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The Lilly Ledbetter Fair Pay Act Took Us Back to the Status Quo: Gender Discrimination Lives On with the Gender Pay Gap

June 25th, 2013 | Rebecca Pontikes



American women were appalled when the U.S. Supreme Court snatched away Lilly Ledbetter's gender pay discrimination victory over Goodyear Tire because Ledbetter did not know about repeated gender discrimination in pay at each moment it occurred. In a decision that ignored workplace norms and realities, the Court explained that Ledbetter lost her right to sue for unequal pay because she did not meet a legal time limit for each discriminatory paycheck (even though she was unaware about the discrimination as it occurred). The outcry started with Justice Ruth Bader Ginsberg. In reading her stinging dissent from the bench, she observed "Pay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination." [Ledbetter v. Goodyear, 550 U.S. 618 \(2007\)](#). The law recognizes that someone in a hostile work environment might take some time to piece it all together and sue, and that worker is not penalized for the time that realization takes with a strict time limit.

Congress reacted, and on January 20, 2009, President Obama signed the [Lilly Ledbetter Fair Pay Act of 2009](#). The Ledbetter Act makes the time limit to bring a lawsuit for discriminatory wages more like that for a hostile work environment, making it a violation of Title VII every time someone receives a discriminatory paycheck and making recovery available for older violations if they are similar to newer violations. Although there was much rejoicing, the Ledbetter Act did not radically change the law. The only effect of the Ledbetter Act was to return the discrimination laws to their original purpose: *to eradicate discrimination*.

What the Ledbetter Act did *not* address was the troubling claim by the majority that Ledbetter's later paychecks could not have been issued with the discriminatory bias because the supervisors who continued to pay less because of her gender *did not make a decision* to pay her less. [Ledbetter, 550 U.S. at 629](#). By focusing on a literal, conscious, deliberative decision the U.S. Supreme Court discounted the role of reflexive bias (acting on gender stereotypes) in managerial decisions, including setting pay, which leads to discrimination. The discriminatory effect of reflexive bias is real. Supervisors acting on stereotypes or on reflexive biases often make decisions based upon stereotypes about male and female roles, including deciding to pay men more and women less, even though they are not making a literal, conscious choice to discriminate and might even think of themselves as unbiased. A decision to pay a female employee less might not be generated by a hostile thought process, yet the effect is just as illegal as a deliberate decision to act with discriminatory intent. Stereotyping as illegal discrimination is not a new idea for the U.S. Supreme Court. While it seems to have ignored it here, in [Price Waterhouse v. Hopkins, 490 U.S. 228 \(1989\)](#), the Court recognized that making a decision based on stereotypes about women or men, including how much (or little) to pay them, is discriminatory and illegal.

Historical wage data illustrates the significant effect of unconscious bias on decisions determining women's pay. In 1979, the first year for which comparable earnings data are available, women earned 62 % of male salaries. By 2010, decades after Title VII and the Equal Pay Act had been in force, the gap had narrowed significantly, with women earning around 79 to 80% of the average male weekly wage. However, it took over thirty years for the gap to narrow, and the gap has not budged since 2004. "[Women in the Labor Force: A Databook \(2010 Edition\)](#)" Table 16, U.S. Dept. of Labor, U.S.

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[Bureau of Labor Statistics, July 2011](#). Even more disturbing are the statistics for working mothers. While a childless woman earns 94 cents of a childless man's dollar, mothers earn only 60 cents of a father's dollar, even less than all women earned in comparison to all men in 1979.

Experimental research shows that mothers in particular are subject to pervasive reflexive gender bias. In one study, test subjects were asked to review resumes that differed only in noting parental status. The reviewers systematically rated childless women and fathers significantly higher than mothers on competency, work commitment, promotability, and recommendations for hire. Reviewers gave mothers the lowest wage offers, averaging \$13,000 less than wage offers made to fathers. [Shelley J. Correll, Stephen Benard, and In Paik, Getting a job: Is There a Motherhood Penalty?, 112 Am. J. of Soc. 1297-1338 \(2007\)](#). This phenomenon occurs whether the woman is a low wage worker or a highly paid one. (See [Chris Fleming, Gender Gap In Starting Physician Salaries Is Growing, Health Affairs Blog, February 3, 2011](#)) It is no surprise that among mothers in management, there is a gender pay gap relative to fathers ranging from 21% to 34%. The wage gap among childless managers is notably lower than the wage gap, at 17% to 24%. [See Testimony of Michelle J. Budig, Assoc. Prof. of Sociology, Faculty Associate, Center for Public Policy Administration, Univ. of Massachusetts at Amherst, "New Evidence on the Gender Pay Gap for Women and Mothers in Management," Sept. 28, 2010](#). Putting these findings together, it is clear that there is a substantial bias against mothers, whether deliberate or unconscious, in the workplace that is causing a sizable gap between working mothers' compensation and childless women and all men.

While the Ledbetter Act was certainly important to reverse the U.S. Supreme Court's limitation on employee rights, it did nothing to address the status quo of wage inequality for women, particularly for working mothers. What we now need are laws that address unconscious gender bias and combat enduring stereotypes about gender roles. One measure to combat this act is the Paycheck Fairness Act ("PFA") (H.R. 377 and S. 84). [The PFA would change the manner in which female-dominated positions are valued, with provisions limiting an employer's defense that compensation was based on factors "other than sex," expanding damages, and proposing guidelines for employers on evaluating jobs without gender bias](#). [Although the bill has been introduced in the Senate since 2009](#), it has never mustered enough votes to pass. In January 2013, [Senator Milkulski has reintroduced the bill and it is currently sitting in committee](#). When a law like the PFA passes, we can make progress in addressing the invidious and unconscious discrimination that perpetuates the gender wage gap and finally close it.

About the Author: Rebecca Pontikes has been practicing law since 1997. She has a passion for employment law and civil rights that drives her practice. In addition to employment, she also has brought suit under Title IX on behalf of a sexually assaulted student. She is a graduate of the University of Michigan Law School and of Tufts University and is admitted to the Massachusetts bar, the Federal District of Massachusetts, and the First Circuit. Her peers selected her as a "SuperLawyer" in 2004, 2007, 2008, 2009, 2010, and 2011. Massachusetts Lawyer's Weekly named her a [Top Woman in Law in 2012](#). She lives in Cambridge with her husband.

Tags: [gender pay discrimination](#), [Lily Ledbetter Fair Pay Act](#), [reflexive bias](#), [wage inequality](#)

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