No. 05-___

IN THE

Supreme Court of the United States

Lilly M. Ledbetter,

Petitioner,

v.

Goodyear Tire and Rubber Company, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than those identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lilly M. Ledbetter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-37a) is published at 421 F.3d 1169. The district court's order and memorandum opinion on post-trial motions (Pet. App. 38a-42) is unpublished. The district court's order on the objections to the magistrate judge's report and recommendation on the defendant's motion for summary judgment, and the report and recommendation itself (Pet. App. 46a-82a), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2005. The court denied a petition for rehearing and rehearing en banc on October 26, 2005. Pet. App. 83a. On January 10, 2006, Justice Kennedy extended the time in which to file this petition to and including February 17, 2006. App. No. 05A633. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. 2000e-5(e)(1) provides, in relevant part:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * ."

STATEMENT

A jury found that respondent Goodyear Tire and Rubber Company paid petitioner less than her male counterparts because of her sex. The court of appeals reversed, holding – contrary to the law of the Second and D.C. Circuits – that an employer is shielded from *any* liability for pay discrimination

if the wage disparity stems from an intentionally discriminatory pay decision that occurred prior to the 180-day limitations period established by Title VII for filing charges of discrimination with the Equal Employment Opportunity Commission (EEOC).

1. Title VII prohibits discrimination "against any individual with respect to his compensation * * * because of such individual's race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(a)(1). Any person subject to such discrimination may file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." *Id.* § 2000e-5(e)(1).[1] If the EEOC is unable to secure voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee can receive a "right to sue" letter and institute a private action against the employer. *Id.* § 2000e-5(f)(1). The employee then has ninety days to initiate a lawsuit. *Ibid.*

2. On March 25, 1998, petitioner Lilly Ledbetter filed a charge with the EEOC alleging that she had been subjected to sex discrimination by respondent Goodyear Tire and Rubber Company.[2] Pet. App. 9a. Ledbetter filed this action on November 24, 1999, alleging – among other things – that Goodyear discriminated against her, in violation of Title VII, by paying her substantially less than her male counterparts for

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[1] In some circumstances, not present here, the limitations period is 300 days. See 42 U.S.C. 2000e-5(c), (e).

[2] The initial charge took the form of an EEOC questionnaire. Ledbetter subsequently filed a more formal charging document in July 1998. Both the parties and the Eleventh Circuit assumed for the purposes of this appeal that the allegations in the July 1998 document related back to the original filing and that the relevant date of the EEOC charge, for purposes of the limitations period, was March 25, 1998. Pet. App. 15a.

the same work because of her sex.[3] *Ibid.* Ledbetter sought backpay for the period beginning 180 days before she filed her EEOC charge, as well as damages for mental anguish and punitive damages. A jury returned a verdict in Ledbetter's favor, rejecting Goodyear's assertion that the pay differential was the result of neutral application of a merit-based pay system. *Id*. 10a-11a.

a. The evidence at trial showed that Ledbetter worked at Goodyear's Gadsden, Alabama plant for approximately nineteen years, from 1979 until her retirement in 1998.[4] Pet. App. 5a-9a. For almost her entire career, she served as an Area Manager or its equivalent, with responsibilities for supervising the production of tires at the plant. *Ibid.* During her career, approximately eighty people worked as Area Managers at the Gadsden plant, only three of whom, including Ledbetter, were women. Trial Tr. vol. I, 30.

Ledbetter presented an array of evidence that ongoing sex-based discrimination by Goodyear led to substantial pay differentials between herself and her male counterparts. For example, during her tenure at the plant, the plant manager told Ledbetter that "the plant did not need women," that women "didn't help it," and that they "caused problems." Tr. vol. I, 29. Moreover, Ledbetter and the two other women who worked as Area Managers during her tenure were all paid less than their male coworkers. Tr. vol. II, 209–213, 223–229, 280, 339, 358–360; Def.'s Ex. 61; Pl.'s Ex. 98. In fact, at the end of 1997, Ledbetter was the lowest paid of sixteen Area Managers in Tire Assembly. Pet. App. 8a. By 1998, Ledbetter's salary was more than twenty percent lower than the lowest-paid male Area Manager with comparable experience. Tr. vol. I, 31–34; Pl.'s Ex. 201.

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[3] Ledbetter also alleged a series of discriminatory acts in relation to her transfer in 1998 to an inferior position. Pet. App. 59a-61a, 65a, 69a-70a, 77a-78a. Those claims are not at issue here.

[4] Ledbetter was temporarily laid off in 1986 and 1989. Pet. App. 5a.

This pay differential was accomplished through discriminatory annual evaluations and pay raises. Each year, Goodyear considered whether to give each employee a raise and, if so, for what amount.[5] Pet. App. 4a. While Goodyear asserted that the pay decisions were based solely on merit, Ledbetter established to the jury's satisfaction that this was false and that she was repeatedly given lower pay raises – or, indeed, no pay raise at all – because of her sex. *Id*. 11a. The jury was told, for example, that one Performance Auditor had admitted to manipulating some of the performance data upon which Ledbetter's salary decisions were based, Tr. vol. I, 41–43; Tr. vol. II, 141–143; Pl.'s Ex. 23, and that Ledbetter's supervisor during this time considered her to be a "troublemaker" because of her complaints of discrimination, Tr. vol. I, 37–38. The evidence further established that this discrimination was ratified each year, when Goodyear based Ledbetter's salary on the prior year's discriminatory pay rate. See *supra* note 5. This discrimination continued until Ledbetter took early retirement in November 1998. Pet. App. 9a.

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[5] Although the court of appeals did at one point describe Goodyear's annual pay raise decisions as "re-establishing employee pay" each year, Pet. App. 24a, both the decision and the record make clear that the annual reviews did not result in a *de novo* consideration of employees' proper salary. Rather, employees' salary rates carried over from the prior year, subject to possible "annual merit-based raises." *Id.* 4a; see also *ibid.* (describing how, "in the early months of each year, each [manager] was charged with recommending salary increases for the salaried employees under his or her supervision"); *id.* 4a-5a (annual evaluation included employee's "performance ranking, present salary, and salary range; the date of his or her last increase; the recommended increase for the coming year (in dollars and as a percentage increase over present salary); and the date that the increase would become effective"); *id.* 6a-7a & n.3 (noting caps and other limitations on the amount of raises).

b. In the district court, Goodyear moved for judgment as a matter of law on the ground that Ledbetter's claims were untimely. Pet. App. 10a-11a. Goodyear argued that even if it had paid Ledbetter a discriminatory wage within the limitations period, it was nonetheless immune from liability because the pay disparity arose from decisions that occurred more than 180 days before Ledbetter had filed her EEOC charge. *Ibid.* The district court denied the motion, and the case proceeded to trial. *Ibid.*

Following the close of testimony and without objection from Goodyear, the district court instructed the jury that Ledbetter was required to "prove that each claim arose within six months of her filing a charge of discrimination with the EEOC." Tr. vol. III, 457. The court further instructed the jury that damages could only be imposed for the period "beginning six months from the day that she filed her EEOC questionnaire." *Id.* at 462.[6]

The jury returned a verdict in Ledbetter's favor on her discriminatory pay claims, finding it "more likely than not that [Goodyear] paid [Ledbetter] an unequal salary because of her sex." Tr. vol. III, 476. The jury awarded backpay, damages for mental anguish, and punitive damages. *Id.* at 476-77.

After trial, Goodyear challenged the sufficiency of the evidence and renewed its motion for judgment as a matter of law, again arguing that it was immune from liability for any pay differential within the limitations period attributable to decisions made more than 180 days before Ledbetter submitted her EEOC charge. Pet. App. 11a. The district court again denied the motion. *Ibid.* The court first concluded that the "jury's finding that Plaintiff was subjected

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[6] The court denied Goodyear's request for an additional instruction requiring that the jury find Ledbetter's sex influenced "decisions made" in the six months prior to her filing a charge of discrimination. Tr. vol. II, 400.

to a gender disparate salary is abundantly supported by the evidence." *Id.* 12a. The court further rejected Goodyear's construction of Title VII's limitations provision, holding that Ledbetter was "entitled to recover for the disparate salaries from March 25, 1996, until her retirement thirty-one months later." *Id.* 41a. The court then concluded that the evidence supported an award of $60,000 in backpay, as well as punitive damages. *Id.* 42a.[7]

3. A panel of the Eleventh Circuit reversed in light of its construction of this Court's decisions in *Bazemore* v. *Friday*, 478 U.S. 385 (1986) and *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002).

In *Bazemore* v. *Friday*, this Court had held it "too obvious to warrant extended discussion" that "[e]ach week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395. In the ensuing fifteen years, the Third, Fourth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits all interpreted *Bazemore* to hold that Title VII claims challenging disparate pay are not time-barred so long as the plaintiff received "at least one paycheck" implementing the challenged pay rate within the statutory claim period. Pet. App. 20a & n.17.

Although this Court's opinion in *National Railroad Passenger Corp.* v. *Morgan*, specifically approved this Court's holding in *Bazemore*, 536 U.S. at 112, the Eleventh Circuit nonetheless held that *Morgan* rendered Lebetter's pay claims untimely. *Morgan* involved allegations of a hostile work environment claim. However, in the course of explaining why the employee's hostile work environment

[7] The jury had originally awarded Ledbetter much more in backpay. See Pet. App. 11a. Ledbetter did not appeal the reduction. The district court also remitted the amount of punitive damages awarded by the jury, a reduction Ledbetter also did not appeal. *Id.* 12a.

claim involved a continuing violation and was not time-barred, the Court observed that "discrete" instances of unlawful employment practices are not actionable if time-barred because "each discriminatory act starts a new clock for filing charges" based on that act. *Id*. at 113-14. Relying on this language, the Eleventh Circuit reasoned that "in a case in which the plaintiff complains of discriminatory pay, there are only two possible sources of such conduct: the decisions setting the plaintiff's salary level or pay rate, and the issuance of paychecks reflecting those decisions." Pet. App. 18a. Because the court concluded that "the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid," it held that the pay decision, not the payment of the discriminatory wage, was the relevant act for determining the running of the Title VII limitations period. *Id.* 23a.

The court of appeals then held that when an "employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that * * * her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting [her] pay immediately preceding the start of the limitations period." Pet. App. 24a. Moreover, the court cautioned that it did not "hold that an employee may reach back even that far; what we hold is that she may reach no further." *Id.* 14a. The court acknowledged that its decision was in conflict with the post-*Morgan* decisions of other courts of appeals, including the Second and D.C. Circuits. *Id.* 27a & n.19.

Applying its new standard to this case, the Eleventh Circuit found insufficient evidence that Ledbetter's two most recent denials of raises had been based on her sex. Pet. App. 31a-32a. Although those raise decisions left in place a prior salary was already substantially lower than Ledbetter's male colleagues, and although the court did not question that this pre-existing disparity was the result of prior illegal sex

discrimination, the court of appeals nonetheless directed that the jury verdict be reversed. *Id.* 37a.

4. On September 13, 2005, Ledbetter filed a petition for rehearing en banc, emphasizing the panel's acknowledged departure from the rule applied in other courts of appeals. EEOC also submitted an amicus brief in support of the petition in which it argued that "the principles enunciated by the Supreme Court in *Bazemore* are still applicable after *Morgan*," and that, "[u]nder these principles, each paycheck Ledbetter received that was lower than it otherwise would have been because of her sex is a 'wrong actionable under Title VII,' even if the sex-based disparity was caused by decision made years earlier." Br. 9. Like Ledbetter, the EEOC also pointed out that the panel's decision conflicted with other post-*Morgan* decisions, including decisions from the Second and D.C. Circuits – each of which had permitted indistinguishable claims in reliance on *Bazemore*. *Ibid.* The petition for rehearing was nonetheless denied on October 26, 2005. Pet. App. 83a. This petition followed.

REASONS FOR GRANTING THE WRIT

As the EEOC noted in urging the Eleventh Circuit to reconsider the decision below en banc, this case presents an "important issue" under Title VII upon which the courts of appeals are intractably divided in the wake of this Court's decisions in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986). See EEOC Br. 1, 9-10. Given the large number of disparate pay claims filed nationally (nearly 40,000 in the last five years alone), *infra* at 16–17, and the important remedial purpose of Title VII, such a conflict is untenable. At the same time, the decision below is wrong, conflicting with this Court's clear instruction in *Bazemore* that the Title VII limitations period does not provide an employer license to continue pay discrimination in perpetuity whenever an employee fails to immediately challenge the initial pay decision. The Eleventh Circuit's contrary view, which also

conflicts with the EEOC's long-standing interpretive guidance, should be reviewed and reversed by this Court.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

1. The courts of appeals are divided over the proper analysis and resolution of disparate pay claims like Ledbetter's in light of *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986). Some courts hold that an employee may challenge disparate paychecks received during the limitations period if the paycheck implements and carries forward into the limitations period discriminatory decisions made by her employer at any point in the past. Other decisions permit employees to challenge such disparities in pay only if they can demonstrate that the disparity arises from independently illegal decisions made during the limitations period itself, or, at most, from the employer's most recent pay decision. As this case demonstrates, this legal distinction can make an enormous practical difference, effectively determining whether an employer may continue its illegal discriminatory pay policies indefinitely whenever an employee fails to object to the first discriminatory paycheck delivered within the brief Title VII limitations period.

a. The Second and D.C. Circuits have clearly and consistently held – both before and since *Morgan* – that an employee may challenge disparities in pay occurring during Title VII's limitations period regardless of when the disparity first arose.

Thus, in *Forsyth* v. *Federation Employment & Guidance Service*, 409 F.3d 565 (2005), the Second Circuit relied on this Court's decision in *Bazemore* to uphold a Title VII claim indistinguishable from Ledbetter's. The plaintiff in *Forsyth* "alleged that throughout his employment * * * he was paid less than similarly situated white male and female employees," who he alleged "were given more frequent wage increases or higher entry salaries than" he had been. *Id.* at

567. Like the Eleventh Circuit in this case, the district court dismissed the plaintiff's claim as untimely. *Id.* at 572. On appeal, the Second Circuit reversed. It explained that "[t]he statute of limitations for an unlawful employment practice begins to run when the unlawful practice occurs." *Ibid.* In a case of disparate pay, "each week's paycheck that delivers less to a [disadvantaged class member] than to a similarly situated [favored class member] is a wrong actionable under Title VII." *Ibid.* (quoting *Bazemore*, 478 U.S. at 395). That the illegal disparity rested on a series of pay decisions made outside the limitations period – in *Forsyth*, from a combination of an initially discriminatory pay rate and discriminatory raises over the years, see *id.* at 567-68 – was of no significance. "A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period." *Id.* at 573 (citing *Bazemore*, 478 U.S. at 396 n.6).

Like the Eleventh Circuit in this case, the district court in *Forsyth* found support for a contrary result in *Morgan*, but the Second Circuit disagreed. "Such view fails to recognize that *Morgan* specifically adopts the understanding set forth in *Bazemore* that every paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act." 409 F.3d at 573 (citing *Morgan*, 536 U.S. at 111-12).[8] As a result, although the plaintiff could "only recover damages related to those paychecks actually delivered during the statute of limitations period," his claim

[8] See also *Elmenayer* v. *ABF Freight Syst., Inc.*, 318 F.3d 130, 134-35 (CA2 2003) (noting that "the weekly cutting of a payroll check" is an actionable "periodic implementation of an adverse decision previously made"); *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115, 119 (CA2 1997) (pre-*Morgan* decision holding that "a claim of discriminatory pay * * * involves a series of discrete, individual wrongs").

"was not time-barred as the district court wrongly believed." *Ibid.*

The D.C. Circuit faced the same questions and reached the same conclusions as the Second Circuit in *Shea* v. *Rice*, 409 F.3d 448 (2005). In that case, the plaintiff alleged that "at the time of his hiring, he was assigned a lower pay grade than similarly-situated minority hires." *Id.* at 449. That disparity persisted over a number of years, even though the employee had been subject to periodic evaluations and was given subsequent raises based on his initial placement in the government pay scale. *Id.* at 450. Even though the plaintiff's claim did not challenge a pay decision occurring within the limitations period, and even though the employer had made subsequent pay decisions that the plaintiff did not assert were discriminatory, the D.C. Circuit nonetheless held that the claim was timely and could go forward under Title VII. "Shea's complaint," the court explained, "is not simply that the [employer] discriminated against him in assigning him a lower pay grade than similarly-situated minority hires *in 1992*," but rather that as a consequence of that decision, "*he 'receiv[es] less pay with each paycheck than [he] would be [receiving] if [he] had not been discriminated[ ] against.'*" *Id.* at 452 (emphases in original, citation omitted). Like the Second Circuit, the court of appeals in *Shea* recognized that "*Bazemore* survives *Morgan*" and that these decisions dictate the conclusion that Congress intended a plaintiff to recover backpay accruing during the limitations period that was attributable to prior discriminatory decisions, notwithstanding the intervening years and pay decisions.[9] *Id.* at 453.

b. The Eleventh Circuit's decision in this case inalterably conflicts with the law of the Second and D.C. Circuits. There can be no question, for example, that the plaintiff's claim in *Shea* would be dismissed under the

[9] See also *Anderson* v. *Zubieta*, 180 F.3d 329, 335 (CADC 1999) (holding a Title VII claim "actionable upon receipt of each paycheck").

Eleventh's Circuit rule, because the plaintiff there claimed only that his initial pay grade assignment was illegal and raised no independent claims of illegality regarding subsequent pay raise decisions. Compare *Shea*, 409 F.3d at 449-50 with Pet. App. 24a (in such cases, the plaintiff "may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period"). Ledbetter's claim, by contrast, would be timely in either the Second or D.C. Circuits, in which "*[a]ny* paycheck given within the statute of limitations period [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period." *Forsyth*, 409 F.3d at 573; see also *Shea*, 409 F.3d at 452 (same).

Although the Eleventh Circuit attempted to distinguish its holding from various pre-*Morgan* decisions (even while suggesting that those decisions did not "survive *Morgan*," Pet. App. 22a), it acknowledged that its holding was inconsistent with the holdings of the D.C. and Second Circuits, *id.* 26a–27a & n.19. That acknowledgment was well founded. While the Eleventh Circuit asserted that the pre-*Morgan* decisions did not "speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim," *id.* 22a–23a, both *Forsyth* and *Shea* held that a plaintiff could bring claims premised on discriminatory decisions that were made years before the limitations period and despite intervening pay decisions. See *Forsyth*, 409 F.3d at 573; *Shea*, 409 F.3d at 452-56.

This difference in outcome was not inadvertent but reflects a fundamental disagreement among the circuits about what constitutes an "unlawful employment practice" that triggers the running of the limitations period. 42 U.S.C. 2000e-5(e)(1). In *Morgan*, this Court made clear that the limitations period begins to run once an "unlawful employment practice" has "occurred." 536 U.S. at 110. As

noted above, the Eleventh Circuit premised its rule on its assumption that "the operative act of discrimination *will always be*, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid." Pet. App. 23a (emphasis added). The Second and D.C. Circuits, on the other hand, premised their very different limitations rule on their conclusions that the "operative act of discrimination" is the tendering of a disparate paycheck. See *Forsyth*, 409 F.3d at 573 ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea*, 409 F.3d at 452 ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason.").

The different rules likewise reflect conscious disagreement about the proper balance between the competing interests of employees (who face illegal pay discrimination in perpetuity if they do not promptly challenge an initial discriminatory decision) and employers (who wish to avoid stale claims). The Eleventh Circuit concluded that "to protect employers from the burden of defending claims arising from employment decisions that are long past," there must "be some limit on how far back the plaintiff can reach." Pet. App. 23a. But the D.C. Circuit directly confronted this same argument in *Shea*, and concluded that the proper balance of competing interests is the one struck by *Bazemore* – *i.e.*, allowing a challenge only to paychecks falling within the limitations period. 409 F.3d at 455-56.

c. Although the conflict in the circuits is most clear in the decisions of the Second, Eleventh, and D.C. Circuits, the proper treatment of disparate pay claims under *Morgan* and *Bazemore* has generated considerable conflict and confusion in other circuits as well.

The Eleventh Circuit's decision in this case is consistent with the Seventh Circuit's decision in *Dasgupta* v. *University of Wisconsin Board of Regents*, 121 F.3d 1138 (CA7 1997).

In that case, the plaintiff alleged that when he was hired, he was paid less than his colleagues on the basis of his national origin, and that although "he received raises similar to those that his peers received," his pay remained lower "since he was starting from a lower base." *Id.* at 1140. The continuing disparity in pay, the court held, was a "lingering effect of an unlawful act" rather than a new and distinct violation. *Ibid.* Accordingly, because the raise decisions occurring during the limitations period were not independently discriminatory, the court dismissed the claim. *Ibid.*

Subsequently, in *Hildebrandt* v. *Illinois Department of Natural Resources*, 347 F.3d 1014 (CA7 2003), the Seventh Circuit adopted a rule similar to the Eleventh Circuit's in this case, permitting plaintiffs to challenge a disparity in paychecks within the limitations period, but only so long as the disparity arose from actionable discrimination in the most recent pay raise decision before the limitations period. *Id.* at 1029; see also *Reese* v. *Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (CA7 2003) (holding that the plaintiff could challenge the denial of a raise when, although the denial took place outside the limitations period, there was no allegation of an intervening pay decision).[10]

In addition to conflicting with other post-*Morgan* decisions, the Eleventh Circuit acknowledged that its decision

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[10] Although *Hildebrandt* reaffirmed *Dasgupta*, 347 F.3d at 1029, and *Reese* described its decision as "consistent with" *Hildebrandt*, 347 F.3d at 1013 n.1, the decisions have been read by some to cast doubt on *Dasgupta*'s rationale. See, *e.g.*, *Reese*, 347 F.3d at 1012-13. Indeed, the Seventh Circuit has recognized that "parties around this circuit * * * find the current state of affairs to be confusing." *id*. at 1012; see also *Cardoso* v. *Robert Bosch Corp.*, 427 F.3d 429, 432 (CA7 2005) (acknowledging, but declining to resolve, the confusion). In fact, the confusion led the Eleventh Circuit to conclude that its decision in this case conflicted with the law of the Seventh Circuit. See Pet. App. 27a n.19 (citing *Reese*, 347 F.3d at 1013, and *Hildebrandt*, 347 F.3d at 1027).

squarely conflicts with the pre-*Morgan* decisions of several additional circuits. Pet. App. 20a; see also *id.* n.17 (collecting cases). A number of those decisions involved claims indistinguishable from Ledbetter's. See, *e.g.*, *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1008-10 (CA10 2002) (noting that "over the years" the plaintiff's salary disparity grew larger "principally due to straight percentage increases" and concluding that each "discriminatory salary payment constitutes a fresh violation of Title VII"); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 348 (CA4 1994) (holding a plaintiff's disparate pay claim not time-barred because "an act of sex discrimination in compensation first inflicted at the date of hiring can thereafter continually violate the plaintiff's rights"); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (CA6 1982) (permitting a claim based on a promotion decision made outside of the limitations period to go forward, despite two subsequent pay re-evaluations, because the plaintiff "suffered a denial of equal pay with each check she received").

d. The Eleventh Circuit's efforts to downplay the conflict between its decision and those that faithfully follow *Bazemore* cannot detract from the clear nature of the circuit split. In attempting to distinguish *Bazemore* and the numerous pre-*Morgan* decisions that followed it, the panel asserted that "[i]t is one thing to say that a claim is not entirely time barred because the discriminatory decision being challenged continued to be periodically implemented through paychecks issued within the limitations period," but it is a different question "how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. That purported distinction does not bear scrutiny, and, more to the point of the extent of the circuit conflict, there is no genuine prospect that it would be recognized by the Second or D.C. Circuits. As the Eleventh Circuit acknowledged, the question of "how far back" a plaintiff may reach to establish that her paycheck is based on illegal sex discrimination is governed by same

statutory provision – 42 U.S.C. 2000e-5(e)(1) – that determines whether the claim is "entirely time barred." *Id.* 19a; see also *id.* 23a (limitation on "how far back the plaintiff can reach" is required because "otherwise, the timely-filing requirement would be completely illusory in many pay-related Title VII cases").[11] Indeed, to say that a plaintiff may not rely on discrimination occurring outside the limitations period is simply another way of saying that her claim is time-barred.

Setting semantics aside, the Eleventh Circuit held that a plaintiff in Ledbetter's position is barred by Section 2000e-5(e)(1) from bringing claims based on discriminatory pay decisions occurring outside the limitations period – a proposition considered and directly rejected by the Second and D.C. Circuits, which considered the same statutory language, cases, and policy considerations reviewed by the panel in this case.

Accordingly, as the Eleventh Circuit itself acknowledged, there is a considered, fundamental disagreement between at least the Second, D.C., and Eleventh Circuits about the proper application of Section 2000e-5(e)(1) to "paycheck-as-discriminatory act cases" after *Morgan*. Pet. App. 27a.

2. This enduring conflict and confusion requires resolution by this Court. As the EEOC explained to the Eleventh Circuit, the question in this case is one of substantial importance to the administration of Title VII claims in the lower courts. See EEOC Br. 1. Each year, the EEOC receives over 25,000 Title VII charges, a significant percentage of which include allegations of disparate pay.[12] In fact, the EEOC informs petitioner that from October 1, 2000,

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[11] Thus, the panel cited to no rule of evidence or other source of evidentiary law supporting its holding.

[12] See EEOC, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES, available at *http://www.eeoc.gov/stats/vii.html*.

to September 30, 2005, employees filed 37,401 claims of pay discrimination with the EEOC or state equal employment agencies.[13] Moreover, as this case illustrates, the limitations question presented by the petition is frequently outcome determinative. As a result, the limitations period for disparate pay claims is a subject of frequent litigation, recurring regularly in cases throughout the country. See, *e.g.*, *Forsyth* v. *Fed'n Employment & Guidance Serv.*, 409 F.3d 565 (CA2 2005); *Shea* v. *Rice*, 409 F.3d 448 (CADC 2005); *White* v. *BFI Waste Servs.*, 375 F.3d 288 (CA4 2004); *Maki* v. *Allete, Inc.*, 383 F.3d 740 (CA8 2004); *Reese* v. *Ice Cream Specialties*, 347 F.3d 1007 (CA7 2003); *Hildebrandt* v. *Ill. Dep't of Natural Res.*, 347 F.3d 1014 (CA7 2003); *Tademe* v. *Saint Cloud State Univ.*, 328 F.3d 982 (CA8 2003); *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005 (CA10 2002); *Cardenas* v. *Massey*, 269 F.3d 251 (CA3 2001); *Anderson* v. *Zubieta*, 180 F.3d 329 (CADC 1999); *Pollis* v. *New Sch. for Soc. Research*, 132 F.3d 115 (CA2 1997); *Ashley* v. *Boyle's Famous Corned Beef*, 66 F.3d 164 (CA8 1995); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336 (CA4 1994); *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (CA11 1993); *Gibbs* v. *Pierce County Law Enforcement Agency*, 785 F.2d 1396 (CA9 1986); *Hall* v. *Ledex*, 669 F.2d 397 (CA6 1982); *Surbey* v. *Stryker Sales Corp.*, No. Civ.A. 05-0228, 2005 WL 3274579 (E.D. Va. Nov. 28, 2005); *Wiggins* v. *Powell*, No. Civ.A.02-1774(CKK), 2005 WL 555417 (D.D.C. Mar. 7, 2005); *Peters* v. *City of Stamford*, No. 3:99-CV-764 CFD, 2003 WL 1343265 (D. Conn. Mar. 17, 2003); *Anderson* v. *Boeing Co.*, 222 F.R.D. 521 (N.D. Okla. 2004); *Robinson* v.

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[13] This figure includes all charges in which both a Title VII and a disparate pay claim were made, even if the disparate pay claim was made pursuant to another statute enforced by the EEOC, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act. It therefore is not possible to determine the exact number of disparate pay claims under Title VII alone. That number, however, is clearly substantial.

Bd. of Regents of the Univ. of Colo., 390 F. Supp. 2d 1011 (D. Colo. 2005); *DeJesus* v. *Starr Technical Risks Agency, Inc.*, No. 03 Civ. 1298 RJH, 2004 WL 2181403 (S.D.N.Y. Sept. 27, 2004); *Quarless* v. *Bronx-Lebanon Hosp. Ctr.*, 228 F. Supp. 2d 377 (S.D.N.Y. 2002); *Tomita* v. *Univ. of Kan. Med. Ctr.*, 227 F. Supp. 2d 1171 (D. Kan. 2002); *Inglis* v. *Buena Vista Univ.*, 235 F. Supp. 2d 1009 (N.D. Iowa 2002).

The continuing uncertainty regarding the proper limitations rule in light of this Court's decisions in *Morgan* and *Bazemore*, moreover, is destructive of the basic purposes of the statute. For limitations periods to accomplish their goals of encouraging prompt resolution of complaints while fairly preserving meritorious claims for resolution on the merits, the rule must be clear and well-established. As it stands now, there is substantial uncertainty in the courts of appeals regarding if and when the analysis in *Morgan* circumscribes the principle announced in *Bazemore*, that "[e]ach week's paycheck that delivers less to [the plaintiff] * * * is a wrong actionable under Title VII." 478 U.S. at 395; see, *e.g.*, *Reese*, 347 F.3d at 1012 (acknowledging confusion regarding the application of Title VII's statute of limitations to disparate pay claims); *Cardoso*, 427 F.3d at 432 (acknowledging, but declining to resolve, the confusion); *Tademe* v. *Saint Cloud State Univ.*, 328 F.3d at 989 (noting that *Morgan* left the application of *Bazemore* unresolved, and assuming, but not deciding, that a plaintiff may base a Title VII claim on the receipt of discriminatory paychecks). Compare also *City of Hialeah* v. *Rojas*, 311 F.3d 1096, 1102-03 (CA11 2003) (holding that the receipt of a discriminatorily low pension benefit payment cannot give rise to a Title VII claim if based on a decision made outside the limitations period) with *Maki* v. *Allete, Inc.*, 383 F.3d 740, 745 (CA8 2004) (holding that a Title VII violation accrues at the moment an employee retires and her pension benefits vest).

Such uncertainty and disparate treatment of similarly situated employees is unfair and untenable. Employees are entitled to fair notice of when they must bring their claims in

order to avoid forfeiture. This is particularly true when, as in the Eleventh Circuit, the limitation rule now effectively relegates an employee to a career of second-class pay and status if she fails to complain of illegal pay discrimination within a few short months of its initiation. That employees in the Eleventh Circuit, but not the Second, should suffer this fate is also unfair. Had Ledbetter worked at the Goodyear tire plant in Tonawanda, New York, rather than the one in Gadsden, Alabama, she would have received the protections of Title VII. And because many employees of multi-state employers may move between job sites in different circuits, their federally created protections against discriminatory treatment may expand and contract depending on where they find themselves filing suit. This disparity in treatment is contrary to Congress's determination to establish nationally uniform protection against discrimination in employment.

3. The circuit split will not resolve itself without this Court's intervention. The Eleventh Circuit consciously and explicitly departed from what it recognized as the majority rule in the courts of appeals and, in particular, from the post-*Morgan* decisions of the Second and D.C. Circuits. Pet. App. 27a n.19. There is little chance that the Eleventh Circuit will revise its decision absent intervention by this Court – although both Ledbetter and the EEOC explicitly brought the circuit conflict to the court's attention in their briefs at the en banc stage, the court nonetheless denied rehearing. *Id.* 83a.

At the same time, the Second and D.C. Circuits' views are similarly entrenched. The Second Circuit has maintained its position since 1997, and has reaffirmed its holding twice since *Morgan*.[14] Similarly, the D.C. Circuit continues to apply the same rule it articulated before *Morgan*. See *Anderson* v. *Zubieta*, 180 F.3d 329 (1999). As the decisions

[14] See *Forsyth*, 409 F.3d at 565; *Elmenayer* v. *ABF Freight Syst., Inc.*, 318 F.3d 130 (CA2 2003).

in the Seventh Circuit demonstrate, further percolation will yield more division and confusion, not less.

Finally, this case presents an ideal vehicle to resolve the circuit split and clarify the rule for the circuits struggling with the question. The question presented was clearly considered and decided by the court of appeals, and was outcome determinative in this case.

II. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And With The Purposes Of Title VII.

Certiorari is also warranted because, as the EEOC argued convincingly below, the decision below conflicts with the decisions of this Court as well as with the text and purposes of Title VII. See EEOC Br. 7-15.

1. As the EEOC has stated in its Compliance Manual, this Court's decisions in *Morgan* and *Bazemore* hold that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC, COMPLIANCE MANUAL § 2-IV.C, available at *http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C*. That view is not only entitled to respect, see *Morgan*, 536 U.S. at 110 n.6, but is manifestly correct.

In *Morgan*, this Court clarified the operation of Title VII's statute of limitations, making a distinction between hostile environment claims, which by their "nature involve[] repeated conduct," and discrete employment actions. 536 U.S. at 114-15. In the later category of cases, the Court explained, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. In this case, as in *Morgan*, the "critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred.'" *Id.* at 110. In the case of illegal pay discrimination, this Court has already answered both questions definitely: "[E]ach week's paycheck that deliver[s]

less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 112 (quoting *Bazemore*, 478 U.S. at 395). It is just as unlawful an employment practice to pay an employee less money than similarly situated coworkers on the basis of sex.

Accordingly, the Eleventh Circuit fundamentally erred in concluding that unlawful pay discrimination "occurs" only at "the moment the decision is made," and not when that decision is implemented. Pet. App. 18a; see also *id.* 23a. Title VII is not violated by an unexecuted decision to pay a worker less on the basis of sex; "If an employer tells his employee, 'I am going to infringe your rights under Title VII at least once every year you work for me,' this does not start the statute of limitations running on the future violations." *Reese*, 347 F.3d at 1012 (quoting *Dasgupta*, 121 F.3d at 1140); *Hildebrandt*, 347 F.3d at 1029 (same). Rather, the "unlawful employment practice" defined by Title VII is the actual payment of unequal wages and the violation occurs when the payment is rendered. See 42 U.S.C. 2000e-2(a). That one element of the offense (*i.e.*, the discriminatory intent) occurred before the offense was completed by the commission of the rest of the elements (*i.e.*, the payment of an unequal wage) does not alter the conclusion that the offense is committed when all of the elements of the offense have been committed and an injury has been inflicted. See *Bay Area Laundry & Dry Cleaning Pension Trust* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 195 (1997) ("[T]he standard rule [is] that the limitations period commences when the plaintiff has 'a complete and present cause of action.'") (quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)).

Moreover, payment of discriminatory wages is illegal each time it is repeated, even if it is only a present execution of a prior discriminatory decision. See *Forsyth*, 409 F.3d at 573; *Shea*, 409 F.3d at 455; *Hildebrandt*, 347 F.3d at 1029 (describing *Bazemore* as "involving the 'periodic

implementation of an adverse decision previously made'") (quoting *Elmenayer*, 318 F.3d at 134).[15] This conclusion is common in the law – had Goodyear illegally set the price of its tires, rather than the salary of its employees, there would be no doubt that the limitations period would start anew with each new sale even if the price-setting decision was made outside the limitations period. See *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("Antitrust law provides that, in the case of * * * a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'") (citation omitted).

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[15] *Morgan* and *Bazemore* thus make clear that pay discrimination is distinguishable from the type of discrimination addressed by this Court in cases like *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff did not allege that her employer's present seniority system was discriminatory; "Nothing alleged in the complaint indicate[d] that United's seniority system treat[ed] existing female employees differently from existing male employees, or that the failure to credit prior service differentiate[d] in any way between prior service by males and prior service by females." *Id.* at 557-58. Rather, she asserted only that the seniority system preserved the lingering effects of a discriminatory termination decision on which the limitations period had run. *Ibid.* By contrast, Ledbetter alleged a series of discrete wrongs occurring within the limitations period, in the form of paychecks that regularly implemented an initial discriminatory salary decision. Pet. App. 2a. Discriminatory paychecks, as discrete unlawful employment practices, thus differ fundamentally from the lingering or continuing effects claim in *Evans*, because, "[i]n a salary case, * * * each week's paycheck is compensation for work presently performed and completed by an employee." *Florida* v. *Long*, 487 U.S. 223, 239 (1988).

To hold otherwise would permit an employer to permanently maintain discriminatory pay policies in place whenever a worker failed to immediately challenge the pay structure. Under such a rule, the only way an employee could reclaim her right to equal treatment under Title VII would be to quit her job and find a new employer, a result Congress surely did not intend. Title VII is meant to eliminate, rather than perpetuate workplace discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII * * * was to achieve equality of employment opportunities * * * . Under the Act, practices, procedures, or tests * * * cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

2. Despite the clear holding of *Bazemore*, reaffirmed by *Morgan*, the Eleventh Circuit held that Ledbetter brought her pay discrimination claims too late. Although it paid lip service to this Court's clear instruction that "*each* week's paycheck" providing discriminatory pay "is a wrong actionable under Title VII," *Morgan*, 536 U.S. at 112 (quoting *Bazemore*, 478 U.S. at 395) (emphasis added), the court of appeals nonetheless held that *some* such paychecks are not, in fact, actionable under Title VII if they implement a discriminatory decision made outside of (or perhaps even immediately preceding) the limitations period. Pet. App. 22a, 24a. *Bazemore* and its progeny, the court concluded, did not preclude this rule because those cases did not address "how far back in time the plaintiff may reach" to find the illegal discrimination implemented by the paychecks during the limitations period. *Id.* 24a.

This attempt to distinguish this Court's rulings in *Morgan* and *Bazemore* fails. First, as the EEOC pointed out, "the holding of the panel in this case is the same as the holding adopted by the court of appeals" – and rejected by this Court – "in *Bazemore*." EEOC Br. 10. In *Bazemore*, "the employer ha[d] a system for periodically reviewing and re-establishing employee pay," Pet. App. 24a, in precisely the

same way as Goodyear did in this case. That is, the employees in *Bazemore* were regularly ranked "according to [their] performance for the previous period" and those rankings were used to make yearly salary adjustments. 478 U.S. at 397 & n.7.[16] This Court nonetheless found actionable discrimination arising from the employer's initial discriminatory salary decision, *id.* at 397, even though the plaintiffs, like Ledbetter, had "regular opportunities to complain of improperly deflated pay and to seek a raise."[17] Pet. App. 26a. This Court explained that the plaintiff's claim was timely because the passage of time neither excused the "continuation of the pre-1965 discriminatory pay structure" nor shielded it from challenge to the extent the initial discrimination still affected the employee's present paychecks. *Bazemore*, 478 U.S. at 396. To the contrary, Title VII imposes on an employer a continuing obligation to eradicate any present disparity in pay based on illegal discrimination, even if that discrimination occurred years

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[16] Although the Eleventh Circuit loosely described this case as involving a system for "re-establishing employee pay," Pet. App. 24a, it clearly did not mean that Ledbetter's supervisors conducted a *de novo* review of her pay each year. To the contrary, Goodyear, like most employers, simply evaluated Ledbetter for a potential marginal increase to her existing salary, see *supra* note 5, as was true in *Bazemore*. There would be no need to create a special rule for employers that conduct a truly *de novo* recalculation of an employee's salary each year; the employer could simply defeat the plaintiff's Title VII claim by showing that the current pay discrepancy was caused solely by the most recent, non-discriminatory *de novo* salary evaluation, without having to rely on any statute of limitations defense.

[17] *Bazemore* thus demonstrates, contrary to the Eleventh Circuit's assumption in this case, that an evaluation system is no guarantee that salary disparities based on discriminatory practices will be rectified.

before or, indeed, prior to the effective date of Title VII. *Id.* at 397.[18]

Second, the Eleventh Circuit's decision is inconsistent with this Court's clear instruction in *Morgan* and other cases that Title VII's limitations period does not affect the scope of the evidence a plaintiff may use to prove that the discrete actions occurring within the limitations period violated Title VII. Just as "[t]he existence of past acts * * * does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed," the statute similarly does not "bar an employee from using the prior acts as background evidence in support of a timely claim." *Morgan*, 536 U.S. at 113. This Court thus has held that a discriminatory act outside of the limitations period "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Evans*, 431 U.S. at 558. See also *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 416 (1960).

There is nothing unusual about allowing a plaintiff to look back well beyond the limitations period to point to evidence that a recent harm was intentionally discriminatory. Indeed, in *Bazemore* this Court permitted the plaintiff to look back more than six years before the filing of the charge for evidence that the alleged salary discrimination was intentional. See 478 U.S. 385. Similarly, this Court has permitted an equal protection challenge to the present-day implementation of statutes enacted for a discriminatory purpose more than seventy-five years prior. See *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985) (permitting challenge to provision of Alabama Constitution of 1901 when

[18] For this reason, the court in *Dasgupta*, 121 F.3d at 1140, erred in concluding that Title VII is not violated when an employer refuses to adjust an employee's pay to eliminate a pay disparity arising from illegal discrimination occurring outside the limitations period.

provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect").

3. Nor is the Eleventh Circuit's rule necessary to encourage employees to file Title VII claims promptly or to protect employers from unduly stale claims. *Contra* Pet. App. 23a. Plaintiffs already have substantial incentives to file EEOC charges promptly. Because *Morgan* precludes use of a "continuing violations" theory for disparate pay claims, employees like Ledbetter are limited to recovering the wage differential that accrues during the short limitations period established by Title VII. Accordingly, every day of delay costs the employee a day's worth of backpay, providing a substantial incentive for prompt filing. At the same time, this limitation on recovery substantially limits the scope of an employer's exposure for claims based on discriminatory decisions made outside the limitations period.

Employers are further protected from stale claims and other unfair disadvantage arising from delay by equitable doctrines, such as laches. *Morgan*, 536 U.S. at 113. Those doctrines ensure that "[e]mployers have recourse when a plaintiff unreasonably delays filing a charge" and "allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.* at 121 (internal quotation omitted).[19]

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19 The Eleventh Circuit's conclusion that the interest in preventing stale claims requires precluding claims based on decisions arising outside of Title VII's short limitations period is particularly unconvincing in light of the much more extensive limitations period available for essentially identical claims under other federal statutes. For instance, under the Equal Pay Act, 29 U.S.C. 206(d), a plaintiff has two years from the time a cause of action accrues to file a claim, unless the cause of action arises out of a willful violation, in which case she has three years to file her claim. 29 U.S.C. 255(a). Similarly suits under 42 U.S.C. 1981 are

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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subject to a two-year statute of limitations in Georgia. See *Stafford* v. *Muscogee County Bd. of Education*, 688 F.2d 1383, 1389 (CA11 1982) (borrowing limitations period from GA. CODE ANN. § 3-704 (1982)).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15264

D.C. Docket No. 99-03137-CV-C-E

LILLY M. LEDBETTER,

Plaintiff-Appellee,

versus

GOODYEAR TIRE AND
RUBBER COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court
Northern District of Alabama

(August 23, 2005)

Before: TJOFLAT, DUBINA, AND PRYOR, CIRCUIT JUDGES.

TJOFLAT, Circuit Judge:

This appeal involves a claim brought under Title VII of the Civil Rights Act of 1964[1] by a former salaried employee of Goodyear Tire and Rubber Co. ("Goodyear"). The employee, Lilly Ledbetter, claims that Goodyear paid her a smaller salary than it paid her male co-workers at Goodyear's Gadsden, Alabama, tire plant because of her sex. Goodyear's position, in addition to denying that sex played any role in the setting of her salary, is that Ledbetter may prevail only if she can prove that unlawful discrimination tainted an annual review of her salary made within 180 days of her filling a charge of discrimination with the EEOC. The question we must decide, therefore, is how Title VII's timely-filing requirement applies in this specie of disparate pay cases—that is, cases involving an employer that annually reviews and re-establishes employee salary levels.

We decline to adopt Goodyear's position definitively, because we need not do so to determine whether Goodyear is entitled to the judgment as a matter of law. All we need to do is examine the last salary decision Goodyear made that affected Ledbetter's pay during the limitations period. We have done that and conclude that no reasonable jury could find that the decision was discriminitorily motivated. We therefore reverse the judgment of the district court denying Goodyear's motion for judgment as a matter of law.

I. Background and the Proceedings in the District Court

A. Background

1. The Gadsden Plant

During the relevant time period, Goodyear's Gadsden plant was divided into several discrete units, called "business centers," each of which was responsible for one of the several stages of the tire production process. The plant included at

[1] 42 U.S.C. §§ 2000e to 2000e-17 (as amended).

least four business centers, each managed by a "Business Center Manager" ("BCM"): (1) Rubber Mixing (a.k.a. "Banbury" or the "Mixing Area"), where the rubber was prepared; (2) Component Preparation (a.k.a. "Stock Prep"), where the components for the tires were made, (Tr. at 26–27); (3) Tire Assembly (a.k.a. the "Tire Room"), where machines were used to press the components into "green," or unfinished, tires, (Tr. at 330); and (4) Curing/Final Finish, where the green tires were cured, painted, trimmed, and inspected before shipment. (Tr. at 27).

These business centers were in some cases further divided into discrete "sections" or "rooms." Tire Assembly, for example, at one point included at least four sections, (*See* PX22), including the Radial Light Truck section ("RLT"), which assembled larger tires for sport-utility vehicles and light trucks, and the "ARF Room," which assembled smaller radial tires for passenger cars. Within any one section or room, there were normally three or four rotating shifts of floor-level workers and their supervisors. (Tr. at 350)

The machines used in the tire-production process were operated directly by "tire builders"—unionized, hourly workers. The tire builders were then supervised by salaried, nonunion, floor-level managers called "Area Managers." Each Area Manager supervised one shift of tire builders, such that if a section were running four shifts, it would have four Area Managers, one for each shift. These "production teams"—the tire builders and their Area Managers—were supported by unionized maintenance and electrical workers, as well as by various salaried managerial officers and specialists, including "Production Specialists" and "Production Auditors." Directly above the Area Managers in the corporate hierarchy were the BCMs, who were responsible for everyone in their business center, including the tire builders, the maintenance and electrical workers, the Area Managers, and the salaried managerial support staff. (Tr. at 295). Supervision of the entire plant, including at least the

four production-oriented business centers described above and a Human Resources Department, fell to a single Plant Manager. (Tr. at 30).

2. The Merit Compensation System

Beginning in the early 1980s, managerial employees' salaries at the Gadsden plant were determined primarily based on a system of annual merit-based raises. The exact details of the system do not warrant extended discussion. Suffice it to say that in the early months of each year, each BCM was charged with recommending[2] salary increases for the salaried employees under his or her supervision, including the Area Managers. These recommendations were based primarily on each employee's performance in relation to that of other salaried employees in the business center during the previous year (the "performance year"). Business-center-wide performance rankings were calculated based on individual "performance appraisals" that had been completed for, and reviewed with, each employee at the end of the performance year or early in the year following. (PX12; DX17; Tr. at 263). Using the performance rankings and certain Goodyear guidelines on the size and frequency of merit-based raises, the BCM would complete a merit increase plan, a worksheet detailing the merit increases the BCM recommended for that year. These plans included, for each salaried employee, his or her performance ranking, present salary, and salary range; the date of his or her last increase; the recommended increase for

[2] The BCMs' recommendations were subject to the approval of higher management. The merit increase planning forms, for example, asked the BCM to state the increase he "proposed" for each employee. (DX48; DX6; DX3; DX2.) Indeed, two of the four planning forms admitted into evidence were signed and dated by individuals who served as Plant Manager, and a third was signed by an individual who served as Human Resources Manager. Goodyear's compensation guidelines for 1996 state that merit increases (for that year) had to be "approved by the head of the division prior to any increase being granted." (PX17, at 6).

the coming year (in dollars and as a percentage increase over present salary); and the date that the increase would become effective. (DX6, DX48, DX2; DX3). These plans were then submitted to higher level management for approval. *See supra* note 1. Thus, each salaried employee at the Gadsden plant had his or her salary reviewed at least once annually by plant management, when the time came for the awarding of merit-based raises.

3. Lilly Ledbetter

Lilly Ledbetter hired in to the Gadsden plaint as a "Supervisor," the precursor to the Area Manager position, on February 5, 1979, at forty years of age. The record discloses very little about the first dozen years of Ledbetter's career. She worked as an Area Manager in several different business centers under several different BCMs. Twice, in 1986 and again in 1989, she was included in general layoffs, one lasting fifteen months. The record does not disclose who, prior to 1992, the other Area Managers in Ledbetter's immediate areas of the plant were, how Ledbetter fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs.

In early 1992, Ledbetter was selected to be part of the start-up team for the new RLT section of the Tire Assembly business center, which would produce large radial tires for sport utility vehicles and light trucks. (Tr. at 27). From the summer of 1992 until the beginning of 1996, Ledbetter was supervised in RLT by Mike Tucker, who was at first "Team Leader" for the RLT section and, after 1995, BCM for the entire Tire Assembly area. Four Area Managers worked together under Tucker in RLT from 1992 until 1996: Ledbetter, Bill Miller, Jimmy Todd, and Jerry Thompson. (DX3; DX2; PX22; Tr. at 134).

With the sole exception of performance year 1994, Tucker consistently ranked Ledbetter at or near the bottom of her co-workers in terms of performance. In 1993, he ranked her third out of the four Area Managers, and fifth out of six

salaried employees, based on her 1992 performance. (DX2, Tr. at 335). Tucker suggested, and she received, a 5.28% increase over her existing salary, the largest percentage increase given to any Area Manager, though the smallest in absolute dollars. (DX2). Jimmy Todd, who was ranked last, received no merit increase.

In planning for the merit increases for 1994, Tucker ranked Ledbetter last among the four RLT Area Managers, and last among the six salaried employees. He proposed that she receive a 5% merit increase, the smallest he proposed. (DX3).

In 1995, Tucker awarded Ledbetter a substantial increase of 7.85%, to become effective December 1, 1995, based on her performance in 1994. (PX14). The record does not reflect her exact performance ranking, but the raise she received included a 4% increase styled as an "individual performance award" and a 3.85% increase styled as a "top performance award." (PX14). According to the compensation guidelines in effect at the time, top performance awards were to be given "for only the highest level of individual performance and contribution in an organization," (PX17, at 3), and to "not more than 30% of the number of salaried associates in an organization." (*Id.*). Dual individual performance/top performance awards of the type Ledbetter received were "intended to be used to reward and recognize the uppermost level of top performer."[3] (*Id.* at 5).

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[3] Neither Ledbetter's performance appraisal for 1994 nor the merit increase planning form Tucker completed in 1995 were produced at trial, so there is no documentary record of how Ledbetter actually ranked against her colleagues. Some evidence suggests that Tucker recommended such a large increase for Ledbetter, not because she was truly a "top performer," but simply because he wanted to raise her salary and thought he could only do so significantly by giving her a "top performance award," which allowed him to exceed a 4 cap on "individual performance" awards. (*See* Tr. at 138–39, 179, 348, 363). We credit the evidence favoring

Ledbetter was ineligible for a merit increase in 1996 because her 1995 raise became effective December 1, 1995, and the minimum time interval between raises was then thirteen months, (Tr. at 141; 344), meaning that she would not be eligible for another merit increase until January 1, 1997. She was nevertheless ranked against the twenty-three other salaried employees in Tire Assembly, which had been unified under a single BCM, Tucker, in 1995. (Tr. at 344). Tucker ranked Ledbetter twenty-third out of twenty-four salaried employees, and fifteenth out of sixteen Area Managers. (DX6; Tr. at 323, 344). Jimmy Todd was ranked twenty-fourth, (Tr. at 370), and both he and the person ranked twenty-second were denied raises (DX6; DX65; DX57).

In March 1996, around the time that Tucker recommended raises for 1995's performance, Ledbetter was transferred to the "ARF room," a section of Tire Assembly that made smaller radial tires for passenger vehicles. Jerry Jones, who replaced Tucker as Tire Assembly's BCM in the summer of 1996, told her that she had been transferred because of her sub-standard performance in RLT. (Tr. at 326; PX48).

At the end of 1996, as Jones was completing the performance appraisals for that year, Pete Buchanan, the Human Resources Manager, instructed him not to evaluate Ledbetter's or Todd's performance because, based on their 1995 performance rankings, both were slated to be included in the plant's upcoming layoffs. (Tr. at 48, 297, 317–19, 362). Jones, in turn, informed Ledbetter that she would be laid off along with Jimmy Todd and a "long list" of people in departments all over the plant. (Tr. at 48, 101).

The next day, however, Jones told Ledbetter that she was to continue working, as a substitute for other Area Managers who were or would be out on extended medical leave.

Ledbetter, however, and grant her the inference that she was truly among the best performing employees in RLT in 1994.

Ledbetter worked in that capacity through 1997, and received the same monthly salary she had been paid since her last merit increase, in December 1995. Thus, at the end of 1997, she was still earning $3727 per month, less than all fifteen of the other Area Managers in Tire Assembly. The lowest paid male Area Manager was making $4286, roughly 15% more than Ledbetter; the highest paid was making $5236, roughly 40% more than Ledbetter. (DX48).[4]

Throughout 1997, Ledbetter and Jones had several conversations in which he expressed concerns about her performance. At one such meeting, in August, Jones strongly recommended that she apply for a non-supervisory Technology Engineer position that was open in the Final Finish area. He reminded her that she was still slated for layoff, and he implied that she would be laid off unless she transferred to an area not effected by the reduction in force.[5] He thought the Technology Engineer position would be good for her. Ledbetter interviewed for the position the same day and was accepted, although she continued working as an Area Manager in the ARF room for the remainder 1997.

In October, Jones transferred to another Goodyear facility and was replaced by Kelly Owen as BCM of Tire Assembly. On January 5, 1998, Ledbetter began working as a Technology Engineer—at the same salary she received in 1997. (Tr. at 55–57). She was replaced in the ARF room by

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[4] The salaries these male Area Managers were receiving included the raises they received for 1997. As stated in the text *supra*, Ledbetter received no raise for that year because she was slated for layoff.

[5] Jones told her that other Area Managers were to be laid off, "going to be cut," as he put it. (Tr. at 51–55, 106–07, 298–300, 325–327; PX48).

Jerry Thompson, who in turn was replaced in RLT by Brent Payne, a former tire builder Ledbetter had once supervised.[6]

Though Ledbetter was no longer working in Tire Assembly, Kelly Owen reviewed her performance, and that of the other salaried employees in the unit, for 1997. (Tr. at 262). Owen ranked her twenty-third out of twenty-four salaried employees and fifteenth out of sixteen Area Managers. (DX48). He ranked one male Area Manager, Dean Nance, below her. Nance, Ledbetter, and the two other lowest ranking Area Managers were all denied raises. (DX48). Because Ledbetter was denied a raise for 1998, as she had been for 1997 and 1996, she remained at the same monthly salary ($3727) she had been paid since her December 1, 1995 raise.

On March 25, 1998, Ledbetter filed a questionnaire with the Equal Employment Opportunity Commission ("EEOC"), alleging that she had been forced into the Technology Engineer position and was being subjected to disparate treatment in her new department on account of her sex. In July, she filed a formal charge of discrimination with the EEOC. This time she alleged, in addition to her earlier complaints, that she had received a discriminatorily low salary as an Area Manager because of her sex.

In August, Goodyear announced that it was going to downsize the Gadsden plant and that those who were likely be laid off would have the option of choosing early retirement. Ledbetter applied, was accepted, and retired effective November 1, 1998.

In February 1999, Goodyear announced that the Gadsden plant would close. (Tr. at 349). The plant never completely shut down, however, but large-scale layoffs were made, and

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[6] Although the record is not explicit, the inescapable inference is that Thompson and Payne continued what Ledbetter had been doing—that is, standing in for the Area Managers who were on medical leave.

several Area Managers were either laid off or given the opportunity to transfer to other plants. At the height of the layoffs and transfers, the number of Area Managers in Tire Assembly—where Ledbetter had worked from 1992 to 1998—fell to from a high of sixteen to a low of four. (Tr. at 350).

B. The Proceedings in the District Court

Ledbetter filed this lawsuit on November 24, 1999.[7] After a wide-ranging jury trial that included evidence spanning the entirety of Ledbetter's nineteen-year career, four claims were submitted to the jury: a claim that Ledbetter had been the victim of gender-disparate pay as an Area Manager, in violation of Title VII, and three claims, brought under Title VII and the Age Discrimination in Employment Act ("ADEA"), relating to her transfer to the Final Finish area as a Technology Engineer. These claims were that the transfer had been involuntarily forced upon her because of her sex or her age, or in retaliation for her having made complaints of sex discrimination.

After the district court denied Goodyear's motion for judgment as a matter of law,[8] the jury found for Goodyear on the transfer-related claims but returned a verdict in favor of

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[7] Ledbetter's complaint presented multiple claims of age discrimination, sex discrimination, and retaliation in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-1 (as amended), the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–34. Other than her disparate pay claim brought under Title VII, and her age-, sex-, and retaliation-based claims relating to her transfer to the Final Finish area as a Technology Engineer, each of Ledbetter's claims was abandoned or dismissed by the district court though summary judgment or judgment as a matter of law in favor of Goodyear. Because the jury found in Goodyear's favor on the transfer-related claims as we relate in the next paragraph of the text, the only claim at issue in this appeal is the Title VII disparate pay claim.

[8] *See* Fed. R. Civ. P. 50(a).

Ledbetter on the Title VII pay claim, finding, in a special verdict,[9] that it was "more likely than not that Defendant paid Plaintiff an unequal salary because of her sex." The jury recommended $223,776 in backpay, awarded $4,662 for mental anguish, and awarded $3,285,979 in punitive damages.

Goodyear thereafter renewed its motion for judgment as a matter of law on Ledbetter's disparate pay claim and, alternatively, moved the court to grant it either a new trial or a remittitur.[10] Goodyear contended, as it had throughout the litigation, that Ledbetter's pay claim—or, more accurately, the way she had been permitted to prove her pay claim—was barred by Title VII's requirement that the conduct complained of in a Title VII action must have been the focus of an EEOC charge filed within 180 days of the occurrence of the conduct. *See* 42 U.S.C. § 2000e-5(e)(1). Addressing its motion for judgment as a matter of law, Goodyear argued that "no reasonable fact finder could conclude that [Ledbetter's] sex was a motivating factor in a salary decision made during the period covered by [the] EEOC charge." Assuming for sake of argument that Ledbetter had made out a case for the jury, Goodyear contended that it was entitled to a new trial because the court had erred in permitting Ledbetter to challenge every annual review of her salary, from 1979 on, all but one of which fell outside the 180-day period created by her EEOC charge.

The district court denied Goodyear's motion for judgment as a matter of law but remitted the entire award to $360,000, including the statutory maximum of $300,000 in compensatory and punitive damages and $60,000 in backpay. Of Goodyear's arguments on the 180-day issue and the sufficiency of the evidence, the court said simply that

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[9] *See* Fed. R. Civ. P. 49(a).

[10] *See* Fed. R. Civ. P. 50(b).

> [t]he jury's finding that Plaintiff was subjected to a gender disparate salary is abundantly supported by the evidence. . . .
>
> The jury could reasonably have found that Terry Amberson is an appropriate comparator.[11] Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. Plaintiff's Exhibit ("PX") 201. The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998. It could have found that in the 1996–1998 period, Plaintiff's base annual salary was $44,724; and that Amberson's base salary was $59,028. (footnote omitted).

The court remitted the punitive damages to $295,338, the amount which, when combined with the $4,662 mental anguish award, reached the $300,000 cap on compensatory and punitive damages in Title VII actions against employers with more than 500 employees. *See* 42 U.S.C. § 1981a(b)(3)(D) (limiting damages awarded under Title VII to $300,000 "in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year"). Ledbetter accepted the remittitur. Judgment was therefore entered for $360,000, plus attorneys' fees and costs. Goodyear timely appealed.[12]

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[11] Terry Amberson was the highest paid of five male Area Managers Ledbetter had used as comparators. Each had worked in Tire Assembly—though not necessarily in her section or room—during Ledbetter's final years as an Area Manager.

[12] Ledbetter did not cross-appeal; accordingly, she does not challenge any of the district court's rulings.

II. Standard of Review

We review *de novo* the denial of a motion for judgment as a matter of law, applying the same standard as the district court. *E.g.*, *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1343 (11th Cir. 2003). Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). When the merits of the motion turn on the sufficiency of the evidence, we review the entire record, examining all evidence, by whomever presented, in the light most favorable to the nonmoving party, and drawing all reasonable inferences in the nonmovant's favor. *See Russell*, 346 F.3d at 1343; *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154 (11th Cir. 2002); *Lambert v. Fulton County*, Ga., 253 F.3d 588, 594 (11th Cir. 2001). Moreover, we do not assume the jury's role of weighing conflicting evidence or inferences, or of assessing the credibility of witnesses. *Brochu*, 304 F.3d at 1154–55 (quoting *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir.2001)).

> Thus, although [we must] review the record as a whole, [we] must disregard all evidence favorable to the moving party that the jury [was] not required to believe. That is, [we] give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000) (quoting 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, at 299–300 (2d ed. 1995)).

At the end of this review, we will reverse the denial of judgment as a matter of law only if "the facts and inferences point overwhelmingly in favor of [the movant], such that

reasonable people could not arrive at a contrary verdict." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) (quoting *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997)). "It bears repeating," however, "that a mere scintilla of evidence does not create a jury question. [Judgment as a matter of law] need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather, there must be a substantial conflict in [the] evidence," *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1230 (11th Cir. 2001) (quoting *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989)), enough such that a *reasonable* jury could find for the nonmovant.

III. Analysis

Goodyear's argument regarding Ledbetter's pay claim is two-pronged. First, Goodyear argues that Title VII's timely-filing requirement limited Ledbetter to challenging the one affirmative decision directly affecting her pay that was made within the 180-day limitations period created by her EEOC charge: Kelly Owen's February 1998 decision not to increase her salary for that year. Second, Goodyear argues that it is entitled to judgment as a matter of law because no reasonable jury could find that decision to have been improperly motived by gender discrimination.

Our analysis proceeds as follows. In Part III.A., we consider how Title VII's timely-filing requirement applies to this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer. We conclude that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further that the last such decision immediately preceding the start of the limitations period. We do not hold that an employee may reach back even that far; what we hold is that she may reach no further. In Part III.B.,

we apply this holding to Ledbetter's claim. We conclude that no reasonable juror could find intentional discrimination in either of the two decisions setting Ledbetter's salary as it existed during the limitations period.

A. The Timely-Filing Requirement

Under § 706 of Title VII, 42 U.S.C. § 2000e-5(e)(1), only those "unlawful employment practice[s]" that are complained of in a timely-filed charge of discrimination to the EEOC can form the basis for Title VII liability. *See*, *e.g.*, *City of Hialeah v. Rojas*, 311 F.3d 1096, 1102 (11th Cir. 2002) ("If the victim of an employer's unlawful employment practice does not file a timely complaint, the unlawful practice ceases to have legal significance, and the employer is entitled to treat the unlawful practice as if it were lawful."). For claims arising in so-called "non-deferral" states, such as Alabama, to be timely, the applicable charge must have been filed within 180 days "after the alleged unlawful employment practice occurred." § 2000e-5(e)(1).[13] Therefore, only those "practice[s]" that "occurred" within 180 days of the operative EEOC charge can form the basis for Title VII liability.

The parties both assume for purposes of this appeal that the operative "charge" in this case is the EEOC questionnaire Ledbetter filed on March 25, 1998, and that her pay claim—which was included in her formal charge filed in July 1998, but not the questionnaire—should relate back to the date of the questionnaire.[14] Measuring from March 25, 1998, the 180-day period began to run on September 26, 1997. The question, therefore, is whether Ledbetter made out a claim for disparate treatment in pay based on conduct occurring after September 26, 1997.

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[13] In "deferral" states—those states that have an EEOC-like state administrative agency—a charge of discrimination must first be filed with the state agency, and the filing period is extended to 300 days.

[14] We do not pass on the correctness of these assumptions.

1. The Morgan Decision.

The Supreme Court substantially clarified the operation of Title VII's timely-filing requirement in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), so we begin our analysis there. In *Morgan*, the Supreme Court granted certiorari to consider "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the timely-filing] period." *Id.* at 105, 122 S. Ct. at 2068. On that question, the Court reached two different answers, one for each of the two types of claims at issue in the case: (1) disparate treatment and retaliation claims challenging "discrete discriminatory or retaliatory acts," and (2) a claim alleging a hostile work environment. *See id.*

The Court held that the timely-filing requirement erects an absolute bar on recovery for "discrete discriminatory or retaliatory acts" occurring outside the limitations period. In doing so, it rejected the Ninth Circuit's "serial violations" doctrine, eschewing the notion "that so long as one act falls within the charge filing period, [time-barred] discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for purposes of liability." *Id.* at 114, 122 S. Ct. at 2072–73. The Court reasoned that "discrete acts of discrimination" such as "termination, failure to promote, denial of transfer, or refusal to hire" are easy to identify, and each "constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114, 122 S. Ct. at 2073. Because each is an identifiable violation of Title VII, "each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113, 122 S. Ct. at 2072. In such cases, there is no issue about when, in the language of the statute, the "alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). It "occurred" on the day that it "happened." *Morgan*, 536 U.S. at 109, 122 S. Ct. 2070. A party, therefore, must file a charge within either 180 or 300 days of the date of a discrete discriminatory or

retaliatory act or lose the ability to recover for it, *id.* at 113, 122 S. Ct. at 2072, regardless of whether the time-barred acts are closely related to acts alleged in a timely-filed charge. Pre-limitations acts can be used, where relevant, "as background evidence in support of [the] timely claim," *Id.* at 113, 122 S. Ct. at 2072, but they cannot themselves form the basis for liability.

The Court distinguished claims in which the plaintiff alleges that he or she was subjected to a hostile work environment. For those claims, the Court held, "consideration of the entire scope of [the] claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.* at 105, 122 S. Ct. at 2068. The Court reasoned that

> [h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.

Id. at 115, 122 S. Ct. at 2073 (citations omitted). "Given," the Court said, "that the incidents constituting a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim." *Id.* at 118, 122 S. Ct. at 2075.

We think it clear that pay claims of the type Ledbetter asserts are governed by that part of the Morgan decision addressing claims alleging "discrete acts of discrimination." It is fundamental that for a Title VII plaintiff to prevail on any type disparate treatment claim, he or she must point to some

specific, conscious conduct that was tainted by the alleged improper consideration (be it "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1)). In a case in which the plaintiff complains of discriminatory pay, there are only two possible sources of such conduct: the decisions setting the plaintiff's salary level or pay rate, and the issuance of paychecks reflecting those decisions. Whether it is a pay-setting decision or the issuance of a confirming paycheck that is viewed as the operative act of discrimination, the act is, like "termination, failure to promote, denial of transfer, or refusal to hire," *Morgan*, 536 U.S. at 114, 122 S. Ct. at 2073, discrete in time, easy to identify, and—if done with the requisite intent—independently actionable. If an employee is denied a raise, given a pay cut, or hired at a deflated pay grade because of a prohibited consideration, the statute is violated and the employee can file suit the moment the decision is made. The decision would be no less unlawful if the employee were to quit the next day in exasperation and never receive a paycheck reflecting her unlawful pay rate; proving damages might be problematic, but establishing liability would not. Similarly, if the act complained of is the issuance of a discrete discriminatory paycheck (or paychecks), then the issuance of the challenged paycheck completes the "alleged unlawful employment practice" for purposes of the timely-filing requirement. Pay claims do not, therefore, have those characteristics that led the Court to devise a separate rule governing the timing of hostile work environment claims: The "unlawful employment practice" can be said to occur on a particular day (though it may be repeated on multiple days), and a single discriminatory act is actionable on its own. The alleged discriminatory behaviors need not accumulate to some critical mass to become actionable.[15]

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[15] The Seventh Circuit has reached the same conclusion. *See Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1010 (7th Cir. 2003) (concluding that "it is relatively easy to rule out" the possibility that disparate pay claims should be treated like hostile

Under *Morgan*, therefore, Ledbetter can state a timely cause of action for disparate pay only to the extent that the "discrete acts of discrimination" of which she complains occurred within the limitations period created by her EEOC questionnaire. Any acts of discrimination affecting her salary occurring before then are time-barred.

2. Ledbetter's Claim.[16]

It is undisputed that Ledbetter's claim is not entirely time barred. In February 1998, after Ledbetter had transferred to the Final Finish area to assume the Technology Engineer position, her pay level was reviewed by Kelly Owen, who decided not to recommend that she receive any raise. That decision was affirmed by higher level management at the plant. Because an affirmative decision directly affecting Ledbetter's pay was made within the limitations period (i.e.,

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environment claims after *Morgan*); *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1028 (7th Cir. 2003) ("Using *Morgan* as our guide . . . we must conclude that each of Dr. Hildebrandt's paychecks that included discriminatory pay was a discrete discriminatory act, not subject to the continuing violation doctrine. Therefore, Dr. Hildebrandt may only recover for the discriminatory pay received within the statute of limitations period.") (footnote omitted); *cf. Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (concluding in a pre-*Morgan* Equal Pay Act case that "a claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action").

[16] We note that neither party has argued that equitable considerations require deviation from straight-forward application of the 180-day filing period. *See Morgan*, 536 U.S. at 121–22, 122 S. Ct. at 2076–77 (reaffirming that the timely-filing requirement is subject to waiver, estoppel, and equitable tolling, and holding that defendants may avail themselves of the defense of laches). We therefore have no occasion to consider, for example, the timing and extent of Ledbetter's awareness of the disparity between her salary and those of her co-workers.

after September 26, 1997), she may at least challenge that decision as discriminatory. The claim is identical in form to the raise-denial claims courts routinely consider.

The rub is that Ledbetter did not want to stop at the 1998 raise decision because doing so would have (1) limited the damages she could have recovered, (2) rendered useless evidence relevant only to other persons in the plant upon which she wanted the jury to rely, and (3) forced her to prove that Owen acted with discriminatory intent. Instead, what Ledbetter did—what the district court allowed her to do—was to point to the substantial disparity between her salary and those of the male Area Managers in Tire Assembly at the end of her career, put on circumstantial evidence that persons having control over her pay earlier in her career had discriminatory animus toward women, show that other female Area Managers in the plant were paid less than their male co-workers, and then put the onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar of difference between her salary and her male co-workers' salaries. This necessarily put at issue every salary-related decision made during Ledbetter's nineteen-year career.

To support her argument that she was entitled to prove her claim in this way, Ledbetter cites a series of pre-*Morgan* cases that, attempting to follow the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986), essentially carved out a doctrine for applying the timely-filing requirement to disparate pay claims. Though the circuits took slightly different approaches, many held prior to *Morgan* that a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful.[17]

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[17] This included at least the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. *See Calloway v.*

Partners National Health Plans, 986 F.2d 446 (11th Cir. 1993) (relying on *Bazemore* in holding that a plaintiff could challenge her initial wage rate as unlawful, even though it had been established outside the limitations period, because she continued to receive paychecks within the limitations period); *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001) ("in a Title VII case claiming discriminatory pay, the receipt of each paycheck is a continuing violation"); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 346 (4th Cir. 1994) ("In a compensation discrimination case, the issuance of each diminished paycheck constitutes a discriminatory act"); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982) ("The discrimination [against the plaintiff] was continuing in nature. [She] suffered a denial of equal pay with every check she received."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc) ("Ashley's Title VII pay claim is timely because she received allegedly discriminatory paychecks within 300 days prior to the filing of her administrative charge.") (citations omitted), abrogated on other grounds by *Morgan*, 536 U.S. at 101, 122 S. Ct. at 2061; *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1400 (9th Cir. 1986) ("As each plaintiff in the instant action filed charges with the EEOC within 180 days of a [wage] payment, we conclude that plaintiffs' action is not time-barred."); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) ("*Bazemore* . . . has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation."), *cert. denied*, 537 U.S. 941, 123 S. Ct. 340, 154 L. Ed. 2d 248 (2002); *Anderson v. Zubieta*, 336 U.S. App. D.C. 394, 180 F.3d 329, 335–37 (D.C. Cir. 1999) (holding that under *Bazemore*, the continued application of a discriminatory compensation scheme is itself an actionable violation, and that the plaintiffs could therefore "be made whole for those paychecks received during" the applicable limitations period).

Some circuits relied on the so-called "continuing violations" doctrine, variously defined, *e.g.*, *Calloway*, 986 F.2d at 448–49; *Cardenas*, 269 F.3d at 258, while others expressly rejected that label, *e.g.*, *Gandy v. Sullivan County, Tenn.*, 24 F.3d 861, 864–65 (6th Cir. 1994) (EPA claim). Some restricted the damages

Assuming that these cases survive *Morgan*, they do not stand for the broad proposition Ledbetter urges. It is one thing to say that a claim is not entirely time barred because the discriminatory decision being challenged continued to be periodically implemented through paychecks issued within the limitations period. It is quite another to say that the bare issuance of a lower-than-wished-for paycheck within the limitations period opens the door for a full inquiry into the motivations of every person who ever made a decision contributing to the plaintiff's pay level as it existed during the limitations period. In other words, the cases on which Ledbetter relies hold simply that pay claims are not *time-barred* if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of

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recoverable to the pay lost as a result of paychecks received within the timely-filing period, *e.g.*, *Brinkley-Obu*, 36 F.3d at 346, n.22; *Ashley*, 66 F.3d at 167–68, while others at least in certain circumstances allowed the plaintiff to recover for the full two-year backpay period specified in 42 U.S.C. § 2000e-5(g)(1), *e.g.*, *Goodwin*, 275 F.3d at 1011 (misreading Ashley as agreeing with this result), *Anderson*, 180 F.3d at 335–37.

The Second Circuit never addressed the issue in the context of Title VII, but pre-*Morgan* decisions under other statutes suggest it would have adopted the majority position. *See Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) (relying on Bazemore in holding in a § 1983 case that "application of a discriminatory policy" within the limitations period preserves a claim against that policy, even if the policy was instituted outside the limitations period); *Pollis v. New School for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997) (holding that Equal Pay Act claims re-accrue with the receipt of each challenged paycheck); *Kim v. Dial Serv. Int'l*, 159 F.3d 1347 (2d Cir. 1998) (unpublished table decision) (holding in a § 1981 case that "under *Bazemore*, each discriminatory paycheck constituted a new violation for which suit could be brought within the statute of limitations period beginning with its occurrence").

every successful disparate treatment claim. *E.g.*, *Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) ("Disparate treatment claims require proof of discriminatory intent[,] either through direct or circumstantial evidence.")

Of course, the necessary implication of these cases is that a plaintiff whose claim is preserved by the continued issuance of improperly low paychecks can look some distance back in time for the underlying, intentionally discriminatory decision. Unless there is a claim that the person—or, more likely today, the computer—who actually issued the paychecks in question did so with intent to discriminate, the operative act of discrimination will always be, not the act of issuing paychecks, but the act of making the underlying decision about what the plaintiff should be paid. Thus, if a claim is timely only because of the continued receipt of paychecks within the limitations period, it must be that the plaintiff can point to a decision outside the limitations period as the offending act.

There must, however, be some limit on how far back the plaintiff can reach. If it were otherwise, the timely-filing requirement would be completely illusory in many pay-related Title VII cases. So long as the plaintiff received one paycheck within the limitations period that was based on the pay level he or she objects to, the plaintiff could effectively call into question every decision made contributing to his or her being paid at that level. This result would be directly contrary to the central purposes of the time-filing requirement: to "encourage prompt resolution of employment disputes," *Hill v. Ga. Power Co.*, 786 F.2d 1071, 1076 n.9 (11th Cir. 1986), and "to protect employers from the burden of defending claims arising from employment decisions that are long past," *Del. State College v. Ricks*, 449 U.S. 250, 256–57, 101 S. Ct. 498, 503, 66 L. Ed. 2d 431 (1980).

Limits on how far into the past the plaintiff can look for an intentionally discriminatory decision are most obviously warranted where, as here, the employee's pay level was

subjected to periodic re-assessment through regularly scheduled raise decisions. In such cases, the timing of the employer's compensation system creates one, obviously preferable opportunity for an employee to make any pay-related complaints: the point at which the employee's salary is reviewed and he or she is dissatisfied with the result. We think, therefore, that at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period. Other, earlier decisions may be relevant, but only to the extent they shed light on the motivations of the persons who last reviewed the employee's pay, at the time the review was conducted. *See, e.g., Downey v. So. Nat. Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981) ("Although Downey's claims relating to the 1974 demotion and failure to transfer are time barred, these actions should be allowed as evidence on the question of whether Downey was constructively discharged. We observe that "(w)hile some or most of this evidence may concern time-barred conduct, it is relevant, and may be used to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." (quoting *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1314 (5th Cir. 1980))).[18]

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[18] Moreover, the employee is limited to recovering for those paychecks received within the limitations period. This is the necessary consequence of *Morgan*'s holding that the timely-filing requirement "precludes recovery for discrete acts of discrimination or retaliation that occur outside the [filing] period," *Morgan*, 536 U.S. at 105, 122 S. Ct. at 2068. Obviously, "the timely filing provision was not meant to serve as a specific limitation . . . on damages." *Id.* at 119, 122 S. Ct. at 2075. But for claims based on discrete acts of discrimination, the "obvious consequence" of the strict limitation on liability is a correspondingly strict limitation on

Despite Ledbetter's contentions, our decision in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993), is not to the contrary. In *Calloway*, the plaintiff, a black woman, had accepted a secretarial position at a salary lower than her equally or less qualified white predecessor had been offered nine months prior. In addition, when the plaintiff left the company, the defendant replaced her with another white woman of equal or lesser qualifications whom it paid more than it had the plaintiff. The limitations period created by the EEOC charge supporting the plaintiff's claim did not reach back to the date she was hired. The defendant therefore argued that the claim was barred because the only conduct that occurred within the limitations period—the issuance of paychecks implementing the plaintiff's disparate pay rate—was simply "the present consequence" of a time-barred act of discrimination: hiring the plaintiff at a discriminatory initial wage rate. *Id.* at 448;

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damages. *Id.* at 126, 122 S. Ct. at 2079 (O'Connor, J., concurring in part and dissenting in part). The other circuits to address this issue after *Morgan* have all reached the same conclusion. *See Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) ("Any paycheck given within the statute of limitations period [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period. But, a claimant [can] only recover damages related to those paychecks actually delivered during the statute of limitations period."); *Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005) ("*Morgan* dooms any hope Shea entertained that his current (and allegedly discriminatory) paychecks can resurrect his otherwise untimely challenges to the paychecks he received before January 12, 2001—or 180 days before he filed his grievance"); *Hildebrandt*, 347 F.3d at 1028 ("Using *Morgan* as our guide . . . we must conclude that each of Dr. Hildebrandt's paychecks that included discriminatory pay was a discrete discriminatory act, not subject to the continuing violation doctrine. Therefore, Dr. Hildebrandt may only recover for the discriminatory pay received within the statute of limitations period." (footnote omitted)).

see also United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977). The district court found that the plaintiff had proven intentional discrimination in her initial wage assignment, but it agreed with the defendant that the claim was time-barred.

A panel of this court reversed. Relying on *Bazemore* and on our own version of the "continuing violations" doctrine, the panel reasoned that "when the claim is one for discriminatory wages, the violation exists every single day the employee works [for the wages she challenges as unlawful]." *Calloway*, 986 F.2d at 448–49 (citing *Bazemore*, 478 U.S. at 396, n.6; 106 S. Ct. at 3006, n.6.). Thus, the defendant "discriminated against [the plaintiff] not only on the day that it offered her less than her white predecessor, but also on every day of her employment." *Id.* (citing *Bazemore*, 478 U.S. at 395, 106 S. Ct. at 3006 ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . .")).

Ledbetter argues that because the plaintiff in *Calloway* was allowed to prove her claim based on the intentional discrimination reflected in her initial wage assignment, she should be allowed to do the same; if she can prove intentional discrimination in any pay decision during her career, even the setting of her initial salary, she can effectively borrow that intent and impute it to the paychecks she received during the limitations period. *Calloway*, however, did not involve, as this case does, an employee whose pay had been reviewed and re-established over a dozen times. There is no indication in the opinions of the district court or the panel in *Calloway* that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay and to seek a raise. Indeed, there is no indication that any decisions were made about the *Calloway* plaintiff's pay rate between the initial date of hire and the start of the limitations period. In such cases, if a claim is allowed to go forward only because paychecks were

received within the limitations period, then of course any intentional discrimination will have to be located in the initial wage assignment. In short, we believe that *Calloway* belongs in a different category of pay-related cases and is fully consistent with the rule we announce today.

We think *Morgan* may indicate that the paycheck-as-discriminatory-act cases, including *Calloway*, read *Bazemore* too broadly and that it therefore remains an open question whether a disparate-pay plaintiff, in contrast to a pattern-and-practice pay plaintiff, should be able to challenge any decision made outside the limitations period.[19] We need not address that question today, however. Even if we assume that the paychecks Ledbetter received within the limitations period allowed her to attack as discriminatory the last affirmative decision affecting her pay before the beginning of the period, that decision—the Gadsden plant administrators' decision not to allow Jerry Jones to consider her for a raise in 1997—is not one that any reasonable jury could find discriminatory.

B. Sufficiency of the Evidence

We conclude, as we must, that Ledbetter was permitted to challenge the one raise decision that was made within the limitations period: Kelly Owen's decision to recommend that she not receive any raise in 1998. Further, we assume that, to

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[19] *But see Reese v. Ice Cream Specialties*, 347 F.3d 1007, 1013 (7th Cir. 2003) ("The Court has left a . . . narrow channel for Title VII plaintiffs who wish to complain that their paychecks, in compensation for work they have presently performed and completed in pay periods within the limitations period, are discriminatorily low because of an earlier act that occurred outside the limitations period."); *accord Forsyth v. Federation Employment & Guidance Service*, 409 F.3d 565, 572–73 (2d Cir. 2005); *Shea v. Rice*, 409 F.3d 448, 453–54 (D.C. Cir. 2005); *Hildebrandt*, 347 F.3d at 1027.

establish that intentional discrimination tainted the paychecks she received within the limitations period but before Owen's decision, Ledbetter could attack as discriminatory the plant administrators' decision not to allow Jerry Jones to consider her for a raise in 1997. The question therefore becomes whether Ledbetter presented sufficient evidence for a reasonable jury to conclude that either of these decisions violated Title VII.

Title VII, in pertinent part, makes it unlawful for an employer to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In this circuit, individual disparate-pay claims brought under Title VII are governed by the familiar burden-shifting framework set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), and their progeny. *See Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992) (adopting the *McDonnell Douglas* framework for disparate pay claims). Under the *McDonnell Douglas*/*Burdine* approach,

> a female Title VII plaintiff establishes a *prima facie* case of sex discrimination by showing that she occupies a job similar to that of higher paid males. Once a *prima facie* case is established, the defendant must articulate a legitimate, non-discriminatory reason for the pay disparity. This burden is "exceedingly light"; the defendant must merely proffer non-gender based reasons, not prove them. Once such a justification is advanced, the plaintiff must demonstrate by a preponderance of the evidence that the employer had a discriminatory intent. In other words, the plaintiff must show that a discriminatory reason

> more likely than not motivated [the employer] to pay her less.

Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994) (citations and quotation marks omitted).

This burden-shifting framework does not relieve the plaintiff of her burden of persuasion; she ultimately bears the burden of showing by a preponderance of the evidence that she was paid at a disparate rate out of intent to discriminate on the basis of sex. *See Burdine*, 450 U.S. at 253, 101 S. Ct. at 1089 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). Instead, the *McDonnell Douglas/Burdine* approach simply switches temporarily the burden of *production*, forcing the defendant (after the plaintiff has established a prima facie case) to produce a target at which the plaintiff can aim her proof—the "legitimate, non-discriminatory reasons" it offers for the pay disparity. "Rejection of the defendant's proffered reasons" does not *compel* judgment for the plaintiff as a matter of law, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2749, but in the *usual* case,[20]

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[20] It is not always the case that "the plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, [will] permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148, 120 S. Ct. at 2109.

> Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and

rejection of the reasons offered by the defendant, combined with the evidence supporting the prima facie case, "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

If, therefore, the plaintiff comes forward with sufficient evidence to establish that "she occupies a job similar to that of higher paid males," *Meeks*, 15 F.3d at 1019, and the defendant in response articulates legitimate, nondiscriminatory reasons for the pay disparity, the sufficiency of the evidence on the ultimate issue of intentional discrimination generally turns on whether a reasonable jury could find that the defendant's justification for the disparity is pretextual. The question becomes whether "the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996)). "The risk of nonpersuasion always remains with the plaintiff." *Meeks*, 15 F.3d at 1019. "If the evidence is in equipoise on the issue of whether a salary differential is based on a factor other than sex, . . . the employer prevails . . . ." *Id.*

In this case, Ledbetter does not dispute that Goodyear came forward with legitimate, nondiscriminatory reasons for Ledbetter's being passed over for raises in 1997 and 1998.

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uncontroverted independent evidence that no discrimination had occurred.

Id.

The sole issue, therefore is whether a reasonable jury could have found those reasons to be pretexts for intentional sex discrimination. The answer is a clear "no."

1. The 1998 Decision.

There simply was no evidence produced at trial impugning Kelly Owen's motives in recommending, in February 1998, that Ledbetter receive no raise in 1998. Ledbetter was ranked twenty-third out of twenty-four employees in Tire Assembly, and fifteenth out of the sixteen Area Managers, based on her performance in 1997. (DX48). That ranking was the same in both the raw performance scores taken directly from the 1997 performance appraisals and in the weighted scores Owen used to create the business-center-wide rankings. (DX19). One male Area Manager, Dean Nance, was ranked below Ledbetter, and he and the two males ranked directly above Ledbetter were all denied raises, just as Ledbetter was.

There was no evidence that Owen purposefully underrated Ledbetter's performance for 1997. There was no evidence that he bore any ill will towards Ledbetter or toward women generally. Moreover, Owen told Ledbetter that she would not be receiving a raise when he met with her to discuss her performance appraisal, and she made no complaint about being discriminated against. (DX17, DX25). She also neglected to make any such complaint when she went to EEOC a month later about her alleged mistreatment in the Technology Engineer position. In short, Ledbetter failed to produce a scintilla of evidence from which a reasonable jury could have found that Owen's decision was in any way affected by her sex.[21]

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[21] Ledbetter did produce some evidence tending to undermine her 1997 performance appraisal. She testified that some of the audits upon which Owen would have relied in completing her performance appraisal were purposefully falsified by Mike Maudsley, the business center's Production Auditor. This, however,

2. The 1997 Decision.

The same is true of Goodyear's decision not to consider Ledbetter for a raise in 1997. The evidence uniformly confirmed that Ledbetter and others were selected in 1996 to be included in layoffs that were expected in 1997, and that Ledbetter avoided actually being out of work during 1997 only because one or more other Area Managers were out on extended medical leave and she was able to work as a substitute. The only reasonable inference is that these layoffs were instituted as the first step in the production cutbacks that ultimately led to the plant's being all but completely shut down. Just a year and half after Jones first informed Ledbetter that she was slated for layoff, Goodyear announced in August 1998 the reduction-in-force that Ledbetter volunteered to be included in. And it was only two years later, in February 1999, that Goodyear announced that the entire plant would close. Many layoffs and transfers were made, and the number of Area Managers in the Tire Assembly area dwindled from sixteen, when Ledbetter was there, to as low as four.

The uncontradicted evidence also established that Ledbetter's impending layoff was the reason for her being denied a raise in 1997. Jones's testimony to this effect went unimpeached and uncontradicted, and there is no suggestion in the record that Ledbetter properly should have been considered for a raise notwithstanding her impending layoff.[22]

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is relevant only to the accuracy of Owen's rankings, not to his intent. It is not discriminatory to honestly rely on inaccurate information, *see Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1261 (11th Cir. 2001); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991); *Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452–53 (11th Cir. 1987), and there was no evidence that Owen acted any way but in good-faith reliance on the information he was using.

[22] On appeal, Ledbetter argues for the first time that the layoff planned in late 1996 does not explain her being denied a raise in

Moreover, common sense suggests that scarce raise dollars would not normally be awarded an employee whose supervisors considered her departure to be imminent.

Because it was clear that Ledbetter was scheduled for layoff and was therefore ineligible for a raise in 1997, her only avenue for undermining the decision not to award her a raise was to attempt to raise the inference that she was improperly selected for the layoff. Her theory, in sum, was that she was on the "layoff list" "so they wouldn't have to give me a raise." (Tr. at 141). Ledbetter pointed to two threads of evidence that could conceivably support this theory: (1) evidence that Jerry Jones and a Plant Manager, Richard O'Dell, bore resentment against her or against women generally; and (2) evidence intended to show that she performed too well in 1995 for the company's decision to be credible.

Ledbetter's attempt to suggest that she performed too well in 1995 to be selected for layoff failed completely.[23]

1997 because it was clear by the time Jones recommended merit increases for 1997 that she would never be laid off. The evidence Ledbetter relies upon in making this argument—including evidence regarding the merit increases that were awarded by Jones in 1997—was not made part of the record of this case. Moreover, Ledbetter's own testimony supports the conclusion that she was still slated for layoff at least as late as August, 1997, well after the merit-increase planning for 1997 would have been done. She testified that Jones told her in August that she was still slated for layoff. (Tr. at 53–55, 106).

[23] There is no basis for questioning Goodyear's evidence that the layoff selections were based on 1995 performance appraisals. Jones testified that he was told by Pete Buchanan that Ledbetter and Todd had been selected layoff based on their 1995 performance. (Tr. at 317–18). Ledbetter testified that Jones told her what Buchanan had said. (Tr. at 48). And Mike Tucker testified that he was aware at the time that the selections were being made based on 1995 performance appraisals, (Tr. at 362), and that it was

Mike Tucker ranked Ledbetter twenty-third out of the twenty-four employees in Tire Assembly for the 1995 performance year. (DX6).[24] Jimmy Todd, who was also included in the layoff, was ranked last. (Tr. at 370). Thus, the two lowest performing Area Managers in Tire Assembly in 1995—the last year for which there were completed performance appraisals—were selected for the layoff. This makes inherent sense; that is, that the managers of a plant in dire financial straits (as the Gadsden plant undisputedly was) would choose for layoff those managers with the poorest recent performance history.

Ledbetter produced no evidence undermining Tucker's evaluation of her performance or suggesting that he had improper motives. Moreover, Ledbetter's next-to-last ranking in 1995 is consistent with her last-place ranking for 1993 (DX3) and her next-to-last rankings for 1992 and 1997 (DX2, DX48). There simply was no reasonable, performance-based reason for questioning Ledbetter's selection for layoff.[25]

The same is true of Ledbetter's attempt to impugn the motivations of Jones and O'Dell, because Ledbetter produced no evidence that either of these men played any role in selecting her for the layoff. Goodyear's evidence that the layoff decision was made at a level of authority above Jerry Jones went uncontradicted and unimpeached; nothing in the

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"common knowledge" in the plant that both Ledbetter and Todd had been selected.

[24] There is absolutely no evidence to support Ledbetter's repeated suggestion, at trial and on appeal, that her "top performance award" was based on her performance in 1995, rather than 1994. *See supra* note 3.

[25] We must credit the evidence that Ledbetter was among the best-performers in the RLT section of Tire Assembly in 1994. However, Ledbetter's solid performance in 1994 does not permit the inference, over direct evidence to the contrary, that she continued to be a top performer in 1995, especially given her otherwise consistently low ratings in other years.

record indicates that Jones had any role in this decision other than delivering the bad new to Ledbetter. Ledbetter's attempt to suggest that Jones bore ill will towards her because of her sex[26] therefore casts no light on the 1997 decision. The same is true of Ledbetter's testimony regarding sexist comments allegedly made by Richard O'Dell, who Ledbetter testified was Plant Manager at some unidentified point "toward[] the end of [her] career."[27] If O'Dell was Plant Manager when

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[26] Ledbetter attempted to establish that Jones treated her poorly in various ways throughout 1997. She claimed to have been ignored in meetings and denied information she needed to perform her job; she pointed to a memoranda in which Jones insensitively addressed his Area Managers as "boys" and then, after she complained, as "Boys and Lady"; and she testified that Jones had retaliated against her in the early 1980s when he was a Human Resources officer and she complained of sexual harassment by her co-workers.

Other evidence introduced by Ledbetter herself suggests that Jones treated her fairly. He was her BCM from 1985 until her temporary layoff in May 1986, and Ledbetter testified that she could recall no problems with him during this time. She also produced a note that Jones had sent her when she was selected to be part of the start-up team for the new RLT section of Tire Assembly in 1992. In it, Jones congratulated Ledbetter on her new assignment, saying that she had "worked very hard," had "made a lot of improvement in the last few years," and "deserved the opportunity." (PX8). She testified that she considered this a sincere compliment from Jones. (Tr. at 115).

[27] According to Ledbetter, O'Dell told her "that [the] plant did not need women, that we didn't help it, we caused problems." (Tr. at 29). Piling hearsay upon hearsay, she also testified (over Goodyear's objection) that one of her former supervisors (she did not specify who) told her that O'Dell asked Jerry Jones "when [he was] going to get rid of the drunk and the damn woman." (Tr. at 30.) The only other mention of O'Dell in the record is his unauthenticated signature on the merit increase plan for Tire Assembly for 1998, which was completed by Kelly Owen. (DX48). As to the timing of O'Dell's alleged comments, the records

Ledbetter was slated for layoff or when she was denied a raise in 1997, or if he had any role in these decisions, Ledbetter produced no evidence of it. His comments were therefore alone insufficient to support an inference of discrimination. *Cf. Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999) ("In several age discrimination cases . . . this court has explained that comments by non-decisionmakers do not raise an inference of discrimination . . . .").

Moreover, the jury's rejection of Ledbetter's claims related to her transfer to the Final Finish room, to the Technology Engineer position, cannot be squared with its accepting Ledbetter's far-flung theory that her layoff was manufactured by Jones or others to avoid raising her salary. Ledbetter advanced two theories to support her transfer claims: (1) that she was deceived into voluntarily applying for the transfer by Jones's falsely telling her she would be laid off if she stayed in her Area Manager position; and (2) that she was effectively forced her into transferring by, among other things, Jones's constantly (correctly) threatening her with layoff. That the jury rejected these theories suggests that it accepted Goodyear's evidence that Jones did not mistreat Ledbetter, that he correctly told her she would be laid off if she remained an Area Manager, and that he arranged an interview for her for the Technology Engineer position as a gratuitous kindness, in an effort to keep her working until she would be eligible for full retirement. In short, if the jury had credited Ledbetter's testimony regarding Jones, it almost surely would have found in her favor on one or more of the transfer claims; that it found against her on those claims suggests it did not credit her testimony.

Given Ledbetter's failure to come forward with a scintilla of probative evidence casting doubt on Goodyear's explanation for denying her a raise in 1997, no reasonable

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suggests only that they were made after Jones became her BCM and "toward[] the end of [her] career." (Tr. at 28).

factfinder could find that the decision was motivated by Ledbetter's sex.

IV. Conclusion

In summary, because Goodyear had a system for periodically reviewing employee salaries, Ledbetter could recover on her disparate pay claim only to the extent she proved intentional discrimination in the one decision affecting her pay made within the limitations period created by her EEOC charge, or, at most, the last such decision made immediately preceding the limitations period. Because she failed to carry her burden of coming forward with sufficient evidence to permit a reasonable jury to find that either of those decisions was a pretext for sexual discrimination, the district court should have granted Goodyear judgment as a matter of law. We therefore **reverse** the judgment of the district court and instruct the court to dismiss Ledbetter's complaint with prejudice.

SO ORDERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	**}**	
Plaintiff,	**}**	
	}	
vs.	**}**	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	**}**	
RUBBER COMPANY,	**}**	
INC.	**}**	
Defendant.	**}**	

ORDER ON POST-TRIAL MOTIONS

Based on the accompanying Memorandum Opinion and the entire record in this case, it is hereby ORDERED as follows:

1 Plaintiff's Motion for Attorney's Fees and Expenses is hereby DENIED, without prejudice to its automatic reinstatement in the event that Plaintiff agrees to remittitur suggested by the Court.

2 Defendant's Renewed Motion for Judgment As A Matter of Law is GRANTED solely to the extant that the jury's award of $328,597.93 in backpay for retaliation, age, and sex discrimination is hereby VACATED. In all other respects, the Motion for Judgment As A Matter of Law is DENIED.

3 Defendant's alternative Motion For A Remittitur is hereby GRANTED. The Judgment previously entered in this case is hereby REDUCED to $360,000, conditioned on

Plaintiff's filing her assent to the remittitur within fifteen (15) days of the date of this Order.

4 Defendant's Motion For A New Trial is DENIED, on condition that Plaintiff assents to remittitur. Should Plaintiff fail to assent to remittitur within the fixed time period, the Court will reconsider the motion *sua sponte* and GRANT it on the issue of damages only.

Done this 23rd day of September, 2003.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	**}**	
Plaintiff,	**}**	
	}	
vs.	**}**	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	**}**	
RUBBER COMPANY,	**}**	
INC.	**}**	
Defendant.	**}**	

MEMORANDUM OPINION ON POST-TRIAL MOTIONS

The Jury rendered a $3,843,041.93 verdict in this case, concluding that Plaintiff Lilly M. Ledbetter had proved that Defendant Goodyear Tire and Rubber Company, Inc. ("Goodyear") probably paid her a disparate salary because of her sex. The jury also found that Goodyear did not involuntarily transfer Plaintiff from the position of Area Manager to Technology Engineer because of her age, sex, or in retaliation of her having complained of sex discrimination.

Goodyear has renewed its Motion for Judgment As A Matter of Law, or, in the alternative a New Trial or Remittitur. For the reasons which follow, the Court concludes that 1) Goodyear is entitled to judgment as a matter of law on the claims of retaliation, age, and sex discrimination: and 2) unless the Plaintiff accepts a remittitur, the Motion For A New Trial will be granted.

I

Despite having conclude that Plaintiff's transfer was not unlawful, the jury awarded the sum of $328,597.93 in backpay based on the claims of age and race discrimination and retaliation. The damages award is obviously consistent with the finding of no liability. The consistency was apparent when the jury's special verdict was read in open court. However, Goodyear chose not to challenge the inconsistency before the jury was dismissed. This failure constitutes a waiver of the inconsistency.

Nonetheless, the Court will exercise its discretion to grant Goodyear's renewed motion for judgment as a matter of law solely on these claims which the jury found to be lacking in merit.

II

The jury could reasonably have found that Terry Amberson is an appropriate comparator. Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. Plaintiff's Exhibit ("PX") 201.* The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998.

*Goodyear's argument that this exhibit was not received in evidence is without foundation.

It could have found that in the 1996–1998 period, Plaintiff's base annual salary was $44,724; and that Amberson's base annual salary was $59,028.

Plaintiff's charge of discrimination relates back to March 25, 1998, when she completed the Equal Employment Opportunity Commission ("EEOC")'s questionnaire. Because of the continuing nature of the disparate salary payments, Plaintiff is entitled to recover for the disparate salaries from March 25, 1996, until her retirement thirty-one months later.

Assuming that the jury found the facts concerning damages in the most favorable light to Plaintiff that is reasonably could have, the maximum award for the salary

differential would have been $60,000—including overtime pay and prejudgment interest.

The Court concludes therefore that to the extent that the jury's award for the disparate salaries exceed $60,000, it is not supported by the evidence.

III

The jury's award of compensatory damages for mental anguish in the amount of $4,662 is solidly supported by the evidence.

IV

The jury's punitive damage award of $3,258,979 must be reduced.

While the evidence does indeed support an award of punitive damages, the law imposes a limitation on such damages in employment cases such as this one brought under 42 U.S.C. § 1981a. The punitive damages, coupled with the compensatory damages, may not exceed $300,000.00. 42 U.S.C. § 1981a (b) (3) (D).

A reasonable jury could have found $500,00 to be a reasonable amount sufficient to punish and deter Goodyear. Given the statutory limitation and the compensatory damage award, it follows that the punitive damage award must be reduced to $295,338.00.

By separate Order, Goodyear's motion for judgment as a matter of law will be granted on the backpay award only. Its motion for a new trial will be granted solely on the damages issue, unless within fifteen days of the date of this Order, Plaintiff files a declaration of her intent to accept a remittitur of the jury's award to $360,000.00.

Done this 23rd day of September, 2003.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	**}**	
Plaintiff,	**}**	
	}	
vs.	**}**	Civil Action Number
	}	**99-C-3137-E**
GOODYEAR TIRE AND	**}**	
RUBBER COMPANY,	**}**	
INC.	**}**	
Defendant.	**}**	

MEMORANDUM OPINION ON OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff has objected to the Magistrate Judge's Report and Recommendation ("R&R") that summary judgment be granted on her claims of disparate pay, transfer to Technical Engineer, and retaliatory refusal to hire. Based on a review of the R&R, the Court concludes that the objections are meritorious.

First, Plaintiff claims that the R&R erroneously made credibility determinations adverse to her in reaching the conclusion that there are no disputed facts on the disparate pay claim. Defendant's articulated reason for the pay disparity is "her length of service and her relative performance." But several white male employees had significantly shorter lengths of service with Defendant than Plaintiff. On her relative performance, Plaintiff's supervisor,

Mike Tucker, complimented Plaintiff and selected her for "Top Performance" and "Individual Performance" Awards—both of which are given to competent and above average performers. Theses awards resulted in an 8% wage increase for Plaintiff. Tucker recognized that "her [Plaintiff's] rate was less than what we were paying everybody else for doing what they were doing." (Tucker Depo. p. 101). After this lawsuit was filed, Tucker says that he lied and that the real reason for the increase was to bring Plaintiff's salary up to the minimum. The Magistrate Judge apparently credited Tucker's most recent contradictory statements. This was plain error. On a motion for summary judgment, the version of Tucker's explanation most favorable to Plaintiff should have been credited. When it is credited, a genuine issue concerning motive is apparent on the disparate pay claim. Summary Judgment is inappropriate on this claim.

Second, Plaintiff complains that the Magistrate Judge erroneously found that her transfer from the Area Manager position to that Technical Engineer was not an adverse action, based on the consideration that Plaintiff requested the transfer after having been "strongly advised" by her supervisor in light of upcoming layoffs. The Court has considered the difference in the two positions. The Area Manager position is a managerial position which requires less manual labor, and the Technical Engineer is much lower than that of an Area Manager. The Court therefore concludes that a reasonable factfinder may well determine that the differences between the two jobs are objectively serious and tangible enough to alter the terms and conditions of employment, i.e., to constitute an adverse employment action. Further, that evidence shows that Jimmy Todd, Plaintiff's male co-worker with less seniority than Plaintiff, was retained as an Area Manager, was allowed to transfer to Akron, Ohio and remain in management. In sum, the undisputed facts and reasonable inferences arising therefrom do no entitle Defendant to summary judgment on the transfer claim.

Finally, Plaintiff complains that the Magistrate Judge erred when he found no casual link between the failure to rehire Plaintiff and her filing of a charge of discrimination. However, when Don Gardner became Defendant's Employment Manage in May 1998, he learned of Plaintiff's Equal Employment Opportunity Commission charge. Thereafter, he rehired retired male Area Managers, but he denied Plaintiff's request for rehire. This is sufficient to establish a *prima facie* case of retaliation. Summary judgment is likewise inappropriate on this claim.

For the reason stated, Plaintiff's objections to the Magistrate Judge's R&R on disparate pay, transfer to Technical Engineer, and retaliatory refusal to rehire are herby SUSTAINED.

In all other respects, the Court hereby ADOPTS and APPROVES the Magistrate Judge's Report and Recommendation.

Done this 30th day of July, 2002.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

LILLY M. LEDBETTER,	**}**	
Plaintiff,	**}**	
	}	
v.	**}**	**CASE NO.**
	}	**CV 99-JEO-3137-E**
GOODYEAR TIRE AND	**}**	
RUBBER COMPANY,	**}**	
INC.	**}**	
Defendant.	**}**	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the court is the defendant's Motion for Summary Judgment. (Doc. 15).[1] For the reasons set forth below, the court finds that the Motion for Summary Judgment is due to be granted in part and denied in part.

I. FACTUAL BACKGROUND[2]

Plaintiff Lilly M. Ledbetter (the "plaintiff" or "Ledbetter") began working for defendant Goodyear Tire and

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[1] References to "Doc. __" are to the documents as numbered by the clerk of court in the court's record of the case.

[2] The facts set out below are gleaned from the parties' submissions and are viewed in a light most favorable to the plaintiff. They are the "'facts' for summary judgment purposes only. They may not be the actual facts. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994)." *Underwood v. Life Insurance Co. of Georgia*, 14 F. Supp. 2d 1266, 1267 n.1 (N.D. Ala. 1998).

Rubber Co., Inc. (the "defendant" or "Goodyear") at its Gadsden, Alabama tire manufacturing facility on February 5, 1979, as a supervisor trainee. (Pl. Depo. at 25–26, 29).[3] In October 1979, the defendant assigned the plaintiff to a Supervisor position in the Stock Prep Division of the Radial Plant, where she remained until approximately 1981. (*Id*. at 32, 35–36, 38). After that, the plaintiff transferred to a Supervisor position in the Final Finish division of the Radial Plant and worked there until May 15, 1986, when she was laid off based on seniority due to production cutbacks. (*Id*. at 38–40). She then worked at Tyson Foods as a Plant Superintendent for 15 months until the defendant called her back. (*Id*. at 40–41). After her recall, the plaintiff worked as a Supervisor in the control room of what would become known as the defendant's Banbury business center, which manufactures tubes for the tires. (*Id*. at 43, 46). In 1985, the defendant changed the title of Supervisor to "Area Manager" and increased the responsibilities of the position. (Pl. Depo. at 37). At that time, the defendant also created four Business Centers within the Radial Tire Division, including (1) Rubber Mixing, also known as Banbury, (2) Component Preparation, (3) Tire Assembly and (4) Curing/Final Finish.[4] (Doc. 17 at 2).[5]

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[3] The plaintiff's deposition is located in the record at Doc 16, Tab 1.

[4] With respect to its organization, the defendant states as follows:

> Each Business Center is an independent unit with unique functions and separate equipment. The Rubber Mixing Business Center operates the Banbury machines which make the rubber compound, the basic raw ingredients in tires. The Component Preparation Business Center processes the other ingredients for tires. The Tire Assembly Business Center builds the tires. The Curing/Final Finish Business Center cures and inspects the tires, and otherwise prepares them for shipment to the customer.

At the relevant times, each Business Center was managed by a Business Center Manager, who would make raise recommendations for the Area Managers in his Business Center by ranking them according to their "performance appraisals." (Breon Depo. at 29–31).[6] The raises were governed by a merit compensation plan. (*See* Breon Depo. at 21, Ex. 1; Tucker Depo. at Ex. 1).[7] Each Business Center manager was allocated a certain amount of money to be divided between Area Managers, whose annual raises were consequently limited to that amount, as divided by the Business Center Manager. (Breon Depo. at 29–31; Jones Depo. at 216).[8] The raises of Area Managers in one Business Center were thus considered separately from those of Area Managers in other Business Centers.

According to existing records, the plaintiff was consistently ranked at or near the bottom of Area Managers in her Business Center. In 1992, she was ranked in the mid-group of Area Managers. (Tucker Depo at Ex. 4). In 1993, she was ranked sixth out of six Area Managers. (*Id*. at Ex. 5). There are no existing records of a 1994 ranking, but in 1995, the plaintiff was ranked twenty-third out of 24 Area Managers. (Heath Depo. at Ex. 5).[9] She did receive a "Pop Performance Award" and an "Individual Performance Award" in December 1995. (Doc. 21 at Ex. 9).

As a result of declining production at the Gadsden plant from 1995 to 1997, the defendant laid off workers there.

(Doc. 17 at 2).

[5] Document 17 consists of the defendant's memorandum in support of its motion for summary judgment.

[6] Shawn Breon's deposition is located at Doc. 16, Tab 6.

[7] Mike Tucker's deposition is located at Doc. 16, Tab 5.

[8] Jerry Jones's deposition is located at Doc. 16, Tab. 2.

[9] Don Heath's deposition is located at Doc. 16, Tab. 4.

(Jones Depo. at 75–76; Gardner Depo. at 28).[10] In January, 1997, Business Center Manager Jerry Jones told the plaintiff and another Area Manager, Jimmy Todd, that they would be laid off. (Pl. Depo. at 110, 113, 117–18; Jones Depo. at 62). Jones was told that both employees were to be laid off, so that there was no need to do their evaluations. (Jones Depo. at 72–74). Both continued to work, however, due to subsequent extended absences of other Area Managers. (Jones Depo. at 62). On July 21, 1997, Jones informed the plaintiff that her performance was unacceptable and that she must "do something different." (Pl. Depo. at 91; Jones Depo. at Ex. 1 p. D-00917). He mentioned that she had been slated for lay-off because of her performance. (*Id*.).

At Jones's suggestion, the plaintiff interviewed for the position of Technology Engineer, was selected and transferred on January 5, 1998.[11] (Pl. Depo. at 104–05; Complaint at ¶¶ 6, 19). From January 6, 1998 to January 25, 1998, the plaintiff took part in an informal training program, receiving approximately 120 hours in training. (*See* Doc. 21 at Tab. 9). After discussing her training with Technical Team Leader Ross Hotz, the plaintiff was assigned to her own shift on January 26, 1998. (*Id*.).

On February 19, 1998, the defendant had to scrap approximately 200 tires because the plaintiff and two male employees each failed to perform a specific function of their job. (Heath Depo. at 203, Ex. 8). In the plaintiff's case, she had failed to check the set-up on a curing press, and the tires were cured with the sidewall installed upside down. (Heath Depo. at 199, Ex. 8). Each of the three employees responsible were suspended for three days. (Pl. Depo. at 234).

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[10] Don Gardner's deposition is located at Doc. 16, Tab. 3.

[11] Jones alleges that he made this suggestion because the plaintiff was still slated to be laid off as Area Manager. (Jones Depo. at 248–49).

In the fall of 1998, the defendant offered a voluntary layoff program. (Pl. Depo. at 399–401). The plaintiff applied for voluntary layoff under this program, and the defendant accepted her application, with her retirement effective on November 1, 1998. (Plaintiff Depo. 411–13; Gardner Depo at Ex. 1). At the time of her layoff, the plaintiff accepted a lump-sum payoff and retired. (Gardner Depo. at 60, 65).

On March 25, 1998, the plaintiff filed responses to a charge questionnaire with the Equal Employment Opportunity Commission ("EEOC") (Pl. Depo. at Ex. 23). In those responses, she made allegations of employment discrimination against the defendant. (*Id*.). On July 21, 1998, the plaintiff filed a Charge of Discrimination against the defendant, alleging that the defendant committed illegal employment discrimination on the basis of sex and age in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"). (*Id*. at Ex. 24). The plaintiff then filed a Supplemental Charge of Discrimination in which she alleged that the defendant had retaliated against her for filing her previous Charge of Discrimination. (*Id*. at Ex. 25).

The plaintiff filed this action on November 24, 1999, alleging violations of Title VII, the ADEA, and the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d) and 215(a)(3). (Doc. 1).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party asking for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the

burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970).

The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322–23; *See* FED. R. CIV. P. 56(a) and (b). Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial,'" *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial; however, the movant may not merely rest on the pleadings. *Id*.

After a motion has been responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322.

The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. A judge's guide is the same

standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259; *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 643 (11th Cir. 1997). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matusushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Allen*, 121 F.3d at 643.

III. DISCUSSION

A. Title VII and ADEA Claims

1. Claims Allegedly Barred by the Failure to file a Timely EEOC Charge

The defendant claims that the plaintiff did not timely file a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") encompassing her claims that, during her term as Area Manager, she suffered sex and age discrimination when she (1) received lower pay than other Area Managers (Complaint at ¶¶ 14, 33), and (2) received a review for 1997 that inaccurately characterized her performance as poor (Complaint at ¶ 16).[12] *See Chanda v Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000) (the filing of an administrative complaint with the EEOC within 180 days of the challenged employment action is a jurisdictional prerequisite to a Title VII or ADEA action). The defendant argues that it is therefore due summary judgment on those claims.

The plaintiff argues that she met this jurisdictional prerequisite by filing a charge questionnaire with the EEOC within 180 days of the challenged employment action, followed by the filing of a Charge of Discrimination and, later, a Supplemental Charge with the EEOC. The last two of these filings should, she alleges, be treated as supplements to the claims set forth in her responses to the Charge Questionnaire and should therefore be treated as relating back to the filing thereof.

The defendant does not dispute that the charge questionnaire can be treated as a Charge of Discrimination, and the court will treat it as such for the purposes of this

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[12] The plaintiff has voluntarily relinquished her claims that she received less overtime than other Area Managers (Complaint at ¶ 15) and that she was not invited to certain business meetings (Complaint at ¶¶ 17–18). (Doc. 22 at 29, n.19).

analysis.[13] Rather, the defendant asserts that none of the allegations in this case regarding the terms and conditions of the plaintiff's employment as an Area Manager are included only in the charge questionnaire, and that the pay allegations are untimely because they were included in the Charge of Discrimination, which was filed after the 180-day limit. (Doc. 26, citing Pl. Depo. at Ex. 23, p.1).

The charge questionnaire included the question, "[w]hat action was taken against you that you believe to be discriminatory? What harm, if any, was caused to you or others in your work situation as a result of that action?" In response, the plaintiff wrote as follows:

> Transferred to Tech. Eng. (Quality) from Production Area Manager. 2nd week on job missed wrong spec. provided for code change which resulted in some scrap. Goodyear made decision to lay-off myself, Area Manager W. Scott and Union Set-up J. Smith. There were 133 tire holds—resulting in scrap in 1997—no lay-offs. W. Scott is a black man [and] I am a white female they are making an example of. Examples—3/5/97—R. Artledge turned power off result—300+ scrap and could have killed someone.

(Doc. 16 at Ex. 23).

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[13] The court assumes that the plaintiff's responses to the charge questionnaire meet the requirements of a charge, since the defendant essentially concedes this point. The court notes that the Eleventh Circuit recently found that determining whether the intake questionnaire can function as a charge requires the court to answer the following question: "Would the circumstances of this case convince a reasonable person that [the plaintiff] manifested her intent to activate the machinery of Title VII by lodging her intake questionnaire with the EEOC?" *Wilkinson v. Grinnell Corp*., 270 F.3d 1314 (11th Cir. 2001).

The other question in the charge questionnaire was "[w]hy do you think this action was taken against you?" In response, the plaintiff wrote as follows:

> Goodyear Representative told me last Oct. (1997) that they did not want me and that I was not getting job done. I ask for production record comparison of my crew vs my peers but they could not provide them. Later they advised me I needed to transfer to Tech. Dept. [and] sent me for interview. They trained me—if putting me with an individual that was told in his evaluation if they could lay someone off it would be him. The procedure on checking specs wasn't covered in training. The action of being only one (and W. Scott) being laid off which all the "Good Ole White Boys" [h]ave not been laid off. I ask to treat me the same as the others involved in the tire holds.

(Doc. 16 at Ex. 23).

In her subsequent Charge of Discrimination, the plaintiff alleges as follows:

> On July 20, 1998, I was suspended from my position as technical engineer for three days due to an error that was placed in the computer by an area manager, and was passed on to me to act upon it. I was transferred involuntarily from an area manager's position on January 5, 1998, to the position as technical engineer. At the time that I was transferred, I learned that the male area managers were earning a higher salary than me. I am also being paid less wages than similarly situated technical engineers who are males. On a continuous basis, I have been subjected to adverse terms and conditions of employment, in that since my transfer, my male co-workers have made comments to me that I

> am a trouble maker and they have to watch out for me. Younger male employees who have made errors and cost the company economically, have not been suspended as I presently have been. I was given four weeks training by three male employees, only on the job duties that they performed during their shifts. I was not given a job description nor a traning manual for the technical engineer position. The on-the-job training that I received was far short of being comprehensive.
>
> I was informed by Ross Hotz, TTL Final Finish, that I had made a terrible error and that I had to be laid off for three days. I inquired why, when others have made errors and nothing happened to them. Mr. Hotz stated that they have not been consistent in the way they discipline, but that he was trying to start making it consistent.

(Doc. 16 at Ex. 24).

Regulatory law allows a timely-filed charge to be amended for technical defects at a later date while retaining the original filing date. "Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b). For the purposes of this analysis, the court will assume that the Charge of Discrimination meets this requirement and that it therefore relates back to the date the plaintiff filed responses to the charge questionnaire.

The plaintiff's "judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination [and the responses to the charge questionnaire]." *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 589 n. 8 (11th Cir.), *cert. denied*, 513 U.S. 919, 115 S. Ct. 298, 130 L. Ed. 2d 212 (1994). Judicial claims

which serve to amplify, clarify, or more clearly focus earlier EEO complaints are appropriate. Allegations of new acts of discrimination, offered as the essential basis for the requested judicial review are not appropriate. *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543, 128 L. Ed. 2d 195 (1994) (citation omitted).

After reviewing the allegations contained in the plaintiff's responses to the charge questionnaire and in the Charge of Discrimination, the court concludes that the review and pay claims are within the scope of an EEOC investigation which can reasonably be expected to grow out of the charges and the questionnaire responses.[14] The court therefore declines to find that those claims are due to be barred.

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[14] The pay claims are stated with reasonable clarity in the Charge of Discrimination, and would therefore be within the scope of an EEOC investigation thereof. The review claims are not stated as clearly in the questionnaire responses. With respect to the claim that a review for 1997 inaccurately characterized her performance, the court notes that the plaintiff mentions in her questionnaire responses that, in October 1997, an unnamed representative of the defendant told her that " they did not want [her] and that [she] was not getting job done." (Doc. 16 at Ex. 23). She also alleges that she asked for, but did not receive, production records in order to compare the work of her crew to those of her peers. According to the complaint, "[i]n January of 1998, the plaintiff received a discriminatory evaluation in which she received a low score while men performing the same job in the same manner as she received a higher evaluation score." (Complaint at ¶16).

Given these allegations, the plaintiff's claims regarding an allegedly inaccurate formal evaluation score in January, 1998, appear to be within the scope of the investigation that would reasonably be expected to grow out of the charge/questionnaire responses. The responses point to an unidentified "representative" making statements about her productivity and her desirability as an employee, without offering records to support such a contention. Further inquiry into the defendant's evaluation of the plaintiff's

2. Title VII and ADEA Analysis

The appropriate framework from which to evaluate the plaintiff's claim of disparate treatment under Title VII is specified in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25, 36 L. Ed. 2d 668 (1973), as the claim is based upon circumstantial evidence. *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1310–11 (11th Cir.), *superseded in part on other grounds*, 151 F.3d 1321 (11th Cir. 1998). The plaintiff has the initial "burden of establishing a prima facie case of [gender] discrimination." *McDonnell Douglas*, 411 U.S. at 802.

In *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999), the Eleventh Circuit Court of Appeals stated:

> To establish a prima facie case of disparate treatment, Appellant must show: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.

Maniccia, 171 F.3d at 1368. The same framework, modified slightly, applies to the plaintiff's ADEA claims. *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 141–42, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (recognizing widespread application of *McDonnell Douglas* framework to ADEA claims).

If a prima facie case is shown, the defendant must "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." *McDonnell Douglas*, 411 U.S.

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performance would be reasonably expected to grow out of these allegations.

The defendant argues that the charge questionnaire responses show that the plaintiff's claims are limited to those related to her transfer and suspension. The court finds the defendant's reading of the charge questionnaire responses to be unduly narrow.

at 802, 93 S. Ct. at 1824. If this is done, the plaintiff is required to show that the proffered reason was merely a pretext for the defendant's acts. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id*.

a. Transfer to Position of Technology Engineer

The plaintiff claims that the defendant committed illegal gender and age discrimination by transferring her from the position of Area Manager to the position of Technology Engineer. Yet, the plaintiff claims that she interviewed for and accepted the offer of the Technology Engineer job after her superior, Business Center Manager Jerry Jones, strongly suggested that she do so. It appears that her complaint is not actually about the transfer, which was done at her own instigation, but rather about the fact that Jones strongly suggested that she seek the transfer. It is highly doubtful that the suggestion of a superior for an employee to apply for a transfer could be characterized as an adverse employment action. *See Gupta v. Florida Board of Regents*, 212 F.3d 571, 587 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L. Ed.2d 671 (2001) (conduct falling short of an ultimate employment decision is not an adverse employment action unless it is objectively serious and tangible enough to alter the terms and conditions of employment).

Even if Jones's suggestion or the transfer itself could be characterized as an adverse employment action, it is not clear that the defendant treated similarly situated younger men more favorably. The court notes that, when Jerry Jones and Pete Buchanan told the plaintiff that she was slated to be laid-off, she made a point of telling them that she needed to work for a while longer before she retired. (Pl. Depo. at 115–16). Jerry Jones noted the plaintiff's impending lay-off before he

discussed the Technology Engineer opening with her. (Jones Depo. at 248–49). There is no evidence that the defendant suggested to any younger male Area Manager slated for lay-off apply that he should apply for a more favorable position than the Technology Engineer job. There is no evidence that the defendant transferred such a younger male employee who was facing a lay off to a better position.

The court finds that the plaintiff has failed to prove a prima facie case as to this claim. The defendant's motion for summary judgment is therefore due to be granted with respect to it.

b. Training for the Position of Technology Engineer

The plaintiff complains that the defendant committed illegal employment discrimination by inadequately training her for the position of Technology Engineer. She complains that she received no training and that "there was no job procedure manual or written job description available" to her. (Complaint at ¶ 27). As the defendant points out, however, the plaintiff does not demonstrate that younger males were trained any differently for the position of Technology Engineer than was she.

The plaintiff alleges that she received "informal training," which consisted of her following three other Technology Engineers around and observing them. (Doc. 22 at 43). She claims that, after her October 1, 1998 retirement date, the defendant asked her to train her younger male replacement, and that she did so for a month. (Doc. 22 at 43; Doc 21 at Tab 39, ¶¶ 8, 10). She does not, however, specify anything about her replacement's training that was substantially different from her own training. In fact, she testified at her deposition that "[the defendant] went ahead and put down my vacation in October because I never really worked a day. I had—I don't think I ever worked a day in October. It was just vacation pay." (Pl. Depo. at 409–10). From this testimony, it appears that, if the plaintiff was indeed

supposed to train her replacement during the month following her retirement, then she failed to do so.[15]

Since the plaintiff has not demonstrated that the defendant treated similarly situated younger males more favorably than it treated her with respect to training for the Technical Engineer position, she cannot establish a prima facie case. The defendant's motion for summary judgment is therefore due to be granted as to this claim.

c. Plaintiff's Suspension

The plaintiff claims that the defendant committed illegal employment discrimination when it gave her a three-day suspension. (Complaint at ¶¶ 28, 34). She claims that similarly situated employees outside the protected class were not suspended.

In 1998, the plaintiff and two male employees (William Scott and Jimmie Smith) were suspended because they were responsible for a "tire hold"—a manufacturing error that caused approximately 200 tires to be scrapped. The ruined tires were cured with the sidewall installed upside down because the plaintiff allegedly failed to check the set-up of the curing presses. (Heath Depo. at 199, Ex. 8). The plaintiff argues that many male employees who were responsible for tire holds were never disciplined. (Doc. 22 at 23–24, 44).[16]

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[15] However, in her affidavit, she states that she trained her replacement after her retirement date. (Doc. 21, Ex. 40, ¶ 10).

[16] The plaintiff also argues that the defendant wrongly attributed this production error to her. (*Id*. at 23). The court finds this argument unpersuasive and untimely. The plaintiff states that Area Manager Steve Thompson was "likely responsible" for the tire hold because the hold occurred after Thompson took over the plaintiff's position in Tire Assembly, at the machine where the error allegedly occurred. (Doc. 22 at 23). There is no evidence that the plaintiff complained about the attribution of this error at the time it was attributed to her or when she was disciplined for it. Her first complaint about it seems to have been in the briefing of this motion.

For the purposes of this analysis, the court will assume that the plaintiff has met the burden of establishing a prima facie case. The defendant does not argue otherwise, but asserts instead that the plaintiff cannot show that the legitimate, non-discriminatory reason offered by the defendant is pretextual.

In discussing the burden that must be met by the plaintiff to show pretext, the Eleventh Circuit stated as follows:

> When deciding a motion by the defendant for judgment as a matter of law in a discrimination case in which the defendant has proffered nondiscriminatory reasons for its actions, the district court's task is a highly focused one. The district court must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered "legitimate reasons were not what actually motivated its conduct," *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 605 (11th Cir. 1994) (citation omitted). The district court must evaluate whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Sheridan*, 100 F.3d [1061,] 1072 [*cert denied*, 521 U.S. 1129, 117 S.Ct. 2532, 138 L. Ed. 2d 1031 (1997),] (citation and internal quotation marks omitted); *see also Walker*, 53 F.3d [1548,] 1564 [(1995)] (Johnson, J., concurring) (discussing methods of proving pretext). However, once the district court determines that a reasonable jury could conclude

> that the employer's proffered reasons were not the real reason for its decision, the court may not preempt the jury's role of determining whether to draw an inference of intentional discrimination from the plaintiff's prima facie case taken together with rejection of the employer's explanations for its action. At that point, judgment as a matter of law is unavailable.

Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998).

The defendant asserts that the plaintiff was suspended because she was responsible for the tire hold. As evidence that this reason is pretextual, the plaintiff argues that male employees had been responsible for tire holds in the past, but were not disciplined. (Doc. 22 at 44). She states as follows:

> For example, Norris Warren was responsible for a large tire hold on an earlier date but was not laid off. (Ledbetter Depo., at 343–344). In 1997, Area Manager Steve Thompson approved two rolls of the wrong sidewall for a batch of tires resulting in a tire hold, but Thompson was not disciplined. (Ledbetter Depo., at 345). Area Manager Jeff Cheatwood changed the tags on stock resulting in a tire hold and was not laid off. (Ledbetter Depo., at 346).

(Doc. 22 at 44).

The defendant argues that the Production Manager, Don Heath, was involved in the decision to suspend the plaintiff, and that any disciplinary actions taken before his tenure as Production Manager began are irrelevant. The Eleventh Circuit has stated as follows:

> [D]ifferences in treatment by different supervisors or decision makers can seldom be the basis for a viable claim of discrimination.

> *See Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989) ("Courts have held that disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis."); *Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1271 (6th Cir. 1986) ("Although a change in managers is not a defense to claims of race or sex discrimination, it can suggest a basis other than race or sex for the difference in treatment received by two employees."); *Bessemer*, 137 F.3d at 1312 n. 7 ("Different supervisors may have different management styles that—while not determinative—could account for the disparate disciplinary treatment that employees experience."); *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 605–06 (8th Cir.1983) (fact that one manager may be more lenient than another may explain the different treatment that employees receive on a non-racial basis).

Silvera v. Orange County School Bd., 244 F.3d 1253, 1261 n.5 (11th Cir. 2001).

The evidence does not clearly reflect Heath's role in the decision-making process with respect to the plaintiff's suspension. Former Plant Manager Richard O'Dell testified that "discipline issues normally start with the department head," and that "normally [discipline] is at the division level." (O'Dell Depo. at 51). There is not sufficient evidence to permit the court to disregard disciplinary incidents that occurred outside of Heath's tenure as Production Manager.

The defendant further argues that, in order to prevail on this claim, the plaintiff must show that "Goodyear honestly believed that another employee was at fault for an occurrence similar to the plaintiff's, yet failed to discipline the employee." (Reply Memorandum in Support of Motion for Summary Judgment at 5). The defendant argues that the

plaintiff has presented no evidence that "Goodyear believed that any employee was at fault for a production error who was not suspended." *Id*.

In reviewing the passages the plaintiff cites from her deposition, it appears that she offers sufficient evidence of pretext to avoid summary judgment as to this claim. In other words, she has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F. 3d at 1538. She cites several incidents in which men who were responsible for mistakes leading to tire holds were treated more favorably than she was treated in sufficiently similar circumstances. Although the defendant attempts to distinguish responsibility for "tire holds" with responsibility for "production errors," the court is not convinced that such a distinction prevents that plaintiff from showing that there is a genuine issue of material fact as to whether the legitimate, non-discriminatory reason offered by the defendant is pretextual. The defendant's motion for summary judgment is therefore due to be denied as to this claim.

d. Disparate Pay Claim

The plaintiff claims that the defendant committed illegal gender and age discrimination by paying her less than those outside the protected class who did similar work. Specifically, she complains that she was paid lower wages than were other Area Managers. (Doc. 22 at 39-41).

The defendant does not dispute that the plaintiff has established a prima facie case with respect to her Title VII pay claims, but it offers, rather, a legitimate, non-discriminatory reason for the pay disparity between the plaintiff and those outside the class. The defendant argues that the plaintiff was paid less than other Area Mangers because of "her length of service and her relative performance." (Doc. 26

at 9). The plaintiff contends that the proffered legitimate, nondiscriminatory explanation is a pretext for discrimination.

In attempting to meet the *Combs* standard set forth hereinabove, the plaintiff states that the proffered reason is unworthy of credence for the following reasons:

> First, Ledbetter's performance was good in 1992 when she was awarded a transfer to the Radial Light Truck department. Mike Tucker was her supervisor that year and testified that her performance improved from 1992 to 1996 while he was her business center manager. She received a Top Performance award in 1995 and was not evaluated or ranked in 1996. Ledbetter never received a low evaluation until after she complained of discrimination in July of 1997 to [Business Center Manager] Jerry Jones, who was responsible for the information provided in her performance evaluation. Moreover, Production Auditor Mike Maudsley, who had a bias against Ledbetter, performed her audits for the first time in 1996 and 1997.

(Doc. 22 at 41).[17]

The defendant replies that "Tucker considered the plaintiff's performance to be relatively low" and that "Tucker gave her a low review in 1995 and ranked her 23 out of 24

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[17] Of Maudsley, the plaintiff states as follows:

> Mike Maudsley became Ledbetter's auditor in 1996. Maudsley had a history of quid pro quo sexual offers to Ledbetter when he was her supervisor in the early 1980's. He also had propositioned her in 1996 and she denied him. Moreover, Ledbetter asked Maudsley why he treated her differently, and he responded that she could not cuss him as hard as the men do and that it is easier to write her up than the men. (Ledbetter Depo., at 315–16).

(Doc. 22 at 41, n. 21).

Area Managers based on her performance in 1995." (Doc 26 at 9, citing Heath Depo. at Ex. 5). The defendant also points out that the plaintiff was slated to be laid off in 1996 because of her low performance. (*Id*. at 62–64). The defendant argues that "[b]ecause the Plaintiff cannot show that the defendant did not honestly believe her performance was relatively low, any viable disparate pay claim should be dismissed as a matter of law." (*Id*. at 10).

Under the *Combs* standard, it appears that the evidence presented by the plaintiff has not "cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Cooper-Houston*, 37 F.3d at 605. Goodyear presented evidence that the plaintiff's performance was ranked at or near the bottom of Area Managers in her Business Center in 1992, 1993 and 1995.[18] (Pl. Depo. at Ex. 13; Tucker Depo. at Ex. 5; Heath Depo. at Ex. 5). Goodyear also presented testimony that the plaintiff was low in seniority in comparison with other Area Managers. (Jones Depo. at 46–47).[19] Although the plaintiff offered evidence that she received a transfer to a desirable position because of her good performance in 1992, this does not cast sufficient doubt on Goodyear's proffered reasons for the plaintiff's lower pay so as to permit her to meet the *Combs* standard. (Pl. Depo. at 55–56, Ex. 1).

The plaintiff relies heavily on evidence that her supervisor was complimentary of her performance and gave her a "Top Performance Award" and an "Individual

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[18] Although the plaintiff complains that her 1996 and 1997 audits were performed by Maudsley, who she claims was biased against her, she points to no evidence as to how these audits were deficient or inaccurate or how any problem with the audits might have impacted her pay.

[19] The Jones Depo. is located at Doc. 16, Ex. 2.

Performance Award" in 1995. (Doc. 21 at Ex. 9). The "Top Performance Awards" are merit-based salary increases given "for only the highest level of individual performance and contribution in an organization" and are "limited to not more than 30% of the number of salaried associates in an organization." (Doc. 21 at Ex. 11) (emphasis in original). But the defendant presented testimony that there is, in practice, some flexibility to use these awards to adjust the pay of boost the pay of employees whose salary is lower than the given range for their work, regardless of their performance. (Heath Depo. at 80–81). In fact, the plaintiff's supervisor testified that the awards given to the plaintiff in 1995 were given for that very reason—the plaintiff's pay was below the minimum of the appropriate range for her job, so her supervisor wanted to bring her pay within that range. (Tucker Depo. at 61–63).

The plaintiff's supervisor testified that he told the plaintiff that she received these awards for her good performance, although this was not true. (Tucker Depo. at 177–78). Instead, it was sued to bring her salary up to the minimum. (*Id*.). He also testified that he complimented the plaintiff on her performance even though he had significant problems with how she performed. (Tucker Depo. at 63–65). The plaintiff's low performance rankings confirm the supervisor's testimony that the plaintiff's awards were not given for merit and that he misrepresented his opinion of her performance when he discussed it with her. The court also notes that other testimony indicates that the plaintiff had performance problems. (Jones Depo. at 142–43, 157–59).

It thus appears that the evidence offered by the plaintiff has not "cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (citing *Cooper-Houston*, 37 F.3d at 605). Summary judgment is therefore due to be granted with respect to the plaintiff's disparate pay claim.

e. Constructive Discharge

"The threshold for establishing constructive discharge in violation of [Title VII] is quite high." *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001), *cert. denied*, 2002 WL 232923 (Feb. 19, 2002). "To successfully claim constructive discharge, a plaintiff must demonstrate that working conditions were so intolerable that a reasonable person in [her] position would have been compelled to resign." *Id*. (quoting *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) (quoting *Thomas v. Dillard Department Stores, Inc.*, 116 F.3d 1432, 1433–34 (11th Cir. 1997))) (internal quotations omitted); *see also Graham v. State Farm Mutual Insurance Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (citing *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)); *Wardwell v. School Board of Palm Beach County*, 786 F.2d 1554, 1557 (11th Cir. 1986). "Before finding a constructive discharge, this court traditionally require[s] a high degree of deterioration in an employee's working conditions, approaching the level of 'intolerable.'" *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991) (citing *Wardwell*, 786 F.2d at 1558 (holding that an employer's failure to promote and consequent embarrassment to employee, together with employee's added workload, "simply do not rise to the intolerable level at which a reasonable person would feel compelled to resign")). Because the court must employ an objective, reasonable person standard, the plaintiff's subjective feelings are not determinative. *Graham*, 193 F.3d at 1284 (citing *Doe v. Dekalb County School Dist.*, 145 F.3d 1441, 1450 (11th Cir. 1998)). The Eleventh Circuit has further held that "[p]art of an employee's obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast." *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987) (italics in original).

The plaintiff states that the defendant put her in a position where she needed to maneuver heavy tires from one

truck to another without assistance. She states that this was an unbearable physical difficulty that led her to take early retirement as a way out of the hardship imposed on her. (Doc. 22 at 19–21, 48). The record reflects that the plaintiff voluntarily applied for the Technology Engineer position, although it is true that she received a strong recommendation to apply for it, as an alternative to being laid off.[20] She chose to take advantage of that recommended alternative. The evidence also reflects, and the plaintiff readily acknowledges, that she was able to perform the job, although it may have been unpleasant and strenuous for her to do so. In fact, she was able to perform the job for the better part of 1998. The evidence does not support the plaintiff's constructive discharge claim. The defendant's motion for summary judgment is thus due to be granted with respect to this claim.

f. Equal Pay Act

The Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), prohibits all gender-based wage discrimination in employment. To establish a *prima facie* case under the EPA, the plaintiff must demonstrate that the defendant paid a different wage to a male comparator than it did to her for equal work on a job, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. *Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013, 1018 (11th Cir. 1994) (citing *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to demonstrate that the differential was justified under one of the four affirmative defenses found in 29 U.S.C. § 206(d)(1), including, in pertinent part, that the pay differential was "based on any factor other than sex." *Mulhall*, 19 F.3d at 590. The burden is a "heavy one,"

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[20] As is set forth above, the plaintiff was scheduled to be laid off.

Mulhall, 19 F.3d at 590, because the "defendant[] must show that the factor of sex provided no basis for the wage differential." *Id*. If the defendant meets its burden, the plaintiff must then rebut the explanation for the differential by showing with affirmative evidence that it is pretextual or offered as a post-event justification. *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995).

Initially, the defendant argues that the plaintiff's EPA claim is barred by the applicable statute of limitations. Under 29 U.S.C. § 255(a), it argues, the statute of limitations for such claims is two years, or three years for a willful violation. As this suit was filed on November 24, 1999, the defendant argues that it is "unqualifiedly entitled to judgment as a matter of law as to all claims regarding matters which occurred prior to November 24, 1996." (Doc. 17 at 14). Accordingly, the defendant has declined to address matters arising before that date. (*Id*.). The plaintiff does not challenge this argument. The court will therefore decline to address claims regarding matters which occurred prior to November 24, 1996. (Doc. 22 at 48–59)

1. EPA Claims as to the Area Manager Position

The defendant argues that, for the purposes of the EPA, the plaintiff has no comparators among the Area Managers, except for those who worked in the Business Center where she worked. It argues that the Area Managers who worked in different Business Centers did not hold jobs requiring equal skill, effort and responsibility, which were performed under similar working conditions, so as to satisfy the requirements of 29 U.S.C. § 206(d). The defendant also points out that the Eleventh Circuit has held that "[t]he standard for determining whether jobs are equal in terms of skill, effort and responsibility is high," and that "the jobs involved must be

substantially identical or equal." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989).[21]

The plaintiff argues that all the Area Managers at the plant should be considered her comparators for EPA purposes. She states as follows:

> The job description is the same for all Area Managers at the Gadsden Goodyear plant. The purpose of an Area Manager is to "plan, organize and direct all activities for all production and maintenance functions within a specific area of the plant consistent with total quality manufacturing environment." (Ex. 42, Area Manager Position Description). The job description does not differentiate between the duties or major responsibilities of Area Managers. Each Area Manager supervises from 25 to 50 union employees. (Ex. 42). The plaintiff worked in Tire Assembly along with over twenty other Area Managers.

(Doc. 22 at 50).

Each of the defendant's Business Centers had a particular purpose, and made different products. That necessarily means that the duties of workers and Area Managers in one Business Center varied somewhat from workers and Area Managers in another Business Center. For instance, the plaintiff stated that she had to learn the exact procedure for building tires when she went to the Radial Light Truck division, because some of those she would be managing had never built tires before. (Pl. Depo. at 76–77). She also said that her lack of machine knowledge held her back in the RLT area. (*Id*. at 215) . It thus appears that some specialized skill was required for Area

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[21] Since *Waters*, the Eleventh Circuit has held that the jobs held by the employees of opposite sexes need not be identical; rather, they need only be substantially equal. *Miranda*, 975 F.2d at 1533.

Managers to supervise employees in the different business centers, even in the plaintiff's own experience. In addition, the employees in different business centers were ranked against each other, rather than against employees in all the business centers. (Doc. 16, Tab 4 at 178–80).

Given such evidence, the court is not satisfied that the plaintiff has established a prima facie case with respect to Area Managers outside the Business Center in which she worked. In other words, the court is not satisfied that the plaintiff has shown that the performance of her Area Manager job required "equal skill, effort, and responsibility" as Area Managers in other Business Centers or that their duties were performed under similar working conditions. *Meeks*, 15 F.3d at 1018. The court is satisfied that the plaintiff has established a prima facie case with respect to the EPA claims involving Area Managers in her own Business Center as comparators.

Since the plaintiff has presented evidence that she was paid a lower wage than all the other Area Managers, including her comparators, the Area Managers in her Business Center, she establishes a prima facie case under the EPA. The burden thus shifts to the defendant, which attempts to meet the heavy burden of demonstrating that the differential was "based on any factor other than sex," and that "the factor of sex provided no basis for the wage differential." *Mulhall*, 19 F.3d at 590.

The defendant argues that any income disparity between the plaintiff and her comparators is attributable to factors other than sex. First, the defendant points to evidence reflecting that the plaintiff had worked for the defendant for less time than her comparators, (Jones Depo. at 46–47), so she had fewer opportunities to be considered for pay increases than did her comparators. The court notes, however, that there is also evidence, discussed elsewhere herein, that the plaintiff's performance was weak in relation to that of her comparators, with whom she competed for scarce salary-increase funds. So, in a sense, longer employment would give

the plaintiff more opportunities to fall further behind her comparators in terms of income. At any rate, the court thus finds the length-of-service arguments to be of limited use in analyzing the challenged pay disparity.

The defendant also argues that the pay disparity is attributable to the plaintiff's performance, which the evidence reflects was weak, relative to that of her comparators, which effectively limited her salary growth. (Pl. Depo. at Ex. 13; Tucker Depo. at Ex. 5; Heath Depo. at Ex. 5).[22] As just stated, the evidence also reflects that merit increases were taken from a limited fund, so the plaintiff was competing with her comparators for scare increase amounts. (Heath Depo. at 65). It thus appears that the disparity between the plaintiff's pay and that of her comparators is based on factors other than sex.

The plaintiff argues that the defendant's asserted reasons for the pay differential—length of service and job performance—are pretexts for illegal discrimination in violation of the EPA. She asserts that the length of service is not really a factor in the pay disparity because her salary was less than that of the only comparator hired after she was hired. (Doc. 22 at 54). She also argues that, in 1998 and afterwards, several comparators who started at essentially the same salary as she did were paid significantly more than she was paid. (Doc. 22 at 54). In view of the evidence that the plaintiff's performance was weak relative to that of her comparators and that she had to compete among these comparators for scarce salary-increase funds, it is hardly surprising that comparators hired after she was hired or who started at the same salary

[22] The defendant states that the amount and frequency of its merit increases in salary are based upon such factors as (1) job performance, (2) where the employee stands within the salary range for the position, (3) the amount and timing of the employee's last merit or promotional increase and (4) the amount of available merit increase funds. (Tucker Depo., Ex. 1 at 13).

should end up with a higher salary than hers. Regardless, as is stated above, the court is not convinced that the length-of-service arguments are useful in this analysis.

The plaintiff next challenges the defendant's ranking system, arguing that it "indicates nothing about the plaintiff's job performance." (Doc. 22 at 55). In support of this argument, she again raises the "Top Performance Award" she received in December, 1995. As noted above, however, the plaintiff's supervisor testified that this award was given to the plaintiff not because of her performance, but to boost her salary into the appropriate range for her position. The plaintiff argues that Tucker admitted that he told her she had received a top performance award based upon her job performance and she points out that he indicated in his deposition that she improved the entire time he supervised her (until August 1996). (*Id*. at 57). The court notes, however, that Tucker admitted that he misrepresented to the plaintiff the reason for her top performance award, which admission is supported by the plaintiff's low performance ranking for that year. Tucker's statement about the plaintiff improving during his supervision of her is too vague to be of value in resolving the issues before the court.

The plaintiff next challenges her low rankings for the year 1995, saying that it had nothing to do with her performance—that she was at the bottom of the list because she was not up for a raise and therefore not ranked. (Doc. 22 at 56). The evidence is, however, that the plaintiff was evaluated and ranked for 1995, and that she was the second lowest performer in her group. (Tucker Depo. at 177; Heath Depo. at Ex. 5).[23]

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[23] It does appear, however, that the plaintiff was not evaluated in 1996 because of her impending lay-off, and that the appearance of her name near the bottom of her peer group list that year was attributable to that fact. (Jones Depo. at 188–91, 198, 218, Ex. 5).

The plaintiff next argues that the rankings were arbitrary, pointing to the 1996 ranking in which Area Managers Kell, Welch, Gunter and Hicks, who did not receive raises were ranked above other Area Managers who did receive raises. (Doc. 22 at 56, citing Doc. 21 at Ex. 18). The defendant answers that the Area Managers who did not receive raises were ineligible for a raise at the time of the ranking because they had recently received raises, but that they were ranked anyway, in keeping with the defendant's practices. (Doc 26 at 12). The ranking does reflect that these employees had recently received raises. (Doc. 21 at Ex. 18). The court is not convinced that the rankings were arbitrary on the basis asserted by the plaintiff.

The plaintiff argues that some male Area Managers received similar written comments on their 1997 evaluations to those that she received on hers, but received higher scores. (Doc. 22 at 57–58). She therefore argues that the scoring system used in the evaluations is a pretext for illegal discrimination. The court is disinclined to assign great significance to what appears to be isolated instances of similar review comments combined with differing scores.

The plaintiff next argues that, in February of 1998, her new supervisor, Kelly Owen, evaluated her unfairly. First, she argues that Owen erroneously noted that she did not attend weekly safety meetings in the Business Center. There is no evidence that Owen's purported error was deliberate, that he did not make similar errors with respect to the evaluations of male employees or that the error had a significant impact on the plaintiff's ranking or salary.

Second, she argues that Owen did not have enough time to evaluate her and simply relied on some notes left by her previous supervisor, Jerry Jones, which notes she argues Jones made in retaliation against her for complaining of illegal discrimination. This allegation is addressed and

factually refuted in section f.2 below.[24] On the basis of that analysis, the court rejects this argument.

The plaintiff further argues that her performance reviews were based primarily upon the ratings Maudsley gave her in his role as Production Auditor. (*See* Tucker Depo. at 122–23). These ratings, she argues, are suspect because, in the early 1980's, Maudsely offered to arrange for her to receive a perfect evaluation in return for meeting him at a hotel and because, in the 1990's, he again made some sexual comments to her. (Pl. Depo. at 316–19). She also states that "on occasions, [she] caught Maudsley issuing low safety scores to [her] for her employees not wearing safety equipment, despite the fact that those employees were wearing all the required safety equipment." (Doc. 22 at 58). She argues that Maudsley's bias "effectively poisons legitimacy of the defendant's entire system of rating and ranking the plaintiff." (*Id*. at 58–59, citing *Gulatte v. Westpoint Stevens, Inc.*, 100 F. Supp. 2d 1315 (M.D. Ala. 2000); *Nida v. Echols*, 31 F. Supp. 2d 1358 (N.D. Ga. 1998)). Although she cites a few individual instances where Maudsley recorded erroneous information about her performance, the plaintiff does not offer evidence that Maudsley tampered with her ratings in such a way as to have a significant impact on her pay relative to males. It is not apparent that Maudsely's errors or omissions caused the pay discrepancy of which the plaintiff complains.

The plaintiff's EPA claim with respect to the Area Manager position thus fails. The defendant's motion for summary judgment as to that claim is therefore due to be granted.

2. EPA Claims as to the Technology Engineer Position

The defendant argues that it is due summary judgment on the plaintiff's EPA claim with respect to her work as a

[24] *See* page 35 herein.

Technology Engineer because, although the plaintiff was paid less than male Technology Engineers, her salary was based on factors other than sex. The plaintiff answers that "when [she] transferred to Technical Engineer, her salary remained lower than her co-workers in the same position. Her low salary in that position carries over from her low salary as an Area Manager. If the plaintiff had been paid equally as an Area Manager, when she transferred to Technical Engineer her pay would have been equal to the male Technical Engineers." (Doc. 22 at 59). The plaintiff's argument thus depends on her assumption that her pay as Area Manager was inconsistent with the EPA. As the court has set forth above, however, the defendant is due summary judgment on the plaintiff's EPA claims relating to her pay as an Area Manager, so this claim must fail as well. The defendant is due summary judgment as to this claim.

g. Retaliation

In addition to prohibiting employers from discriminating on the basis of race, Title VII makes it unlawful:

> for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this subchapter [of Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [of Title VII].

42 U.S.C. § 2000e-3(a).

The plaintiff's retaliation claims must be evaluated under the *McDonnell Douglas* framework.[25] The plaintiff has the initial "burden of establishing a prima facie case." *McDonnell*

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[25] "Retaliation claims do involve burden-shifting as in *McDonnell Douglas-Burdine*" *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501 (citing *E.E.O.C. v. Total System Services, Inc*., 221 F.3d 1171, 1174 (11th Cir. 2000)).

Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. "If a plaintiff establishes a prima facie case of [retaliation], the defendant employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action." *Chambers v. Walt Disney World, Co.*, 132 F. Supp. 2d 1356 (M.D. Fla. 2001) quoting *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). Once the defendant has articulated its legitimate, nondiscriminatory reasons for the adverse employment action, the court "must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (citing *Cooper-Houston*, 37 F.3d at 605).

In order to establish a prima facie case of retaliation, the plaintiff must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between her protected activity and the adverse employment action. *Bass v. Board of County Commissioners*, 256 F.3d 1095, at 1117 (11th Cir. 2001); *see also Gupta*, 212 F.3d at 587; *Farley v. Nationwide Mut. Ins.*, 197 F.3d 1322, 1336 (11th Cir. 1999); *Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir. 1997).

The plaintiff claims that the defendant retaliated against her in violation of Title VII when it (1) transferred her to the position of Technical Engineer; (2) evaluated her performance and (3) failed to rehire her. The defendant argues that the plaintiff cannot prove a prima facie case of retaliation with respect to any of these claims, and that the court should therefore grant summary judgment as to each of them.

1. Transfer to Technology Engineer

Jerry Jones wrote a memo to his Area Managers dated July 2, 1997, addressing them as "boys." (Jones Depo. at 211). After the plaintiff complained, Jones addressed his next memo, dated July 13, 1997, to "boys and lady." (*Id*. at 211).

Jones then wrote a memo dated July 21, 1997, outlining a discussion he had with the plaintiff in which he criticized the plaintiff's job performance and she had responded that she thought he was singling her out because she was a woman.[26] (*Id*. at 127, 164–65, 202–03, Ex. 1 at D00917). Afterward, Jones strongly recommended to the plaintiff that she interview for the position of Technology Engineer. (Pl. Depo. at 105). The plaintiff applied for the position and was transferred to it as of January 5, 1998. (Pl. Depo. at 105–08; Complaint at ¶ 19). The plaintiff complains that this was an involuntary transfer in retaliation for her complaints of discrimination.

The defendant argues that the plaintiff's transfer to the position of Technology Engineer was voluntary—the result of her voluntary application for the position. Thus, it argues, there is no adverse employment action so as to allow the plaintiff to satisfy the prima facie case. The plaintiff asserts, however, that Jones told her that applying for the job would be in her best interest and essentially arranged for her to get it. Thus, she argues, there was, in essence, an adverse employment action against her.

The court doubts that what Jones did would amount to adverse employment action so as to permit the plaintiff to establish a prima facie case. Even assuming that it did amount to an adverse employment action, this claim would still fail because the defendant offers a legitimate, non-discriminatory reason for Jones's recommendation that the plaintiff apply for the Technology Engineer position. It argues that the plaintiff, who had previously been slated for lay-off in her Area

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[26] The evidence indicates that, months before he criticized the plaintiff's performance, Jones was instructed by the defendant's Human Resources staff to lay off the plaintiff and one other employee (Jones Depo. at 62–64). The decision to slate the plaintiff for layoff, which plays a part in the legitimate, non-discriminatory reason discussed below, was therefore not Jones's decision.

Manager position, told Jones that it was important to her that she continue working up until age 62, so he suggested that she apply for the Technology Engineer position in order to avoid losing employment with the defendant. (*See* Pl. Depo. at 105–09). Nothing offered by the plaintiff casts "sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (11th Cir.).

2. 1997 Evaluation

The plaintiff claims that Jones's allegedly retaliatory memorandum dated July 21, 1997, was the sole basis for the 1998 evaluation she received by Jones's successor, Kelly Owen. The defendant argues that the plaintiff first raised this retaliation claim in her brief and that the court should dismiss it as a claim not properly plead.

The court agrees with the defendant that the plaintiff did not properly plead this retaliation claim. The complaint pointedly lists the other two retaliation claims herein addressed, but makes no mention of Owen's alleged use of Jones's memorandum. (Complaint at ¶¶ 35–39). Even assuming that it had been properly pled, however, the claim still fails. First, the claim is factually erroneous. A cursory comparison of Jones's July 21, 1997 memorandum (Jones Depo., Ex. 1 at D00917) and Owen's notes of his evaluation with the plaintiff (Doc. 16 at Tab 8) reveals that Owen's notes include many comments and observations not included in Jones's memorandum. Also, as the plaintiff acknowledges, Owen had a full month to evaluate her job performance. (Ledbetter Aff. at ¶ 18).[27] Thus, it is apparent that the Jones memorandum was by no means the sole basis of the plaintiff's 1997 evaluation, although the plaintiff asserts that Owen told her otherwise. (Pl. Depo. at 191, 197). Even if

[27] The plaintiff's affidavit is located in the record at Doc. 21, Tab 39.

Owen did make such a statement to the plaintiff, the evidence reveals that he relied upon data other than the allegedly retaliatory memorandum. There is not a sufficient causal connection between the Jones memorandum and the 1997 evaluation to allow the plaintiff to establish a prima facie case. The defendant is therefore due summary judgment as to this claim.

3. Failure to Rehire Plaintiff

The plaintiff complains that she has applied to be rehired as a Technical Engineer with no success, while her male co-workers who have not complained of discrimination have been rehired into positions for which the plaintiff is qualified. The plaintiff cannot establish a prima facie case with respect to this claim because she does not show that "there was a causal link between [the] protected activity and the adverse employment action." *Bass*, 256 F.3d at 1117. The defendant has a policy of not rehiring former employees who have retired, although it sometimes retains them as contract employees where there has been a special request by a business center manager. (Breon Depo. at 18; Gardner Depo. at 25, 29–30; Heath Depo. at 36–38). The plaintiff has not shown that any business center manager who made contract employment requests for which she was qualified during the relevant period were aw are of her protected activity. The defendant's motion for summary judgment is due to be granted with respect to this claim.

IV. CONCLUSION

For the reasons set forth above, the undersigned recommends that the defendant's Motion for Summary Judgment (doc. 15) be granted in part and denied in part.

DONE this 3rd day of April, 2002.

/s/ John E. Ott

JOHN E. OTT

United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15264-GG

LILLY M. LEDBETTER,
Plaintiff-Appellee,

versus

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(October 26, 2005)

Before: TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)