



The public radio show about law and American life

Justice Talking Radio Transcript

Employment Discrimination: Post-Ledbetter Discrimination—Air Date: 10/22/07

This past spring, in Ledbetter v. Goodyear Tire and Rubber Company, the U.S. Supreme Court decided that women who sue for pay discrimination must file a claim against their employers within 180 days of the first time the pay disparity occurs, even if the discriminatory treatment continues for years thereafter. Employment rights advocates fear that this procedural hurdle may make it nearly impossible for victims of discrimination to seek redress. Join us for this edition of Justice Talking as we look at sex discrimination in the workplace. We'll ask what the Ledbetter case will mean for people facing employment discrimination and whether Congress is likely to change the law to make it easier to sue.

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. On today's show we take a look at pay discrimination under the law. One alleged victim in the nation's largest class action suit says she's still fighting for her rights.

UNIDENTIFIED FEMALE: He laughed at me and he said, Stephanie, this is Wal-Mart. Do you know how many people try and sue us each and every day? And oh my goodness, I was so mad. I said you write my name down, O-D-L-E. You have not heard the last of me. You cannot do this to people. I will not let you get away with it.

MARGOT ADLER: But members of the business community say a recent decision by the Supreme Court brings needed relief.

UNIDENTIFIED MALE: It is very difficult for employers to defend themselves from allegations made many, many years down the line.

MARGOT ADLER: Fair pay at the workplace: coming after the news.

MARGOT ADLER: This is Justice Talking, from the University of Pennsylvania's Annenberg Public Policy Center. I'm Margot Adler. The Supreme Court attracted both favor and fury with its controversial decision this past spring narrowing pay discrimination claims. Leaders in the business community say the ruling in *Lilly Ledbetter v. Goodyear Tire* protects employers from costly, hard to prove, outdated cases. But critics in Congress have vowed to write new legislation expanding worker's rights. Today on Justice Talking we take a look at discrimination at work and what the landmark *Ledbetter* decision will mean for the workplace. The Supreme Court decision on pay discrimination took place as the federal courts are considering one of the largest class-action gender discrimination cases ever brought in the U.S. A million and a half women are suing Wal-Mart alleging they were denied promotions, equal pay, or endured treatment barred under federal law. Stephanie Odle is one of the plaintiffs in that case. Stephanie, you'd been working for Wal-Mart a few years when you say you learned that a less experienced male manager was making a lot more than you, thousands more than you. And you say this was a chance discovery.

STEPHANIE ODLE: Right. I, um, he left his W-2 in the receiving office and I happened be the receiving manager, so someone gave it to me. I found it and went wait a minute. How come this guy's making thousands of dollars more a year than I am? So I took that to my boss and said, hey I know I'm not supposed to know this, but it's not like I went looking for it. And I want a raise.

MARGOT ADLER: And what did your boss say?

STEPHANIE ODLE: My boss said, well, Stephanie, he has a wife and children to support. And I was like, well, I'm a single woman about to have a baby. So give me some more money.

MARGOT ADLER: And did you get a raise?

STEPHANIE ODLE: I did get a raise. I got about, I think it was about \$1,200 more a year.

MARGOT ADLER: And that still, I gather, left you making less than--

STEPHANIE ODLE: About, yeah, \$10,000 less a year than the male manager who had less experience than I did.

MARGOT ADLER: Now as all this was happening, how did you react? I mean what affect did all of these things have on you?

STEPHANIE ODLE: As they were happening, at the time, I was like, you know, this is just one ignorant comment from my general manager. Not, um, you know, okay, here's this district manager that's really trying to help me. He's telling me to write a budget and submit it and he's going to get me a raise. Hello! Why would I have ever done that because I think this guy is trying to take care of me? Look at him. He's concerned about me. He wants to know how's my family life working, what can he do to make it better for me. No, that was not it at all! They

were blatantly discriminating against me and trying to find out what's the least amount of money they could give me to get me to shut up.

MARGOT ADLER: You worked in three different states at nine different stores during your time with Wal-Mart, and you've clearly described some of them as very positive. And you said, I gather that it was an environment that was better in some places and worse in others. Why did you decide to bring a suit against the company at large?

STEPHANIE ODLE: You know, I really thought that we could fight this, you know, work it out without a lawsuit, but when I tried to use what they call the "open door" -- you go up basically the chain of command -- and I contacted the vice president of my region and I said, look, I know what you guys did. You terminated me and you already had a man in route to take my job. Their personnel person calls me and says, you know, I'm not coming down, basically you can give me your side of the story over the phone, but he really wasn't interested. And I said, you know, this isn't right. You can't do this to people. You're not going to get away with it. And he laughed at me and he said, Stephanie, this is Wal-Mart. Do you know how many people try and sue us each and every day? And oh my goodness, I was so mad. I said you write my name down, O-D-L-E. Write it down. You have not heard the last of me. You cannot do this to people. I will not let you get away with it.

MARGOT ADLER: Stephanie Odle worked for Wal-Mart for eight years. She's a plaintiff in a class-action gender discrimination suit against Wal-Mart. She's now in business for herself. Thank you so much for joining me.

STEPHANIE ODLE: Thank you.

MARGOT ADLER: Wal-Mart declined to be interviewed for this program. Right now the case is on appeal on procedural questions. The merits of the claims against Wal-Mart have not yet been tried. In a press release the company issued earlier this year, a Wal-Mart vice president, Susan Chambers, said the company has strong equal employment opportunity policies and fosters female leadership, and dismissed the claims of the six lead plaintiffs as "simply not representative of the experiences of women working at Wal-Mart, including my own."

MARGOT ADLER: Each year 80,000 complaints are filed with the federal government. Mary Jo O'Neill with the Federal Equal Employment Opportunity Commission says 30 percent are gender-based. But race bias remains the most common complaint. It's O'Neill's job to litigate violations of several federal laws that prohibit job discrimination based on categories such as race, age, and disability. Mary Jo, welcome to Justice Talking.

MARY JO O'NEILL: Thank you so much for having me.

MARGOT ADLER: I gather that the E.E.O.C. has seen a substantial rise in charges of race-based discrimination and national origin discrimination. What are you seeing?

MARY JO O'NEILL: Yeah, we've seen an increase in national origin and in race, as you've said, and in religion. We've litigated--we've tried a couple of cases this year representing Muslim people who were discriminated against after 9/11. We had a trial against Alamo Rent-a-Car this year: A Somali Muslim woman wanted to wear her head scarf after 9/11 and was told not only could she not wear it, if she wore it, she'd be fired. And in fact she was fired. And so we had a trial this year in Phoenix and the jury came back and said yes this is religious discrimination. And they gave her a verdict of about \$290,000.

MARGOT ADLER: I gather that a lot of the discrimination you're seeing in regard to race and national origin is not very subtle or even covert.

MARY JO O'NEILL: No, I think your audience would be surprised at some of the very egregious, overt situations that we see: nooses in the workplace, the use of the n-word, racial epithets towards Hispanic workers--very egregious, hostile behavior towards large groups of people in the workplace. And that seems to be increasing. There seems to be a freer ability in some workplaces to act in this kind of awful, ugly, hateful way.

MARGOT ADLER: I've read that more than 80,000 workers go to the E.E.O.C. each year complaining that they've experienced bias at work, but that the agency files lawsuits in fewer than 1 percent of the cases annually. Are there a lot of frivolous claims?

MARY JO O'NEILL: Well, I'm not sure that there are a lot of frivolous claims. A lot of cases get settled when it's, when they're in the investigative process. And we have a fabulous mediation program that started about 10 years ago where workers and their employers can sit down at a table and mediate the case early on as soon as the charge is filed, which is a terrific way to solve problems. If the problem can be solved early before litigation, it should. We file around 350,400 cases a year in court, and that is probably as much as we can handle given our staff. But it doesn't really mean that there's a lot of frivolous cases, because many of those go on and private lawyers take them and are successful in court.

MARGOT ADLER: How do you separate the wheat from the chaff?

MARY JO O'NEILL: Well, you certainly meet the witnesses and meet the charging parties, uh, and look at the evidence. We are in the enviable position at the E.E.O.C. to sort of cherry-pick the best cases and look at a case that makes sense to bring to have some sort of national impact. We had a case against Abercrombie and Fitch that was a nationwide case. They were hiring people based on kind of the "American look." Well that looked like it was engaging in race discrimination and some gender discrimination. So we look to see, take cases that will have an impact either legally or in the community, telling employers knock this behavior off, or telling employees these are your rights.

MARGOT ADLER: What about the question of retaliation against workers who file discrimination claims? Is there a lot of it out there? Is it increasing?

MARY JO O'NEILL: It's a great question. There is a lot of it out there and it is increasing. We've seen about a 35 percent increase in retaliation charges over the last 10 years. It's

something that I'm very concerned about. People should have a right to bring what they believe to be discrimination complaints forward without retaliation. If an employer engages in retaliation in any kind of way against somebody who's raised a complaint of discrimination, that's a second violation of the law. Or sometimes it's the first real violation of the law. And it is one of the reasons that people are afraid to come forward. Many victims just leave workplaces, just resign, just quit instead of filing a complaint because they're so afraid of the battle ahead.

MARGOT ADLER: Later in the show we'll be looking at the decision in the Ledbetter case which the Supreme Court handed down this past spring. Do you think that this decision will have a big impact on your work?

MARY JO O'NEILL: Well, I think the decision has some impact on our work. In terms of wage cases under Title VII it won't have an impact. That was really an Equal Pay Act case.

MARGOT ADLER: Help us understand the various ways that people can file discrimination claims. In layman's language, tell us why some turn to Title VII, others rely on the Equal Pay Act of 1963.

MARY JO O'NEILL: People can file charges of discrimination with the E.E.O.C. -- and I would tell people to look at eeoc.gov to look where their local E.E.O.C. office is -- or state agencies, and it's free. And people can file a charge of discrimination and it is served on the employer within 10 days after that. When an employee meets with an E.E.O.C. investigator they'll have a discussion about what they think the appropriate statutes are. And if it's a wage case for example, a gender wage case, hopefully the charge would be filed under both the Equal Pay Act and the Title VII wage portion.

MARGOT ADLER: When you look at the issues that you're facing, the cases that you've litigated, do you think that we're going to be facing these same kinds of gender discrimination problems 20 years from now?

MARY JO O'NEILL: Oh boy, what a question! I certainly hope not for my daughter's sake. But unfortunately I think that we will still continue to see some. We've seen this huge increase in pregnancy charges over the last few years and it's almost like employers have forgotten that it was illegal. So I think we're two steps forward and one step back, I think, is the way it feels like it's going.

MARGOT ADLER: Mary Jo O'Neill is a regional attorney for the Equal Employment Opportunity Commission. Thank you so much for coming on Justice Talking.

MARY JO O'NEILL: Thank you for all your great work.

MARGOT ADLER: Coming up on Justice Talking a debate on what the *Lilly Ledbetter* decision will mean for workers and employers.

UNIDENTIFIED MALE: Frankly, I think the ultimate impact of the *Ledbetter* decision is not as has been claimed by many. I think that this decision will be relatively minor in terms of its impact to working people.

UNIDENTIFIED FEMALE: If you think about what an employee is supposed to do, I think you can see that it's actually quite questionable that this was even a good decision for employers.

MARGOT ADLER: And later we'll hear from a reformer who says sharing information with employees, including everyone's salary, makes the workplace more productive. Stay with us.

MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I'm Margot Adler. Early this summer the U.S. House of Representatives took this testimony from retired Goodyear Tire employee Lilly Ledbetter.

LILLY LEDBETTER: Every paycheck I received I got less than what I was entitled to under the law. The Supreme Court said that this didn't count as a legal discrimination, but it sure feels like discrimination when you're on the receiving end of the smaller paycheck.

MARGOT ADLER: Ledbetter gave that testimony after the Supreme Court ruled against her in a lawsuit she brought against the tire company claiming that she was paid far less than her colleagues because she was a woman. Ledbetter won her case in front of a jury, arguing that Goodyear had violated Title VII of the Civil Rights Act which prohibits employment discrimination based on race, religion, color, sex, and national origin. But the tire company won on appeal, arguing that Ledbetter's low wage had been set so long ago that it was too late to challenge the abuse now, and a divided Supreme Court agreed.

With me today to discuss what it all means for workers and employers is Michael Eastman. He represents more than 3 million businesses as an executive policy analyst at the U.S. Chamber of Commerce. And Professor Deborah Brake: Professor Brake teaches at the University of Pittsburgh School of Law. Previously she litigated sex-discrimination cases for the National Women's Law Center. Welcome both of you to Justice Talking.

DEBORAH BRAKE: Thank you.

MICHAEL EASTMAN: Thank you.

MARGOT ADLER: Michael, let's start with you. You say the Court did the right thing.

MICHAEL EASTMAN: The issue before the Court was whether Ms. Ledbetter brought her case in a timely manner. The Court said that the clock on the statute of limitations begins to run at a time when a discriminatory decision is made and communicated to the employee, not as Mrs. Ledbetter alleged, each time she received a paycheck that might reflect the results of that potentially discriminatory decision. The Chamber of Commerce certainly agrees with the

Supreme Court decision. Ultimately Title VII has a statute of limitations. It does begin to run at a time certain and it does end at a time certain.

MARGOT ADLER: And it's 180 days, right?

MICHAEL EASTMAN: It is 180 days or 300 days depending on which state you are in. And in most states it's 300 days.

MARGOT ADLER: Deborah, I assume you take a very different point of view.

DEBORAH BRAKE: You're absolutely right. I think it's one of the worst Title VII decisions in decades. And it's a terrible decision for working Americans, and of course, a terrible decision for Lilly Ledbetter who worked for Goodyear for 19 years. By the end of her career she earned less than the lowest paid male manager who performed the same work. She didn't realize all of this time that she had been working there that there were these kinds of pay disparities in the workplace. When she found out about them she brought this pay discrimination lawsuit and a jury in rural Alabama agreed with her that the only reason she was paid less is because she was the only woman plant manager. And unfortunately the Supreme Court's decision makes it virtually impossible for an employee to comply with the time limit and vindicate their rights to equal pay. And so it can only exacerbate the gender wage gap that we have in this country that our pay discrimination laws are supposed to be eradicating.

MARGOT ADLER: Deborah, Title VII is very specific in its time limit for filing a pay discrimination claim with the Equal Employment Opportunity Commission. It says a charge under the section shall be filed within 180 days after the alleged unlawful employment practice occurred. Isn't Ledbetter and any employee who fails to file a timely charge just out of luck? I mean there may have been past discrimination, but Title VII says the legal door is closed.

DEBORAH BRAKE: Well, Margot, the problem in the case was how you define an unlawful employment practice. And you're exactly right that the statute is very clear that within 180 days of that unlawful employment practice you're out of time. But the difficulty in this case is what counts as an unlawful employment practice? And until the Supreme Court decided the *Ledbetter* decision in a 5-4 ruling, the law of the land was very settled that the unlawful employment practice in a pay claim is the paycheck that pays you less because of your sex, regardless of when the disparity first went into your paycheck. The *Ledbetter* ruling came along and said, oh no, the unlawful employment practice is that moment in time when someone with intentional animus put a disparity into your paycheck. A hundred and eighty days after that first decision and you're out of luck. So a woman who doesn't realize until much later in her career that she's getting paid less than the men, and that the only reason is because of her sex, is completely out of luck after this ruling.

MARGOT ADLER: Michael, Ledbetter argued that even if Goodyear's decision to pay her less happened years ago it doesn't matter because each paycheck she continued to receive was less than it should have been and so the discrimination continued, and even affected her pension and social security. What's wrong with that argument?

MICHAEL EASTMAN: Well, there's several things wrong with it. First of all, I'd like to clarify that we respectfully disagree with Professor Brake about the status of the law prior to the *Ledbetter* decision. While it is true that there were some circuit courts that had endorsed a paycheck rule, there were others, the Seventh and Eleventh being the two most notable ones, that did not. So I don't think it's at all settled that the paycheck rule was the law of the land. The issue here is that an allegedly discriminatory decision was made at some point in the past and there are effects that continue to flow from that today and therefore shouldn't that be good enough to restart the statute of limitations? And the answer from the employer perspective is no. And that's because Title VII has a strong incentive for employees to file claims quickly so that matters are resolved while all the facts and evidence are fresh and in people's minds. And it is very difficult for employers to defend themselves from allegations made many, many years down the line. This case is very different from an intentionally discriminatory pay system, for example, a pay system that distinguishes between men and women or minorities and non-minorities. This is a very different sort of case in that regard. And while an intentionally discriminatory pay system discriminates every time it is used, something like this, where a decision was made long ago, is quite distinguishable.

MARGOT ADLER: Deborah, Justice Samuel Alito, who authored the Supreme Court's majority opinion, wrote that the filing deadline under Title VII protects employers against what they call "stale" discrimination claims. Shouldn't companies be allowed to do business without having to worry about ancient accusations that may be hard to dispute? Employers forget. They die. Employees move on. Records can be lost.

DEBORAH BRAKE: Well there's nothing unfair to employers about asking employers to account for ongoing current disparities in pay on the basis of sex. Employers much more than employees are in the best position to know what everybody in the workplace makes. The reason that the *Ledbetter* ruling is so terribly unfair to workers is workers don't have that kind of knowledge. A worker may know what her own percentage pay raise is. She doesn't necessarily know the pay raise of all of her male colleagues. And even if she did, she couldn't fairly evaluate whether it was discriminatory or based on some performance factor. Employers do have that knowledge. And the way to defend a pay discrimination case for an employer is just to show that a pay disparity there isn't based on sex. It's based on qualifications, performance, some legitimate factor. And it's the employee who has the burden of proof in these cases. So to the extent that there's a delay, it disadvantages the party with the burden of proof, the employee.

MARGOT ADLER: What do you think the ultimate impact of the *Ledbetter* decision will be? Michael, you first.

MICHAEL EASTMAN: Well, frankly I think the ultimate impact of the *Ledbetter* decision is not as has been claimed by many. I think that this decision will be relatively minor in terms of its impact to working people. You know, it remains, of course, if Congress passes legislation, and as a reaction to that then that will change significantly.

MARGOT ADLER: Deborah?

DEBORAH BRAKE: Well, of course I disagree. I do think that the impact is significant. I think that the impact of the *Ledbetter* decision is that it basically guts Title VII as a remedy for pay claims. If you think about what an employee is supposed to do, I think you can see that it's actually quite questionable that this was even a good decision for employers. What an employee is supposed to do, let's say from the moment in time that they are hired, is search around the workplace and make sure that they're not being paid less if it's a woman than her male colleagues. If she has the slightest inkling or suspicion that she might be paid less than her male colleagues she'd better immediately file a pay discrimination claim. At every raise decision she better be sniffing around to make sure that her raise wasn't less than that of her male colleagues. And if she hears that someone got a higher raise than her who was a male to preserve her rights under *Ledbetter* she'd better immediately file an E.E.O.C. claim. I don't think that is in the best interest long-term of employers or employees. As employment lawyers often say, the term for someone who complains about employment discrimination is "unemployed." It's professional suicide. To complain about every raise decision is not something any worker wants to do.

MARGOT ADLER: Michael, do you have a response to that?

MICHAEL EASTMAN: You know, we do have a problem with, with litigation under Title VII. We know that of the approximately 75,000 charges that are filed through the E.E.O.C. every year that the agency routinely finds about 5 to 6 percent have reasonable cause for discrimination. That indicates a serious problem. And a problem that would be exacerbated, I believe, by a paycheck rule that would allow claims to be filed many years into the future. One of the problems we have with frivolous litigation is an employee at some point in their career becomes disgruntled. That employee may be terminated. They may disagree with an employment decision, something like that. They seek counsel and a lawsuit is filed alleging every cause of action under the sun. And employers need to investigate those allegations and respond to them. Any responsible employer will take those allegations very seriously and if they are indeed founded on something they will respond to those.

MARGOT ADLER: Well, let me go back to something that you said earlier. And I want to start with Deborah, actually. It's clear that it's reasonable, or it seems so to me, to have a strict time limit for certain forms of discrimination claims, like firings and demotions. When these things happen, you know, a worker knows about them quickly. Deborah, would you accept a 180-day time limit for those kinds of forms of discrimination as opposed to pay discrimination?

DEBORAH BRAKE: Well, again, it's not the 180 days that I'm objecting to here. That is clearly part of the law. What I'm objecting to is a ruling that starts the clock running before any employee has enough reason or incentive to even think about filing a discrimination claim.

MARGOT ADLER: And I guess what I'm asking, Michael, is isn't pay discrimination different than these other forms of discrimination because pay discrimination is incremental? It often takes years for employees to understand exactly what's happening. *Ledbetter* said she only discovered she was paid less when, you know, she got an anonymous tip. So I guess what I'm asking is: Doesn't the private nature of salary decisions mean that there should be more leniency when it comes to these kinds of claims, Michael?

MICHAEL EASTMAN: I would make I guess two responses here. The first is when the clock starts to run, if the information is not all in the employee's hands, when a decision is communicated to the employee, is there some kind of discovery rule, which some courts have held, in which the clock does not start to run until the employee discovers the necessary information. And that's an issue that the Court clearly sidestepped in the *Ledbetter* decision. That's clearly an open issue. I would argue that from our perspective the vast majority of courts have said there is discovery rule and that the clock does not start to run until employees indeed have discovered the information. Ultimately many of these other types of employment actions are linked to compensation. While it's true that it's not common practice in most workplaces to discuss pay, many of these other sorts of employment actions, for example promotions, demotions, things like that, are linked to pay as well. So if you have a special rule for pay it will impact every other form of discrimination as well.

MARGOT ADLER: So of course if all salaries were transparent we'd have no problem here, right?

MICHAEL EASTMAN: I think that would be a really interesting debate and I wonder what people would say if we were to suggest that their salary information be public information. Clearly under current law if an employee does not know salary information they're certainly free to ask co-workers. And the law prohibits an employer from having a broad policy prohibiting employees from sharing that kind of information with each other. But in practice most employees don't do that. That's certainly true.

MARGOT ADLER: Justice Ginsburg ended her dissent by inviting Congress to act and overturn the Court's decision in the *Ledbetter* case. Earlier this year the House approved the Lilly Ledbetter Fair Pay Act which does just that. It's still pending in the Senate. Michael, the Chamber of Commerce has testified against this act. Tell us your concern.

MICHAEL EASTMAN: We have significant concerns with this bill. Obviously, as we have discussed, the Chamber of Commerce does support the Court's decision in *Ledbetter*, but we recognize that there is room for reasonable people to debate the issues that were before the Court. The legislation that the House passed however is far broader than merely overturning the *Ledbetter* decision. It does not only address intentional discrimination, it gets into the area of disparate impact or unintentional discrimination. It would also permit broader classes of employees to sue anyone affected by discrimination such as a spouse, child, or other person could bring a claim. These are clearly serious concerns that were not well thought out as the House rushed this bill through in less than one month after the Supreme Court decision was issued.

MARGOT ADLER: Deborah, you testified in support of the act.

DEBORAH BRAKE: I certainly did. I think it is crucial to overturn this decision so that we can salvage our pay discrimination laws. And to again go back to Lilly Ledbetter's case: You know, in addition to the problems of knowing about discrimination which we've talked about, we also have to keep in mind the burden that the Court puts on employees to challenge each and every possibly discriminatory pay decision. If you think about it one of the things that makes pay

unique is its additive nature. If you get a 2 percent raise and unbeknownst to you your male colleague gets, say, a 5 percent raise, that 2 percent raise continues to hurt you as every year, year after year, your base salary is then adjusted with another percentage-based raise. So, you know, to basically tell a woman well you got 1 percent less of a raise, you better challenge it now or forever hold your peace, she may hope that next year it'll be rectified, that it's not so significant in the end. But if she gets to a point where she looks back and sees a pattern that these discriminatory raises over time have added up to a couple thousand dollars less a month, which was the case for Lilly Ledbetter, she is out of luck under the *Ledbetter* ruling. And that's a terrible result for the purposes of Title VII.

MARGOT ADLER: Deborah Brake teaches at the University of Pittsburgh School of Law. Michael Eastman is the executive director of labor law policy at the U.S. Chamber of Commerce. Thank you both for joining me on Justice Talking.

MICHAEL EASTMAN: Thanks very much.

DEBORAH BRAKE: Thank you.

MARGOT ADLER: Coming up on Justice Talking, we hear from the plaintiff in this now famous case.

LILLY LEDBETTER: I want to be able to help change this law because this is not right. Justice Ginsburg was exactly right in her dissent, everything she said. And I will be eternally grateful for what she did say because it gave me the dignity that I can hold my head up.

MARGOT ADLER: Ledbetter promises to fight for stronger laws for fair pay. And we hear a variety of voices talk about doing away with secret salaries altogether.

UNIDENTIFIED MALE: In a perfect world, in a wonderful Utopian world, maybe. We tend to always overvalue our own worth and our own performance. And frankly having everybody else's salary known as opposed to just, say, assuming the worst, would be even worse.

MARGOT ADLER: Stay with us.

MARGOT ADLER: This is Justice Talking, where we make the connection between law and American life. I'm Margot Adler. Lilly Ledbetter has been the focal point of the national debate on pay equity in America today. As policy analysts debate the pros and cons of workplace regulations, we reached Ledbetter at her home in Jacksonville, Alabama, to hear her response to the ruling. Lilly Ledbetter, welcome to Justice Talking.

LILLY LEDBETTER: Thank you.

MARGOT ADLER: In May of this year the Supreme Court ruled against you, essentially arguing that you waited too long to file your claim, which under Title VII is 180 days in Alabama. What was your response to the ruling?

LILLY LEDBETTER: I am very disappointed and I appreciate the opportunity to say that, too, that I could not believe that Justice Thomas ruled against me and even Justice Kennedy. I felt sure that we would have picked up one or both of those two men. And see Justice Thomas at one time was all over the E.E.O.C. And the fact is in 180 days you can't find out. In my company I was told you do not discuss your salary with anyone.

MARGOT ADLER: The House recently passed a bill bearing your name, the Lilly Ledbetter Fair Pay Act. It essentially reverses the Supreme Court ruling. A similar bill is still pending in the Senate. What's it been like for you since the Supreme Court ruling?

LILLY LEDBETTER: I knew that this case would create a lot of interest. But it has been more than I would've ever anticipated. In fact, my attorney in Birmingham, Mr. John Goldfarb, he has stated that he is just flabbergasted at the attention this case has gotten, because I do TV shows. I do speaking engagements. I just returned from Buffalo, New York, where I spoke to 160 people. And I have speaking engagements all the way up to next April of '08. But also what hurts me, too, to know that there are so many women and minorities out there struggling to make ends meet and to earn a living for their families, and there are so many families that are, there's only one parent or one person earning a living. And it has been a terrible struggle for these people, especially in the Deep South. And they're getting cheated every day or not being paid what they should be paid.

MARGOT ADLER: I know that many activist groups have taken up your cause and you've become a symbol in some cases of employment discrimination. Does it ever make you uncomfortable? Is it ever overwhelming to suddenly be pushed into the situation?

LILLY LEDBETTER: The overwhelming part is that I just hope that everything, every word I say, and everything I do, promotes this and I can help. Because see right now I'm 69. I'll be 70 next spring and I am retired. And I want to be able to help change this law because this is not right. Justice Ginsburg was exactly right in her dissent, everything she said. And I will be eternally grateful for what she did say because it gave me the dignity that I can hold my head up and I feel like that I did not get the award but that I help won something else that's much greater. And if I can help change this law, that will change it for my daughter, my granddaughter, and other's people children, and here in my state, actually surrounding states, I have had a lot of correspondence from men who have picked up the cause. We need to be careful when we vote and elect a president in '08 because it needs, you need to think about who are they going to appoint to the Supreme Court.

MARGOT ADLER: Lilly Ledbetter sued Goodyear Tire for gender pay discrimination. The case went all the way to the Supreme Court. Thank you so much for being on Justice Talking.

LILLY LEDBETTER: Thank you so much for having me.

MARGOT ADLER: Lilly Ledbetter says she only learned late in her career that her salary at Goodyear was much lower than her colleagues. What if every employee knew what everyone else was being paid?

UNIDENTIFIED MALE: If someone knew what I made or I knew what they make it won't bother me, it just, I'd just probably encourage the person because, see, it's what you bring into the company is basically what you get paid, you know, besides your performance. And if everyone knew what everybody made, I think everybody would be more happy, more content, because then they know there is a goal to achieve.

UNIDENTIFIED FEMALE: I don't think that would fix the situation. It would compromise your privacy a lot. It would be a mess. Everybody would be fighting because one's getting paid more and the other one is not. So, no. That would be a terrible idea.

UNIDENTIFIED MALE: Absolutely. I think in larger companies you definitely have a lot of people doing the same job and getting paid completely differently. So if they were to post salaries and pay wages, it would at least make people more aware.

UNIDENTIFIED MALE: I don't really know to what extent pay discrimination really exists in the workplace. So maybe if there really is a huge problem or something maybe it would be worth the trouble to maybe get these hostilities out in the open.

UNIDENTIFIED FEMALE: You know, something as overt as putting stuff on the board, you know, or publishing it, would probably be more detrimental than good. But I also think that places that keep these things an absolute secret and tell employees not to discuss these things or not to ask about them, or it's made an absolute taboo, I think that that's also bad.

MARGOT ADLER: These public opinions may be varied, but Jeffrey Pfeffer says few understand how much there is to gain from a climate of trust and openness at work. Pfeffer is a professor at Stanford's Graduate School of Business. Welcome to Justice Talking.

JEFFREY PFEFFER: Thank you, Margot. It's great to be with you.

MARGOT ADLER: Jeffrey, wages, pay, salaries, it's hard to imagine a more sensitive question to ask someone than "How much money do you earn?" And for many employers, posing this question is a firing offense. So how come pay is such a guarded company secret?

JEFFREY PFEFFER: Well I think pay is related to status. And pay is related to power. And, you know, status is kind of related to how much the organization loves you or at least how much you think the organization loves you. And, you know, love, status, and power are all kinds of very sensitive issues. So that's I think why, uh, why people are really reluctant to talk about this. But organizations of course have made it worse by in many instances making it a fireable offense.

MARGOT ADLER: There are advocates for disclosing pay. Companies like Whole Foods and a handful of others who ascribe to what is sometimes called the "democratic workplace." Under

this model, secrecy and hierarchy are considered counterproductive. Do you think that this is a good model?

JEFFREY PFEFFER: I think it's a fabulous model. And there's a lot of evidence for that. I mean, studies of what are called high-performance work practices, or high-performance workplaces demonstrate the companies that do a bunch of things including sharing information with their employees -- though in some cases this does not entail sharing salaries -- do better.

MARGOT ADLER: Now, I've heard that some companies go even further. Among the 3,000 employees at Semco, a Brazilian conglomerate that does everything from banking to industrial manufacturing, workers hire their own managers and set their own salaries. The company has reportedly seen remarkable growth over the last 20 years. What are the advantages of doing business this way?

JEFFREY PFEFFER: Well the advantages are--if you look at the public opinion survey data, particularly in the United States, but also today in the United Kingdom, you see high levels of employee distrust, high levels of employee disengagement, and the evidence suggests that between 2004 and 2006, turnover for many positions doubled. The question is what can you do as an employer to cut the costs of all of this and have employees who actually care about their jobs. And the best way to have people care about what they're doing is to share information with them and involve them in decisionmaking, and treat them in fact like the adults that they are.

MARGOT ADLER: If these kinds of policies are so great, why don't more companies do them?

JEFFREY PFEFFER: That is, Margot, the \$64,000 question. You know, we could ask the same question about many other policies with respect to customers. I mean surveys, for instance, show that 95 to 99 percent, depending upon the survey, of customers do not like automated phone response systems. But they get them anyway, even though if you were to call Southwest Airlines you would probably get a representative rather than a concert. So, you know, I cannot explain why companies have not taken advantage of this research. But, you know, the companies that have--places like, in fact, Whole Foods, and places like New United Motors, which is the Toyota-General Motors joined venture, places like the Men's Warehouse, these companies have consistently over the last decade out-performed their competition.

MARGOT ADLER: I've heard two major arguments against open-pay policies. One is that as soon as you need to bring in someone from outside the company you might need to offer them a premium. If everyone knows, that would lead to pay inflation. And compensation experts at Salary.com say that's one of the reasons that C.E.O. pay has skyrocketed.

JEFFREY PFEFFER: I think that employees understand differences in performance and have some sympathy for that. So take a look at a counter example. Pay in professional sports is very public. Everybody knows what Barry Bonds is making. And everybody knows what Alex Rodriguez is making. So I don't understand why this can happen in professional sports and the same logic cannot happen in companies where you again have people who want to be part of winning organizations and are happy to see talent be brought in, as long as there is some rational justification for why people are getting what they're getting.

MARGOT ADLER: The other major argument that I've heard is that managers rightly have different expectations from different workers. The argument goes some people are not as gifted as others and shouldn't be paid as much but don't need to have it rubbed in their face. What about that?

JEFFREY PFEFFER: Oh goodness. Well, expecting that people are not very good creates a self-fulfilling prophecy and it-- There's a large body of literature that goes back now literally decades that demonstrates that if you have high expectations of people they are likely to meet those expectations. So I certainly think that companies that say, you know, we got a bunch of people who aren't very good, so we're not going to pay them very much, have sent in a variety of ways messages which ensure that they will not have a very engaged, talented, or motivated workforce and they'll suffer the consequences.

MARGOT ADLER: Jeffrey Pfeffer is a professor of organizational behavior at Stanford's Graduate School of Business. Thank you for joining us today.

JEFFREY PFEFFER: Thank you very much.

MARGOT ADLER: Business author Lee Miller offers very different advice for success in the workplace. Miller is co-president of YourCareerDoctors.com and he's just written a book, "UP: Influence, Power and the U Perspective – The Art of Getting What You Want." Welcome to Justice Talking.

LEE MILLER: Thank you for having me.

MARGOT ADLER: Boosters of an open-book pay policy say in an atmosphere of secrecy people assume the worst anyway. Discussing pay openly forces companies to have fair policies and motivates workers. Why isn't that true?

LEE MILLER: In a perfect world, in a wonderful utopian world, where everybody viewed their own performance absolutely accurately and viewed everybody else's performance perfectly, appropriately, maybe. But in the real world we tend to always overvalue our own worth and our own performance. And frankly, having everybody else's salary known as opposed to just, say, assuming the worst, would be even worse because we'd actually spend a lot of time fighting about and feeling unhappy about what those salaries are.

MARGOT ADLER: Why do organizations such as the military, nonprofits, public universities, and government, you know, members of the Supreme Court, for example, have more transparent pay structures?

LEE MILLER: Because they have what I will call a uniform pay structure. And that's really kind of the problem with transparency. I would say transparency requires uniformity, so you don't have outstanding performers who can be rewarded in the military. You get rewarded by

being promoted. I mean--and that's frankly the way we deal with some of these so-called transparency issues. In reality--

MARGOT ADLER: So there's more equality in other words but--

LEE MILLER: Well, equality suggests that the economics professor whose market value is greater because perhaps they have other opportunities, is somehow--it's fair to pay the English professor who may be just as good and in some cosmic sense, you know, equally valuable to society, the same. Well, the market doesn't say that. The market says that the person who is an economics professor is going to get paid more because that's the law of supply and demand and you can't repeal that. I like to think when I was the head of HR that what I did was actually more valuable than perhaps what the C.F.O. did. But uniformly out in the world heads of HR get paid less than C.F.O.s.

MARGOT ADLER: So for example in--well even at a place like National Public Radio, your pay, the exact pay isn't disclosed, but you know at least within a range. And you're saying that that's bad.

LEE MILLER: Well having a range is okay if the range is wide enough, okay? And even then if you have a range, what you're going to find if you have a star, and if some--you know, he's going to draw listeners in, and you've got to get that person. And you've got to hire them from another radio station. If you want that person you're going to have to pay the market, what they can negotiate. If everybody at the station knows, you're still going to do that, but they're going to be unhappy.

MARGOT ADLER: If some maverick companies can make it work -- and there are examples from small tech startups to industrial conglomerates -- isn't it just habit and convention that leads businesses to stick to the old model?

LEE MILLER: I would say the other way around. There are a handful of companies who purport to make it work. And as I said they have exceptions and they kind of bury those under the table because it wouldn't fit with their model. But only a handful of companies do it and even try to do it. And if it was such a great model, don't you think a lot of companies would be jumping on the bandwagon?

MARGOT ADLER: So it works for jobs that are really wonderful to do where pay is secondary and it doesn't work for jobs where what you really want to do is earn money and nothing else?

LEE MILLER: Well, in part that's true. I mean in today's world, and this is something I'm a real believer in having been a recruiter, having been the head of HR, is that you want to customize everybody's package. Some people need more flexibility. You can give them that flexibility by perhaps adjusting their pay. Some people need more certainty. So you give them a kind of a guaranteed salary. Other people you can give more of an incentive-based salary that fluctuates. If you are truly, I think, a great employer, the trend ought be towards individualizing everybody's compensation package as much as possible, so that with the same basic cost structure everybody gets the best package that they can get and that's best for them.

MARGOT ADLER: Let me ask you as someone who is the co-president of something called YourCareerDoctors.com, what's your own advice of the best way to deal with gender-based pay discrimination?

LEE MILLER: Well, I have a lot of women clients who I work with and I help. In the first instance the thing I tell them is you've got to learn to negotiate and you've got to negotiate for yourself. A lot of women, especially senior women who are really good negotiators, they know how to negotiate, they are great on behalf of their organizations, have problems negotiating for themselves.

MARGOT ADLER: Lee Miller has just written a book, "UP: Influence, Power, and the U Perspective – The Art of Getting What You Want." He also teaches management at Seton Hall University. Thank you so much for joining us.

LEE MILLER: Thank you so much, Margot, for having me.

MARGOT ADLER: You can learn more about the *Ledbetter* decision and today's guests on our website, justicetalking.org.

While you're there, check out our blog, where many of the nation's leading commentators give their views on law and American life. Thanks for listening. I hope you'll tune in next week. I'm Margot Adler.
