US Supreme Court curbs workers' ability to sue for pay discrimination

By Barry Grey
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The US Supreme Court on Tuesday sharply curtailed the ability of workers to sue employers who engage in pay discrimination. With the 5-4 decision, the court reversed long-standing legal precedent and administrative practice, reinterpreting workplace discrimination provisions of the 1964 Civil Rights Act in a manner that shields companies which illegally penalize employees because of their gender, race, religion or national origin.

Workers who suffer pay discrimination because of age or disability will also be adversely affected by the ruling.

The case, *Ledbetter v. Goodyear Tire & Rubber Company*, involved a suit by a female supervisor, Lilly Ledbetter, who charged she was unfairly given lower pay than her male counterparts in the course of her nearly two-decade tenure at Goodyear. She won her case before a jury in federal district court, only to have the verdict reversed by a federal appeals court.

Tuesday's high court ruling, which upheld the appeals court decision, is a massive legal attack on women workers, and on the working class as a whole.

Business groups hailed the decision. "Today's ruling is a victory for employers because it limits how far back an employee may go when making a discrimination claim involving pay," said Robin Conrad, executive vice president of the National Chamber Litigation Center, an arm of the United States Chamber of Commerce.

Karen Harned, executive director of the National Federation of Independent Business, said, "We're thrilled with the Ledbetter decision."

Spokespeople for women's rights and civil rights organizations decried the ruling. "The ruling is clearly a very important setback in the ability to eliminate discriminatory pay," said Marcia Greenberger, a co-president of the National Women's Law Center.

Debra Ness, president of the National Partnership for Women & Families, which filed a "friend of the court" brief in support of Ledbetter, said, "If employers can keep the discrimination hidden for a period of time, they can continue to discriminate without being held accountable."

Theodore M. Shaw, president of the NAACP Legal Defense and Education Fund Inc., said, "Essentially what it says is, if you don't catch an employer red-handed at the moment of discrimination, if there's a cumulative discriminatory impact, that discrimination is beyond the reach of the law."

In an interview with the *New York Times*, Ledbetter said she first faced discrimination in the early 1980s. She told the newspaper, "My department manager, when he would evaluate me, he would tell me things like, 'If you meet me at the Ramada Inn, you can be No. 1, and if you don't, you're on the bottom'."

She added that her superiors ultimately forced her to retire early by giving her an unusually arduous job.

"I'm very disappointed about the ruling. I'm disappointed for all the females who are out there working today," she told the *Times*.

The majority decision, written by Associate Justice Samuel Alito and joined by Chief Justice John Roberts and Associate Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy, employs an absurdly narrow definition of unlawful pay discrimination. It does so in order to prevent victimized workers from utilizing evidence from previous years that demonstrates they were discriminatorily paid less than their co-workers, even if the past discrimination continues to hold down their wages.

Instead, workers must prove a "discrete act of discrimination" in the 180 days prior to their filing a complaint with the federal agency that enforces Title VII of the Civil Rights Act, the Equal Employment Opportunity Commission (EEOC). Under Alito's decision, knowingly giving an employee a paycheck that is depressed because of previous discrimination does not constitute such a "discrete act."

As a result of Tuesday's ruling, a worker facing pay discrimination will be obliged to file a claim against virtually every separate pay-setting decision of his or her employer, or fall outside the 180-day timeframe laid down in Title VII, and thus forfeit the ability to legally fight his or her victimization.

Previous law and practice assumed that each paycheck which reflected the effects of past discrimination constituted a new discriminatory act, and therefore a worker could challenge the employer and cite past discrimination to make his or her case. Indeed, this was the position of the EEOC itself, which actively intervened on the side of the Ledbetter.

With the new ruling, companies will be able, in effect, to wipe the slate of previous discrimination clean, making it immeasurably more difficult for employees to successfully sue them.

Lilly Ledbetter worked for nearly 20 years at the Gadsden, Alabama Goodyear plant. The only woman among 16 men at the same management level, she discovered late in her working career that she was being paid less than any of her counterparts, including those with lower seniority.

By the time she brought suit in 1998, her salary was as much as 40 percent lower than the salaries of the male supervisors. She was earning $3,727 a month, while the lowest paid man was making $4,286.

Her case went to trial in Federal District Court in Birmingham, Alabama, and the jury awarded her more than $3 million in back pay and compensatory and punitive damages. The trial judge reduced the total award to $360,000.

Goodyear appealed and won a reversal from the United States Court of Appeals for the 11th Circuit in Atlanta, Georgia. The appeals court ruled that because Ledbetter could not show that she suffered intentional discrimination during the 180 days prior to her filing a complaint, she was not the victim of an "unlawful employment practice" and therefore not entitled to relief under Title VII.

That decision contradicted previous rulings by federal appeals courts, which had upheld the traditional interpretation of Title VII and the policy of the EEOC. Last June, the US Supreme Court agreed to hear Ledbetter's appeal of the 11th Circuit Court decision in order to resolve the issue. At that point, the Bush administration intervened on the side of Goodyear, and the US solicitor general argued in support of the company and the 11th Circuit Court ruling.

Alito's decision, backed by the right-wing troika of Roberts, Scalia and Thomas and joined by the "swing" justice, Kennedy, upheld the position of the 11th Circuit Court.

Associate Justice Ruth Bader Ginsburg wrote a biting dissent, which was joined by the other liberals on the court—Stephen Breyer, David Souter and John Paul Stevens. To underscore her opposition to the majority ruling, Ginsburg took the unusual step of reading her dissenting opinion out loud from the bench.

Alito's decision is a model of cynicism and casuistry. He acknowledges that Ledbetter introduced evidence sufficient to convince a jury that Goodyear had over a protracted period given her poor evaluations because of her sex, resulting in lower pay increases than if she had been treated fairly. In other words, that the company had violated the law.

He then turns around and says that since Ledbetter did not prove that the company intentionally discriminated against her in making the two pay decisions that occurred in the 180 days preceding her filing a complaint with the EEOC, she could not sue under Title VII of the Civil Rights Act.

Verbally wagging his finger at the plaintiff, Alito writes: "But current effects alone cannot breathe life into prior, uncharged discrimination... Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure."

He simply dismisses the arguments of Ledbetter's attorneys that pay discrimination is more difficult to recognize and prove than other forms of job discrimination—since it involves no single and public act such as dismissal or failure to promote, and since employers keep pay information secret—as "policy arguments" that have nothing to do with the statute.

He likewise brushes aside arguments based on the reality of the work place, such as the understandable hesitation of women and minority employees, especially those recently hired, to rush into filing EEOC complaints against their employers, for fear of retribution, including the loss of their jobs.

He rejects the plaintiff's citation of a Supreme Court precedent on pay discrimination, the 1986 case of *Brazemore v. Friday*, in which the court explicitly rejected his new interpretation of what constitutes an unlawful action under Title VII. In that decision, the court wrote that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."

In her dissent, Ginsburg was unusually blunt, declaring, "In our view, the court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination....

"Title VII was meant to govern real-world employment practices, and that world is what the court today ignores."

She pointed out that Supreme Court precedent and lower court rulings "have overwhelmingly held that the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man."

She concluded by urging Congress to pass legislation that would overturn the court's weakening of Title VII protections for women and minority workers.

There is virtually no likelihood of that occurring. The Republicans will overwhelmingly oppose any such legislation, and the Democrats will not seriously pursue it. In fact, the Democratic Party played a critical role in facilitating the confirmation of the two Bush appointees, Chief Justice Roberts and Associate Justice Alito, whose entry onto the court in 2005 and 2006 respectively shifted it further to the right.

In the case of Roberts, the Senate voted overwhelmingly (78-22) to confirm the nomination, while in the case of Alito, Democrats refused to mount a serious filibuster attempt. The Senate voted 72-25 to close debate on Alito's nomination, assuring his confirmation. That vote came despite warnings from women's rights groups and civil rights advocates that Alito, as a federal appeals court judge, had consistently rejected workplace discrimination claims.

As a result of Democratic complicity in the confirmation of Bush appointees, the Supreme Court is in a position to mount a sweeping assault on previous legal and social reforms. Only last month, the same five justices reversed previous court precedent and, in major attack on abortion rights, upheld the Partial-Birth Abortion Ban Act of 2003.

What is involved in these rulings is a systematic drive to strip working people of any serious redress in the courts to illegal and predatory actions by big business—on workplace discrimination, consumer fraud, environmental pollution, health and safety violations—undermine democratic rights and strengthen the police powers of the state.