Statement of the U.S. Chamber of Commerce

ON: **JUSTICE DENIED? THE IMPLICATIONS OF THE SUPREME COURT'S LEDBETTER V. GOODYEAR EMPLOYMENT DISCRIMINATION DECISION"**

TO: **THE HOUSE COMMITTEE ON EDUCATION AND LABOR**

BY: **NEAL D. MOLLEN**
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DATE: **JUNE 12, 2007**

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business— manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Statement of Neal D. Mollen

Paul, Hastings, Janofsky & Walker LLP

Before the U.S. House of Representatives Committee on Education and Labor

June 12, 2007

I am here today to testify, on behalf of the United States Chamber of Commerce (Chamber), about proposed legislation that would reverse the Supreme Court's decision in *Ledbettter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___ (2007). I had the privilege of serving as counsel of record for the Chamber in the *Ledbetter* case. I am a practitioner in the area of employment law, handling issues and matters across the broad span of employment discrimination and personnel practices. I have counseled and defended employers with respect to such issues for the past 21 years. I am co-editor of the American Bar Association/Bureau of National Affairs treatise **Employment Discrimination Law** (4th and 5th eds.), and the **Equal Employment Law Update** (BNA 7th ed. Fall 1999). For three years, I served as an Adjunct Professor of Labor Law at the Georgetown University Law Center. I currently serve as the chair of the Washington, D.C. Employment Law Department of Paul, Hastings, Janofsky &Walker

LLP.[1] Paul Hastings has over 1,100 attorneys internationally and 130 attorneys in our Washington office.

I am testifying today on behalf of the United States Chamber of Commerce (Chamber). The Chamber is the world's largest business federation, representing more than three million businesses of every size, industry sector, and geographic region.

The Chamber strongly supports equal employment opportunity for all and appropriate mechanisms to achieve that important goal. When Congress passed Title VII, it selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" that goal,[2] with vigorous enforcement by private parties and the Equal Employment Opportunity Commission when those efforts fail. The Chamber believes that Congress' chosen enforcement scheme — voluntary compliance and conciliation first, litigation thereafter when necessary — has been vindicated over the intervening 43 years. Without question, discrimination remains a problem in society as a whole, but the enormous progress made by employers in assuring non-discrimination is undeniable, and stands as a testament to the efficacy of the enforcement tools selected by Congress.

The *Ledbetter* decision emphatically endorsed these methods of voluntary cooperation and conciliation. The rule emanating from *Ledbetter* is simple; if an employee believes that he or she has been treated discriminatorily by an employer, that matter should be raised internally and then with the EEOC (or similar state agency) promptly and confronted forthrightly. Only in this way can the processes of investigation and voluntary cooperation and conciliation be expected to work. When disagreements and disputes in the workplace fester and potential damage amounts increase, compromise and cooperation become far more difficult.

Ms. Ledbetter claimed, however, that she was entitled by a special "paycheck rule" applicable only to claims of alleged pay discrimination, to sleep on her rights for *decades* before raising her concerns with the EEOC. This "paycheck" limitations rule, soundly and expressly rejected in *Ledbetter*, would have utterly frustrated Congress' design for attempting to resolve such matters, at least in the first instance, without litigation.

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[1]The views expressed in this paper are my own and those of the Chamber and not necessarily those of the Firm.

[2] *Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355 (1977), *quoting Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974).

Moreover, in order to embrace this "paycheck" rule, the Supreme Court would have been required to renounce a rule announced in a long line of well-understood cases regarding the application of rules of limitation under Title VII. The Court had repeatedly held that the statute's limitations period begins to run when the alleged discriminatory decision is made and communicated, *not* when the complainant feels the consequences of that decision.[3] For the Court to overrule this precedent or for the Congress to supersede this settled law with legislation would promote instability and confusion in the law.

Finally and perhaps most importantly, the *Ledbetter* decision recognized the profound unfairness inherent in a limitations rule that would permit an individual to sleep on his or her rights for years, or even decades, before raising a claim of discrimination. To defend itself against a claim of discrimination, an employer must be in a position to explain — first to the EEOC and the charging party, and perhaps later to a jury — the reasons it had for making the challenged decisions. To do so, it must rely on the existence of documents and the memories of people, neither of which is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination, as Ms. Ledbetter did in this case, he or she can "wait out" the employer, *i.e.*, ensure that the employer is effectively unable to offer any meaningful defense to the claim. That, the Court properly held, is patently unfair. It does not serve Congress' goal — eliminating discrimination — to substitute a game of "gotcha" for the investigation and conciliation Congress envisioned.

Statutes of limitation are an expression of society's principled, collective judgment that is it is unfair to call upon a defendant to answer serious charges when placed at such a disadvantage. A rule that "refreshes" the period of limitations with every paycheck received to permit a challenge to every decision that contributed to current pay cannot be squared with this important societal value.

I would like to expand briefly on some of these observations:

1. Congress's Design In Creating Title VII's Charge-Filing Period Was Based On Fundamental Fairness To Employees *And* Employers Alike. Limitations periods "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

[3] *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 554-58 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 912 n.5 (1989) (*superseded by statute on other grounds*).

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974). A period of limitation represents a balance between competing interests: it "afford[s] plaintiffs with what the legislature deems a reasonable time to present their claims, [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

The interest in repose is particularly compelling in the employment setting. To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged decision, and to do so convincingly. In an employment discrimination case, the employer attempts to show at trial that it had good reason for treating the plaintiff in the way it did, and the plaintiff tries to show that the employer's explanation is unworthy of credence; the jury must decide whom to believe. In many, if not most, trials, the testimony devolves to a "he said/she said" battle of recollections, and the most vivid rendition of events usually prevails.

An employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no "opportunity to gather and preserve the evidence with which to sustain [itself]. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)). That is precisely why Congress wisely selected relatively brief periods of limitation for filing administrative charges under Title VII.

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, expansions, acquisitions, reductions-in-force, divestitures and reorganizations. When a dispute in the workplace is raised promptly as Congress intended, most or all of the decision-makers, witnesses, and human resources representatives an employer will need to consult and to tell its story convincingly are likely to still be working for the defendant-employer at the time of a trial, or at least the employer will usually be able to locate them. The employer's ability to muster a defense dwindles, however, as the challenged decision recedes

into the past. The American workforce currently has a median job tenure of only four years.[4] This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties. *Id.* It also varies by job category. For example, employees in "administrative and support services" and "accommodation and food services" have median tenures of only 1.9 and 1.6 years respectively. *Id.* Thus, when an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.

The *Ledbetter* case is a perfect example. At her trial, Ms. Ledbetter challenged every one of her employee evaluations (and associated pay increases) back to 1979, when she started at Goodyear. Most of her complaints centered on the actions of a single manager; she claimed that this man had retaliated against her when she refused to go out with him on a date. By the time the case went to trial, however, the manager had died of cancer and was unavailable to tell the jury that he had never asked Ms. Ledbetter on a date or that he never made a biased compensation decision. Goodyear was effectively unable to counter Ms. Ledbetter's in-person testimony in front of the jury and, not surprisingly, the jury returned a verdict for her. As the *Ledbetter* Court recognized, "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." Op. at 12.

The fact that an employer may keep some employment records documenting decisions affecting pay is of little comfort. First, in practice, employers rarely record detailed explanations on paper as to why one employee might have received an incrementally lower or higher pay increase than his or her co-worker. Unlike terminations, which are relatively rare and therefore are usually documented thoroughly at the time, most employers make compensation decisions about every one of their employees every year. The employer can hardly be expected to write extended narratives explaining the rationale for every one of those decisions for every employee, or record comparisons between and among all of the other similarly situated employees — *i.e.*, why Employee A got a 3.5% increase and Employee B got 4%.

Second, even if this kind of documentation existed, the "story line" of an employment decision cannot be told at trial solely with a few pieces of paper. Few defendants are likely to prevail at a trial — even when the challenged decision was entirely bias-free — by meeting the

[4] *See* Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, www.bls.gov/news.release/tenure.nr0.htm (last viewed on 6/6/07).

live, detailed, and often emotional testimony of the plaintiff with a few words recorded on a document.

It is important to note that the Equal Employment Opportunity Commission requires employers to keep only certain specified employment records (including those relating to "rates of pay or other terms of compensation"), and then only requires that the records be kept for one year. *See* 29 C.F.R. § 1602.14. The agency selected one year as the appropriate period "so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added). But when an EEOC charge has been filed, the employer is obligated to keep all records related to the substance of the charge until the matter has been resolved. If Title VII is amended to reverse *Ledbetter*, employers would be obligated to keep these records, not for one year, but in perpetuity.

Thus, the limitations periods selected by Congress in enacting Title VII are rooted in notions of fundamental fairness that are the hallmarks of our American system of justice. The American people are fair. They want individuals to have an opportunity to raise their concerns and, where their legal rights have been invaded, a process through which they can seek redress.

But they also believe — correctly — that an injured party has to act with reasonable dispatch in pressing his or her claims. It violates the most basic notions of justice to allow an individual — even one who may have been subjected to discrimination — to wait until the employer is essentially defenseless to raise the allegation. Ms. Ledbetter waited nearly 20 years to raise her claims, and by that time there was no real chance that Goodyear could defend itself. The Court rightly concluded that this sort of delay is unacceptable. That decision should be embraced, not reversed.

2. The Outcome In *Ledbetter* Was Compelled By A Long Line Of Supreme Court Cases. Those criticizing the *Ledbetter* decision have suggested that it is a departure from prior precedent. Nothing could be further from the truth. The Supreme Court's cases in this area have always emphasized the distinction between *decisions* and *consequences*. For example, in *United Airlines v. Evans*, 431 U.S. 553 (1977), the plaintiff challenged the downstream, seniority-related consequences of her discriminatory termination; the Court held that the employer's actionable conduct occurred at the time of discharge, not when she felt the consequences in her comparative seniority when she was rehired. In *Delaware State College v.*

Ricks, 449 U.S. 250, 252-54, 258 (1980), the plaintiff was a college professor who was informed that he had been denied tenure and that, when the coming school year ended, so would his employment. Instead of filing a charge when notified of the decision, he waited until he was actually terminated before filing a charge of discrimination. This, the Court held, was too late.

Ledbetter is merely a relatively straightforward application of this long-recognized distinction. Ms. Ledbetter should have complained to the EEOC when she was informed of her evaluation results; waiting until her retirement — decades after some of these *decisions* — was unfair.

The *Ledbetter* critics have suggested that a special rule should be created for pay cases. The distinction they seek to make is a false one. Nearly every form of adverse employment action has an impact on compensation — denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline — they *all* have the potential to affect pay. In this case, Ms. Ledbetter complained that her low salary could be attributed to low evaluations she received over the years. She complained about the *consequences* of those evaluations rather than the evaluations themselves.

The compensation *consequences* of any of these otherwise discrete employment decisions will appear in an employee's paychecks as long as that employee is with the same employer. If there were a separate rule of limitations for "pay" cases, *every* Title VII case would become a "pay" case, including those that previously have been characterized as denial-of-promotion or discipline cases. Employers would, undoubtedly, be forced to defend out-of-time claims challenging discrete actions because those discrete decisions ultimately led to paycheck disparity.

3. Title VII's Charge-Filing Period Was Intended To Foster Conciliation And Resolution; These Goals Become Much Less Attainable As Time Passes. Finally, I believe that much of the criticism recently leveled at the *Ledbetter* decision reflects a fundamental misunderstanding of the charge-filing process mandated by Title VII and the manner in which the process begins. Critics, including Justice Ginsburg, have suggested that it is often unfair to expect a worker to possess sufficient information to conclude that discrimination has occurred in time to meet the statute's filing deadlines. I believe this concern is misplaced for several reasons.

First, one need only look at this case to recognize that the concern is vastly overstated. Ms. Ledbetter knew every year what her evaluation results were, and understood the relationship between those results and her pay — low evaluation scores inevitably resulted in low pay increases. She also complained to her co-workers *at the time* that she believed she was being treated unfairly. This is not a case, then, where the alleged victim was ignorant of her potential claim. She simply failed to do anything about it until she had decided to retire.

Second, the courts have developed a number of special rules that can mitigate the impact of the filing deadlines in those few cases in which the employer has in some fashion misled the employee into allowing the period of limitations to lapse or otherwise prevented the employee from gaining access to the administrative process.[5] In those circumstances, strict adherence to the statute's limitations provisions would be unfair, but legislative action is unnecessary to achieve justice because the law already provides a mechanism for avoiding harsh results.

Third, and most importantly, *Ledbetter* critics seem to be confusing the threshold standard for filing a *lawsuit* with the *much lower* standard for filing a charge of discrimination. To file a *lawsuit* in federal court, one must attest that, after reasonable inquiry, the allegations contained in the complaint "have evidentiary support." Fed. R. Civ. P. 11(b)(3). No similar threshold requirement exists for filing a charge of discrimination. The charging party need not have "evidentiary support" to go to the agency for help, merely an inkling of unfair treatment.[6]

"[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is 'reasonable cause' to believe that the employer

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[5] *See*, *e.g.*, *Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993) ("relief from limitations periods through equitable tolling … remains subject to careful case-by-case scrutiny."); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (equitable tolling may apply "when defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" and equitable estoppel may apply when, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.").

[6] "[L]oose pleading" is permitted before the EEOC." *Deravin v. Kerik*, 335 F.3d 195, 202 (2d Cir. 2003); *Alvarado v. Bd. of Tr. of Montgomery Cmty. Coll.*, 848 F.2d 457, 460 (4th Cir.1988) ("precise pleading is not required for Title VII exhaustion purposes").

has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding." *EEOC v. Shell Oil Co.*, 466 US. 54, 68 (1984).

That is, the purpose of the charge is to *begin* the fact-finding process. Once filed, the charge arms the EEOC with the authority to go to the employer and ask for precisely the sort of detailed information the *Ledbetter* critics seem to assume a charging party must have *before* going to the agency. That is simply not the case.

Once the charging party has shared his or her suspicions with the EEOC, and an investigation has commenced, the truth usually comes out. The charging party sometimes realizes that her concerns were unfounded. The employer sometimes realizes that it (or one of its supervisors) made a mistake or even a biased decision. Whatever the facts reveal, the parties then sit together with an agent of the EEOC and discuss the possibility of compromise — of an arrangement that resolves the employee's concerns in a manner acceptable to the employer. That is precisely the process Congress envisioned when it enacted Title VII, and in the ensuing decades, it has produced remarkable results.

Only if this Congressionally mandated process of voluntary cooperation and conciliation fails to result in an acceptable compromise does the case end up in court, and if it does, the complainant is then armed with the evidence divulged during the agency process to support the much higher pleading standard applicable in federal court.

In order for the conciliation process to work as Congress intended, allegations must be presented to an employer in a timely fashion. If allowed to fester over years — or decades — instead of being addressed when the employee first believes a problem might exist, it is much less likely that conciliation will work. As time passes, the parties may become more and more entrenched in their positions, potential "fixes" for the employee's problems become more difficult to arrange, and potential damages escalate. Simply put, the process envisioned by Congress cannot work if disappointed employees are allowed to wait years before filing a charge.

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Every statute of limitations reflects a legislative compromise among competing societal goals. Congress has provided a mechanism through which employees can raise allegations of bias and have them addressed, and it has judged that this process will work best if those allegations are raised, and, one hopes, resolved promptly. The system works.

But that system cannot work effectively to eradicate discrimination, and employers will not be treated fairly, if Congress turns its back on the important societal goal underlying Title VII's period of limitations. Accordingly, the Chamber does not support proposals that would reverse or limit the decision handed down in *Ledbettter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___ (2007).

Thank you for the opportunity to discuss these important issues with the Committee. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

Committee on Education and Labor

Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

1. Your Name (Please Print):		
2. Will you be representing a federal, State, or local government entity? (If the answer is yes please contact the Committee).	Yes	No X
3. Please list any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 2004: None		
4. Will you be representing an entity other than a government entity?	Yes	No X
5. Other than yourself, please list what entity or entities you will be representing: Chamber of Commerce of the United States		
6. Please list any offices or elected positions held and/or briefly describe your representational capacity with each of the entities you listed in response to question 5: I represented the Chamber as amicus curiae of the United States in the Ledbetter case		
7. Please list any federal grants or contracts (including subgrants or subcontracts) received by the entities you listed in response to question 5 since October 1, 2004, including the source and amount of each grant or contract: None		
8. Are there parent organizations, subsidiaries, or partnerships to the entities you disclosed in response to question number 4 that you will not be representing? If so, please list:	Yes	No X

Signature: _____ Date: 6/28/07

Please attach this sheet to your written testimony.