ledbetter . . . *How did you finally find out how much your male co-workers were making?* The only way that I really knew was that someone left an anonymous note in my mailbox showing my pay and the pay for the three males who were doing the same job”), <http://prospect.org/article/tap-talks-lilly-ledbetter-0>.
- 9 *Ledbetter*, 550 U.S. at 621.
- 10 *Ledbetter v. Goodyear Tire & Rubber Co.*, Case No. 05-1074, *Joint Appendix* at pg. 233 (Page 123 of Ledbetter’s deposition), available at [www.scorusblog.com/movabletype/archives/LedbetterJoinAppendix.pdf](http://www.scorusblog.com/movabletype/archives/LedbetterJoinAppendix.pdf) (this is from a web site co-sponsored by Ledbetter’s own lawyers in the Supreme Court, the Howe & Russell law firm); see also Copus, *Pay Discrimination Claims After Ledbetter*, 75 DEFENSE COUNSEL JOURNAL 300, 305 (2008) (Copus, a leading employment lawyer who once worked for the EEOC, noting that Ms. Ledbetter admitted in her deposition that she was aware of the disparity in pay by 1992).
- 11 *Ledbetter*, 550 U.S. at 621.
- 12 Stuart Taylor, *The Right Should Stop Demagoguing -- And Obama Should Stop Distorting Facts*, NATIONAL JOURNAL, May 28, 2009, available at <http://ninthjustice.nationaljournal.com/2009/05/the-right-should.php>.
- 13 See, e.g., Jim Abrams, *Democrats in House Push Through 2 Pay-Equity Bills*, ASSOCIATED PRESS, *supra* (“The Lilly Ledbetter Act would reverse a 2007 Supreme Court ruling that a worker must file claims of wage discrimination within 180 days of the first decision to pay that worker less, even if the person was unaware of the pay disparity”); *Shut loophole on inequality*, Editorial, VENTURA COUNTY STAR, Aug. 27, 2008 (“When Ms. Ledbetter retired from

- her job of 19 years, she got an anonymous note that her salary of \$45,000 a year was \$6,600 less than the lowest-paid male supervisor”; the courts ruled against her because “Ms. Ledbetter had not filed her discrimination lawsuit within the proscribed 180 days after the alleged discrimination occurred, which was several years earlier. The catch? Ms. Ledbetter did not know that, for years, she had been paid less than her male colleagues.”), available at <https://www.vcstar.com/news/2008/aug/27/shut-loophole-on-inequality/>; Gail Collins, *McCain’s Compassion Tour*, N.Y. TIMES, April 26, 2008, at A21 (“When she was near retirement, she got an anonymous letter listing the salaries of the men who held the same job,” who were paid more; the Supreme Court “ruled 5-to-4 against Ledbetter, saying that she should have filed her suit within 180 days of receiving her first paycheck in which Goodyear discriminated against her. The fact that workers generally have no idea what other people are making when they start a job did not concern the court. . . . In other words, pay discrimination is illegal unless it goes on for more than six months.”).
- 14 House Speaker Nancy Pelosi, *Fair Pay* (“the Supreme Court said that Ledbetter had waited too long to sue for pay discrimination, despite the fact that she filed a charge with the U.S. Equal Employment Opportunity Commission as soon as she received an anonymous note alerting her to pay discrimination.”) ([www.democraticleader.gov/floor?id=0269](http://www.democraticleader.gov/floor?id=0269)).
- 15 See, e.g., Kenneth R. Bazinet & Davis Saltonstall, *Michelle Charms at Bam’s 1<sup>st</sup> Bill Signing, Lauds Granny Behind Equal-Pay Law*, N.Y. DAILY NEWS, Jan. 30, 2009, at 2 (Obama claimed Ledbetter worked for Goodyear “for nearly two decades before discovering that for years, she was paid less than her male colleagues.”).
- 16 Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009), 42 U.S.C. § 2000e-5(e)(3).
- 17 Macon Phillips, *Now Comes Lilly Ledbetter*, THE WHITE HOUSE BLOG, January 25, 2009, 1:48 p.m. EDT, available at <http://www.whitehouse.gov/now-comes-lilly-ledbetter/>.
- 18 *Ledbetter*, 550 U.S. at 642 n.10.
- 19 *Id.* at 621. See 29 U.S.C. § 255(a) (deadline of 2 or 3 years under the Equal Pay Act depending on the type of claim); *Ledbetter*, 550 U.S. at 658 n.8 (Ginsburg, J., dissenting) (saying that “under the Equal Pay Act,” Ledbetter “would not have encountered a time bar”).
- 20 Paul Mirengoff, *Demonizing the “Roberts Court,” Dishonestly, Part One*, POWERLINE BLOG, July 5, 2010, <http://www.powerlineblog.com/archives/2010/07/026687.php>.
- 21 *Zipes v. Trans World Airlines*, 451 U.S. 385, 393 (1982).
- 22 For example, Ross Runkel wrote that “This is the correct decision, following the reasoning that I predicted back in November.” Runkel, *Ledbetter Loses Pay Discrimination Case*, LAW MEMO, May 29, 2007, [http://www.lawmemo.com/blog/2007/05/ledbetter\\_loses.html](http://www.lawmemo.com/blog/2007/05/ledbetter_loses.html).
- 23 *Ledbetter*, 550 U.S. at 642 n.10.
- 24 See *Zipes*, 451 U.S. at 393; *Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir.1980) (extending deadline due to deceptive statements); *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 382-83 (9th Cir. 1979) (deadline extended due to employer’s fraudulent concealment of violation).
- 25 *Ledbetter*, 550 U.S. at 621.
- 26 See *id.* at 658 n.8 (Ginsburg, J., dissenting) (discussing limitations period of two or three years for Equal Pay Act claims, and saying that “under the Equal Pay Act,” Ledbetter’s claim “would not have encountered a time bar”).
- 27 *Ledbetter*, 550 U.S. at 621.
- 28 29 U.S.C. § 255(a) (prescribing a three-year deadline for willful violations, and a two-year deadline for all other violations, such as unintentional violations, in minimum wage cases); 29 U.S.C. § 206(d)(3) (treating Equal Pay Act violations as if they were minimum wage violations, and thus subjecting them to the deadline in § 255(a)).
- 29 *Ledbetter*, 550 U.S. at 640 (responding to Ledbetter’s observation that “lower courts routinely hear [EPA] claims challenging pay disparities that first arose outside the limitations period” by noting that “the EPA and Title VII are not the same”; “If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts”).
- 30 *Ledbetter*, 550 U.S. at 658 n.8 (Ginsburg, J., dissenting) (“Under the

EPAs,” “a claim charging denial of equal pay accrues anew with each paycheck,” citing legal treatise).

31 42 U.S.C. § 2000e-2(k)(1) (employer policies that have an unintentional “disparate impact” on a race or gender are illegal unless they are shown to be “job related” and “consistent with business necessity”).

32 130 S.Ct. 2191 (2010).

33 *Ledbetter*, 550 U.S. at 640 (citing 29 U.S.C. § 206(d)(1)).

34 42 U.S.C. § 2000e-5(e)(3).

35 It passed the House on July 31, 2008. See H.R. 1338 (110th): Paycheck Fairness Act, <http://www.govtrack.us/congress/bills/110/hr1338>; see also 154 Cong. Rec. H7681. It passed the House again on January 9, 2009. See 155 Cong. Rec. H127; see also H.R. 12 (111th): Paycheck Fairness Act, <http://www.govtrack.us/congress/bills/111/hr12>. It “was never passed by the Senate.” *Id.*

36 House Speaker Nancy Pelosi, *Fair Pay*, [www.democraticleader.gov/floor?id=0269](http://www.democraticleader.gov/floor?id=0269).

37 See, e.g., Abrams, *supra* note 8 (“The Lilly Ledbetter Act would reverse a 2007 Supreme Court ruling that a worker must file claims of wage discrimination within 180 days of the first decision to pay that worker less, even if the person was unaware of the pay disparity”).

38 *Zipes*, 455 U.S. at 393 (“filing a timely charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling”).

39 See 29 U.S.C. § 206(d).

40 Pelosi, *supra* note 36.

41 Jones v. R.R. Donnelley & Sons, 541 U.S. 369 (2004) (four-year deadline).

42 Maitland v. Univ. of Minnesota, 155 F.3d 1013 (8<sup>th</sup> Cir. 1998).

43 See Davis v. Passman, 442 U.S. 228 (1979) (Constitution forbids employment discrimination based on sex).

44 See Torcaso v. Watkins, 367 U.S. 488 (1961).

45 See, e.g., Egerdahl v. Hibbing Comm. College, 72 F.3d 615 (8<sup>th</sup> Cir. 1995).

46 *Ledbetter*, 550 U.S. at 640 (noting that the deadline might run anew with each paycheck under a statute that does “not require . . . proof of intentional discrimination”).

47 *Lewis*, 130 S.Ct. at 2199 (“a Title VII plaintiff must show a “present violation” within the limitations period. . . What that requires depends on the claim asserted. For disparate-treatment claims—and others for which discriminatory intent is required—that means the plaintiff must demonstrate deliberate discrimination within the limitations period. See *Ledbetter*, *supra*, at 624–629 . . . But for claims that do not require discriminatory intent, no such demonstration is needed. Cf. *Ledbetter*, *supra*, at 640. . . [*Ledbetter*’s] reasoning has no application when, as here, the charge is disparate impact, which does not require discriminatory intent.”).

48 *Ledbetter*, 550 U.S. at 632 n.4.

49 Even if she was paid less, that was not illegal, unless her lower pay was based on her sex. If her job performance was worse, or her male co-workers were better at negotiating raises, those could be defenses to liability. See *Dey v. Colt Construction*, 28 F.3d 1446, 1462 (7<sup>th</sup> Cir.1994).

50 Rep. Louise Slaughter, *Close Wage Gap That Hurts Women and Undercuts Principle of Equality*, ROCHESTER DEMOCRAT & CHRON., July 20, 2008, at A17 (“Paycheck Fairness Act” is “critical legislation will rectify the Supreme Court’s decision in *Ledbetter v. Goodyear*,” which supposedly prevented women from suing because “pay practices typically take place in secret,” making it “almost impossible for a woman to discover discrimination within 180 days.”); Anne Ladky, executive director, Women Employed, *Pay Discrimination*, CHICAGO TRIBUNE, June 15, 2012, at 35 (PFA needed because “women often have no way of knowing that they are being paid less,” and PFA “would make it illegal to retaliate against an individual for talking about pay with other employees”).

51 Pelosi, *supra* note 36.

52 42 U.S.C. § 1981a(a)(1)&(b)(3).

53 42 U.S.C. § 2000e-5 (g).

54 42 U.S.C. § 2000e-5 (k); see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

55 See *Russell v. City of Overland*, 838 F.Supp. 1350, 1354 (E.D. Mo.1993).

56 See 42 U.S.C. § 1981a(a)(1).

57 Paycheck Fairness Act, S. 182, § 3(c)(1) (amending 29 U.S.C. § 216(b)).

58 *Id.*

59 See 42 U.S.C. § 1981a(b)(3).

60 Nancy Pelosi, *supra* note 36; see Paycheck Fairness Act S. 182, § 3(a)(3) (adding 29 U.S.C. § 206(d)(1)(B) (“The bona fide factor defense . . . shall apply only if the employer demonstrates that such factor . . . (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.”), <http://www.opencongress.org/bill/111-s182/text>.

61 The Society for Human Resource Management contends that “the PFA would effectively prohibit employers from using many legitimate factors to compensate their employees, including professional experience, education, training, employer need, local labor market rates, hazard pay, shift differentials and the profitability of the organization.” See Tim Gould, *HR Morning*, May 25, 2012, [www.hrmorning.com/hr-pros-rally-against-paycheck-fairness-act-passage/](http://www.hrmorning.com/hr-pros-rally-against-paycheck-fairness-act-passage/) (quoting the SHRM).

62 Steve Tobak, *The Gender Gap Is A Complete Myth*, CBS NEWS, March 8, 2011, [http://www.cbsnews.com/8301-505125\\_162-28246928/the-gender-pay-gap-is-a-complete-myth/](http://www.cbsnews.com/8301-505125_162-28246928/the-gender-pay-gap-is-a-complete-myth/).

63 Bureau of Labor Statistics, FATAL WORK INJURIES AND HOURS WORKED, By Gender of Worker 10 (2010), available at <http://www.bls.gov/iif/oshwc/cfoi/cfch0009.pdf>.

64 Tobak, *supra* note 62.

