

# Diversity and Generational Change: Shifts in the Law

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## Lilly M. Ledbetter v. The Goodyear Tire & Rubber Company, Inc., 550 U.S. 618 (2007)

- Supreme Court case that triggered a change in the way that employers need to look at discrimination claims, especially as they relate to compensation.
- Plaintiff worked for Respondent for 20 years starting in 1979, mostly as a salaried manager.
- When she retired, Ledbetter was the only female area manager.
- Through an anonymous tip just before she retired, Ledbetter found out that she was paid less than her male counterparts (\$3700 per month vs. \$4300–\$5200 per month for her male colleagues).
- Ledbetter filed a Charge of Discrimination with the Equal Employment Opportunity Commission in July 1998 claiming that she received lower performance evaluations because of her gender and as a result was paid a lower salary.
- Ledbetter would subsequently describe her employment conditions as consisting of acts of sexual harassment (*quid pro quo* relating to a requested exchange for a favorable performance evaluation), hostile work environment, retaliation (reassignment to a heavy-lifting position), as well as pay differentials.
- The District Court allowed the case to proceed to trial and the jury found in favor of Ledbetter. The Eleventh Circuit Court of Appeals reversed, “holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee’s pay during the EEOC charging period. 421 F. 3d 1169, 1182-1183 (2005).” *Ledbetter* at 622-623.
- The U.S. Supreme Court affirmed the Eleventh Circuit’s decision.

- *Held*: The later effects of past discrimination do not restart the clock for filing an EEOC charge; “[b]ecause a pay-setting decision is a ‘discrete act,’ it follows that the period for filing an EEOC charge begins when the act occurs.” *Ledbetter* at 621. Ledbetter’s EEOC charge was filed considerably more than 180 days after her employer established her salary and thus was untimely. (Subsequent pay decisions were deemed non-discriminatory.)
- Note: Ledbetter’s claim was brought in Alabama. The EEOC filing period to bring a charge of discrimination is 300 days for states with a parallel agency with jurisdiction over employment discrimination claims. In states without such a state agency, like Alabama, the filing period is only 180 days.
- Thus, the effect of the *Ledbetter* decision was to cut off claims by employees where the most recent discriminatory act occurred more than 180 days (or 300 days) before discovery and filing of a Charge of Discrimination.

## Lilly Ledbetter Fair Pay Act of 2009

- Following the Supreme Court’s decision, Congress addressed its concern that the intent of the underlying Title VII and related equal employment opportunity legislation was thwarted.
- Statute: “An Act to amend [T]itle VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to 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 or other practice . . . .”
- Congressional finding # 1: “The Supreme Court in [*Ledbetter*] significantly impairs statutory protections against discrimination in

compensation that Congress established and that have been bedrock principles of American law for decades.”

- Congressional finding # 2: “The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.”
- Act effective as of May 28, 2007 (the day before the Supreme Court’s decision in *Ledbetter*).
- Impact on employers—potential increase in exposure for discriminatory pay practices. Federal government contractors, covered by Executive Order 11246, may have greater exposure from the compensation analysis portion of audits conducted by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs.
- Advice to employers—take proactive approach to examine *and address* all compensation discrepancies.

## From “Traditionalists” to “Gen Next”—Significant Changes in Employment Law

Expansion of who can sue and for what

*Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 Ct. 1325 (2011)

- This case changed the standard for evaluating what employee actions constitute “protected activity.”
- Court determined that plaintiff’s verbal complaints constituted protected conduct and triggered the anti-retaliation protective provisions of the Fair Labor Standards Act.

*Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011)

- Recognized “Cat’s Paw” theory of employer liability where decision-maker relied on “tainted” personnel records prepared by other employees.
- Under some fact scenarios, an employer can assert a shield of protection from liability if a manager or other “authority” is not aware of the offending facts or could not reasonably be expected to know of the offending facts.
- The “Cat’s Paw” theory, in contrast, recognizes that otherwise “innocent” managerial decision-makers may be influenced by the bias of others in the investigation and recommendation chain.
- The Supreme Court’s ruling suggests an affirmative obligation on decision-makers to ensure that the information relied upon is free of bias.

Retaliation—increasingly a popular cause of action

- Elements:
  - Employee engaged in protected activity
  - Employer took adverse employment action against employee
  - Causal connection between protected activity and adverse employment action

*Crawford v. Metro. Gov’t of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846 (2009)

- Retaliation claim can arise even if employee did not file a complaint of discrimination.

- Supreme Court recognized that an employee’s comments made during an internal investigation of another employee’s harassment complaint amounted to “protected conduct” and warranted protection from retaliation.

*Thompson v. North American Stainless*, 131 S. Ct. 863 (2011)

- Supreme Court recognized claim of third party for retaliation under Title VII.
- Where an employee claimed discrimination, an employer could not take an adverse employment action against the employee’s fiancé, who was also an employee.
- The fiancé’s ability to bring a third-party claim for retaliation was upheld.

### Workplace implications and opportunities

- Employment Practices 101: Consistent, well-documented, performance-based decisions provide a helpful defense.
- Employers may utilize effective diversity and inclusion workforce strategies, including training, to:
  - Enhance credibility
  - Demonstrate “good faith” efforts
  - Create employee engagement
  - Create community supplier support
  - Mitigate against claims for workplace discrimination and/or harassment and the attendant claims for compensatory and punitive damages.

- Comprehensive diversity and inclusion strategies typically include:
    - Executive sponsorship
    - Vision
    - Mission
    - “Business Case”—customized for the organization
    - Definitions
    - Scope—workforce, workplace, marketplace
    - SMART goals and objectives
    - Metrics
    - Accountabilities
    - Communication and training components
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## Elizabeth A. Campbell

**Partner and Chief Diversity Officer,  
Houston Office**

Elizabeth is an attorney and diversity practitioner with a successful record of working with business leaders, executives and teams to accomplish organizational goals. During her career, Elizabeth has worked in the areas of administrative and employment law both in law firm and in-house counsel settings, and has led human resources, employment relations and diversity strategies at large corporations. Before joining Andrews Kurth in February 2007, Elizabeth served as Vice President of Employment Relations and Corporate Diversity Officer for ARAMARK Corporation in Philadelphia, Pennsylvania. Elizabeth received her J.D. from the University of Michigan in Ann Arbor, Michigan, and her B.A. from American University in Washington, D.C.

### Elizabeth's work for Andrews Kurth

In her role as Partner and Chief Diversity Officer, Elizabeth devotes her time exclusively to the development and implementation of the diversity and inclusion components of the firm's strategic plan. Specifically, the plan incorporates the "promotion of our culture of collaboration, diversity and inclusion, personal commitment, and professionalism" as a key element of the firm's Vision. To that end, Elizabeth collaborates with the firm's Labor and Employment Section and is a frequent speaker, training facilitator and author on the topic of diversity and inclusion and related employment law topics. She also works with the firm's clients on matters relating to diversity and inclusion strategy.

## Supporting Andrews Kurth's Organizational Culture

For more than a century, Andrews Kurth has built its practice on the belief that "Straight Talk is Good Business." This statement resonates with our firm because it describes the way we advise our clients and also the way we manage and develop our staff. We are proud of the culture we have developed. We believe it sets us apart from other nationally recognized law firms. With low partner/associate ratios, our associates are able to work immediately with partners and clients. Because we do not overstaff our representations, associates have the opportunity to develop more quickly than at other firms. Unique opportunities to grow exist through day-to-day guidance from partners as well as through efforts like our Women's Initiative Team, Diversity and Inclusion strategy, and Flex Path Program. Andrews Kurth also fosters a close working relationship between associates and partners, creating a working atmosphere that is informal and friendly.



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