PREGNANCY LEAVE AND SENIORITY SYSTEMS UNDER TITLE VII: A CRITIQUE OF *AT&T V. HULTEEN*

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INTRODUCTION

After a historic election and within his first several weeks of taking office, President Obama signed his first bill into law on January 29, 2009, stating that the passage of the Lilly Ledbetter Fair Pay Act ("Ledbetter Act")[1] "send[s] a clear message"[2]:

> [T]hat making our economy work means making sure it works for everybody; that there are no second-class citizens in our workplaces; and that it's not just unfair and illegal, it's bad for business to pay somebody less because of their gender or their age or their race or their ethnicity, religion or disability; and that justice isn't about some abstract legal theory. . . . It's about how our laws affect the daily lives and the daily realities of people: their ability to make a living and care for their families and achieve their goals.[3]

In effect, the Ledbetter Act repudiated the U.S. Supreme Court's controversial 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[4] *Ledbetter* restricted the filing period for which an employee could file a pay discrimination charge with the Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act of 1964.[5] Title VII makes it an "unlawful employment practice"[6] for an employer to "discriminate against any individual with respect to his

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*Annotations Editor, *Cardozo Journal of Law & Gender*, 2010-2011; J.D. Candidate, Benjamin N. Cardozo School of Law, 2011; B.A. Tufts University, 2007. I dedicate this paper to my parents for their love and support.

1 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e and 29 U.S.C. § 626 (2000)).

2 Barack Obama, U.S. President, Remarks by the President Upon Signing the Lilly Ledbetter Bill (Jan. 29, 2009), 2009 WL 207323.

3 *Id.*

4 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

5 *Id.* at 621.

6 42 U.S.C.A. § 2000e-2(a) (2000).

compensation . . . because of such individual's race, color, religion, sex, or national origin."[7]

Lilly Ledbetter, a retired female supervisor of a Goodyear tire plant in Alabama, sued her former employer alleging that poor performance evaluations based on sex discrimination made during her nineteen-year career at the company were reflected in lower pay as compared to her male colleagues.[8] Justice Alito, writing for the Court's five-four majority, rejected Ledbetter's "paycheck accrual rule"[9] in which she argued that the 180 days filing period was triggered each time she received a paycheck, regardless of when the prior discriminatory conduct that affected her paycheck amount occurred.[10] Justice Alito concluded that since the EEOC requires an individual to report a claim 180 days "after the alleged unlawful employment practice occurred,"[11] Ledbetter's suit was untimely because "the later effects of past discrimination do not restart the clock for filing an EEOC charge."[12] As the result of the Supreme Court ruling, Ledbetter lost her jury verdict in the district court.[13] The decision, however, was neither without opposition nor did it remain unchallenged for long.[14]

Not even a month after the Court delivered its decision in *Ledbetter*, House Representative George Miller (Democrat-California) on June 22, 2007 introduced legislation that would later become part of the Ledbetter Act.[15] The bill was voted on and passed by the House of Representatives but was then blocked by Senate Republicans.[16] After President Obama's election, the bill was re-introduced in January 2009—passing in the House by a vote of 247 to 171 and the Senate two

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[7] *Id.* § 2000e-2(a)(1).

[8] *Ledbetter*, 550 U.S. at 621-22.

[9] *Id.* at 633. This "paycheck accrual rule" was adopted by the U.S. Supreme Court in Bazemore v. Friday, 478 U.S. 385 (1986). However, Justice Alito distinguished *Bazemore* from *Ledbetter* on the basis that *Bazemore* centered on a *current* violation while *Ledbetter* concerned the issue of carrying forward a *past* act of discrimination. *Id.* at 633-36.

[10] *See Ledbetter*, 550 U.S. at 633-36 (2007).

[11] 42 U.S.C.A. § 2000e-5(e)(1).

[12] *Ledbetter*, 550 U.S. at 618.

[13] *See Ledbetter*, 550 U.S. 618.

[14] *See* Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASHINGTON POST, Sept. 5, 2007, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090401900.html (last visited Feb. 17, 2011):

> Three Democratic presidential candidates have signed on to Senate legislation [the Fair Pay Restoration Act] that would overturn the court's decision. The House has already acted, approving the Lilly Ledbetter Fair Pay Act on July 31. The American Bar Association passed a resolution supporting Ledbetter and the legislation at its convention last month.

Katie Putnam, Note, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 687 n.13 (2009) (quoting Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASHINGTON POST, Sept. 5, 2007, at A19).

[15] H.R. REP. NO. 110-237, at 4 (2007).

[16] *Id.* at 34. Republicans were opposed to the bill because it allegedly "eliminates the statute of limitations and EEOC charging requirements contained in current law with respect to almost every conceivable claim of discrimination one can imagine." *See id.* at 28.

weeks later by a vote of 61 to 36.[17] The purpose of the Ledbetter Act was to renounce the ruling in *Ledbetter* and to break down barriers for "workers to stand up for their basic rights at work."[18] The Act amended Title VII[19] to include that unlawful employment practice occurs "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."[20] Thus, under the new law, Ledbetter's claim for sex discrimination would have been timely because she had filed her charge within 180 days of a discriminatory paycheck. Moreover, in passing the Ledbetter Act, Congress made known its strong objection to *Ledbetter,* finding that its holding "significantly impairs statutory protections against discrimination in compensation . . . [,] ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."[21]

Given the recent enactment of the Ledbetter Act and Congress's and President Obama's criticism of the *Ledbetter* decision, it may have come as a surprise when the U.S. Supreme Court issued its decision in *AT&T Corp. v. Hulteen*[22] in May 2009—the first pay discrimination case decided after the Ledbetter Act. *Hulteen* held that an employer does not necessarily violate Title VII, when it gives fewer retirement credits to employees who took pregnancy leave prior to the passage of the Pregnancy Discrimination Act ("PDA")[23] than for those who took medical leave generally.[24] In the *Hulteen* case, four former and current female employees brought a Title VII action against their employer, American Telephone and Telegraph Company ("AT&T"), when each woman discovered that she would be entitled to a greater pension benefit if her pregnancy leave was treated on the same basis as other bases for temporary disability leave.[25]

Similar to the *Ledbetter* decision, *Hulteen* focused on whether the sex-based discrimination claims were timely under Title VII. Prior to the enactment of the

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[17] Robert Pear, *House Passes 2 Measures on Job Bias*, N.Y. TIMES, Jan. 9, 2009, *available at* http://www.nytimes.com/2009/01/10/us/10rights.html?hp (last visited Feb. 17, 2011). *See generally* Putnam, *supra* note 14.

[18] H.R. REP. NO. 110-237, at 3.

[19] The Lilly Ledbetter Fair Pay Act also amended the Age Discrimination in Employment Act of 1967, and modified the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. *See* Ledbetter Act, 123 Stat. 5.

[20] *Id.* at 6.

[21] *Id.* at 5.

[22] AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009). This case was a 7 to 2 decision in which Justice Ginsburg and Justice Breyer dissented.

[23] The PDA was passed on October 31, 1978 amending sex discrimination to include pregnancy discrimination in Title VII of the Civil Rights Act of 1964. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C.A. § 2000e (2000)). The four plaintiffs in AT&T took leave between 1968 and 1976. AT&T Corp. v. Hulteen, 441 F.3d 653 (9th Cir. 2006), *aff'd en banc*, 498 F.3d 1001 (9th Cir. 2006), *rev'd sub nom*, 129 S. Ct. 1962 (2009).

[24] *Hulteen*, 129 S. Ct. at 1966.

[25] *Id.* at 1967.

Ledbetter Act, employer AT&T relied on *Ledbetter* in its oral argument before the Supreme Court, asserting that the company's policy was consistent with Justice Alito's conclusion that current effects of sex-based discrimination "cannot breathe life into prior, uncharged discrimination."[26] AT&T argued that plaintiffs' fewer retirement benefits were merely present effects of a *past* violation of Title VII, and that the female plaintiffs, like Ledbetter, were therefore prevented from bringing their stale claims of sex discrimination against their employers.[27] On the other side, plaintiffs claimed that AT&T committed a *present* violation of Title VII and their claims were thus timely because AT&T had implemented a policy that was facially discriminatory by giving fewer service credits toward retirement benefits for time spent on pregnancy leave than for other kinds of medical leave.[28] In light of the Ledbetter Act's protection of employees to assert their rights, particularly in cases involving compensation inequity, why then, did the Court find for the employer in *Hulteen*?

Hulteen is significant because it denies an estimated 15,000 women[29] who have either retired or are nearing retirement age the pension benefits they deserve. On a different level, *Hulteen* narrows the application of the Ledbetter Act and, contrary to the remedial nature of Title VII, makes it much more difficult for women and other victims of employment discrimination to file claims against their employers. While the Ledbetter Act relaxes the statute of limitations for which employees could bring charges of pay discrimination, *Hulteen* reaffirms employers' control over such claims by emphasizing the employee's burden to prove "intentional" discrimination.[30] Another unsettling implication of the majority opinion is that pregnancy discrimination was never part of the meaning of sex discrimination until the PDA was passed in 1978.

This Note argues that the majority opinion in *Hulteen* is flawed because it addresses the case in a vacuum by brushing aside the Ledbetter Act, and further fails to consider pre-PDA policies and the legislative history and intent behind Title VII. By not taking into account the broader social and political context in which the case was decided, the majority's formalistic opinion undermines realities of the workplace and basic fundamental rights of workers. Part I lays out the pertinent provisions of Title VII of the Civil Rights Act of 1964 and the Pregnancy

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[26] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628 (2007). *See* Transcript of Oral Argument at 13-14, AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2008) (No. 07-543). *See also* Adam Liptak, *Justices Hear Bias Case on Maternity, Pensions and Timing*, N.Y. TIMES, Dec. 10, 2008, at B7, *available at* http://www.nytimes.com/2008/12/11/business/11bizcourt.html?scp=2&sq=hulteen&st=cse (last visited Feb. 17, 2011).

[27] *Hulteen*, 129 S. Ct. at 1968.

[28] *Id.*

[29] Marcia Coyle, *Seeking To Undo Bias in Pension: Pregnancy Leave Policy At Issue*, 31 NAT'L L.J. at 14 (2008). *See* Christopher Twarowski, *High Court to Take Up Pregnancy Leave Case*, WASHINGTON POST, June 24, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/06/23/AR2008062301973.html (last visited Feb. 17, 2011).

[30] *Hulteen*, 129 S. Ct. at 1972.

Discrimination Act of 1978. Part II includes background on the facts and issues presented in *Hulteen*. Part III provides a discussion of two competing models adopted by federal courts and the U.S. Supreme Court concerning the treatment of past employment practices that have had subsequent effects on employment compensation. This part argues that congressional actions reveal support of one model over the other. Part IV examines the primary weaknesses in the majority opinion, underscoring the decision's restrictive interpretation of Title VII and its misplaced reliance on the *Gilbert* decision. This section contains original arguments and highlights relevant points from Justice Ginsburg's dissent to support the overall analysis. Finally, this Note concludes with a brief discussion of *Hulteen's* impact on future employment discrimination claims.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Title VII and Seniority Systems

Congress passed Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination, stating that it is an "unlawful employment practice"[31] for an employer to:

> [D]iscriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees . . . in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee . . . .[32]

As a prerequisite to bringing a Title VII suit, an employee must first file a charge of discrimination with the EEOC within the applicable time period—in this case, 300 days after the alleged unlawful employment practice occurs.[33]

Additionally, Title VII carves out an exception in section 703(h) for seniority systems—a method of calculating an employee's term of employment,[34] defined more precisely as a "scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase."[35] Section 703(h) provides in relevant part:

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[31] 42 U.S.C.A. § 2000e-2(a).

[32] *Id.*

[33] *Id.* § 2000e-5(e)(1).

[34] Pallas v. Pacific Bell, 940 F.2d 1324, 1328 (9th Cir. 1991), *abrogated by* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

[35] Cal. Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980). This case noted that, "Title VII does not define the term 'seniority system,' and no comprehensive definition of the phrase emerges from the legislative history of § 703(h)," and goes on to define seniority system using the common understanding in labor relations. *Id.* at 605-06.

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.[36]

This exception is particularly important because the *Hulteen* majority finds that "[t]here is no question that [AT&T's] payment of pension benefits . . . is a function of a seniority system, given the fact that calculating benefits under the pension plan depends in part on an employee's term of employment."[37] In creating such an exception, section 703(h) protects employers who implement facially neutral seniority systems in good faith but that have an unintentional negative impact on protected groups.[38] Protection accorded by section 703(h) emphasizes the state of mind or intent of the employer. Thus, an employer cannot rely on section 703(h) where he or she has implemented a system that intentionally discriminates—regardless of whether the policy is facially discriminatory or facially neutral.[39]

The Civil Rights Act of 1991[40] amended Title VII in section 706(e)(2) to expand the right to challenge discriminatory seniority systems. This amendment—mirroring the language found in the Ledbetter Act—states that an "unlawful employment practice" occurs "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."[41] Even though the amendment gives greater protection to seniority systems, it

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[36] 42 U.S.C.A. § 2000e-2(h).

[37] AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1968 (2009).

[38] Teamsters v. United States, 431 U.S. 324, 353-54 (1977). In *Teamsters*, the federal government brought an action against the employer for violation of Title VII for allegedly refusing to treat African Americans and Spanish-surnamed Americans less favorably than white individuals, including challenging the company's seniority system. The U.S. Supreme Court provides the following example of the alleged "built-in disadvantage" to the racial minority employees:

> An example would be a Negro who was qualified to be a line driver in 1958 but who, because of his race, was assigned instead a job as a city driver, and is allowed to become a line driver only in 1971. Because he loses his competitive seniority when he transfers jobs, he is forever junior to white line drivers hired between 1958 and 1970. The whites, rather than the Negro, will henceforth enjoy the preferable runs and the greater protection against layoff. Although the original discrimination occurred in 1958 before the effective date of Title VII the seniority system operates to carry the effects of the earlier discrimination into the present.

Id. at 345, n.27. The Court, however, held that the seniority system was protected by § 703(h) because while the employer discriminated in hiring line drivers, the seniority system itself lacked discriminatory terms. *Id.* at 352-53. The *Hulteen* majority relied on *Teamsters* to argue that the seniority system at issue there was also bona fide and therefore fell under § 703(h). *Hulteen*, 129 S. Ct. at 1969-70.

[39] Shannon Barrows Bjorklund, Comment, *The Impact of Pregnancy Discrimination on Retirement Benefits: A Present Violation of Title VII or a Claim Belonging to History?*, 75 U. CHI. L. REV. 1191, 1194 (2008).

[40] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.A. § 2000e *et seq.* (2000)).

[41] *Id.* at 1079.

reiterates that it is applicable to seniority systems that are intentionally discriminatory.[42]

B. Pregnancy Discrimination Act of 1978

Passage of the PDA was prompted by two U.S. Supreme Court decisions in the mid-1970s—*General Electric Co. v. Gilbert*[43] and *Nashville Gas Co. v. Satty*.[44] Prior to 1978, pregnancy discrimination was not explicitly included in the definition of sex discrimination under Title VII. It was not until 1976 when the Supreme Court decided *Gilbert*—more than ten years after enactment of the civil rights law—did the Court first directly consider whether discrimination on the basis of pregnancy is sex discrimination, and therefore constituted an unlawful employment practice. In *Gilbert*, General Electric provided all employees with a disability plan that pays for weekly non-occupational sickness and accident benefits, but excludes disabilities that arise from pregnancy.[45] The passage of the PDA—an amendment to Title VII—was thus a response to the decision by Justice Rehnquist in *Gilbert*, which held that an employer disability benefit plan that excluded pregnancy was not sex-based discrimination within the meaning of Title VII.[46] Relying on an earlier decision that presented a similar plan,[47] Justice Rehnquist reasoned that the General Electric plan "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."[48] Since the program divides two groups into one that is exclusively female and another that includes members of both sexes—the group of non-pregnant persons—Justice Rehnquist concluded:

> Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to . . . exclude pregnancy from the coverage . . . just as with respect to any other physical condition.[49]

A year later, the Court revisited this particular question in *Nashville Gas Co. v. Satty*.[50] This time, in another majority opinion by Justice Rehnquist, the Court

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[42] *Id.*

[43] 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[44] 434 U.S. 136 (1977).

[45] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[46] *Id.* at 145-46.

[47] *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (involving a disability insurance program that exempted coverage of work loss resulting from pregnancy).

[48] *Gilbert*, 429 U.S. at 134.

[49] *Id.* at 134-35.

[50] 434 U.S. 136 (1977).

decided that the employer violated Title VII when it denied seniority credit to women returning from pregnancy leave.[51] In distinguishing *Gilbert*, the former Chief Justice reasoned that the practice in *Satty* was unlawful because the employer did not merely deny benefits, but imposed a "substantial burden"[52] on women upon returning from pregnancy leave since they were denied specific employment opportunities that were open to men.[53] However, this distinction between the two cases was less than clear. In deciding *Satty*, Rehnquist did not explain why the women in *Gilbert* were not burdened when they were deprived of pay while on pregnancy leave. *Satty* "left both employers and employees in the untenable position of guessing, without any judicial guidance, whether the courts would apply the 'benefits' or the 'burdens' label to a particular policy."[54] In a direct response to *Gilbert* and *Satty*, Congress swiftly enacted the PDA, which provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[55]

In passing the PDA, Congress sought to clarify its intent that pregnancy discrimination is indeed a form of sex-based discrimination under Title VII, and to "make[] clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."[56] Congress rejected the majority's reasoning in *Gilbert* that the differential treatment of pregnant employees is not sex-based discrimination because only women can become pregnant. Instead, the House of Representatives' Education and Labor Committee found that the dissenting judges correctly interpreted Title VII.[57] Justice Brennan, in his dissent, noted that the EEOC's position that pregnancy discrimination is in violation of Title VII, is reasonable and in line with the "broad social objectives of Title VII"[58] where the employer's plan provided comprehensive coverage for men and not for

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[51] *Satty* was remanded to determine whether the employer intended to discriminate based on sex. *Id.* at 137.

[52] *Id.* at 142.

[53] *Id.*

[54] H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

[55] Pregnancy Discrimination Act, 92 Stat. 2076. According to the amendment, employers are required to provide equal benefits for employees who take pregnancy and disability leaves. It would then, not be a violation of the PDA if an employer did not give seniority credit for both pregnancy and discrimination leaves. *Id.*

[56] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

[57] H.R. REP. NO. 95-948.

[58] *Id.* at 2.

women.[59] Justice Stevens, in a separate dissent, remarked that the majority erred, arguing "it is the capacity to become pregnant which primarily differentiates the female from the male."[60] In adding the PDA to "reflect the commonsense view"[61] of sex discrimination, Congress noted that contrary to *Gilbert*, prior cases in "eighteen federal district courts and all seven federal courts of appeals which have considered the issue have rendered decisions prohibiting discrimination in employment based on pregnancy."[62] That is, Congress felt that it did not need to address pregnancy discrimination before *Gilbert* since every court that has considered the issue reached what Congress deemed to be the correct conclusion.

II. BACKGROUND OF *AT&T V. HULTEEN*

A. AT&T's Pregnancy Leave Policy

While the PDA was passed in 1978, the recent U.S. Supreme Court decision of *AT&T v. Hulteen*[63] issued in 2009 puts into question the impact of the legislation more than thirty years later. In *Hulteen*, plaintiffs Nora Hulteen, Eleanora Collet, Arma Horton,[64] and Elizabeth Snyder were all employees of Pacific Telephone and Telegraph Company ("PT&T"), a subsidiary of defendant AT&T.[65] In 1984, the federal government entered a judgment against AT&T that resulted in a divesture of its subsidiaries, including PT&T.[66] As the result of this court order, plaintiffs in this case and many other employees of PT&T became employees of AT&T and their service credits earned while at PT&T "were carried over to AT&T."[67]

Since as early as 1914, AT&T and its subsidiaries utilized a Net Credited Service ("NCS") system based on the length of time that an employee has been with the company and adjusted by any leaves of absence that he or she has taken.[68] The NCS system "is critical in determining a host of benefits for which employees can qualify: the amount of pension payments; eligibility for early retirement;

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[59] *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976) (Brennan, J., dissenting), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

[60] *Gilbert*, 429 U.S. at 162 (Stevens, J., dissenting).

[61] H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

[62] *Id.* at 2.

[63] AT&T Corp. v. Hulteen, 441 F.3d 653 (9th Cir. 2006), *aff'd en banc*, 498 F.3d 1001 (9th Cir. 2006), *rev'd sub nom*, 129 S. Ct. 1962, 1968 (2009).

[64] Arma Horton was an original plaintiff and was subsequently replaced by plaintiff Linda Porter. *See* Complaint, AT&T Corp. v. Hulteen, No. C-01-1122 2001 WL 36168843 (N.D. Cal. Mar. 19, 2001) [hereinafter Complaint].

[65] *Id.*

[66] AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1966, n.1 (2009).

[67] *Id.*

[68] AT&T Corp. v. Hulteen, No. C-01-1122 MJJ, 2003 WL 25777891,*1, *2 (N.D. Cal. 2003), *rev'd*, 441 F.3d 653 (9th Cir. 2006), *aff'd en banc*, 498 F.3d 1001 (9th Cir. 2007), *rev'd sub nom*, 129 S. Ct. 1962 (2009).

qualification for certain voluntary termination packages; job bidding; shift preference; seniority for layoffs, etc."[69] Under AT&T's NCS system, each employee is given a "Term Of Employment" or TOE and an NCS date.[70] The NCS date represents the start of an employee's TOE, defined as an employee's "period of continuous employment in the service of the Company."[71] Where an employee takes leave, the NCS date is adjusted accordingly to reflect the uncredited leave time.[72]

Prior to 1977, AT&T used different policies for granting service credit depending on the type of leave taken.[73] Employees on "disability" leave received service credit for the entire time that they were absent—regardless of how long the period of time spanned—whereas employees on "personal" leaves were given credit for a maximum of thirty days.[74] During this period, pregnancy leave was treated as personal rather than disability leave.[75] For example, if a female employee became pregnant and was disabled for 100 days, she only received service credit for thirty days, and her NCS date was then pushed back seventy days, rather than the full 100 days.

This thirty days maximum service credit policy was, however, eliminated in 1977 as the result of AT&T's subsequent adoption of its Maternity Payment Plan.[76] The plan created a separate category for pregnancy leave by granting pregnant employees up to six weeks of service credit.[77] By contrast, employees who took disability leave unrelated to pregnancy continued to receive full service credit during their entire period of absence.[78]

AT&T again changed its pregnancy leave policy in 1979.[79] On April 29, 1979—the date on which the PDA became effective[80]—AT&T replaced its

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[69] *Id.* at *1.

[70] *Id.* at *2.

[71] *Id.*

[72] The district court in *Hulteen* gave the following example to illustrate how the NCS and TOE worked:

> [I]f an employee began working on September 1, 1970, and stayed with the company without interruption until September 1, 1971, she would be credited with 365 days of service, and her NCS date would remain September 1, 1970. However, if the employee went on a leave of absence for 25 days, she would be credited for only 340 days of service, and her NCS date would be adjusted accordingly. The new date would then become September 26, 1970.

Id.

[73] AT&T Corp. v. Hulteen, 441 F.3d 653 (9th Cir. 2006), *aff'd en banc*, 498 F.3d 1001 (9th Cir. 2006), *rev'd sub nom*, 129 S. Ct. 1962, 1967 (2009).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Even though the PDA became applicable to benefit plans on April 29, 1979, it is not entirely clear which date the statute became applicable to seniority systems. *Compare* EEOC Compliance

Maternity Payment Plan with the Anticipated Disability Plan.[81] The new plan required that pregnancy leave be treated the same as disability leave.[82] This plan remains in place at AT&T today.[83]

B. Plaintiffs' Allegations Against AT&T

Plaintiffs were long-time female employees of PT&T before they joined AT&T as the result of a federal court order. Each of these women took pregnancy leave between 1968 and 1976, and during such time was only permitted a maximum of thirty days full service credit for the entire period of her absence.[84] As a consequence, each plaintiff received a reduced benefit and fewer service credits than she would have accrued had AT&T treated her pregnancy leave on the same basis as disability.[85]

Following AT&T's ongoing refusal to recalculate plaintiffs' NCS credits, each plaintiff separately filed a complaint with the EEOC, alleging that AT&T had violated Title VII by discriminating on the basis of sex and pregnancy.[86] The EEOC, in response, issued a letter finding reasonable cause that AT&T had discriminated against plaintiffs "'and a class of other similarly-situated female employees whose adjusted [NCS] date has been used to determine eligibility for a service or disability pension, the amount of pension benefits, and eligibility for certain other benefits and programs, including early retirement offerings.'"[87] After the EEOC granted plaintiffs a right to sue, the individual plaintiffs, joined by Communications Workers of America[88]—the collective bargaining representative for non-management employees of AT&T—filed suit in the United States District Court for the Northern District of California.[89] They alleged that AT&T's unlawful employment practices violated Title VII and the Employment Retirement Income Security Act of 1974 ("ERISA").[90] Plaintiffs argued that by failing to

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Manual § 616.25(b)(1) (2009) (indicating October 31, 1978 as the effective date) *with* EEOC v. Ameritech Servs., Inc., 129 Fed. Appx. 953, 954 (6th Cir. 2005) (implying that the PDA applied to seniority systems in April 1979). *See* Bjorklund, *supra* note 39.

81 AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1967 (2009).

82 *Id.*

83 Hulteen v. AT&T Corp., No. C-01-1122 MJJ, 2003 WL 25777891, at *3 (N.D. Cal. 2003).

84 For a more detailed account of each plaintiff's employment history with PT&T and AT&T, *see id.*

85 *Hulteen*, 129 S.Ct. at1967. Specifically, seven months fewer for Hulteen, about six months for Collet, and about two months for Porter and Synder. *Id.*

86 *Id.*

87 Complaint, *supra* note 64, ¶ 44.

88 Communications Workers of America had previously tried through collective bargaining "to convince AT&T to restore [NCS] credits to female employees who took maternity or pregnancy-related disability leaves prior to April 29, 1979." *Id.* at ¶ 80.

89 Complaint, *supra* note 64.

90 Hulteen v. AT&T Corp., No. C-01-1122 MJJ,2003 WL 25777891, at *1 (N.D. Cal. 2003). Plaintiffs in *Hulteen* argued in their Complaint that AT&T violated ERISA when it "breached their fiduciary duties to the participants and beneficiaries of the PP [Pension Plan] and MPP [Management Pension Plan] by failing to act solely in the interests of the participants and beneficiaries of those plans"

recalculate their NCS date and service credits earned during their employment, AT&T's pregnancy leave policies were "facially discriminatory,"[91] "intentionally designed to discriminate against pregnant women,"[92] and "constitute ongoing, current, and continuing discrimination against pension plan participants and beneficiaries based on gender and pregnancy."[93]

C. Battle Over the Application of the Ninth Circuit Decision in Pallas v. Pacific Bell

To determine whether AT&T violated Title VII, the Ninth Circuit interpreted and applied *Pallas v. Pacific Bell*.[94] The facts and legal question presented in *Pallas* are virtually identical to the ones in *Hulteen*. In *Pallas*, the plaintiff was a female employee who brought suit against PT&T alleging that the company had violated the PDA in denying her early retirement for taking pregnancy leave in 1972.[95] The *Pallas* court noted that while the *United Air Lines, Inc. v. Evans*[96] U.S. Supreme Court line of cases recognizes the special provision accorded to seniority systems under Title VII and has held that for the purposes of facially neutral systems, a discriminatory act occurs at the time of their adoption, this line of cases was not dispositive.[97] The Ninth Circuit found two major problems with following the *Evans* line of cases: first, it was not until 1987 when PT&T adopted its program that Pallas could have become aware of its discriminatory effects; "the [Title VII] claim could not have been brought earlier."[98] Second, the court found that the early retirement program was not facially neutral.[99]

The Ninth Circuit in *Pallas* instead relied on *Bazemore v. Friday*[100] in which the Supreme Court concluded that even though an employer is not liable for acts of discrimination prior to the enactment of Title VII, an employer could be held liable for discrimination perpetuated after the Act took effect.[101] Following the reasoning

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as required by § 404(a)(1) of the Act. Complaint, *supra* note 64, ¶ 96. Further, AT&T "interpreted and applied the terms of the PP and MPP in an arbitrary and/or discriminatory manner . . . have otherwise wrongfully denied benefits . . . to current and former female AT&T employees on a continuous, ongoing, and current basis." *Id.* at ¶ 97. The district court dismissed the ERISA claim as a matter of law on the basis that the statute of limitations started to run when the NCS policy was adopted in 1979. Hulteen v. AT&T Corp., No. C-01-1122 MJJ,2003 WL 25777891, at *14 (N.D. Cal. 2003). The ERISA claim was not addressed by the Ninth Circuit. Hulteen v. AT&T Corp., 441 F.3d 653 (9th Cir. 2006).

91 Complaint, *supra* note 64, ¶ 88.

92 *Id.* at ¶ 90.

93 *Id.* at ¶ 95.

94 940 F.2d 1324 (9th Cir. 1991), *abrogated by* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

95 *Id.* at 1325.

96 431 U.S. 553 (1977). *See also* Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Delaware State Coll. v. Ricks, 449 U.S. 250 (1980).

97 *Pallas*, 940 F.2d at 1326.

98 *Id.* at 1327.

99 *Id.*

100 478 U.S. 385 (1986).

101 *Id.*

in *Bazemore*, the *Pallas* court decided that in 1987, PT&T "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the [PDA]."[102] Even though Pallas took her pregnancy leave prior to the PDA's enactment in 1978, the discriminatory act occurred in 1987 for the purposes of stating a claim under Title VII when PT&T instituted its retirement program.[103]

Despite AT&T's argument that *Pallas* misapplied *Bazemore*, the district court in *Hulteen* declared that it was bound by this earlier Ninth Circuit decision and granted summary judgment to plaintiffs on the Title VII claim.[104] AT&T distinguished *Bazemore* on the ground that the employer maintained the same pay structure that had been identical to the one in place before the enactment of Title VII.[105] In contrast, AT&T's pre-PDA policies that treated pregnancy leave differently than other disability leave was legal and therefore was not facially discriminatory under *Gilbert*.[106] AT&T insisted that the *Pallas* court should have used the framework in *Evans*. Even if the policy was actionable, AT&T argued that plaintiffs should have filed a claim in 1979 when its policy took effect.[107] Under AT&T's argument, there is no present violation of the PDA because its current NCS system treats pregnancy and disability leaves on the same basis, and thus, is a facially neutral policy under section 703(h).[108] Furthermore, the Sixth and Seventh Circuits[109] considered the same issue in question here and reached the opposite conclusion as *Pallas*.

The Ninth Circuit in *Hulteen* agreed with AT&T. In reversing the district court, the Ninth Circuit held that, "[t]he problem with plaintiffs' position that the NCS system is facially discriminatory is that it necessarily depends, again, on a retroactive application of the PDA."[110] In other words, there could be no continuing current violation of the PDA unless the court declared that the pre-PDA policy was "facially discriminatory."

However, the Ninth Circuit sitting *en banc* affirmed the district court's decision in favor of the *Hulteen* plaintiffs.[111] In reviewing its previous decision, the court sitting *en banc* found that it blurred the distinction between facially

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[102] *Pallas*, 940 F.2d at 1327.

[103] *Id.*

[104] Note that the district court in *Hulteen* dismissed the ERISA claim: "the relevant act for plaintiffs' ERISA claim is the adoption of the policy not to credit pre-1979 pregnancy leave . . . Any complaints under ERISA needed to be filed within three years of the 1979 adoption of that policy." Hulteen v. AT&T Corp., No. C-01-1122 MJJ, 2003 WL 25777891, at *14 (N.D. Cal. 2003).

[105] *Pallas*, 940 F.2d at 1326-27.

[106] *See id.*

[107] *See id.*

[108] *Pallas*, 940 F.2d at 1326-27.

[109] *See, e.g.*, Ameritech Benefit Plan Comm. v. Foster-Hall, 220 F.3d 814 (7th Cir. 2000) (holding that any Title VII challenge to calculating pre-PDA leave was time-barred); Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007) (relying on the *Ameritech* and *Evans* decisions in granting summary judgment to employer).

[110] Hulteen v. AT&T Corp., 441 F.3d 653, 662 (9th Cir. 2006).

[111] AT&T Corp. v. Hulteen, 498 F.3d 1001 (9th Cir. 2006), *rev'd sub nom*, 129 S. Ct. 1962 (2009).

neutral and facially discriminatory policies.[112] *Pallas* appropriately relied on *Bazemore* because PT&T "engage[d] in intentional discrimination *each time it applie[d] the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA."[113] The outcome in *Pallas* thus depended largely on the court's decision to follow either the Supreme Court cases of *Evans* or *Bazemore* as the controlling model in cases of past discriminatory pay decisions. The following section explores the background and arguments made in both cases and argues that there is congressional support of the *Bazemore* framework.

III. *EVANS* OR *BAZEMORE*?: TWO COMPETING MODELS DEVELOPED BY THE UNITED STATES SUPREME COURT TO ADDRESS PAST DISCRIMINATORY PAY DECISIONS

A. United Air Lines, Inc. v. Evans

In *Evans*, a female flight attendant forced to resign after marrying, alleged that United Airlines's denial of her seniority credit when she was later rehired as a new employee constituted a present continuing violation of Title VII.[114] The U.S. Supreme Court—in an opinion by Justice Stevens—rejected plaintiff's Title VII claim. When plaintiff was fired by United Airlines in 1968, she failed to file an EEOC charge for employment discrimination and her claim became time-barred.[115] Further, the Court observed that Evans failed to allege that the seniority system itself was designed to discriminate.[116] The Court found that United Airlines's seniority system was a facially neutral system pursuant to section 703(h) because it did not treat two similarly situated groups differently on the basis of sex: "both male and female employees . . . who resigned or were terminated for a nondiscriminatory reason (or for an unchallenged discriminatory reason), and were later reemployed . . . receive[d] no seniority credit for their prior service."[117] While the "no marriage"[118] rule was discriminatory and the Court agreed that the seniority system at issue gave present effect to a past act of discrimination, "it [was] merely an unfortunate event in history which [had] no present legal consequences."[119]

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[112] *Id.* at 1006, n.4.

[113] *Id.* at 1007.

[114] United Airlines, Inc. v. Evans, 431 U.S. 553, 554 (1977).

[115] *Id.* at 559.

[116] *Id.* at 560.

[117] *Id.* at 557.

[118] *Id.* at 555. Prior to November 1968, United Airlines had a policy forbidding flight attendants to be married. After a collective-bargaining agreement went into effect in 1968, the "no marriage" policy ended and United rehired certain flight attendants who were fired under the earlier rule. *Id.*

[119] *Id.* at 558.

B. Bazemore v. Friday

More than nine years after the Supreme Court decided *Evans*, Justice Brennan, who dissented in *Evans*, created a second line of case precedent in *Bazemore* to determine whether a discriminatory practice constituted an "unlawful employment practice" under Title VII.[120] In *Bazemore*, black and white workers were segregated into two different branches until the Civil Rights Act came into effect in 1965.[121] At that point, the two branches were merged but "some pre-existing salary disparities [between black and white workers] continued."[122] The Court held that even though the pay disparity started before the effective date of Title VII, "[e]ach week's paycheck that delivers less to a black [employee] than to a similarly situated white [employee was] a wrong actionable under Title VII."[123] Justice Brennan observed that *Evans* does not represent a different rule, because the "critical question"[124] in that case was whether a present violation existed.[125] Since United Airlines was not engaging in any discriminatory practices at the time Evans brought suit, there was no violation of Title VII.

C. Effect of the 1991 Amendment to Title VII and the Ledbetter Act on Whether Evans *or* Bazemore *is the Applicable Model*

Despite Justice Brennan's attempt to reconcile *Evans* and *Bazemore*, these cases seem to represent two distinct holdings. *Evans* stands for the proposition that a new unlawful employment practice does not arise each time an employee feels the present effect of a past unlawful employment practice.[126] *Bazemore*, on the other side, holds that an employer commits a new violation of Title VII with each paycheck that reflected a discrepancy that results from a discriminatory pay decision—even if the decision was made before the effective date of the Act.[127]

As in *Pallas*, "[r]easonable policy arguments can be made in favor, or against, either model as a basic framework for thinking about when the current compensation effects of past decisions and practices should be subject to present challenge under Title VII."[128] The *Hulteen* majority evades the question of whether *Evans* or *Bazemore*—or perhaps neither—is the appropriate and controlling model. The majority does not acknowledge *Evans* in its decision and additionally

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120 *See* Bazemore v. Friday, 478 U.S. 385 (1986).

121 *Id.* at 394.

122 *Id.*

123 *Id.* at 395.

124 *Id.* at 396 n.6 (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

125 *Id.*

126 *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

127 *See Bazemore*, 478 U.S. at 385.

128 Motion for Leave to File Supplemental Brief After Argument and Supplemental Brief at 1, AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009) (No. 07-543) [hereinafter Motion for Leave].

dismisses the application of *Bazemore* by limiting the holding of *Bazemore* to its facts.[129]

While there is a lack of judicial guidance and clarity, there exists legislative support of the *Bazemore* model in Title VII's 1991 amendment to the Civil Rights Act and the Ledbetter Act. After *Lorance v. AT&T Technologies, Inc.*[130] was decided by the U.S. Supreme Court, Congress passed the 1991 amendment to the Civil Rights Act. This amendment broadened the time frame for which an employee could file a complaint regarding a seniority system with the EEOC from when the system was adopted to the following:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), *when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.*[131]

In *Lorance*, the Supreme Court upheld the lower court's decision that the action challenging a seniority system's disparate impact on female employees should have been brought when the seniority system was adopted in 1979, and thus, their claim was time barred.[132] But for the new system, the female plaintiffs would not be demoted from "tester" positions because they had spent more years working in the plant than the male tester employees.[133] The plaintiffs brought their claim in 1983 when they were demoted as the result of the new system, arguing that the seniority system had its genesis in intentional sex discrimination and perpetuated that discrimination into the present as the tester position was traditionally male-dominated.[134] The *Lorance* majority recognized that while it was "possible to establish a different theoretical construct"[135] to understand when the Title VII violation occurred, such an alternative approach is not plausible in light of the holding in *Evans*.[136]

The 1991 amendment, in rejecting *Lorance,* embraces the *Bazemore* framework by stating that an employee can challenge a discriminatory seniority system at three separate junctures, since an "unlawful employment practice" occurs

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[129] The Court differentiates *Bazemore* from *Hulteen* on the grounds that *Bazemore* did not involve a seniority system and its pay structure continued after the Act was passed rendering the disparate treatment an unlawful practice. AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1972 (2009).

[130] 490 U.S. 900 (1989) *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[131] 42 U.S.C.A. § 2000e-5(e)(2) (emphasis added).

[132] *See Lorance*, 490 U.S. at 900.

[133] *Id.* at 901-04.

[134] *Id.* at 902-03.

[135] *Id.* at 906.

[136] *Id.* at 906.

when: (1) the employer adopts the seniority system; (2) the plaintiff becomes subject to the system; or (3) the plaintiff is injured by the application of the system.[137] The addition of the second and third considerations to the original text therefore expands the time period for when a worker can file a complaint with the EEOC before the claim becomes time-barred.

Further support of the *Bazemore* model is provided by the enactment of the Ledbetter Act. Unlike *Hulteen*, the *Ledbetter* opinion considers both *Bazemore* and the *Evans* line of cases[138] and follows the *Evans* model in concluding that the EEOC charging period is triggered each time a discrete unlawful practice takes place. However, contrary to the Court, Congress again rejects the *Evans* model when it passed the Ledbetter Act,[139] which provides:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to 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.[140]

Thus, even though there was disagreement in the Ninth Circuit over the application of the *Evans* and *Bazemore* models and confusion over the proper framework in these cases, Congress offered clarification when it followed the *Bazemore* model first in the 1991 amendment for seniority systems and then in the Ledbetter Act for employment practices generally. Moreover, the Ledbetter Act's broad language tracks the text of the 1991 amendment by broadening the definition of when an unlawful employment practice occurs to include when "an individual becomes subject to a discriminatory compensation decision or other practice."[141] The Ledbetter Act goes even a step further than the 1991 amendment in stating that a discriminatory practice occurs when an employee is affected "in whole or *in part* from such a decision or *other practice*."[142] The broad language choice and the fact that the Ledbetter Act applies "to *all* claims of discrimination in compensation

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137 42 U.S.C.A. § 2000e-5(e)(2).

138 The *Ledbetter* court also relied on Delaware State Coll. v. Ricks, 449 U.S. 250 (1980), *Lorance*, 490 U.S. 900, and Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) to determine when an EEOC charge is triggered. Ledbetter v. Goodyear, 550 U.S. 618, 619 (2007). In *Ricks*, a professor sued his former employer after his termination on the basis of national origin discrimination. The Court found that the Title VII claim was untimely because the filing period was triggered when the college made the tenure decision even though the effects of the decision did not occur until later. *Morgan* dealt with a racial discrimination and retaliation claim under Title VII. The Court there held that only acts occurring within the 300 days EEOC filing period were actionable.

139 Motion for Leave, *supra* note 128, at 8.

140 Ledbetter Act, 123 Stat. 5 at 5-6.

141 *Id.* at 5.

142 *Id.* at 6 (emphasis added).

under [T]itle VII . . . that are pending on or after [May 28, 2007]"[143] suggest that the Act applies to the claims in *Hulteen*.

The *Hulteen* majority, however, glosses over the implications of *Lorance* and the new statute on this particular case, arguing that section 703(h) of Title VII—a defense for compensation disparities that arises from a "bona fide seniority" system[144]—renders both statutes inapplicable because there is no intent to discriminate. Viewed in light of Title VII's legislative history and the Ledbetter Act's recent enactment, the majority's argument fails to address important relevant issues that govern the outcome of plaintiffs' claims. By focusing almost exclusively on the exception provided in section 703(h), the majority loses sight of the big picture of Title VII.

IV. PRIMARY WEAKNESSES IN THE *HULTEEN* MAJORITY OPINION

While *Hulteen* provides little help in reconciling *Evans* and *Bazemore*, the majority opinion's principal flaw is that its analysis does not take into account that AT&T's pension system and other such programs are "not creatures of a social or cultural vacuum devoid of stereotypes."[145] As Justice Brennan pointed out in his *Gilbert* dissent in arguing that a benefit plan excluding pregnancy-related disabilities is sex-based discrimination: "discrimination is a social phenomenon encased in a social context and therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals."[146]

While *Gilbert* has since been repudiated by Congress and criticized by courts[147] after it was decided more than thirty years ago, Justice Brennan's criticism of the *Gilbert* majority opinion applies to the *Hulteen* case as well. By strictly limiting its reasoning to the text of section 703(h) of Title VII and *Gilbert* to support its ruling, the *Hulteen* majority only manages to scratch the surface of pregnancy discrimination in the context of seniority systems. This section seeks to provide a more comprehensive and accurate depiction of the issues presented in *Hulteen* by looking at the legislative intent behind Title VII and the social and political context in which *Gilbert* was decided, and argues that the majority's holding is inconsistent against this backdrop. As discussed in greater detail in the subsections that follow, the majority's omission of this discussion is misleading

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143 *Id.* at 7 (emphasis added).

144 42 U.S.C.A. § 2000e-2(h).

145 Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (Brennan, J., dissenting).

146 *Id.* at 159. *See* Lau v. Nichols, 414 U.S. 563 (1974) (holding that San Francisco's failure to provide special language instruction to Chinese-speaking students violated § 601 of the Civil Rights Act of 1964, banning racial or national origin discrimination).

147 *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272 (1987).

and creates a rather basic and distorted story of pregnancy discrimination as it relates to sex-based discrimination in the workplace.

A. Overview of the Majority's Analysis

In overruling the Ninth Circuit's decision in *Pallas*, Justice Souter's majority opinion in *Hulteen* is troubling because it fails to adequately consider the purpose and congressional intent of the PDA, the Ledbetter Act, and more broadly, Title VII of the Civil Rights Act. Instead of directly following *Evans* or *Bazemore*, the Court narrowly focuses on section 703(h) and the *Gilbert* decision. The Court argues that AT&T's failure to recalculate plaintiffs' service credits does not violate Title VII because it is protected under section 703(h). Section 703(h) provides a safe harbor for seniority systems where there is no intent to discriminate despite disparate treatment.[148] The United States Supreme Court held in *Gilbert*—two years prior to the passage of the PDA in 1978—that "an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all."[149] Therefore, the majority contends that AT&T's pension system is a "bona fide seniority system" within the meaning of section 703(h), because it contained no discriminatory terms since pregnancy discrimination was legal after *Gilbert*.

The premise of the majority argument is two-fold. First, pregnancy discrimination was not sex discrimination under Title VII until the PDA was passed in 1978. Second, AT&T's seniority system rules were applied at the time the pregnancy leaves were taken rather than at the time the plaintiffs retired. Under this rationale, the majority rejects plaintiffs' claims because to hold otherwise would mean applying the PDA retroactively—that AT&T's acts were illegal prior to the PDA taking effect.[150] Relying on its conclusion that AT&T lacked discriminatory intent when it adopted its seniority system pre-PDA, the Court dismisses both section 706(e)(2)—added by the 1991 amendment expanding the right to challenge seniority systems—and the Ledbetter Act as having any application in this case.[151]

B. A Restrictive Interpretation of Title VII Conflicts with Legislative Intent

The majority's formalistic analysis of section 703(h) is weakened by its lack of practicality and therefore undermines the social objectives of Title VII, as reasserted by the PDA and the Ledbetter Act. In abrogating *Gilbert* and *Ledbetter*, Congress, in its enactment of the PDA and the Ledbetter Act criticized the restrictive judicial interpretations of Title VII. Congress noted that the PDA was

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148 42 U.S.C.A. § 2000e-2(h).

149 *Gilbert*, 429 U.S. at 136.

150 AT&T v. Hulteen, 129 S. Ct. 1962, 1971 (2009).

151 *See id.*

necessary to broaden the definition of sex discrimination in Title VII to "reflect the commonsense view [of sex discrimination] and to ensure that working women are protected against all forms of employment discrimination."[152] Further, Congress "mandated equal access to employment and its concomitant benefits for female and male workers," but the "[U.S.] Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment."[153] In voting to pass the Ledbetter Act, Congress also recognized that the statute of limitations required for filing of pay discrimination claims "ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."[154] As a result, the Ledbetter Act changed the time at which a filing with the EEOC is triggered from when a discrete discriminatory *act* occurs, to when a person is affected "in whole or in part from such a [discriminatory] decision or other practice."[155]

This broad language choice gives courts less discretion to narrowly read Title VII, particularly in light of Justice Alito's reliance on *Lorance* as part of his precedent-based argument in defeating Ledbetter's claim.[156] In amending Title VII in 1991, Congress rebuked the reasoning in *Lorance* by expanding the period for which an employee can challenge an allegedly discriminatory seniority rule.[157] In rejecting Ledbetter's argument that her claim was timely, the Court emphasized that the post-*Lorance* legislation was narrowly tailored to seniority systems only: "[f]or present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination."[158] Contrary to the Court's analysis in *Ledbetter*, Congress's decision to use the phrases "in whole or in part" and "other practice" in the Ledbetter Act underlines legislative intent to accommodate more liberal judicial readings of employment discrimination claims. Adding "other practice" to the Act suggests that the legislature disagreed with Justice Alito's categorization of different forms of employment practices.

The 1991 amendment is also instructive in determining more specifically Congress's intent on Title VII charges as it relates to seniority systems. The extension of the timing provisions prior to the Ledbetter Act undermines the majority's assertion that seniority systems are given greater protection than other forms of employment practices under the civil rights law: "[s]eniority systems are

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152 H.R. REP. NO. 95-948, at 3 (1978).

153 *Id.*

154 H.R. REP. NO. 110-237, at 1 (2007).

155 Ledbetter Act, 123 Stat. 5 at 2.

156 *See* Putnam, *supra* note 14, at 698.

157 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1079.

158 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 627 (2007). *See* EEOC v. City Colls. of Chi., 944 F.2d 339 (7th Cir. 1991) (upholding the dismissal of a claim under the Age Discrimination Act, as the 1991 amendment does not ban the application of the *Lorance* decision to federal statutes or to situations involving seniority systems).

afforded special treatment under Title VII, reflecting Congress's understanding that their stability is valuable in its own right."[159] Rather, the 1991 amendment in "[v]iewing each application of a discriminatory system as a new violation serves the equal opportunity goals of Title VII by ensuring that victims of discrimination are not prevented from having their day in court."[160]

As the Amicus Brief submitted by the Lawyers' Committee for Civil Rights Under Law et al. in *Hulteen* argues, the unambiguous language of the 1991 amendment also makes clear that Congress intended to permit employees to challenge a discriminatory seniority system at retirement.[161] The common understanding of the phrase "injured by the application" of a policy is the time at which a policy is imposed on an individual to her detriment.[162] Under this principle, "application" of a pension plan "is a discrete act that occurs upon the calculation of benefits pursuant to the plan."[163] Otherwise, "injured by the application" language would be rendered meaningless and contrary to the ordinary understanding of the statute's text.[164]

The *Hulteen* majority's narrow reading of Title VII is therefore at odds with congressional intent to lessen restrictions for victims of employment discrimination, which is precisely what Title VII emphasizes as its prevailing concern—one that has become increasingly clear with each Title VII change, as evidenced by the prompt and direct legislative responses to *Lorance* and *Ledbetter*. Committee Reports of both Houses found "a compelling need for legislation to overrule the *Lorance* decision"[165] due to concern that the rule in that case would "bar all challenges to contemporary applications of discriminatory rules adopted prior to 1965—that is, all the discriminatory rules in existence when Title VII became effective—because the deadline for a timely charge would have expired before Title VII ever came into effect."[166] For this reason, one of the stated purposes of the amendment was to "respond to recent decisions of the [U.S.] Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[167]

The Ledbetter Act affirmed the original congressional intent of Title VII and built on the express aim of the 1991 amendment when it rejected *Ledbetter* as the decision "made it more difficult for workers to stand up for their basic rights at

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[159] AT&T Corp. v. Hulteen, 129 S. Ct. at 1968-69 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977)).

[160] Lorance v. AT&T Techs., Inc., 490 U.S. at 915 (Marshall, J., dissenting).

[161] Brief for Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae Supporting Respondents, AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2008) (No. 07-543), 2008 WL 4948401 [hereinafter Brief for Lawyers' Committee].

[162] *Id.* at 6-7.

[163] *Id.* at 9.

[164] *Id.* at 7-8.

[165] S. REP. NO. 101-315, pt. 4, at 27 (1990). *See* H.R. REP. NO. 101-644, pt. II, at 10-11 (1990).

[166] S. REP. NO. 101-315, pt. 4, at 26.

[167] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071.

work."[168] In *Ledbetter*, the plaintiff filed an EEOC complaint for pay discrimination shortly after she retired and discovered that her employer had been paying her significantly less than her male colleagues.[169] *Ledbetter* does not reflect the realities of the American workplace because it ignores the secrecy that surrounds pay decisions in a work environment.[170] For example, conversations concerning salary are not merely discouraged, but one-third of U.S. employers in the private sector have adopted specific policy known as pay/confidentiality rules that prohibit employees from discussing their wages with co-workers.[171] The secrecy surrounding compensation discrimination distinguishes this from other forms of employment practices and renders it reasonable for an employee to lack awareness that pay disparities existed. In recognizing the obstacle created by the statute of limitations barring Ledbetter's claim, Congress relaxed the time period for when an unlawful employment practice takes place, and in turn, would be timely under Title VII.[172]

Accepting AT&T's characterization of the seniority system as proof that it is not facially discriminatory is likewise inconsistent with the realities of the average American workplace. The Court rests the strength of its argument on section 703(h), stressing the technical legal distinction between a neutral and facially discriminatory seniority system. Implicit in this argument is the assumption that the discriminatory act occurred pre-PDA—or more specifically as AT&T claims: the service credits were calculated when plaintiffs returned from their pregnancy leaves rather than when they retired. As a result, the majority argues that since each of the plaintiffs returned from her leave before the passage of the PDA in 1978, the claims based on sex discrimination are not actionable.[173] However, in alleging that AT&T failed to treat the female plaintiffs "the same for . . . purposes [of the] receipt of [pension] benefits . . . as other persons . . . similar in their ability or inability to work,"[174] the Ninth Circuit was correct in finding that it is irrelevant whether AT&T made adjustments to an employee's service credits on an on-going basis or at the time it set the plaintiffs' pensions. Instead, the time to bring a Title VII claim starts when an "unlawful employment practice" takes place, defined as when "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment" occurs.[175] But since plaintiffs' seniority rights did not affect their shift preference, layoffs or job bidding, there

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168 H.R. REP. NO. 110-237, at 3.

169 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621-22 (2007).

170 *See generally* Bindu George, Note, Ledbetter v. Goodyear: *A Court Out of Touch with the Realities of the American Workplace*, 18 TEMP. POL. & CIV. RTS. L. REV. 253 (2008).

171 Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 170-72 (2004).

172 *See* H.R. REP. NO. 110-237.

173 AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1970 (2009).

174 42 U.S.C.A. § 2000e(k).

175 *Id.* § 2000e-2(a)(1).

was no *immediate* impact on an employee's "compensation, terms, conditions, or privileges of employment."[176]

Even if AT&T adjusted plaintiffs' service credits when they returned from their pregnancy leaves, whether there will be any effect on fringe benefits is also speculative depending on factors such as whether they stay with the company long enough for the pension to vest or whether AT&T changes its pension benefit formula before their retirement.[177] Adopting AT&T's justification would lead to absurd results and an evasion of the legislative response to *Lorance*, embodied in section 706(e)(2). Under this interpretation, an employer could adopt a seniority system that violates Title VII and change the accrual rule before pensions became due and insist that the system was not facially discriminatory.[178] This result is not intended by section 706(e)(2) since the entire purpose of the amendment was to ensure that an intentionally discriminatory seniority system would be subject to challenge not only when adopted, but also when implemented, often many years later.[179]

Plaintiffs present a more realistic view of when the discriminatory act occurred. They argue that the discriminatory act occurred at retirement when AT&T excluded service credit from their pregnancy leaves. "AT&T's argument misapprehends how pension benefits operate and distorts the Ninth Circuit's reasoning"[180] because it is not until an employee retires will her pension be impacted. This is in harmony with *Bazemore's* continuing violation theory where "each time a discriminatory seniority system is applied, like each time a discriminatory salary structure is applied, an independent 'unlawful employment practice' . . . takes place, triggering the limitations period anew."[181]

By relying on pre-PDA calculations, AT&T carried the discrimination forward to present-day pension decisions, which is illegal under the post-PDA regime.[182] As such, the Ninth Circuit did not create a new obligation as contended by AT&T. Thus, given Title VII's pro-employee sentiment, the consequences of taking the majority's view in *Hulteen* as to when the discriminatory act occurred is unworkable. The implication that plaintiffs should have brought a Title VII claim immediately after they returned from their leaves is unreasonable where they have not felt the harm—or had any awareness—of a discriminatory act.[183] Similarly,

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[176] Brief for the Respondents at *10, AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2008) (No. 07-543), 2008 WL 4892759.

[177] *Id.*

[178] *See id.*

[179] H.R. REP. NO. 102-40, pt. II, at 23 (1991).

[180] Petition against Writ of Certiorari at *10, AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2007) (No. 07-543), 2007 WL 4613643.

[181] Lorance v. AT&T Techs. Inc., 490 U.S. 900, 915 (1989) (Marshall, J., dissenting).

[182] *See* Pregnancy Discrimination Act, 92 Stat. 2076.

[183] Plaintiffs assert that they did not have actual knowledge that NCS would be applied in a discriminatory manner until the 1990s. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at *17, AT&T Corp. v. Hulteen, No. C01 122 MJJ (9th Cir. 2002), 2002 WL 34453277.

Ledbetter could not have brought forth her Title VII claim any sooner because she lacked sufficient knowledge of the pay disparity that existed between she and male supervisors at the Goodyear plant until she retired, at which time the Court deemed was too late. But as Justice Ginsburg noted in her *Ledbetter* dissent, "only when the disparity becomes apparent and sizable . . . that an employee in Ledbetter's situation is likely to comprehend her plight and . . . complain."[184]

C. Failure to Consider Gilbert *in Context*

1. Significance of *Gilbert*

Amendments to Title VII—including the recent enactment of the Ledbetter Act—support a broad reading of the Act, and shed light on the troubling implications that come from relying on AT&T's premise that a Title VII claim was triggered when plaintiffs' service credits were calculated prior to their retirement. The *Hulteen* majority's acceptance of AT&T's other premise that pregnancy discrimination is not automatically sex discrimination under Title VII before the PDA's enactment, is perhaps even more far reaching and disconcerting. The Court states, "AT&T's intent when it adopted the pregnancy leave rule (before the PDA) was to give differential treatment that as a matter of law, as *Gilbert* held, was not gender-based discrimination."[185] As a consequence, "AT&T's system must be viewed as bona fide, that is, as a system that has no discriminatory terms, with the consequence that [section 703(h)] controls."[186] By concluding that *Gilbert* provides immunity to employers like AT&T because their seniority systems were in place prior to the decision, the *Hulteen* majority opinion therefore turns on *Gilbert* and the statutory interpretation of the PDA.

The emphasis on *Gilbert* to support the *Hulteen* majority's conclusion that AT&T had not committed an unlawful practice—as highlighted by Justice Ginsburg's dissent—is misguided. The majority argues that since AT&T lacked an intent to discriminate pursuant to section 703(h) because *Gilbert* declared that pregnancy discrimination was legal, neither the post-*Lorance* legislation nor the Ledbetter Act are applicable since both statutes only apply to an unlawful employment practice.[187] However, it is questionable whether AT&T's seniority system was facially neutral and constituted a bona fide system in the first instance. *Gilbert* held that disability plans that exclude pregnancy-related disabilities do not violate Title VII absent a showing that the exclusion was used as a "mere pretext[ ] designed to effect an invidious discrimination against the members of one sex."[188]

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[184] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

[185] AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1970 (2009).

[186] *Id.*

[187] *Id.* at 1971-73.

[188] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 134 (1976).

Assuming that the discriminatory act took place prior to the passage of the PDA, a deeper analysis of the political and social environment in which *Gilbert* was decided suggests that this, in itself, does not automatically mean that AT&T's pension system was lawful. Thus, considering Congress's unambiguous disapproval of *Gilbert*, Justice Ginsburg argues: "Congress intended no continuing reduction of women's compensation, pension benefits included, attributable to their placement on pregnancy leave."[189] As such, she "would hold that AT&T committed a current violation of Title VII when, post-PDA, it did not totally discontinue reliance upon a pension calculation premised on the notion that pregnancy-based classifications display no gender bias."[190]

2. Deference to the EEOC

Before *Gilbert* came before the U.S. Supreme Court, the EEOC guidelines in 1972—its first formal statement concerning pregnancy—asserted that classifying and disadvantaging employees based on pregnancy-related conditions is "in prima facie violation of Title VII."[191] More specifically, the guidelines provided:

> [D]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies . . . formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.[192]

While EEOC guidelines are not legally binding on the Court,[193] Congress created the EEOC—an independent federal agency—through the Civil Rights Act of 1964 to oversee the enforcement of Title VII and other acts.[194] As part of its role in enforcement, the Commission is given the statutory power to interpret Title VII[195] and educate individuals who have historically been vulnerable to employment discrimination about their rights under the civil rights law.[196] Since

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189 *Hulteen*, 129 S. Ct. at 1977 (Ginsburg, J., dissenting).

190 *Id.* at 1975.

191 29 C.F.R. § 1604.10(a) (1999).

192 29 C.F.R. § 1604.10(b) (1999).

193 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991), in which the Court recognized:

> Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations . . . the level of deference afforded [to the EEOC] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
> (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).

194 *See* Civil Rights Act of 1964 § 705(a), 42 U.S.C.A. § 2000e-4(a) (2000).

195 *Id.* at § 2000e-12.

196 *Id.* at § 2000e-4(h).

the legislative history of Title VII includes no discussion about the scope of sex discrimination,[197] Justice Brennan observed in his *Gilbert* dissent that, "as a matter of law and policy, this is a paradigm example of the type of complex economic and social inquiry that Congress wisely left to resolution pursuant to its Title VII mandate."[198] As such, courts did not merely consider EEOC's interpretations on what qualifies as sex discrimination but gave them "great deference."[199]

Thus as Justice Ginsburg indicates, prior to *Gilbert*, all federal courts presented with the issue followed the EEOC's interpretation and concluded that pregnancy discrimination indeed violated Title VII.[200] Further, by the 1970s, twenty-five states interpreted their fair employment practice laws to prohibit pregnancy-based discrimination even though some of the state laws did not explicitly mention pregnancy.[201] Despite the fact that Title VII did not expressly include pregnancy discrimination as a form of sex discrimination, employers at this time—including AT&T—had sufficient grounds to believe that treating pregnancy leave differently than other temporary disability leave was in fact illegal. Since the plaintiffs took their pregnancy leaves between 1968 and 1976—prior to the decision in *Gilbert*—at the time that AT&T claims it calculated the service credits, there were objectively reasonable grounds to believe that it displayed an intent to discriminate and the seniority system should not have been subject to the section 703(h) exception.

3. The *Satty* Decision Limits *Gilbert*'s Holding

It was not entirely clear that pregnancy-based discrimination was prohibited as sex discrimination under Title VII between the time *Gilbert* was decided and the passage of the PDA. This was due to the U.S. Supreme Court's decision in *Satty*—merely a year after *Gilbert* was decided—in which the Court held that the employer violated Title VII when it denied seniority credit to women returning from pregnancy leave.[202] In distinguishing *Gilbert*, the Court reasoned that the practice in *Satty* was unlawful because the employer did not merely deny benefits, but imposed a "substantial burden"[203] on women upon returning from pregnancy leave

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[197] *See generally* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

[198] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 155 (1976) (Brennan, J., dissenting) (citing H.R. REP. NO. 92-238 (1972)).

[199] Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971).

[200] *See, e.g.*, Commc'ns Workers of Am. v. AT&T Co., 513 F.2d 1024 (2d Cir. 1975), Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975), Hutchinson v. Lake Oswego Sch. Dist. No. 7, 519 F.2d 961 (9th Cir. 1975). *See generally* AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1974 (2009). Eighteen district court opinions had concluded that pregnancy-based discrimination was sex discrimination under Title VII, and only one opinion held the reverse, by the time that the PDA was enacted. *See* H.R. REP. NO. 95-948, at 2.

[201] *See* H.R. REP. NO. 95-948, at 3.

[202] Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977).

[203] *Id.* at 142.

since they were denied specific employment opportunities that were open to men.[204] As Congress acknowledged when it passed the PDA, *Satty* "left both employers and employees in the untenable position of guessing, without any judicial guidance, whether the courts would apply the 'benefits' or the 'burdens' label to a particular policy."[205] The *Hulteen* majority's analysis of *Gilbert* in isolation thus results in a failure to realize that *Satty* narrowed *Gilbert*'s holding and weakened the legal force of its decision. EEOC guidelines and lower court decisions make clear that pregnancy discrimination was widely considered to violate Title VII when plaintiffs took their pregnancy leaves. After *Gilbert*, *Satty* created unpredictability for employers who may or may not be subject to liability for implementing similar pregnancy-related policies.

4. The PDA

Notwithstanding EEOC guidelines and court decisions that support plaintiffs' claims, at the most basic level, it is difficult to ignore that "in generations proceeding—and lingering long after—the passage of Title VII, that history demonstrates, social attitudes about pregnancy and motherhood severely impeded women's employment opportunities."[206] The deeply entrenched discriminatory attitudes toward pregnancy in the work force meant many pregnant women left work when they became pregnant, either because they were forced by employers or knew it was only a matter of time before they were required to leave.[207]

This particular social and political background does not fit squarely with the *Hulteen* majority's reliance on *Gilbert* to argue that the seniority system is shielded from liability under Title VII because AT&T displayed no "intention to discriminate."[208] The ordinary understanding of this phrase can be seen from the PDA's legislative history in which Congress stated that it sought to "reflect the commonsense view . . . that distinctions based on pregnancy are per se violations of Title VII."[209] Congress went on to further explain that "the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and deadend jobs."[210] This necessitates legislative action because if "the [U.S.] Supreme Court's interpretations of Title VII were allowed to stand, Congress would yield to an intolerable potential trend in employment practices."[211]

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204 *Id.*

205 H.R. REP. NO. 95-948, at 2.

206 AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1974 (2009) (Ginsburg, J., dissenting).

207 *See generally* Courtni E. Molnar, *"Has the Millennium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163 (2005).

208 *Hulteen*, 129 S. Ct. at 1956 (citing Teamsters v. United States, 431 U.S. 324, 356 (1977)).

209 H.R. REP. NO. 95-948.

210 *Id.*

211 *Id.*

CONCLUSION

Unlike the majority opinion, Justice Ginsburg's understanding of plaintiffs' claims is consistent with the pro-employee sentiment and remedial nature of Title VII as it relates to discriminatory pay decisions. Justice Ginsberg's alternative interpretation, that AT&T committed a current violation of Title VII when it failed to discontinue its reliance on a pre-PDA calculation system, reveals the limits of confining the Court's analysis to section 703(h). This is especially true considering that it is not entirely clear that the AT&T seniority system at issue in *Hulteen* is "bona fide" and therefore even fits into the exception to begin with. As the result of the Court getting caught up in a highly technical and formalistic analysis, *Hulteen* is yet another decision in a line of past employment discrimination cases—such as *Gilbert*, *Lorance*, and *Ledbetter*—that loses sight of the basic premise of the Act and leads to a half-hearted enforcement of Title VII. As Justice Marshall points out in his *Lorance* dissent, "[t]he distinction the majority erects today serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one."[212]

More than thirty years have passed since the enactment of the PDA and Congress's recognition that discrimination against pregnant women is one of the chief reasons why women employees are treated like second-class workers.[213] Since this time, discrimination against pregnant women remains one of the most prevalent forms of employment discrimination and the number of complaints about pregnancy discrimination has been rising.[214] Despite current trends, by denying the *Hulteen* plaintiffs the service credits that they would have been entitled to had AT&T treated their pregnancy leaves on equal grounds as disability leave, they have essentially been injured twice. The majority's detached and severe interpretation of this case diminishes the application of Title VII to seniority systems and curtails legislative effort to adequately remedy allegations of workplace discrimination. An analysis that fully realizes and meaningfully incorporates the congressional concern behind Title VII is needed in the future for courts to better serve alleged victims, guard against employment discrimination, and warn employers that such policies will not be tolerated.

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212 Lorance v. AT&T Techs., Inc., 490 U.S. 900, 917 (1989) (Marshall, J., dissenting).

213 H.R. REP. NO. 95-948, at 3.

214 EEOC data found that between 1992 to 2007, there was a sixty-five percent increase in the number of pregnancy discrimination claims filed by individuals. *See* National Partnership for Women and Families, The Pregnancy Discrimination Act: Where We Stand Thirty Years Later 10 (2008), *available at* http://www.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act__Where_We_Stand_30_Years_L.pdf?docID=4281 (last visited Feb. 8, 2011).