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VIA E-MAIL (Justin_Pentenrieder@judiciary-dem.senate.gov) AND U.S. MAIL

Hon. Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
ATTN: Justin Pentenrender, Hearing Clerk

Re: Lawrence Z. Lorber's Responses to Questions from The Honorable Arlen Specter
"Barriers to Justice: Equal Pay for Equal Work"

Dear Chairman Leahy:

Thank you for this opportunity to respond to Ranking Member Arlen Specter's questions following the United States Senate Committee on the Judiciary hearing regarding "Barriers to Justice: Examining Equal Pay for Equal Work" on September 23, 2008. My responses to your questions are below.

1. Some argue that Title VII of the Civil Rights Act of 1964 does not adequately account for victims of discrimination who do not know they are being discriminated against during the statutory filing period.

- **To what extent does current law provide a day in court for victims of discrimination who otherwise might not meet the statutory filing period because they did not have enough information to know they were being discriminated against?**

RESPONSE:

The U.S. Equal Employment Opportunity Commission ("EEOC") and federal courts apply three longstanding legal doctrines to assure that victims of discrimination who lacked enough information to know they were being discriminated against have their day in court: (1) the discovery rule; (2) the equitable tolling doctrine; and (3) the equitable estoppel doctrine.

The extent to which federal courts apply such doctrines and whether they do so with consistency may be an appropriate area for Congress to examine, rather than effectively extending the filing period indefinitely.

1. The Discovery Rule

The "discovery rule functions . . . to postpone the beginning of the statutory limitations period from the date when the alleged unlawful employment practice occurred, to the date when the plaintiff actually discovered "that the employer had made the allegedly unlawful decision. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d 1994). Thus, the common law discovery rule "postposes the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990).[1]

Importantly, the discovery rule does require diligence on the part of the plaintiff. The purpose is not to have an individual "sit" on a claim, but rather, to surface the claim when the individual is aware of a problem or believes that she is being unfairly treated. A claim accrues as soon as a potential plaintiff is either aware or should be aware (after a sufficient degree of diligence) of the existence and source of an actual injury. *See Oshiver*, 38 F.3d at 1386.

The majority opinion in *Ledbetter* reserved judgment on the use of the discovery rule in Title VII cases. "We have previously declined to address whether Title VII sutis are amenable to a discovery rule [citing *National RR Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)]. Because *Ledbetter* does not argue that such a rule would change the outcome in her case, we have no occasion to address the issue." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2167, n.10 (U.S. 2007).

[1] In equal employment opportunity cases, as well as in many other contexts, federal courts have applied a discovery rule to a statute of limitations. Eight federal circuits have held that "the discovery rule is the general accrual rule in federal courts" and applies in all federal question cases. *Romero v. Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005).

In truth, *Ledbetter* did not present the best case to test whether discriminatory pay decisions long in the past are actionable because they have present effects. The record and Ms. Ledbetter's testimony show that Ms. Ledbetter knew of both the pay differences and the subpar evaluations that caused them more than 180 days before filing her charge. As the Court said, Ms. Ledbetter "makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her." *Ledbetter*, 127 S. Ct. at 2164. In her specific case, it is hard to see why a plaintiff with knowledge of differences in pay between herself and similarly situated men, and with knowledge of low performance evaluations, should be entitled to a special rule postponing the running of the statute of limitations.

2. Equitable Tolling

Another theory called "equitable tolling" could be used to delay the limitations clock where an employee does not have reason to suspect discrimination. Equitable tolling differs from the discovery rule in that the plaintiff is assumed to know that she has been injured, so that the statute of limitations has begun to run; but she cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. *Cada,* 920 F.2d at 451. A plaintiff may toll the statute of limitations if, despite all due diligence, she is unable to obtain enough information to conclude that she may have a discrimination claim. *Thelen v. Marc's Big Boy Corp.* 64 F.3d 264, 268 (7th Cir. 1995). Equitable tolling does not postpone the running of the statute of limitations until the plaintiff is "*certain* [her] rights had been violated." *Cada,* 920 F. 2d at 451. Rather, the limitations period begins to run when a reasonable person would believe she *may* have a cause of action. *See* EEOC Compliance Manual § 2-IV(D)(1) (stating that a charging party who waits longer than would ordinarily seem reasonable to file a charge is responsible for showing that special circumstances justified the delay).

3. Equitable Estoppel

The filing period can also be extended when the plaintiff's delayed filing is attributable to active misconduct by the employer intended to prevent timely filing, or actions that an employer should have known would cause a delay in filing. Where equitable estoppel applies, the filing period begins to run when the charging party knew or should have discovered the misconduct. *See, e.g., Oshiver,* 38 F.3d at 1390 (automatic extension by length of tolling period is justified where employer's deceptive conduct caused untimeliness); *Felty v. Graves-Humphreys Co.,* 785 F.2d 516, 520 (4th Cir. 1986) (limitations period extended by such time as employer's misconduct effectively operates to delay employee's effort to enforce his/her rights).

Thus, there are several existing theories of law which, if utilized, may well have addressed Ms. Ledbetter's issues, or, which would obviate the incentive to change the structure and procedures of employment case adjudication. The legislation before the Congress would destroy the imperative to reach conclusion in employment cases while the facts are fresh and the matter can be resolved expeditiously.

2. Some have proposed that pay discrimination can be harder to detect because of resistance by some to discuss their pay.

- **Do you think pay scales and compensation should be made public?**
- **Given a drive towards greater privacy protections, for example, of health care or genetic information, do you think we should be requiring employers to offer less privacy protection when it comes to compensation?**

RESPONSE:

Requiring employers to make available to any individual who requests information about the salary or compensation of fellow employees would constitute a gross breach of privacy, and would run counter to the growing recognition in the law that individuals must have confidence that their personal information will not be disclosed. As noted in the answer regarding equitable tolling, the common law has long recognized that a party cannot simply hide evidence and thereby avoid accountability for its illegal or improper actions. To the extent that an individual may believe that she is being paid less than counterparts working in the same or substantially similar job, requesting general information as to wage rates or compensation levels for that job may be appropriate.

It is clear however, that diligence on the part of the employee can lead to resolution of different compensation issues. For example, when Ms. Ledbetter knew or had reason to believe that she was being compensated less while performing the same job, with the same qualifications under the same working conditions, she could have raised the issue either with her employer or with the EEOC at that time.

Of course, the law already prohibits employers from restricting employees from discussing pay and other terms and conditions of employment. For a recent example of the application of this rule, *see Cintas Corp.*, 343 NLRB 943 (2005), enforced 482 F.3d 463 (DC Cir. 2007).

3. How does the Equal Pay Act, as distinguished from Title VII, operate with respect to filing periods?

RESPONSE:

The *Ledbetter* decision stated that if Ms. Ledbetter had pursued her EPA claim, "she would not face the Title VII obstacles she now confronts." *Ledbetter*, 127 S. Ct. at 2176. Individuals experiencing sex-based pay inequity may file a claim under the EPA without first filing a complaint with the EEOC. In addition, the EPA has two-year statute of limitations (three years for willful violations), which is longer than Title VII's 180- or 300-day period. Unlike Title VII, the EPA bans the current payment of discriminatorily set pay, regardless of how long ago the decision was made, and does not require a showing of intent.[2] Finally, the burden of showing that the pay differential meets one of the exceptions under the EPA is a burden which must be met by the employer. *See* 29 C.F.R. § 206(d)(1).

4. Has the Supreme Court, in the context of civil rights laws like Title VII, Age Discrimination in Employment Act, and the Americans with Disabilities Act, ever endorsed an open-ended statute of limitations that extends as long as the effects of discrimination are felt regardless of when the victim learned of the discriminatory acts?

RESPONSE:

The Supreme Court has never endorsed an open-ended statute of limitations in the context of federal civil rights statutes.

More than thirty years ago, for example, the Supreme Court strictly applied a statute of limitations to bar a race discrimination claim brought under § 1981. "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 463-464 (1975) (declining to toll the limitations period under § 1981 during the administrative processing of plaintiff's EEOC charge).

A steady stream of Supreme Court decisions in employment discrimination cases since *Johnson* have made the same point. The majority opinion in *Ledbetter* cited most of these cases:

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[2] *See, e.g.*, *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (under Title VII, a plaintiff seeking to show pay discrimination must prove an intent [by the employer] to discriminate; "[i]n contrast, the [EPA] creates a type of strict liability in that no intent to discriminate need be shown.")

> Statutes of limitations serve a policy of repose. . . . The EEOC filing deadline protects employers from the burden of defending claims arising from employment decisions that are long past. Certainly, the 180-day EEOC charging deadline . . . is short by any measure, but by choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.

Ledbetter, 127 S. Ct. at 2171 (quotations omitted). In citing the Congressional policies protecting employers from stale claims, the *Ledbetter* majority explained that suits based on remote employment actions are disfavored because "the passage of time may seriously diminish the ability of the parties and the fact finder to reconstruct what actually happened." *Id.*

The Supreme Court showed a similar disdain for stale claims in *National Railroad Passenger Corp. v. Morgan*:

> Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address. Statutes of limitation promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

536 U.S. 101, 125 (2002) (quotations omitted)

Indeed, providing open-ended filing periods for employment related complaints is antithetical to the statutory structure prohibiting employment harm. Congress has established narrow filing periods for a host of employment issues, including whistleblower claims. For example, the recently passed Sarbanes-Oxley bill has an unwavering 90-day period in which an individual may bring a whistleblower claim (*see* 18 U.S.C. § 1514A(b)(2)(D)) to prevent claims from lingering long past the time that they may be addressed.

Moreover, open-ended statutes of limitations for employment discrimination claims would run afoul of agency record retention policies, including record-keeping policies required by the EEOC, which only requires employers to maintain employment records for one (1) year.

Under the EPA, an employer must retain records for only three (3) years. Even the federal tax laws only require the retention of personal tax information for four (4) years under Federal Unemployment Tax Act ("FUCA") and Federal Insurance Contributions Act ("FICA"). Therefore, establishing an unlimited statute of limitations period will enable claims to be brought long past the time that employers must retain the relevant records, making a coherent examination of the claims practically impossible.

5. In the Civil Rights Act of 1991, Congress overturned the Supreme Court's decision in *Lorance*, relating to the applicability of filing periods to seniority systems.

- **Can you explain how Congress's decision overturned the Supreme Court without imposing an open-ended statute of limitations?**

RESPONSE:

In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Supreme Court ruled that the EEOC charge-filing period ran from the time when the discrete act of alleged discrimination occurred, not from the date when the effects of the practice were felt. The plaintiffs in *Lorance* filed suit based on their demotion under a facially neutral seniority system, operated in a non-discriminatory manner, but allegedly adopted with a discriminatory purpose, outside the statutory period. The Court, citing *Evans*, *Ricks*, and the special status of seniority systems in discrimination law, (*Lorance*, 490 U.S. at 911-12), held that "[b]ecause the claimed invalidity of the ... seniority system is wholly dependent on the alleged illegality of signing the underlying [collective bargaining] agreement, it is the date of that signing which governs the limitations period." *Id.* at 911.

After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. *See* 42 U.S.C. § 2000e-5(e)(2). Congress adopted a discovery rule, which allowed for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application. *Id*. As Justice Alito noted in the *Ledbetter* decision, Congress specifically limited its amendment to Title VII to seniority cases and not as a general expansion of the statute of limitations for Title VII purposes. *Ledbetter*, 127 S. Ct. at 2169 n.2. Furthermore, the language Congress used was carefully chosen to apply only to seniority systems adopted for an intentionally discriminatory purpose, thus limiting the opportunity for frivolous litigation based on disparate impact or unintentional discrimination.

6. We have heard that the *Ledbetter* decision reversed existing interpretation of the law with respect to Title VII filing periods.

- **Is there precedent from the Supreme Court demonstrating that the *Ledbetter* decision was consistent with established interpretations of Title VII?**

RESPONSE:

The *Ledbetter* decision was consistent with, and arguably compelled by, prior Supreme Court precedent. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (U.S. 2007). The decision cited and discussed two important precedents at length.

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), plaintiff alleged the defendant airline maintained a salary system based on seniority. The plaintiff was terminated, in an allegedly discriminatory act, and although subsequently rehired several years later, was then treated as a new employee for seniority (and thus salary) purposes. Evans argued, similarly to *Ledbetter*, that although a suit for the initial discriminatory act was time barred, the airline's alleged refusal to give her credit for her prior service gave present effect to its past illegal act and thereby perpetuated the consequences of the alleged forbidden discrimination. *Evans*, 431 U.S. at 557. The Supreme Court refused to take the airline's alleged discriminatory intent in 1968, when it discharged the plaintiff supposedly because of her sex, and attach that intent to its later act of neutrally applying its seniority rules. *Id.* at 558.

Similarly, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a college librarian, Ricks, was refused tenure, and given a non-renewable one-year contract. When that contract expired, Ricks filed with EEOC, alleging that the denial of tenure was based in discrimination in violation of Title VII. *Id.* at 252-53. This was well outside of the 180-day period, but Ricks argued that the clock should start at the end of the one year contract, not the denial of tenure. *Id.* The Supreme Court said the appropriate time from which to measure the running of the statute of limitations was from the date of the University's communication of its decision to Ricks that it would not grant him tenure — not from the date of his termination at the end of the one-year contract. *Id.* at 257-58.

In *Ledbetter*, the Court concluded that these and other precedents stand for the proposition that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place," and that more to the point, "[a] new violation does not occur, and a new [180-day] period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination" (although naturally, "if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed"). *Ledbetter,* 127 S. Ct. at 2169. The Court explained that to accept *Ledbetter*'s argument that each pay check starts the clock anew "would shift intent from … the act that consummates the discriminatory employment practice … to a later act that was not performed with bias or discriminatory motive," with the effect that despite the plain requirement of the statute, "liability [would be imposed] in the absence of the requisite intent." *Id.* at 2170.

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Please contact me if I can provide additional information on this topic.

Sincerely,

Lawrence Z. Lorber