No. 07-4023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARY LOU MIKULA,

Plaintiff-Appellant,

v.

ALLEGHENY COUNTY OF PENNSYLVANIA,

Defendant-Appellee.

On Panel Rehearing From The United States
District Court For The Western District Of Pennsylvania

BRIEF *AMICI CURIAE* OF EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE ON PANEL REHEARING AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amici Curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) The instant appeal is not a bankruptcy appeal.

Katherine Y.K. Cheung

June 11, 2009

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Katherine Y.K. Cheung

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below, and thus supports the position of Defendant-Appellee, Allegheny County of Pennsylvania.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every

industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

As employers subject to the Lilly Ledbetter Fair Pay Act (Fair Pay Act), 42 U.S.C. § 2000e-5(e)(3)(A), as well as other labor and employment statutes and regulations, EEAC and the Chamber's members have a direct and ongoing interest in the issues presented in this appeal regarding the proper scope and applicability of the Fair Pay Act to discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and other federal employment nondiscrimination laws.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the substantial significance of this case to the constituency they represent.

STATEMENT OF THE CASE

The Allegheny County Police Department hired the Plaintiff-Appellant, Mary Lou Mikula (Mikula), on March 19, 2001 as its Grants Coordinator at an annual salary of $35,500. *Mikula v. Allegheny County*, 2007 U.S. Dist. LEXIS 70510, at *1 (W.D. Pa. Sept. 24, 2007). Three years later, Mikula asked for a change in job title and to be paid the same or more than Ed Przybyla, the County's male Fiscal Manager. She expressed her request in a memorandum dated September 10, 2004 to the Police Superintendent. *Id*. at *4. At the time of Mikula's request, Przybyla had been Fiscal Manager for more than ten years. *Id.* at *3. Although Mikula's manager forwarded the request to the Human Resources department, Mikula did not receive a response. *Mikula v. Allegheny County*, 2009 U.S. App. LEXIS 6281, at *2-3 (3d Cir. Mar. 10, 2009) (*per curiam*), *vacated and reh'g granted*, 2009 U.S. App. LEXIS 10629 (3d Cir. May 15, 2009). Mikula repeated her request for a pay adjustment in 2005, *id.* at *3, and six months later, filed an internal complaint with the County's Human Resources Department alleging age- and sex-based pay discrimination. *Id.* The County investigated, concluding that Mikula's allegations of discrimination were unfounded and that her current title and rate of pay were fair when compared with similar jobs. *Id.* She subsequently filed an EEOC charge of discrimination alleging Title VII sex discrimination on April 16, 2007, more than two and a half years after her initial

request for a pay raise in 2004 and seven years after she was hired by the County. 2007 U.S. Dist. LEXIS 70510, at *4.

The County moved for summary judgment, arguing that Mikula's Title VII claim was untimely based on the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). *Id.* at *7. The district court agreed that Mikula's Title VII disparate pay claim was untimely. *Id.* at *8-9. It found that because Mikula was aware of the alleged pay discrepancy by the time she requested a pay raise on September 10, 2004, the limitations period for filing an EEOC charge began to run as of that date. *Id.* Since Mikula did not file an EEOC charge until April 2007, the district court concluded that her charge was untimely. *Id.* The district court also rejected Mikula's contention that the County's August 23, 2006 determination that her pay was fair was itself a discrete discriminatory act occurring within 300 days of the date Mikula filed her EEOC charge. *Id*.

On appeal, a three-judge panel of the Third Circuit affirmed. *Mikula v. Allegheny County*, 2009 U.S. App. LEXIS 6281 (3d Cir. Mar. 10, 2009) (*per curiam*), *vacated and reh'g granted*, 2009 U.S. App. LEXIS 10629 (3d Cir. May 15, 2009). It found that because Mikula's requests for raises in 2004 and 2005 fell outside the 300-day EEOC charge filing period, she was time-barred from pursuing

those claims in court.[1] 2009 U.S. App. LEXIS 6281, at *6. The Appeals Court also rejected Mikula's claim that the County made a pay decision on August 23, 2006, holding that the County "merely provided Mikula with the result of its investigation into her discrimination complaint." *Id*. It went on to observe that the alleged discrimination about which Mikula complained – the unanswered requests for a pay raise in 2004 and 2005 – "all occurred more than 300 days before Mikula filed her EEOC charge," thus barring her suit on timeliness grounds. *Id*. (footnotes omitted). The Appeals Court further found that the newly passed Lilly Ledbetter Fair Pay Act, 42 U.S.C. § 2000e-5(e)(3)(A), did not save Mikula's claim, *id.* at n.1, concluding that "[a]pplication of the Fair Pay Act requires the *adoption* of a discriminatory compensation decision, rather than, as in this case, a request for a raise that was never answered." *Id.* at *6-7 n.1.

Mikula then petitioned this Court to vacate the panel decision and for panel rehearing, which it granted on May 15, 2009. 2009 U.S. App. LEXIS 10629 (3d Cir. May 15, 2009).

[1] *Amici* note that while this brief is submitted in support of affirmance of the district court's grant of summary judgment in favor of Defendant-Appellee, *amici* do not agree that each of Mikula's requests for a pay raise constitutes an unlawful employment practice.

SUMMARY OF ARGUMENT

This panel and the district court below correctly held that the newly enacted Lilly Ledbetter Fair Pay Act (Fair Pay Act), 42 U.S.C. § 2000e-5(e)(3)(A), does not apply to this case. The statute extends the limitations period for bringing a claim of discrimination in compensation under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(e). It does not, however, define or otherwise explain what constitutes a compensation decision or "other practice" that is subject to the expanded limitations period.

The legislative history evidences Congress's intent to restore the law that was in place prior to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Prior to *Ledbetter*, the law was well settled that a Title VII plaintiff must challenge a discrete act of discrimination within 180 or 300 days of when the act allegedly occurred. In *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101, 110 (2002), for instance, the Supreme Court clarified that Title VII's limitations period for "discrete" discriminatory acts, such as discipline, discharge, promotion, transfer and hiring, begins when the unlawful employment practice occurred. *Morgan* remains good law.

The Fair Pay Act's expanded limitations period is triggered only by discriminatory compensation decisions or other pay-influencing decisions that already are unlawful under Title VII. In this case, Mikula has failed to establish

that her repeated requests for more money were discriminatory compensation decisions taken *because of* her sex. Instead, her claim that a male employee was paid more money for doing comparable work is a classic argument for comparable worth. Yet, nothing in the Fair Pay Act expands Title VII to cover such claims.

Mikula's efforts to expand the Fair Pay Act's reach by arguing that her periodic requests for more money are compensation decisions or other practices that trigger the expanded charge filing periods similarly are unpersuasive. Such an interpretation of the Act would effectively eliminate the charge filing limitations period. Employees could perpetually extend charge filing periods by asking for a pay increase on the eve of the expiration of their 180 or 300 day limitations period. This continual extension would erode the very purpose of statutory limitations periods, that is, to avoid the prejudice employers face when defending stale claims, and therefore must be rejected by this court.

Allowing the conclusion of an internal discrimination investigation to trigger a new limitations period for filing a Title VII discrimination charge under the Fair Pay Act would have the perverse result of penalizing employers for conducting thorough investigations by giving aggrieved individuals more time to raise old claims, thereby discouraging them from conducting internal investigations and thus undermining the spirit and intent of Title VII.

ARGUMENT

I. THIS PANEL AND THE DISTRICT COURT BELOW CORRECTLY HELD THAT THE NEWLY ENACTED LILLY LEDBETTER FAIR PAY ACT DOES NOT APPLY TO THIS CASE

The Ledbetter Fair Pay Act (Fair Pay Act), 42 U.S.C. § 2000e-5(e)(3)(A), amends the limitations period in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), to extend the time period for bringing a claim of unlawful compensation discrimination under the Act. The Fair Pay Act provides:

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

42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added). The Act also extends the time period for bringing a compensation discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d), the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq.* The Fair Pay Act thus permits an individual to file an EEOC charge within 300 days of receipt of a paycheck or other form of compensation that carries forward the effects of past discriminatory compensation practices, whether

or not the discrimination actually occurred within the statutory charge filing limitations period.

A. The Legislative History Evidences Congress's Intent To Restore The Law That Was In Place Prior To The Supreme Court's Decision In *Ledbetter*

The Act does not define or otherwise explain what constitutes a compensation decision "or other practice." 42 U.S.C. § 2000e-5(e)(3)(A). Where the words of a statute are unclear, courts look to the legislative history to determine Congress's intent. *See United Steelworkers v. Weber*, 443 U.S. 193, 254 (1979). The legislative history of the Fair Pay Act, however, provides little guidance as to what is meant by the term "other practice." Senator Barbara Mikulski, the principal sponsor and Manager of the bill on the Senate floor, described the bill as designed only to apply to discrimination in compensation – "nothing more, nothing less" – expressing her view that it would not extend to "discrete" acts, such as promotions and terminations, even though such decisions can affect an individual's pay. 155 Cong. Rec. S557 (daily ed. Jan. 15, 2009) (statement of Sen. Mikulski). But, she pointed out that "[u]nfair differences in pay" also could be the result of discriminatory job classifications or discriminatory job assignments. *Id.*

Mikula's attempt to broaden the scope of the Fair Pay Act to practices unrelated to pay discrimination is inconsistent with the primary purpose of the law and therefore should be soundly rejected by this Court. The legislative history of

the Act is replete with references evidencing that the law was intended to reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, and, in doing so, to restore the law applicable to compensation discrimination claims as it existed pre-*Ledbetter.* Senator Barbara Mikulski described this limited purpose as follows: "It will restore the law to the way it was before the Supreme Court's decision on *Ledbetter v. Goodyear*." 155 Cong. Rec. S557 (daily ed. Jan. 15, 2009) (statement of Sen. Mikulski). Senator Mikulski reiterated this view during floor debate by characterizing the bill as narrowly tailored "because it simply restores the law, with greater clarity, that existed before the outrageous Supreme Court decision." *Id*. at S739 (statement of Sen. Mikulski). Senator Barbara Boxer, a co-sponsor and strong supporter of the measure, confirmed, "[t]he bill Senator Mikulski is urging us to vote for simply restores the law to what it was in almost every State in the country before the Supreme Court dealt us a very serious blow and said, in fact, you had to move from the minute the discrimination started." *Id.* at S742 (statement of Sen. Boxer). Representative George Miller similarly described the purpose of the pending bill in the House to "reset the law as businesses and most courts and employees and the EEOC had understood it to be before the court's dramatic ruling [in *Ledbetter*.]" 155 Cong. Rec. H114 (daily ed. Jan. 15, 2009) (statement of Rep. Miller).

Congress mandated that the time limitations for filing a Title VII discrimination charge would commence on the date of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(3)(A); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980) (internal quotation omitted). In *National Railroad Passenger Corp. (Amtrak) v. Morgan*, 536 U.S. 101, 110 (2002), the Supreme Court further clarified that a Title VII plaintiff who challenges a "discrete" discriminatory act (such as discipline, discharge, promotion, transfer, and hiring), first must file an EEOC charge within 180 or 300 days of when the act "occurred" – or, as *Morgan* instructs, on the day that it "happened."[2] *Id.* at 110 (internal quotations omitted).

Over the years, the Supreme Court repeatedly has refused to sanction arguments in favor of lengthening the charge filing limitations period for discrete acts in certain cases beyond 180/300 days. In *Morgan*, the Court rejected the notion that a series of discrete acts could work together to constitute a single unlawful employment practice, noting that discrete acts are "easy to identify" and "are not actionable if time barred, even when they are related to acts alleged in

[2] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time — perhaps even years. 536 U.S. at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court said, the cumulative total may. *Id.* Therefore, the Supreme Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

timely filed charges." *Id.* at 113-14. Prior to *Morgan*, the Supreme Court held in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977), that the present "effects" of past discriminatory acts also are not actionable under Title VII and that the law instead requires a plaintiff to show a "present *violation*" of the law within the limitations period. Likewise, *Delaware State College v. Ricks*, 449 U.S. 250 (1980), held that the college's decision to deny tenure was the discriminatory act that marked the beginning of the limitations period, even though the plaintiff did not suffer the effects of the decision until his termination. Again, the *Ricks* Court reminded litigants that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257 (citing *Evans*). Accordingly, the law was well settled prior to *Ledbetter* that a Title VII plaintiff must challenge a discrete act of alleged discrimination within the 180/300 day time frame established by Congress.

B. The Fair Pay Act's Expanded Limitations Period Is Triggered Only By Discriminatory Compensation Decisions Or Other Pay-Influencing Decisions

In this case, Mikula has alleged that the County's failure to respond to her requests for a pay adjustment to the level of the County's male Fiscal Manager – who is not similarly situated to her – amounts to a discriminatory compensation decision or other practice within the meaning of the Fair Pay Act. Yet, she has failed to establish that the County's actions constituted an employment decision at

all, let alone a compensation-related one that was taken "because of" sex in violation of Title VII. In Title VII sex discrimination cases, the Supreme Court has instructed that the "critical issue … is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (internal quotation and citation omitted). Mikula's failure to demonstrate this essential element of her claim that her pay was lower because of her sex thus warrants affirmance of the lower court's grant of summary judgment in favor of the County in this case.

Mikula's attempt to salvage her untimely claim by relying upon the section of the Fair Pay Act that provides that the limitations period can begin to run "when an individual is affected by the application of a discriminatory practice, including each time wages, benefits or other compensation is paid," 42 U.S.C. § 2000e-5(e)(3)(A), is misplaced. While the Fair Pay Act extended the limitations period for when an aggrieved individual can file a charge describing a discriminatory compensation decision, the Act did not alter the types of conduct that constitute unlawful discriminatory compensation decisions under Title VII. The plain language of the statute confirms that the expanded limitations period applies only to certain types of compensation claims that *already* are unlawful under Title VII. New subsection (e)(3)(A) provides that "an unlawful employment practice occurs,

with respect to discrimination in compensation *in violation of this title*," when certain conditions are met. 42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added). By limiting the application of the statute to discriminatory compensation practices "in violation of this title," *id.*, the Fair Pay Act merely expands the time frame in which aggrieved individuals must complain about alleged pay bias in violation of Title VII. It does not, as Mikula seems to suggest, expand the types of substantive, intentional discrimination claims that may be brought under Title VII.

Several federal district courts have correctly limited the application of the Fair Pay Act to a narrow universe of compensation-based discrimination claims. In *Rowland v. CertainTeed Corp.*, 2009 U.S. Dist. LEXIS 43706, at *16-17 (E.D. Pa. May 21, 2009), for example, the district court ruled that the Act did not apply to extend the limitations period on the plaintiff's non-promotion claim because failure to promote is a discrete act that does not constitute a discriminatory compensation decision within the meaning of the Act. Likewise, in *Leach v. Baylor College of Medicine,* 2009 U.S. Dist. LEXIS 11845, at *50-51 (S.D. Tex. Feb. 17, 2009), the district court ruled, "[t]he Fair Pay Act of 2009 only affects the *Ledbetter* decision with respect to the timeliness of discriminatory compensation claims . . . . The rule set out in *Ledbetter* and prior cases – that 'current effects alone cannot breathe new life into prior uncharged discrimination' – is still binding law for Title VII disparate treatment cases involving discrete acts other than pay."

See also Richards v. Johnson & Johnson, Inc., 2009 U.S. Dist. LEXIS 46117, at *30-31 (D.N.J. June 2, 2009) ("[The Fair Pay Act] does not purport to overturn *Morgan*, and thus does not save otherwise untimely claims outside the discriminatory compensation context"). In this case, by contrast, Mikula's claim that she should be paid more is not a discriminatory compensation decision or other practice under the Fair Pay Act. At most, her claims that she did not receive a pay raise are discrete acts that are subject to the rule the Supreme Court set forth in *Morgan*. *But see* n.1, *supra*.

1. Nothing in the Fair Pay Act expands Title VII to cover claims of comparable worth

In this case, Mikula decided on her own that she should be paid the same amount as the County's male Fiscal Manager, and asked "that her salary be increased 'to be equal or greater than our Fiscal Manager [Ed Przybyla].'" *Mikula v. Allegheny County*, 2007 U.S. Dist. LEXIS 70510, at *2 (W.D. Pa. Sept. 24, 2007) Plaintiff-Appellant has failed to present – either to this Court, the district court below, or to the County as part of her internal complaint – *any* evidence supporting her contention that she is similarly situated to Przybyla or that the County's refusal to increase her pay was in any way based on sex. Even assuming she can establish a *prima facie* case of sex-based compensation discrimination, Mikula nevertheless has failed to rebut the County's legitimate, nondiscriminatory reason for the pay differential, *to wit,* that Przybyla was responsible for (among

other things) formulating and managing an operating budget for the police department that ranged from at least *seven to fifteen times* the amount of the grant amounts over which Appellant had responsibility. *Id.* at *2-3. Instead, Mikula simply believed that "'she was not paid enough for what she did,'" *id.* at *3, a sentiment that nearly every employee, regardless of the employer, likely shares.

Simply put, this is not a case in which the plaintiff has alleged that she is intentionally being paid less than a similarly situated male because of her sex. Instead, at the heart of Mikula's claim is her contention that she was not paid enough for the work that she did, that her job was just as difficult as that of the Fiscal Manager, and that her contributions to her employer were just as valuable. This is a classic argument for comparable worth, which is a theory that is insufficient, without more, to establish a *prima facie* case of intentional sex discrimination under Title VII. *See, e.g., Loyd v. Phillips Bros.*, 25 F.3d 518, 524-25 (7th Cir. 1994); *AFSCME v. Washington*, 770 F.2d 1401, 1406-07 (9th Cir. 1985); *Lemons v. City of Denver*, 620 F.2d 228, 228-30 (10th Cir. 1980). Merely showing that a man and a woman are paid different wages for doing comparable work does not establish a Title VII disparate treatment claim. Instead, it is well settled that a plaintiff must show evidence of discriminatory intent or motive as an essential element of a disparate treatment claim. *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

The Seventh Circuit rejected an attempt similar to Mikula's to recast a comparable worth claim as an actionable Title VII cause of action in *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768 (7th Cir. 2007). There, the Seventh Circuit held that a female park manager who was responsible for managing a six-acre park was not properly compared to a male park manager who was responsible for managing a 100-acre park. In affirming dismissal of the plaintiff's Title VII claim, the court pointed out in particular that the male park manager's park was almost 17 times larger, and offered additional services, such as a swimming pool, than the plaintiff's park. *Id*. at 770. As the Seventh Circuit explained, "Title VII does not require equal work, but neither does it allow for recovery on the basis of the theory of comparable worth. So merely showing that a man and a woman who perform different jobs for the same employer are paid differently does not get a Title VII plaintiff to first base." *Id.* at 772.

Thus, Mikula's claim that she was paid less than a male employee simply is not subject to the Fair Pay Act. The practice or "decision" to pay two people performing vastly different jobs under different working conditions is not, without more, actionable compensation discrimination under Title VII and therefore does not trigger the Fair Pay Act's expanded filing period.

2. Periodic employee requests for more money are not compensation decisions or other practices that trigger the Fair Pay Act's expanded charge filing periods

Title VII includes a specific requirement that aggrieved individuals must file a charge of discrimination with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if a State or local agency with authority over that unlawful employment practice exists, "within three hundred days after the alleged unlawful practice occurred." 42 U.S.C. § 2000e-5(e)(1). "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (footnote omitted).

This Court should reject Mikula's contention that the County's lack of response to her request for a raise is itself a pay-setting decision within the meaning of the Fair Pay Act. This is not a situation in which an employer has affirmatively denied an employee, for discriminatory reasons, a merit-based increase (as part of, for instance, an annual performance appraisal process or merit cycle). Rather, it is one in which the employer simply chose not to respond to its employee's repeated requests – even after a pay equity analysis was performed – that she should be making more money. Certainly, a common practice for employers is to respond to employee requests for pay increases, even if the request

is rejected. But, regardless of whether the County responded to Mikula's request or not, Mikula's argument that each instance was an actual unlawful compensation decision by claiming that "each time the County refused to respond to her requests for a raise was an independent actionable activity . . . ," Brief of Plaintiff-Appellant, at 10, is unfounded.

Such an interpretation of the Fair Pay Act effectively would eliminate the charge filing limitations periods applicable to such claims. Employees could avoid untimely claims simply by asking for a pay increase on the eve of their 180 or 300-day limitations period, thereby giving themselves an additional 180 or 300 days to file their EEOC charge. Employers would be placed on perpetual notice of having to defend against potential pay discrimination claims based on discrete employer actions taken months, or as in this case, years earlier, thus undermining the very aims and purposes of statutory limitations periods.

As the Supreme Court observed in *Mohasco Corp. v. Silver*:

> [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days – rather than months or years – we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

447 U.S. 807, 825-26 (1980); *see also International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) ("Congress has already spoken

with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).[3]

Employers must be permitted to operate without the constant pressure that flows from uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they are "designed to assure fairness to defendants" and to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation omitted). The interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve her Title VII claim must, therefore, give way to the strong policy aim of swift and efficient resolution of such claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending

[3] The 1972 amendments to Title VII enlarged the limitations period to 180 days. (codified as amended at 42 U.S.C. § 2000e-5(e)).

claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

The EEOC's record retention regulations provide that employment or personnel records must be kept for one year after they are made, unless a charge of discrimination or lawsuit has been filed. 29 C.F.R. § 1602.14. The one-year retention period means that employers will not destroy relevant documents as part of routine personnel file maintenance before an individual has had the opportunity to file an EEOC charge. Because Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Expanding the limitations period beyond 300 days in cases that do not involve compensation discrimination – and thus do not trigger the Fair Pay Act – would severely prejudice employers who reasonably have relied on the EEOC's record retention regulation lawfully to destroy relevant documents. Such employers may not have any documents to support pay decisions made more than

one year ago, which will hamper drastically their ability to defend against subsequent claims.

II. THE CONCLUSION OF AN INTERNAL EEO INVESTIGATION DOES NOT TRIGGER A NEW LIMITATIONS PERIOD FOR FILING A TITLE VII DISCRIMINATION CHARGE

In an attempt to resurrect a clearly untimely claim, Mikula argues that the time limit for filing her EEOC charge began to run on the date the County's Human Resources Department issued its determination that Plaintiff-Appellant's pay was fair, not from the time she first sought a pay adjustment. Brief of Plaintiff-Appellant, at 10. She contends that the County's August 23, 2006 letter setting forth the results of its investigation was itself an unlawful pay decision that independently triggered a new, 300 day charge filing period under the Fair Pay Act: "[T]he County's formal determination that [Mikula] did not merit a pay increase (communicated in response to her complaint to the Human Resources Department) was a pay decision – a decision to *not* increase [her] pay." *Id.*

However, Mikula does not (and cannot) cite any legal authority for the proposition that the conclusion of an internal investigation should re-start the limitations clock. In fact, the Supreme Court squarely rejected the argument that the pendency of an internal grievance process extends the limitations period under Title VII in *Ricks*, 449 U.S. at 261. "[T]he pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running

of the limitations period . . . The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made." *Id.* (citations and footnotes omitted). The Court described an employer's internal investigation into a discrimination complaint as "a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made," *id.,* which would not extend the limitations period for a charge of discrimination as Mikula urges.

A principle aim of Title VII is to encourage employers to investigate allegations of workplace misconduct and to correct conduct that, if left unresolved, could lead to unlawful discriminatory employment practices. Employers should be free to investigate claims of discrimination without the fear that the longer they take to do a thorough and accurate job, the more time they have given an employee to file an EEOC discrimination charge.

Permitting discrimination plaintiffs to sit on their rights and ignore their obligation to file timely charges of discrimination simply because their employers proactively sought to promptly investigate their claims would discourage employers from even looking into their claims. Such an outcome would thereby undermine Title VII's preference for voluntary compliance and prompt and informal resolution of complaints in lieu of formal litigation, and would frustrate

its primary aim not to provide redress, but to avoid harm. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975).

CONCLUSION

For the foregoing reasons, the panel decision and district court ruling below should be affirmed.

Respectfully submitted,

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June 11, 2009

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

June 11, 2009

Katherine Y.K. Cheung

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Katherine Y.K. Cheung

CERTIFICATE OF COMPLIANCE

I, Katherine Y.K. Cheung, hereby certify that this BRIEF *AMICI CURIAE* OF EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE ON REHEARING AND IN SUPPORT OF AFFIRMANCE complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B). This brief is written in Times New Roman 14-point typeface using MS Word 2003 and contains 5,197 words.

I further certify that the text of the electronic brief in .pdf format and the text of hard copies of this brief are identical and that a virus check was performed using the following virus software: Symantec Anti-Virus Corporate Edition 10.1.6 (updated June 11, 2009)

June 11, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June 2009, the undersigned filed one (1) electronic original using the CM/ECF system and ten (10) true and correct copies of the foregoing brief via Federal Express Priority Overnight with the Clerk of the Court. Electronic service via the CM/ECF system will send notification of such filing to the following:

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