■ 'LEDBETTER V. GOODYEAR TIRE'

Improper hurdles

By Lynne Bernabei & Alan R. Kabat SPECIAL TO THE NATIONAL LAW JOURNAL

THE U.S. Supreme Court's May 29 *Ledbetter v. Goodyear Tire* decision got it wrong—the majority opinion views the civil rights laws as an obstacle course or a series of hurdles that the employee has to overcome in order to vindicate her rights to be free of discrimination and retaliation. Lilly Ledbetter was a female employee at Goodyear's Gadsden, Ala., plant, who was paid significantly less than her male co-workers. Since Goodyear, as do most private employers, keeps salary information confidential, Ledbetter did not realize for a number of years that Goodyear's setting of her compensation could have been motivated, at least in part, by the bias of her former supervisors.

At trial, Ledbetter prevailed by presenting evidence that one supervisor admitted that Goodyear's explanation that she had "poor performance" was pretextual since she received a "top performance award" in one year; that another supervisor was openly biased against women in the workplace; and that the plant manager made sexist remarks about women in the workplace. Ledbetter also presented testimony from two female managers who confirmed that they, too, suffered from discrimination in the workplace, including disparate pay.

Motivation to conceal data

The majority opinion ignored this evidence, which the jury found compelling in reaching a verdict for Ledbetter, and instead created a new procedural hurdle for plaintiffs bringing suits pursuant to Title VII of the Civil Rights Act of 1964. Under *Ledbetter*, employees have to file an Equal Employment Opportunity Commission (EEOC) charge within 180 or 300 days after the employer makes a discriminatory pay decision, not when the employee first learns that the employer's decision was motivated by discriminatory intent. Now, employers will be motivated as never before to conceal compensation information from their employees; employers may also use their employee handbooks to forbid employees from discussing compensation with each other. That way, employers can prevent employees from realizing that intentional discrimination may be at work.

The majority's opinion refused to allow Title VII plaintiffs to invoke the doctrines of equitable estoppel and equitable tolling. The federal and state courts have applied these doctrines to a wide range of statutory and common law claims, not only employment cases, to find that the employer's conduct concealed information from the plaintiff, or otherwise lulled the plaintiff into inaction, and that an employer should not be rewarded for concealing its discrimination. There is no reason that these judicially developed doctrines should not be used in the employment arena for Title VII plaintiffs.

The anti-discrimination statutes are neither a track meet, nor a race to the finish line, and the courtroom is not an obstacle course. Instead, these statutes are designed to protect employees from discrimination and retaliation. In fact, Ledbetter, like many other employees, had allegedly overcome every hurdle in her career—except for Goodyear's discrimination against her.

Justice Ruth Bader Ginsburg, in her dissent, recognized that the high court has twice before got it wrong on Title VII claims by creating new procedural hurdles that were "incompatible with the statute's broad remedial purpose." The Civil Rights Act of 1991 was enacted, in part, to supersede or reverse aspects of the court's holdings in *Wards Cove v. Atonio* (1989) and *Price Waterhouse v. Hopkins* (1989). She specifically called upon Congress "to correct this Court's parsimonious reading of Title VII."

If Congress remedies the *Ledbetter* decision and legislates that employees may file an EEOC charge once they learn that their compensation is lower because of past discrimination, employers will not be faced with an onslaught of losing jury verdicts based on decisions made 20 years ago, as the majority needlessly bewails. Employers can still argue, based on the plaintiff's allegations, that the plaintiff knew that there was discrimination, but waited too long to file an EEOC charge.

The *Ledbetter* decision is a radical departure, as it now denies meritorious plaintiffs their day in court. NLJ

Lynne Bernabei is a founding partner of Washington-based Bernabei & Wachtel, where she handles claims of civil rights violations, discrimination and other employment and contract disputes. Alan R. Kabat is a partner at the firm.

■ RACIAL INEQUALITY IN THE E.U.

Facts are essential

By David B. Oppenheimer SPECIAL TO THE NATIONAL LAW JOURNAL

THE EUROPEAN Union has declared 2007 the "European Year of Equal Opportunities for All." In January, the E.U. equality ministers met in Berlin for their first "Equality Summit" to call attention to their anti-discrimination efforts. And, while global warming wasn't on the agenda, by the end of the first day the discussions had generated enough heat to make the French delegates very uncomfortable.

The 450-plus equality ministers and officials, members of parliaments, representatives of labor and business, civil rights groups, and a bevy of academics (including this unofficial observer from the United States) had waded through a sea of platitudes about discrimination and diversity. When we were then informed at length of the results of the "Eurobarometer survey on discrimination"—a public opinion poll on whether residents of the 27 E.U. member states thought discrimination was a problem—more than a few delegates started grumbling, asking why it mattered that people in Britain were more likely to see race discrimination as a problem than were people in Italy.

But when Trevor Phillips, chairman of the British Commission for Equality and Human Rights, opened the afternoon session by arguing that "opinion is valuable, but facts are essential. And we can only deal with them if we collect data," the room started buzzing. And when Ursula von der Leyen, the German federal minister for family affairs, agreed, the French delegate made it clear he took it personally. Why? The French prohibit government collection of data about race, ethnicity or religion, because it is inconsistent with the French ideal of "citizenship" as the only legitimate form of identity. But in the absence of data, this "colorblindness" allows the French to be blind to the impact of color, even as it distorts the lives of French citizens with dark skin, and undermines the equally essential French ideal of equality.

As the equality delegates met in Berlin, the polling organization TNS-Sofres in Paris released the results of a poll that revealed that 56% of France's black adults said they suffered from discrimination, with 37% saying the situation had become worse in the past year. It was the first such poll ever conducted in France.

"If you're not counted, you don't count," explained Patrick Lozes, head of the Representative Council of Black Associations in France, which commissioned the poll. As with the Eurobarometer, however, the poll measures only perceptions, while failing to provide an actual measurement of inequality.

What data collection reveals

Here in the United States, data measuring racial inequality are readily available. A quick search of our Census Bureau Web site tells us that 9% of white Americans, but 24% of black Americans, live below the poverty line; the median family income for white families is $53,356, while for black families it's $33,255 (62% of the white family income); and 71% of white households, but only 46% of black households, live in owner-occupied homes. And studies by social scientists add to the data on racial inequality, demonstrating that blacks and whites are substantially segregated in the communities in which they live, the schools they attend, the hospitals where they're treated and the stores where they shop; that blacks pay more than whites for insurance, appliances, car loans, home loans and many basic services; and that blacks are less likely to be offered employment or housing compared to equally qualified whites. Some Americans would like to emulate the French, banning the collection of racial data, but an attempt to pass such a law by voter initiative here in California was overwhelmingly defeated in 2003.

Measuring the extent of racial inequality hasn't eliminated the problem in the United States, nor will it in Europe. But it does make it harder to ignore. As Phillips explained in bringing the afternoon session to a close, "the most powerful way to get people aware is to tell them the facts." Until the extent of the problem of racial inequality is fully disclosed, here and in Europe, there's little reason to hope that a solution is at hand. NLJ

David B. Oppenheimer is a professor of law at Golden Gate University in San Francisco, and he also teaches Comparative Equality Law at the University of Paris X. He is a co-author of Whitewashing Race: The Myth of a Color-Blind Society *(University of California Press 2003).*

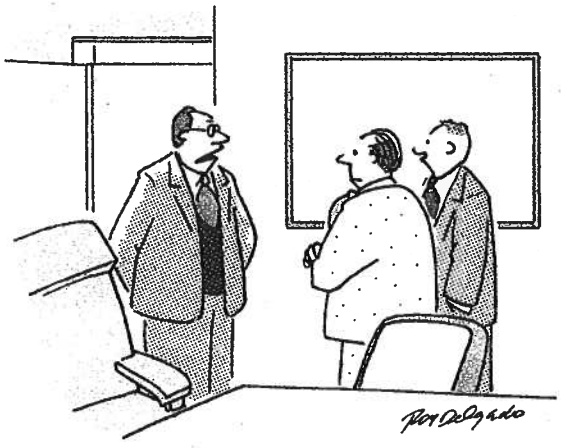
LETTERS TO THE EDITOR

Reprimand appealability

THE ARTICLE "No recourse for bash from bench: In 7th Circuit, lawyer can't appeal judge's critique" [NLJ, May 14] identifies only the 3d, 5th, 9th and District of Columbia U.S. circuit courts of appeals as holding that the reprimand of an attorney is appealable, even if not accompanied by monetary sanctions. This list is incomplete, however. The 10th Circuit joined the 5th, 9th, and D.C. circuits in 2003, in *Butler v. Biocore Medical Technologies Inc.*, 348 F.3d 1163, 1168 (10th Cir. 2003). This should have been clear because the 7th Circuit's opinion cites *Butler*. Additionally, although the article identifies the decision as a "break," the opinion itself says that the court is reaffirming its own earlier decisions, citing *Crews Assoc. Inc. v. U.S.*, 458 F.3d 674, 677 (7th Cir. 2006), and *Clark Equipment Co. v. Lift Parts Manufacturing Co. Inc.*, 972 F.2d 817, 820 (7th Cir. 1992). In other words, this does not appear to be as thoroughly new a holding as the article implies.

MARK MYERS
SAN DIEGO

■ LAW AND LAUGHTER



"We use foreign labor, but when we sue we use American lawyers."