

Insular Individualism: Employment Discrimination Law After *Ledbetter v. Goodyear*

Tristin K. Green*

When the Supreme Court decided *Ledbetter v. Goodyear Tire and Rubber Co.*¹ last year, holding that an employee must assert a Title VII pay discrimination claim within 180 days² of when the pay decision was first made, commentators—both legal and non-legal—immediately recognized the obstacle the decision poses for individuals suffering from discrimination in pay. American workers rarely know what their co-workers are paid, making it difficult to complain about a disparity.³ And, even if they are aware of a pay disparity and suspect discrimination early on, the disparity may not be worth fighting for, or even make a winnable case, until it magnifies over time (through, for example, a policy of calculating future raises as a percentage of the current salary). Shortly after *Ledbetter* was decided, op-eds appeared in the *New York Times*, the *Chicago Tribune*, and the *Los Angeles Times*, all calling for the decision to be overturned and/or better access to pay information.⁴ Lawmakers scrambled to draft legislation providing that each paycheck could constitute an act of discrimination, thus extending the period within which an individual would be able to file her complaint. Within two weeks of the Supreme Court’s decision, Lilly Ledbetter was testifying before the House Education and Labor Committee on the proposed legislation.⁵

* Professor of Law, Seton Hall Law School. I owe thanks to Carl Coleman, Solangel Maldonado, and Charles Sullivan for their valuable comments on earlier drafts. Thanks also to the Seton Hall faculty summer research stipend program for financial support.

¹ 127 S. Ct. 2162 (2007).

² This period is extended to 300 days in jurisdictions with state or local antidiscrimination agencies. See 42 U.S.C. § 2000e(5)(e).

³ See generally 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 (2004) (exploring some of the social norms that underlie employee secrecy regarding pay and employer pay secrecy or confidentiality rules).

⁴ See, e.g., Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18; Editorial, *Sterile Thinking on Pay Equity*, CHI. TRIB., June 4, 2007, at 18; Editorial, *Life vs. The Law: By Reading Statutes Too Rigidly in Rendering Opinions, The Supreme Court Can Be In Denial of Reality*, L.A. TIMES, May 31, 2007, at A26. See also Reynolds Holding, *Stumble on the Bench*, TIME, June 18, 2007, at 56 (discussing attempts to overrule *Ledbetter* in Congress). For commentary by legal academics, see Joanna Grossman & Deborah Brake, *Reviving Title VII’s Protection Against Pay Discrimination in the Wake of the Supreme Court’s Harsh Decision: A Call for Congressional Action*, THE WRIT (July 10, 2007), available at http://writ.news.findlaw.com/commentary/20070710_brake.html.

⁵ See *Amendment to Title VII: Hearing Before the House Committee on Education and Labor*, 110th Cong. (June 12, 2007) (testimony of Lilly Ledbetter) available at <http://edworkforce.house.gov/testimony/061207LillyLedbetterTestimony.pdf> (last visited March 16,

What these efforts to mitigate the immediate effects of *Ledbetter* miss, however, is that *Ledbetter* is part of a much deeper and more potentially devastating conceptual shift that is taking hold in employment discrimination law. This “insular individualism”—the belief that discrimination can be reduced to the action of an individual decisionmaker (or group of decisionmakers) isolated from the work environment and the employer—renders the narrow legislative attempts to overrule *Ledbetter* woefully incomplete. Without adequate challenge to this broader concept, the entrenchment of insular individualism that *Ledbetter* reflects is likely to have significant repercussions for the future of employment discrimination law, even if *Ledbetter* itself is legislatively addressed.

This Article uncovers the insular individualism in *Ledbetter* and maps some of its potential consequences for antidiscrimination law. It argues that the insular individualism reflected in *Ledbetter* is likely to lead to at least two significant changes in individual disparate treatment law: (1) a narrowing of the evidence plaintiffs alleging individual disparate treatment are permitted to use to prove their cases; and (2) a cutting back on employer vicarious liability, both by providing exceptions to employer liability for actions taken by what are seen as errant or rogue discriminating employees and, as in the area of sexual harassment, by requiring victims of discrimination to complain to their employers about discrimination early on, even when the discrimination is not yet legally actionable. And these changes are on the immediate horizon. The Supreme Court recently decided a case raising the first opportunity for such a change, and other opportunities are likely to follow shortly.

The changes are not inevitable, however. Understanding the conceptual underpinnings of insular individualism opens the door to persuasive challenges. Indeed, plaintiffs, too, may have been unnecessarily mired in insular individualism. *Ledbetter* and her attorneys, for example, missed an important opportunity to challenge insular individualism. Similarly, plaintiffs in cases yet to come before the Court can emphasize the contextual nature of workplace decisionmaking, thus pulling back on the entrenchment of insular individualism. At the same time, the Article does not propose a complete rejection of the emergent distinction between the actions of employers (who set the policies, devise the decisionmaking systems, and monitor the organizational culture and work environment) and those of their employees (who make day-to-day decisions within that context). It suggests that the distinction not only makes sense; it is useful for advancing a more sophisticated

2008) [hereinafter, *Ledbetter Testimony*]. The House introduced legislation to overturn *Ledbetter* on June 22, 2007. See *Ledbetter Fair Pay Act of 2007*, H.R. 2831, 110th Cong. (2007) (amending Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973 to provide that a discriminatory act occurs each time compensation is paid pursuant to a discriminatory pay decision).

understanding of discrimination—and for devising a more effective antidiscrimination law.

The Article proceeds in three Parts. Part II uncovers the insular individualism in *Ledbetter*.⁶ It illustrates that *Ledbetter* entrenches a conceptual shift that has emerged over the past several decades, as employers have outwardly embraced an egalitarian ideal and begun to hold out diversity as good for business. This insular individualism underlies the majority opinion in *Ledbetter* and may explain the plaintiff's limited procedural moves in the case.

Part III considers where insular individualism is likely to take employment discrimination law, particularly individual disparate treatment law. The Supreme Court recently decided *Sprint/United Management Co. v. Mendelsohn*,⁷ involving the question whether and under what circumstances a plaintiff bringing an individual claim of discrimination should be permitted to present the testimony of other employees of the defendant company about their own discriminatory treatment. The Court declined to decide the issue, remanding instead on the ground that the court of appeals had misconstrued the district court's ruling as establishing a *per se* rule of exclusion unless the other employees' testimony involved the same supervisor as the plaintiff. The Court's holding in *Mendelsohn*, by placing the decision whether to admit evidence firmly within the purview of the trial courts, leaves the door open for the exclusion of other-employee testimony. If the lower courts adhere to the insular individualism of *Ledbetter*, they are likely to exclude the evidence when the other employees did not share the same supervisor as the plaintiff and when the plaintiff presents no independent statistical evidence of a pattern or practice of discrimination or other evidence suggesting a policy or directive of discrimination by the employer.

Part III also predicts that insular individualism is likely to affect employment discrimination law in less obvious ways.⁸ Isolating the individual discriminator from the employer conceptually, as insular individualism does, makes it more likely that courts will cut back on employer vicarious liability for the discriminatory acts of its employees. Much like the Supreme Court has done in the sexual harassment area, courts adhering to insular individualism are likely to begin to provide employers with exceptions to vicarious liability, based both on the employer's efforts to prevent or correct individual instances of discrimination and on the victim's failure to take advantage of preventive or corrective opportunities provided by the employer. In this area, too, the Supreme Court granted certiorari in a case that provided an opportunity for such changes.⁹ Although the Court later dismissed the certiorari

⁶ See discussion *infra* notes 11–72 and accompanying text.

⁷ 128 S. Ct. 1140 (2008).

⁸ See *infra* notes 73–130 and accompanying text.

⁹ *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

upon settlement by the parties, the issues continue to percolate in the lower courts.

Part IV then outlines several ways in which litigants and advocates might counter insular individualism.¹⁰ Rather than advocating for a return to the past, when employers and their decisionmaking employees were often conceptually conflated, the Article argues for a push toward the future and a more accurate understanding of the complexity of discrimination. It submits that the Court is generally correct to distinguish between the actions of employees and those of their employers, but that it is wrong to isolate the individual decisionmaker from the work environment and to assume either that discrimination is easily resolved by exclusive attention to individual instances or that employers are innocent bystanders to the wrong of employment discrimination.

The key to pulling back on the insular individualism reflected in *Ledbetter* is to contextualize discrimination, to make clear that individuals do not discriminate in isolation from the environments in which they work. Part IV considers how the plaintiff in *Ledbetter* could have better challenged insular individualism in her individual disparate treatment case and how the plaintiffs in *Mendelsohn* and the vicarious liability cases can do the same. It also highlights the importance of systemic disparate treatment cases for challenging insular individualism.

II. INSULAR INDIVIDUALISM AND *LEDBETTER V. GOODYEAR*

Courts and scholars have long viewed discrimination through a lens of individualism. Discrimination is, after all, a human problem and, as such, it is difficult to understand without attention to the biases and actions of individuals. But insular individualism goes beyond mere recognition of the role that individuals play in discrimination; it isolates the individual discriminator from the work environment and from the employer. According to insular individualism, individual instances of discrimination are largely, if not exclusively, a problem of errant or rogue individual discriminators acting contrary to organizational policy and interest.

A. *The Emergence of Insular Individualism*

The insular individualism that underlies *Ledbetter* is part of a conceptual shift that has occurred over the past several decades toward viewing discrimination as largely a problem of individuals acting contrary to the interests of the organizations within which they work. In the early years after Title VII was enacted, when employers actively resisted the nondiscrimination obligation in various ways, courts tended to view individual and em-

¹⁰ See *infra* notes 131–159 and accompanying text.

ployer interests as aligned.¹¹ This perceived alignment of interests led courts to conflate questions of employer and employee motivation.

Furnco Construction Corp. v. Waters, decided by the Supreme Court in 1978, provides a good example.¹² In that case, several black bricklayers sued Furnco, a company specializing in the relining of blast furnaces for steel mills, alleging racial discrimination in hiring.¹³ Instead of maintaining a permanent force of bricklayers, Furnco hired a superintendent for each bricklaying job and delegated hiring of bricklayers to the superintendent.¹⁴ The plaintiffs in the case claimed that Joseph Dacies, the superintendent for a particular bricklaying job, had refused them work because of their race.¹⁵ Dacies did not accept bricklayer applications on the jobsite.¹⁶ Instead, he hired only from a compiled list of bricklayers whom he claimed to know personally to be competent at bricklaying work or who had been recommended to him.¹⁷ The plaintiffs in the case, one of whom did know Dacies and therefore was arguably eligible for placement on the list, were either rejected or employed only long after they appeared at the jobsite seeking work.¹⁸

The lower courts and the Supreme Court in *Furnco* all agreed that the plaintiffs' claims were properly analyzed using individual disparate treatment theory¹⁹ and that the plaintiffs had established a prima facie case of discrimination under that theory by proving that "they were members of a

¹¹ See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 341 n.21 (1977) (involving a company that hired hundreds of long-haul truck drivers between 1965 and 1969, not one of whom was black); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (involving a company that adopted education and testing requirements on the date Title VII went into effect). See generally HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* (1977) (exploring institutional resistance, by both employers and unions, to early civil rights laws). During this time judges, like everyone else, witnessed widespread resistance to civil rights in education and in housing, as well as in employment.

¹² 438 U.S. 567 (1978). The Court's earliest individual disparate treatment case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), evinces a similar view. The ultimate question in the case was whether Percy Green had been denied reemployment because he was black. *Id.* at 803-04. Instead of focusing exclusively on the state of mind of a particular decisionmaker, the Court asked more broadly whether the "employer" had discriminated, and it explained that "[e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired." *Id.* at 804. For a more recent example, see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (1989) (Brennan, J., plurality opinion), where the plurality combined evidence relevant to the question of whether the employer engaged in discrimination against women with evidence relevant to the question of whether the individual decisionmakers acted with discriminatory bias in the plaintiff's case.

¹³ *Furnco*, 438 U.S. at 569.

¹⁴ *Id.* at 569-70.

¹⁵ *Id.* at 570.

¹⁶ *Id.*

¹⁷ *Id.* at 570, 581.

¹⁸ *Id.* at 569-70.

¹⁹ See *id.* at 575. *Furnco* was decided one year after *Int'l Bhd. of Teamsters*, 431 U.S. 324 (1977), the Court's foundational systemic disparate treatment case in which the plaintiffs relied on statistical disparities to prove a pattern or practice of discrimination. The plaintiffs in *Furnco* made no such statistical showing, and the courts accordingly analyzed the plaintiffs'

racial minority; they did everything within their power to apply for employment; . . . they were qualified in every respect for the jobs which were about to be open; they were not offered employment . . . ; and the employer continued to seek persons of similar qualifications."²⁰ In a contemporary case, the next question would be whether Dacies' stated reason for not hiring the plaintiffs—that none of their names were on his list—was a pretext for discrimination. In other words, a court analyzing an individual disparate treatment case today would ask whether the superintendent acted with discriminatory bias when he refused the plaintiffs work.²¹

According to the Supreme Court in *Furnco*, however, the ultimate question in the case was whether the *employer's* hiring practices—its “refusal to engage in on-the-job training or to hire at the gate”—were a pretext for discrimination.²² Moreover, the Court explained that “[p]roof that [the employer's] work force was racially balanced or that it contained a disproportionately high percentage of minority employees” would be relevant to the *employer's* intent.²³ Nowhere in its discussion did the Court consider the state of mind of the allegedly discriminating superintendent, who had made the decision not to hire at the gate and had created a list that included no black bricklayers.

While there is substantial evidence that discrimination in employment persists,²⁴ employers, pressured by Title VII, a strong egalitarian norm, and a developing business case for diversity, are much more likely today than they were in the 1960s and early 1970s to expressly embrace diversity.²⁵ This

claims using the individual disparate treatment framework laid out by the Supreme Court in *McDonnell Douglas*, 411 U.S. at 792.

²⁰ *Furnco Construction Corp. v. U.S.*, 438 U.S. 567, 576 (1978).

²¹ *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

²² *Furnco*, 438 U.S. at 571, 578.

²³ *Id.* at 580. The Court further stated:

Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that *Furnco's* actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation.

Id. (emphasis added). In a later case, the Court also cites approvingly the district court's reliance on evidence that “the number of black employees [in the employer's work force] remained constant” to conclude that discrimination was not likely in a particular instance. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 n.2 (1993) (quoting *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991)).

²⁴ A mass of social science research shows that discriminatory biases continue to operate and to influence behavior. This research focuses on identifying the existence of implicit biases and on exploring their role in discriminatory behavior. *See generally* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006) (describing studies revealing behavioral manifestations of bias).

²⁵ On the shift in norms, see JAMES M. JONES, *PREJUDICE AND RACISM* 93-100 (2d ed. 1997), detailing studies showing an overall trend toward endorsement of the principle of racial equality in the 1970s. On the emergence of a business case for diversity, see Lauren Edelman et al., *Diversity Rhetoric and Managerialization of Law*, 106 AM. J. OF SOC. 1589 (2001). A 1991 study of over 400 American companies reported that sixty-three percent had already initiated a formal diversity management program and another sixteen percent intended to do

shift in employer attitudes has led courts to move away from the conflation of the employer and employee in cases of individual treatment, instead conceptualizing discrimination at work as a problem of individual employees isolated from the work environment and the employer. Indeed, just as one can see the Court in early cases conflating the individual decisionmaker with the employer, when their interests were presumed to be aligned, one can see the Court in more recent cases taking care to isolate the employer from the wrongdoing of its employees.

In *St. Mary's Honor Center v. Hicks*, for example, Justice Scalia, writing for the majority, stresses the distinction between discriminating employees and the employers for whom they work.²⁶ Rejecting the dissent's argument that a defendant should be worse off after presenting a nondiscriminatory reason for a particular decision that is false than if it presented no reason at all, he explains that "in these Title VII cases, the defendant is ordinarily *not* an individual but a company, which must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact; and that central fact is *not* a physical occurrence, but rather that employee's state of mind."²⁷ The employee in this account is the wrongdoer, acting contrary to the employer's interest.

Insular individualism also underlies the Court's 1998 decision to limit the vicarious liability of employers for the discriminatory actions of their employees. According to the Court's opinion in *Burlington Industries v. Ellerth*,²⁸ the creation of an affirmative defense for employers in cases in which a supervisor creates a hostile work environment but does not take a tangible employment action against the plaintiff makes sense largely because individuals who engage in sexual harassment do so for their own personal motivations rather than with the aim of serving the employer.²⁹ Employers should be provided an affirmative defense, according to the Court, because "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" and because "limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive."³⁰ Employers are conceptualized in this account as bystanders to discriminatory harassment.³¹ They are encouraged to create anti-harassment policies and grievance mechanisms as a way of halting the

so. See MARY J. WINTERLE, WORK FORCE DIVERSITY: CORPORATE CHALLENGES, CORPORATE RESPONSES 21 (1992).

²⁶ 509 U.S. at 502. For another example, see *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), focusing on the state of mind of a single decisionmaker, Powe Chesnut.

²⁷ *St. Mary's Honor Ctr.*, 509 U.S. at 520.

²⁸ 524 U.S. 742 (1998).

²⁹ *Id.* at 756-57; see also *id.* at 756 (explaining that "a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer").

³⁰ *Id.* at 764.

³¹ The defense implicitly recognizes that employers play some role in harassment, albeit a limited one. See *infra* notes 131-159 and accompanying text (discussing further the employers' role in individual acts of discrimination in the workplace).

rogue harasser, rather than as a means of gaining knowledge about the organizations' own role in harassment. Understood this way, the defense provides the innocent employer with protection from open-ended liability for the acts of its employees.³² It is within this context of insular individualism that the Supreme Court decided *Ledbetter*.

B. Ledbetter v. Goodyear

Lilly Ledbetter worked at Goodyear Tire and Rubber Company's Gadsden, Alabama tire plant for almost twenty years.³³ For much of that time she worked as an Area Manager, supervising the tire builders in several different assembly sections of the Tire Assembly Center at the plant.³⁴ Yearly raises for Area Managers at Goodyear during most of Ledbetter's tenure were based on the recommendations of their immediate supervisors, the Business Center Managers.³⁵ Ledbetter, one of only a handful of female Area Managers, was evaluated over the years by a number of male Business Center Managers for the Tire Assembly Plant, some of whom recommended raises of various percentages and others of whom recommended that she receive no raise.³⁶ By 1997, Ledbetter was paid \$3,723 per month, less than all fifteen of the other Area Managers in Tire Assembly, all of whom were male. The lowest paid male Area Manager received \$4,486, roughly fifteen percent more than Ledbetter, and the highest paid received \$5,236, roughly forty percent more than Ledbetter.³⁷

During her tenure at Goodyear, Ledbetter also experienced a number of sex-based incidents, including:

In the early 1980s, Ledbetter was sexually harassed by her supervisor, Mike Maudsley. Maudsley told Ledbetter that if she would meet him at the Ramada Inn, he would rate her performance more

³² See *Ellerth*, 524 U.S. at 763 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.")).

Insular individualism also underlies some lower courts' requirement that, in order to support an inference of discrimination, plaintiffs' comparators have shared a supervisor. See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). This requirement is in tension with the Supreme Court's description of relevant evidence in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). See *supra* note 12.

³³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007).

³⁴ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1171-73 (11th Cir. 2005) (describing the organizational structure at Goodyear and Ledbetter's position within that structure).

³⁵ *Id.* at 1172-73.

³⁶ *Id.* at 1173-75 (describing annual performance reviews and merit increase recommendations).

³⁷ *Id.* at 1174. According to Ledbetter's testimony before the House Education and Labor Committee, she first learned of the pay disparity when she received an anonymous note in her mailbox at work. The note showed what she was paid and what three of the male managers were paid. See *Ledbetter Testimony*, *supra* note 5.

highly than if she refused.³⁸ She refused and complained to Jerry Jones, a Personnel Manager at the time. Jones told her that she “was a troublemaker”; that “these men had good careers at Goodyear and [he was] not going to dismiss them; and that Goodyear really didn’t need troublemakers.”³⁹ Ledbetter filed a charge of discrimination with the EEOC, which was resolved when Goodyear agreed to move her away from Maudsley and Jones.⁴⁰

From 1990 until 1997, Maudsley worked as the Performance Auditor for Ledbetter’s Center and falsified several performance audits, writing Ledbetter up for violations that did not occur.⁴¹ When Ledbetter confronted Maudsley about the falsified reports, he responded that it was “a lot easier to downgrade you You’re just a little female and these big old guys, I mean, they’re going to beat up on me and push me around and cuss me.”⁴² Maudsley also continued to ask Ledbetter out on dates, and when she refused, the false audit reports got worse.⁴³ Kelly Owen, Ledbetter’s subsequent supervisor, relied on the falsified audit reports when he denied her a pay increase in February 1998.⁴⁴

Jerry Jones, the Personnel Manager to whom Ledbetter had originally complained about Maudsley’s behavior, became Ledbetter’s supervisor from 1996 to October 1998. During that time, Jones addressed his Area Managers as “boys” and, after Ledbetter complained, as “Boys and Lady.”⁴⁵

Toward the end of Ledbetter’s career, the Plant Manager, Richard O’Dell, told Ledbetter “that [the] plant did not need women, that [women] didn’t help it” and “caused problems.”⁴⁶

In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging discrimination because of sex.⁴⁷ She filed a formal EEOC charge of discrimination that July and filed suit in federal court in November alleging, among other things, discrimination in pay because of sex in violation of Title VII.⁴⁸ The Title VII claim went to trial. In addition to testimony regarding

³⁸ See Joint Appendix at 39-40, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007) (No. 05-1074).

³⁹ *Id.* at 41-42.

⁴⁰ *Id.* at 42-43.

⁴¹ *Id.* at 43-45.

⁴² *Id.* at 46.

⁴³ *Id.*

⁴⁴ Joint Appendix, *supra* note 38 at 77-78.

⁴⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1188 n.26 (11th Cir. 2005).

⁴⁶ *Id.* at 1189 n.27.

⁴⁷ *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007).

⁴⁸ *Id.* In addition to her Title VII pay disparity claim, Ledbetter alleged a violation of the Equal Pay Act; that claim was dismissed before trial. Ledbetter also alleged that she was transferred to a non-supervisory position in 1998 because of her age and sex and in retaliation

the sex-based incidents above, Ledbetter presented statistical evidence on the stark disparity between her pay and that of male Area Managers, testimony by other women regarding their discriminatory treatment at Goodyear, and evidence that her work did not warrant her low pay.⁴⁹

The jury found in favor of Ledbetter and awarded her back pay and compensatory and punitive damages.⁵⁰ Goodyear moved for judgment as a matter of law, arguing that “no reasonable fact finder could conclude that [Ledbetter’s] sex was a motivating factor in a salary decision made during the period covered by [the] EEOC charge.”⁵¹ According to Goodyear, Ledbetter was limited to challenging the salary decisions that occurred within 180 days of her filing of the EEOC questionnaire, that is, to pay decisions made on or after September 26, 1997. The only timely-charged actions under this approach were a decision in 1997 not to consider Ledbetter for a raise and a recommendation by her supervisor in 1998 that she receive no raise. The district court denied the motion, and Goodyear appealed.⁵² On appeal, the Court of Appeals for the Eleventh Circuit reversed, agreeing with Goodyear that Ledbetter was time-barred from challenging any pay decisions other than those made in 1997 and 1998.⁵³ Evaluating the evidence of discriminatory bias in those decisions, the court held that Ledbetter had failed to present sufficient evidence from which a reasonable jury could find that either of the decisions had been because of her sex.⁵⁴ Ledbetter appealed, and the Supreme Court granted certiorari, deciding the case on May 29, 2007.

C. *Uncovering Insular Individualism in Ledbetter*

The entrenchment of insular individualism is apparent in a number of places in the Supreme Court’s decision in *Ledbetter*. It is most evident, however, in Justice Alito’s insistence, for the majority, that Ledbetter’s discrimination claim rested on the actions of Mike Maudsley, who was both her supervisor during the early 1980s and her Performance Auditor during the 1990s. As described above, Ledbetter alleged that Maudsley retaliated against her in the early 1980s by recommending low pay increases after she rejected his sexual advances and that he did so again in the 1990s by submit-

for her complaints of discrimination. The transfer-related claims went to trial, and the jury found in favor of Goodyear on those claims. *Ledbetter*, 421 F.3d at 1175 n.7.

⁴⁹ See *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting). See also Brief for Petitioner, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074).

⁵⁰ The jury recommended \$223,776 in back pay and awarded \$4,662 for mental anguish and \$3,285,979 in punitive damages. The district court remitted the award to \$360,000, representing the \$300,000 statutory maximum in compensatory and punitive damages, and \$60,000 in back pay. *Ledbetter*, 421 F.3d at 1175-76.

⁵¹ *Id.* at 1176 (quotations omitted).

⁵² *Id.*

⁵³ *Id.* at 1177-85.

⁵⁴ *Id.* at 1185-90.

ting false audit reports.⁵⁵ According to the Court, Maudsley's actions—and not any actions by the employer or other employees—were the acts of discrimination that triggered Ledbetter's filing obligation.⁵⁶

Insular individualism is also evident in the portion of the majority opinion distinguishing *Ledbetter* from the Supreme Court's earlier decision in *Bazemore v. Friday*.⁵⁷ *Bazemore* involved allegations of discrimination in pay by the North Carolina Agricultural Extension Service ("Service").⁵⁸ For years, Service employees had been segregated into a "white branch" and a "negro branch," with the latter receiving less pay.⁵⁹ Although the two branches merged in 1965, pay discrepancies persisted. After the extension of Title VII to public employees in 1972, several black employees brought suit.⁶⁰ The court of appeals dismissed their claim.⁶¹ It viewed the claim as asserting that any discriminatory difference in salaries should have been "affirmatively eliminated," something that Title VII did not require.⁶² The Court, in a per curiam opinion in which all justices joined Justice Brennan's separate opinion, reversed. Justice Brennan wrote: "that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII."⁶³ Rather, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."⁶⁴ Ledbetter relied on this statement in *Bazemore* to argue that each paycheck that she received was an actionable wrong.⁶⁵

According to the *Ledbetter* majority, however, *Bazemore* is readily distinguishable. Ledbetter's claim involved discrete decisions by individual employees regarding Ledbetter's pay. Indeed, by focusing on Maudsley's actions, the majority ensures that Ledbetter's case is understood as a problem of a particular decisionmaker at a discrete moment in time, set apart from the employer, who, according to the Court, bears no direct responsibility for the action. *Bazemore*, in contrast, involved continuing discrimination by the *employer* rather than by an employee. As the *Ledbetter* majority explains

⁵⁵ See *supra* notes 38-44 and accompanying text.

⁵⁶ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 n.4 (2007) (expressing concern that while Maudsley had died by the time of trial and therefore could not testify, "[a] timely charge might have permitted his evidence to be weighed contemporaneously").

⁵⁷ 478 U.S. 385 (1986).

⁵⁸ *Id.* at 390-91.

⁵⁹ *Id.*

⁶⁰ The Title VII discrimination in pay claim was only one of a number of claims brought against the Service, by employees as well as by the recipients of its services. See *id.* at 390.

⁶¹ *Id.* at 394.

⁶² *Id.*

⁶³ *Id.* at 395 (emphasis in original).

⁶⁴ *Id.*

⁶⁵ See Brief for the Petitioner at 18-22, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007) (No. 05-1074).

Bazemore, “[a]n employer that adopts and intentionally retains [a facially discriminatory pay structure] can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.”⁶⁶

This distinction would make sense if Ledbetter had sought to challenge only the pay decisions made by Maudsley and if those decisions had not been influenced by the larger practices and policies of Goodyear. As Justice Ginsburg points out in her dissent, however, Ledbetter presented evidence “that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear’s pervasive discrimination against women managers in general and Ledbetter in particular.”⁶⁷ In addition to evidence suggesting that Ledbetter was underpaid and that Ledbetter’s supervisor was “openly biased toward women,” Justice Ginsburg highlights evidence that plant officials harbored discriminatory bias toward women and points to the testimony of two women who had previously worked as managers at the plant as indicative of Goodyear’s pervasive discrimination against female employees.⁶⁸ Those women told the jury that they “had been subject to pervasive discrimination and were paid less than their male counterparts.”⁶⁹ This passage is Justice Ginsburg’s effort to reframe Ledbetter’s claim beyond an identifiable decisionmaker at a discrete point in time; it is her effort to break free from the insular individualism that underlies the majority opinion.

Justice Ginsburg is hampered, however, by Ledbetter’s—or, more accurately, her lawyers’—adherence to insular individualism. As Justice Alito emphasizes early in the majority opinion, Ledbetter did not seek review of the Eleventh Circuit’s holding that she had failed to present sufficient evidence from which a reasonable jury could find that either the 1997 or 1998 pay decisions, both within the 180-day period, were the product of discriminatory bias.⁷⁰ Nor did she allege that Goodyear was engaging in systemic discrimination against women as a group. Instead, she sought review of the following question:

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.⁷¹

⁶⁶ 127 S. Ct. at 2173. Whether the employer in *Bazemore* did intentionally retain a facially discriminatory pay structure is less than certain. See *infra* notes 152-154 and accompanying text.

⁶⁷ *Id.* at 2187 (Ginsburg, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2166.

⁷¹ *Id.*

Had the sufficiency of the evidence rulings been before the Supreme Court or had Ledbetter brought a claim of systemic discrimination, the majority would have found it much more difficult to reduce her claims to the action of a single individual in isolation. Ledbetter's attorneys may have had a number of reasons for making this choice.⁷² Nonetheless, their willingness to frame the case as they did—as an effort to challenge a discrete discriminatory decision that occurred outside of the limitations period—provided an easy path for the entrenchment of insular individualism.

III. WHERE INSULAR INDIVIDUALISM LEADS

The insular individualism reflected in *Ledbetter* is likely to have significant repercussions for individual disparate treatment law. When individual decisionmakers are seen as errant or rogue actors, conceptually isolated from the environments in which they work and from the employers who shape those environments, the courts are likely to construe the scope of relevance narrowly and to cut back on employer liability for the discriminatory acts of their employees. This Part considers both of these moves by drawing on several recent cases.

A. *The Scope of Relevance*

The most immediate effect of the insular individualism reflected in *Ledbetter* is likely to be on the evidence that plaintiffs alleging individual disparate treatment can use to prove their claims. The Supreme Court recently decided a case that raised this issue. In *Sprint/United Management Co. v. Mendelsohn*,⁷³ Ellen Mendelsohn sued her former employer, alleging that it had discriminated against her on the basis of age when it selected her for termination during a company-wide reduction in force.⁷⁴ At trial, Mendelsohn sought to introduce the testimony of five other employees of Sprint whose employment had been terminated as part of the same reduction in force and who claimed that their terminations were also age-based.⁷⁵ Sprint sought to exclude the testimony of these employees, arguing that “any reference to alleged discrimination by any supervisor other than Paul Reddick [Mendelsohn's supervisor], was irrelevant to the issue in [Mendelsohn's] case.”⁷⁶ The district court agreed, and excluded the evidence because none

⁷² The decision not to challenge the sufficiency of the evidence could easily have been driven by the realities of the certiorari system. By framing the issue around the paycheck rule, over which circuit courts were divided, Ledbetter's lawyers made it more likely that the Court would grant certiorari in her case.

⁷³ 128 S. Ct. 1140 (2008).

⁷⁴ *Id.* at 1143.

⁷⁵ *Id.*

⁷⁶ *Id.* In its motion, Sprint relied exclusively on *Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997), a discriminatory discipline case in which the court had limited the plaintiff's use of comparators to those employees with whom the plaintiff shared a supervisor. *See supra*

of the five employees whose testimony Mendelsohn sought to present were supervised by the same supervisor as Mendelsohn.⁷⁷

On appeal, the Court of Appeals for the Tenth Circuit reversed. According to the court, “[e]vidence of an employer’s alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer’s state of mind or attitude toward members of the protected class.”⁷⁸ This reasoning, consistent with early Title VII cases, conflates the employee with the employer; the evidence is relevant to the “*employer’s* discriminatory intent” and is therefore admissible.⁷⁹

Several other circuits, in contrast, have agreed with the district court in *Mendelsohn* that testimony by employees other than the plaintiff as to their own discriminatory treatment is admissible only if the employees shared the same decisionmaker as the plaintiff or if the plaintiff presents independent evidence to support an inference that the employer engaged in a “pattern or practice” of discrimination or had a company-wide policy of discrimination.⁸⁰ In *Goff v. Continental Oil Co.*, for example, the Fifth Circuit Court of Appeals upheld the district court’s exclusion of testimony by three employees as to their own racially discriminatory treatment by the company.⁸¹ The

note 32 (noting the tension between this restriction on comparator evidence and *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). The Supreme Court pointed out in *Mendelsohn* that reliance on *Aramburu* is misplaced. See *Sprint/United Mgmt. Co.*, 128 S. Ct. at 1146.

⁷⁷ The district court’s decision on the motion states: “Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. ‘Similarly situated employees,’ for purposes of this ruling, requires proof that (1) Paul Ruddick [sic] was the decisionmaker in any adverse employment action; and (2) temporal proximity.” See *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1225 n.1 (10th Cir. 2006) (quoting the full minute entry on the district court docket sheet).

⁷⁸ *Id.* at 1230 (citing *Spulak v. Kmart Corp.*, 894 F.2d 1150 (10th Cir. 1990)). In *Spulak*, the court stated, “As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer’s discriminatory intent.” 894 F.2d at 1156.

⁷⁹ *Id.* at 1226 (emphasis added). At oral argument before the Supreme Court, Mendelsohn and the Department of Justice (DOJ) as amicus curiae attempted to link the other-incidents evidence to the state of mind of the particular decisionmaker through the inference of employer intent. See Transcript of Oral Argument at 42, *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) (Mendelsohn’s attorney arguing that the circumstances surrounding the other incidents support an inference that the CEO had issued a directive to lower supervisors, including Mendelsohn’s supervisor, to lay off older workers); *id.* at 25-26 (DOJ arguing that “[w]here you have supervisors in the same division, in the same vicinity, carrying out the same plan, providing the same distinct explanations in similar circumstances, a reasonable juror might infer that plaintiff’s own [treatment was discriminatory]”). Although this argument may be successful in some cases, it is likely to represent a narrow exception to a general rule of exclusion of other-incident evidence by courts adhering to insular individualism. See, e.g., *id.* at 24 (DOJ describing the other-incident evidence in *Mendelsohn* as involving a “common catalyst,” the reduction in force, close geographic vicinity, and same time frame).

⁸⁰ See, e.g., *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121-22 (2d Cir. 1984); *Goff v. Cont’l Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982). See also *Mendelsohn*, 466 F.3d at 1233 (Tymkovich, C.J., dissenting) (arguing that testimony of other discriminatory incidents should be inadmissible unless the plaintiff presents “independent evidence of specific enterprise-wide policy”) (citing *Rivera v. City & County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004)).

⁸¹ *Goff*, 678 F.2d at 596-97.

court explained that “[b]ecause none [of the other employees] had worked in [the plaintiff’s] department, their testimony would not have concerned the same supervisors of whom [the plaintiff] complained.”⁸² Moreover, said the court, three employees’ testimony concerning race discrimination, even if believed, would not as a matter of law be sufficient to prove a pattern or practice of company-wide discrimination by the employer, and, therefore, the evidence could not be used for that purpose.⁸³

In February, the Supreme Court unanimously vacated the judgment of the court of appeals in *Mendelsohn* and required remand of the case with instructions that the district court clarify its evidentiary ruling.⁸⁴ Justice Thomas, writing for the Court, faulted the court of appeals for treating the district court’s order as the application of a *per se* rule that evidence from employees with other supervisors is irrelevant to proving discrimination in an ADEA case,⁸⁵ and explained that “such evidence is neither *per se* admissible nor *per se* inadmissible.”⁸⁶ But that is the extent of the Court’s ruling on the issue.⁸⁷ And that ruling leaves plenty of room for the district court to reaffirm exclusion of the other-employee testimony.⁸⁸

Indeed, if the lower courts adhere to the insular individualism reflected in *Ledbetter*, they are likely to agree with the Fifth Circuit’s decision in *Goff* that testimony of employees as to their own discriminatory treatment is inadmissible in a case of individual disparate treatment unless those employees shared the plaintiff’s decisionmaker or the plaintiff presented independent evidence of company-wide discrimination or a directive to discriminate. The Tenth Circuit’s holding in *Mendelsohn*, after all, conflates the employee and the employer in a way that is inconsistent with insular individualism. And the Fifth Circuit’s holding, in contrast, isolates the discriminating employee from the employer. If the plaintiff seeks to use the testimony to prove that the employer engaged in a pattern or practice of discrimination, then the

⁸² *Id.* at 597.

⁸³ *Id.*

⁸⁴ *Mendelsohn*, 128 S. Ct. at 1143.

⁸⁵ *See id.*; *see also id.* at 1144 (“[W]e hold that the Court of Appeals erred in concluding that the District Court applied a *per se* rule.”).

⁸⁶ *Id.* at 1143.

⁸⁷ The Court did point out that it would be wrong for the district court to rely on *Aramburu*. *See id.* at 1146 (“*Aramburu* defined the phrase ‘similarly situated’ in the entirely different context of a plaintiff’s allegation that nonminority employees were treated more favorably than minority employees.”); *see supra* note 76 for discussion of Sprint’s reliance on *Aramburu* and the district court’s use of similar language in its order.

⁸⁸ *Id.* at 1145 (describing the “broad discretion” owed to district court evidentiary determinations). Although most courts have held that the evidence is irrelevant to the question of whether the individual decisionmaker at issue acted with discriminatory bias, some courts have alternatively held that, even if relevant, the evidence should be excluded under FED. R. EVID. 403 because the probative value of the testimony is “substantially outweighed by the danger of unfair prejudice.” *See, e.g., Schrand*, 851 F.2d at 156; *Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984). The Supreme Court’s holding in *Mendelsohn* leaves ample room for district courts to exclude other-employee testimony under Rule 403 as well. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1145 (2008) (describing the deference owed to district court rulings under Rule 403).

inference is largely one of statistical likelihood: It is more likely that the supervisor discriminated in this instance because discrimination was rampant within the company.⁸⁹ But making that argument will require additional, statistical evidence since the Court has long stressed that plaintiffs must show “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts” to establish a pattern or practice of discrimination.⁹⁰ If, on the other hand, the plaintiff seeks to use the testimony to create an inference of discriminatory bias on the part of the decisionmaker without first establishing a company-wide practice or directive of discrimination, then, according to the Fifth Circuit, the testimony must involve a relationship between the testifying employee and the decisionmaker.⁹¹

As Part IV discusses in greater detail, the problem with this holding—and the insular individualism on which it rests—lies not in its rejection of the conflation of employee and employer, or even its rejection of a mingling of evidence; rather, the problem is that it ignores the role of context in shaping individual decisions. The courts, in other words, are correct that the statistical likelihood or directive inference is unsustainable without sufficient evidence of a pattern or practice of discrimination or other evidence of a policy or directive of discrimination within the company, but they are wrong in assuming that the testimony is otherwise only relevant if it involves a relationship between the testifying employee and the decisionmaker. Instead of involving a relationship between the testifying employee and the decisionmaker, the testimony may involve the larger work environment in which the decisionmaker acted. If the decisionmaker acted in a work environment in which discriminatory remarks and behavior were common and went unchecked by the employer, then it is more likely that the decisionmaker acted with discriminatory bias.⁹²

B. *Vicarious Liability*

Insular individualism is also likely to affect the shape of individual disparate treatment law in less obvious ways. If the Supreme Court continues to

⁸⁹ See, e.g., *Goff*, 678 F.2d at 597. (“Goff also argues that in adducing evidence concerning discrimination in other departments within the company, he was attempting to establish a pattern or practice of discrimination pervading the entire company, which, if proved, would have a tendency to make his claim of individualized discrimination seem more probable.”).

⁹⁰ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Even then, of course, proof of a pattern or practice is not determinative of whether there was discrimination in a particular instance. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.19 (1973) (cautioning that determinations that “‘the (racial) composition of defendant’s labor force is itself reflective of restrictive or exclusionary practices’ . . . while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire”).

⁹¹ *Goff*, 678 F.2d at 597.

⁹² See *infra* notes 135.

adhere to the insular individualism reflected in *Ledbetter*, it is likely to cut back on employer vicarious liability in two interrelated ways.

1. *Standard for Vicarious Liability When the Ultimate Decisionmaker Harbors No Discriminatory Bias*

The first change involves the standard that courts will use to decide when to hold an employer vicariously liable for a decision in which the ultimate decisionmaker did not herself act on discriminatory bias but relied on a recommendation or evaluation by a subordinate who did. Last year, the Supreme Court granted certiorari in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, a case that raised this issue.⁹³ Although the grant was later dismissed upon the settlement of the parties, the case provides a good starting point for discussion.

In the case, Stephen Peters, an African American man, sued BCI for terminating him because of his race in violation of Title VII.⁹⁴ Peters had worked as a merchandiser for BCI in its Albuquerque, New Mexico facility for six years.⁹⁵ During much of that time, Peters reported to Cesar Grado, a District Sales Manager who was responsible for monitoring and evaluating employees but who was not authorized to discipline or terminate.⁹⁶ Grado was expected to bring disciplinary matters to the attention of the Human Resources Department, which was responsible for taking any disciplinary action.⁹⁷

On Friday, September 28, 2001, Grado reported Peters for insubordination to Pat Edgar, a Human Resources official based in the Phoenix, Arizona office, after Peters refused to come into work on a Sunday as directed.⁹⁸ Three days later, on October 1, 2001, Edgar decided to terminate Peters' employment for insubordination.⁹⁹ She explained that she based her decision "[f]irst and foremost," on "the conduct of Mr. Peters toward Mr. Grado on Friday."¹⁰⁰ Edgars did not know Peters' race.¹⁰¹ Grado, however, not only knew Peters' race, but also had a history of treating black employees less favorably than other employees and of making disparaging racial remarks in the workplace.¹⁰²

The district court granted summary judgment for BCI. It held that the discrimination inquiry must focus exclusively on whether Edgar, the ulti-

⁹³ 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

⁹⁴ *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 482 (10th Cir. 2006).

⁹⁵ *Id.* at 478.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 479-80.

⁹⁹ *BCI*, 450 F. 3d at 480-81.

¹⁰⁰ *Id.* at 480.

¹⁰¹ *Id.* at 481.

¹⁰² *Id.* at 482-83 (detailing evidence of Grado's racial bias and his treatment of Peters).

mate decisionmaker, “honestly believed that Mr. Peters was guilty of insubordination on Friday, September 28.”¹⁰³ Grado’s bias, according to the court, was immaterial. The Court of Appeals for the Tenth Circuit reversed, holding that BCI could be held liable for discrimination if “the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action.”¹⁰⁴

The Supreme Court might be tempted in a case like this one to hold that only the state of mind of the ultimate decisionmaker matters and, therefore, that the employer cannot be held liable for discrimination unless that decisionmaker acted with bias. This was, after all, the argument made by BCI in its brief to the Court, and several courts of appeals have agreed.¹⁰⁵ However, constrained by principles of agency law,¹⁰⁶ the Court is unlikely to adopt such an extreme position. Instead, it is likely to rely on its earlier interpretation of agency principles to hold that although individual discriminators, like harassers, generally do not act within the scope of employment (because they act in their own interests rather than in the interests of their employers), they are aided in the agency relation.¹⁰⁷ When employees are given the authority by an organization to supervise and submit performance reviews or disciplinary reports that will then be used by other employees to make an ultimate decision, they are aided in the agency relation, and, under Restatement of Agency principles, the employer is vicariously liable for the supervisor’s action if it is discriminatory.¹⁰⁸ The discriminating employee used the

¹⁰³ *Id.* at 483.

¹⁰⁴ *Id.* at 487.

¹⁰⁵ *See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290–91 (4th Cir. 2004) (requiring that the ultimate decisionmaker be so influenced by the subordinate that “the subordinate is the actual decisionmaker”). The courts of appeals have adopted a variety of standards. *See, e.g., Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (requiring that the plaintiff show that the subordinate employee “influenced or was involved in the decision”); *BCI*, 450 F.3d at 487 (adopting a causation standard); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994) (requiring that the plaintiff show “that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action”).

¹⁰⁶ The term “employer” is defined in Title VII to include “agent[s].” 42 U.S.C. § 2000e(b) (2000). The Supreme Court has recognized on several occasions that this use of terms means that Congress directed federal courts to interpret Title VII based on agency principles. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). For an examination of Supreme Court decisions suggesting a causation standard over a conscious intent standard, beyond adherence to agency principles, see Rebecca Hanneu White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 *L.A. L. REV.* 495, 500–11 (2001).

¹⁰⁷ *See Ellerth*, 524 U.S. at 757 (“The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.”); *id.* at 762 (“The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.”).

¹⁰⁸ *See id.* at 762–63. This is equally true, one could argue, for co-workers as for supervisors. If the employer has adopted, for example, a system under which co-workers are given responsibility for performance evaluations or for reporting acts requiring discipline, then co-workers who carry out those responsibilities with discriminatory bias are aided in the agency relation as contemplated by the Court in *Ellerth*. *See id.* at 762 (expressing concern that employer should not be held vicariously liable for sexual harassment by a co-worker because

authority vested in her by the employer to harm the victim of discrimination. If the employee's review or report *causes* the ultimate decision, then, the employer will be vicariously liable for the discrimination of its agent.¹⁰⁹

Drawing on these agency principles, the Court is likely to adopt the causation standard applied by the court of appeals in *BCI*. This does not mean, however, that insular individualism will have no effect on its decision. Rather, insular individualism is likely to come into play much more subtly, in the Court's understanding of the ways in which an employer can break the chain of causation, thus avoiding liability.¹¹⁰ In *BCI*, the court of appeals noted that the employer could break the chain of causation by conducting an "independent investigation."¹¹¹ According to the court, if the employer has conducted an independent investigation, then "the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated."¹¹²

Insular individualism is likely to influence courts' interpretation of this causation-breaking activity. Accepting a wide range of causation-breaking activity is consistent with a belief that the ultimate decisionmaker can make an independent decision, uninfluenced by the historical or organizational context for that decision. Moreover, it is consistent with the belief that employers are largely innocent bystanders to discrimination. If employers are innocent bystanders, then we need expect very little of them in the way of

"anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct"). *But see* White & Krieger, *supra* note 106, at 522-23 (arguing that an employer should not be held vicariously liable under *Ellerth* for the firing of an employee who had been falsely reported for theft by a co-worker because of racial animus).

¹⁰⁹ The Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and the subsequent amendment of Title VII to provide that discrimination occurs when a protected characteristic is a "motivating factor" in the decision, 42 U.S.C. § 2000e-2(m), might be used to establish a lesser standard of liability. At the very least, however, *Ellerth* suggests that the Court will adopt a causation standard rather than the strict, alter-ego or "substantial influence" standard of the Fourth Circuit. *See Hill*, 354 F.3d at 291.

¹¹⁰ Insular individualism also underlies the holding that individual discriminatory decisions are generally not within the scope of employment. *See supra* note 29 and accompanying text.

¹¹¹ *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2006). Other courts have construed the employer's obligation even more loosely, requiring only that the target have had a reasonable opportunity to challenge the earlier decision. According to one court, for example:

If established procedures have given an employee a reasonable opportunity to inspect the supervisory evaluations in his or her file, to challenge allegedly inaccurate materials, and to have such materials corrected or removed, and if the organization gives its employees adequate notice that these rights may be exercised, then it may rely in good faith on such evaluations in making subsequent employment decisions without violating Title VII.

Stoller v. Marsh, 682 F.2d 971, 979 (D.C. Cir. 1982) (footnotes omitted). *See also* *Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir. 1986). The *Stoller* court also held that "[t]hese procedures need not form part of an equal employment opportunity program; general procedures for disclosure of employee appraisals, coupled with grievance procedures for correcting inaccurate files, might be sufficient." 682 F.2d at 979 n.11.

¹¹² *BCI*, 450 F.3d at 488. Interestingly, the court chooses to refer to the "employer" here rather than to the ultimate decisionmaker. *Id.*

efforts to change their own structures and cultures to minimize discrimination.

2. *Statute of Limitations and Delayed Action*

Ledbetter adds another wrinkle to the multiple decisionmaker issue. Specifically, it raises the following question: Which act, the ultimate decision to terminate or the initial decision to write up for insubordination, triggers the 180-day statutory filing period? The facts of *BCI* render the issue relatively unimportant in that case because the termination followed just four days after the insubordination report,¹¹³ but the timing will not always be so close. In fact, many cases will involve biased evaluations that take place months, even years, before the ultimate decision to refuse a raise, to deny a promotion, or to discharge.

The case of *Thomas v. Eastman Kodak Co.* serves as an example.¹¹⁴ In that case, Myrtle Thomas, the only black customer service representative in Eastman Kodak's Wellesley, Massachusetts office, was laid off in 1993 after years of service with the company.¹¹⁵ She filed suit within the statutory period as measured from the layoff decision.¹¹⁶ Her claim, however, alleged that the 1993 decision was discriminatory because it resulted from a ranking process that relied on racially biased performance appraisals in 1990, 1991, and 1992.¹¹⁷ The Court of Appeals for the First Circuit held that the layoff decision rather than the performance appraisals triggered the statute of limitations because the appraisals did not have "crystallized implications or apparent tangible effects" at the time that they were conducted.¹¹⁸ Kodak sought certiorari in *Thomas*, but the Supreme Court denied the request,¹¹⁹ leaving the issue unresolved.

Assuming that a plaintiff in Thomas's position could show that the earlier performance evaluations caused the layoff decision, the first option would be for the Court to hold, as the First Circuit did, that the ultimate layoff decision, the one that had a tangible, economic effect on the plaintiff's employment, triggers the running of the statutory period. This holding would be consistent with a long line of cases requiring an "ultimate" or "adverse" employment action, such as a rejection in hiring, a discharge, a pay disparity, or a promotion denial, before a claim of discrimination is legally actionable.¹²⁰ *Ledbetter* suggests, however, that the Court will not take this path,

¹¹³ *See id.* at 480–81.

¹¹⁴ 183 F.3d 38 (1st Cir. 1999).

¹¹⁵ *See id.* at 42–43.

¹¹⁶ *See id.* at 48.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 55.

¹¹⁹ *Eastman Kodak Co. v. Thomas*, 528 U.S. 1161 (2000).

¹²⁰ *See, e.g., Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) ("While the action complained of [a lateral transfer] may have had a tangential effect on [the plaintiff's] employment, it did not rise to the level of an ultimate employment decision intended to be

for at least two reasons. First, such an approach would divorce the state of mind or intent element of discrimination from the act element of discrimination, something that the Court in *Ledbetter* seemed unwilling to do.¹²¹ Second, as a practical matter, it would mean that evidence relating to intent in some cases could be months or years in the past.¹²²

The second option would be for the Court to hold that the decision involving discriminatory bias (in Thomas's case, the performance evaluations), even if not yet resulting in an ultimate or adverse employment action, triggers the statutory filing period. The benefit of this approach, in light of the *Ledbetter* Court's reasoning, is that it would keep the intent and action requirement together, and it would avoid the adjudication of claims turning on "stale" evidence. The Court, however, is unlikely to adopt this approach as well, for it would undoubtedly lead to a substantial surge in EEOC charges and lawsuits, and it would result in litigation over actions that may never have resulted in tangible harm. Finally, such a ruling would be inconsistent with the Court's earlier explication of agency principles in which tangible employment actions play a central role.¹²³

The third option would be for the Court to hold that the ultimate employment decision triggers the statutory filing period, but that the employer may raise an affirmative defense to liability. That defense would operate when the initial discriminatory decision falls outside of the statutory filing period. The employer could avoid liability under the defense by proving: (1) that it exercised reasonable care to prevent and correct promptly any discriminatory behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Functionally, this means that a plaintiff in Thomas's position would be required to challenge the discriminatory performance evaluations internally within a reasonable period of time in order to hold the employer accountable for the later discriminatory layoff decision.

actionable under Title VII."); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (requiring discrimination in "what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating"). See also *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006) (interpreting Title VII's retaliation provision more broadly than its antidiscrimination provision, which the Court stated has been interpreted to require a "so-called ultimate employment decision").

¹²¹ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 (2007) ("A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent. Nothing in Title VII supports treating the intent element of *Ledbetter's* claim any differently from the employment practice element.")

¹²² *Id.* (expressing concern that "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened").

¹²³ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-62 (1998) ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."). The Court may have implicitly approved an ultimate decision requirement for antidiscrimination claims under Title VII in *Burlington Northern v. White*. 126 S. Ct. at 241. See also *id.* at 2421-22 (Alito, J., concurring) (urging the same "materially adverse action" or "tangible employment action" requirement for retaliation claims as for antidiscrimination claims under Title VII).

This defense should sound familiar. It is, after all, roughly the defense created by the Supreme Court in *Burlington Industries v. Ellerth* and available in hostile work environment cases in which a supervisor has created a hostile work environment but has not taken a tangible employment action, defined by the Court as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹²⁴ Granted, the delayed action case is not perfectly parallel to the hostile work environment case. In the delayed action case, the plaintiff will have suffered a tangible employment action that was caused by discriminatory bias. Still, the same insular individualism that drove the Court’s holdings in *Ellerth* and *Ledbetter* is likely to drive the Court to adopt some variation of this option in the delayed action cases.¹²⁵

Insular individualism isolates the individual decisionmaker as an errant or rogue actor, operating independently of the employer and contrary to the employer’s interest. Individual discriminators, accordingly, are understood to be acting “for personal motives, motives unrelated and even antithetical to the objectives of the employer,”¹²⁶ which means that the employer’s vicarious liability rests solely on the aided in the agency relation standard.¹²⁷ In *Ellerth*, the Court held that an employer’s vicarious liability under that standard should be limited “to encourage employees to report harassing conduct before it becomes severe or pervasive.”¹²⁸ Encouraging employees to report harassing conduct, according to the Court, promotes conciliation rather than litigation and “serve[s] Title VII’s deterrent purpose.”¹²⁹ The same reasoning would apply to the delayed action issue: If an employee who suspects discrimination in an evaluation complains to her employer at that time, then

¹²⁴ *Ellerth*, 524 U.S. at 761.

¹²⁵ One variation of this option would be to require that the plaintiff prove negligence on the part of the employer, but that seems inconsistent with *Ellerth*, in which the Court rejected a negligence standard for a hostile work environment created by a supervisor on the ground that “the supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.” *Id.* at 762. Like the supervisor in *Ellerth*, the supervisors or other workers empowered by the company to provide performance reviews in a case like *Thomas* are empowered by the employer with the authority to affect another’s tangible, economic job conditions, including pay, promotion, demotion, etc. See also RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) Comment E (1957) (explaining that the “aided by the agency relation” standard applies in situations where “the servant may be able to cause harm because of his position”).

¹²⁶ *Ellerth*, 524 U.S. at 757.

¹²⁷ *Id.* at 760.

¹²⁸ *Id.* at 764. The Court has also repeatedly insisted that “Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be responsible.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). See also *Ellerth*, 524 U.S. at 763-64 (noting that “Congress has not altered *Meritor*’s rule even though it has made significant amendments to Title VII in the interim”).

¹²⁹ *Ellerth*, 524 U.S. at 764. The Court also found the defense consistent with the “avoidable consequences doctrine” in tort law. *Id.*

the employer can take action to avoid discrimination in the ultimate decision.¹³⁰

Each of these changes would be driven, at least in part, by the insular individualism reflected in *Ledbetter*. But they are not inevitable. On the contrary, understanding insular individualism and the role that it plays in these changes opens up opportunities for challenge. The next Part outlines several such challenges, both at the level of individual disparate treatment law, under which employers are held vicariously liable for the discriminatory actions of their employees, and at the level of systemic disparate treatment law, under which employers are held directly liable for the discriminatory actions of high-level decisionmakers.

IV. PULLING BACK ON INSULAR INDIVIDUALISM

The problem with insular individualism, and the changes to individual disparate treatment law that it is likely to fuel, is twofold: (1) insular individualism underestimates the influence of context on individual decisionmaking; and (2) insular individualism ignores the employer's role in creating that context. This Part explores several ways in which civil rights advocates—litigants, lobbyists, and scholars—can counter insular individualism. It does this by revisiting the cases and issues discussed above, with an emphasis on the context of decisionmaking and employer responsibility for that context. Rather than resisting the emergent distinction between employer and employee action, this Part suggests that advocates should contextualize the court's conception of discrimination, both at the individual and at the systemic, or employer, level.

The challenges to insular individualism proposed here are practical; they have not yet been foreclosed by the Supreme Court, in *Ledbetter* or elsewhere. More importantly, they are foundational. As the following issue discussions illustrate, pulling back on the insular individualism reflected in *Ledbetter* will have far-reaching effects on the shape of employment discrimination law and on its potential to remedy discrimination in the workplace.

A. *Contextualizing Discrimination at the Individual Level*

At the individual level, insular individualism can be challenged by emphasizing the influence of context on decisionmaking. The focus of the inquiry in these cases will still be on an individual decisionmaker (or group of

¹³⁰ Under this view, requiring employees to give notice to the employer of suspected bias is only "fair" to the employer. See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 51-53 (1st Cir. 1999) (considering but ultimately rejecting the defendant's argument that "fairness" requires notice of suspected discrimination in earlier decisions). See also *Amtrak v. Morgan*, 536 U.S. 101, 117-18 (2002) (rejecting the "fair notice" argument for hostile work environment claims).

decisionmakers), and the employer's liability will remain vicarious rather than direct. However, the determination of whether the individual acted with discriminatory bias will include consideration of the work environment that the employer created and/or sustained.

1. *Contextualizing Individual Decisionmaking in Ledbetter*

Had Ledbetter challenged the court of appeals' sufficiency-of-the-evidence findings, she could have argued that the 1997 and 1998 decisions, both within the statutory filing period, were based on her sex in violation of Title VII. She presented testimony in the case that Jerry Jones, the Personnel Manager to whom Ledbetter had complained about Maudsley's sexual harassment and who had responded that Ledbetter "was a troublemaker" and that "these men had good careers at Goodyear and he was not going to dismiss them," became Ledbetter's supervisor from 1996 to October 1998. She also alleged that during that time Jones had referred to his Area Managers as "boys" and, after Ledbetter complained about the reference, as "Boys and Lady."¹³¹ In addition, Kelly Owen, the supervisor who denied Ledbetter a raise in 1998, relied on Maudsley's falsified performance audits in making that decision.¹³²

Ledbetter also submitted evidence that the work environment at the plant during the period in which the 1997 and 1998 pay decisions were made was generally hostile toward women. The Plant Manager, Richard O'Dell, at one point told Ledbetter "that [t]he plant did not need women, that [women] didn't help it" and "caused problems."¹³³ Only a handful of women had worked as Area Managers during Ledbetter's time at the plant, and of those, two testified as to their own discriminatory treatment.¹³⁴

This evidence suggests that the 1997 and 1998 decisions regarding Ledbetter were discriminatory. The decisions were made and/or influenced by individuals who exhibited discriminatory bias toward Ledbetter. Moreover, the decisions took place in a context that was hostile toward women. Long-standing social science research—not to mention common sense—teaches that stereotyping, hostility, and biased action in the decisionmaking environment make it more likely that an individual decisionmaker, acting in that environment, will rely on stereotypes and biases.¹³⁵ Plaintiffs after *Ledbetter*

¹³¹ See *supra* note 45.

¹³² See *supra* note 44. The court of appeals held that the falsification of the reports was relevant "only to the accuracy of Owen's rankings, not to his intent." *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1187 n.21 (11th Cir. 2005). This holding raises the issue presented in *Mendelsohn*. See *supra* notes 73–92 and accompanying text.

¹³³ See *supra* note 46.

¹³⁴ See *supra* notes 36, 49.

¹³⁵ Not only are individuals more likely to act on and express their conscious biases and stereotypes in an environment in which those biases and stereotypes are socially accepted; they are more likely to act on even their unconscious biases and stereotypes when similar biases and stereotypes are prevalent in the environment. The social science research shows that stereotype "priming" (i.e., exposure to stereotypic statements) exacerbates stereotyping in evalua-

can use this research to contextualize pay decisions that come within the statutory filing period.

2. *Contextualizing Individual Decisionmaking in Mendelsohn*

Mendelsohn presents a similar opportunity. Like Ledbetter, Mendelsohn can challenge insular individualism by contextualizing the individual decisionmaking at issue in the case. Instead of arguing that she should be permitted to present the testimony of other employees as to their own discriminatory treatment because it goes to the employer's state of mind, thus conflating the employee and employer,¹³⁶ or because it establishes a pattern or practice or directive of discrimination by the employer that makes it more likely that discrimination happened in this instance, Mendelsohn should argue that the testimony of the five other employees is relevant because it shows the context in which the decision to lay off Mendelsohn was made. At least four of the five employees worked at the same Sprint division as Men-

tion. *See, e.g.,* Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in *DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 231-53 (Shelly Chaiken & Yaacov Trope eds., 1999) (describing a study finding that men who were primed with stereotypic statements about women were more likely to ask a female job applicant "sexist" questions); Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. OF SOC. BEHAV. & PERSONALITY 3-26 (1995) (finding that comments priming stereotypes before evaluation exacerbates stereotyping). The Supreme Court credited this line of research in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (crediting testimony by social psychologist Susan Fiske that individuals are more likely to act on their biases and stereotypes when similar biases and stereotypes are prevalent in the environment). Other research shows that individuals must be motivated to modify the automatic operation of stereotypes and prejudice in order to correct for those biases. *See, e.g.,* Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. OF PERSONALITY & SOC. PSYCHOL. 645 (2001) (finding that individuals who believed that they were "out of step" with their peers in racial stereotyping exhibited lower levels of automatic race stereotypes than individuals who believed that their racial beliefs were congruent with those of their peers); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119-20 (1994) (finding that individuals must be motivated to correct for unconscious biases in order to correct for those biases).

This point builds more generally on a long line of research and scholarship exploring the influence of organizational context on discriminatory bias and behavior. *See, e.g.,* ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977) (describing contextual influences on definitions of merit); ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, UNEQUAL PAY FOR WOMEN IN AMERICA* (1999) (describing organizational bases of the "male, profit-making club" at a banking institution); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000). For efforts to use this research to shape employers' obligation under antidiscrimination law see Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005). *See also* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (defining a structural approach to employment discrimination law and setting the normative foundation for such an approach).

¹³⁶ *See, e.g.,* *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1226 (10th Cir. 2006) (agreeing with Mendelsohn that "the evidence she sought to introduce is relevant to Sprint's discriminatory animus toward older workers").

delsohn, and several worked at the same headquarters office complex as Mendelsohn.¹³⁷ One testified that her supervisor “told [her] that [she] was too old for the job.” Another testified that her supervisor complained of “too many older people” in the department.¹³⁸ This testimony suggests that Mendelsohn’s supervisor made the decision to lay her off in an environment that was hostile to older workers, which makes it more likely that her supervisor acted with discriminatory bias.¹³⁹

There will, of course, be limits to the relevance of other-employee testimony. The testimony of the employee who worked in a different Sprint division than Mendelsohn, for example, may not be relevant to the particular decision at issue. If the person deciding to terminate Mendelsohn’s employment, or the people performing the evaluations on which the decision to terminate was based, had no contact with people in other divisions, then discrimination in another division may not serve as context for the decision regarding Mendelsohn. The relevance inquiry under the reasoning provided here will, like all relevance inquiries, depend upon the specifics of the particular testimony and situation at issue in each case. Nonetheless, in many cases other-employee testimony will be relevant as context for the decision at issue, even if the testimony involves other supervisors and the plaintiff lacks evidence sufficient to prove a claim of company-wide systemic discrimination.

3. *Delayed Action Cases*

The delayed action cases also present opportunities to challenge the insular individualism of *Ledbetter* by contextualizing individual decisionmaking. Litigants should point out in these cases, for example, the difficulty in achieving an “independent investigation.” In *BCI*, the court of appeals stated that “simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.”¹⁴⁰ That statement is misleadingly broad. The court cites an earlier Tenth Circuit case, *Kendrick v. Penske Transportation Service, Inc.*,¹⁴¹ for the proposition, but the facts of that case render its application much narrower than the *BCI* court suggests.

In *Kendrick*, a low-level supervisor, Tirrell, reported that Kendrick, an African American man, had shoved him.¹⁴² Another supervisor investigated

¹³⁷ See Brief in Opposition to Writ of Certiorari at 3, *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 U.S. 1130 (2008) (No. 06-1221).

¹³⁸ *Id.* at 3 n.4; see also Brief for the Respondent at 4-10, *Sprint/United Mgmt. Co.*, 128 U.S. 1140 (No. 06-1121) (describing the excluded testimony).

¹³⁹ See *supra* note 135.

¹⁴⁰ *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2006) (citing *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231-32 (10th Cir. 2000)).

¹⁴¹ 220 F.3d at 1220.

¹⁴² *Id.* at 1223-25.

the complaint and gave Kendrick an opportunity to respond. Kendrick refused. The investigating supervisor then recommended that Kendrick be terminated on the basis of the physical altercation. Noting that Kendrick had been given an opportunity to respond, the court found insufficient evidence of discrimination.¹⁴³

Unlike *Kendrick*, however, many delayed action cases will not involve a specific allegation of wrongdoing on which the ultimate decision was based (i.e., whether Kendrick shoved Tirrell). Instead, they will involve low or less-than-enthusiastic performance reviews, or supervisor recommendations against a hire, a pay increase, or a promotion.¹⁴⁴ In many of these cases, the ultimate decisionmaker will have relied on a written report compiled by a lower-level supervisor or manager. In such cases, courts should be cautioned against assuming that the ultimate decisionmaker approached the decision *de novo*. Social science research shows that even if an ultimate decisionmaker does conduct her own investigation, she may be overly influenced by a recommendation from a lower-level manager, particularly if that recommendation is accompanied by a factual account supporting its position.¹⁴⁵ This research supports a narrow interpretation of the “independent investigation” referred to by the *BCI* court. Indeed, some commentators have argued that, to break the causal chain, the investigation must include explicit consideration of the possibility that bias influenced the decision-making process.¹⁴⁶

In some cases, there may even be room to argue that the independent investigator was influenced by discriminatory biases and stereotypes, rather than simply giving effect to the earlier decisionmaker’s biased action. Social cognition research teaches that the “expectancy-confirmation bias,” or the tendency to filter information to confirm a hypothesis, is magnified when the factual basis of a recommendation is consistent with a stereotype that is associated with the target’s social group.¹⁴⁷ This means that stereotype-confirming information in a written report, for example, is less likely to be purged in a later investigation. Moreover, when the ultimate decisionmaker occupies a position of power over the target, as in most employment discrimination cases, she is less likely to correct for her own stereotypes and biases.¹⁴⁸

¹⁴³ *Id.* at 1231.

¹⁴⁴ *See, e.g.,* *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999); *Stoller v. Marsh*, 682 F.2d 971 (D.C. Cir. 1982).

¹⁴⁵ For a detailed discussion of this research and its importance for courts’ interpretation of the “independent investigation,” see White & Krieger, *supra* note 106, at 524-27.

¹⁴⁶ *See id.* at 527 (arguing, based on social science research, that “bias injected into the decision making process early in the social judgment sequence can be purged only through affirmative efforts at bias correction”).

¹⁴⁷ *Id.* at 524-25; *see generally* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20 (1983).

¹⁴⁸ *See generally* Monica J. Harris et al., *Awareness of Power as a Moderator of Expectancy Confirmation: Who’s the Boss Around Here?*, 20 BASIC & APPLIED SOC. PSYCHOL. 220 (1998).

The organizational context of the investigation is also relevant here. If the investigation is conducted in an organizational culture that facilitates stereotyping and biases, it is less likely to purge the bias from the decision-making process.¹⁴⁹ Litigants should search for such contextual evidence and urge courts to examine the decisionmaking process as a whole and the culture of the workplace to determine whether the ultimate decision was based on membership in a protected group.¹⁵⁰

The target's "opportunity to respond" will also be substantially different in these latter cases. An opportunity to respond to a performance evaluation or a recommendation not to hire will be much less likely to break the chain of causation than an opportunity to respond to an allegation of a single incident of shoving. Unlike a discrete incident with concrete facts, the range of skills covered in a performance evaluation and the frequently subjective nature of the assessment make it difficult for an investigator to conduct an independent review, even if the target's side of the story is taken into account.¹⁵¹

B. *Contextualizing Discrimination at the Systemic Level*

Another potentially powerful challenge to the insular individualism of *Ledbetter*—and to the practical difficulties that it creates—lies at the systemic, or employer, level. Here, the aim is to challenge insular individualism's assumption that employers are innocent bystanders to the discriminatory actions of their lower-level employees. Instead of seeking to hold employers vicariously liable for the discriminatory actions of individual employees, systemic claims seek to hold employers directly liable for their own discriminatory actions. As at the individual level, though, contextualizing decisionmaking is the key to a successful challenge. Employers create the context—the policies, the decisionmaking systems, the work environment and culture—in which individual decisions are made. Employers, then, must be understood to be active participants in discrimination, even when they, like most of their employees, do not take an overtly exclusionary stance toward members of protected groups.

¹⁴⁹ See White & Krieger, *supra* note 106, at 535-36.

¹⁵⁰ For an examination of contextual influences on decisionmaking in the workplace, see Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659 (2003). For a discussion of how an emphasis on organizational context might help ease the drive to cut back on vicarious liability, see *infra* notes 157-159 and accompanying text.

¹⁵¹ See generally Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 *FLA. ST. U. L. REV.* 959, 993-1001 (1999) (describing the use of performance evaluations as a means of bulletproofing employers' decisions from claims of discrimination).

1. *Ledbetter as a Systemic Case*

It is possible to recast *Ledbetter* as a systemic case, one in which a plaintiff or plaintiffs sues the employer alleging a pattern or practice of discrimination against members of a protected group. By framing her case as systemic, *Ledbetter* would seek to hold Goodyear directly liable for its own discriminatory treatment of women as a group, rather than to hold Goodyear vicariously liable for the discriminatory actions of its employees, whether Maudsley, Jones, or some other supervisor or supervisors.

Recast in this way, *Ledbetter* would be more like *Bazemore*. According to the majority in *Ledbetter*, *Bazemore* was a case where the employer “intentionally retain[ed a facially discriminatory] . . . pay structure.”¹⁵² In reality, however, there was no evidence that the defendant in *Bazemore* consciously retained its pay structure out of animus toward blacks. Rather, it simply did nothing about its pay structure, in the face of a continued disparity in pay.¹⁵³ What, then, if Goodyear also had access to statistics showing a stark disparity in pay between male and female Area Managers, and at least one supervisor of those managers exhibited “discriminatory bias toward women?”¹⁵⁴ If Goodyear continued to rely on a pay raise system that consisted primarily of subjective recommendations by that supervisor and other male supervisors in the face of a stark disparity, should it not be held directly liable for “intentionally retain[ing]” a discriminatory pay system?¹⁵⁵

This recasting of *Ledbetter* brings the case in line with a number of recent class actions in which plaintiffs have alleged systemic discrimination by major corporations with largely decentralized, highly subjective decision-making systems, lacking in specific or objective criteria or oversight.¹⁵⁶ These lawsuits seek to hold employers responsible for their role in creating the organizational structures, decisionmaking systems, and environments that influence individual decisionmaking. As such, they accept insular individualism’s distinction between action of the employer and its individual employees, but they challenge the assumption that employees act in isolation from the environment shaped by the employer.

¹⁵² *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2173 (2007).

¹⁵³ To say that it did nothing is not quite accurate. Indeed, the Service had made some effort to get rid of the disparity. See *Bazemore v. Friday*, 478 U.S. 385, 394-95 (1986) (“The Extension Service admits that, while it made some adjustments to try to get rid of the salary disparity on account of pre-Act discrimination, it had not made all the adjustments necessary to get rid of all such disparity.”)

¹⁵⁴ See *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting).

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (affirming the district court’s certification of the class). See generally Green, *supra* note 150 (describing some of the recent class actions).

2. *Vicarious Liability and Systemic Challenge*

Contextualizing decisionmaking at the systemic level should also help ease the drive to limit vicarious liability. Insular individualism is consistent with a “principal-agent” model of organizational misconduct, which understands organizational misconduct as primarily a problem of single, independent agents who disregard the preferences of the employer.¹⁵⁷ This principal-agent model of misconduct, like insular individualism, oversimplifies the organization’s role in wrongdoing.¹⁵⁸ It both erroneously assumes that employer and employee interests regarding discrimination are rarely aligned and that misconduct is best addressed through identification of specific, deviant individuals and direct correction of those individuals’ actions.

Ellerth reflects this view, with its emphasis on encouraging victims of harassment to complain about the behavior of specific harassers so that the employer can correct the harasser’s behavior or insulate the victim from the deviant individual. Highlighting the role that the employer plays in creating the environment in which decisions are made should help persuade courts that the affirmative defense of *Ellerth*, at the very least, should not be extended beyond the harassment context.¹⁵⁹ Correcting for and preventing discriminatory decisionmaking within an organization must involve broader, systemic and structural changes as well as efforts to directly control individual behavior through incentives and penalties.

V. CONCLUSION

The recent outrage over the Supreme Court’s holding in *Ledbetter* is understandable. Discrimination in pay remains prevalent, and the Court’s decision makes it exceedingly difficult for victims to hold their employers accountable for that discrimination. The narrow efforts to mitigate the immediate effect of *Ledbetter*, though, risk overshadowing the deeper conceptual shift that the case reflects. Insular individualism—the belief that discrimination can be reduced to the action of an individual decisionmaker or a

¹⁵⁷ See Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 597 (2005) (describing the “principal-agent model” of organizational misconduct).

¹⁵⁸ The principal-agent model of misconduct arguably underlies a wide-ranging move toward duty-based organizational liability schemes, from securities and environmental regulation to product defects. See *id.* at 572, 598-99.

¹⁵⁹ *Ellerth* can also be critiqued on this ground. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (emphasizing the structural component of sexual harassment).

There is also a rich research and literature critiquing the expectation that victims of discrimination complain early on about their discriminatory treatment. See, e.g., Theresa M. Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001); L. Camille Herbert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711 (2007); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169 (2001).

group of decisionmakers isolated from the work environment and the employer—has tremendous potential to reshape individual disparate treatment law. But there are ways to loosen its grip. Litigants and advocates who understand insular individualism can work to reduce its influence by emphasizing the complexity of discrimination, particularly the role of organizations in shaping the context for individual actions. Employers are not innocent bystanders to independent acts of discrimination by their employees; they are intimately involved in the discrimination that takes place within their walls.

