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

PETITION FOR PANEL REHEARING OR REHEARING EN BANC OF PLAINTIFF-APPELLANT MARY LOU MIKULA

Jocelyn Samuels
Dina R. Lassow
(Counsel of Record)
Fatima Goss Graves
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW, Ste. 800
Washington, DC 20036
(202) 588-5180

Attorneys for Plaintiff-Appellant
Mary Lou Mikula

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE HISTORY

MISCELLANEOUS

STATEMENT OF COUNSEL PURSUANT TO CIRCUIT RULE 35.1

I express the belief, based on a reasoned and studied professional judgment, that the panel's decision presents a question of exceptional importance because the interpretation of a new statute, the Lilly Ledbetter Fair Pay Act of 2009, was presented to this Court for the first time and the panel failed to follow the clear language of that Act. The panel's failure to give effect to all the terms of the statute in its per curiam decision is contrary to the decisions of this Court in *United States v. Gregg*, 226 F.3d 253, 257 (3d Cir. 2000), and *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008), and to the decision of the United States Supreme Court in *Reiter v. Sonotone Corp.*, 422 U.S. 330 (1979). Therefore, consideration by the full court is necessary to secure and maintain uniformity of the decisions of this Court, and rehearing is warranted.

s/ Dina R. Lassow

Dina R. Lassow
Attorney of Record for the Appellant

Appellant Mary Lou Mikula ("Mikula") respectfully petitions for rehearing by the panel or rehearing by the full court of the per curiam decision under Federal Rules of Appellate Procedure 35 and 40.[1] In that opinion, the panel dismissed her Title VII claim as time-barred because her "unanswered request" for a pay increase did not amount to "the adoption of a discriminatory compensation decision." Slip Op. 2, n.1. However, 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), makes clear that the statute of limitations period for Title VII compensation claims is triggered both when the unlawful compensation decision occurs ***and*** each time an individual is affected by the unlawful compensation decision, including each time a discriminatory paycheck is received. In other words, each discriminatory paycheck renews the charging period.

The panel's error was compounded by its characterization of Allegheny County's ("the County") refusal to respond to Mikula's requests for a raise as mere unanswered requests not covered by the Fair Pay Act.

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[1] Mikula also has an Equal Pay Act claim, which was remanded to the district court. She is not challenging the decision on the Equal Pay Act claim; this petition is limited to the panel's decision to affirm the district court's dismissal of her Title VII claim as time-barred.

The panel decision is not only inconsistent with the Fair Pay Act's plain text, it also undermines the very purpose of the Fair Pay Act and Title VII more broadly. For these reasons, rehearing by the panel or rehearing by the full court on Mikula's Title VII claim is warranted.

STATEMENT

1. Title VII of the 1964 Civil Rights Act requires that any person challenging a potentially unlawful employment practice file a charge with the Equal Employment Opportunity Commission within 300 days[2] of the alleged unlawful employment practice. 42 U.S.C § 2000e-5(e)(1). In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court addressed the type of activities that trigger the statute of limitations period in compensation cases. In so doing, the Court ruled that employees cannot challenge ongoing pay discrimination if the original discriminatory pay-setting occurred more than 300 days earlier, even when the employee continues to receive paychecks that have been discriminatorily reduced. This decision upset longstanding and virtually universal precedent under Title VII and other civil rights statutes.

[2] Although a 180-day period applied to Lilly Ledbetter's case, because of the difference in the relevant state anti-discrimination law, the filing period here is 300 days. To avoid confusion, we will use a 300-day period when discussing the time period for filing a charge of discrimination.

Prior to the *Ledbetter* line of cases, every federal appellate court to consider the issue – including this court (*Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001)) – determined that employees could challenge ongoing compensation discrimination because each discriminatory paycheck renewed the charge filing period.[3] Authoritative guidance issued by the Equal Employment Opportunity Commission also acknowledged that discriminatory paychecks renewed the limitations period – "Repeated occurrences of the same discriminatory employment action, ***such as discriminatory paychecks***, can be challenged as long as one discriminatory act occurred within the charge filing period." 2 EEOC Compliance Manual § 2-IV-III.

[3] *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 572-573 (2d Cir. 2005); *Reese v. Ice Cream Specialties, Inc*., 347 F.3d 1007, 1013-1014 (7th Cir. 2003); *Goodwin v. Gen. Motors Corp*., 275 F.3d 1005, 1009-1011 (10th Cir. 2002); *Cardenas v. Massey*, 269 F.3d 251, 257-258 (3d Cir. 2001); *Anderson v. Zubieta*, 180 F.3d 329, 335-336 (D.C. Cir. 1999); *Ashley v. Boyle's Famous Corned Beef Co*., 66 F.3d 164, 168 (8th Cir. 1995) (*en banc*); *Brinkley-Obu v. Hughes Training, Inc*., 36 F.3d 336, 346-347 (4th Cir. 1994); *Gibbs v. Pierce Cty. Law Enforcement Support Agency*, 785 F.2d 1396, 1399-1400 (9th Cir. 1986); *Hall v. Ledex, Inc*., 669 F.2d 397, 398 (6th Cir. 1982); *see also Lamphere v. Brown Univ.*, 685 F.2d 743, 747 (1st Cir. 1982) ("a decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights"). Prior to the Eleventh Circuit's decision in *Ledbetter*, 421 F.3d 1169 (11th Cir. 2007), it, too, had determined that each discriminatory paycheck renewed the statute of limitations. *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 448-449 (11th Cir. 1993).

Following Justice Ginsburg's instruction that, "[o]nce again, the ball is in Congress' court * * * to correct this Court's parsimonious reading of Title VII," 550 U.S. at 2184, Congress responded quickly. Less than two years after the *Ledbetter* decision and during the first month of the 111th Congress, both the House and Senate passed the Fair Pay Act. And on January 29, 2009, the Fair Pay Act became the first substantive piece of legislation signed by the President.

Under the Fair Pay Act, there are three triggers for a compensation discrimination claim. The Act explicitly provides that "an unlawful employment practice occurs when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, ***or*** when an individual is affected by application of a discriminatory practice, ***including each time wages, benefits, or other compensation is paid***" as a result of such a practice. 42 U.S.C. § 2000e-(5)(e)(3)(a) (emphasis added). It applies to all compensation discrimination claims pending on or after May 28, 2007 under Title VII, the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* and Sections 501 and 504 of the Rehabilitation Act of 1973,

29 U.S.C. § 791 and 794. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), amending 42 U.S.C. § 2000e-5(e).

2. Mary Lou Mikula has managed the Police Grants Budget for Allegheny County ("the County") since March 2001. Slip Op. 1. Her complaint is that she is paid less than Ed Przybyla, the manager of the Police Operating Budget. Her starting pay was $35,500 and she now earns $40,429 a year. *Id.* Although she and Przybyla, the manager of the Police Operating Budget, share at least 18 common fiscal management responsibilities[4] and both report to the Superintendent of Police, Przybyla earns $47,740. *Id.*; *see also* App. III, Tabs 20, 24; App. II, Tab 17. She claims that the pay disparity is discriminatory. Mikula's grants budget is smaller than the operating budget, but is more complex. App. II, Tabs 15, 17. Mikula also has the additional responsibility not shared by Przybyla of writing grant proposals. App. II, Tab 19. While Przybyla's tenure with the County is longer, the County does not employ a formal seniority system. Slip Op. 2, 4. In addition, there is no set salary range for either position and the positions are not part of a current job classification or pay plan. App. IV, Tab 40, p 441,

[4] Both Przybyla and Mikula's responsibilities included managing and preparing budgets, preparing and submitting purchase orders, vouchers, statements for the Controller and financial reports, depositing funds to accounts, directing fund transfers, maintaining financial records, and periodically meeting with auditors.

456-459.

Mikula made several attempts to increase her salary to at least that of Przybyla over a period of years. In September 2004, she submitted a written request for a pay raise to the Superintendent, specifically asking that her salary be increased "to be equal or greater than" Przybyla. Slip Op. 1. In October 2005, she reminded the Superintendent of the pay disparity between her and Przybyla. *Id.* In November 2005, she discussed the pay disparity with the Deputy Director of Human Resources. *Id.* No one in County government responded to these requests.[5] *Id.*

In March 2006, Mikula filed a formal internal discrimination complaint with the County's Human Resources Department, alleging that she had been paid unfairly. *Id* . The Human Resources Department issued a formal response on August 23, 2006, determining that no discriminatory acts had occurred and that Mikula's "rate of pay [was] fair." *Id.* Mikula filed an Equal Pay Act suit in federal district court on December 6, 2006. App. I, Tab 6. On April 17, 2007, Mikula filed an EEOC charge of gender-based

[5] Despite the County's failure to respond in 2004, Mikula believed she would ultimately receive a pay increase when County Manager Jim Flynn negotiated and signed grant contracts that specified that a portion of the program funds would be used to administer the grants, presumably by the Mikula, the grants manager. The pay increase was never authorized. App. IV, Tabs 29, 30, 31.

wage discrimination and, after receiving a right-to-sue letter, amended her district court complaint to include a Title VII claim. *Id.* The district court granted summary judgment in favor of the County on both claims, and Mikula filed a timely appeal to this court. *Id.* at 2.

3. The panel vacated the district court judgment on the Equal Pay Act claim and remanded to the district court "for further proceedings focused on whether Mikula stated a prima facie claim for violation of the [Equal Pay Act] and whether the County has met its burden of proving its affirmative defenses." Slip Op. 5.

On the Title VII claim, the panel affirmed the district court's grant of summary judgment, finding that the claim was time-barred. First, it found that the County's August 23, 2006 decision was not a pay decision and thus could not serve as a trigger for the 300 day filing period. Slip Op. 2. It next determined that Mikula's unanswered requests for a pay raise were not the sort of pay decisions covered by the Fair Pay Act. *Id.*

ARGUMENT

The language of the Lilly Ledbetter Fair Pay Act of 2009 could not be more clear – each discriminatory paycheck (rather than simply the original decision to discriminate) resets the 300-day limit to file a claim. 42 U.S.C. § 2000e-(5)(e)(3)(a). Nor is there any confusion over Congress' intent in

enacting the Fair Pay Act. Congress acted quickly to overturn the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and "reject[] the Court's underlying idea that the statute of limitations starts to run [only] upon the mere decision to discriminate and not also upon the employer's effectuation of that discriminatory decision." H.R. Rep. No. 110-237, at *17 (2007). Rehearing on Mikula's Title VII claim is therefore warranted.

A. The Panel Decision Is Inconsistent With the Plain Language of the Lilly Ledbetter Fair Pay Act.

The first principle of statutory construction is that when the language is plain, it controls. Indeed, it is the "first step in statutory construction." *In re Lord Abbott Mutual Fund Fees Litigation*, 553 F.3d 248, 254 (3d Cir. 2009). "If the language of the statute expresses Congress's intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms." *United States v. Gregg*, 226 F.3d 253, 257 (3d Cir. 2000).

There is nothing ambiguous in the language of the Fair Pay Act: each paycheck renews the limitations period for Title VII compensation claims. But in concluding that the Act would "not change the result reached in [its] opinion," the panel seems to have ignored a key provision of the Act. It focused exclusively on the first part of the statute, emphasizing that

Mikula's request for a raise was not an "*adoption* of a discriminatory compensation decision." Slip Op. 2 (emphasis in original).

To be sure, the "adoption of a discriminatory compensation decision" is one event that may trigger the statute of limitations in a Title VII compensation claim, but the period may begin for other reasons as well. Congress provided for the limitations period to begin not only "when a discriminatory compensation decision or other practice is adopted," but also, as relevant here, "when an individual is affected by the application of a discriminatory practice, ***including each time wages, benefits, or other compensation is paid***." 42 U.S.C. § 2000e-(5)(e)(3)(a). Indeed, Congress' use of the disjunctive indicates that it intended the limitations period for discriminatory compensation claims to be triggered by either identified reason. *See Reiter v. Sonotone Corp.*, 422 U.S. 330 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). Thus, to "give effect to each word in the statute," *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), the limitations period must be renewed with each discriminatory paycheck.

Moreover, even if the Fair Pay Act were limited to the "adoption of a discriminatory compensation decision" and Congress had not overturned the

Ledbetter decision, the refusal to give a raise is a pay-setting decision. *Denman v. Youngstown State Univ.*, 545 F. Supp. 2d 671 (N.D. Ohio 2008) (finding that the "decision to deny [the plaintiff]'s raise and non-renew her contract are clearly discrete acts" that trigger the charge period); *Osborn v. Home Depot, USA*, 518 F. Supp. 2d 377, 389 (D. Conn. 2007) (finding that "repeatedly fail[ing] to address [the plaintiff's] complaints of unequal pay and requests for a raise to bring her wage to a fair level" is distinguishable from *Ledbetter* in that the discrete, discriminatory conduct occurs inside the charge period).

Mikula made several requests that her pay be raised to at least the level of Przybyla, to which the County provided no response. Each time the County refused to respond to her requests for a raise was an independent actionable activity, even under the erroneously narrow holding in *Ledbetter*. Moreover, the County's formal determination that she did not merit a pay increase (communicated in response to her complaint to the Human Resource Department) was a pay decision – a decision to *not* increase Mikula's pay. A plain reading of the Fair Pay Act thus compels the conclusion that Mikula's claim is not time-barred.

B. The Panel Decision Undermines the Basic Purpose of the Lilly Ledbetter Fair Pay Act.

That the panel decision is inconsistent with the Fair Pay Act's plain language is reason enough for rehearing, but the panel decision also undermines the central purpose of the Fair Pay Act. This court must avoid constructions that would lead to 'odd' or 'absurd results' or that are 'inconsistent with common sense." *Disabled in Action of Pennsylvania v. Southeastern Penn. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008).

Here, every piece of evidence in the legislative record demonstrates that the Fair Pay Act was designed to reverse the impact of the Supreme Court's decision in *Ledbetter* on compensation claims in order to provide full protection against discrimination under Title VII. Congress emphasized that point in several ways.

1. To begin with, Congress repeatedly indicated that the Fair Pay Act would restore the law to the longstanding rule in place prior to the Ledbetter decision. In the statutory text, for example, the Fair Pay Act preamble makes clear that the bill will "clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs ***each time compensation is paid pursuant to the discriminatory compensation decision*** * * *." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), amending 42 U.S.C. § 2000e-5(e) at Sec. 2, Preamble. The House Report also emphasized that that the purpose of the

Act is "to reverse the Supreme Court's * * * ruling in *Ledbetter v. Goodyear*." H.R. Rep. 110-237, at *3 (2007). And while the Fair Pay Act was debated on the floor of the House and the Senate, the same view was expressed repeatedly.[6] The President made similar statements prior to signing the bill into law. *See* Press Release, White House Office of Communications, Now Comes Lilly Ledbetter (Jan. 25, 2009) (stating that the Fair Pay Act would "restore the law to where it was before the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co").

2. Congress also emphasized that the *Ledbetter* decision undermined the goals in Title VII and other civil rights laws. For example, the findings section emphasizes that the decision in *Ledbetter* "unduly restricting the time period * * * for discriminatory compensation [claims is] * * * ***contrary to the intent of Congress***." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), amending 42 U.S.C. § 2000e-

[6] *E.g.*, 155 Cong Rec. H83-01 (daily ed. Jan. 8, 2009) (statement of Rep. Kaptur) (The Fair Pay Act "will restore the law and justice by clarifying that each paycheck resulting from a discriminatory pay decision would constitute a new violation of the employment nondiscrimination law and reset the 180-day clock."); 155 Cong. Rec. E67-01 (daily ed. Jan. 13, 2009) (statement of Rep. Van Hollen) (The Lilly Ledbetter Fair Pay Act corrects an errant Supreme Court decision in the case of Ledbetter v. Goodyear"); 155 Cong. Rec. S557-01 (daily ed. Jan. 15, 2009) (statement of Sen. Mikulski) ("That is what the Lilly Ledbetter bill will ensure. It will restore the law to the way it was before the Supreme Court decision on *Ledbetter v. Goodyear*.").

5(e); see also *id.* (noting that the Supreme Court decision "is at odds with the robust application of the civil rights laws that Congress intended"). *Id.*

3. Finally, Congress enacted the Fair Pay Act to prevent the precise consequences of the panel decision – a decision, like the corrected holding in *Ledbetter*, that allows current pay discrimination to continue. Indeed, although Title VII is structured to encourage voluntary compliance, *see Johnson v. Transp. Agency*, 480 U.S. 616, 641-43 (1987) (emphasizing that Title VII seeks to encourage employers' voluntary efforts to identify and prevent discrimination), the panel opinion creates the opposite incentives. Once the 300 day period has passed from the time the pay decision is "adopted," the pay discrimination can continue and the employers can benefit from it financially indefinitely. Employers thus are perversely encouraged by the panel opinion to conceal their discriminatory conduct for 300 days when they can escape Title VII's commands. This is exactly what Congress enacted the Fair Pay Act to prevent.

Moreover, the facts of this case illustrate why Congress acted quickly to restore the law. Mikula repeatedly requested a pay raise from the County and was met each time with silence. It was not until the County's Human Resources Department formally indicated that it believed that her title and

pay were "fair" that Mikula firmly understood that the County would not correct the pay disparity. She then took legal action against the County.

The panel opinion – as the County did here – would allow employers to circumvent Title VII's ban on pay discrimination and drag their feet until the 300-day period had passed. By waiting out the employee or hiding the conduct for less than a year the employer would be free to discriminate for all time. This outcome strikes at the core purpose of the Fair Pay Act. Indeed, the panel's rule is tantamount to a finding that the Fair Pay Act has no application at all.

C. The Panel Decision Conflicts With Decisions of Courts Around The Country

Although the application of the Fair Pay Act is one of first impression in this court, courts around the country have held that the Lilly Ledbetter Fair Pay Act superseded the *Ledbetter* decision to allow for the charging period under Title VII to be renewed with each discriminatory paycheck. Indeed, every other court to consider the issue has consistently determined that the Fair Pay Act instructs courts to reset the charging period with each discriminatory paycheck. *E.g.*, *Shockley v. Minner*, No. 06-478 JJF, 2009 WL 866792 (D. Del. Mar. 31, 2009) ("agree[ing] with Plaintiff that Congress has explicitly overruled the decision and logic of the *Ledbetter* decision"); *Rehman v. State Univ. of New York at Stony Brook*, 596 F. Supp.

2d 643, 651 (E.D.N.Y. 2009) (finding that under the Fair Pay Act, the plaintiff's wage discrimination claims are timely); *Musgrove v. Gov't of District of Columbia*, No. 06-1861 (EGS), 2009 WL 650399, *1 (D. DC. Mar. 16, 2009) (defendant withdrew its timeliness argument after the court directed the parties to address the applicability of the Fair Pay Act to the plaintiff's Title VII claims); *Goodlet v. Delaware*, No. 08-298-LPS, 2009 WL 585451, *6 (D. Del. Mar. 6, 2009) (finding that Goodlet's pay disparity claims survive because "the 300 day clock for filing a Title VII pay disparity claim starts anew with each discriminatory pay period").

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for rehearing or rehearing en banc be granted and that the panel opinion be vacated in part to reverse the grant of summary judgment on Mikula's Title VII claim.

Respectfully submitted,

s/ Dina R. Lassow_____

Jocelyn Samuels
jsamuels@nwlc.org
Dina R. Lassow
dlassow@nwlc.org
Fatima Goss Graves
fgraves@nwlc.org
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW, Ste 800
Washington, DC 20036
(202) 588-5180

APRIL 7, 2009