

The Lilly Ledbetter Fair Pay Act: Back to the status quo, but now where do we go?

On January 20, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009. The Ledbetter Act amended Title VII, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973. The amendment states:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when a individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory practice, *including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.*

Pub. L. No. 111-2, s. 3-5. With the passage of the Act, Congress codified Justice Ruth Bader Ginsburg's observation that "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, 646 (2007) (dissent). The Act implicitly acknowledges the obstacles female employees face in determining wage discrepancies, also noted by Justice Ginsburg in her dissent. Ledbetter, 550 U.S. at 648-652 (dissent). Far from a radical change in the law, the Ledbetter Act returned the discrimination laws to their original purpose: *to eradicate discrimination.*

However, the Ledbetter Act did not address the troubling discussion by the majority opinion regarding the intent required in discrimination cases. In emphasizing the importance of proof of discriminatory intent, the Ledbetter majority claimed that Ledbetter's subsequent paychecks could not have been issued with the requisite discriminatory bias because the actors who did the ministerial act of issuing the paycheck did not make the decision to pay her less because of her gender. Ledbetter, 550 U.S. at 629. In relying upon this argument, Ledbetter appears to implicitly reject 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 are not making a literal, conscious choice to discriminate and might even think of themselves as unbiased. However, as the sociological literature has repeatedly shown, and the case law has recognized, people often make decisions based upon stereotypes about male and female roles. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009); Thomas v. Eastman Kodak Co., 183 F.3d 38, 56 (1st Cir. 1999). These decisions are not generated by a hostile thought process, yet their effects are just as illegal as a deliberate decision to act with discriminatory intent. Furthermore, these ingrained stereotypes are even more difficult to change because the perpetrators usually do not realize they are acting discriminatorily.

The significance of unconscious bias is illustrated by historical wage data. In 1979, the first year for which comparable earnings data are available, women earned 62 % of male

salaries. By 2010, the gap had narrowed significantly, with women earning 81% of the average male weekly wage. However, this narrowing of the gap occurred over thirty years, and has not budged since 2004.¹ 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. Among mothers in management, there is a gender pay gap relative to fathers ranging from 21% to 34%.² The gap among childless managers is notably lower, at 17% to 24%.

Experimental research shows that mothers in particular are subject to pervasive reflexive gender bias.³ In a recent 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.⁴ This phenomenon occurs whether the woman is a low wage worker or a highly paid one.⁵ Putting these findings together, it is clear that there is a substantial bias against mothers (though perhaps unconscious) in the workplace that causing a sizable gap between working mothers' compensation and childless women and all men.

Not only are women subject to disparate pay in side by side comparisons to similarly skilled men, but the sectors frequently dominated by women (such as administrative positions, education and healthcare) generally pay less than male-dominated sectors (such as construction, production and transportation). Women's rights advocates suspect that the valuation of female-dominated positions is subject to stereotypical notions that devalue work traditionally conceived of as "women's work." One measure to combat this act, proposed jointly in the U.S. Senate and House of Representatives, was the Paycheck Fairness Act ("PFA") (S.797, H.R. 1519). The PFA sought to 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. Unfortunately, the PFA was defeated by the Senate in November 2010 on a 58-41 procedural vote.

¹ "Highlights of Women's Earnings in 2010," U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, July 2011.

² Childlessness has risen among American women since the 1970s, particularly among highly educated women who are at high levels of management, indicating that the mothers who persist are a select group and likely the cream of the crop, given the balancing act required to reach this level. This makes the large wage gap even more disconcerting.

³ See, e.g., 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.

⁴ Shelley J. Correll, Stephen Benard, and In Paik, *Getting a job: Is There a Motherhood Penalty?*, 112 Am. J. of Soc. 1297-1338 (2007).

⁵ Robert Lowes, *Gender Gap in Physician Pay Widening*, Medscape Medical News, Feb. 4, 2011.

Thus, while the Ledbetter Act was certainly important to reverse the limitation placed on employee rights by the Ledbetter majority and to restore compensation discrimination law to the status quo, that status quo is a near-20% average wage gap between men's and women's wages. What we now need are laws that address not only invidious discrimination but also unconscious gender bias, to prevent the perpetuation of misconceptions about the value of women's work and combat enduring stereotypes about gender roles, particularly for mothers. When the laws are amended to address both invidious and unconscious discrimination, the remaining wage gap can be brought to a close.