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CASE COMMENT

AN INTERPRETATION AND APPLICATION OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: HOW COURTS GOT IT WRONG . . . TWICE

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"[T]here ought to be equal pay, and the [Fair Pay Act] would provide for equality of pay . . . [and] break the glass ceiling . . . . It could include

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promotion, demotion, hiring, transfer, tenure, training, layoffs, or many other items."[1]

I. INTRODUCTION

Lilly Ledbetter grew up in a poor farming community just outside of Jacksonville, Alabama.[2] As a child, she chopped cotton, picked beans, and canned vegetables to help her family survive.[3] Her drive and ambition eventually helped her obtain a job at Goodyear Tire, which she used to lift herself out of poverty.[4] Ledbetter became a mother of two and an active member of the First Baptist Church during her two decades of employment with Goodyear.[5] During her career, she performed well, receiving periodic pay raises and a Top Performance Award in 1996.[6] Despite these facts, Ledbetter's supervisor asked her for sexual favors in return for a favorable performance evaluation, and Ledbetter was paid almost thirty percent less than her male counterparts, a fact only brought to her attention by an anonymous note.[7] Sadly, Ledbetter's life story is not unusual.

Title VII of the Civil Rights Act of 1964 ("Title VII")[8] is meant to curb this trend, as it "prohibits employment discrimination based on race, color, religion, sex and national origin."[9] In 2007, Lilly Ledbetter turned to that statute after facing discrimination from her employer.[10] Ledbetter alleged that her supervisors at Goodyear gave her poor evaluations based on her sex, and as a result, she did not receive the raises she should have.[11] In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Supreme Court barred Ledbetter's pay discrimination claim, finding that the decision to compensate her less than her male counterparts was a discrete decision that required the statutory period to begin when the compensation decision was made rather than when each discriminatory

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[1] 155 CONG. REC. 1383 (2009) (statement of Sen. Arlen Specter). Senator Specter, a Republican at the time of the passage of the FPA, clearly specified on the Senate floor that he supported the extension of the FPA to a number of compensation decisions—although his proposed amendment attempted to limit the FPA—so long as the end result was pay equality. *Id.*

[2] Glen Browder, *Introducing Lilly Ledbetter: As Known (or Unknown) by Her Homefolks*, HUFFINGTON POST (May 24, 2013, 6:31 PM), http://www.huffingtonpost.com/glen-browder/introducing-lilly-ledbett_b_3323122.html.

[3] *Id.*

[4] *Id.*

[5] Kate Pickert, *2-Minute Bio: Lilly Ledbetter*, TIME (Jan. 29, 2009), *available at* http://content.time.com/time/nation/article/0,8599,1874954,00.html; Browder, *supra* note 2.

[6] Browder, *supra* note 2.

[7] Pickert, *supra* note 5.

[8] 42 U.S.C. § 2000e (2012).

[9] 42 U.S.C. § 2000e-2(a)(1) (2012).

[10] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 621 (2007).

[11] *Id.*

paycheck was issued.[12] Therefore, under Title VII's statute of limitations, Ledbetter had to bring her suit within either 180 or 300 days[13] of the action giving rise to the pay discrimination.[14] Although the Court ruled that her claim was time-barred,[15] the perceived injustice in Ledbetter's case prompted Congress to make an important change to Title VII's timing provisions through the Lilly Ledbetter Fair Pay Act ("FPA" or "the Act").[16] The FPA remedies the *Ledbetter* decision by extending the statute of limitations for bringing a suit for pay discrimination. Specifically, the FPA allows plaintiffs to bring a suit within 180 or 300 days of *receiving* a paycheck affected by discrimination rather than within 180 or 300 days of the discriminatory act itself.[17]

Since the Act's passage, courts have varied greatly in their interpretations of the FPA.[18] Courts agree that the FPA allows the statute of limitations to reset with the issuance of each paycheck affected by discrimination in cases involving wage differentials between similarly situated employees, such as when a female employee is paid less than a male employee with the same qualifications performing the same job functions.[19] However, many courts have been reluctant to allow the statute of limitations to reset where a plaintiff claims that a pay differential is the result of an allegedly discriminatory demotion, transfer, failure to promote, or other discrete practice.[20] This discrepancy results largely from mixed interpretations of the statutory language "discriminatory compensation decision or other practice."[21]

Although most courts have interpreted the FPA quite narrowly, disallowing the application of the FPA in cases other than straightforward pay differential cases,[22] four federal district courts have accepted a very broad interpretation of the FPA, holding that the FPA can extend the statute of limitations for pay

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[12] *Id.* at 628.

[13] A 180-day statute of limitations is typical for pay discrimination claims, but the 300-day statute of limitations occurs in jurisdictions with state or local fair employment practice agencies. 42 U.S.C. § 2000e-5(b) (2012); 29 U.S.C. § 633(b) (2012).

[14] *Ledbetter*, 550 U.S. at 642.

[15] *Id.* at 643.

[16] 42 U.S.C. § 2000e-5(e)(3)(A) (2012).

[17] *Id.*

[18] *See infra* Part II.B (explaining that in most cases, courts have held that the FPA applies when an employer decides to compensate one similarly situated employee less than another, but occasionally have held that the FPA can apply in situations where pay is affected by other discrete acts).

[19] *See infra* Part II.B (discussing cases in which courts have held that the FPA applies when an employer decides to compensate one similarly situated employee less than another).

[20] *See infra* Part II.B (outlining court decisions holding that, in some instances, the FPA can apply in situations where pay is affected by a discrete, discriminatory act).

[21] 42 U.S.C. § 2000e-5(e)(3)(A) (2012).

[22] *See infra* Part II.B.

discrimination following discrete acts that affect compensation.[23] These cases were all decided in 2009, the year in which the FPA was passed.[24] Fewer courts use an intermediate interpretation of the FPA when analyzing discrete acts affecting pay.[25]

This Comment will argue that Congress intended an interpretation of the FPA that allows plaintiffs to bring claims following some, but not all, discrete acts affecting pay. This interpretation strikes a compromise between the narrow interpretation adopted by most federal courts since 2009 and the broadest interpretation in use. Part II of this Comment will provide a brief overview of the Supreme Court's decision in *Ledbetter v. Goodyear*, the passage of the FPA, cases decided in the wake of the FPA, and tools of statutory interpretation. Part III relies on textualism and legislative intent to argue that Congress intended that courts read the FPA to allow for resetting the statute of limitations with each paycheck following some other discriminatory decisions with effects on compensation.[26] Part III will also compare courts' FPA decisions with an interpretation that falls in line with canons of statutory interpretation and then refute arguments made by those in favor of an overly narrow or overly broad interpretation of the statute. This Comment will conclude with a recommendation that courts interpret the FPA to allow for the extension of the statute of limitation for pay discrimination claims following certain discrete, discriminatory acts.

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[23] Gertskis v. N.Y.C. Dep't of Health & Mental Hygiene, No. 07 CIV. 2235(TPG), 2009 WL 812263 (S.D.N.Y. Mar. 26, 2009); Gentry v. Jackson State Univ., 610 F. Supp. 2d 564 (S.D. Miss. 2009); Shockley v. Minner, Civil Action No. 06-478 JJF, 2009 WL 866792 (D. Del. Mar. 31, 2009); Bush v. Orange Cnty. Corr. Dep't, 597 F. Supp. 2d 1293 (M.D. Fla. 2009).

[24] *Gertskis*, 2009 WL 812263; *Gentry*, 610 F. Supp. 2d 564; *Shockley*, 2009 WL 866792; *Bush*, 597 F. Supp. 2d 1293.

[25] *See, e.g.*, *Gentry*, 610 F. Supp. 2d at 567 (allowing the FPA to apply to a pay discrimination case when the pay discrepancy was due to a failure to promote an employee to a tenured position); *Shockley*, 2009 WL 866792, at *1 (applying the FPA to a pay discrimination issue caused by the failure to promote a military employee to a higher ranked position); Greenleaf v. DTG Operations, Inc., No. 2:09-CV-192, 2011 WL 883022 (S.D. Ohio Mar. 11, 2011) (disallowing the application of the FPA in a failure to promote situation where a employee sought a unique managing promotion but allowing its application to an unrelated pay discrimination claim).

[26] Professor Charles Sullivan has used some tools of interpretation to analyze the FPA and concluded that the correct interpretation of the statute is one that provides for "radical implications." Charles A. Sullivan, *Raising the Dead? The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 500 (2010). Although Sullivan makes some similar arguments, this Comment differs from Sullivan's in that it uses a wider variety of statutory tools and reaches a narrower conclusion.

II. BACKGROUND

A. *The Lilly Ledbetter Controversy*

1. *Ledbetter v. Goodyear*

Lilly Ledbetter worked for Goodyear Tire & Rubber Co. in Alabama from 1979 until 1998.[27] In 1998, Ledbetter alleged sex discrimination and filed a formal charge with the Equal Employment Opportunities Commission ("EEOC").[28] Later that year, she took early retirement and commenced a claim for pay discrimination under Title VII, among other claims.[29] While Ledbetter worked at Goodyear, the company determined whether salaried employees were given or denied raises based on performance evaluations.[30] During her trial in district court, Ledbetter introduced evidence that while she was employed by Goodyear, her supervisors gave her poor evaluations because of her sex.[31] She argued that because of these evaluations, she did not obtain the raises she would have received if her evaluations were not tainted by discrimination.[32] As years went on and promotions accrued, the gap in pay between Ledbetter and her male colleagues grew significantly.[33]

In district court, the jury found for Ledbetter.[34] However, on appeal before the Eleventh Circuit, Goodyear argued that Ledbetter's claim was time-barred with respect to all decisions made 180 days before she filed with the EEOC.[35] The Eleventh Circuit reversed the district court's decision based on Goodyear's statute of limitations argument.[36] Ledbetter then filed a petition for a writ of certiorari to review "[w]hether . . . 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 limitation period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period."[37]

The Supreme Court granted her writ of certiorari, and Ledbetter argued that the Court should use a "'paycheck accrual rule,' under which each

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[27] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 621 (2007).

[28] *Id.*

[29] *Id.* at 622.

[30] *Id.* at 621.

[31] *Id.* at 622; *see* Brief for Plaintiff-Appellee, Ledbetter v. Goodyear, (No. 03-15264), 2004 WL 4072444 (C.A. 11), at *1 (explaining Ledbetter's allegation that she was given unfair evaluations because she was a woman working in a traditionally male job and that her scores were significantly lower than her male co-workers' scores although they were performing the same job in the same manner).

[32] *Ledbetter*, 550 U.S. at 622.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 623 (quoting Pet. For Cert. i.).

paycheck . . . triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck."[38] Ledbetter's argument was based on *Bazemore v. Friday*,[39] a Supreme Court case holding that when an employer adopts a facially discriminatory pay structure, he engages in intentional discrimination each time he issues a paycheck.[40]

The *Ledbetter* Court considered *National Railroad Passenger Corporation v. Morgan*,[41] a case in which it explained that an "employment practice" generally refers to a single, discrete act such as termination, failure to promote, or refusal to hire.[42] As a result, the Court held that a plaintiff can only file a charge concerning discrete acts that occurred within the statute of limitations period.[43] Justice Alito, writing for the majority, concluded that the EEOC statutory period begins when a discrete practice occurs and that a new violation does not occur each time a subsequent nondiscriminatory act occurs, even if that act may adversely affect a plaintiff.[44] Therefore, although Ledbetter's evaluations may have constituted discrete, discriminatory acts, the issuance of paychecks based on those acts did not restart the EEOC statute of limitations period.[45] For those reasons, the Court affirmed the judgment of the Eleventh Circuit.[46]

In her dissenting opinion, Justice Ginsburg noted that Ledbetter was a supervisor at Goodyear and for most of her employment, had worked in a "position largely occupied by men."[47] By the end of her time with Goodyear, Ledbetter was the only woman working as an area manager and Goodyear was paying her $3,727 per month, while paying her fifteen male counterparts (many with less seniority) between $4,286 and $5,236 per month.[48] Justice Ginsburg argued that pay discrimination claims are based on "the cumulative effects of individual acts"[49] and pay disparities are often hidden from employees' view, making

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[38] *Id.* at 633.

[39] 478 U.S. 385 (1986).

[40] *Id.* at 388 (Brennan, J., concurring in part) ("Each week's paycheck 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.").

[41] 536 U.S. 101 (2002).

[42] *Id.* at 102 (explaining that a "practice" is a discrete act even if it is connected to other, continuing acts).

[43] *Id.*

[44] *Ledbetter*, 550 U.S. at 628.

[45] *Id.*

[46] *Id.* at 642.

[47] *Id.* at 643 (Ginsburg, J., dissenting) (noting that Ledbetter worked for Goodyear from 1979 until 1998 and throughout the course of her employment, she went from being one of a few women to the only woman in her position).

[48] *Id.*

[49] *Id.* at 648.

them particularly difficult for potential plaintiffs to notice.[50] The dissent pointed out that precedent suggests that a payment based on discrimination constitutes an unlawful practice[51] and for that reason, the Court should have held that Ledbetter's claim was not time-barred.[52] Justice Ginsburg concluded by calling on the legislative branch to remedy the Court's bad decision, writing that "the ball is in Congress' court . . . [T]he Legislature may act to correct this Court's parsimonious reading of Title VII."[53]

2. The Call for Change

The Supreme Court's decision in *Ledbetter* gained attention from political groups, the public, the government, and the media.[54] Following her case, Lilly Ledbetter testified before Congress, authored an op-ed article in the *Christian Science Monitor*, and appeared on YouTube.[55] Next, other groups involved themselves in the issue. For example, the American Bar Association passed a resolution in support of the FPA at its annual convention.[56]

The legislature quickly responded to Justice Ginsburg's request. House Majority Leader Steny Hoyer, a Democrat from Maryland, and House Education and Labor Chairman George Miller, a Democrat from California, announced their intention to pass legislation that would prevent future plaintiffs from facing Ledbetter's fate.[57] After the House passed the FPA on July 31, 2007,[58] three Democratic presidential candidates signed on to the legislation.[59] Although Senate Republicans blocked the bill, widespread support created momentum for its eventual passage.[60]

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[50] *Id.* at 645.

[51] *Id.* at 646.

[52] *Id.* at 661.

[53] *Id.*

[54] Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASH. POST (Sept. 5, Politics, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090401900.html/09/04/AR2007090401900.html (outlining various reactions to the *Ledbetter* case).

[55] *Id.* (examining Ledbetter's rise to fame, beginning with her Op-Ed and videos filmed in her home by Normal Lear of People for the American Way).

[56] *Id.* (urging the House of Representatives to support legislation that would overrule the Court's decision).

[57] Jesse J. Holland, *House Dems Target Court's Pay Ruling,* USA TODAY (June 12, 2007, 4:45 PM), *available at* http://usatoday30.usatoday.com/news/washington/2007-06-12-2953732132_x.htm (explaining that "[a] key provision of the legislation will make it clear that discrimination occurs not just when the decision to discriminate is made, but also when someone becomes subject to that discriminatory decision, and when they are affected by that discriminatory decision, including each time they are issued a discriminatory paycheck.").

[58] This was just over two months after the Court's ruling. *See Ledbetter*, 550 U.S. at 621 (2007); Barnes, *supra* note 54.

[59] Barnes, *supra* note 54.

[60] Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES

3. The Passage of the Fair Pay Act

On its second attempt, the FPA passed in both the House and the Senate. It was signed into law on January 29, 2009 by President Barack Obama with Lilly Ledbetter at his side.[61] In reference to the passage of the FPA, Ledbetter proclaimed "[t]here will be a far richer reward if we secure fair pay . . . [f]or our children and grandchildren, so that no one will ever again experience the discrimination that I did."[62] The FPA was the first piece of legislation that President Obama signed in office, and it amended the Civil Rights Act of 1964, effectively nullifying the 2007 Supreme Court decision.[63] The text of the FPA reads as follows:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[64]

In practice, the FPA changes the way in which courts treat the statute of limitations in pay discrimination cases. Its effect is to reopen the window of time that exists between a discriminatory act and the last point at which a plaintiff can bring a claim by counting each paycheck issued as an occurrence of discrimination that can restart the statutory clock.[65] However, the FPA does limit plaintiffs' recovery by "expressly limiting back-pay recovery to no more than two years prior to the filing of the claim."[66] Additionally, the FPA has a retroactive effect,[67] meaning that it applies to all claims pending on or after

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(Apr. 4, 2008), *available at* http://www.nytimes.com/2008/04/24/washington/24cong.html?_r=2&sq=&oref=slogin (noting that by a vote of 56 to 42, the Senate fell four votes short of the number required to begin consideration of the FPA).

[61] *Obama Touts Equal-Pay Bill at Signing Ceremony*, NBC NEWS (Jan. 29, 2009, 8:08 PM), http://www.nbcnews.com/id/28910789/#.Uub0kBAo7IU. Obama included other prominent figures in the ceremony, such as former Speaker of the House Nancy Pelosi and former Secretary of State Hilary Clinton. *Id.*

[62] *Id.*

[63] *Id.* Additionally, the FPA amended the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Rehabilitation Act. Sullivan, *supra* note 26, at 523; Daniel A. Klein, Annotation, *Construction and Application of Lilly Ledbetter Fair Pay Act of 2009*, 58 A.L.R. FED. 2D 201 (2011).

[64] 42 U.S.C. § 2000e-5(e)(3)(A) (2012).

[65] Megan Coluccio, *Fait Accompli?: Where the Supreme Court and Equal Pay Meet A Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*, 34 SEATTLE U. L. REV. 235, 249 (2010).

[66] *Id.*

[67] *Id.* at 253.

May 28, 2007, the day before the Supreme Court decided *Ledbetter v. Goodyear*.[68]

B. *Federal Court Interpretations of the Fair Pay Act*

Since the passage of the FPA, courts have heard countless pay discrimination cases and made statute of limitations decisions based on their own readings of the FPA, particularly of the phrase "discriminatory compensation decision or other practice." Generally, each FPA case falls under a narrow or broad interpretation of the statute. A narrow reading of the statute would interpret "discriminatory compensation decision or other practice" as including only those decisions to assign compensation amounts. A broad reading would allow the FPA to reach other types of discrete decisions and practices, such as failures to promote, transfers, or demotions.[69] Discrete decisions also have important subcategories; this Comment distinguishes between sequential promotions, which involve progressing through the ranks, and merit-based promotions, which are more limited and coveted.[70] To clarify the applications of these interpretations, this Comment will review some key decisions on both sides of the debate.[71]

1. FPA Decisions in Which Courts Have Extended the Statute of Limitations

Cases in which courts have found that plaintiffs have properly pleaded the FPA can be roughly divided into two categories: (1) cases in which the FPA was interpreted broadly, thus allowing plaintiffs to recover based on decisions with an effect on compensation; and (2) cases in which plaintiffs prevailed when courts read the FPA narrowly, allowing only plaintiffs who were paid less than similarly situated employees to use the paycheck accrual rule.[72]

In a small number of cases, courts have construed the FPA broadly, allowing plaintiffs to bring claims within the statutory period following the receipt of paychecks when those paychecks were influenced by different discrete employ-

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[68] *President Obama Signs Lilly Ledbetter Fair Pay Act Letter No. 257*, OFCCP MANUAL NEWSLETTERS, OFCCP Fed. Cont. Compl. Man. (CCH) Feb. 27, 2009, 2009 WL 9089672.

[69] The broadest interpretation considers any type of discrimination that touches compensation reachable by the FPA. *See* Sullivan, *supra* note 26, at 527 (arguing that any employer practice that results in discrimination in compensation is actionable).

[70] An example of a sequential promotion might occur in the military, where soldiers are automatically promoted to higher ranks after set periods of years. These promotions might be delayed due to poor performance or behavior, but are typically obtained. *See generally* Department of Defense Instruction Number 1320.14, Dec. 11, 2013, http://www.dtic.mil/whs/directives/corres/pdf/132014p.pdf. A limited, merit-based promotion might occur in a law firm where one outstanding associate among hundreds is promoted to partner.

[71] Since many cases involve multiple claims, some cases outlined include decisions to allow pay discrimination claims to proceed under the FPA while other claims based on discrete acts are time-barred.

[72] *Id.*

ment decisions.[73] First, in *Gentry v. Jackson State University*,[74] a female professor sued her employer after she was denied tenure and a corresponding salary increase.[75] The university moved for summary judgment, arguing that the employee's claims were time-barred because she brought her claim two years after her employer failed to promote her.[76] The District Court for the Southern District of Mississippi ruled that "the denial of tenure, which plaintiff has contended negatively affected her compensation, qualifie[d] as a 'compensation decision' or 'other practice' affecting compensation within the recently-enacted Lilly Ledbetter Fair Pay Act of 2009."[77] Although denial of tenure was a discrete decision that the employee immediately noticed, the action affected her salary and was thus a compensation decision protected by the FPA.[78]

In *Gertskis v. New York City Department of Health and Mental Hygiene*,[79] a Jewish Ukrainian woman worked as an assistant chemist.[80] She sued her employer for failing to promote her to the position of Associate Chemist and argued that the decision was discriminatory.[81] She asserted that as a result of these failures to promote, she was undercompensated.[82] The District Court for the Southern District of New York held that her claims were not time-barred under the FPA because her employer's failure to promote her continued to affect the plaintiff until she began her leave of absence.[83]

Also, in *Shockley v. Minner*,[84] an employee alleged that he was not promoted to the rank of Sergeant because of his gender.[85] The Delaware District Court denied his employer's motion to dismiss, holding that the employee's claim was not time-barred based on the FPA.[86] There, although neither the employee nor the court mentioned the paycheck accrual rule, they agreed that the discovery rule and the doctrine of equitable tolling[87] extended the statute of limita-

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[73] *See infra* notes 74–110 and accompanying text (outlining the instances in which courts have used a broad interpretation of the FPA).

[74] 610 F. Supp. 2d 564 (S.D. Miss. 2009).

[75] *Id.* at 565.

[76] *Id.* at 566.

[77] *Id.*

[78] *Id.* at 567.

[79] 07 CIV. 2235 (TPG), 2009 WL 812263 (S.D.N.Y. 2009) aff'd sub nom. Gertskis v. NYC D.O.H.M.H.F. 375 App'x 138 (2d Cir. 2010).

[80] *Id.* at *1.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Shockley v. Minner, CIV. A. No. 06-478 JJF, 2009 WL 866792 (D. Del. Mar. 31, 2009).

[85] *Id.*

[86] *Id.* at *1.

[87] The discovery rule states that the statute of limitations does not begin to run until the plaintiff knew or should have known of an injury. *Definition of Discovery Rule*, FINDLAW .COM, http://dictionary.findlaw.com/definition/discovery-rule.html (last visited Jan. 24,

tions period date because of the FPA.[88]

Finally, in *Bush v. Orange County Correctional Department*,[89] a case decided the same year as the passage of the FPA, African American women contended that they were paid less than similarly situated Caucasian male employees based on a decision made sixteen years prior to the filing of their claim.[90] They asserted that sixteen years before their case, they were fooled into accepting demotions that came with pay reductions.[91] Although these employees did not prevail on the merits of their case, the District Court for the Middle District of Florida ruled that their claim was not time-barred as a result of the FPA and allowed the statute of limitations to begin running each time a new paycheck was issued to the plaintiffs.[92]

There have also been several instances in which courts have narrowly interpreted the FPA and made straightforward, pro-employee decisions. For example, the Court of Appeals for the Seventh Circuit applied the FPA in *Groesch v. City of Springfield, Illinois*.[93] There, police officers had voluntarily resigned and were rehired by the Springfield Police Department.[94] Appellants, Caucasian police officers, alleged that they were denied credit for their prior years of service to the department while African American officers in the same situation were granted credit.[95] Appellants relied on the paycheck accrual rule, and the court held that because each paycheck issued to appellants constituted a new act of discrimination, the FPA extended their pay discrimination suit's statute of limitations.[96]

In *Nelson v. Special Administrative Board of St. Louis Public Schools*,[97] an African American woman learned that a Caucasian co-worker with the same position and title was earning over $20,000 more each year than she was.[98] The plaintiff contended that this discrepancy was based on retaliation for filing a discrimination claim.[99] Based on the FPA, the District Court for the Eastern

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2015). The doctrine of equitable tolling is the principle that the statute of limitations should not bar a plaintiff's claim if the plaintiff did not or could not bring his claim within the statutory period despite the use of due diligence. *Definition of Equitable Tolling*, FINDLAW .COM, http://dictionary.findlaw.com/definition/equitable-tolling.html (last visited Jan. 24, 2015).

[88] *Shockley*, CIV.A 06-478 JJF, 2009 WL 866792 (D. Del. Mar. 31, 2009).

[89] 597 F. Supp. 2d 1293 (M.D. Fla. 2009).

[90] *Id.* at 1294, 1296.

[91] *Id.* at 1295.

[92] *Id.* at 1296.

[93] 635 F.3d 1020 (7th Cir. 2011).

[94] *Id.* at 1022.

[95] *Id.*

[96] *Id.* at 1026.

[97] 873 F. Supp. 2d 1104 (E.D. Mo. 2012).

[98] *Id.* at 1109.

[99] *Id.*

District of Missouri ruled that the plaintiff's claim was timely and that "for purposes of a retaliation claim under Title VII, an unlawful employment practice occur[ed] at the time of a discriminatory compensation decision as well as each time compensation [was] paid pursuant to that discriminatory decision."[100]

In the following two cases involving multiple claims, courts held that failure to promote claims were time-barred while pay discrimination claims were allowed to proceed under the FPA. The employees in these cases did not argue that they were paid less than they should have been *because* of a failure to promote; instead, they brought two separate claims alleging failures to promote and pay discrimination. First, in *Vuong v. New York Life Insurance Co.*,[101] a Chinese employee was denied a promotion to Managing Partner and was instead promoted to co-Managing Partner.[102] In that position, the plaintiff was compensated less than his co-Managing Partner.[103] The allocation decision, which plaintiff claimed was discriminatory, was made in February of 1998.[104] Subsequent compensation was based on that allocation decision.[105] The District Court for the Southern District of New York ruled that although plaintiff's initial failure to promote claims were barred, each paycheck restarted the tolling period for his compensation discrimination claim.[106]

In a similar case, *Grant v. Pathmark Stores, Inc.*,[107] the District Court for the Southern District of New York allowed an African American plaintiff, who claimed that he was given a smaller raise than others in his position, to bring a discriminatory pay claim after the statute of limitations period had expired following the raise decision.[108] The plaintiff was a part-time clerk and maintenance employee who wanted a full-time position, but during his years with Pathmark, the company was unable to promote any employees in the plaintiff's position to full-time work.[109] Although the court allowed the plaintiff to bring a discriminatory pay claim, the court did not allow the plaintiff to extend the filing deadline for his failure to promote claim under a continuing violation theory, holding that his failure to promote was a discrete act.[110]

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[100] *Id.* at 1116.

[101] 03 CIV. 1075(TPG), 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009) *aff'd sub nom.* Pheng Vuong v. New York Life Ins. Co., 360 F. App'x 218 (2d Cir. 2010).

[102] *Id.* at *3.

[103] *Id.*

[104] *Id.* at *9.

[105] *Id.*

[106] *Id.*

[107] No. 06-Civ-5755, 2009 WL 2263795 (S.D.N.Y. July 29, 2009).

[108] *Id.* at *2–4, 9.

[109] *Id.* at *2–3 (explaining that zero part-time maintenance workers were promoted to full-time positions and only one other employee was promoted from part-time to full-time during the entirety of plaintiff's employment).

[110] *Id.* at *7.

2. FPA Decisions in Which Courts Have Not Extended the Statute of Limitations

Procedural decisions concerning the FPA have overwhelmingly favored employers, as courts generally refuse to apply the FPA due to their narrow interpretations of the statute. The following three cases illustrate this trend. First, in *Barnabas v. Board of Trustees of University of the District of Columbia*,[111] a female professor brought a suit claiming age discrimination when her employer failed to promote her to a permanent teaching position.[112] In *Lipscomb v. Mabus*,[113] an African American man in the Navy sued his employer for multiple failures to promote him to a higher rank.[114] Finally, in *Noel v. the Boeing Co.*,[115] a Haitian man sued his employer because Caucasians were promoted in rank and pay more quickly than he was.[116] In all of these cases, courts refused to apply the FPA to extend the plaintiffs' claims when the basis of the claim was their failure to be promoted,.[117]

Similarly, the District Court for the Southern District of Texas did not apply the FPA in *Harris v. Auxilium Pharmaceuticals, Inc.*[118] There, a woman working as a Medical Sales Associate was denied a promotion within her company while employees with less experience and less impressive performance records were promoted.[119] The plaintiff asserted that younger male workers in her position received higher base salaries than she did and that the quotas assigned to her were unreasonable when compared to the quotas of her co-workers.[120] The court held that the "[FPA]'s wording does not indicate that it meant to extend the statute of limitations for claims based on 'discrete acts.'"[121] The court further reasoned that a failure to promote is a discrete act which an employee would notice and could quickly respond to with a suit. In contrast, compensation claims accrue slowly, so plaintiffs may not be made aware of them within

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[111] 686 F. Supp. 2d 95 (D.D.C. 2010).

[112] *Id.* at 98 (relying on the FPA to revive her late-filed discrimination claims in order to recover losses sustained as a result of not obtaining tenure).

[113] 699 F. Supp. 2d 171 (D.D.C. 2010).

[114] *Id.* at 173 (using the FPA as a tool to bring a claim for discriminatory compensation due to failing to receive a promotion to a higher rank).

[115] 622 F.3d 266 (3d Cir. 2010).

[116] *Id.* at 268 (attempting to recover wages that he would have received if he had been promoted).

[117] *Barnabas*, 686 F. Supp. 2d at 102; *Lipscomb*, 699 F. Supp. 2d at 174; *Noel*, 622 F.3d at 272.

[118] 664 F. Supp. 2d 711, 747 (S.D. Tex. 2009) *opinion vacated in part on reconsideration*, 407CV3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) *rev'd*, 473 F. App'x 400 (5th Cir. 2012).

[119] *Id.* at 720 (disclosing that plaintiff was ranked the fourteenth best Medical Sales Associate out of 125 associates, but was not promoted).

[120] *Id.* at 721.

[121] *Id.* at 747.

the statute of limitations period.[122] Although the court allowed the pay discrimination claim to proceed because it was not tied to the employee's unattained position, it held that the failure to promote was a discrete act that was not covered by the FPA because the plaintiff should have been aware of the action and filed a claim quickly.[123] The court found that the phrase "other practice" in the FPA should cover the types of actions identified by Ledbetter and outlined other types of acts that might be covered, such as assigning one sex higher base salaries, higher bonuses, and lower quotas.[124]

In *Zambrano-Lamhaouhi v. New York City Board of Education*,[125] a female assistant principal was demoted and her salary lowered after she gave birth to her child.[126] The District Court for the Eastern District of New York did not apply the FPA, finding that it "applies only to discriminatory employment decisions specifically related to pay, and not to other employment decisions, even where such decisions directly affect pay."[127] Similarly, in *Maze v. Towers Watson Am., LLC*,[128] a plaintiff alleged that she was put on an unreasonable performance improvement plan and eventually fired because of her age and the fact that she was a mother.[129] Additionally, some of her work was given to younger male colleagues, and she was denied promotions and advancement opportunities offered to her younger male colleagues.[130] The District Court for the Northern District of Illinois found that the plaintiff's "EEOC charge [did] not refer to a denial of raises," and her complaint mainly concerned discrete actions, so it was not affected by the FPA.[131]

The District Court for the Southern District of Ohio interpreted the FPA broadly but with limits in *Greenleaf v. DTG Operations, Inc.*[132] In that case, an African American man sued his employer, alleging retaliation and discrimination following his employer's failure to promote him to General Manager or Central Area Director.[133] The court failed to allow the plaintiff's claims under

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[122] *Id.*

[123] *Id.* at 747, 744.

[124] *Id.*; *see* 58 A.L.R. FED. 2D 201 (Originally published in 2011) (discussing Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 747 (S.D. Tex. 2009), *opinion vacated in part on reconsideration*, No. 407CV3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) *rev'd*, 473 F. App'x 400 (5th Cir. 2012) ("[A]ny of the discrete acts could somehow impact a plaintiff's wages and therefore be deemed a 'compensation decision;' the plaintiffs who are never hired, or who are terminated, likely suffer somewhat diminished compensation.").

[125] 866 F. Supp. 2d 147 (E.D.N.Y. 2011).

[126] *Id.* at 155–58.

[127] *Id.* at 167.

[128] No. 11 C 8120, 2012 WL 568683 (N.D. Ill. Feb. 21, 2012).

[129] *Id.* at *1.

[130] *Id.*

[131] *Id.* at *5.

[132] 2:09-CV-192, 2011 WL 883022 (S.D. Ohio Mar. 11, 2011).

[133] *Id.* at *9.

the FPA and observed that "[t]he reach of the Fair Pay Act extends to discriminatory employer practices that result in discrimination in compensation by affecting how an employer calculates wages."[134] The court observed that such practices included—but were not limited to—performance-based pay evaluations, business reassignments, and job classifications.[135] The court found that Congress did not intend to include isolated and discrete personnel actions such as promotions or terminations in the FPA, although some promotion and retaliation claims might be appropriately covered by an extension under the FPA.[136]

C. *Tools of Statutory Interpretation*

This Comment will employ tools of statutory interpretation to analyze the FPA. Courts generally apply the tools of statutory interpretation when the words of a statute are vague or ambiguous on their face.[137] This Comment groups these tools into two broad categories: textual arguments and legislative intent. However, these tools of interpretation do overlap a great deal and a complete interpretation requires a combination of both interpretive methods.[138]

1. Textual Arguments

Many tools of statutory interpretation require a close look at a statute's text, and therefore, this Comment will refer to them collectively as textual methods. One important theory of statutory interpretation is known as "textualism" and

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[134] *Id.* at *8.

[135] *Id.*

[136] *Id.* at *9; *see also* Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 372 (D.C. Cir. 2010) (holding that two employees who brought a claim against their employer for failing to promote them to partnership positions, a decision they alleged was due to their ages, was time-barred when approximately four or five of two dozen employees held partnership positions); Rowland v. Certainteed Corp., et al, No. 08-3671, 2009 WL 1444413, at *6 (E.D. Penn. May 21, 2009) (holding that, since the plaintiff's failure to promote claims were not ultimately related to compensation issues, their timeliness was unaffected by the FPA); Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 628 (10th Cir. 2012) (holding that a woman who sued her employer, UPS, for failing to promote her on the basis of alleged sex discrimination and retaliation, could not extend her filing deadline under the FPA because her "failure-to-promote claim [was] not a compensation-related claim"); Almond v. Unified Sch. Dist. No. 501, 665 F.3d 1174, 1183 (10th Cir. 2011) (holding that an employee who sued his employer when he was transferred to a lower-level position could not use the FPA because "the Ledbetter Act governs the accrual only of discrimination in compensation (unequal pay for equal work) claims . . . nothing more, nothing less").

[137] *See* Katharine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, THE WRITING CENTER, GEORGETOWN UNIVERSITY LAW CENTER, http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf (introducing statutory interpretation as a tool to discern the meaning of unclear statutes).

[138] *Id.*

focuses on words and phrases in a statute.[139] Textualism is derived from formalism, and like formalism, assumes that each statute has a determinable, objective meaning.[140] Because textualism focuses on the words themselves, it deemphasizes the importance of the reader in creating meaning for a text.[141] Textualists first employ the "plain meaning rule," which calls for no additional interpretation if the meaning of the statute is clear on its face.[142] If a statute is not immediately clear, textualists may use dictionaries to determine the meaning of ambiguous words or phrases in statutes.[143]

Additionally, there are other tools that courts utilize when attempting to interpret a statute based only on its text. The phrase *ejusdem generis*, which means "of the same kind, class, or nature," describes the process of determining the meaning of an ambiguous word when it exists in a group of words with clear meaning.[144] The doctrine of *ejusdem generis* is useful when analyzing a series of terms, as general words following more specific words are construed to include only concepts or things similar to the specific thing or concept named.[145] In applying this doctrine, judges use specific objects or things named in a statute to determine the other objects or things that should be included.[146] Another doctrine, *noscitur a sociis*, which means "it is known by its associates," similarly relies on other words in a statute to determine the meaning of an ambiguous word or phrase when those words are associated with each other.[147] *Noscitur a sociis* requires the use of contextual clues and is most useful in interpreting a word or term that is grouped with two or more other terms with similar meaning.[148] Additionally, the rule to avoid surplusage is based on the idea that each word in a statute is meaningful and a statute should be read so as not to render a word useless or redundant.[149] Under this rule, an

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[139] Clark & Connolly, *supra* note 137; William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 756 (3d. ed. 2001) (noting that textualists try to find objective readings of statutes).

[140] Clark & Connolly, *supra* note 137.

[141] Clark & Connolly, *supra* note 137.

[142] Eskridge, Frickey & Garrett *supra* note 139, at 670 (explaining that the plain meaning of a statute is what a reasonable person would understand it to mean).

[143] Eskridge, Frickey & Garrett *supra* note 139, at 756, 770. Dictionary usage in Supreme Court majority opinions doubled from the beginning of the Rehnquist era to its end, and is continuing to increase. Justices Scalia, Thomas, Breyer, Souter, and Alito have been the heaviest users of dictionaries in the recent past. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 489 (2013).

[144] Eskridge, Frickey & Garrett *supra* note 139, at 823.

[145] Eskridge, Frickey & Garrett *supra* note 139, at 823.

[146] Eskridge, Frickey & Garrett *supra* note 139, at 823.

[147] Eskridge, Frickey & Garrett *supra* note 139, at 823.

[148] Eskridge, Frickey & Garrett *supra* note 139, at 823.

[149] Eskridge, Frickey & Garrett *supra* note 139, at 833.

interpretation that renders a word or phrase unnecessary is assumed to be incorrect.[150]

2. Legislative Intent

Another doctrine of statutory interpretation, intentionalism, focuses on the meaning that the legislature intended to give a statute.[151] However, like textualism, intentionalism assumes that each statute has a correct, objective meaning.[152] In order to find that objective meaning, intentionalists attempt to put themselves in the positions of those who enacted the legislation while also considering the historical context in which the legislation was drafted.[153] Another common tool used to determine legislative intent is the legislative history of the statute, which may include committee reports, committee hearings, or floor debates.[154] Reading a statute for legislative intent can also include applying the doctrine of *noscitur a sociis* or another text-based tool, but requires reading the text of a statute while asking why the legislature organized words in one way or another.[155] The doctrine of purposivism has a similar goal and calls for interpreting a statute in light of the purpose for which the statute was enacted.[156] Purposivism differs from an analysis of legislative intent because it focuses more on historical context and public policy than specifically on the thoughts of the legislature that created and passed the statute.[157]

Although some doctrines of statutory interpretation do not look directly at legislative intent, they remain closely related to doctrines that do look directly at legislative intent in that they concern the role of a statute in fitting society's needs. For example, the substantive canon favors interpretation in light of fundamental values so that the statute does not violate society's view of fairness.[158]

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[150] *See* Clark & Connelly, *supra* note 137.

[151] Eskridge, Frickey & Garrett *supra* note 139, at 684 (noting that intentionalists assume that there is a purely objective reading of a statute).

[152] Clark & Connolly, *supra* note 137, at 16.

[153] Clark & Connolly, *supra* note 137, at 16.

[154] Clark & Connolly, *supra* note 137, at 16. There are two types of legislative history: evidence of specific intent in creating a statute, and evidence of the general intent of the legislature that could be used to extrapolate specific intent. Some intentionalists do not consider general intent in their analyses.

[155] Clark & Connolly, *supra* note 137, at 7.

[156] Clark & Connolly, *supra* note 137, at 17.

[157] *See* Clark & Connolly, *supra* note 137 (explaining the applications of intentionalism and purposivism).

[158] *See* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989) (explaining that public values include "legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community" and that they "appeal to conceptions of justice and the common good, not to the desires of just one person or group").

A final rule of interpretation with general applicability focuses on choosing an interpretation of a statute that avoids absurd results.[159]

III. ANALYSIS

An analysis of the FPA turns on the words "discriminatory compensation, decision, or other practice" as they appear in the full text. Jurisdictions are far from uniform in how they interpret and apply the FPA, although courts lean heavily in favor of a narrow interpretation and therefore, in favor of employers. The general trend among courts is to interpret the phrase "discriminatory compensation decision or other practice" to include only those decisions that create pay differentials when they are not based on other discrete acts.[160] However, this Comment argues that a correct reading of the FPA based on tools of statutory interpretation allows for the use of the paycheck accrual rule in calculating the statute of limitations period when some, but not all, discrete discriminatory decisions with an effect on compensation are made.

A. *Statutory Analysis*

1. Textual Arguments

A plain reading of the FPA leads to the conclusion that the statute should prolong the statute of limitations by utilizing the paycheck accrual rule when decisions to compensate employees in a discriminatory manner are made or when other practices with similar results take place.[161] The plain text suggests that "other practice" cannot mean "compensation decision" and must be something more because otherwise, the term "other practice" would be meaningless and would not have been included in the FPA.[162] However, the definition of the phrase "other practices" is still vague following an application of the plain meaning rule and therefore requires more analysis.[163]

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[159] EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 148 (2008).

[160] *See supra* Part II.B.

[161] *See generally* 42 U.S.C. §2000e-2(a)(1) (2012).

[162] Grossman and Brake, attorneys writing for Find Law, used the plain meaning rule to come to their conclusion that "the Act applies to decisions to set a discriminatory initial wage or issue a discriminatory raise, as well as to the later implementation of such decisions through paychecks . . . [and] [c]learly the Act's inclusion of the language 'or other practice' was intended to have some meaning. At a minimum, it should extend to practices covered in the Act beyond decisions that directly set an employee's salary . . . employment practices that cause an employee to receive lower compensation that she would have received but for the discriminatory practice." Joanna L. Grossman & Deborah L. Brake, *The Lilly Ledbetter Fair Pay Act of 2009: A Preliminary Report, Part Three*, FIND LAW, (Oct. 13, 2009), http://writ.news.findlaw.com/grossman/20091013.html.

[163] Charles Sullivan recommends a "causation only" interpretation of the FPA, arguing that "as long as [a practice] results in 'discrimination in compensation,' the statute on its face

The next step in textual analysis requires the use of a dictionary.[164] The word "discriminatory" means "unfairly treating a person or group differently from other people or groups of people."[165] According to one definition, "compensation" means "payment given for doing a job,"[166] while a "decision" is "a choice that [one] make[s] about something after thinking about it."[167] Taking these words together, a "discriminatory compensation decision" is a choice that an employer makes, after consideration, regarding what payment an employee should receive when that choice is based on unfair treatment because an individual is different than others.[168]

According to Merriam-Webster, the word "other" is "used to refer to all the members of a group except the person or thing that has already been mentioned."[169] A "practice" is "something that is done often or regularly; a repeated or customary action; actual performance or application."[170] If a "discriminatory compensation decision" is an unfair choice concerning payment, "[an]other practice" must refer to additional actions included in the same group of "discriminatory compensation decisions."[171] However, the narrow interpretation of the FPA does not proceed with this analysis. Specifically, courts that

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reaches any employer 'practice,' which is the word Title VII uses to describe any violation of its prohibitions. Thus, for example, a denial of promotion is actionable to the extent it results in lower compensation." Sullivan, *supra* note 26, at 527–28. He also notes that the FPA should reach practices that were not apparently discriminatory at the time that they took place or that were relatively insignificant when viewed individually. Sullivan, *supra* note 26, at 533.

[164] *See* Eskridge, Frickey & Garrett *supra* note 139, at 770 (explaining the role of dictionary use in textualist analysis).

[165] *Definition of Discriminatory*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/discriminatory (last visited Feb. 22, 2015). *See also Definition of Discriminatory*, AMERICAN HERITAGE DICTIONARY, http://ahdictionary.com/word/search.html?q=discrimination&submit.x=47&submit.y=7 (last visited Feb. 22, 2015) (defining discrimination as "[t]reatment or consideration based on class or category, such as race or gender, rather than individual merit").

[166] *Definition of Compensation*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/compensation (last visited Feb. 22, 2015).

[167] *Definition of Decision*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/decision (last visited Feb. 22, 2015).

[168] *See supra* text accompanying notes 165–167 (compiling definitions to define "discriminatory compensation decision").

[169] *Definition of Other*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/other (last visited Feb. 22, 2015). *See also Definition of Other*, AMERICAN HERITAGE DICTIONARY, http://ahdictionary.com/word/search.html?q=other&submit.x=47&submit.y=7 (last visited Feb. 22, 2015) (defining other as "different than those implied or specified" and not specifying the need for "those" to be members of one group).

[170] *Definition of Practice*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/practice (last visited Feb. 22, 2015).

[171] *See supra* Part II.B.

interpret the FPA narrowly only consider decisions regarding amounts of pay as "discriminatory compensation decisions" under the statute.[172] This is the narrowest possible reading, as it excludes all actions other than decisions regarding pay differentials and completely disregards the phrase "or other practice." According to the rule to avoid surplusage, a statute cannot be interpreted to render a word or phrase useless or redundant because each word in a statute is meaningful.[173] This narrow reading of the FPA renders "other practice" unnecessary, and therefore cannot be the statute's correct interpretation.[174]

Under a broader interpretation employing dictionary definitions, "other practice" includes any regular action other than a "discriminatory compensation decision" that fits within the group of activities in which "discriminatory compensation decisions" falls.[175] The broadest interpretation of this phrase might be that the group includes all practices that result in pay differentials based on impermissible discrimination.[176] Choices that affect pay might include, but are not limited to, promotions, demotions, transfers, dismissals, or failures to take those actions. Therefore, under the broadest interpretation, a "discriminatory compensation decision or other practice" is any discriminatory choice an employer makes that affects an employee's pay.[177] However, to avoid absurd results, this broad interpretation must be narrowed somewhat. Otherwise, if this broad interpretation were to be adopted, any employee could bring a claim for any decision he or she deems discriminatory at any point, so long as he or she is still receiving paychecks that would be different if the action could had not occurred. This interpretation would cause absurd results, as it could potentially invalidate Title VII's statute of limitations and flood courts with litigation.[178]

A more conservative interpretation of this phrasing results in a different conclusion concerning what is included in the group of activities in which "discriminatory compensation decisions" falls. Specifically, "compensation decision" reasonably includes decisions regarding salaries, bonuses, and other types of payments to employees.[179] What, therefore, is added by including the phrase "other practice?" If "other practice" is rendered meaningless by this interpreta-

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[172] *See generally supra* Part II.B (outlining federal court decisions and focusing on several narrow interpretations by various courts).

[173] Eskridge, Frickey & Garrett *supra* note 139, at 833.

[174] *See* Eskridge, Frickey & Garrett *supra* note 139, at 833; 42 U.S.C. §2000e-2(a)(1) (2012).

[175] *See supra* text accompanying notes 169–170 (defining "other practice").

[176] *See* Sullivan, *supra* note 26, at 527 (arguing that all discrete acts that affect pay should be covered by the FPA).

[177] *See supra* text accompanying notes 165–167 (defining the phrase "discriminatory compensation decision").

[178] *See generally* 155 CONG. REC. 1379 (2009) (statement of Sen. Arlen Specter) (warning of increased litigation and incorrect usage of the FPA if the term "other practice" is interpreted too broadly).

[179] Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 374 (D.C. Cir. 2010).

tion of the FPA, such interpretation cannot be correct pursuant to the rule against surplusage.[180]

Because the broadest and narrowest interpretations of "other practice" are not functional, there must be a compromise. "Other practice[s]" must include more than just compensation decisions but less than all practices affecting compensation.[181] A reasonable compromise might be the inclusion of failures to promote when the promotion is sequential but not when the promotion is limited and merit-based. Demotions and transfers would be analyzed on a case-by-case basis but guided by the logic governing sequential versus limited, merit-based promotions.

Remaining textual tools support this interpretation. *Ejusdem generis* applies because the *phrase* in question is ambiguous or unclear.[182] Using this doctrine, general words following specific words are construed to include only concepts or things similar to the specific thing or concept named.[183] If "discriminatory compensation decision" is a specific concept, "other practice" is the general phrase that must include concepts similar to "discriminatory compensation decisions." This analysis falls in line with textualist interpretations and reaches the same conclusion: "other practices" must be more than simply decisions of compensation amounts and must include some discrete acts but less than all discrete acts to avoid absurd results.[184]

The *noscitur a sociis* analysis utilizes other words in the statute to determine the meaning of the phrase in question.[185] A phrase at the end of the FPA, "including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice," is useful.[186] These words suggest that "other practice" must mean something more than just discriminatory compensation decisions, as the FPA explicitly distinguishes "decisions" and "practices" as acts that can affect wages, benefits, or other compensation.[187]

2. Legislative Intent

There is a great deal of legislative history for the FPA—mainly in the form of floor debates—that supports a reading of the FPA that includes more than

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[180] *See supra* notes 169–170.

[181] *See supra* notes 169–170.

[182] *See* Eskridge, Frickey & Garrett *supra* note 139, at 823.

[183] *See* Eskridge, Frickey & Garrett *supra* note 139, at 823.

[184] *See supra* text accompanying note 162.

[185] *See* Eskridge, Frickey & Garrett *supra* note 139, at 823.

[186] 42 U.S.C. § 2000e-5(e)(3)(A) (2012).

[187] An interpretation of the FPA that allows its application for all discriminatory employment practices would lead to absurd results because it would potentially invalidate Title VII's statute of limitations and flood courts with litigation. *See* Elhauge, *supra* note 159, at 148 (explaining that statutory interpretation requires interpreting a statute in a way that does not lead to absurd results).

simple compensation decisions.[188] Senate floor debates directly discuss the language "other practice" and the goal of securing justice for Ledbetter.[189] House floor debates also focus on Ledbetter and creating a statute that would prevent situations like Ledbetter's from occurring in the future.[190]

In the Senate floor debates, Senator Arlen Specter, then a Republican senator from Pennsylvania, proposed amendment no. 27 which "would strike the language of 'other practice'" from the FPA.[191] Specter's concern was that the language "other practice" might lead to confusion as to whether promotion, hiring, firing, training, tenure, demotion, reassignment, discipline, temporary reassignment, or transfer decisions would be covered.[192] Specter argued that "the [FPA] does not define the phrase ["other practice"] and thus could be interpreted to mean that an employee is excused from filing a timely challenge to any employment decision that ultimately affects compensation, not simply pay decisions."[193] Although he stated it might be proper for some of those other practices to be included under the FPA, "they ought to be specified so we do not have the vague and ambiguous term, 'other practices,' which would lead to tremendous litigation."[194] He concluded by requesting that the Senate be specific in their language.[195]

Senator Barbara Mikulski, a Democratic senator from Maryland, replied that Specter's amendment would defeat the legislation's purpose, which she argued was to overturn *Ledbetter v. Goodyear*.[196] She went on to state that if Specter's amendment were adopted, the FPA "would no longer cover situations like Ledbetter's, where a discriminatory difference in pay is tied to a practice (like job evaluations) that contributes to the employer's decision to set a worker's pay at a certain level."[197] According to Mikulski, the FPA should reflect the reality of work-place discrimination—namely, that job discrimination often occurs when salary determinations rely on other discriminatory actions.[198] "Unfair differ-

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[188] *See infra* text accompanying notes 191–209. Sullivan also relies on arguments centered on legislative intent. Sullivan, *supra* note 26 at 527–28. He notes the repeated references to Ledbetter's case and the fact that proponents of the FPA claimed that it would restore Title VII law to what it was before the Supreme Court's decision. Sullivan, *supra* note 26 at 527–28.

[189] *See infra* notes 191–204 (reviewing parts of Senate floor debates discussing the FPA's specific language and Ledbetter herself).

[190] *See infra* notes 207–209 and accompanying text (discussing House debates centered on correcting the Court's *Ledbetter* decision).

[191] 155 CONG. REC. 1379 (2009) (statement of Sen. Arlen Specter).

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] 155 CONG. REC. 1365 (2009) (statement of Sen. Barbara Mikulski).

[197] *Id.*

[198] *Id.*

ences in pay may be brought about not only b[y] discriminatory job evaluations, but also by discriminatory decisions to classify a job in particular way, or by discriminatory assignments to a particular location," and for that reason, the "other practice" language in the FPA is necessary.[199] Mikulski also warned that legislation without that phrase might create loopholes that would encourage employers to link pay setting decisions to other actions to avoid lawsuits.[200]

Ultimately, the Senate voted not to adopt Specter's amendment.[201] An obvious interpretation of the decision not to adopt an amendment to remove the phrase "other practice" from the FPA is that the wording in question is integral to the statute. Additionally, even Specter conceded that practices like promotions, hiring, firing, and other discrete acts might belong under the FPA's coverage.[202] Therefore, this Comment's interpretation is in line with even conservative legislative intent. The decision to include "other practice" may also imply agreement with Mikulski, who knew that compensation is often tied to a practice and must be covered.[203] Regardless, there was ample discussion concerning the phrase "other practice," and the Senate decided that the language belonged in the FPA after hearing arguments concerning its interpretation.[204]

As Mikulski noted in the Senate, justice for Lilly Ledbetter was a major motivating factor in the passage of the FPA.[205] House debates followed suit, with multiple members of Congress alluding to Ledbetter herself.[206] Representative John Dingell, a Democrat representing Michigan's 15th District in 2009, argued that passing the FPA was important because "[b]y restoring the law to as it was prior to the Supreme Court's ruling, we will ensure that women, such as Lilly Ledbetter, who are unknowingly discriminated against for years retain the legal right to challenge their employer and obtain compensation for the discrimination that they have endured."[207] Representative John Conyers of Michigan's 14th District similarly argued that "[t]he time has come for the Congress to reverse the wrongheaded and discriminatory Supreme Court case of *Ledbetter* . . . [otherwise] this case will . . . continue to undermine the validity of our Nation's gender discrimination laws."[208] Representative Rush Holt of

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[199] *Id.*

[200] *Id.*

[201] 155 CONG. REC. 1383 (2009) (reporting a vote of 55 yeas to 39 nays).

[202] 155 CONG. REC. 1379 (2009) (statement of Sen. Arlen Specter).

[203] *See* 155 CONG. REC. 1380 (2009) (statement of Sen. Barbara Mikulski).

[204] *See generally* 155 CONG. REC. 1363 (2009); *see also* Sullivan, *supra* note 26, at 532–33 (arguing that the rejection of Specter's amendment supports a causation-only reading of the statute).

[205] *See* 155 CONG. REC. 1385 (2009) (statement of Sen. Barbara Mikulski) (discussing correcting the Court's mistake in *Ledbetter*).

[206] *Id.*

[207] 155 CONG. REC. 441 (2009) (statement of Rep. John Dingell).

[208] *Id.* (statement of Rep. John Conyers).

New Jersey's 12th District argued that "Justice Alito's opinion runs contrary to decades of civil rights law, and the Lilly Ledbetter Fair [Pay] Act would restore the law as it was prior to the Court's ill-considered decision. This bill would make it clear . . . that the protections of Title VII . . . extend not only to these discriminatory pay decisions and practices but to every paycheck that results from those pay decisions and practices."[209]

The arguments concerning Lilly Ledbetter in both the Senate and the House are highly instructive: the legislature intended to right the wrong created by the Supreme Court. The fact that the legislature was so concerned with remedying Ledbetter's situation is very important because it leads to an essential conclusion that may be used as an analogy for analysis purposes: a poor performance evaluation must fall under the heading of "discriminatory compensation decision or other practice." According to an interpretation of the FPA that relies most on legislative intent, the FPA must cover situations like that of Ledbetter, and therefore, performance evaluations must be covered.[210] The narrower readings of the FPA that many courts have employed would not have covered Lilly Ledbetter's situation and therefore, cannot be correct.

Building off of a textualist reading of the FPA, a performance evaluation like Ledbetter's is not a "compensation decision" because a compensation decision is simply the choice to pay an employee a particular amount.[211] Therefore, a performance evaluation must be a type of "other practice."[212] Because a performance evaluation is covered by the FPA under the language "other practice," other decisions and acts of employers that are similar logically must fall under the protection of the FPA.

Performance evaluations in *Ledbetter* have three important characteristics that may be used as a test when determining which acts by employers are also "other practices": the majority of employees working for Goodyear were rou-

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[209] 155 CONG. REC. 444 (2009) (statement of Rep. Rush Holt). *See* 155 CONG. REC. 442 (2009) (statement of Rep. Jim Moran) (agreeing that "Ledbetter was a victim of a system gone awry"); 155 CONG. REC. 443 (2009) (statement of Rep. Anna Eshoo) (sharing in these sentiments about Ledbetter, saying that "[u]nder the Supreme Court's ruling, the Ledbetter decision allows employers to escape responsibility by keeping their discrimination hidden and running out the clock"); 155 CONG. REC. 443 (2009) (statement of Rep. Pete Stark) (arguing with increasing passion and calling the Court's ruling "absurd" and the current law "unfair"); 155 CONG. REC. 442 (2009) (statement of Rep. Raul Grijalva) (reiterating the point of the bill: "if an individual uncovers a sex based discriminatory act related to compensation that has been going on for years, like Ms. Ledbetter, that individual can seek redress.").

[210] *See generally* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (finding that the discriminatory act that affected Ledbetter's salary was a performance evaluation); 42 U.S.C. § 2000e-5(e)(3)(A)(2012).

[211] *See supra* notes 166–167 (defining "compensation decision").

[212] *See supra* notes 163–170 and accompanying text (arriving at the conclusion that an evaluation is not a type of "compensation decision").

tinely evaluated, employees were aware of their evaluations, and these evaluations affected their pay.[213] First, Goodyear's evaluations were a tool regularly used to examine employee performance, and all employees were subject to evaluations that were part of the overall promotion process (commonality prong).[214] Second, because Ledbetter was aware of the performance evaluations as they were written, other employees were likely aware of the evaluations as well (awareness prong).[215] Therefore, evaluations were actions that employees would have noticed and could have acted upon immediately. Third, these performance evaluations were linked to salary, insofar as the evaluations served as an employer's guide for determining promotions and raises (linking prong).[216] These factors can be used when analyzing whether discrete acts should fall under the FPA.

The first prong in the test adopted from *Ledbetter* is commonality.[217] When analyzing promotion decisions, this prong is especially useful. This prong implies that acts affecting most employees should be covered by the FPA.[218] This means that sequential promotions should be covered because most—if not all—employees in the sequential promotion system are subject to decisions about promotions and can expect to move within an employer's ranks eventually.[219] In limited, merit-based promotion decisions, very few employees are considered for a limited number of positions and therefore, these promotions do not meet the commonality requirement.[220]

The awareness prong asks whether an employee's awareness of evaluations

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[213] *See Ledbetter*, 550 U.S. at 623 (noting the link between performance evaluations and pay increases); *see generally* Brief for Plaintiff-Appellee at *15, 41, *Ledbetter v. Goodyear*, No. 03-15264-GG, 2004 WL 4072444 (C.A. 11) (explaining the purpose and process of performance evaluations at Goodyear).

[214] *See Ledbetter*, 550 U.S. at 623 (noting the link between performance evaluations and pay increases); *see generally* Brief for Plaintiff-Appellee at *15, 41, *Ledbetter v. Goodyear*, No. 03-15264-GG, 2004 WL 4072444 (C.A. 11) (explaining the purpose and process of performance evaluations at Goodyear).

[215] *See* Brief for Plaintiff-Appellee, *supra* note 214, at *41 (explaining that the purpose of performance evaluations was to let employees understand their performance so therefore, they must see the evaluations as they are written).

[216] *See Ledbetter*, 550 U.S. at 623 (mentioning that Goodyear used performance evaluations when determining pay decisions).

[217] *See* Brief for Plaintiff-Appellee at *17, 41 (outlining performance evaluation usage for Goodyear employees).

[218] *See generally supra* notes 210–221; *See generally supra* notes 209–217 and accompanying text (explaining the utility of analogizing Ledbetter's situation to establish similar acts which the FPA should cover).

[219] *See generally* Dep't of Instruction No. 1320.14 (Dec. 11, 2013), http://www.dtic.mil/whs/directives/corres/pdf/132014p.pdf (providing an example of a sequential promotion in which soldiers are automatically considered for promotions to higher ranks).

[220] Again, a law firm's system for choosing partners is an example of a situation in which it is not typical for an employee to gain a promotion.

resulted in awareness of discriminations in pay. If an employee's knowledge of the use of evaluations does not give rise to knowledge of pay discrimination, any pay discrimination claim based on the use of evaluations would not be time barred.[221] In contrast, pay differentials connected directly to discriminatory employer decisions likely will be noticed by employees, allowing them to bring discrimination claims immediately. Finally, the linking prong requires that an employer's decision effect the employee's pay, as only pay discrimination suits fall under the FPA. Using this analysis, the same discrete acts classified as "discriminatory compensation decision[s] or other practice[s]" by a textualist interpretation are valid.

Another tool of interpretation is the doctrine of purposivism, which requires looking at the purpose for which a statute was enacted.[222] The FPA was enacted in direct response to Justice Ginsburg's dissent in *Ledbetter v. Goodyear* and the outcry following that decision.[223] Purposivism requires an analysis that reiterates the arguments set forth in the analysis of Congress' intent to right the wrong that Ledbetter faced.[224] Again, if the purpose of the FPA was to create relief for plaintiffs like Ledbetter, then a narrow interpretation of the FPA cannot be correct.[225]

Applying the substantive canon and interpreting the FPA in light of fundamental societal values, narrow, broad, and intermediate interpretations can be justified on policy grounds. However, an intermediate interpretation is most justified, as the broadest interpretation goes too far and the narrowest interpretation creates dangerous loopholes in protection.

A hypothetical may be useful here: Suppose a sexist employer does not want women in his organization to earn as much as men. The employer wishes to pay a male employee more than a female employee, although both the male and female employee do substantially similar work, receive similar performance evaluations, and currently have the same job title. Assume that this hypothetical employer conducts business in a jurisdiction in which courts adopt a narrow interpretation of the FPA and is aware of courts' tendencies to interpret the FPA narrowly by only allowing pay discrimination decisions to proceed under the FPA when a "discriminatory compensation decision or other practice" is simply the decision of an amount of compensation, not motivated by a discrete

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[221] Discrete decisions that employees are not aware of generally are actionable. *See supra* Part II.B.1 (explaining cases in which employees were allowed to use the FPA to extend claims, typically wage differentials, following employment decisions of which they were not previously aware).

[222] *See* Clark & Connolly, *supra* note 137.

[223] *See, e.g.*, 155 CONG. REC. 1363 (2009) (statement of Sen. Barbara Mikulski) (asserting, as many other members of Congress have, that the FPA was a response to *Ledbetter*).

[224] *See supra* text accompanying note 209 (explaining that Ledbetter's situation must be covered by the FPA and situations that are analogous to Ledbetter's should also fall under the FPA's coverage).

[225] *See supra* text accompanying note 209.

action. In Situation A, the employer may take advantage of a loophole by giving the favored male employee a "promotion" by adding the word "Senior" before his current title and linking a 10% pay increase to his "promotion." In Situation B, the employer does not change the male employee's title, but simply says "I prefer male employees over women, so I will pay them 10% more." In Situation A, the female employee must pursue a pay discrimination claim based on failure to promote instead of a simple pay discrimination claim—thus, she cannot use the FPA to seek justice. An action like this could easily go unnoticed, and if the female employee becomes aware of her employer's action after 180 or 300 days, she has no cause of action for pay discrimination. In effect, Situation A is identical to Situation B, which will be covered by even the narrowest interpretation of the FPA because it is a clear "discriminatory compensation decision." Therefore, a narrow interpretation of the FPA is dangerous because it may lead to the utilization of loopholes so that similar plaintiffs do not see the same results in court.

B. *The Narrowness of Actual Federal Court Interpretations*

Statutory interpretation suggests that the FPA should apply in more than the narrow circumstances in which an employer chooses to pay an employee less than other similarly situated employees, but should not apply broadly in every case in which discrimination reaches compensation.[226] However, this is often not the interpretation that courts have used, as courts have frequently adopted either overly narrow or overly broad statutory interpretations.[227]

It appears that all federal courts but four have interpreted the FPA narrowly, denying plaintiffs' claims for extensions of their statutes of limitations when they were based on discriminatory decisions.[228] In only four cases has a broad interpretation of the FPA been applied.[229] These decisions are similar in their holdings and also for the fact that they were all decided in the same year as the passage of the FPA.[230] In other decisions favorable to employees, courts only allowed victims of discrimination to bring their claims under the FPA when those claims resulted from employers' decisions to create pay differential be-

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[226] *See supra* Part III.A (concluding that the correct interpretation of the FPA is an intermediate between the broadest and narrowest interpretations currently in use).

[227] *See supra* Part II.B (outlining various federal court interpretations of the FPA).

[228] *See supra* Part II.B (discussing very broad FPA interpretations).

[229] Gertskis v. N.Y.C. Dep't of Health and Mental Hygiene, 07 CIV. 2235 (TPG), 2009 WL 812263, at *4 (S.D.N.Y. 2009) *aff'd sub nom.* Gertskis v. NYC D.O.H.M.H. F. App'x 138 (2d Cir. 2010); Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 568 (S.D. Miss. 2009); Shockley v. Minner CIV.A 06-478 JJF, 2009 WL 866792, at *1 (D. Del. Mar. 31, 2009); Bush v. Orange Cnty. Corr. Dep't, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009).

[230] *See Gertskis*, 2009 WL 812263; *Gentry*, 610 F. Supp. 2d 564; *Shockley*, 2009 WL 866792; *Bush*, 597 F. Supp. 2d at 1293.

tween different employees for discriminatory reasons.[231] In these instances, "discriminatory compensation decision or other practice" was held to mean a situation in which an employer decided, simply on discriminatory bases, that one employee should be paid less than another.[232] All pro-employer interpretations fell in line with these narrow, pro-plaintiff decisions.[233]

Many of these decisions are consistent with the canons of statutory interpretation. In the most straightforward pay differential cases where other discriminatory actions were not considered, courts always applied the FPA in a manner consistent with textualism and legislative intent.[234] These cases were relatively basic and were decided in the same manner regardless of whether courts utilized a broad or narrow interpretation of the statute.

More complicated cases have seen mixed results. In favorable cases for employees, such as *Gentry v. Jackson State University* and *Shockley v. Minner,* some employees were allowed to use the FPA when the discriminatory decision affecting their compensation was a sequential promotion, which falls in line with the reading of the FPA consistent with statutory interpretation.[235] However, some courts erred in cases involving sequential promotions, such as *Barnabas v. Board of Trustees of University of DC* and *Lipscomb v. Mabus*, by refusing to extend statutes of limitations using the FPA.[236] In failure to promote cases involving limited, merit-based promotions, only one court in *Gertskis v. New York City Dept. of Health and Mental Hygiene* mistakenly applied the FPA.[237] In another, *Greenleaf v. DTG Operations, Inc.,* these claims were held to be time-barred—a choice consistent with the canons of interpretation.[238]

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[231] *See supra* Part II.B.1 (discussing cases in which courts have made pro-plaintiff rulings when only simple pay differentials were in question).

[232] *See supra* Part II.B.1.

[233] *See supra* Part II.B.2.

[234] *See* Vuong v. N.Y. Life Ins. Co., No. 03CIV.1075 (TPG), 2009 WL 306391, at *9 (S.D.N.Y. Feb. 6, 2009), *aff'd sub nom.* Pheng Vuong v. N.Y. Life Ins. Co., 360 F. App'x 218 (2d Cir. 2010); Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 745–746 (S.D. Tex. 2009), *opinion vacated in part on reconsideration*, No. 407CV3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010), *rev'd,* 473 F. App'x 400 (5th Cir. 2012); Grant v. Pathmark Stores, No. 06–Civ–5755, 2009 WL 2263795, at *9 (S.D.N.Y. July 29, 2009); Nelson v. Special Admin. Bd. of St. Louis Pub. Schs., 873 F. Supp. 2d 1104, 1116 (E.D. Mo. 2012).

[235] Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 566–568 (S.D. Miss. 2009); Shockley v. Minner, CIV.A 06-478 JJF, 2009 WL 866792, at *1 (D. Del. Mar. 31, 2009).

[236] *Barnabas*, 686 F. Supp. 2d 95, 102 (D.D.C. 2010); *Lipscomb*, 699 F. Supp. 2d 171, 174 (D.D.C. 2010).

[237] Gertskis v. N.Y. City Dep't of Health and Mental Hygiene, 07 CIV. 2235 (TPG), 2009 WL 812263 (S.D.N.Y. 2009) *aff'd sub nom.* Gertskis v. NYC D.O.H.M.H. F. App'x 138 (2d Cir. 2010).

[238] Greenleaf v. DTG Operations, Inc., No., 2:09-CV-192, 2011, 2011 WL 883022, at *9 (S.D. Ohio Mar. 11, 2011).

C. *Why Have Courts Interpreted the FPA so Narrowly?*

1. The Argument for Noticing Discrete Acts

Narrow interpreters argue that the extension of the statute of limitations under the FPA is only necessary when employees are unaware of discrimination.[239] According to this argument, decisions that would affect pay and that an employee would easily recognize do not deserve coverage because an employee would have no excuse to fail to file a claim within the normal statute of limitations period.[240] However, this argument is incorrect because under such an interpretation, Ledbetter would have been unable to bring her claim under the FPA.[241] While it is true that Ledbetter was unaware of her pay differential, she was aware of her negative evaluations, which are classifiable as "discriminatory compensation decision[s] or other practice[s]."[242]

Additionally, many individuals who support a narrow reading of the FPA argue about the difference between discrete acts and continuing violations.[243] Some argue that generally, discrete acts should be noticed and acted upon, while "other practices" should include violations that accrue slowly and acts such as assigning one sex higher base salaries, higher bonuses and lower quotas.[244] However, under this interpretation of the FPA, the phrase "other practice" is rendered superfluous. A choice such as assigning higher salaries or bonuses to one gender *is* a straightforward "compensation decision." Therefore, it need not qualify under the "other practice" language. Perhaps assigning a lower quota to one worker would be "[an]other practice" under a textualist interpretation of the FPA, but this action would fall in line with some promotions or transfers.[245] If assigning a lower quota is grounds for an FPA exten-

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[239] *See* 155 CONG. REC. 1379 (2009) (statement of Sen. Arlen Specter) ("We want employees to challenge those decisions when they are aware of the unfair decision."); Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 747 (S.D. Tex. 2009) *opinion vacated in part on reconsideration*, 407CV3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) *rev'd*, 473 F. App'x 400 (5th Cir. 2012) (finding that a plaintiff could and should have brought her claim within the regular filing period because it was based on a discrete act that she knew about).

[240] *See* 155 CONG. REC. 1363 (2009); *Harris*, 664 F. Supp. 2d at 747.

[241] *See* Brief for Plaintiff-Appellee, *Ledbetter*, 2004 WL 4072444 at *41 (explaining that the purpose of performance evaluations was to let employees understand their performance so therefore, they must see the evaluations as they are written); *Ledbetter*, 550 U.S. at 622 (noting that Ledbetter was not aware of the pay differentials themselves until after her employment with Goodyear ended).

[242] *See* Brief for Plaintiff-Appellee, 2004 WL 4072444 at *41; *Ledbetter*, 550 U.S. at 622.

[243] *See* Daniel A. Klein, Annotation, *Construction and Application of Lilly Ledbetter Fair Pay Act of 2009*, 58 A.L.R. FED. 2D 201 (2011) (discussing Harris v. Auxilium Pharm., Inc., 664 F. Supp. 2d 711, 747 (S.D. Tex. 2009) *opinion vacated in part on reconsideration*) (discussing the *Harris* court's finding that the FPA was not intended to cover discrete acts).

[244] *Harris*, 664 F. Supp. 2d at 747.

[245] In Schuler v. PricewaterhouseCoopers, LLP, the court wrote that an example of "other

sion, then some other acts with effects on pay are as well.

2. The Need to Protect Businesses by Decreasing Litigation

Many critics favor a narrow interpretation of the FPA because they value minimizing litigation and protecting businesses from lawsuits filed after the typical statute of limitations period. They would argue that the FPA should not extend the statutory period for filing claims except for in situations in which employers decided on a dollar amount for one employee which was less than the amount given to similarly situated employees in a way that an employee victim would be unable to recognize.[246]

Before the passage of the FPA, many conservatives worried that the statute would increase litigation.[247] Although their arguments pertain to the FPA generally, they are mirrored by individuals who favor a narrow interpretation of the FPA. Before the passage of the FPA, Jason Straczewski, director of employment and labor policy for the National Association of Manufacturers, said that "th[e] legislation would open the door to lawsuits that employers cannot defend."[248] The Washington Post also reported that "Republicans and business advocates warned that [the FPA] could make business executives liable for actions taken by managers who had left a company long ago."[249] Rep. Howard P. McKeon of California, the top Republican on the Education and Labor Committee at the time, warned that the FPA "conceivably could allow a retiring employee to seek damages against a company now led by executives who had nothing to do with the initial act of discrimination."[250] Neal D. Mollen, who served as the lawyer for the U.S. Chamber of Commerce and the National Federation of Independent Businesses in the *Ledbetter* case, worried that if this litigation took place, parties would have to "rely on documents and the memory of individuals, and neither of those is permanent. If a disappointed employee can wait for many years before raising a claim of discrimination . . . he or she can wait out the employer" and prevent the employer from offering a meaning-

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practice" is giving an employee a poor performance evaluation based on discriminatory motives and using that evaluation to determine pay. 595 F.3d 370, 376 (D.C. Cir. 2010). The court argued that this ruling prevents the "other practice" language from being superfluous. Klein, *supra* note 243, at 16 (discussing Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370 (D.C. Cir. 2010). While a performance evaluation must be a type of "other practice," by analogy, some other discrete actions must be "other practice[s]" as well. *See supra* text accompanying notes 169–170 (defining "other practice").

[246] *See infra* notes 247–251 (explaining the reasoning some interpreters of the FPA use to justify a narrow interpretation based on business grounds).

[247] Barnes, *supra* note 54; Holland, *supra* note 57 (discussing fears that the FPA would hurt businesses).

[248] Barnes, *supra* note 54.

[249] Barnes, *supra* note 54.

[250] Holland, *supra* note 57.

ful defense.[251]

However, the FPA specifically created a two-year limit on back pay to prevent employees from waiting for damages to accrue and to keep employers from paying unreasonably high damages.[252] Finally, none of these arguments are more powerful than the argument that victims deserve their day in court.[253] A short filing deadline would prevent justice, which runs counter to the goals of America's court system.[254]

IV. CONCLUSION

The Lilly Ledbetter Fair Pay Act was enacted in order to prevent situations like Ledbetter's from reoccurring.[255] However, the FPA has been applied very differently by different courts. Based on an interpretation of the statute itself focusing on textual clues, legislative intent, and other methodologies, it is clear that both the narrowest and broadest interpretations of the FPA are incorrect. The FPA is meant to apply to situations other than simple, straightforward wage differential cases, but cannot apply in all situations involving discrete acts with effects on pay. One method of limiting the FPA would involve separating promotions into sequential promotions, which are actionable under the FPA when they affect pay, and limited-merit based promotions, which should not be actionable under the FPA. Courts can analogize other acts to these promotion types. Additionally, a comparison to performance evaluations from *Ledbetter*, analyzing commonality and a link to pay but noting that employee awareness of an act is not fatal, provides guidance. This interpretation of the FPA adequately balances the needs of employees and employers; employees can turn to the courts after their employers have discriminated against them without fearing that employers are utilizing loopholes to obstruct justice, and employers need not fear a flood of litigation flowing from discrete past events. Moving forward, courts should allow for a broader interpretation of the FPA, as was intended, to protect more plaintiffs from discrimination in the workplace.

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[251] Holland, *supra* note 57.

[252] Coluccio, *supra* note 65, at 249 (explaining the FPA's back pay provision and its dual purpose of protecting employers from enormous settlements and allowing plaintiffs to recover what they deserve).

[253] *See generally Access to Courts*, 122 HARV. L. REV. 1151 (2009) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .") (citing Chambers v. Baltimore & Ohio R.R., Co., 207 U.S. 142, 148 (1907)).

[254] *Id.*

[255] *See* 155 CONG. REC. 1363 (2009) (statement of Sen. Barbara Mikulski) (discussing correcting the Court's mistake in *Ledbetter*).