

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LILLY M. LEDBETTER, :

4 Petitioner :

5 v. : No. 05-1074

6 THE GOODYEAR TIRE & :

7 RUBBER COMPANY, INC. :

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9 Washington, D.C.

10 Monday, November 27, 2006

11

12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the United
14 States at 11:03 a.m.

15 APPEARANCES:

16 KEVIN K. RUSSELL, ESQ., Washington, D.C.; on behalf
17 of the Petitioner.

18 GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of
19 the Respondent.

20 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington,
22 D.C.; as amicus curiae on behalf of the
23 Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Ledbetter versus Goodyear Tire & Rubber Company.

Mr. Russell.

ORAL ARGUMENT OF KEVIN K. RUSSELL,
ON BEHALF OF PETITIONER

MR. RUSSELL: Mr. Chief Justice, and may it please the Court.

A jury found that at the time petitioner filed for charge of discrimination with the EEOC, respondent was paying her less for each week's work than it paid similarly situated male employees and that it did so because of her sex. The question for the Court is whether that present act of disparate treatment because of sex constituted a present violation of Title VII. This Court has already answered that question.

Consistent with the law's traditional treatment of pay as arising from recurring transactions and giving rise to recurring causes of action, and consistent with the paycheck accrual rule everyone agrees Congress adopted for the Equal Pay Act, this Court in Bazemore versus Friday held under

1 Title VII, each week's paycheck that offers less to
2 an employee because of her race or sex --

3 JUSTICE KENNEDY: But are you saying that
4 the rule for paycheck decisions is different than the
5 rule for other sorts of decisions?

6 MR. RUSSELL: It -- it is. For example,
7 the respondents give the example of promotion
8 decisions but we think that there are analytical and
9 well as practical and historical distinctions that
10 Congress, that led Congress to treat pay differently.
11 As a practical matter, while it's always the case or
12 almost always the case that somebody knows they have
13 been subject to disparate treatment in a promotion
14 case -- they know that they didn't get the promotion
15 and somebody else did -- -it is frequently possible
16 for an employee to be subject to disparate pay
17 without ever knowing that she has been treated
18 differently than anybody else. And certainly --

19 JUSTICE KENNEDY: That seems to me to work
20 the other way around, just like the case we've just
21 heard argued in the last hour. It's a question of
22 specificity here. If the, if the employee, he
23 alleges that promotions were based on experience and
24 the employee didn't have the experience because of
25 past discrimination, why is that different than the

1 paycheck rule? I take it indicates that you would
2 not allow the, a cause of action unless the
3 discrimination was within the statute of limitations
4 period?

5 MR. RUSSELL: Yes. Yes. A promotion --
6 discrimination in promotion is different analytically
7 than with discrimination with respect to pay
8 decisions themselves. Because in a promotion
9 decision the employee is deprived of the opportunity
10 to take on added responsibilities and therefore earn
11 more pay, but in, but the pay itself is not
12 discriminatory in the sense of treating people doing
13 the same work differently.

14 JUSTICE SCALIA: I don't really see a vast
15 difference between a promotion and being elevated to
16 a higher pay grade. I mean, there may be no
17 different responsibilities but it's a single act of
18 discrimination: "No, you're not going to move up to
19 the next pay level." I don't see why that's
20 different from "no, you're not going to move up to
21 the next job."

22 MR. RUSSELL: Because, I think the
23 difference is that when somebody is denied a
24 promotion for discriminatory reasons the paychecks
25 themselves are not discriminatory. They treat

1 similarly situated workers differently.

2 JUSTICE GINSBURG: Mr. Russell, I thought
3 that your argument was that yes, you know that you
4 haven't got the promotion, you know you haven't got
5 the transfer, but the spread in the pay is an
6 incremental thing. You may think the first year you
7 didn't get a raise, "well, so be it." But you have,
8 you have no reason to think that there is going to be
9 this inequality. I mean she started out getting the
10 same pay, right?

11 MR. RUSSELL: Yes, and that practical
12 distinction I think does support Congress's decision
13 under the Equal Pay Act as well as under Title VII to
14 choose a paycheck accrual rule because it's
15 frequently that even if an employee knows she has
16 been subject to disparate pay, it's frequently very
17 difficult for her to have a good faith belief that
18 that pay is intentionally discriminatory without more
19 information.

20 So for example, if you look at that chart
21 on page 174 of the joint appendix, which summarizes
22 the pay decisions for one of the years at issue here,
23 if petitioner knew only the pay raise that she got
24 that year, she would know that she got a 5.28 percent
25 raise which is not - which is not suspicious. If she

1 knew what Mr. Conte had gotten, she would know that
2 in fact that pay raise decision decreased the
3 disparity between her pay and Mr. Conte's pay. If
4 she knew what also happened with respect to Mr. Bice
5 she would see he got a higher absolute raise than he
6 did, but she got a bigger one than Todd. It's only
7 if petitioner had all of the information in this
8 chart, that she would know that that pay raise
9 decision increased the overall disparity between her
10 wages and the average wages of men doing the same
11 job. And even then the amount of that disparity,
12 standing alone wouldn't provide a sufficient reason
13 to go claim intentional discrimination to the EEOC.

14 JUSTICE SCALIA: How does, how does time
15 solve that difficulty?

16 MR. RUSSELL: It's only after -- one would
17 expect in a merit system that there would be some
18 level of variation in the area and that would work
19 out over time. It's only when it doesn't, when the
20 disparity persists, when the different treatment
21 accrues again and again and the overall disparity in
22 the wages increases, that the employee has some
23 reasonable basis to think that it's not natural
24 variation in the pay decisions but actually
25 intentional discrimination.

1 In the paycheck accrual rule that's been
2 applied by the lower courts for more than 20 years
3 without incident, adequately balances the interest of
4 employees and being able to come forward once they
5 find out that there is a reason to suspect
6 discrimination, with an employer's reasonable
7 interest in avoiding having to defend stale claims.

8 I think it's important to note that the
9 Equal Pay Act, which everybody agrees has a paycheck
10 accrual rule, imposes all of the same burdens on
11 employers that respondents allege would have led
12 Congress to never impose a paycheck accrual under
13 Title VII.

14 JUSTICE GINSBURG: What happened to the
15 Equal Pay Act claim? You started out with a Title
16 VII claim and an equal pay claim and somewhere along
17 the way the equal pay claim dropped out.

18 MR. RUSSELL: It did. The magistrate
19 judge initially recommended dismissing both the Title
20 VII and equal pay claims on the grounds that there
21 was a nondiscriminatory reason for the disparity.
22 The District Courts held that there were fact
23 disputes that precluded that conclusion, but for some
24 reason only reinstated the Title VII claim.

25 JUSTICE GINSBURG: Why didn't you ask for

1 the equal pay claim? As I understand the magistrate
2 judge he said, yes, you had made it across the first
3 hurdle, you had a prima facie case. You showed that
4 you're a woman, and you're getting this and all the
5 men are getting much higher. But the employer has
6 come forward with any other factor other than sex and
7 the other factor is that, your inadequate
8 performance.

9 MR. RUSSELL: We should have objected to
10 the failure to reinstate the Equal Pay Act claim. We
11 didn't; we didn't think it was that important and the
12 time because we still had the Title VII claim.

13 JUSTICE GINSBURG: Because in the Title
14 VII case assuming you're right, that you get across
15 the same threshold, you're faced with the same
16 defense. Right?

17 MR. RUSSELL: Yes. It's essentially the
18 same case kind of case in each instance. Although
19 the jury has to find intentional discrimination in
20 the Title VII case; under the Equal Pay Act the jury
21 has to determine whether the employer has shown that
22 the present disparity is the result of some factor
23 other than sex. And so in both cases, the jury
24 always has to consider the basis of prior decisions
25 that are the cause of the present disparity.

1 JUSTICE ALITO: Do you have to show that
2 at the time when a particular paycheck in question is
3 issued, there was an intent to discriminate?

4 MR. RUSSELL: No. The execution of a
5 prior discriminatory decision constitutes a present
6 violation of Title VII. It's frequently --

7 JUSTICE ALITO: What if the situation is
8 that when the particular paycheck is cut, the
9 company, the employer, whoever it is, has no intent
10 whatsoever to discriminate? They think that they are
11 issuing this pay on a totally nondiscriminatory
12 basis?

13 MR. RUSSELL: It still constitutes a
14 violation because they are executing a present
15 disparity that is because of sex within the meaning
16 of the statute.

17 CHIEF JUSTICE ROBERTS: So if 15 years
18 earlier a discriminatory decision was made to give a
19 pay raise of 4 percent rather than 5 percent, and
20 that over the 15 years became the basis with other
21 raises, you think you can challenge the
22 discrimination 15 years later and say well, this was
23 discriminatory because 15 years ago I didn't get a
24 raise and that, carried forward, had a ripple effect
25 into the current 180-day period.

1 MR. RUSSELL: Yes. That kind of claim
2 would be timely under Section 706. The employer
3 would have an awfully good laches defense.

4 JUSTICE KENNEDY: Would that be true if
5 there were a change in ownership of the company, so
6 the discrimination originally occurred under owner A,
7 then the company is purchased by owner B, completely
8 unrelated, and the, the disparity is used for
9 bonuses, etcetera?

10 MR. RUSSELL: That would depend on the
11 general rules for attributing a liability from a
12 successful --

13 JUSTICE KENNEDY: Well, under the, under
14 the answer that you gave to the Chief Justice and the
15 rule you propose, what of the case of differing
16 ownership?

17 MR. RUSSELL: I would think that they are
18 still responsible in the same way that they are
19 responsible for other actions that the prior company
20 took.

21 JUSTICE SCALIA: But that, but that would
22 not be the result if the reason for the disparity
23 between 4 percent and 5 percent was not a, a denial
24 of a pay increase to a higher pay level, but rather
25 denial of a promotion to another job.

1 MR. RICHARDS: That's correct.

2 JUSTICE SCALIA: If that were the case,
3 then it washes out and you have to challenge it right
4 away.

5 MR. RUSSELL: That is correct. And we
6 think --

7 JUSTICE SCALIA: Does that make any sense?

8 MR. RUSSELL: Well, I think that it does
9 for the reason that I said before, that that kind of
10 consequence is a secondary effect of the prior
11 unlawful employment practice, but under Evans, which
12 that kind of problem goes to --

13 JUSTICE SCALIA: Well, you could call it a
14 secondary effect but the only reason you want to get
15 promoted to another job is to get more money. I
16 think it's a primary effect.

17 MR. RUSSELL: Well even if the Court
18 didn't think that this is a completely satisfactory
19 analytical line to draw, as I said before there are
20 good practical reasons for drawing it, and every
21 reason to think that Congress did draw it, because
22 Congress enacted this statute against the background
23 legal principle that pay, that the pay aspects of the
24 employment relationship arise out of recurring
25 transactions and give rise to recurring causes of

1 action. And that's the rule that everybody
2 acknowledges Congress adopted under the Equal Pay
3 Act. And to hold that there is a different rule
4 under Title VII would for example lead to the
5 anomalous proposition that Congress intended to
6 permit women, a white woman in 1967 to challenge the
7 present disparity in her pay, but not a black man
8 under Title VII because the discrimination there was
9 racial. We don't think that Congress intended the
10 two acts to perform in such dramatically different
11 ways. In fact --

12 CHIEF JUSTICE ROBERTS: Well, Congress
13 could have specifically provided for the Equal Pay
14 Act rule under Title VII, but it didn't do that.

15 MR. RUSSELL: No, it didn't have the same
16 elements, but there's no reason to think that the
17 difference in the elements --

18 JUSTICE GINSBURG: It didn't have the same
19 defenses because the Bennett amendment makes the
20 defenses under the Equal Pay Act applicable under
21 Title VII, right?

22 MR. RUSSELL: That's right. And as a
23 result the claims and the process of adjudicating
24 both kinds of claims are not significantly different.

25 JUSTICE BREYER: Suppose you go back to

1 the 15 year old action which led to disparity that
2 continues up to today, and suppose at the beginning
3 or in July of 2006 the woman discovers it and brings
4 her claim and suppose she wins. Now, is it the case
5 -- and here I'm uncertain. I thought there was some
6 rule in respect to getting damages that you could
7 only go back 2 years?

8 MR. RUSSELL: There is a provision of
9 Title VII that limits back pay to at most 2 years.

10 JUSTICE BREYER: And in that case would it
11 mean that in this case where it happened 15 years ago
12 and she won, but she didn't bring her act until
13 August of 2006, that she could only then collect the
14 extra money for the preceding 2 years?

15 MR. RUSSELL: That's correct.

16 JUSTICE BREYER: So it isn't going to open
17 up tremendous liability for 15 or 20 years ago.

18 MR. RUSSELL: That's absolutely right, and
19 in fact there's no reason to think that such claims
20 are particularly common. This has been the rule in
21 effect for 20 years in the lower courts and
22 respondent is unable to show any actual evidence that
23 these kinds of claims are common. But much more
24 common are instances in which an employee has no
25 reasonable basis for filing a charge of

1 discrimination within 180 days of the disparity.

2 CHIEF JUSTICE ROBERTS: I suppose all
3 they'd have to do is allege that sometime over the
4 past -- I mean, it doesn't have to be 15 years. It
5 could be 40 years, right -- that there was a
6 discriminatory act, in one of the semi-annual pay
7 reviews I was denied this, a raise that I should have
8 gotten. It may have been 20 years ago. It may have
9 been 40 years ago.

10 MR. RUSSELL: They can certainly make that
11 allegation, but the employer is left open to avail
12 itself of the equitable defenses and they'll have a
13 very easy time of showing that there's been undue
14 delay.

15 JUSTICE GINSBURG: Where does it say --

16 CHIEF JUSTICE ROBERTS: Why is that if
17 they just discovered it? I just learned about what
18 happened 30 years ago at this company and it's -- I
19 filed right away. There's no laches.

20 MR. RUSSELL: In that case --

21 CHIEF JUSTICE ROBERTS: But then they have
22 to go back and litigate what happened 30 years ago.

23 MR. RUSSELL: I do acknowledge that a
24 traditional laches defense would be more difficult
25 than those --

1 JUSTICE GINSBURG: I thought your answer
2 before was that this is not -- if she's going to
3 bring a case I got a 2 percent raise, he got a 3
4 percent raise, her chances are very slim, but if this
5 builds up year by year to the point where she is
6 saying, I'm being denied equal pay, it's a
7 requirement of the anti-discrimination law that I get
8 equal pay, so today I'm not getting equal pay, I
9 thought -- I mean, the chance that she could win when
10 she gets a salary review and she gets a little less
11 than the other person are nil.

12 MR. RUSSELL: Yes, and it's only after
13 that same kind of decision has been repeated over a
14 number of years that you actually have a case that
15 you can bring to the EEOC. But under respondent's
16 view by that time it's too late.

17 CHIEF JUSTICE ROBERTS: That's not your
18 theory. I mean, if it happened once 20 years ago you
19 have a case that you can bring, isn't it?

20 MR. RUSSELL: That's true, but the
21 practical --

22 CHIEF JUSTICE ROBERTS: You've got a memo
23 that says we're going to pay, 20 years ago, we're
24 going to pay males this much and we're going to pay
25 females this much, and she says that obviously

1 affected my pay over the ensuing 15, 20 years.

2 MR. RUSSELL: That's true, but the
3 paycheck accrual rule also serves the function of the
4 much more common case in which somebody doesn't
5 derive notice of the potential discrimination until
6 the discrimination has been repeated over time.

7 JUSTICE ALITO: But isn't your position
8 that an employer violates Title VII unless the
9 employer periodically reviews the entire pay record
10 of every employee to make sure that there has never
11 been an uncomplained of act of discrimination at any
12 point in the past that would have a continuing
13 present effect on the amount of money that the
14 employee is paid?

15 MR. RUSSELL: No. They certainly have an
16 incentive to do that under both the Equal Pay Act,
17 which everybody acknowledges puts the employer
18 subject to liability for any present disparity based
19 on any prior decision that can't be justified as
20 based on some factor other than sex, and that
21 incentive has been around for a very long time and
22 respondents aren't able to show that that's been an
23 unmanageable burden. But employers as a matter of
24 basic agency law know from the very beginning whether
25 or not they've been paying the plaintiff less because

1 of her sex.

2 JUSTICE SOUTER: How do they know that?
3 10 years ago the employee got a particular, got a
4 particular job evaluation and that dictated the
5 amount of pay that that employee was going to get for
6 that period and all, all subsequent pay built on that
7 base, and then it turns out many years later that
8 there was discrimination in the way the employee was
9 evaluated way back when, even though there was no
10 complaint about it; then under your theory that would
11 be a present Title VII violation, to cut a paycheck
12 that built, that was based on pay that was built on
13 this act of discrimination that occurred long ago?

14 MR. RUSSELL: Because this Court made
15 clear as recently Faragher that when an employer
16 delegates pay-setting authority to a supervisor the
17 discrimination undertaken by that supervisor is
18 imputed to the employer as a matter of agency law
19 principles.

20 JUSTICE SOUTER: Oh, yeah, but that
21 assumed a present discrimination, and it seems to me
22 the problem that we've got is the problem of
23 connecting a past discrimination with what may in
24 fact be an apparently neutral act 15 or 20 years
25 later.

1 MR. RUSSELL: Well, I don't think that the
2 proof that the act is discriminatory is any more
3 difficult or any more difficult in concept when it
4 happened several years ago than when it happened 180
5 days ago. It's still the employer -- the employee
6 still has to show that the present disparity is
7 because of sex. And the fact that it may be more
8 difficult as a practical matter is something that the
9 court can take into account under a laches defense.

10 JUSTICE KENNEDY: Does he have to know
11 that the present decision to continue the pay
12 structure is discriminatory?

13 MR. RUSSELL: No. It's enough that the
14 employer knows as a matter of basic agency law that
15 the petitioner is being paid less because of her sex,
16 because of prior discriminatory decisions.

17 JUSTICE GINSBURG: The -- as I remember
18 the facts of this case, wasn't it in 1995 that she
19 got a substantial raise and the reason, according to
20 her supervisor, was that he noticed that her pay was
21 below the minimum of the appropriate range for her
22 job?

23 MR. RUSSELL: That's true. She did get a
24 higher raise that year and that was his testimony.
25 He also testified that he had told her differently,

1 that she had done a very good job that year and
2 that's why she had gotten it, and the jury was
3 entitled to believe that.

4 JUSTICE STEVENS: I didn't understand one
5 of your answers. Supposing that today the management
6 does not know of the prior discrimination. Just,
7 records that have been lost, it happened a long time
8 ago. But there was evidence that there was a firm
9 policy that women get 20 percent less than men
10 forever and it's still -- that policy has continued
11 up to date, but that these people making the decision
12 today did not know that. Would there be liability or
13 not?

14 MR. RUSSELL: There would.

15 JUSTICE STEVENS: I thought you said the
16 other. That's why I was --

17 MR. RUSSELL: I apologize if I was unclear
18 about that. There would be liability, and basic
19 agency law principles impute to the employer those
20 prior decisions. So it's not possible for Goodyear
21 as a matter of law to claim that it did not know
22 about those decisions when they occurred, and I'm not
23 aware of any principle of agency law --

24 JUSTICE KENNEDY: Well, the question is
25 whether or not there was a discriminatory act and if

1 the employer, let's say it's an employer that has
2 just purchased a business, thinks that it's a neutral
3 criterion to base wages or bonuses or increase on a
4 prior pay scale and he doesn't know about the prior
5 discrimination, why isn't that a defense?

6 MR. RUSSELL: It may be a defense. I'm
7 not quite certain how agency law principles apply in
8 that circumstance when there's been a change of
9 ownership. But certainly when there hasn't been it's
10 not unfair to the employer to say that so long as you
11 base present pay on long past decisions it's your
12 responsibility to make sure that that present pay is
13 not discriminatory.

14 CHIEF JUSTICE ROBERTS: And it's not
15 enough presumably for somebody to come in and even up
16 everybody? I mean, if you see that the women are
17 making 20 percent less than the men you don't escape
18 liability by paying everybody the same going forward,
19 because perhaps if nondiscriminatory decisions had
20 been made the women would have making 20 percent more
21 than the men. You have to go back and revisit every
22 pay decision or you're exposed to liability for
23 current pay.

24 MR. RUSSELL: That's true, that they have
25 an incentive to do so. They also have that incentive

1 concededly under the Equal Pay Act and nothing in
2 this Court's decision in this case is going to remove
3 that incentive or that burden. And the fact that
4 Congress didn't find that burden inappropriate under
5 the Equal Pay Act is good reason to think that
6 Congress wouldn't have thought it was inappropriate
7 here.

8 JUSTICE SOUTER: Well, what is your burden
9 to prove? You've talked about their burden to go
10 back when -- do I understand it that your view is
11 that the only thing you have to prove is that in this
12 case a woman was being paid at a rate which is
13 different from the rate of a man doing a comparable
14 job?

15 MR. RUSSELL: No, that's not our position.
16 We have to prove in addition that that disparity is
17 because of sex, which necessarily --

18 JUSTICE SCALIA: So you too then have to
19 go, unless you can find a present policy to
20 discriminate on sex, you too in your proof have to go
21 back whatever it may be, you know, the 15 or 20
22 years?

23 MR. RUSSELL: Yes, and the longer that an
24 employee waits the longer it is for her to sustain
25 her burden of proof on that score. And in fact --

1 CHIEF JUSTICE ROBERTS: Why is that true?
2 I mean, it depends. I suppose it may be harder for
3 the company to mount a defense over time, so it may
4 be to her advantage to wait.

5 MR. RUSSELL: But if the employer can show
6 in fact that there is a disadvantage, that there is
7 prejudice, it can ask the court to limit the scope of
8 the claim or eliminate it entirely under an equitable
9 defense such as laches.

10 I think it's important to keep in mind
11 that this is not the first time that this Court has
12 struggled with this question when does the unlawful
13 employment practice occur in a disparate pay case.
14 This Court confronted precisely that question in
15 Bazemore and held that -- and rejected the Fourth
16 Circuit's interpretation in that case that the
17 present payment of a disparate wage was simply a
18 consequence and not in itself a present violation of
19 Title VII?

20 JUSTICE SOUTER: What do you say of the
21 explanation that was given in Bazemore? I forget the
22 subsequent case. It was in footnote 6. You know
23 what I mean. Which referred to Bazemore as a case
24 that involved a present discrimination which, which
25 is inconsistent with your theory. What do you say

1 about footnote 6?

2 MR. RUSSELL: I don't think it's
3 inconsistent. There was present discrimination.
4 There was, people were being paid less and it was
5 because of their race. It just so happened that the
6 because of their race was based on a decision that
7 was made before the effective date of the act. I
8 don't think --

9 JUSTICE SOUTER: Well, the policy -- I
10 thought the assumption was that the policy was in
11 fact a policy which, which was sort of currently
12 honored and intended to be honored by the company,
13 whereas the case that we're concerned about is the
14 case in which there was a discriminatory act, you
15 know, 5, 10, 15 years ago. Nobody remembers the
16 discrimination now. It's just that it continues to
17 have these ripple effect consequences. I would have
18 thought that the subsequent explanation in Bazemore
19 would have been inconsistent with your position with
20 respect to the current ripple effect.

21 MR. RUSSELL: No, I don't think that's an
22 accurate description of what was going on in
23 Bazemore. Recall, for example, that there were
24 plaintiffs in Bazemore --

25 JUSTICE SOUTER: Well, do you take -- I'm

1 sorry, I can't think of the name of the case. You
2 know the case that I'm talking about with the
3 footnote?

4 CHIEF JUSTICE ROBERTS: Lorange?

5 JUSTICE SOUTER: I guess. Do you think
6 that the Court in the footnote misstated Bazemore and
7 that therefore we should trust to Bazemore and not
8 the subsequent explanation?

9 MR. RUSSELL: No. I thought -- I'd take
10 the footnote in Lorange, if that's what you're
11 referring to, to simply say that, like a facially
12 discriminatory pay policy which discriminates every
13 time it's implemented, a facially discriminatory
14 seniority policy that discriminates every time it's
15 implemented, the Court was -- considered in Bazemore
16 a similar kind of recurring violation because, just
17 like a facially discriminatory policy, a
18 discriminatory pay structure or pay decision treats
19 differently -- similarly situated people differently
20 every time it's implemented.

21 JUSTICE SOUTER: But that assumes that the
22 company in effect says, we have a pay structure and
23 our pay structure as it is now treats people
24 differently depending on sex, race, or whatever. And
25 that's not the kind -- that's something very

1 different from the ripple effect argument.

2 MR. RUSSELL: I don't think that it is.
3 For example, remember that in Bazemore there were
4 plaintiffs, workers who were hired after the merger,
5 after 1965, and when they were hired they were paid
6 the same rate as the white employees, and the
7 disparity in their wages in 1972 arose solely because
8 of the discriminatory application of a merit-based
9 pay raise decision, system, which is exactly the same
10 kind of claim that we're making in this case. But
11 this Court nonetheless held that continuing to pay
12 workers, those workers, less than similarly situated
13 whites because of that discrimination that occurred
14 before the effective date of the act was still a
15 present violation of Title VII.

16 JUSTICE STEVENS: Let me ask this
17 question. Supposing in the annual review before a
18 promotion is concerned the officer making the
19 recommendation was instructed not only to decide what
20 increase would be appropriate but also to review past
21 history and decide whether or not the employee was
22 being paid fairly in a nondiscriminatory basis and
23 that was part of the assignment. Would you have a
24 case if that were the case?

25 MR. RUSSELL: The plaintiff would be

1 required to show that that de novo decision was
2 intentionally discriminatory.

3 JUSTICE STEVENS: You couldn't rely on the
4 past history in that situation?

5 MR. RUSSELL: That's right.

6 JUSTICE STEVENS: Because I think that's
7 sort of what Justice -- Judge Jofla thought was going
8 on here.

9 MR. RUSSELL: I don't think that he -- he
10 couldn't have thought that because the facts are
11 absolutely clear and Goodyear acknowledges in this
12 Court that the pay system that they had in place
13 simply made an annual decision whether to make a
14 marginal increase into the raise and took the prior
15 salary as given.

16 If I could, before I sit down, I'd like to
17 make the point that to the extent the Court doesn't
18 think Bazemore decides this case, and doesn't think
19 that the statute is clear on this question, it should
20 defer to the expert opinion of the EEOC on this
21 question in which they have particular expertise
22 because they see thousands of these claims every
23 year. They know better than anybody else whether the
24 paycheck accrual rule is unworkable in practice, or
25 that the pay decision accrual rule will lead to the

1 elimination of many claims that Congress would have
2 intended to preserve. If I could reserve the
3 remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you counsel.
5 Mr. Nager, we'll hear now from you.

6 ORAL ARGUMENT OF GLEN D. NAGER

7 ON BEHALF OF RESPONDENT

8 MR. NAGER: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This Court has repeatedly said that a
11 claim of intentional discrimination is timely and
12 actionable only if it concerns intentionally
13 discriminatory acts taken during Title VII's charge
14 filing period.

15 And the question presented in this case
16 asks the Court to hold that a disparity in pay states
17 a timely actionable claim for intentional
18 discrimination if it is merely the result of
19 allegedly discriminatory actions taken outside of the
20 charge filing period. The question presented is
21 inconsistent with holding after holding of this
22 Court. When Goodyear issued paychecks during the
23 charge filing period, it did not commit intentionally
24 discriminatory acts. No one at Goodyear took
25 Miss Ledbetter's sex into account during the charge

1 filing period in deciding what to pay her.

2 JUSTICE STEVENS: Mr. Nager, can I test
3 your theory with a hypothetical question? Supposing
4 20 years ago, there was an actual written policy
5 statement, we pay women 20 percent less than men.
6 And that was written up and everybody knew it. And
7 then nothing changed for the next 20 years, and the
8 person then sued today. Would she be -- and there
9 was no intent to do anything, this is just the way
10 it's always been. Would she have a cause of action?

11 MR. NAGER: The answer to that, I think,
12 is no, if I understand your hypothetical, if the
13 employer was not intending to classify on the basis
14 of gender.

15 JUSTICE STEVENS: If present intent was
16 merely to do what we have always done, you have to go
17 back 20 years to find out that what we have always
18 done is the result of a policy decision made 20 years
19 ago that we can hire women at a less expense than men
20 so we will continue to pay the same rate. Would the
21 per paycheck rule apply to that case?

22 MR. NAGER: I think the answer is it
23 clearly would be untimely insofar as the allegation
24 is that there is discrimination today merely because
25 there was discrimination yesterday. Whether or not

1 there is discrimination going on during the charge
2 filing period, whether or not women are intentionally
3 being treated differently than men, I think the
4 answer, based upon your hypothetical, is no, given
5 what you've said.

6 JUSTICE ALITO: If the employer had a
7 policy of paying women, all women, 20 percent less
8 than men, and it continued that policy, surely it
9 would know in the present day when it issued those
10 paychecks that it was paying women less than men. So
11 it would be intentionally discriminating at this
12 time, wouldn't it?

13 MR. NAGER: Justice Alito, that's why I
14 qualified my answer to Justice Stevens, because I
15 think that the question his hypothetical raises, like
16 your question, goes to the sufficiency of evidence
17 necessary to prove intent during the charge filing
18 period. And I don't want in any way to be heard that
19 there is anything in our position in this case that
20 tries to answer that question.

21 The reason I'm not trying to answer that
22 question in this case is because that question is not
23 before the Court except with one small respect. If
24 the only thing that the plaintiff is relying upon is
25 discrimination outside of the charge filing period,

1 that is legally insufficient under this Court's cases
2 in Evans, Ricks, Lorange and Machinists before it.

3 What Bazemore dealt with was a case very
4 much like your hypothetical, Justice Alito, of an
5 allegation of an ongoing racial classification during
6 the actionable time period. And it was because of
7 that allegation of ongoing actionable racial
8 classification and pay that there was both a timely
9 claim, and according to Justice Brennan's opinion for
10 all nine members of the Court of that -- in that
11 case, a very serious potential error by the district
12 court in that case as to whether or not it had been
13 clearly erroneous in holding that the United States
14 had failed its proof of proving an ongoing
15 intentional race discrimination case --

16 JUSTICE SCALIA: Mr. Nager, why did it
17 make any sense to treat this area any different from
18 the Equal Pay Act.

19 MR. NAGER: Because they are two different
20 statutes and the elements of the plaintiff's claims
21 are fundamentally different. That's the fundamental
22 flaw in the petitioner's claim in this case. Let me
23 explain, if I may, Justice Scalia.

24 In a Title VII case, in an intentional
25 discrimination case, the question is whether or not

1 there is an act that is motivated by gender during
2 the charge filing period. That is not an element of
3 the plaintiff's cause of action in an Equal Pay Act
4 case.

5 In an Equal Pay Act case, all the
6 plaintiff has to do is allege they are performing
7 equal work to a male, and that they are paid
8 differently. And it's that cause of action that
9 triggers the statute of limitations in an Equal Pay
10 Act case. That's fundamentally different. As Chief
11 Justice Roberts said --

12 JUSTICE GINSBURG: Why is it different if
13 the one further statement was made. And the employer
14 knew that every woman is being paid less than every
15 man. Why isn't that sufficient under Title VII, and
16 if you want evidence, your own supervisor said, oh,
17 we saw one year that she was outside the range
18 appropriate for this job.

19 MR. NAGER: Well, knowledge is a necessary
20 condition, but it's not a sufficient condition,
21 Justice Ginsburg. In Evans, the employer knew it
22 previously had a sexual -- a gender-based
23 discriminatory policy about whether or not female
24 flight attendants could work after they got married.
25 But that prior knowledge of prior discrimination by

1 the employer wasn't sufficient to make the neutral
2 action taken --

3 JUSTICE GINSBURG: Evans involved a factor
4 that simply is not present here. I mean, Evans
5 involved a seniority system. And if this person who
6 had been off the job were to come back two years
7 later, and bump people who had been there every day,
8 well, certainly that's a different case than this
9 one, where she is saying, I should have been paid
10 equally. I wasn't. And I know I can go back only
11 two years. That's quite a bit different than the
12 Evans situation.

13 MR. NAGER: Justice Ginsburg, Title VII
14 allows proof of dissimilar treatment as evidence of
15 present intentional discrimination, but it's not the
16 elements of the claim. As Chief Justice Roberts was
17 pointing out, Title VII would prohibit paying a woman
18 the same amount as a male if the employer would have
19 paid the female more because she had a -- more
20 degrees or other criteria that the employer
21 ordinarily took into account.

22 The elements of those two claims are
23 fundamentally different. What makes this case
24 untimely and unactionable is that there is no claim
25 and there can be no claim because it's the law of the

1 case that Goodyear took Miss Ledbetter's sex into
2 account during the charge filing period.

3 What Goodyear did was the same kind of
4 neutral rule as in Evans. What Goodyear did was it
5 said, we are looking at the pay rate contained in our
6 payroll system, and applying those rates as they are
7 mandated for all of our employees, male or female.
8 And what Goodyear did at the beginning of each
9 evaluation period was say, we are starting this
10 payroll period with the pay rates that were paid in
11 the last period for all of our employees, male or
12 female, no matter what their prior causes.

13 JUSTICE GINSBURG: If only the 180 day
14 period counts, and she can complain only about
15 discrimination in that period, then how do you
16 account for her being able to go back not 180 days,
17 but two years for her remedy?

18 MR. NAGER: The two-year rule is only a
19 damages rule that applies only in Title VII cases.
20 And it's triggered in cases such as where there has
21 been equitable tolling or equitable estoppel, because
22 the employer -- it was a promotion case or a pay case
23 --

24 JUSTICE GINSBURG: I thought it was the
25 lid on the amount of compensation you could get in

1 Title VII cases. You can't go back more than two
2 years for damages. But it would seem that doesn't
3 fit at all whether you can go back only 180 days.

4 MR. NAGER: No. What the 180 days is for
5 is determining the time period during which the
6 allegedly illegal act must occur. That period can be
7 tolled using a tolling rule. It can tolled for three
8 years possibly. The back pay rule says, even if you
9 tolled the statute of limitations for more than the
10 two-year back pay period, you can only get back pay
11 for two years. What is going on, of course, in this
12 case, is they are trying to use allegedly
13 discriminatory acts that occurred 10, 15, 20 years
14 ago, both to make neutral acts actionable, and to get
15 compensatory and punitive damages.

16 JUSTICE GINSBURG: Why is she claiming
17 that in 1995, a supervisor recognized that my pay was
18 way out of line. Isn't that what the supervisor
19 testified?

20 MR. NAGER: He did. And he said he raised
21 her pay up the maximum amount he was entitled to that
22 year. And she didn't file a charge of discrimination
23 in 1995.

24 JUSTICE GINSBURG: Maybe she thought that,
25 well, they are on the right track. Next year, they

1 are going to raise me up to the equal pay level.

2 MR. NAGER: And what the purpose of the
3 charge filing requirement under Title VII, as this
4 Court has repeatedly said, is to require that
5 employee to come forward promptly within 180 days of
6 the date that the alleged unlawful employment action
7 is communicated to her, and bring that claim or lose
8 it, that the purpose of Section 706 was to create
9 repose.

10 JUSTICE GINSBURG: The question that I
11 asked Mr. Nager that I think is really important, and
12 that is, where do you put these pay cases? Do you
13 put it in the box with the hostile environment that
14 builds up over time, and as long as the environment
15 is hostile at the time you bring your complaint, then
16 it doesn't matter that it started 20 years ago. This
17 notion of one year, it's 2 percent, and the other
18 person got 3 percent, you really don't have an
19 effective claim unless it builds up to the point
20 where there is a noticeable disparity.

21 MR. NAGER: Justice Ginsburg, the
22 petitioner in this case has agreed with us that this
23 is the kind of discrete employment action that
24 triggers the 180-day period. It is not like a sexual
25 harassment claim.

1 JUSTICE GINSBURG: Where is that
2 agreement?

3 MR. NAGER: It's in their brief. They
4 repeatedly quote the portion of Morgan which
5 described pay claims as discrete acts subject to the
6 discrete trigger rule in the Morgan opinion. And
7 that, of course, is an obvious concession that they
8 had to make in this case, because Mr. Russell would
9 not concede when Justice Scalia asked that that first
10 pay rate decision was not an identifiable act, that
11 it wasn't an actionable -- immediately actionable
12 claim.

13 JUSTICE GINSBURG: I thought that the
14 Morgan decision quotes Bazemore for saying, under
15 Title VII, each week's paycheck that delivered less
16 to a black than to a similarly situated white is a
17 wrong, actionable under Title VII.

18 MR. NAGER: And that's in the portion of
19 the opinion that's dealing with discrete employment
20 action. It's not in the portion of the opinion
21 dealing with sexual harassment claims. I'm trying to
22 answer your question about which portion of Morgan
23 pay claims fall into.

24 JUSTICE GINSBURG: Whatever portion it's
25 in, it says each week's paycheck that delivered less

1 to a black than to a similarly situated white is a
2 wrong, actionable --

3 MR. NAGER: Because Justice Thomas'
4 opinion was accurately describing the holding in
5 Bazemore on the facts of Bazemore, because in
6 Bazemore there was a claim, in contrast to this case,
7 of ongoing intentional race discrimination in
8 classifying employees on the basis of their race and
9 paying the black employees less than the whites. If
10 the Court would look at the remand order in the
11 Bazemore case, they'll see that the Court did not
12 remand with instructions that judgment be entered for
13 the United States merely because there was a
14 disparity in salaries.

15 JUSTICE BREYER: Justice Brennan's opinion
16 sounds to me, part one, as if he is saying what the
17 mistake was that the company made here is that they
18 didn't really eradicate the effects of the past bad
19 act, and they were trying to eradicate it.

20 MR. NAGER: Well, actually, the United
21 States' allegations in the case were trying --

22 JUSTICE BREYER: That's another part of
23 the case that's part two and part three about the
24 evidence that came in. In fact, there are about six
25 other parts. I'm just talking about part one.

1 MR. NAGER: That's part one.

2 JUSTICE BREYER: Yes. All right. So I
3 read that. Now, this is my this is my cost/benefit
4 analysis here. If we follow the other side's rule,
5 it's very simple, we just said Bazemore applies,
6 whether there's a practice or whether it was a
7 discrete thing, or whatever, so it's simple. But we
8 do have to distinguish pay from the other kinds of
9 things. And we have heard them explain why there is
10 a distinction. I'd rather get to your side and then
11 you can attack both, or whatever.

12 Your side of it, it seems to me, if I
13 agree to you, I now have to create in the law some
14 kind of thing that sounds very complicated about
15 whether that old bad thing was somehow a pattern or a
16 practice that, as a pattern or a practice, didn't get
17 eradicated within the last few years, or was a
18 totally discrete act, and therefore, had no
19 implication as a pattern or practice that didn't get
20 eradicated. That sounds hard.

21 And the second thing I guess I'd have to
22 do is to create a lot of tolling law because there
23 will be probably a significant number of
24 circumstances where a woman is being paid less, and
25 all she does is for the last six months get her

1 paychecks and she doesn't really know it because pay
2 is a complicated thing, and through no fault of her
3 own, it takes about eight or nine months or even a
4 year for her to find out. And we are going to have
5 to toll, aren't we?

6 So I have, legally speaking, a complicated
7 tolling system that I have to graft on to this, your
8 case. I also have to start distinguishing Bazemore
9 which is pretty hard to do. But on the other side,
10 they are just saying, go with the flow. Nobody is
11 really hurt, because the employer has to worry about
12 all this stuff anyway under the Equal Pay Act. I'm
13 giving you that summary so you can just shoot it
14 down.

15 MR. NAGER: Well, it was a compound
16 question, but I'll try to answer each of its parts.

17 The first point I would make is that
18 Bazemore came after Evans and Hazelwood and Ricks,
19 and it did not distinguish Evans or Hazelwood or
20 Ricks on the grounds that Bazemore is a pay case and
21 Hazelwood and Evans were not pay cases. It
22 distinguished them on the grounds of whether or not
23 the alleged discrimination was taking place in the
24 charge filing period. So this notion that Bazemore
25 stands as a proposition that Evans and Lorange and

1 that line of cases doesn't apply because they don't
2 apply to pay cases was not the opinion of the Court
3 in Bazemore.

4 Secondly, we are not asking you, and I
5 don't think it takes any difficulty to apply the rule
6 that we are proposing in this case. We are proposing
7 the same rule that's set forth in Justice Stevens'
8 opinion for the Court in Evans, the same rule that's
9 set forth in Justice Powell's opinion in Ricks, the
10 same rule that's set forward in Justice Scalia's
11 opinion for the Court in Lorance.

12 JUSTICE STEVENS: But there is a slight
13 difference in that you're focused on whether
14 discrimination occurred within the 180-day period.
15 And if I understand you correctly, discrimination
16 would have occurred during the 180-day period if the
17 employer knew of the policy that I described, because
18 then he would be knowingly paying less.

19 MR. NAGER: No. Not if he had knowledge
20 of --

21 JUSTICE STEVENS: I thought your answer to
22 Justice Alito made that point.

23 MR. NAGER: Well, what I said to Justice
24 Alito was, if the employer knew that it previously
25 had a policy and if it knew and intended that its

1 present pay would be done for gender-related reasons
2 or racially-related reasons, it would constitute --

3 JUSTICE STEVENS: But the question of
4 whether just knowing that that's a source of the
5 policy would be a gender-related reason.

6 MR. NAGER: Well, the question is whether
7 there was a present policy. That's the point the
8 Solicitor General makes in its brief and the point we
9 make in our brief.

10 JUSTICE STEVENS: Well, in my hypothetical
11 there was a policy established 20 years ago, a 20
12 percent differential, never been changed. And the
13 only question that would differ, in some cases the
14 employer knows about it and in some others he
15 doesn't.

16 MR. NAGER: And if the employer is
17 presently applying, and knowingly and intentionally
18 doing so, a 20 percent differential for male and
19 female employees for no reason other than the gender
20 of the employees, that's a present violation.

21 JUSTICE STEVENS: Well, what his reason
22 is, this is always the way we did it. That's his
23 reason.

24 MR. NAGER: Well, if what he's saying is,
25 the way we have always done it is engage in gender

1 discrimination, then doing it in the present time
2 period would state a present claim.

3 JUSTICE KENNEDY: But suppose he has no
4 intent to discriminate as a present matter, but he
5 also knows that his decision is necessarily based on
6 a policy that was discriminatory some years ago.
7 What result?

8 MR. NAGER: I think if I understood the
9 question, Justice Kennedy, I think no present claim,
10 because the only thing you said that he knew is that
11 they previously engaged in discriminatory actions.

12 JUSTICE KENNEDY: He knows it, but his
13 present decision is necessarily based on some prior
14 decision that was discriminatory.

15 MR. NAGER: That in and of itself is not
16 sufficient. That's the point that, the seniority
17 system in Lorance was necessarily based upon an
18 earlier decision that the employer --

19 JUSTICE KENNEDY: How is that -- how is
20 that consistent with the statement in Bazemore that
21 the employer has a duty to eradicate past
22 discrimination?

23 MR. NAGER: Well, the duty was to
24 eradicate the alleged ongoing facially discriminatory
25 pay practices that preceded the enactment of Title

1 VII and were alleged to have been maintained for
2 racially purposeful reasons after Title VII became
3 effective to a public employer. There is no
4 contemplation in that case that that duty would
5 require an employer to investigate discrete
6 employment decisions made in years gone by that
7 weren't made the subject of a timely charge. What
8 this Court has said repeatedly is when the charge
9 filing period passes and no charge is brought, the
10 employer is entitled to treat that past act as if it
11 was a lawful act. That's what Justice Thomas'
12 opinion in Morgan says. That's what, the opinion
13 that Justice Stevens wrote for the Court in Evans.

14 JUSTICE SOUTER: Is that so even if they
15 know it was in fact originally an unlawful act?

16 MR. NAGER: Yes.

17 JUSTICE SOUTER: You draw a line between
18 present purposeful discrimination and present
19 knowledge of past discrimination which is knowingly
20 carried forward.

21 MR. NAGER: That's correct. Because the
22 purpose of Section 706(e) is to give repose for those
23 past decisions.

24 JUSTICE GINSBURG: How do you describe
25 dealing with a case like Manhart where they were

1 complaining about a pension plan that had been
2 instituted, oh, way longer than 180 days, years and
3 years before?

4 MR. NAGER: That plan was facially
5 discriminatory. It included on the face of the plan
6 gender-based mortality tables. And as Justice
7 Scalia's opinion for the Court in Lorance and the
8 footnote that Justice Souter pointed out to, a
9 facially discriminatory policy necessarily evidences
10 present intent each time it is applied, and that is
11 the important distinction. On the one hand you have
12 cases that are both timely and as a matter of law
13 show present intent because they are facially
14 discriminatory. On the other end of the continuum
15 you have cases that are only about past
16 discrimination and do not involve any present
17 actionable claim of intentional discrimination, and
18 they are both untimely and legally insufficient. And
19 then you have the cases in the middle which concern
20 present allegations of discriminatory practices so
21 obnoxious, as alleged in Bazemore, that the Court
22 held that district court may have been clearly
23 erroneous in its conclusion that there was no present
24 intentional discrimination.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Nager. Mr. Gornstein?

2 ORAL ARGUMENT OF IRVING L. GORNSTEIN

3 ON BEHALF OF THE RESPONDENT

4 MR. NAGER: Mr. Chief Justice, and may it
5 please the Court:

6 Title VII gives employees like petitioner
7 180 days to challenge an individual pay decision such
8 as a denial of a pay raise. Employees who allow the
9 180-day period to pass may not years later and even
10 at the end of their careers challenge their current
11 paychecks on the grounds that they are the result of
12 a number of discrete individually discriminatory pay
13 decisions that occurred long ago.

14 JUSTICE GINSBURG: This would be a good
15 Equal Pay Act case, wouldn't it?

16 MR. NAGER: If it met the requirements of
17 the Equal Pay Act, which is that it has to be the
18 same knowledge, skills and responsibilities and
19 effort for the job, then every time that you have a
20 failure to deliver equal pay for equal work there is
21 a violation of the act. But Title VII is not an
22 equal pay for equal work statute, it is a
23 nondiscrimination statute, and so that you have to
24 show intentional discrimination in pay, not just the
25 absence of equal pay.

1 JUSTICE GINSBURG: Why doesn't it become
2 intentional, at least after 1995, when the supervisor
3 recognizes that he's got an employee that is out of
4 the appropriate range for her job, whether she does
5 it badly or well?

6 MR. GORNSTEIN: Justice Ginsburg, if an
7 employee brought a claim within 180 days of the
8 decision made then, that is to not, to not equalize
9 the pay further --

10 JUSTICE GINSBURG: Why would she bring it
11 then? They gave her a big raise that year.

12 MR. GORNSTEIN: Well, because I think what
13 you're suggesting is they didn't give her a big
14 enough raise, because there was still intentional
15 discrimination from prior years that were not, that
16 were unchallenged.

17 JUSTICE GINSBURG: Didn't she have every
18 reason to expect, well, they finally noticed it, so
19 next year I'm going to get that same size raise, but
20 that it doesn't happen the next year?

21 MR. GORNSTEIN: And if it doesn't happen
22 that next year, then that employee has 180 days to
23 challenge that pay decision on the ground that it's
24 intentionally discriminatory. If she does not do
25 that, she cannot come back 15 years later and say

1 that a decision that was made 15 years ago and 14
2 years ago were based on my gender, and they --

3 JUSTICE GINSBURG: She is not talking
4 about a decision made 15 or 14 in this case. She
5 starts out even, and it builds up over time.

6 MR. GORNSTEIN: Well, I think in some, in
7 some cases that, pay cases, it will build up over
8 time. In some cases it will happen immediately. But
9 in either case, what Title VII says is that you have
10 180 days to challenge a discrete pay decision. If
11 you do not do that, you cannot come back later, years
12 later, four years later, six years later, or here at
13 the end of her career, and challenge every pay
14 decision that's been made up until then on the
15 grounds that intent, it was intentionally
16 discriminatory and continues to have ongoing effects.

17 JUSTICE STEVENS: But you could if the
18 person making the decision was aware of the
19 discriminatory policy.

20 MR. GORNSTEIN: Knowledge of prior
21 unlawful acts is relevant evidence in deciding
22 whether it's present day intentional discrimination.
23 But just as in a case where there's a promotion and
24 I'm aware that there was a prior discrimination in a
25 promotion and that was not timely challenged, and the

1 person comes to me today and says I want my promotion
2 now. If I'm aware that she was denied that promotion
3 for discriminatory reason but she did not timely
4 challenge it, my decision not to give her that
5 promotion is not automatically discriminatory.

6 JUSTICE STEVENS: But you're changing the
7 hypothetical. My hypothetical was simply a pay case.

8 MR. GORNSTEIN: I understand that, and I'm
9 saying the same rule applies in a pay case that
10 applies in a promotion case.

11 JUSTICE STEVENS: You're saying, I think
12 contrary to your colleague if I remember correctly,
13 that even if the employer knew of the 20 percent
14 differential policy established 20 years ago, it
15 could still carry it into effect today.

16 MR. GORNSTEIN: What I'm saying with
17 respect to a policy is if you have an ongoing policy
18 that is still being applied in the limitations
19 period, and that your current policy is to pay less
20 to women than to men, then of course you can sue.

21 CHIEF JUSTICE ROBERTS: Let's say it's the
22 same person who made the decision. You know, five
23 years ago he said I'm giving a 6 percent raise to
24 men, I'm giving a 3 percent raise to women, and then
25 he decides that's illegal, and so from now on

1 everybody is going to get a 4 percent raise every
2 year if you meet certain standards. Is that ongoing
3 discrimination or is that a neutral thing, that he
4 doesn't have to take into account the past
5 discrimination?

6 MR. GORNSTEIN: That's a neutral discrete
7 act that was made at the time. It was not
8 challenged.

9 CHIEF JUSTICE ROBERTS: Even though he
10 knows that it carries forward the illegal
11 discrimination?

12 MR. GORNSTEIN: Even when the employer --
13 you can have an inference from knowledge of past
14 illegal conduct that your present intent is to carry
15 forward that differential based on the person's sex,
16 but it is not an automatic inference. You can also,
17 the employer could say look, that was a decision that
18 occurred a while ago. A lot of people did this.
19 There were decisions made that affected a lot of
20 other people --

21 JUSTICE GINSBURG: But you're talking
22 about --

23 MR. GORNSTEIN: -- and I didn't correct
24 those either, and that's a neutral policy.

25 JUSTICE GINSBURG: But that's a defense.

1 And you're talking about, yes, you might draw that
2 inference but that inference would be wrong because I
3 have a defense. The defense is poor performance
4 explains it, not sex discrimination.

5 MR. GORNSTEIN: But under Title VII, poor
6 performance isn't a defense. It is negating
7 intentional discrimination. It's the employer's
8 employee's burden --

9 JUSTICE GINSBURG: I thought at least in
10 this area, the defenses were the same as under the
11 Equal Pay Act.

12 MR. RUSSELL: Well, there are -- there is
13 an additional layer of defense, but still the
14 employee has to prove an additional element in a
15 Title VII claim, not just the absence of equal pay
16 for equal work, it has to --

17 JUSTICE SCALIA: Mr. Gornstein, why should
18 we listen to the Solicitor General rather than the
19 EEOC? I mean, they have taken a different position
20 from the one that you're urging upon us.

21 MR. GORNSTEIN: The EEOC has taken a
22 different position but that decision that the EEOC
23 has taken has been based on its reading of this
24 Court's decision in Bazemore, and this Court does not
25 give deference to the EEOC under Skidmore or under

1 any other standard.

2 JUSTICE GINSBURG: So why don't we at
3 least hear from the EEOC? That has happened in other
4 cases where the Department of Justice and the EEOC
5 take different positions, at least the EEOC filed a
6 brief even though it wasn't the Government's brief.

7 MR. GORNSTEIN: That has occasionally
8 happened in the past. It has not happened as a
9 regular matter, or to my knowledge it does not
10 ordinarily occur. The EEOC --

11 JUSTICE SOUTER: If the EEOC is upheld in
12 the Court of Appeals and review is sought here, will
13 the Government confess error?

14 MR. GORNSTEIN: I'm sorry, Justice Souter?

15 JUSTICE SOUTER: If the EEOC decision is
16 upheld by one of the Courts of Appeals and there is
17 an attempt to bring the case here on cert, will the
18 Government confess error?

19 MR. GORNSTEIN: If the Court rules in the
20 Government's favor in this case, then that case would
21 have to be vacated and remanded for reconsideration
22 in light of this Court's decision today. The EEOC's
23 --

24 JUSTICE SOUTER: Well, I'm asking a
25 simpler question. Let's assume that somehow we fudge

1 it. If -- if there is a clear cut case in which the
2 EEOC takes a position different from the one the
3 Government is now espousing, and a Court of Appeals
4 upholds it, and cert is sought here, will the
5 Solicitor General say please remand, or simply
6 confess judgment?

7 MR. GORNSTEIN: Justice Souter, I would
8 like to answer that question today but of course if
9 the Court doesn't resolve the question today that's
10 been decided today, but issues a new decision,
11 anything we would have to do would have to look at
12 that new decision and make a judgment about what the
13 law is at that time. And so my -- my point is --

14 JUSTICE SOUTER: I think I got your point.

15 JUSTICE SCALIA: Touche.

16 MR. GORNSTEIN: To go on, there are three
17 decisions of this Court that control the result here,
18 Evans, Ricks and Lorance, each of which says that the
19 employee cannot circumvent the limitations period by
20 challenging conduct within the limitations period on
21 the grounds that it is the result of a prior act of
22 intentional discrimination that was not timely
23 challenged.

24 A second reason to reject petitioner's
25 rule is that petitioner's rule, as petitioner admits,

1 creates a special rule for pay cases when there is
2 nothing in the language of Title VII that would
3 justify a special rule. Title VII has the same
4 mandate of nondiscrimination for pay as for any other
5 practice. It has the same 180-day period for pay
6 claims as any other claim.

7 And the third reason to reject
8 petitioner's view is that it would undo the statute
9 of limitations in pay cases, because the result would
10 be, what you have here is that an employee could wait
11 until the end of their career, or at least a very
12 substantial number of years, and then challenge
13 current pay on the basis of past acts that took place
14 a long time ago. And Justice Breyer, you talked
15 about it being limited to just back pay during the
16 two-year period. The courts that have looked at this
17 have not decided whether it's the 180-day period or
18 the two-year period if you buy petitioner's theory, I
19 don't think he has either. But the important
20 additional point of order is you're still hinging
21 liability on past acts long ago and you're adding the
22 possibility of compensatory relief and punitive
23 damages, so it's not the limited damage award that
24 you're contemplating necessarily.

25 JUSTICE BREYER: What would you do on the

1 other side of this? It if you win on this, then
2 don't you have to have a fairly relaxed standard of
3 allowing the woman, tolling or something, when she
4 just gets some paychecks that would take her a while
5 to figure out that these are really reflecting some
6 old discrimination and she doesn't know. It's
7 different in that respect from the promotion itself.

8 MR. GORNSTEIN: Well in some -- if she's
9 denied a pay raise and she's aware that other people
10 are getting substantial pay raises -- I don't think
11 it's that much different than somebody else getting
12 the promotion and me not getting that promotion.

13 JUSTICE BREYER: Well, she knows this.
14 She knows that, all these boxes on her paychecks and
15 she's not quite sure what they mean. All right, your
16 answer is not much different.

17 MR. GORNSTEIN: Well, to the extent that
18 you want to address equitable tolling. That's the
19 question, should there be equitable tolling until
20 such time as she's aware of the disparity. But what
21 petitioner's theory does is says even after the
22 employee is aware of the disparity she can wait 15
23 more years and then sue.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Russell, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

3 ON BEHALF OF THE PETITIONER

4 MR. RUSSELL: I think the fundamental
5 disagreement in this case comes down to what is the
6 unlawful employment practice Congress was referring
7 to when it prohibited discrimination with respect to
8 compensation. If it is under our view, in our view,
9 the payment of an intentionally disparate wage, then
10 there's no question that under Bazemore the violation
11 occurred during the limitations period. The fact
12 that the intent was formed outside the limitations
13 period doesn't make the present payment of a
14 disparate wage because of sex any less intentionally
15 discriminatory. But the difference in the
16 conceptions, which frankly isn't answered by the
17 plain text of this statute itself, should be resolved
18 in light of the practical consequences of the
19 differences in the rules.

20 The Solicitor General acknowledges that a
21 paycheck accrual rule applies at least in a case of a
22 policy of discrimination, but that's a very difficult
23 rule to administer for the EEOC, which must make a
24 determination of timeliness before it even has
25 authority to investigate a claim. It shouldn't be

1 left to the EEOC to figure out whether there's an
2 unwritten practice or an unwritten policy which would
3 require an extensive investigation not only of the
4 petitioner's pay but of everybody else's. You recall
5 that in Bazemore they had to conduct a multiple
6 regression analysis to establish a pattern of
7 discrimination there.

8 Our rule is simple to administer and has
9 been administered for decades in the lower courts and
10 it's the rule that the EEOC itself has chosen in
11 construing this ambiguous aspect of the statute.

12 JUSTICE SCALIA: Do you agree that their
13 action is just based on Bazemore or their reading of
14 Bazemore?

15 MR. RUSSELL: No, that's incorrect. I
16 mean, the EEOC has taken this position that you can
17 challenge present pay disparities even before the
18 Court's decision in Bazemore and it continued to
19 adhere to it afterward. The fact that they cited to
20 Bazemore shouldn't disentitle them to the kind of
21 deference that they're ordinarily entitled to when
22 they construe a statute that's given to them, and
23 this is precisely the kind of question Congress would
24 have entitled them to exercise their expertise on.

25 Finally, I would like to raise the point

1 that under respondent's rule the Extension Service
2 would have been permitted to pay blacks less than
3 white in perpetuity in Bazemore so long as it did so
4 because of cost and not because it wanted to continue
5 to discriminate on the basis of race. And similarly,
6 under the Solicitor General's view an employer who
7 had intentionally discriminated through discrete
8 decisions against some of its employees prior to the
9 act would be allowed to continue to do so after the
10 act because the decision would have been the
11 potentially unlawful act in that case and that
12 wouldn't have been actionable.

13 We respectfully suggest that Congress
14 intended nothing than a complete --

15 JUSTICE ALITO: How could cost justify a
16 dual pay scale?

17 MR. RUSSELL: It could -- the Extension
18 Service --

19 JUSTICE ALITO: You'd have to have another
20 factor in the decision, which was that you didn't
21 want to change pay. But cost alone couldn't justify
22 that.

23 MR. RUSSELL: It would be a
24 nondiscriminatory reason. They would -- they would
25 say that, the reason we didn't immediately equalize

1 salaries is because it cost too much, it would have
2 required -- we'd be required to cut down on our
3 programs. And under respondent's view that is not
4 intentionally pay-maintaining discrimination.

5 JUSTICE ALITO: No, you'd have to say, we
6 don't want to spend any more and we also don't want
7 to equalize pay. You have to say the second too.

8 MR. RUSSELL: They would say, we don't
9 want to equalize pay because it costs too much, and
10 that's not a discriminatory reason for maintaining
11 the prior disparity. But ultimately --

12 JUSTICE ALITO: If you say you're not
13 going to equalize pay, you're saying you're going to
14 discriminate on the basis of race.

15 MR. RUSSELL: Which is what happened here.
16 Goodyear continued to discriminate on the basis of
17 sex, knowing as a matter of agency law that it had
18 done, it had set her pay for discriminatory reasons
19 in the past.

20 CHIEF JUSTICE ROBERTS: You can equalize
21 pay by lowering others. You don't -- raising the
22 discriminated-against class is not the only way to
23 equalize pay. So I don't see how cost is a
24 justification for continuing the disparity.

25 JUSTICE GINSBURG: Not under the Equal Pay

1 Act. You can only equalize up, not down.

2 MR. RUSSELL: That's true.

3 CHIEF JUSTICE ROBERTS: Under Title VII
4 you can equalize either way, right?

5 MR. RUSSELL: It would, but if they chose
6 not to equalize at all because they don't want to
7 spend the money the money that would be a
8 nondiscriminatory reason.

9 JUSTICE ALITO: You'd certainly have a
10 very happy work force if you equalized one way.

11 MR. RUSSELL: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 12:04 p.m., the case in the
16 above-entitled matter was submitted.)

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