

4-1-2011

## \$0.77 Does Not Equal \$1.00: A Perspective on the Ledbetter Fair Pay Act in a Dukes v. Wal-Mart World

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### Recommended Citation

1 Am. U. Lab. & Emp. L. F. 247 (2011).

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# NOTE

## \$0.77 DOES NOT EQUAL \$1.00: A PERSPECTIVE ON THE LEDBETTER FAIR PAY ACT IN A *DUKES V. WAL-MART* WORLD

JESSICA B. CLARKE\*

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This Note builds upon a lecture of the same title that Fatima Goss Graves, Vice President for Education and Employment at the National Women's Law Center, delivered at Washington College of Law on October 28, 2010. THE LABOR & EMPLOYMENT LAW FORUM and the Women's Law Association co-sponsored the lecture.

## I. INTRODUCTION

November 17, 2010 started and ended like a normal day for most people. For working women across the United States, it was another slap in the face. The defeat of the Paycheck Fairness Act (“PFA” or “Act”)<sup>1</sup> in the U.S. Senate delivered a strong blow to the pay equality movement and women across the country.<sup>2</sup> Among other objectives, the Act sought to provide for punitive damages for sex-based pay discrimination and to limit the ability of employers to assert that a factor other than sex prompted a difference in pay.<sup>3</sup> Ultimately, the Act sought to rectify pay discrepancies between the sexes; on average, women in the United States make seventy-seven cents for every dollar earned by a man.<sup>4</sup>

In today’s world, fair and equal pay for equal work should be the norm, but, sadly, that is not the case for most American women.<sup>5</sup> Although the wage gap between men and women has decreased, there is still work to be done to bridge that difference.<sup>6</sup> The death of the Paycheck Fairness Act should not, and cannot, be the end of the fight for wage equality.<sup>7</sup> This Note will contextualize the Paycheck Fairness Act’s importance in the

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1. Paycheck Fairness Act, S. 182, 111th Cong. (2009). The Act was reported to committee in January of 2009 and then had no movement until it was reintroduced in 2010 as S. 3772, 111th Cong. (2010) by Senator Reid. Ultimately, despite being approved by the House of Representatives, the Senate voted down the bill in November 2010. *Pay Equity Information*, NAT’L COMM. ON PAY EQUITY, <http://www.pay-equity.org/info-leg.html> (last visited Apr. 8, 2011) [hereinafter *Pay Equity Information*].

2. See Mark Gruenberg, *Senate Kills Paycheck Fairness Act*, INT’L LABOR COMM’NS ASS’N (Nov. 19, 2010), <http://ilcaonline.org/content/senate-kills-paycheck-fairness-act> (stating how the Act was defeated along party lines, with the two female Republican senators from Maine voting against the Act).

3. See NAT’L WOMEN’S LAW CTR., HOW THE PAYCHECK FAIRNESS ACT WILL STRENGTHEN THE EQUAL PAY ACT 1–2 (2010) [hereinafter NWLC, STRENGTHEN EQUAL PAY ACT], available at [http://www.nwlc.org/sites/default/files/pdfs/Broad\\_Paycheck\\_Fairness\\_Fact\\_Sheet.pdf](http://www.nwlc.org/sites/default/files/pdfs/Broad_Paycheck_Fairness_Fact_Sheet.pdf) (noting that the Paycheck Fairness Act would strengthen the remedies available under the Equal Pay Act by allowing for liquidated damages and back pay awards, in addition to limiting the “factor other than sex” affirmative defense only to situations where the employer can show that the pay differential is related to job performance and consistent with a business necessity—and not merely caused by the gender of the employee).

4. *Id.*

5. See generally NAT’L WOMEN’S LAW CTR., WOMEN’S LOWER WAGES WORSEN THEIR CIRCUMSTANCES IN A DIFFICULT ECONOMY 1 (2010) [hereinafter NWLC, WOMEN’S LOWER WAGES], available at <http://www.nwlc.org/sites/default/files/pdfs/lowerwageshurtwomen.pdf> (observing that while other civil rights laws have helped narrow the wage gap, issues still exist in the enforcement of wage equality between sexes).

6. See *Closing the Loophole: The Paycheck Fairness Act and Eliminating Caps on Damages*, NAT’L WOMEN’S LAW CTR. (Oct. 1, 2010), <http://www.nwlc.org/resource/closing-loophole-paycheck-fairness-act-and-eliminating-caps-damages> [hereinafter *Closing the Loophole*] (stating that “[u]nlike most anti-discrimination statutes, the [Equal Pay Act] does not currently allow the award of compensatory or punitive damages” and limits lesser paid women to “unpaid minimum wages, or their unpaid overtime compensation” and “an additional equal amount as liquidated damages” (internal quotation marks and citations omitted)).

7. See Gruenberg, *supra* note 2 (announcing that the leading women’s rights organizations would be meeting to discuss future strategy after the defeat of the PFA).

pay equality movement and for all working women in the United States. To that end, Part II of this Note will discuss the background of the pay equality movement. Part III will analyze why the Paycheck Fairness Act should be enacted and why a remedy is necessary to rectify the current issues in wage inequality.

## II. BACKGROUND

### A. *What Wage Inequality Really Looks Like*

Wage inequality exists not only between the sexes but also across racial and national origin lines, state lines, and even among members of white-collar professions.<sup>8</sup> Census data from 2009 shows, on average, American women earn seventy-seven cents for every dollar their male counterparts receive.<sup>9</sup> African-American women make sixty-one cents for each dollar earned by white, non-Hispanic men, and Latina women make fifty-two cents for each dollar earned by white, non-Hispanic men.<sup>10</sup> The District of Columbia shows the smallest wage gap between men and women; with women earning 88.2% of what men earn.<sup>11</sup> The largest wage gap is seen in Wyoming, where women make 65.5% of what men make.<sup>12</sup>

In October 2010, the National Association of Women Lawyers (“NAWL”) and the NAWL Foundation released a national report on the retention and promotion of women in law firms.<sup>13</sup> In this report, the NAWL found that women, while representing approximately 50% of all law school graduates, still do not earn as much as their male colleagues.<sup>14</sup> Women equity partners

8. See, e.g., Kevin Clark & Patrick Maggitti, *How Women Can Reduce Their Wage Gap*, FORBES (Mar. 19, 2010, 12:02 PM), <http://www.forbes.com/2010/03/19/women-compensation-pay-leadership-careers-ceiling.html> (discussing a study among white-collar professionals enrolled in MBA programs that looked at, among other factors, compensation among men and women).

9. NWLC, *WOMEN’S LOWER WAGES*, *supra* note 5, at 1 & n.2 (utilizing U.S. Census Bureau income data for persons aged fifteen and older of Hispanic origin).

10. See *id.*; NAT’L WOMEN’S LAW CTR., *THE LILLY LEDBETTER FAIR PAY ACT OF 2009*, at 1 (2009) [hereinafter NWLC, *FAIR PAY ACT*], available at <http://www.nwlc.org/sites/default/files/pdfs/Ledbetter%20Fair%20Pay%20Act%20of%202009%20-%20Summary%20of%20case%20and%20Bill.pdf>.

11. See *Wage Gap Persists in All 50 States Fact Sheet*, NAT’L WOMEN’S LAW CTR. (Oct. 20, 2010), <http://www.nwlc.org/resource/wage-gap-persists-all-50-states> (citing U.S. CENSUS BUREAU, *MEN’S AND WOMEN’S EARNINGS BY STATE: 2009 AMERICAN COMMUNITY SURVEY* (2010), available at <http://www.census.gov/prod/2010pubs/acsbr09-3.pdf>).

12. *Id.*

13. See STEPHANIE A. SCHARF & BARBARA M. FLOM, *THE NAT’L ASS’N OF WOMEN LAWYERS & THE NAWL FOUNDATION, REPORT OF THE FIFTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS* 3–4 (2010), [http://nawl.timberlakepublishing.com/files/NAWL%202010%20Final\(1\).pdf](http://nawl.timberlakepublishing.com/files/NAWL%202010%20Final(1).pdf) (finding that women are underrepresented in law firm leadership, as they only account for 15% of the equity partners, are not listed as major rainmakers, and earn less than their male counterparts).

14. See *id.* at 2, 3–4 (observing that, despite the fact that women make up fifty percent of the law school graduates, women only account for fifteen percent of equity partnership in law firms and earn less than their male counterparts).

make 85% of what their male counterparts make.<sup>15</sup> Moreover, although associate pay is generally “on a par” for both men and women, wage gaps begin to appear as women move higher up in the law firm hierarchy.<sup>16</sup>

### B. Legislative Background

The Civil Rights era saw the passage of two important pieces of legislation related to sex-based discrimination: the Equal Pay Act of 1963<sup>17</sup> and the Civil Rights Act of 1964,<sup>18</sup> signed into law by Presidents Kennedy and Johnson (respectively).<sup>19</sup> The Equal Pay Act was an amendment to the Fair Labor Standards Act (FLSA);<sup>20</sup> among other requirements, the Equal Pay Act established a minimum wage for employees.<sup>21</sup> The primary aim of the Equal Pay Act was to prohibit the payment of unequal wages between men and women for equal work.<sup>22</sup> At that time, women were earning fifty-nine cents to every dollar earned by men.<sup>23</sup> President Johnson signed the Civil Rights Act in 1964 in an effort to continue President Kennedy’s civil rights legislation after President Kennedy was assassinated in 1963.<sup>24</sup> Title VII of the Civil Rights Act covers employment-based discrimination of protected classes, one of which is sex.<sup>25</sup>

The Equal Pay Act mandates the payment of equal wages to men and women in the same establishment when they perform equal work; provided that their

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15. *Id.* at 4.

16. *See id.* at 21–22 (emphasizing that even though the survey found that the associate compensation appears to be equal, differentials begin to appear at the counsel, non-equity, and equity partner levels, with female counsel earning eighty-eight percent, non-equity partners earning ninety-four percent, and equity partners earning eighty-five percent of what their male counterparts earn).

17. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2006)).

18. Pub. L. No. 88-325, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2006)).

19. *See Overview of the Equal Pay Act*, AM. ASS’N OF UNIV. WOMEN [http://www.aauw.org/act/laf/library/payequity\\_epa.cfm](http://www.aauw.org/act/laf/library/payequity_epa.cfm) (last visited Apr. 8, 2011) (stating the Equal Pay Act extended wage protection to women, while Title VII broadened protections to all employment actions based on protected classes—including sex).

20. Fair Labor Standards Act, 29 U.S.C. § 201–19 (2006).

21. *See* § 206(d) (prohibiting discrimination based on sex in the payment of wages).

22. *See Closing the Loophole*, *supra* note 6 (noting that President Kennedy signed the Equal Pay Act into law, making the payment of unequal wages illegal because he thought of the Equal Pay Act as an essential component of the civil rights movement).

23. *Id.*; *see* Albert H. Ross & Frank V. McDermott, Jr., *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. INDUS. & COM. L. REV. 1, 4 (1974) (claiming that the Equal Pay Act was a result of the call of the War Labor Board for adjustments to equalize the wage and salary rates of men and women that was later adopted by the Commission on the Status of Women, created by President Kennedy).

24. *See* RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND McCLUNG CASES 14 (2001) (recalling President Lyndon B. Johnson’s comments to Congress that “no ‘memorial oration or eulogy could more eloquently honor President Kennedy’s memory than the earliest possible passage of the civil rights bill for which he fought so long.’”).

25. *See* 42 U.S.C. § 2000e-2(a) (2006) (providing that it is “unlawful . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment [on the basis] of race, color, religion, sex, or national origin”).

jobs “require[] equal skill, effort, and responsibility;” and they work under similar working conditions.<sup>26</sup> However, the Act allows differences in wages if an employer bases the wage differential on “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>27</sup>

Nevertheless, despite the passage of both of these important pieces of legislation, women still receive less pay than their male counterparts for doing equal work.<sup>28</sup> Loopholes in both laws allow employers to justify paying different wages to male and female employees doing equal work.<sup>29</sup>

### C. Ledbetter v. Goodyear

Lilly Ledbetter was a female manager at Goodyear Tire and Rubber Company’s plant in Gadsden, Alabama.<sup>30</sup> She worked for the company from 1979 until 1998.<sup>31</sup> By the time Ledbetter retired in 1998, she had attained the position of Area Manager.<sup>32</sup> She was one of a few female supervisors at the Gadsden plant and she faced many instances of sexual harassment while working there.<sup>33</sup> At one point, her male supervisor allegedly told her that “women didn’t belong in the company.”<sup>34</sup> This supervisor consistently rated her near the bottom of all Area Managers each performance year.<sup>35</sup> Another supervisor offered her a better evaluation in exchange for sexual favors.<sup>36</sup>

26. 29 U.S.C. § 206(d)(1) (2006).

27. *Id.*

28. See *Closing the Loophole*, *supra* note 6 (highlighting the fact that although the wage gap has narrowed there is a substantial need to change the current law to ensure that the wage gap between sexes ceases to exist).

29. See NAT’L WOMEN’S LAW CTR, PAYCHECK FAIRNESS: CLOSING THE “FACTOR OTHER THAN SEX” GAP IN THE EQUAL PAY ACT 1 (2009) [hereinafter NWLC, PAYCHECK FAIRNESS], available at <http://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf> (noting evidence of employers using the loopholes provided under § 206(d)(1) to justify otherwise illegal practices and stating the need to readdress the gaps of the law).

30. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (observing that during Ledbetter’s nineteen-year tenure at Goodyear, salaried managers received—or were denied—“raises based on their supervisors’ evaluation of their performance”).

31. *Id.*

32. See Bindu George, Note, *Ledbetter v. Goodyear: A Court Out of Touch With the Realities of the American Workplace*, 18 TEMP. POL. & CIV. RTS. L. REV. 253, 256 (2008) (stating that although Ledbetter was an Area Manager, in 1997, on the advice of her male supervisor, Ledbetter applied for and received the non-supervisory position of Technology Engineer, but she still functioned as an Area Manager).

33. NWLC, FAIR PAY ACT, *supra* note 10, at 1.

34. Paula A. Monopoli, *In A Different Voice: Lessons from Ledbetter*, 34 J.C. & U.L. 555, 560 (2008) (indicating that the supervisor that made this comment reflected his opinion of women not belonging at Goodyear by making sure that she received lower pay increases than her male counterparts over the years).

35. See George, *supra* note 32, at 255 (noting that Ledbetter was ranked twenty-third out of twenty-four salaried employees).

36. Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 508 (2010) (detailing the sexual harassment that Ledbetter faced from several male employees at her time at Goodyear, when she complained to management no action was taken, and when she finally complained to EEOC, after which she faced retribution from her coworkers).

During her employment, Ledbetter was unaware that she was being paid less than her male counterparts.<sup>37</sup> While some of her male co-workers bragged about how much they made working overtime, the company had a policy that did not allow employees to discuss their pay among themselves.<sup>38</sup> Ledbetter had received raises throughout the years but had no idea that the difference in pay was significant.<sup>39</sup> It was not until Ledbetter received an anonymous note informing her that she was being paid less than her male colleagues that she suspected pay discrepancy.<sup>40</sup> At the conclusion of 1997, Ledbetter was earning \$3,727 per month, in contrast with the lowest paid male area manager who made \$4,286 a month, and the highest paid male area manager who made \$5,236 a month.<sup>41</sup> Consequently, Ledbetter filed a formal charge alleging sex-based discrimination with the EEOC in July 1998.<sup>42</sup> In November 1998, she filed suit in federal district court and alleged violations of Title VII and the Equal Pay Act.<sup>43</sup>

The district court allowed Ledbetter's Title VII claim to proceed to trial but granted summary judgment in favor of Goodyear for the Equal Pay Act claim and several other of her claims.<sup>44</sup> A jury found for Ledbetter on her Title VII discrimination claim and awarded her back pay plus damages.<sup>45</sup>

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37. NWLC, FAIR PAY ACT, *supra* note 10, at 1.

38. Sullivan, *supra* note 36, at 508 (describing how, when Ledbetter first began working for Goodyear, all of the supervisors were paid the same but as time passed, Goodyear adopted a subjective performance-based system in which employees were told that the amount that they were paid was strictly confidential). For more on the illegality under Title VII of employer pay scale schemes which allow management to base promotion and wages on characteristics other than on their performance, see, for example, *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 613, 633 (5th Cir. 1983), which held that a pay plan that arbitrarily assigned predominantly blacks and women to lower paying job classifications would be illegal under Title VII and affected employees would be entitled to back pay.

39. See Sullivan, *supra* note 36, at 508 (recounting that some of Ledbetter's pay raises were "pretty good, percentage-wise," which led her to believe that there was not a substantial disparity between her pay and the pay of male employees doing the same job (internal quotation marks omitted)).

40. See *id.* (observing that after Ledbetter found out she was paid substantially less than her male counterparts, that discovery provoked her to quickly go to the EEOC and file a formal claim against Goodyear).

41. See Monopoli, *supra* note 34, at 563 (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting)).

42. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621–22 & n.1 (2007) (majority opinion), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

43. *Id.* at 621–22.

44. *Id.* at 622.

45. *Id.*; see *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507253, at \*1–2 (N.D. Ala. Sept. 24, 2003) (stating that Ledbetter was awarded approximately \$3.3 million in compensatory and punitive damages in addition to the back pay award), *rev'd*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; see also Sullivan, *supra* note 36, at 508–09 (stating that the jury awarded Ledbetter three million dollars in compensatory and punitive damages, but "the trial judge reduced the damage award to \$300,000" due to the Title VII statutory damages award cap).

Goodyear appealed to the Eleventh Circuit and contended that Ledbetter's pay discrimination claims were time-barred before her EEOC contact.<sup>46</sup> The Eleventh Circuit reversed the district court's decision and held that a plaintiff "can state a timely [Title VII pay discrimination claim] for disparate pay only to the extent that the 'discrete acts of discrimination' of which she complains, occurred within the limitations period created by her EEOC questionnaire. Any acts of discrimination affecting her salary occurring before then are time-barred."<sup>47</sup>

On appeal to the Supreme Court, Ledbetter sought review of the following question:

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.<sup>48</sup>

The Supreme Court granted certiorari and heard oral arguments on November 27, 2006.<sup>49</sup> Then, on May 29, 2007—nearly ten years after Ledbetter first contacted the EEOC—the Supreme Court, in a five to four decision, affirmed the Eleventh Circuit's holding that the discriminatory acts claimed by Ledbetter were untimely and that her claim was time-barred.<sup>50</sup>

#### *D. Lilly Ledbetter Fair Pay Act*

In 2009, in one of his first acts as President, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009—which superseded the Court's decision in *Ledbetter v. Goodyear*.<sup>51</sup> The Ledbetter Fair Pay Act restored the rights taken away by the Court's decision in *Ledbetter* and established that "pay discrimination claims on the basis of sex, race, national origin, age,

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46. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169 (11th Cir. 2006) (holding that under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), Ledbetter's claims of discrimination were time-barred under the statute of limitations created by her EEOC questionnaire), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

47. *Id.* at 1180.

48. Petition for Writ of Certiorari at i, *Ledbetter v. Goodyear Tire & Rubber Co.*, 548 U.S. 903 (2006) (No. 05-1074).

49. *Ledbetter*, 550 U.S. at 618.

50. The majority of the court, in an opinion authored by Justice Alito, upheld the decision of the Eleventh Circuit and held that because a pay decision is an act that is made at a particular point in time, an EEOC statutory period begins when the act occurs. *Id.* at 621. Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, authored a dissenting opinion that claims that the majority is incorrect and that the 180-day statutory period should be combined for each offense, rather than run for each offense individually, because pay disparities accumulate over time. *Id.* at 646-47 (Ginsburg, J., dissenting).

51. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending 42 U.S.C. §2000e-5 (2006)); see Carolyn E. Sorock, Note, *Closing the Gap Legislatively: Consequences of the Lilly Ledbetter Fair Pay Act*, 85 CHI.-KENT L. REV. 1199, 1209 (2010) (noting that several Republican Senators feared that, without deadlines for filing, suits over pay discrimination would be unduly burdensome for businesses).

religion, and/or disability ‘accrue’” with each discriminatory act.<sup>52</sup> Qualifying discriminatory acts include the receipt of a discriminatory paycheck, the adoption of or an employee’s subjection to a “discriminatory pay decision or practice.”<sup>53</sup> Whenever such an act occurs, a pay discrimination claim can move forward under the Ledbetter Fair Pay Act.<sup>54</sup> Moreover, the Act is effective as of the day prior to the Supreme Court’s *Ledbetter* decision.<sup>55</sup>

Since the enactment of the Ledbetter Fair Pay Act, several cases have applied the expanded statutory time limitations period.<sup>56</sup> Courts have confirmed the Ledbetter Fair Pay Act’s greater statutory timeframe by allowing each discriminatory paycheck to renew the limitations period for pay discrimination claims.<sup>57</sup> As such, each time an employee receives a paycheck based on a discriminatory pay decision, the time period in which an employee may file an EEOC complaint starts anew.

Despite the passage of the Ledbetter Fair Pay Act, other issues still exist in the fight for equal pay. One issue concerns the meaning of the clause: “when an individual becomes subject to a discriminatory compensation decision or other practice.”<sup>58</sup> Courts have interpreted this phrase in different ways and have reached different outcomes.<sup>59</sup> Additionally, what qualifies as a “compensation

52. NAT’L WOMEN’S LAW CTR., THE LILLY LEDBETTER FAIR PAY ACT OF 2009: ONE YEAR LATER 1 (2010) [hereinafter NWLC, ONE YEAR LATER], available at [http://www.nwlc.org/sites/default/files/pdfs/Ledbetter\\_FPA\\_One\\_Year\\_Later.pdf](http://www.nwlc.org/sites/default/files/pdfs/Ledbetter_FPA_One_Year_Later.pdf).

53. *Id.*

54. *Id.*

55. *Id.*

56. *See, e.g.,* Mikula v. Allegheny Cnty. (*Mikula I*), 583 F.3d 181, 186 (3d Cir. 2009) (holding that each discriminatory paycheck renewed the time for filing a pay discrimination claim under the Ledbetter Fair Pay Act), *rev’d*, 583 F.3d 181 (3d Cir. 2009); Hester v. N. Ala. Ctr. for Educ. Excellence, 353 F. App’x 242, 243–44 (11th Cir. 2009) (finding that the plaintiff’s claim was timely under the Ledbetter Fair Pay Act); Johnson v. District of Columbia, 632 F. Supp. 2d 20, 22–23 (D.D.C. 2009) (reinstating the plaintiff’s claims after the passage of the Ledbetter Fair Pay Act and stating “there can be no dispute that, under the Fair Pay Act, plaintiff may seek relief under” the relevant federal laws); Goodlett v. Delaware, No. 08-298-LPS, 2009 WL 585451, at \*6 (D. Del. Mar. 6, 2009) (holding that the plaintiff’s pay disparity claim survived after the passage of the Ledbetter Fair Pay Act and “the 300-day clock for filing a Title VII pay disparity claim starts anew with each discriminatory pay period”).

57. *See* NWLC, ONE YEAR LATER, *supra* note 52, at 1.

58. 42 U.S.C. §2000e-5(e)(3)(A) (2006 & Supp. 2009).

59. *Compare* Mikula I, 320 F. App’x at 136 (holding under *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that plaintiff’s claims were untimely, due to the fact that they were not filed within 180 days of the occurrence with the EEOC), *with* Mikula v. Allegheny Cnty. (*Mikula II*), 583 F.3d 181, 186 (3d Cir. 2009) (recognizing that the Ledbetter Fair Pay Act effectively overruled the Supreme Court’s decision in *Ledbetter* and holding that the plaintiff’s claim was timely). *See, e.g.,* Schengrund v. Pa. State Univ., 705 F. Supp. 2d 425, 432–33 (M.D. Pa. 2009) (articulating that plaintiffs “may recover for each and every paycheck received from the present dating back to 300 days prior to their filing with the EEOC”). *But cf.* AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1973 (2009) (holding that the Ledbetter Fair Pay Act does not apply in the calculation of pension benefits calculated, in part, under an accrual rule). *See generally* Sorock, *supra* note 51, at 1212–13 (discussing, in detail, the various judicial responses to the Lilly Ledbetter Fair Pay Act).

decision” under the Act varies from jurisdiction to jurisdiction.<sup>60</sup>

### *E. Paycheck Fairness Act*

Senator Hillary Clinton (D-NY) and Representative Rosa DeLauro (D-CT) introduced the Paycheck Fairness Act in January 2009 to remedy some of the shortcomings of the Fair Pay Act.<sup>61</sup> One aim of the bill was to strengthen the amount of damages a prevailing plaintiff could recover; another goal was to close a loophole in one of the four affirmative defenses available to employers under the Equal Pay Act.<sup>62</sup> Nevertheless, despite approval by the House of Representatives, the Senate rejected the Paycheck Fairness Act on November 10, 2010.<sup>63</sup>

## III. DISCUSSION

### *A. Congress Should Reintroduce the Paycheck Fairness Act or Otherwise Remedy the Issues the PFA Sought to Address*

While the Fair Pay Act restored the rights the *Ledbetter* decision removed, there are still problems that persist with the enforcement of equal pay for equal work.<sup>64</sup> First, the Equal Pay Act provides an employer with an affirmative defense when the employer can show that it based the allegedly discriminatory pay differential on a factor other than sex.<sup>65</sup> Many employers use this defense to defeat plaintiffs’ Equal Pay Act claims by asserting the reason for differences between two employees’ pay is not sex.<sup>66</sup> The Paycheck Fairness Act would have closed this loophole by requiring the employer to show the following: that it used a “bona fide factor . . . not based upon or derived from a sex-based

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60. See NAT’L WOMEN’S LAW CTR., THE LILLY LEDBETTER FAIR PAY ACT OF 2009: CURRENT STATUS AND EMERGING ISSUES 2–3 (2009) [hereinafter NWLC, EMERGING ISSUES], available at [http://www.nwlc.org/sites/default/files/pdfs/Ledbetter\\_Act\\_Current\\_Status\\_and\\_Emerging\\_Issues.pdf](http://www.nwlc.org/sites/default/files/pdfs/Ledbetter_Act_Current_Status_and_Emerging_Issues.pdf) (showing different types of claims that have been raised under the Ledbetter Fair Pay Act and how different jurisdictions have ruled).

61. *Pay Equity Information*, *supra* note 1.

62. See NWLC, STRENGTHEN EQUAL PAY ACT, *supra* note 3, at 1–2 (stating that other aims include: improving the remedies available; facilitating class action claims; prohibiting employer retaliation, modifying the “establishment” requirement; improving the collection of pay information by the EEOC; and reinstating pay equity programs and enforcement at the Department of Labor).

63. See Paycheck Fairness Act, S. 182, 111th Cong. (2009); see also *Pay Equity Information*, *supra* note 1 (stating the vote was 58–41, mostly along party lines).

64. See NWLC, EMERGING ISSUES, *supra* note 60, at 2–3 (discussing problems of interpretation that have come before the courts, including problems with retroactivity and problems with the actual reach of the Act).

65. See 29 U.S.C. § 206(d) (2006) (providing four exemptions to the general prohibition of pay disparity); see also NWLC, PAYCHECK FAIRNESS, *supra* note 24, at 2–3 (noting that a number of courts have allowed “factors other than sex” exemptions in their decisions, resulting in employers’ being allowed to pay male employees more than female employees).

66. See NWLC, PAYCHECK FAIRNESS, *supra* note 29, at 2 (asserting that judicial misinterpretation of the “factors other than sex” defense would be remedied with the Paycheck Fairness Act).

differential;” that the “factor other than sex” was “job-related to the position in question;” and that use of a “factor other than sex” to distinguish pay was “consistent with business necessity.”<sup>67</sup> Under the Paycheck Fairness Act, if the employee could show that “an alternative employment practice” could have served “the same business purpose without producing a pay differential and the employer refused to adopt” the practice, then the employer would not have prevailed on the “factor other than sex” defense.<sup>68</sup>

A second aim of the PFA was to increase the amount of damages awarded to a prevailing plaintiff.<sup>69</sup> Unlike awards under Title VII or the Age Discrimination in Employment Act, awards under the Equal Pay Act do not include compensatory or punitive damages.<sup>70</sup> The prevailing plaintiff in an Equal Pay Act claim is entitled to back pay during the relevant limitations period and an additional, equal, amount as liquidated damages.<sup>71</sup> Usually, the award of back pay and liquidated damages is not very large.<sup>72</sup> By not being allowed to receive compensatory or punitive damages, victims of sex-based wage discrimination receive different treatment than other workplace discrimination victims.<sup>73</sup>

### B. Application: *Dukes v. Wal-Mart*

An example of how wage inequality has emerged in a non-white-collar professional setting is *Dukes v. Wal-Mart*.<sup>74</sup> Here, a female employee, Betty Dukes, who initially had received an excellent ninety-day review and a promotion, alleged that she later experienced discrimination and retaliation

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67. *Id.* at 4.

68. *Id.*

69. See *Closing the Loophole*, *supra* note 6 (detailing that the Paycheck Fairness Act would allow for both compensatory and punitive damages and would eliminate the cap on damages).

70. See also NWLC, STRENGTHEN EQUAL PAY ACT, *supra* note 3, at 1 (explaining that the Equal Pay Act does not permit the award of compensatory or punitive damages); *cf.* 42 U.S.C. § 2000e-5(g) (2006) (providing for back pay and reinstatement but no other damages).

71. See NWLC, STRENGTHEN EQUAL PAY ACT, *supra* note 3, at 1 (comparing the remedies of the Equal Pay Act with those of the Paycheck Fairness Act and finding the Paycheck Fairness Act remedies of compensatory and punitive damages superior).

72. See *id.* (noting that damage awards under the Equal Pay Act are insubstantial on the whole).

73. See *Closing the Loophole*, *supra* note 6 (observing that the Equal Pay Act remedies are not as far-reaching as those in other anti-discrimination statutes).

74. 603 F.3d 571 (9th Cir. 2010), *cert. granted sub nom.* Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. argued Mar. 29, 2011).

for complaining to her District Manager.<sup>75</sup> Dukes claimed that her supervisors never gave her the opportunity to train for higher-level and higher-paying positions and reprimanded her more harshly for mistakes than her male counterparts.<sup>76</sup> Dukes, along with six other female employees, filed a class action suit on June 8, 2001.<sup>77</sup> The plaintiffs allege that Wal-Mart pays women less than men in comparable positions, even when the lower-paid women have higher performance ratings and greater seniority than their male counterparts, and that women “receive fewer—and wait longer for—promotions to in-store management positions.”<sup>78</sup> In addition, they allege that Wal-Mart’s corporate culture encourages “gender stereotyping and discrimination” and that this treatment “is common to all women who work or have worked in Wal-Mart stores.”<sup>79</sup>

One issue is whether it was appropriate for the district court to grant class certification under the Federal Rules of Civil Procedure.<sup>80</sup> On December 6, 2010, the Supreme Court granted Wal-Mart’s petition for certiorari and heard oral argument on March 29, 2011.<sup>81</sup>

This case is important because of its potential social ramifications.<sup>82</sup> Wal-Mart, a large corporation, is one of the largest employers in the United States.<sup>83</sup> A favorable outcome for Dukes and the other plaintiffs would send a strong message not only to Wal-Mart, but to other employers as well; discriminatory promotion and compensation policies toward female employees are

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75. See WAL-MART WATCH, BETTY V. GOLIATH: A HISTORY OF *DUKES V. WAL-MART* 5 (2006), available at [http://walmartwatch.com/img/blog/dukes\\_backgrounder.pdf](http://walmartwatch.com/img/blog/dukes_backgrounder.pdf) (recounting allegations that Ms. Dukes experienced retaliation through “1) discipline for procedures regularly used by male employees without being reprimanded; 2) not allowing her to train for a department manager position; 3) demotion to cashier and being falsely accused of violating company policy while performing a transaction that had been performed many times by Ms. Dukes and other employees in the past without incident; 4) a reduction in hours and hourly wage; 5) not being informed of at least four un-posted promotional opportunities (department and/or support manager positions) for which she would have been eligible but were each filled by males; and, 6) being discouraged from applying for future department manager positions”).

76. *Id.* at 5.

77. 603 F.3d 571, 577–78 (noting plaintiffs’ class alleged rampant Title VII violations).

78. *Id.* at 577.

79. *Id.* at 577–78.

80. See FED. R. CIV. P. 23(a) (requiring commonality of facts for all members of the representative class in order to permit certification); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010) (mem.) (granting certiorari to the question of “[w]hether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)”).

81. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010).

82. See WAL-MART WATCH, *supra* note 75, at 4–5 (discussing the potential important implications of *Dukes* for consumers, investors, and employees alike, such as, risk to the “Wal-Mart ‘brand’ in the public eye”).

83. See WALMART, CORPORATE FACT SHEET 1 (2010), available at <http://www.walmartstores.com/download/2230.pdf> (stating that Wal-Mart is one of the largest private employers in the United States).

intolerable.<sup>84</sup> As one attorney, who represents the *Dukes* class, explained the crux of the issue, “People keep shopping at Wal-Mart because they don’t connect the fact that the low price they’re paying is effectively subsidized by the woman at the checkout counter.”<sup>85</sup>

#### IV. CONCLUSION

Despite the existing laws protecting wage equality, wage inequality remains. Savvy employers are able to defeat many legitimate EPA claims simply by asserting that a factor other than sex prompted a difference in pay.<sup>86</sup> When employees do prevail, the damages they obtain are generally a drop in the bucket for their employers.<sup>87</sup> Given the tough financial times that most Americans have been facing during this recession, women suffer harder hits to their wallet than men do as a result of the pay disparity.<sup>88</sup>

However, the political makeup of the 112th Congress makes it unclear whether any member of Congress will reintroduce the Paycheck Fairness Act and put it up for another vote before 2013. Regardless, the fight for equal pay for equal work must continue. Forty-eight years out from the passage of the Equal Pay Act, significant wage gaps between men and women are unacceptable.

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84. See *WAL-MART WATCH*, *supra* note 75, at 4, 9 (stating that this litigation is being watched closely by competitors while law firms are releasing reports to their clients on how to avoid similar class-action employment litigation).

85. *Id.* at 4 (internal quotation marks and citation omitted).

86. NWLC, *PAYCHECK FAIRNESS*, *supra* note 29, at 1.

87. See *Closing the Loophole*, *supra* note 6 (“Employers would gamble that it costs less to pay damages than to create workplaces free of discrimination.”).

88. See NWLC, *WOMEN’S LOWER WAGES*, *supra* note 5, at 1–2. At least one reason that wage gaps continue—and are exacerbated—in a bad economy are cultural perceptions that women are only secondary contributors to household income. See *e.g.* *Steger v. Gen. Electric Co.*, 318 F.3d 1066, 1079 (11th Cir. 2003) (detailing that one of the reasons that management told Steger that she could not have a wage increase was because she did not “need” one since she could rely on her husband’s salary).