Sex Discrimination Claims under Title VII: What Imprint Will the Roberts Court Leave?

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Ever since its passage over forty years ago, Title VII of the Civil Rights Act of 1964 has been credited with offering the promise of equal treatment for women in employment matters. This article traces the unusual origins of this complex statute and surveys some of the historic controversies over its implementation. It also examines contemporary challenges that may threaten the effectiveness of this legislation in achieving its stated purpose.

For many women in the United States, Title VII of the Civil Rights Act of 1964 has always been the statute that opened the doors of promise of equal treatment in employment matters for women. Now, this landmark legislation is over 40 years old and is facing a new set of challenges. This paper will trace the development of this statute and examine its impact on equal rights for women. The paper will also discuss various obstacles that have threatened, and still do threaten, the effectiveness of the statute.

It is an important exercise for women – and all persons interested in the equal treatment of women in the area of employment – to look back at what Title VII has accomplished in equalizing opportunities for women and to look forward toward the tasks yet to be completed before women are truly equal under the law. It should go without saying that treating women employees fairly and equally should be a goal of any thinking business person. The future strength of the economy will be shaped in large part by the skill and knowledge of women workers, and savvy employers know they need talented employees regardless of their skin color or sex. However, the will to discriminate against employees on the basis of sex still runs deep in some sectors of the business culture even though such discrimination has been illegal for over forty years.

Since the passage of Title VII, women have made real progress in employment matters, but more ground remains to be covered. On the positive side, more corporations have begun to allow women into the boardroom. In 1983, thirty-four percent of people in high paying executive positions were women; in 1998, that number was 46 percent.[1] However, the median weekly wage in 2006 for women working full-time was $600; for men, the corresponding figure was $743.[2] This essentially means that women are earning just 81 cents for every dollar their male counterparts earn.[3] While more women are now working as executives, many women are still being segregated into administrative support positions, which are typically even lower-paid than production positions.

The inclusion of sex discrimination claims under Title VII had a very strange beginning; it was inserted late in the process and came almost as an afterthought. Consequently, it has always been difficult to enforce the sexual discrimination aspect of this important statute. Now that the Supreme Court has entered a new phase with Chief Justice Roberts at its head, there is some question regarding the imprint that this new court will leave on the federal judiciary's stance toward job discrimination claims.

Title VII has always been a complex piece of legislation, covering a vast area of discrimination in employment based on race, national origin, color, sex, or religion. It also represented a Great Society-era attempt to make fundamental changes in American social structure and societal attitudes – a huge undertaking for any statute. The sweeping size and scope of this law make it an exceedingly daunting task for it to succeed in its essential function. Yet, Title VII remains a critical and essential piece of legislation for women seeking equal treatment under the law.

Over the years, there has been an ongoing push and pull between branches of the federal government to refine our understanding of what is covered by Title VII and how it is to be implemented. When the EEOC (an executive branch agency) appeared too sluggish in addressing job discrimination claims in the 1960s and 1980s, for example, Congress stepped in with a firm legislative response. Similarly, when the Congress disapproved of the Supreme Court's narrow reading of Title VII as evidenced in a wave of decisions during the Reagan-Bush years, it passed the Civil Rights Acts of 1991 to change the underlying statute and provide clearer legislative guidance. On other occasions, it has been the Supreme Court that has led the way in enforcement.

TITLE VII IS BORN

Title VII became the law of the land with the passage of the Civil Rights Act of 1964. However, this milestone was several years in the making. Civil rights legislation had been proposed in every session of Congress from 1945 to 1957, with limited success and repeated frustration. In 1963, President Lyndon Johnson dedicated the Civil Rights Act pending in Congress as a memorial to the late John Fitzgerald Kennedy, who had recently been assassinated (Lindren & Taub, 1993). Most people at the time identified the passage of the Civil Rights Act of 1964 with the struggle for racial equality, but it was also a pivotal moment in the struggle of women for equal rights in employment.

Prior to this, the women's equality movement had become fragmented after women received the right to vote in 1920. After the ratification of the 19th Amendment, few legislative measures were passed to help women in their pursuit of equality. Statutes or constitutional cases that considered the plight of women at all were centered on "protecting" women or on justifying differential treatment on the basis of compensating women for the extra burdens they were asked to shoulder in bearing and raising children.[4]

For most of American political history, women had little protection under the Constitution. Congress refused to guarantee women the same rights as black men when it was debating and passing the 13th, 14th, and 15th Amendments after the Civil War. Floor debates in the House of Representatives showed the split growing between abolitionists and supporters of rights for women. Many abolitionists believed they had to concentrate on equal protection and voting rights for black males first and work on women's issues at a later time (Babcock, 1996).

The Supreme Court considered women's standing under the Constitution for the first time in *Bradwell v. Illinois* in 1872. In that case, the Court upheld the constitutionality of the Illinois law denying Bradwell membership in the Illinois bar because of her sex (83 U. S. 130). In his concurring opinion, Justice Bradley said, "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator" (*Bradwell* at 141). This decision had the effect of placing equal protection for women on the constitutional back burner for decades.

Even today, women are still not as fully covered constitutionally under the equal protection clause of the Constitution as are racial minorities.[5] In deciding race-based cases under the equal protection clause, the courts use a "strict scrutiny" test which requires the discriminatory statute or act to be justified by a compelling state interest. Because it is always difficult to prove such a compelling state interest, those statutes or acts are more likely to be declared unconstitutional. When deciding cases based on gender, however, the courts apply what is known as a "heightened scrutiny" test (sometimes called an intermediate scrutiny test). When courts apply this test, the discriminatory action or statute is easier for the state to defend.

Women became more and more dissatisfied with their role in the economy after World War II. As Chafe (2000) explains, millions of women took jobs outside the home during the war, and when the men returned, their mothers, wives, sisters and daughters were expected to leave their jobs and return to their unpaid domestic sphere. In response to the rising chorus of charges regarding unequal treatment for women, President Kennedy established the Commission on the Status of Women in 1961 and asked former first lady Eleanor Roosevelt to serve as its chair (Chafe, 2000).

At the dawn of the New Frontier, neither women's groups nor labor organizations had a clear consensus about the best path to achieve equal rights for women. For the first time since the passage of the Civil Rights Act of 1957 (which had allowed women to sit on federal juries), Congress evidenced some concern about equal treatment for women by passing the Equal Pay Act of 1963. The passage of Title VII of the Civil Rights Act of 1964 continued to put the focus on equal treatment of women in the workplace (Stetson, 1997).

Title VII was initially meant to give blacks equal opportunities in employment and open the doors to jobs and careers that had long been denied to blacks in America. The inclusion of "sex" as a protected classification in Title VII was much less than a glorious victory for those seeking equal treatment for women.[6] In an effort to defeat the passage of Title VII, Congressman Howard Smith (D-VA), a Southerner opposed to equal rights for blacks, added "sex" as a protected category under the act. He believed by adding protection for women, the bill would surely be defeated (Chafe, 2000). Many women's groups including the Commission on the Status of Women were opposed to adding "sex" as a protected category. The "sex" amendment divided women's groups, political parties, and civil rights activists. At the same time, the insertion of the "sex" amendment was viewed by many supporters of equal opportunity for blacks as a dilution of the rights that blacks were about to claim (Stetson , 1997).

TITLE VII BECOMES THE LAW

After successfully surviving a filibuster and strenuous opposition in the Senate, the Civil Rights Act of 1964 passed the Congress and was signed into law by President Johnson. The relevant part of Title VII – §703 (a) – reads as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2 (a)).

The same prohibitions also apply to labor organizations and employment agencies under the Act. The courts quickly began to apply the prohibitions outlined in §703 (a) where cases of race discrimination were claimed, but application of these same prohibitions in cases of sex discrimination was not as forthcoming.

After the passage of Title VII, the agency charged with enforcing Title VII, the Equal Employment Opportunity Commission (EEOC), chose to ignore the protections that the Act afforded to women. As Dorothy McBride Stetson (1997) writes:

The first commissioners [of the EEOC] did not take the ban on sex discrimination seriously ... Congress had given little indication of what it intended by prohibiting sex discrimination in employment. Despite the four thousand sex discrimination complaints filed in the first year, the EEOC's first guidelines did little to disturb employer practices... The EEOC left protective labor laws intact and refused to ban sex-segregated job advertisements (p. 231).

For several years, the judicial system used the uncertain and sparse legislative record on the prohibition of sex discrimination in Title VII as a reason to dismiss claims made by women under Title VII (Bird, 1997).

Protection for women in the arena of employment discrimination had been added to Title VII at the last minute in an effort to defeat its passage, so there was no concerted interest or effort to ensure equal opportunity for women in employment. However, the failure of EEOC and the courts to press the advantage that women had gained legally under Title VII provided feminists with the motivation they needed to begin a new wave of activity on the issue of equal rights. For example, the National Organization for Women (NOW) was created in 1966, and one of its first goals was to work to clear up any ambiguity about equal rights for women that had been read into the legislative history of Title VII (Stetson, 1997).

Enforcement of Title VII: Having rights is one thing; enforcing those rights is another. Enforcing rights under Title VII has always been a procedural minefield. People have two avenues to use in enforcing their claims under Title VII. They must file claims with the Equal Employment Opportunity Commission (EEOC) or with a state EEO agency. The EEOC allows claims to be deferred to state EEO agencies, and state courts may hear EEO claims since Congress did not preempt the field. Plaintiffs in discrimination suits must have exhausted their administrative remedies before they can go to the courts.

After the EEOC investigation, they can seek a right-to-sue letter and take their claims to federal court (or to state court if they have gone the state EEO route), or they can seek to use the power that the EEOC has to bring claims in federal court on behalf of victims of sex discrimination. The difficulty victims have in relying on EEOC is that it does not often elect to file cases in federal court.[7] Thus, complainants must enforce their own claims under Title VII, acting as private attorneys general.[8] The costs of litigating a claim can be a deterrent to victims who are under-paid or unemployed because of discrimination. Plaintiffs must also decide quickly to file a suit since Title VII has a very short statute of limitations (180 days), and courts have moved to enforce that limitation in the strictest sense.[9] In spite of the large number of sex discrimination claims filed, recovery rates have been modest.[10]

Judges alone fashioned remedies in Title VII until 1991. With the passage of the Civil Rights Act of 1991, a person making claims under Title VII could now request a jury trial. Punitive damages were also allowed for the first time if defendants engaged in willful violation of Title VII (42 U.S.C. § 1981a (a)). While these new remedies have helped women seeking to enforce the Act, the long delay in allowing plaintiffs the traditional remedies that juries and punitive damages afford to those hurt by wrongful action has lessened Title VII's effectiveness in deterring discrimination in the workplace. Punitive damages are capped by the Civil Rights Act of 1991, so plaintiffs may not recover the full extent of their damages even where the violation of the statute was willful

SOME PROBLEMS IN THE APPLICATION OF TITLE VII

Sexual Harassment: In *Carne v. Bausch and Lomb* (1975), the U.S. District Court in Arizona refused to find sexual harassment as a cause of action under Title VII. A New Jersey Court similarly found no sex

discrimination under Title VII when a woman was physically attacked by her supervisor at work (*Tomkins v. Public Service Electric & Gas Co.*, 1976). These cases were overturned on appeal, but they illustrate the difficulty the courts had initially finding a viable sexual harassment claim under Title VII. In fact, the EEOC did not adopt guidelines on the issue of sexual harassment until 1980 (29 CFR § 1604.11).

The EEOC guidelines established clearly that *quid pro quo*[11] sexual harassment was actionable under Title VII, but it was not until the case of *Meritor Savings Bank SFB v. Vincent* (1986) that the courts chose to adopt "hostile environment" claims as actionable under Title VII. The dramatic spectacle of the Senate Judiciary Committee hearings on the confirmation of Clarence Thomas as an associate justice on the Supreme Court reflect the difficulties a woman had in the area of sexual harassment in the early 1980s. Anita Hill underwent hour after hour of questioning about the sexual harassment she claimed to have suffered from Thomas, and she was asked repeatedly why she did not file a claim of sexual harassment at the time of the alleged offense. The short answer was that she could not have filed a claim because she worked for Thomas from 1980 to 1982 and "hostile environment" claims were not recognized as viable until 1986. Many working women found themselves in conditions similar to Hill's before the courts formally recognized hostile environment as a cause of action.

Even after the *Meritor* case added hostile environment claims to sexual harassment cases, judges in several circuits insisted that claimants demonstrate that they were psychologically harmed by a pervasively abusive workplace. To win her claim in a "hostile environment" case, a plaintiff was expected to prove that her working environment was so bad that it caused her psychological harm. In 1993, a unanimous Supreme Court ruling in *Harris v. Forklift Systems*, erased this standard and determined that a plaintiff in a "hostile environment" case need only show impairment of work or training opportunities to prove her claim.

Pregnancy and Discrimination: For several years, discrimination based on pregnancy was also a difficult claim to establish under Title VII. EEOC guidelines sought as early as 1972 to establish that discrimination on account of pregnancy was actionable under Title VII (29 CFR § 1604.10 and 1604.2 (b) (1)). However, the Supreme Court in *General Electric Co. v. Gilbert* (1976) said that discrimination on the basis of pregnancy was not sex discrimination under Title VII. In the *Gilbert* case, pregnant women were denied benefits available to other disabled workers. The courts continued to rule against pregnant working women until Congress passed the Pregnancy Discrimination Act (PDA) in 1978. Congress passed the PDA because working women and their families applied political pressure saying the Court had misread Title VII in the *Gilbert* case. With the passage of the PDA, a company that provided disability benefits could no longer exclude pregnancy from its coverage. The PDA says: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. § 2000e (k)). The PDA amended Title VII and stated unequivocally that discrimination on account of pregnancy was considered a form of sex discrimination under the Act. However, courts still had some difficulty applying an appropriate standard in pregnancy cases since men did not get pregnant. They wrestled with how equality of treatment could be weighed when men and women are not (and cannot be) similarly situated.

Exceptions in Title VII Coverage: A part of Title VII also provided a defense for employers who discriminated against one of the protected groups; that defense was called a bona fide occupational qualification or BFOQ (42 U.S.C. § 2000e(e)). Employers who needed to fill some position with a male rather than a female could defend against a Title VII action by showing that sex was "a *bona fide* occupational qualification necessary to the normal operation of that particular enterprise" (42 U.S.C. § 2000e (e)). EEOC guidelines instructed courts and employers to interpret that defense narrowly (29 CFR § 1604.1 (a)), and the courts did interpret that guideline narrowly for the most part.[12] Because of the narrow-interpretation guideline, a BFOQ was rarely found in race cases. However, where sex was the basis for the underlying claim, the courts showed more willingness to allow the BFOQ defense to protect the discriminatory work rule.

The Supreme Court supported the narrow interpretation for the BFOQ, but in *Dothard v. Rawlinson* (1977) the Court upheld a rule in the Alabama Corrections System that forbade women from taking counselor positions in maximum-security institutions that would require close contact with violent offenders. The Court said that inmates were likely to "assault women guards because they were women" (*Dothard* at 335). Justice Marshall pointed out in his dissent that the Court's decision in this case amounted to perpetuating the stereotypes that the law is supposed to address. He wrote, "In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women – that women, wittingly or not, are seductive, sexual objects" (*Dothard* at 346). Marshall went on to warn that expansion of the decision "would erect a serious

roadblock to economic equality for women" (*Dothard* at 347). Nevertheless, lower courts have continued to apply the kinds of arguments raised in *Dothard* to support other male-only positions. [13]

Disparate Impact Claims: The *Dothard* case is also an important case in sex discrimination under Title VII because it was the first case concerning a sex discrimination claim in which the Supreme Court applied the disparate impact analysis it had earlier developed in race cases in *Griggs v. Duke Power Co.* (1971). Disparate impact claims are now one of the three main types of sex discrimination claims that are brought under Title VII; the other two are disparate treatment and sexual harassment claims. A plaintiff can claim disparate impact as a cause of action under Title VII if she belongs to a protected group and has been the victim of a facially neutral employment policy that has had an adverse impact on the protected group. In *Griggs*, the facially neutral employment policy was the requirement of a high school diploma for entry-level jobs. That requirement had the effect of excluding racial minorities, but it was not necessary to the performance of the jobs in question. The application of disparate impact analysis in sex discrimination cases was a huge step forward in enforcing women's rights under Title VII. More subtle forms of workplace discrimination could now be attacked via a disparate impact cause of action.

This movement forward for women in the area of employment law was dealt a serious setback in 1989 with the Supreme Court's decision in *Ward's Cove Packaging Co. v. Antonio*. In this case, a more conservative Court attempted to make disparate impact cases much more difficult for plaintiffs to win. The Court essentially changed the burden of proof that had been established in *Griggs*, so that the employer only needed to assert a "reasonable justification" for a neutral policy that had an adverse impact on the protected group, rather than proving the policy was a business necessity. The burden switch meant it would be virtually impossible for plaintiffs to win a disparate impact case. Shortly after the *Ward's Cove* decision, Congress passed the Civil Rights Act of 1991. This legislation amended Title VII and restored the burden of proof as set out in the *Griggs* case—restoring disparate impact claims as viable (42 U.S.C. § 2000e (k) (1) (a)).

Summary Judgment: Currently, the courts have shown a tendency to grant defendants' summary judgment motions in Title VII cases. The court can grant summary judgment early in a case, before any trial happens, if there are no genuine issues of fact and only issues of law to be decided. Almost by definition, Title VII cases tend to be very fact-sensitive, and proof of fact concerning the employment situation is usually essential to a plaintiff's case. If summary judgment is granted, then the plaintiff loses her case without ever having a chance to receive adequate discovery. Sometimes, plaintiffs have made their *prima facie* showing of discrimination (the point at which the burden of proof should shift to defendant in these cases) and they still find their case dismissed on summary judgment. In the past, courts have commented on the impropriety of granting summary judgment in employment discrimination cases since they almost always involve intent, which is an issue of fact.[14] However, in 1986, the Supreme Court simultaneously issued three opinions that changed the practice of law significantly for all Title VII plaintiffs in the federal courts in the United States.[15] These cases allowed summary judgment in sex discrimination cases when plaintiffs had not had the chance to use discovery to develop the facts of the case.

Although the law set out by the Court was not different in theory from the summary judgment standard, the practical result in federal court proceedings has been a green light for federal judges to use these summary judgment proceedings to clear their dockets (Levitt, 1989; Stempel, 1988). The summary judgment proceeding has thus become a hurdle that many employees claiming employment discrimination must clear before their case can proceed to trial. This procedure is costly and time-consuming one, making a plaintiff's likelihood of reaching trial very slim.

In 2000, the Supreme Court indicated that the federal courts may have gone too far in their eagerness to dismiss employees' cases. In *Reeves v. Sanderson Plumbing Products, Inc.* (2000), the Supreme Court reminded the federal courts that in summary judgment proceedings, a material fact that is disputed precludes summary judgment, and all inferences must be drawn in favor of the non-movant (generally the employee). Nevertheless, trial courts are still actively using summary judgment to dismiss some sex discrimination claims.

Class Action Suits: The courts have also displayed a mixed record of friendliness to Title VII class action cases. After the passage of Title VII, class action lawsuits were a procedural tool under Federal Rule of Civil Procedure 23 that could be used by plaintiffs to change the employment practices and obtain monetary damages for a group of employees affected by the same employment practices.[16] The Supreme Court has repeatedly recognized the judicial economy in the use of class actions by private litigants to vindicate the rights of many.[17] However, in 1982, the Supreme Court issued a decision that severely limited class certification. In *General Telephone v. Falcon* (1982),

the Court affirmed that federal courts would no longer certify "across the board" classes (Davis & McIntyre, 1984; Tisdale, 1984). The result of that ruling has been that class certification proceedings have themselves become trials, sometimes spanning weeks. The federal courts have refused to certify most class action lawsuits after *Falcon*, and fewer litigants are bringing class action lawsuits (Rose, 1989). Since *Falcon*, certified class actions are much rarer and require a mini-trial on the class issue. Now, it is far more difficult for Title VII plaintiffs to act as "private attorneys general" to vindicate the rights of others. Consequently, would-be class representatives cannot represent those who are too frightened or timid to file suit themselves, and claimants lose the safety of numbers that comes with a class action.

In recent years, the federal bench has appeared to be somewhat less hostile to class actions and has certified large classes in high-profile cases dealing with alleged discrimination at Home Depot and Wal-Mart (Daniels, 2003). Over the past ten years, large settlements have also been reached in cases involving Mitsubishi in 1996, Merrill Lynch in 1998, American Express in 2002, Morgan Stanley in 2004, and Boeing in 2004 (Gill, 2005). Whether these cases signal a trend is not yet clear. The Roberts Court will likely be asked to review the class action issue soon, and its decision may enhance or harm one of the most useful enforcement tools available to Title VII claimants.

RECENT DECISIONS

Prior to the recent appointments of Chief Justice John Roberts and Associate Justice Samuel Alito, the Supreme Court gave litigants a couple of reprieves from a long line of decisions that had threatened the effectiveness of Title VII. The Supreme Court in *National R.R. Passenger Corp. v. Morgan* (2002), held that hostile environment (whether racial or sexual harassment) could also include conduct that predated the statute of limitations, under a continuing violation theory, since a hostile environment is an unlawful employment practice. This ruling makes it possible for plaintiffs to recover when an employer creates or maintains a hostile environment that affects a plaintiff's working conditions, even though much of the conduct might have taken place earlier than the two-year statute of limitations.

In *Pollard v. E.I. du Pont de Nemours & Co.* (2001), the Supreme Court held in an opinion drafted by Justice Clarence Thomas, possibly the most conservative member of the high court, that front pay was not an element of compensatory damages within the meaning of the Civil Rights Act of 1991. Therefore, it was not subject to the Act's statutory cap, and a plaintiff could recover more than the cap amount placed on punitive damages as a result.

Those hopeful decisions were made prior to the installation of the Roberts Court. In May of 2007, the Roberts Court issued a 5-4 decision in *Ledbetter v. Goodyear* that has set Title VII enforcement on its head. The plaintiff, Lilly Ledbetter, brought a sex discrimination claim against her employer, Goodyear Tire and Rubber, in 1998. She claimed, among other things, that she had been paid substantially less than her male counterparts for most of her career. The evidence showed she had indeed been paid much less. She won a jury verdict against Goodyear, but Goodyear appealed, arguing that Ledbetter's Title VII claim had not been filed within 180 days of the initial gender-based pay disparity. A 5-4 majority of the Roberts Court agreed with Goodyear. Even though pay discrimination that had been ongoing for almost 20 years resulted in Ledbetter's pay being dramatically lower than her coworkers, this pattern of discrimination was not considered actionable from the point when she discovered the disparity. According to the ruling, she should have filed a claim much earlier or under another statute in order to recover. Justice Ruth Bader Ginsburg, in a scathing dissent, said:

> Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption. This assessment gains weight when one comprehends that even a relatively minor pay disparity will expand exponentially over an employee's working life if raises are set as a percentage of prior pay. (p. 2184) … Yet, under the Court's decision, the discrimination Ledbetter proved is not redressable under Title VII. Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male area manager. Knowingly carrying past pay discrimination forward must be treated as lawful conduct. (pp. 2187-2188).

In her dissent, part of which she read from the bench, Justice Ginsburg called the Ledbetter decision a "cramped interpretation of Title VII" similar to the one in the 1989 case of *Wards Cove Packing Co.* Significantly, the *Wards Cove* decision was one of a series of controversial Supreme Court rulings that led the Congress to amend Title VII by the passage of the Civil Rights Act of 1991.

To date, the Ledbetter decision by itself has not yet garnered as much attention from policymakers as did the wave of Reagan-Bush era rulings on workplace discrimination. However, it has already generated some speedy legislative action in Congress. This is possibly the result of the Democratic takeover of the House and the Senate in the 2006 midterm elections after several years of being in the minority. Less than

two months after the Ledbetter decision was handed down by the Roberts Court, the House passed the Lilly Ledbetter Fair Pay Act by a vote of 225 to 199, mostly along strict party lines.[18] At the time this article was written, the Senate has yet to vote on this legislation, but President George W. Bush has already announced his strong opposition to the bill and his firm intention to veto it if it reaches his desk.

An array of competing groups have begun to line up on opposing sides of this debate, with the U.S. Chamber of Commerce and other business groups mounting an effort to undermine the bill's forward movement. Meanwhile, several Democratic presidential candidates, leading civil rights groups, women's rights organizations, and the American Bar Association have all worked to promote the passage of this bill. All of them seem to be in agreement that the actions taken by the Roberts Court in the area of workplace discrimination require a firm legislative response. When Wade Henderson, president of the Leadership Conference on Civil Rights, testified before the House Education and Labor Committee, he pointedly repeated language taken directly from Justice Ginsburg's dissent: "For years, we in the civil rights community have watched as the Supreme Court has rolled back the ability of victims of discrimination to obtain meaningful remedies. But the watching is over. It is time – past time – to take action…As Justice Ginsburg sees it, 'Once again, the ball is in Congress' court."[19]

THE FUTURE FOR TITLE VII

Because equal protection claims under the Constitution are weighed differently where sex discrimination is the basis for the claim,[20] equal protection for women outside the employment arena would still benefit from the passage of an Equal Rights Amendment. Title VII construction and remedies supply women and other targets of job discrimination with much-needed protection in the workplace, and its provisions need to be strengthened rather than weakened by the courts. When Title VII was passed, there was no real sense of commitment to the principle of equal protection for women in employment.

Over forty years and several amendments later, the courts still have difficulty agreeing about the meaning of essential terms (i.e. sexual harassment, discrimination "on account of sex," equality, equitable treatment, equal treatment, equal protection, and equal pay). Moreover, the composition of the Supreme Court has recently changed, and the first woman ever appointed to the Court has now been replaced by a much more conservative male jurist.[21] How will gender discrimination claims under Title VII fare under the Roberts Court? For Title VII to be a forceful tool, its basic principles and terms must be defined and enforced by the courts and the legislature. At present, the Court seems to be interpreting the Act in a way that will narrow the enforcement options for women much as it did in *Gilbert* and in *Wards Cove Packing Co*. Congress has the power to respond with legislative action as it did in those cases. What remains to be seen is whether there is sufficient political will to address these sex discrimination issues through legislation. Real equality for women in the employment arena should not be hostage to current political affiliations, it should be a part of a woman's guaranteed rights as a full citizen. Employers could do a great deal to enhance equal treatment of women in the workforce by seeing that women are provided with a working environment that is free from harassment and discrimination. Profits would go up and worker satisfaction would improve if discrimination were eliminated from the workplace. Presently, Title VII is the best tool available to address sex discrimination in the workplace.

NOTES

[1] These statistics can be found in the following source: United Nations, *The World's Women 2000: Trends and Statistics* (New York: United Nations, 2000), p. xiv.

[2] These statistics are from the U.S. Department of Labor. See: *Quick Stats 2006*, retrieved October 28, 2007, from http://www.dol.gov/wb/stats/main.htm.

[3] *Ibid*. When looking only at younger Americans, aged 16 to 24, the disparity was not nearly as great. Young women in 2006 were earning 94 percent of what young men earned.

[4] See for example: *Hoyt v. Florida*, 368 U. S. 57 (1961); *Breedlove v. Suttles*, 302 U. S. 277 (1937); *Goesaert v. Cleary*, 335 U. S. 464 (1948).

[5] *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). This case sets the "heightened scrutiny" standard for weighing statutes that discriminate on the basis of gender.

[6] Robert C. Bird, "More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act," (*3 Wm & Mary J. of Women & Law* 137, Spring 1997), p. 139. In this article, Bird argues that Smith, an ardent opponent of equal rights for blacks, may have introduced the sex amendment as a means of defeating the bill, but he later became convinced the amendment was necessary if white women were to be protected. For an alternative interpretation, see the work of Jo Freeman, "How 'Sex' Got Into Title VII: Persistent Opportunism as a Maker of Public Policy," *Law and Inequality: A Journal of Theory and Practice*, vol. 9, No. 2, March 1991), pp. 163-184

[7] According to the Equal Employment Opportunity Commission, victims of sex discrimination filed 25,536 charges with EEOC in 2002. (See *Charge Statistics FY 1992 through FY 2002*, retrieved on October 28, 2007, from http://www.eeoc.gov/stats/charges.html.) That same year, the EEOC only filed 240 suits in court on behalf of plaintiffs alleging sex discrimination. (See *EEOC Litigation Statistics, FY 1992 through FY 2002*, retrieved on October 28, 2007, from http://www.eeoc.gov/stats/litigation.html.)

[8] Interpreting 42 U.S.C. § 1988, the federal court found one purpose of this section was to encourage individual plaintiffs to act as "private attorneys general." See *Arkansas Community Organizations for Reform NOW v. Arkansas State Board of Optometry*, 468 F. Supp. 1254 (E. D. Ark., 1979).

[9] Joanna Grossman & Deborah Brake, (2007, September 4), *An Overlooked Problem with Title VII's Protections Against Discrimination: Procedural Obstacles to Invoking the Law*, retrieved October 28, 2007, from http://writ.lp.findlaw.com/commentary/20070904_brake.html. This article discusses the problems with short statutes of limitations and the problems with the way the courts have interpreted the retaliation protection under Title VII.

[10] Paula J. Dubeck & Dana Dunn. *Workplace /Women's Place*, (Los Angeles: Roxbury Publishing Co., 2002), p. 62. The authors report claimants before the EEOC with sex discrimination claims recovered two to three million dollars in damages each year between 1992-1997.

[11] *Quid pro quo* harassment was easier to understand, and it was defined early on. It is sex or sexual favors in exchange for favorable treatment in the employment arena. It was often called the "smoking gun" type of claim.

[12] See *Weeks v. Southern Bell & Telephone Co*., 408 F. 2d 228 (5th Cir, 1969) and *Diaz v. Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir, 1971).

[13] See *Jones v. Hinds General Hospital*, 666 F. Supp. 933 (S.D. Miss., 1987) or *EEOC v. Sedita*, 755 F. Supp. 808 (N.D. Ill., 1991).

[14] See e.g. *Foster v. Swift & Co*., 615 F.2d 701 (5th Cir. 1980) (holding that summary judgment is especially questionable when intent as to employment discrimination is in question); *Hayden v. First Nat'l Bank of Mt. Pleasant, Tex.*, 595 F.2d 994 (5th Cir., 1979); *Teledyne Indus. v. Eon Corp*., 373 F. Supp. 191 (S.D.N.Y. 1974).

[15] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986).

[16] See e.g. *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Stalling v. Califano*, 86 F.R.D. 140 (N.D. Ill., 1980; *Petty v. Peoples Gas, Light & Coke Co.*, 86 F.R.D. 336 (N.D. Ill., 1979); *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268 (4th Cir., 1981*); International Woodworkers of America v. Chesapeake Bay Plywood Corp*., 659 F.2d 1259 (4th Cir. 1981); *Kirby v. Colony Furniture Co, Inc.*, 613 F.2d 696 (8th Cir., 1980).

[17] *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

[18] Only two Republican lawmakers voted for the bill, while six Democrats voted against it. Robert Barnes, (2007, September 5), "Exhibit A in Painting Court as Too Far Right," *Washington Post*, p. A19

[19] Wade Henderson's full testimony before Congress can be found at the website of the Leadership Conference on Civil Rights: http://www.civilrights.org/library/advocacy-letters/testimony/ledbetter-justice-denied.html. (Last retrieved on October 28, 2007.)

[20] *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718 (1982). This case set the highest standard for reviewing discrimination on the basis of sex under the Equal Protection Clause of the Constitution, but that standard is still not the "strict scrutiny" standard applied for race discrimination cases. When the Fourteenth Amendment was passed after the Civil War, sex was excluded from the language of the Fourteenth Amendment and women were not given the right to vote until 1920.

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42 U.S.C. §2000e-2 (a)

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