No. 07-4023

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARY LOU MIKULA,
Plaintiff-Appellant,

v.

ALLEGHENY COUNTY OF PENNSYLVANIA,
Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil Action No. 06-cv-01630)
Honorable Arthur J. Schwab

Brief of American Civil Liberties Union, American Civil Liberties Union of Pennsylvania, National Partnership for Women and Families, and Women's Law Project as *AMICI CURIAE* in Support of PLAINTIFF-APPELLANT on Rehearing Urging Reversal.

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CERTIFICATION

Mary Catherine Roper, one of the attorneys for *Amici Curiae*, hereby certifies that:

1. On this 12th day of June, 2009, I filed one electronic original using the CM/ECF system and ten true and correct copies of this *Amici Curiae* brief via Fed Ex Regular Delivery with the Clerk of the Court, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure. Electronic service via the CM/ECF system will send notification of such filing to:

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2. I am admitted to the bar of the Third Circuit.

3. This *Amici Curiae* brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing second-step briefs. The brief contains 4,149 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

4. The printed *Amici Curiae* brief filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

5. The electronic version of the *Amici Curiae* brief filed with the Court was virus checked using Symantec Endpoint Protection, version 11.0.4 on June 12, 2009, and was found to have no viruses.

6. Pursuant to Fed. R. App. P. 26.1, I certify that the American Civil Liberties Union Foundation, the American Civil Liberties Union Foundation of Pennsylvania, the National Partnership for Women & Families, and the Women's Law Project do not have a parent corporation and that no publicly held corporation owns 10 percent or more of any stake or stock in them.

s/Mary Catherine Roper
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STATEMENTS OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Through its Women's Rights Project (founded in 1972 by Ruth Bader Ginsburg), the ACLU has long sought to ensure that the law provides individuals with meaningful protection from sexual harassment and other forms of discrimination on the basis of gender. To that end, the ACLU was an active supporter of the Lilly Ledbetter Fair Pay Act. The ACLU of Pennsylvania is the local affiliate of the ACLU, and regularly provides counsel in women's rights and other discrimination matters arising in the State of Pennsylvania. Because economic opportunity is the bedrock of personal autonomy, the ACLU seeks to ensure that all women have equal access to employment and fair treatment in the workplace.

National Partnership for Women & Families is a national non-profit advocacy organization that promotes equal opportunity for women; accessible, quality health care; and policies that help women and men meet their work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious

workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and federal circuit courts of appeal to advance fair and equal treatment of women in employment, including one in the Supreme Court on the *Ledbetter* case itself.

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The parties have consented to the filing of this brief.

INTRODUCTION

This Court should reverse the panel's *per curiam* decision and reinstate Mary Lou Mikula's Title VII gender-based wage discrimination claim. The facts alleged by Mikula—that she was paid less than a similarly

situated male employee from her date of hire and continued to be paid less despite her requests for redress—are exactly the type Congress intended to cover when it passed the Lilly Ledbetter Fair Pay Act of 2009 (42 U.S.C. § 2000e-(5)(e)(3)(a), which overrules the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).[1]

As shown in its debates and reports, Congress passed the Lilly Ledbetter Fair Pay Act in order to restore the law as it existed prior to the *Ledbetter* decision regarding the timeliness of wage discrimination charges, to encourage workers to fully investigate and informally attempt to resolve their claims, to ensure that employers would not be able to escape liability by hiding their discrimination during the charge filing period, and to set bright line rules regarding the statute of limitations for wage discrimination charges. By finding that the Act does not apply to Mikula's claim, the panel decision both ignores the plain language of the statute and frustrates all of these purposes.

Moreover, it is clear that the facts in Mikula's case are not even the type about which the opponents of the Act were concerned; her claim is timely even under the *Ledbetter* decision, and is only more obviously so as a result of the Act's passage, as it was brought within 300 days of her

[1] All facts regarding Mikula's case are taken from *Mikula v. Allegheny County of Pennsylvania*, No. 07-4023, slip op. at 1 (3d Cir. Mar. 24, 2009).

employer's decision to deny her the raise that would have remedied the pay discrimination. The Act provides three possible starting points at which the statute of limitations period for filing a charge may begin to run: (1) when a discriminatory compensation decision or other practice is adopted, (2) when an individual becomes subject to the compensation decision or other practice, or (3) when an individual is affected by the compensation decision or other practice—such as each time a paycheck is issued. 42 U.S.C. § 2000e-(5)(e)(3)(a). Mikula filed her EEOC charge within 300 days of receiving a discriminatory paycheck. That alone indisputably establishes that her claim is timely. In the alternative, she timely filed it within 300 days of the County's discriminatory decision to deny her a raise as set out in its August 2006 response to her internal discrimination complaint. For these reasons, the panel's decision was error.

ARGUMENT

I. The Lilly Ledbetter Fair Pay Act Was Passed to Help Combat the Serious Problem of Discriminatory Pay Faced by Working Women.

As the facts of *Ledbetter* and Mikula's case show, gender-based unequal pay remains a serious problem for women. Women working full-time, year-round still are paid only 78 cents for every dollar paid to men.

U.S. CENSUS BUREAU & BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY 2007, Table PINC-10 (August 26, 2008), *available at* http://www.census.gov/hhes/www/macro/032008/perinc/new10_000.htm. Women of color fare even worse: in 2007, African American women's median income was only 71% of men's overall median income, and Latina women's median income was a mere 59% of the median income of all men. *Id.* Even when education levels and occupations are controlled, women earn less then men. For example, a study of 95 occupations conducted by the *New York Times* found only four where women earned the same as or more than men in the same position. Hannah Fairfield and Graham Roberts, *Why is her paycheck smaller?*, N.Y. TIMES, March 1, 2009, *available at* http://www.nytimes.com/interactive/2009/03/01/business/20090301_WageGap.html; *see also* JUDY GOLDBERG DEY AND CATHERINE HILL, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, BEHIND THE PAY GAP (2007) (showing that the gender wage gap for college-educated women increases over time and exists even within majors and when controlling for employment experience, employment continuity, education, and training).

Against the backdrop of clear and persistent gender disparities in pay, the Supreme Court's decision in *Ledbetter v. Goodyear Tire* was

devastating. Under the Supreme Court's rationale, women who were paid less than men because of their sex were consigned to live with that discrimination with no opportunity for redress if their employer was successful in hiding the initial discriminatory compensation decision for the required 300 days.[2] Responding to Justice Ginsburg's dissent, which called on lawmakers to remedy this injustice, Congress acted swiftly to reinstate the law as it had existed prior to the *Ledbetter* decision, providing that the time for victims to file a charge challenging a discriminatory compensation decision would restart each time the victim received a discriminatory paycheck. *See Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

II. The Plain Language and Legislative History of the Lilly Ledbetter Fair Pay Act Shows that the Act Covers Claims Like Mikula's.

Lawmakers supporting the Lilly Ledbetter Fair Pay Act made clear that its purposes were: (1) to reinstate in plain language the rule as it existed prior to the *Ledbetter* decision regarding when a claim of pay discrimination was to be considered timely; (2) to give employees the time necessary to investigate whether they really were the victims of pay discrimination and

[2] The *Ledbetter* case took place in Alabama where the charge filing deadline is 180 days. Pennsylvania has a 300-day charge filing deadline. The timeliness standards applied are identical, regardless of the number of days. To avoid confusion, this brief will refer to the 300-day standard applicable in the present case except in quotations.

the opportunity to informally resolve their complaints; (3) to ensure that employers that successfully hid pay discrimination for 300 days after the original discriminatory decision would not be able thereby to escape liability; and (4) to provide a bright line for employers and employees regarding when the statute of limitations would begin to run. 155 CONG. REC. S694, 708 (daily ed. January 21, 2009) (statement of Sen. Mikulski). Each of these purposes is frustrated by the panel's decision in *Mikula.*

a. Congress intended to reinstate the paycheck accrual rule.

The Lilly Ledbetter Fair Pay Act was passed to restore the paycheck accrual rule that courts had applied in Title VII pay discrimination cases for decades and that the Supreme Court reversed in the *Ledbetter* decision. *See, e.g.,* H.R. REP. NO. 110-237, at 3 (2007) (purpose of statute was "to reverse the Supreme Court's May 29, 2007, ruling in *Ledbetter v. Goodyear*, which dramatically restricted the time period for filing pay discrimination claims under Title VII and made it more difficult for workers to stand up for their basic rights at work."); 153 CONG. REC. S9661, 9661 (daily ed. July 20, 2007) (statement of Sen. Kennedy) ("It simply restores the status quo as Congress intended and as it existed on May 28, 2007, before the *Ledbetter* decision was made."); 153 CONG. REC. H8940, 8942 (daily ed. July 30, 2007) (statement of Rep. Miller) ("This bill restores the law so that the 180-

day statute of limitations clock runs when a discriminatory pay decision or practice is adopted, when a person becomes subject to the pay decision or practice, or when a person is affected by the pay decision or practice, including whenever she receives a discriminatory paycheck…. That is as the law was for these many, many years."); *id.* (statement of Rep. Andrews) ("This is not a novel theory. This has been the law for nearly 40 years. And this bill restores that law."); *id.* at 8945 (statement of Rep. Hirono) ("The bill reinstates the paycheck accrual rule, a law widely interpreted by eight Federal circuit courts to mean that the 180 day time limit for filing a charge of discrimination with the Equal Employment Opportunity Commission begins each time a discriminatory paycheck is received.").

Given that both the plain language of the Act and the legislative history evidence Congress' clear intent to restore the paycheck accrual rule that existed prior to *Ledbetter*, the panel erred in concluding that Mikula's claim was untimely, because Mikula received a discriminatory paycheck within 300 days of her claim. Prior to *Ledbetter*, this Circuit recognized the paycheck accrual rule and applied it to allow discriminatory compensation cases filed within 300 days of a tainted paycheck. *See Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (applying the paycheck accrual rule in a national origin discrimination case and finding the claim timely because it

was filed within 300 days of receipt of a discriminatory paycheck).[3] The Act restores the vitality of this precedent—a fact completely overlooked by the panel's decision. That Mikula filed within 300 days of receiving a discriminatory paycheck therefore conclusively establishes that her charge was timely.

b. Congress intended to allow employees time to investigate pay discrepancies and to resolve their claims without resorting to litigation.

In passing the Lilly Ledbetter Fair Pay Act, Congress was concerned that the *Ledbetter* decision would force employees to file cases quickly in order to preserve their claims, rather than permitting workers the opportunity to determine whether or not discrimination had actually occurred and the chance to approach their employer regarding the alleged pay discrimination. In fact, the Senate rejected a substitution to the Act in part because that substitute would have required an employee to file a charge when she "reasonably should have known" about the discrimination rather than allowing the time necessary for a worker to investigate further and negotiate with her employer. *See* 155 CONG. REC. S694, 707 (daily ed. January 21, 2009) (statement of Sen. Klobuchar) (speaking against the substitution and

[3] Prior to *Ledbetter,* the paycheck accrual rule had also been applied in cases involving the denial of a raise when the charge was brought more than 300 days after that denial. *See Reese v. Ice Cream Specialties, Inc.,* 347 F.3d 1007, 1013-14 (7th Cir. 2003).

noting that "[t]he Lilly Ledbetter Fair Pay Act is the only bill that gives employees the time to consider how they have been treated and try to work out solutions with their employers"); *id.* at 708 (statement of Sen. Mikulski) ("We want to be able to work out disputes amicably, to go to maybe some alternative dispute resolution mechanism, have time to find out the facts…. Employees may want to give their employers the benefit of the doubt hoping the employers will voluntarily remedy that gap or may want to work actively with the employer to resolve the dispute."); 155 CONG. REC. S739, 743 (daily ed. January 22, 2009) (statement of Sen. Mikulski) ("[T]he Lilly Ledbetter Act gives workers a chance to figure out whether they are being discriminated against, approach the employer, and perhaps have an alternative dispute resolution on this before EEOC complaints, before going to court.")

By holding that Mikula's claim is time-barred because she did not file her charge either immediately after she was hired or immediately after her initial requests for raises were ignored,[4] the panel frustrates Congress' clear purpose in passing the Act. The Act is designed to encourage precisely the

[4] Given that Mikula's employer did not respond to her initial request for raises, the panel's theory that she should have filed within 300 days after such tacit denial is especially troubling, as it is impossible to determine with any precision when silence becomes refusal and the clock begins to run in such a scenario.

type of internal conciliation that Mikula attempted to initiate with her employer when she repeatedly asked for raises. Perversely, the panel's decision in effect penalizes Mikula for patiently engaging in exactly the type of informal resolution of Title VII claims that Congress sought to encourage with the Act and that Title VII has always been understood to promote.[5]

c. Congress intended to limit employers' immunity from compensation discrimination complaints.

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[5] *See Johnson v. Transportation Agency*, 480 U.S. 616, 628 (1987) (finding that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts."); *Int'l Ass'n. of Firefighters v. Cleveland*, 478 U.S. 501, 516 (1986) (noting that the Supreme Court has "on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. . . . This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding that 'Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity . . . .'") (citing 29 C.F.R. § 1609.1(b) (1985)); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 771 (1983) (stating that voluntary compliance with Title VII is "an important public policy" and that Congress intended "cooperation and conciliation to be the preferred means of enforcing Title VII"); *Burgh v. Borough Council of Montrose*, 251 F.3d 465, 470 (3d Cir. 2001) (explaining the EEOC charge process and noting that "[t]he congressional policy underlying this framework was to resolve discrimination claims administratively through cooperation and voluntary compliance in an informal, noncoercive manner."); *EEOC v. A&P*, 735 F.2d 69, 83-84 (3d Cir. 1984) (stating that "cooperation and voluntary compliance were selected as the preferred means" of achieving compliance with Title VII and that "[t]he express policy of Title VII favors voluntary compliance not only before, but even after an EEOC suit is filed.").

In passing the Lilly Ledbetter Fair Pay Act, Congress was motivated by a concern that the Supreme Court's decision allowed employers to escape liability for discriminatory pay decisions as long as the employer was able to hide the decision for the 300-day charge filing period. Once that time had passed, the employer could not be sued, regardless of how long the pay disparity continued or how large it grew. Such a rule, Congress believed, both created a perverse incentive for employers to hide discrimination and left workers with no legal recourse. *See* H.R. REP. NO. 110-237, at 7 ("[Under the Supreme Court's decision] the employer is forever insulated from liability once the initial 180-day period has passed even though it continues to pay discriminatory compensation. Consequently, the rule adopted by the Court leaves victims of pay discrimination without recourse, even though they continue to receive discriminatory pay for work currently performed."); *id.* at 11 ("Rather than encouraging employers to hide the ball, run out the clock, and continue reaping the financial rewards of paying someone less for discriminatory reasons, as is the incentive under the *Ledbetter* decision, H.R. 2831 is designed to encourage employers to stop paying individuals in an unlawful, discriminatory fashion"); 155 CONG. REC. S694, 695 (daily ed. January 21, 2009) (statement of Sen. Leahy) ("[The *Ledbetter* decision] sends the message to employers that wage

discrimination cannot be punished as long as it is kept under wraps"); 155 CONG. REC. H546, 547 (daily ed. January 27, 2009) (statement of Rep. Miller) ("The Supreme Court simply told bad employers that to escape responsibility for pay discrimination all they need to do is keep it hidden for the first 180 days.").

The panel's decision returns employers and workers to the landscape they faced after *Ledbetter*. Under the panel's decision, employers have an enormous incentive to deny requests for raises (or not to respond to such requests) because, if the employee does not file a charge within 300 days of the initial denial, the employee's chance to bring a Title VII wage discrimination claim will be forever lost. The employer will be able to discriminate against the worker permanently and indeed openly, without fear of liability, and the worker will be forced to accept lower, discriminatory wages. This situation is exactly what Congress intended to prevent by passing the Act.

d. Congress intended to provide a bright-line for employers and employees as to when the statute of limitations for filing a charge begins to run.

The plain language of the Lilly Ledbetter Fair Pay Act specifies that the adoption of a compensation decision will begin the 300-day period within which an employee may file a charge. The Act also specifies that this

300-day period begins again each time an individual is affected by a discriminatory compensation decision, such as when each new discriminatory paycheck is issued. The Act's clarity in delineating the different times at which the limitations period may begin reflects Congress' frustration with attempts to muddle the issue and seeks to minimize any confusion for employees and employers.

Congress intended that there be no doubt about a plaintiff's ability to file a charge within 300 days of receiving a discriminatory paycheck, instructing that "[a]n employer who decides to discriminate based on pay should be subject to challenge with every repeated instance of the employer effectuating that decision. Present and future instances of discrimination must not be immunized by a cramped reading of when an unlawful employment practice occurs for purposes of the statute of limitations." H.R. REP. NO. 110-237, at 17. To ensure that repeated instances of discrimination could not be swept under the rug, Congress realized it needed to "make it a clear rule, make it a bright-line rule, as we do in so many other employment cases." 155 CONG. REC. S694, 706 (daily ed. January 21, 2009) (statement of Sen. Klobuchar).

The Act's bright-line rules also specify that the 300-day period begins again each time an employee is affected by a discriminatory compensation

decision, a scenario that the Act does not limit to the repeated issuance of discriminatory paychecks. Congress explained that it was critical that the Act not restrict its scope to pre-ordained scenarios, because "[t]he Committee cannot envision every fact pattern in which charges might be brought within 180/300 days of an act that effectuates a past decision to discriminate. Application of the seniority system in *Lorance* was one; paycheck issuance in *Ledbetter* was another." H.R. REP. NO. 110-237, at 17.

Congress also intended for the Act to encompass a wide scope of discriminatory compensation "decisions or other practices," and rejected an amendment by Representative Keller and Senator Spector that would have struck "other practices" from the Act. Congress explained that this language was necessary in order to successfully reverse the *Ledbetter* decision by "captur[ing] the wide gamut of compensation practices, from single, discrete decisions about pay to arrangements, schemes, systems, or other practices related to pay," thus avoiding any "hairsplitting" definitions of "compensation decision." *Id*. at 5.

Both bright lines were crossed here. First, the County continued to issue Mikula paychecks effectuating the initial prior discriminatory decision. That alone is completely sufficient to establish that her claim is timely. Second, when the County issued its decision concluding that Mikula's pay

was appropriate and her requests for raises had been properly rejected, its decision clearly affected her compensation and thus should be considered a "compensation decision," contrary to the panel's decision. If the denial of a raise—a quintessential example of a decision that affects compensation—is not a compensation decision, then Congress' desire for a bright-line rule regarding compensation decisions will be irreparably frustrated.

III. Even Opponents of the Ledbetter Act Were Not Attempting to Block Claims Like Mikula's.

The panel's failure to recognize Mikula's timely filing under the Lilly Ledbetter Fair Pay Act is especially troubling, because given the facts of her case, the timeliness of her charge would even satisfy the standards set out by the Supreme Court in *Ledbetter*. *See* 550 U.S. at 628 ("EEOC's charging period is triggered when a discrete unlawful practice takes place."). Indeed, the facts of her case were not the type of facts about which the opponents of the Act were concerned.

Opponents of the Act based their objections on the proposition that '[a]n employer's ability to tell its story dissipates sharply as time passes," positing cases in which plaintiffs might wait decades to bring a claim. H.R. REP. NO. 110-237, at 34. Although plaintiffs who waited many years to file a charge would forfeit years of backpay and thus have a disincentive to unnecessarily delay, opponents of the Act cautioned that by reinstating the

paycheck accrual rule, "the Ledbetter legislation could allow for the filing of lawsuits long after someone knew they were subject to a discriminatory act, effectively eliminating the statue of limitations from Title VII in many cases." 155 CONG. REC. S694, 696 (daily ed. January 21, 2009) (statement of Sen. Voinovich).

However, opponents of the Act never objected to cases in which the plaintiff files a charge within 300 days of the adoption of a compensation decision. In fact, the House Minority Views report, written in opposition to the Act, describes a charge filed within 300 days of an employee receiving a discriminatory raise as one which does fairly put the employer "on notice" and allows for investigation while "recollections are fresh." H.R. REP. NO. 110-237, at 39. Mikula filed a formal internal discrimination complaint in March 2006, received a response denying her a raise in August 2006, and filed her EEOC charge in April 2007.[6] In responding to her complaint, the County found evidence sufficient to conclude that no discriminatory acts had occurred and that her "rate of pay [was] fair," and Mikula filed less than 300 days after receiving the County's decision. Mikula's case is thus not even

[6] The County failed to respond to Mikula's requests for raises, and thus, the first notice that she had that her request was denied was the August 2006 letter from the County. To hold that Mikula's time to file a charge had run while the County did not respond to her raise request, as the panel decision does, creates an incentive for employers to simply ignore such requests for 300 days so that workers will be out of time to file EEOC charges.

one that presents the concerns about employer defense and delayed filing that galvanized opponents of the Act.

CONCLUSION

For the reasons stated herein and in the plaintiff's brief, the panel's decision regarding the timeliness of Mikula's claim should be reversed.

June 12, 2009

Respectfully submitted,

s/Mary Catherine Roper

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