LILLY LEDBETTER RESPONSES TO QUESTIONS FROM THE SENATE JUDICIARY COMMITTEE ON "BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK"
OCTOBER 14, 2008

Questions from The Honorable Patrick Leahy

Question 1:

Last June, the House Judiciary Committee's Subcommittee on the Constitution held a hearing on "the impact of *Ledbetter v. Goodyear* on the enforcement of civil rights laws." During that hearing, Mr. Neal Mollen, on behalf of the Chamber of Commerce, testified that Justice Ginsburg's concern, that it is often unfair to expect a worker to possess sufficient information to conclude that discrimination has occurred in time to meet a statute's filing deadlines, was "misplaced." In particular, Mr. Mollen contended that, in your trial and in your Congressional testimony, you testified that you knew you had been the victim of discrimination years before you filed your charge with the EEOC. Is that correct? How do you explain your trial and congressional testimony?

Answer 1:

As I state in my response to Senator Specter's question, both my deposition and my Congressional testimony show that I simply had no proof that I was being paid less than each of my male peers – much less that any disparity was the result of discrimination – until I got an anonymous note in 1998 laying out the salaries of each of the male managers in comparison to my own. At that point, I immediately went to the EEOC to file a charge. As a result, Mr. Mollen is simply wrong that I knew that I had been the victim of discrimination years before I filed my charge.

But Mr. Mollen is also dead wrong on the larger point. Workers typically do not have information about the amounts their coworkers are paid; in fact, many employers, like Goodyear, penalize employees who discuss their salaries. And even if employees do know what their coworkers make, the criteria that employers use to set salaries are a big secret; it's information that is solely in the possession of the employer, leaving employees with no way to evaluate whether there is a discriminatory reason for any disparity. So putting the onus on employees to figure out when they have been subject to discrimination does not take account of the realities of the workplace and shields employers, who are in control of pay decisions and have all the relevant information, from responsibility for their actions. It is only through enactment of the Lilly Ledbetter Fair Pay Act, which makes clear that workers can challenge each discriminatory paycheck they receive, that Congress can undo the damage caused by the Supreme Court's decision in my case and restore the law to where it was.

Question 2:

At the Senate hearing, Mr. Lawrence Lorber testified that the *Lilly Ledbetter Fair Pay Act* would provide incentives for employees to wait for years, if not decades, to challenge pay discrimination by their employers – and could even wait until years after they had left the company. Do you agree with Mr. Lorber that the *Lilly Ledbetter Fair Pay Act* creates these incentives? Why or why not?

Answer 2:

I firmly disagree with Mr. Lorber's assessment. In the real world, employees have no incentive to wait to complain about being paid too little. They may be afraid that if they complain they will lose their jobs, but it only hurts them to wait. For the vast numbers of employees who live paycheck to paycheck, any increase in that check is sorely needed. Delay is costly – both because we need every penny we can earn, and because our raises, bonuses, pensions and other benefits are often based on the amounts we make in salary. We thus have every incentive to file charges as soon as we possibly can, to make sure that we begin earning the amount to which we are entitled as soon as possible. Add to that incentive the fact that Title VII limits the amount of backpay recovery to the two years preceding charge filing. As a result, any failure to promptly challenge pay discrimination means that employees will permanently forfeit any monies they would have been owed for longer periods. There is simply no such thing as the big kill in employment discrimination cases, so waiting only harms employees.

Mr. Lorber is particularly ill-informed in saying that the *Lilly Ledbetter Fair Pay Act* would authorize employees to wait until years after they left the company to file EEOC charges. In fact, under the Act, the period for filing a charge runs from the last discriminatory paycheck an employee receives. If an employee has left the company, her right to challenge discriminatory pay thus expires 180 days from the date on which she was last paid by the company. It is simply incorrect to suggest that the *Ledbetter Fair Pay Act* allows suits by former employees years after they have left a company's employ.

Questions from The Honorable Arlen Specter

Question 1:

You testified that while employed by Goodyear, you were not aware of the differences between your pay and that of your male counterparts until someone left an anonymous note in your mailbox. However, during your deposition in the case, you testified that you knew in 1992 (six years before you initiated your claim) that you were being paid less than your male counterparts, and suspected it was due to gender discrimination (Testimony at pages 122-123).

Can you clarify for the record when you were first aware that you were being paid less than your male counterparts?

Answer 1:

My deposition testimony in my case and my testimony before this Congress both demonstrate the same fundamental facts: that I did not have any evidence, until I received an anonymous note in my mailbox in 1998, of either how much less I was making than my male counterparts or of the fact that the differences were the result of sex discrimination. Prior to that time, my coworkers had bragged to me about the amount of overtime pay they were getting, and I knew from my managers that my salary fell short of the midpoint level set for my job category. But the frequent boasts of my coworkers had often in the past proved to be absolutely false. And the fact that I was below the midpoint told me nothing about the amounts Goodyear was paying to any individual coworker, or what the basis for those calculations was.

In addition, I knew from my experience filing a prior sexual harassment charge with the EEOC that I could not go to the agency with a complaint unless I had some proof beyond idle gossip – and some very specific information. And I did not want to endure the workplace abuse and retaliation that I suffered after filing my sexual harassment charge unless I was confident that I had a solid basis for my claims. I did not have even a minimal level of proof until I received the anonymous note in 1998.

At bottom, this question illustrates the problem with assessing when an employee "knew or should have known" that she has been subject to pay discrimination. Had this standard been in effect when I brought my case, would a court have found that I "should have" filed a charge based on the boasts and gossip of my co-workers and dismissed my case for failure to do so? If so, I would have ended up being penalized for wanting to wait until any suspicions that the gossip might have raised in my mind were confirmed or to see if my employer might voluntarily fix any disparity. In fact, my managers had told me, when I got a Top Performance Award, that they would be raising my pay to the level of my peers. It was only when I got the note in 1998 that I realized that they had failed to do that and that I saw how much less I was earning than the other supervisors.

As a result, basing the time when an employee should file an EEOC charge on the point at which she theoretically "should have known" about discrimination makes no sense and is surely a disservice to both employers *and* employees. It is also a disservice to the courts, which will have another issue that will have to be decided. All would instead benefit from the certainty and predictability of the long-standing approach taken in the Lilly Ledbetter Fair Pay Act, which remains the only bill that would fix the problems caused by the Supreme Court's decision in my case and restore the law to the way it had always been enforced.

Question 2:

Why did you decline to pursue your claim under the Equal Pay Act before the U.S. Court of Appeals for the Eleventh Circuit?

Answer 2:

As you know, I am not an attorney and was relying on the advice of my counsel at each stage of the legal proceedings. But as I understand the situation, the magistrate judge who initially heard my case recommended dismissing both the Title VII and the Equal Pay Act claims on the ground that there was a nondiscriminatory reason for the pay disparity. The District Court then held that there were factual disputes that prevented that conclusion, but for some reason only reinstated the Title VII and not the Equal Pay Act claims. The jury then awarded me $3.8 million on the Title VII claim. At that point, I assume, my attorneys believed that there was no reason to pursue the Equal Pay Act claim.

Had I and my attorneys known that my Title VII claim would end up being dismissed on a wholly different basis, we likely would have decided to pursue my Equal Pay Act remedies. And those remedies, which are not the same as those under Title VII anyway, are also not available to those who are subject to pay discrimination based on race, national origin, religion, age or disability. As a result, the Equal Pay Act is no substitute for passage of the Lilly Ledbetter Fair Pay Act.