CASE NO. 07-2932

IN THE UNITED STATES
COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,

Plaintiffs-Appellants,

v.

THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
Case No. 04 cv 3162
Hon. Jeanne E. Scott, Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF THE PLAINTIFFS-APPELLANTS, KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT
(formerly known as Certificate of Interest)

Appellate Court No: 07-2932
Short Caption: Kevin Groesch, et.al. v. City of Springfield, Illinois

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1. Each attorney is asked to complete and file a Disclosure Statement with the Clerk of the Court as soon as possible after the appeal is docketed in this Court. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3: Kevin Groesch, Greg Shaffer, Scott Allin
(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Baker, Baker & Krajewski, LLC
(3) If the party or amicus is a corporation: not applicable.

I) identify all its parent corporations, if any: None.
ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: None.

The Court prefers the statement be filed immediately following docketing; but, the disclosure statement shall be filed with the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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IN THE UNITED STATES COURT OF APPEALS
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KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,	)	
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INITIAL BRIEF OF KEVIN GROESCH, GREG SHAFFER AND SCOTT ALLIN

I. JURISDICTIONAL STATEMENT

Kevin Groesch, Greg Shaffer and Scott Allin ["the Officers"], Caucasian patrol officers on the Police Department ["Department"] of the City of Springfield, Illinois ["City"], advanced claims of race discrimination before the District Court. They invoked the jurisdiction of the District Court relying upon 28 U.S.C. Sections 1331 and 1337, and 42 U.S.C. Sections 1983 and 2000e-5.

Title 28, United States Code, Section 1291 gives this Court jurisdiction to hear final decisions of the district courts of the United States. In this appeal, the Officers request that this Court reverse an order entered on July 11, 2007 by the District Court granting summary judgment to the City. A timely notice of appeal was filed with the clerk of the District Court on August 10, 2007.

II. ISSUES PRESENTED FOR REVIEW

1. Because of the enactment into law of the "Lilly Ledbetter Fair Pay Act of 2009" [42 U.S.C. § 2000e-5] ("Ledbetter Act"), must the judgment of the District Court be set aside?

a) In view of the Ledbetter Act, were the claims of the Officers perfected in a timely manner?

b) In view of the Ledbetter Act, are the Officers claims barred by the doctrine of *res judicata* in their entirety?

2. Did the District Court err by applying the doctrine of res judicata to dismiss the Officers' backpay claims arising prior to the state court judgment?

III. STATEMENT OF THE CASE

In November of 1999 Donald Schluter ["Schluter"], an African-American police patrol officer for the City, voluntarily resigned his employment in order to take a job in the private sector. In late January of 2000 he asked to return to his job on the Department. At that time an ordinance of the City prevented him from returning to his job unless he went through the City's hiring process for new police officers. Nonetheless, in March of 2000, the Springfield City Council enacted an ordinance enabling him to return to the City's employment. Upon his return to employment, he was credited with his prior years of service. This enabled him to receive the same salary and level of fringe benefits that he was receiving at the time he left the City's employ.

Like Schluter, each of the Officers at one time left the Department and later

returned to work as a police patrol officer. Unlike Schluter, however, none of them were restored with their prior years of service. Instead, each had to start over. Unlike Schluter who retained the same salary he had when he left his employment, each of the Officers, upon returning to the Department, had to start at the bottom of the salary scale for police patrol officers.

Following Schluter's return to employment with the City, the Officers made a request to the Chief of Police that they, like Schluter, be credited with their earlier years of service. This request was ignored. As a result, they were deprived of the salary which they would have received had they been treated as Schluter.

Based upon these events, the Officers advanced before the District Court claims of race discrimination in violation of both Title VII of the "Civil Rights Act of 1964" ["Act"] (42 U.S.C. § 2000e et.al.) and the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Following discovery, the City requested that the District Court grant it summary judgment.

On December 29, 2006 the District Court with two exceptions denied the City's request.[1]

On January 18, 2007 the District Court stayed any further proceedings in this case pending the decision of the United States Supreme Court in the case,

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[1] The District Court granted summary judgment to the City with respect to: 1) any claim for damages of the Officers arising prior to November 10, 2003, the date a judgment was entered in a state court proceeding between the City and the Officers; and 2) Shaffer's claim for monetary damages accruing prior to January 19, 2005.

Ledbetter v. Goodyear Tire and Rubber Company, Inc., 421 F.3d 1169 (11th Cir. 2005). On May 29, 2007 the Supreme Court issued its decision in *Ledbetter*. Relying upon the holding in *Ledbetter*, the District Court vacated its earlier ruling and granted summary judgment to the City concluding that the claims of the Officers were both time barred and barred by *res judicata*.

IV. STATEMENT OF FACTS

A) The City's Employment Of Police Patrol Officers.

The hiring process for police officers for the City is governed by the Springfield Civil Service Commission. An individual wishing to become a police officer must initially go through a testing process. Thereafter, he is placed on an eligibility roster. An applicant is ranked on that roster based upon the score he achieved as a result of the testing process. Applicants are hired by the City as police officers from that list in the order of their ranking on the list [R22, Ex.4, pp. 11-14,18]. Once hired, a police officer's salary as well as the amount of the fringe benefits to which he is entitled varies directly with his length of service. The longer one serves the City as a police patrol officer, the greater his salary and benefits [SA73 ¶10, R22, Ex.4, p.28, Ex.5,p.22].

Section 36.58 of the Springfield City Code contains the City's leave of absence policy. That section provides that an employee shall not be granted a leave of absence for the purpose of working for a "for profit" entity. Section 36.60 of the Springfield City Code provides that when a City employee submits a resignation from employment it becomes irrevocable once accepted by the City [R22, Dep.Ex.4].

B) Kevin Groesch's Work History With The City.

In December of 1988 Kevin Groesch ["Groesch"] had served the City as a police patrol officer for approximately 7 ½ years. His rate of pay at that time was based upon his years of service with the City. In December of 1988 he accepted a position with the Illinois Department of Corrections as an investigator. In that position he performed various investigatory activities and possessed police powers [R22, Groesch Aff.3,16].

Prior to leaving the Department in 1988, Groesch requested a six month leave of absence and later a three month leave of absence. Those requests were denied, but he was granted a sixty day leave of absence [R22, Groesch Aff.10]. Shortly following the expiration of his leave of absence, Groesch inquired with Department officials about returning to the City as a patrol officer. Because his leave of absence had expired and he had resigned his employment, he was informed he could not return to the Department as a police patrol officer without going through the hiring process [R22, Groesch Aff.11].

In 1994 Groesch discovered that the City of Champaign, Illinois had adopted an ordinance allowing police officers who resigned in good standing to return to employment with it without going through the hiring process for new hires. He approached his Alderman to see if a comparable ordinance might be adopted by the City. Later, his Alderman informed him that the Champaign concept had been discussed with other members of the City Council, but there was insufficient support to adopt such an ordinance [R22, Groesch Aff.6].

Between 1989 and September of 1996 each time the Department created a new eligibility list to hire police officers, Groesch made application for a patrol officer position, was tested and placed on the eligibility list. In September of 1996 he was hired by the City as a police patrol officer. Because of his law enforcement experience, he was not required to attend the Police Academy upon returning to employment with the City as a police patrol officer [R22, Groesch Aff.7-8].

At the time he returned to the Department, Groesch, because of his employment with the Illinois Department of Corrections, had an additional eight years of experience as a law enforcement officer [R22, Groesch Aff.9].

When he returned to the Department as a police patrol officer in September of 1996, he was not restored the years of service he had earned prior to leaving the Department in 1988. Instead, he had to start over with the Department in accruing service. His salary and fringe benefits were calculated as if he had never before served on the Department [R22, Groesch Aff.12].

C) Greg Shaffer's Employment History With The City.

Greg Shaffer ["Shaffer"] joined the Department as a patrol officer in January of 1980. In July of 1987 after he was denied a leave of absence, he left the Department. He returned to the Department as a patrol officer in July of 1993. Like Groesch, upon his return, he had to go through the rehiring process. Once hired, he was given no credit for his prior 7 years of service in determining his salary and fringe benefits [R22, Dep.Ex.7a].

D) Scott Allin's Employment History With The City.

Scott Allin ["Allin"] joined the Department as a police patrol officer in January of 1980. In 1986 he left the Department to go into business for himself. Prior to leaving, he requested from the Chief of Police a leave of absence. That request was denied [R22, Allin Aff.1-4].

Approximately six months after he left the Department, Allin attempted to return to the Department as a police patrol officer. He contacted the City's Personnel Director to find out what was required in order for him to return. He was informed that he would have to submit a new application for employment, undergo the necessary testing and then be placed on the police patrol officer eligibility roster. Following that advice, Allin made application to return to the Department, took the necessary tests and was placed on the eligibility roster [R22, Allin Aff.5-6].

On January 9, 1989, Allin was selected from the eligibility roster and hired by the City as a police patrol officer. When he returned to the Department, he discovered that he had been given no credit for his six earlier years of service with the Department as a police officer. Instead, his salary and fringe benefits were calculated as if he had never before worked as a police patrol officer [R22, Allin Aff. 7]. Following the completion of his probationary period, the City refused to restore to Allin his prior years of service. Accordingly, through the Policemen's Benevolent and Protective Association, Unit 5 ["Union"], the police patrol officer union, Allin submitted a grievance requesting that his earlier years of service be restored to

him. The City opposed that grievance and it was eventually submitted to arbitration. On January 24, 1991 the arbitrator concluded that under the terms of the collective bargaining agreement governing Allin's employment, he was not entitled to credit for his earlier years of service [R22, Allin Aff.8-9].

When Allin left the Department in December of 1986, he had almost seven years of service with it. The rate of his salary and certain fringe benefits were based upon those years of service. When he returned to the Department in January of 1989, he was not restored those years of service. Instead, he had to start over and his salary and fringe benefits were calculated as if he were a new hire [R22, Allin Aff.8-9].

E) Schluter's Employment History With The City.

Schluter, an African-American, joined the Department as a police patrol officer on April 4, 1994. In late 1999 he resigned from the Department to take a job as a conductor with the Norfolk Southern Corporation [R22, Schluter Dep.7,12-13,36-37].

On October 29, 1999 Schluter submitted his resignation from employment as a police patrol officer with the City effective November 12, 1999 [R22, Dep.Ex.1].

John Harris, the Chief of Police for the City, became aware that Schluter was planning to leave the Department. Retention of minorities on the Department was important to Harris. He informed Schluter he did not want to lose him from the Department. Schluter informed Harris that he wanted to try something new. He asked Harris if he could take a leave of absence. Harris indicated he would check

about whether a leave of absence could be granted [R22, Harris Dep.31-32,Dep.Ex. 1].

Thereafter, Harris checked with the City's Department of Human Resources about the possibility of Schluter taking a leave of absence. He was informed that, under City policies, a leave of absence could not be granted because Schluter intended to go to work in the private sector. Harris informed Schluter that he was not eligible for a leave of absence. Nonetheless, Schluter resigned and left the Department in November of 1999 [R22, Harris Dep.34-37; Ex.4]. Harris was aware that when Schluter submitted his resignation it was, by virtue of a City ordinance, irrevocable [R22, Harris Dep.65; Dep.Ex.4].

Later, Schluter decided he did not want to make a career with the Norfolk Southern Corporation. After working for it for about three months, he left its employ [R22, Schluter Dep.17-19].

On January 31, 2000 Schluter sent Harris a letter requesting that he be allowed to return to work as a police officer. In his letter he pointed out that the Department had not been successful with minority recruitment and he could fill a void within the Department [R22, Dep.Ex.5].

On February 14, 2000 Harris wrote to Schluter acknowledging that he had received Schluter's letter. He informed Schluter he would look into Schluter's request. Harris checked with the Department of Human Resources concerning that request and was informed that in order for Schluter to return to the Department City Council action would probably be necessary [R22, Harris Dep.39-40; Dep.Ex.8].

At the time he received Schluter's letter, Harris felt that there was a need for African-American officers on the Department. The fact that Schluter was a qualified black officer who could immediately be placed in a police position was a factor in his desire to return Schluter to the Department without requiring him to go through the normal hiring process [R22, Ex.19,pp.25-27].

Chief Harris discussed the Schluter situation with Frank McNeil, a black City alderman. McNeil believed that the only way Schluter could be reinstated was by the adoption of an ordinance. He was aware that Schluter could not be reinstated because of an existing City ordinance. McNeil felt that the barrier for Schluter returning to the Department was a disservice to the community because of the need for qualified minority officers [R22, McNeil Dep.22-23,39-40; Harris Dep. 45]. McNeil understood that Chief Harris could not grant a retroactive leave of absence without the City Council enacting an ordinance. He was also aware that under City ordinances a leave of absence could not be granted for an employee who left the City to work in the private sector [R22, McNeil Dep.43-44].

On March 28, 2000 the Springfield City Council enacted an ordinance sponsored by McNeil granting Schluter a retroactive leave of absence. The ordinance permitted Schluter to return to his position as a police patrol officer. The face of the ordinance recited that it was in the public interest to have diversity in the ranks of the Springfield Police Department [R33, Dep.Ex.3A]. The ordinance was enacted in furtherance of Harris' request that Schluter be allowed to return to the Department and applied only to Schluter. Another officer wanting to return to

work with the Department could not return without the enactment of a similar ordinance. The Schluter ordinance did not amend any existing provision of the City Code, but merely granted a retroactive leave of absence to Schluter [R22, Harris Dep.47; McNeil Dep.30-31,48; Dep.Ex.3d].

Upon the enactment of the ordinance, Schluter was allowed to return to his position as a police patrol officer without going through the normal pre-hiring process. He was allowed to retain his prior years of service with the Department. Unlike the Officers, he did not forfeit his prior years of service upon returning to the City and, when he returned to work, he received the same rate of pay that he had when he resigned [R22, Kliment Dep.20-21,24].

F) The Litigation Over The Schluter Ordinance.

On April 11, 2000, shortly following the enactment of the Schluter ordinance, the Union initiated a lawsuit against both the City and Schluter challenging the enactment of the ordinance. It claimed that the ordinance was unconstitutional, unreasonable, discriminatory and an abuse of legislative discretion by the City Council. It requested that the ordinance be set aside [R22, Kliment Dep.31]. The Officers became aware of that lawsuit. They understood that if the lawsuit was successful the ordinance would be set aside and Schluter would lose the credit he had received for his earlier years of service [R22, Groesch Aff.16; Allin Aff.15].

On August 17, 2001 the Circuit Court of Sangamon County, Illinois, decided the Union's lawsuit. It found in favor of the Union and concluded that the ordinance, in providing special benefits only to Schluter, was an unreasonable

classification.

On April 26, 2002 the Illinois Appellate Court for the Fourth District reversed the decision of the Circuit Court. It concluded that the Union lacked the necessary standing to maintain a lawsuit challenging the ordinance [*Springfield Policemen's Benevolent & Protective Association, Unit No. 5 v. City of Springfield*, 328 Ill. App.3d 1107, 817 N.E.2d 228 (4th Dis.2002)].

G) The Officers' Attempt To Secure Treatment Similar To Schluter's.

Following the decision of the Appellate Court, the Officers sent a memorandum to Chief Harris. They brought to his attention that Schluter had been allowed to return to the Department with no loss of seniority and at the same wage rate as when he left. They informed Harris that, like Schluter, they had left the Department in good standing and later returned, but unlike Schluter, were not restored to their prior seniority and given the same wage rate as when they left. They requested that they be treated like Schluter and be credited with their prior years of service for purposes of determining their wage rate and benefits [SA11].

Chief Harris did not respond to their request. He was aware that if they had been given their prior years of service then each would have received the same benefit that was provided to Schluter. Chief Harris was not aware of anything which would have prohibited the City Council from adopting an ordinance giving the Officers what they were requesting [R22, Harris Dep.66-68,72].

H) The Proceeding In The District Court.

On July 27, 2004 the Officers filed their complaint against the City in the

District Court [R1]. The gravamen of their claims of race discrimination was the preferential treatment give to Schluter when he returned to employment with the City under an arrangement in which he was given credit for his prior years of service. In their complaint the Officers claimed that: a) the salary of police patrol officers was determined by their longevity of service and their salary increased with their seniority [¶6]; b) upon becoming re-employed as police patrol officers, they were given no credit for their prior years of service in determining their salary and fringe benefits. Instead, they were treated as if they had never before worked for the City [¶7]; c) because they were not given credit for their prior years of service, their salary was significantly less and remained significantly less than what it would have been had they been given credit for their prior years of service [¶8]; d) Schluter, in contrast, was, upon returning to employment with the City, given credit for his prior years of service with the City for purposes of determining both his salary and fringe benefits [¶11]; and e) as a result Schluter was compensated with respect to his salary and benefits under an arrangement which provided him significantly greater benefit than the method applied in determining their salary and benefits when they returned to the City's employ [¶14].

Initially, the City sought the dismissal of the complaint pursuant to Rule 12(b)(6) of the "Federal Rules of Civil Procedure." Among other things, it claimed that the officers federal claims were barred because of a prior judgment in state court in which they had unsuccessfully sued the City because of the events described earlier.

The District Court partially agreed with the City. It concluded that the application of *res judicata* could bar the Officers claims since both the state court proceeding and the proceeding before the District Court arose from the same "core of operative facts" and state courts have concurrent jurisdiction under both Sections 1983 and the Act [SA00012]. The District Court noted, however, that in a case of pay discrimination the City's violations under both Section 1983 and the Act "arise anew with every paycheck they receive." It observed that the Officers alleged that with every paycheck they receive less favorable treatment than did Schluter. The District Court, relying upon *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014 (7th Cir.2003) and *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007 (7th Cir.2003), reasoned that each paycheck the City remitted to the Officers creates a separate, discrete discriminatory act. This includes paychecks remitted to them after April 3, 2003, the date they initiated their state court proceeding. It concluded that neither *res judicata* nor collateral estoppel bars the claims of the Officers with respect to salary payments made after April 3, 2003 because the issue decided in the prior adjudication is not identical to their federal claims arising after that date [SA00012-16].

Following discovery, the City requested summary judgment. It argued that the Officers could establish neither a *prima facie* claim of race discrimination nor that the City's reasons for treating Schluter better than they were pretextual. Additionally, it asserted that the Officers' claims were barred by *res judicata*,

collateral estoppel and the applicable statutes of limitation.[2]

On December 29, 2006 the District Court granted the City's motion for summary judgment in part and denied it in part. It concluded that the City was entitled to summary judgment with respect to the Officers' claim for damages arising prior to November 10, 2003, the date judgment was entered in the state court proceeding, and with respect to Shaffer's claim for monetary damages accruing prior to January 19, 2005. In all other respects the motion was denied [SA00067].

On February 2, 2007 the Court, with the consent of the parties, stayed the proceeding pending a decision by the Supreme Court in *Ledbetter v. Goodyear Tire and Rubber Company, Inc.*, 421 F.3d 1169 (11th Cir.2005).

Following the decision of the Supreme Court in *Ledbetter v. Goodyear Tire and Rubber Company, Inc.*, 550 U.S. 618, 167 L.Ed.2d 982 (2007), the City renewed its motion for summary judgment.

On July 11, 2007 the District Court, in view of the decision in *Ledbetter*, vacated its earlier order denying summary judgment and allowed the City's motion for summary judgment with respect to all of the Officers' claims. In its opinion, the

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[2] The City also claimed that, because Shaffer filed a petition seeking bankruptcy relief in January of 2005 and the City thereafter purchased his claims in the federal proceeding from the trustee in bankruptcy, Shaffer was barred from pursuing any claim for monetary damages accruing prior to the date of his bankruptcy filing. For purposes of summary judgment, Shaffer did not dispute the City's contention on this point and agreed that he has no claim against the City for monetary damages arising prior to the date he filed his bankruptcy petition.

District Court noted that *Ledbetter* rejected the "paycheck accrual rule" under which each paycheck represented a separate discriminatory act. It observed that under *Ledbetter* each paycheck is merely a reflection of a past discriminatory act and is not sufficient to create a new violation of the Act. It reasoned that because of the holding to *Ledbetter* the Officers claims under both Section 1983 and the Act are barred by *res judicata* since they could have brought their federal claims of racial discrimination as a part of their state court action [A00009-10].

The District Court further noted that even if the Officers claims under the Act were not barred by *res judicata* they were untimely because they failed to allege any discrete, discriminatory act that occurred within 300 days of the date they filed their administrative charge of discrimination.

The Court noted that even though the Officers constitutional claims were brought within 2 years of their claimed adverse employment action, they were, nonetheless, barred by *res judicata* since they could have brought it as a part of the state court action which they initiated in April of 2003. In this respect it observed:

> "After Ledbetter, it is clear that this lawsuit arises from the same set of operative facts as the April, 2003, state court action. Thus, even though the Section 1983 claims were filed within the applicable limitations period, they are barred by *res judicata*" [A00011-12].

The District Court rejected the officers contention that their situation was analogous to the one presented in *Bazemore v. Friday*, 478 U.S. 385, 92 L.Ed.2d 315 (1986). According to the District Court, *Bazemore* involved an employer adopting a discriminatory pay structure for African-Americans and Caucasians. It reasoned

that in the present case there was no discriminatory pay structure like the one presented in *Bazemore*. Instead, it was a single act that afforded favorable treatment to a single individual [A00012-13].

It is from the foregoing facts that this case finds its way to this Court.

V. SUMMARY OF THE OFFICERS' ARGUMENT

The Ledbetter Act recognizes that a claim for discrimination in compensation can occur in three distinct situations. First, when a compensation decision or practice is adopted. Second, when an individual is subject to a discriminatory compensation decision or practice. Third, when an individual is affected by the application of a discriminatory compensation decision or practice. That law, which applied to claims of discrimination pending on or after May 28, 2007, was intended to overturn the Supreme Court's decision in *Ledbetter*. It did not extend the limitation period established by the Act, but instead expanded the situation when unlawful employment practices might occur.

For several reasons, the Ledbetter Act applies to the present case.

First, the Officers case was pending on May 28, 2007 and that act retro-actively applies to cases pending on that date. The District Court's reconsideration of the City's motion for summary judgment arose because of the *Ledbetter* decision.

Second, the Officers' claims involve allegations of discrimination in compensation. In their complaint they allege that Schluter was compensated under a method providing him significantly greater benefits than the method used in determining their salary and benefits. In this respect the Officers' claims are, in

significant respects, similar to those which arose in the *Ledbetter* case.

At least with respect to the backpay claims of the Officers arising after the judgment in the state court proceeding, their claims should not be barred by *res judicata* in view of the Ledbetter Act.

Prior to *Ledbetter*, this Court recognized that a fresh cause of action for discrimination in compensation occurred each time a plaintiff received a paycheck resulting from a discriminatory compensation practice. Because the Ledbetter Act recognizes that a discrete and separate cause of action occurs each time an individual receives such a paycheck, the paycheck accrual method has been restored by statute. Thus, claims arising out of payments received by the Officers following the state court judgment represent new causes of action which are not barred by the doctrine of *res judicata*.

Prior to *Ledbetter*, this Court recognized that the paycheck accrual theory applied not only to compensation discrimination claims arising under the Act, but also to such claims maintained under § 1983. The District Court applied the *Ledbetter* analysis to the Officers' § 1983 claims. Because Congress, in enacting the Ledbetter Act, has essentially vacated the effects of *Ledbetter*, the pre-*Ledbetter* decisions of this Court applying the paycheck accrual method to § 1983 claims should be followed.

A federal court must give preclusive effect to a state court judgment under the *res judicata* doctrine. In Illinois *res judicata* is an absolute bar in a subsequent action with respect not only to claims actually determined in the prior proceeding,

but those which could have been raised in that proceeding. The Officers' claims under the Act could not have been maintained in the earlier state court proceeding. A prerequisite to maintaining a claim under the Act is that a plaintiff: a) file a charge of employment discrimination; and b) secure a right to sue letter. Absent meeting these prerequisites, a claim under the Act must be dismissed. Because the Officers, at the time of the state court proceeding, had not secured permission to institute a judicial proceeding alleging discrimination under the Act, the state court could not have considered that claim. If the Officers could not have asserted in the state court proceeding their claims under the Act, then the judgment in the state court proceeding could not, through the application of *res judicata*, bar them from pursuing their claims in the District Court under the Act for discriminatory payments prior to the date of the state court judgment. Because the Officers in the state court proceeding did not have a full and fair opportunity to litigate their claims under the Act, the District Court was mistaken to dismiss them by applying the *res judicata* doctrine.

VI. ARGUMENT

A) Standard of Review.

The review of a district court's grant of summary judgment is *de novo*. This Court must review the record and all inferences drawn from it in the light most favorable to the Officers and be persuaded that no genuine issue as to any material fact exists and the moving party as a matter of law is entitled to judgment. Summary judgment is only appropriate when the record reveals that no reasonable

jury could find for the non-moving party [See *Karasanos v. Navistar International Transportation Corp.*, 948 F.2d 332 (7th Cir.1991); and *Konowitz v. Schnadig Corporation*, 965 F.2d 230 (7th Cir.1992)].

B) The Ledbetter Act requires that the judgment of the District Court be reversed.

In pertinent part the Ledbetter Act provides as follows with respect to claims arising under the Act:

> "- - an unlawful employment practice occurs, with respect to discrimination in compensation - - -, 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)].

The Ledbetter Act, which by its terms applies to claims of discrimination in compensation pending on or after May 28, 2007, was intended by Congress to set aside the effects of the Supreme Court's decision in *Ledbetter* [*Schuler v. Price, Waterhouse Coopers, LLP,* 595 F.3d 370, 374 (D.C. Cir.2010)].

The Ledbetter Act did not extend the limitation period established by the Act. Instead, it expands when "an unlawful employment practice occurs" [*Glover v. Sitel Corporation*, 1010 WL 1292146 (W.D. Wis.); *Ekweani v. Ameriprise Financial, Inc.*, 2010 WL 749648 (D. Ariz.); and 42 U.S.C. § 2000e-5(e)(3)(A)].

By its terms, the Ledbetter Act creates a cause of action for discrimination in compensation in three separate situations. First, when a discriminatory

compensation decision or practice is adopted. Second, when an individual becomes subject to a discriminatory compensation decision or practice. Third, when an individual is affected through the application of a discriminatory compensation decision or practice. The third situation occurs each time wages, benefits or other compensation is paid which results in whole or in part from such a decision or practice [42 U.S.C. § 2000e-5(e)(3)(A)].

1) The Ledbetter Act applies to the case at bar.

The Ledbetter Act applies to the claims of the Officers.

First, as an initial matter, the Officers' claims were pending on May 28, 2007. The Ledbetter Act retroactively applied to claims pending on that date [*Schuler* at p.374].

Second, as noted earlier, Congress intended, in adopting the Ledbetter Act, to undo what was created by the Supreme Court's decision in *Ledbetter*.

It was because of the *Ledbetter* decision that the City was granted summary judgment. In its July 11, 2007 order the District Court reconsidered its earlier opinion denying the City's request for summary judgment "in light of *Ledbetter*" [A5]. In view of *Ledbetter*, the District Court rejected the notion that a new discriminatory event occurred each time the Officers received a paycheck calculated without crediting them for their earlier service. Accordingly, it concluded that:

> "Based on Ledbetter, all of plaintiffs' claims (under Title VII and 42 U.S.C. § 1983) are therefore barred by *res judicata*" [A10].

It further noted that, even if the Officers' claims were not barred by *res*

judicata, they are, under *Ledbetter*, untimely at least with respect to those claims maintained under the Act [A11].

Third, the claims of the Officers involve "discrimination in compensation" and are thus covered by the Ledbetter Act. The Officers' claims are similar in certain key respects to the claim advanced by the employee in *Ledbetter*.

According to the *Ledbetter* plaintiff, during the time she worked for her employer salaried employees were granted or denied salary increases based upon supervisory evaluations of their performance. According to her, during her course of employment, several supervisors had given her poor evaluations which she claimed occurred because of her sex. As a result of these evaluations, her pay was not increased as much as it would have been had she been evaluated fairly. She claimed that those past pay decisions "continued to affect the amount of her pay throughout her employment" [*Ledbetter* at pp. 618-619].

Like the *Ledbetter* plaintiff, the Officers claim that they were paid less than what they would have received had they been treated in the same manner as the African-American officer.

It is clear from the text of their complaint that the Officers claim that they were the victims of race discrimination with respect to their compensation. They claim that Schluter, an African-American, upon returning to his employment with the City "was compensated with respect to salary and benefits under a method which provided him significantly greater benefit than the method applied in determining the salary and benefits of the Plaintiffs when each of them returned to

employment with the City" [R1 ¶12].

The Officers presented evidence that under the City's compensation system for its police patrol officers longevity in service had much to do in determining the level of an officer's salary. The longer an officer worked for the City, the higher his salary rate. Thus, an officer working for the City for eight years would be paid a greater salary than an officer who had worked for a year or less [SA73 ¶10, R22, Ex. 4 p.28, Ex.5,p.23]. At the time each of the Officers left the City, he had accrued a number of years of service. When he returned to work as a patrol officer for the City, his salary was not calculated based upon what it was when each left the City. Instead, each had to start over as if he had never before worked for the Department [R22, Groesch Aff. 12]. He earned less because he was not credited with his prior years of service. By contrast, Schluter, upon returning to the City, did by virtue of an ordinance enacted for his benefit receive the same salary as the one he enjoyed at the time he left. Unlike the Officers, he did not have to start over [R22, Kliment Dep.20-21,24]. The affect of this disparity lingered with the Officers since each paycheck they received, after returning to work with the City, was calculated on the basis of years of service with the City he had been credited.

The claims of the Officers relate to the application of a discriminatory compensation practice. Each time they receive a wage payment or fringe benefit calculated without giving them their prior years of service, they were affected by that practice.

2) Because of the Ledbetter Act, the Officers' claims are not barred by *res judicata.*

This Court has recognized that the doctrine of *res judicata* requires litigants to join in a single suit all legal and remedial theories that concern a single transaction. Claims based upon the same or nearly the same factual allegations must be joined. However, if the wrongful events are separated by time and function, multiple suits are permissible [*Perkins v. Board of Trustees of the University of Illinois*, 116 F.3d 235, 236-237 (7th Cir.1997)]. In other words, wrongful events separated by time or function are not considered a single transaction.

Prior to the *Ledbetter* decision, a body of federal law recognized that with respect to salary and pay discrimination each salary and benefit payment represents a separate and discrete act of discrimination triggering a new limitation period.

In *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 153 L.Ed.2d 106 (2002), a claim arising under the Act, the Supreme Court considered when a cause of action involving a series of separate, discrete acts of discrimination begins to accrue. The *Morgan* Court recognized that each discrete act must be filed in timely fashion. It further recognized that each discrete discriminatory act "starts a new clock for filing charges." It stated:

> "The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves

> timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim" [*Morgan*, 536 U.S. at 113].

Relying upon *Morgan*, this Court, before *Ledbetter*, considered when a cause of action arises in a claim of wage discrimination.

In *Hildebrandt v. Illinois Department of Natural Resources,* 347 F.3d 1014, 1029 (7th Cir.2003), it concluded that each payment made to an employee which was the product of discrimination was a discrete act triggering the statute of limitations. Relying upon both *Morgan* and *Bazemore v. Friday,* 478 U.S. 385, 92 L.Ed.2d 315 (1986), the *Hildebrandt* court reasoned that each discriminatory paycheck represented a separate discriminatory act giving rise to a separate actionable claim.

In *Reese v. Ice Cream Specialties, Inc.,* 347 F.3d 1007 (7th Cir.2003), it concluded that:

> "*Bazemore* compels the conclusion that each paycheck constituted a fresh act of discrimination, and thus his suit is not untimely solely because the initial act of discrimination occurred when it did" [pp.103-104].

The Ledbetter Act essentially adopts this concept. By its terms, each time an employee receives wages, benefits or other compensation resulting from a discriminatory decision or practice, he is affected by the application of that decision or practice. In such a situation a new unlawful employment practice occurs [42 U.S. C. § 2000e-5(e)(3)(A)].

Prior to the Supreme Court's decision in *Ledbetter*, the District Court, relying upon *Hildebrandt* and *Reese*, concluded that the state court judgment did

not bar the claims of the Officers with respect to compensation received as a result of discrimination after the entry of the state court judgment because paychecks received after that time represented separate and new causes of action [SA14-16, 67].

The Ledbetter Act essentially vacates the holding in *Ledbetter* by recognizing that a discrete and separate cause of action occurs each time an individual receives a paycheck as a result of a discriminatory compensation decision practice. The District Court's initial *res judicata* analysis with respect to compensation received after the state court judgment is consistent with both *Morgan* and the body of law developed by this Court before *Ledbetter* and should, in view of the Ledbetter Act, be followed.

3) The Officers' claims under the Equal Protection Clause should be reinstated.

Both this Court as well as other Circuits have recognized that in situations where a plaintiff maintains under § 1983 a claim parallel to one maintained under the Act judicial decisions construing the Act and its limitation rules applies equally to claims maintained under § 1983. This approach arose because there is the lack of a "principled basis" to restrict judicial precedent to only claims maintained under the Act [see *Hildebrandt* at footnote 18, p.1036; *Sharpe v. Cureton*, 319 F.3d 259, 267 (6th Cir.2003); and *R.K. Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058-1061 (9th Cir.2002)]. There is no principled reason for applying the paycheck accrual theory to claims arising under the Act, but not to those maintained under §

1983.

Prior to *Ledbetter*, this Court recognized that the paycheck accrual theory applied not only to claims arising under the Act, but also to claims maintained under § 1983 [see *Hildebrandt* at p.1036 and footnote 18].

Although the *Ledbetter* decision arose in a claim maintained under the Act and not § 1983, the District Court, nonetheless, applied its rationale in granting summary judgment to the Officers' claims under the Equal Protection Clause. After *Ledbetter*, it concluded that the Officers' § 1983 claims were barred by *res judicata* [A11-12].

Initially, the District Court, relying upon *Hildebrandt*, applied the paycheck accrual approach to the Officers' claims under the Equal Protection Clause as well as to their claims under the Act [SA15-16]. The Ledbetter Act essentially vacates the effectiveness of *Ledbetter*. The initial analysis of the District Court, in applying the paycheck accrual method to § 1983 claims was sound and consistent with the holding in *Hildebrandt*.

C) The District Court mistakenly applied the *res judicata* doctrine in dismissing the Officers' claims arising before the entry of the state court judgment.

The District Court, in its initial summary judgment order, granted summary judgment to the City with respect to the Officers' claims for damages arising prior to the entry of a state court judgment on November 10, 2003 [SA67]. Earlier, it reasoned that the judgment entered in the state court proceeding dismissing the Officers' claims against the City arose out of the same "core of operative facts" as

their federal claims. Because state courts have concurrent jurisdiction over claims arising under both the Act and 42 U.S.C. § 1983, the Officers' claims prior to the entry of the state court judgment were barred under the doctrine of *res judicata* [SA8-12].

28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which they emerged if: 1) under the law of the forum state the claim would be barred by the doctrine of *res judicata*; and 2) the party against whom the earlier decision is asserted as a bar had a full and fair opportunity to litigate the claim or issue [see *Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308 (1980); *Kramer v. Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262 (1982); and *Migra v. Warren City School District, Board of Education*, 465 U.S. 75, 79 L.Ed.2d 56 (1984)].

Because the Officers could not have litigated their claims arising under the Act against the City in the state court proceeding, the District Court was mistaken in dismissing their claim for damages prior to the state court judgment under the *res judicata* doctrine.

Res judicata in a claim preclusion sense in Illinois operates as an absolute bar to a subsequent action with respect not only to claims actually determined, but those which could properly have been raised as well in the earlier proceeding. It is a judicially created doctrine resulting from the practical necessity that there be an end to litigation [see *Hughey v. Industrial Commission*, 76 Ill.2d 577, 394 N.E.2d

1164 (1979); *Best Coin-Op, Inc. v. Paul F. Ilg Supply Company, Inc.*, 189 Ill.App.3d 638, 545 N.E.2d 481 (1st Dis.1989); *Henry v. Farmer City State Band*, 808 F.2d 1228 (7th Cir.1986); and *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119 (7th Cir. 1981)].

In Illinois, the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action [*Licari v. City of Chicago*, 298 F.3d 664, 666 (7th Cir.2002); and *Nowak v. St. Rita High School,* 197 Ill.2d 381, 757 N.E.2d 471 (2001)]. The bar created by the disposition of the first action extends not only to what was actually decided in that proceeding, but to what could have been decided as well [*River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 703 N.E.2d 883 (1998)].

Res judicata applies where: 1) a final judgment on the merits is rendered by a court of competent jurisdiction; 2) there is an identity of the causes of action; and 3) there is an identity of parties or their privies [see for example, *Downing v. Chicago Transit Authority*, 162 Ill.2d 70, 73-74, 642 N.E.2d 456 (1994); *River Park, Inc.* at p.302; *People v. Dejesus*, 127 Ill.2d 485, 537 N.E.2d 800 (1980); and *Best Coin-Op, Inc. v. Paul F. Ilg Supply Company, Inc.* (op.cit. 1989)].

When the state court proceeding was pending, the Officers could not have joined their claims under the Act since they had not, at that time, secured the necessary permission to institute such a claim [R8].

A plaintiff bringing a claim under the Act must satisfy certain administrative requirements before filing a claim in court. First, he must file a charge with the United States Equal Employment Opportunity Commission ["EEOC"] which encompasses all claims he would later raise in the court proceeding [*Cheek v. Western and S. Life Insurance*, 31 F.2d 497, 488 (7th Cir.1994)]. He must then receive a right to sue letter [42 U.S.C. § 2000e-5(f)(1)]. Second, he must file a complaint in court within 90 days following the date he receives a right to sue letter [see 42 U.S.C. §§ 20003-5(b), (e), and (f); and *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 129 (7th Cir.1989)].

If the EEOC has not issued a right to sue letter, these requirements are not met, and the action is premature and must be dismissed [*EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1288 n.3 (7th Cir.1993)].

If the Officers had alleged violations of the Act in the state court proceeding with a right to sue letter, the state court would have had to dismiss that claim [see *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1288 n.3 (7th Cir.1993); and *Sherman v. Standard Rate Data Service, Inc.*, 709 F.Supp. 1433, 1437 (N.D. Ill. 1989)]. The court has no obligation to allow the case to proceed further [*Gibson v. Kroger Company*, 506 F.2d 647, 652 (7th Cir.1974) (holding that lawsuit was properly dismissed where plaintiff filed suit before receiving right to sue letter)]. The requirements of a right to sue letter is a condition precedent to the filing of the lawsuit in the first instance [*Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991)].

At the time the Officers' state law claims were before the Circuit Court, they did not have the permission required under the Act to institute a court proceeding. Because the Officers lacked that permission, *res judicata* cannot be invoked to bar their claims under the Act [see *Green v. Illinois Department of Transportation*, 609 F.Supp. 1021, 1025 (C.D. Ill. 1985)]. The bedrock principle of the claim preclusion doctrine is that a plaintiff be limited to one full and fair opportunity to litigate his claim [Allen at pp.94-96]. For the reasons noted above the Officers were deprived of that opportunity with respect to claims arising under the Act.

VII. CONCLUSION

For the reasons more fully stated above, the Plaintiffs-Appellants, Kevin Groesch, Greg Shaffer, and Scott Allin, respectfully request that this Court reverse the decision of the District Court granting the City's summary judgment and remand this case to it for purposes of trial.

KEVIN GROESCH, GREG SHAFFER
AND SCOTT ALLIN

By:_____
One of their Attorneys

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NO. 07-2932
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,	)	
Plaintiffs-Appellants,	)	On Appeal from a judgment of the United States District Court
v.	)	for the Central District of Illinois, Springfield Division
THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,	)	Case No. 04 CV 3162 Hon. Jeanne E. Scott, Presiding
Defendant-Appellee.	)	

CERTIFICATE OF COMPLIANCE

COME NOW the Appellants, Kevin Groesch, Greg Shaffer and Scott Allin, and in compliance with Circuit Rule 32(d)(2) states that the initial brief of the Appellants complies with the type volume limitation. The initial brief contains 8170 words according to the count of the word processing program WordPerfect used by counsel for the Appellants.

Kevin Groesch, Greg Shaffer and Scott Allin

BY:_____
JAMES P. BAKER

September 15, 2010

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NO. 07-2932
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,	)	
Plaintiffs-Appellants,	)	On Appeal from a judgment of the United States District Court for the Central District of Illinois, Springfield Division Case No. 04 CV 3162 Hon. Jeanne E. Scott, Presiding
v.	)	
THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,	)	
Defendant-Appellee.	)	

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically pursuant to Circuit Rule 31(e), all of the appendix items that are available in non-scanned PDF format.

Kevin Groesch, Greg Shaffer and Scott Allin

BY:_____
JAMES P. BAKER

September 15, 2010

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v.	)	
THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,	)	
Defendant-Appellee.	)	

CERTIFICATE OF SERVICE

The Plaintiffs-Appellants, Kevin Groesch, Greg Shaffer and Scott Allin, hereby certify that on September 15, 2010, three copies of the Brief and Required Short Appendix of Appellants as well as a digital version containing the brief, were delivered by United States Mail from the office of the undersigned to counsel for the DefendantAppellee, at the following address:

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Kevin Groesch, Greg Shaffer and Scott Allin

By:_____
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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
07-2932

KEVIN GROESCH, GREG SHAFFER , SCOTT ALLIN,	)	
Plaintiffs-Appellants,	)	From the United States District Court for the Central District of Illinois, Case No. 04-3162
v.	)	
CITY OF SPRINGFIELD, ILLINOIS,	)	Before the Honorable Jeanne E. Scott
Defendants-Appellees.	)	

REQUIRED SHORT APPENDIX TO THE INITIAL BRIEF OF THE PLAINTIFF-APPELLANTS, KEVIN GROESCH, GREG SHAFFER AND SCOTT ALLIN

Pursuant to Rule 30(d) of the Local Rules of the United States Court of Appeals for the Seventh Circuit, counsel certifies all materials required by parts (a) and (b) of this rule are included.

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September 15, 2010

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN, Plaintiffs, v. THE CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation, Defendant.	)	Case No. 04-3162

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Plaintiffs, Kevin Groesch, Greg Shaffer and Scott Allin, appeal to the United States Court of Appeals for the Seventh Circuit from orders entered on February 1, 2005 with respect to the Defendant's motion to dismiss, December 29, 2006 granting in part the Defendant's motion for summary judgment, and July 11, 2007 granting the Defendant's motion for summary judgment which resulted in a final judgment being entered on July 11, 2007 in favor of the Defendant and against the Plaintiffs.

KEVIN GROESCH, GREG SHAFFER and
SCOTT ALLIN, Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,
Plaintiffs,

vs.

Case Number: **04-3162**

CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,
Defendant.

☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to an Opinion entered by the Honorable Jeanne E. Scott on July 11, 2007, the Court vacates the portion of the December 29, 2006, Opinion (d/e 26) that denied summary judgment and directs that judgment be entered in favor of the Defendant. All pending motions are denied as moot. This case is CLOSED.----------

ENTER this 11th day of July, 2007

s/John M. Waters
JOHN M. WATERS, CLERK

s/M. Stewart
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN,	)	
Plaintiffs,	)	
v.	)	No. 04-3162
CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,	)	
Defendant.	)	

OPINION

JEANNE E. SCOTT, U.S. District Judge:

This matter comes before the Court on Defendant City of Springfield, Illinois' (City) Motion for Summary Judgment (d/e 19). On December 29, 2006, the City's summary judgment motion was granted in part and denied in part. See Opinion entered December 29, 2006 (d/e 26). By agreement of the parties, the matter was stayed pending the United States Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162 (2007). The Supreme Court issued its decision on May 29, 2007. On May 31, 2007, this Court directed the parties to

submit supplemental memoranda addressing the impact of Ledbetter on the present case. Text Order entered May 31, 2007. The parties have done so. Accordingly, the Court must now reconsider its December 29, 2006, Opinion on the summary judgment motion in light of Ledbetter. As set forth below, the City's Motion for Summary Judgment is now ALLOWED as to all claims. The Court vacates the portion of the December 29, 2006, Opinion that denied summary judgment.

BACKGROUND

Plaintiffs Kevin Groesch, Greg Shaffer, and Scott Allin filed the instant lawsuit claiming that the City discriminated against them on account of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Counts I, III, and V). Plaintiffs also brought this suit under 28 U.S.C. § 1983 asserting that the City discriminated against them on the basis of race by treating them less favorably than a similarly situated African-American colleague in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Counts II, IV, and VI).

The facts of this case are more fully set forth in the December 29, 2006, Opinion. As such, the Court will only briefly restate the facts as they

apply here. The Plaintiffs in this case all had similar employment patterns. Plaintiff Groesch began his employment with the City's Police Department in June of 1981, but left in good standing in December 1988. On September 10, 1996, however, he returned to the City's employ as a patrol officer. Plaintiff Shaffer began his employment with the City's Police Department in January 1980 as a patrol officer, but left in good standing in July 1987. He, however, returned to the City's employ on July 6, 1993. Plaintiff Allin began his employment with the City's Police Department on January 7, 1980, but left in good standing on November 22, 1986. He later returned to the City's employ on January 9, 1989. When the Plaintiffs returned to the City's employ, they were not given credit for their prior years of service when their salary and benefits were calculated.

The Plaintiffs contended that the City treated their African-American colleague, Donald A. Schluter, more favorably than they were treated. Schluter started his employment with the City's Police Department on April 4, 1994, but left on November 12, 1999, while in good standing. On January 31, 2000, Schluter sent a letter to then Chief of Police John Harris, expressing his interest in returning to the City's employ. Chief Harris actively assisted Schluter in that effort. On March 28, 2000, the City

passed Ordinance 198.3.00 (the Schluter Ordinance) which enabled Schluter to return as a City patrol officer with his previous level of seniority. The Schluter Ordinance was solely applicable to Schluter and no one else.

On December 11, 2002, the Plaintiffs sent a letter to Chief Harris, requesting that they, too, be afforded the same treatment by having their prior years of service restored. Neither Chief Harris nor the City Council took any action with respect to the Plaintiffs' request. This Court stated in the December 29, 2006, Opinion that the adverse employment action in this case occurred in December of 2002, when the Plaintiffs renewed their requests for restoration of service and the City Council failed to act upon their request.[1]

On April 3, 2003, the Plaintiffs filed a complaint against the City in the Illinois Circuit Court for the Seventh Judicial District, alleging a violation of the equal protection clause of Article I, Section 2 of the Illinois Constitution of 1970. Unlike the Complaint filed with this Court, Plaintiffs did not allege in the state court complaint that they had suffered reverse

[1]The Court notes that the City erroneously asserts in its Supplemental Memorandum that the adverse employment action occurred on March 29, 2000, when the City passed the Schluter Ordinance. Defendant's Supplemental Memorandum (d/e 30), at 3.

racial discrimination. On November 10, 2003, the Circuit Court issued an order dismissing Plaintiffs' complaint as being time-barred. On July 22, 2004, the Illinois Appellate Court for the Fourth District affirmed the Circuit Court's decision. On July 27, 2004, Plaintiffs filed the instant lawsuit.

ANALYSIS

The City previously moved to dismiss the Plaintiffs' Complaint, asserting, among other things, that the action was barred by the doctrines of res judicata and collateral estoppel due to Plaintiffs' unsuccessful state court action. In addressing whether the Plaintiffs' claims were so barred, this Court looked to Illinois law and determined that the requirements of res judicata had been satisfied. See Opinion entered February 1, 2005 (d/e 11), at 8-16. This Court, however, noted that Plaintiffs' claim that the City's violations of both Title VII and § 1983 arose anew with every paycheck they received made a principal difference in the Court's res judicata analysis. The Plaintiffs argued that every paycheck they received from the City constituted a separate, discriminatory action. This Court noted that the Seventh Circuit case law at that time supported the Plaintiffs' contention that every paycheck the City paid each Plaintiff was

a separate, discrete, potentially discriminatory act. Id. at 14. Accordingly, this Court stated in the December 29, 2006, Opinion that the City was entitled to summary judgment on Plaintiffs' claims for damages arising prior to April 3, 2003, and on Plaintiffs' claims arising before the date of the state trial court judgment on November 10, 2003, on the basis of res judicata.[2] This Court, however, noted that the Plaintiffs' remaining claims (namely, claims arising from allegedly discriminatory wages paid after November 10, 2003) were actionable, provided that they satisfied the relevant statute of limitations.

The Supreme Court in Ledbetter rejected the "paycheck accrual rule" relied upon by the Plaintiffs in this case, under which they argued that every paycheck they received constituted less favorable treatment than that afforded to Schluter. In rejecting the paycheck accrual rule, the Ledbetter Court stated that the continuing effects of past discriminatory actions cannot resuscitate claims that are time-barred.[3] In other words, paychecks

[2]The Court also wrote in the December 29, 2006, Opinion that the City was entitled to summary judgment as to Plaintiff Shaffer's claims for monetary damages accruing prior to January 19, 2005, based on the fact that, after Shaffer had filed for bankruptcy on January 19, 2005, the City purchased Shaffer's then existing claim from the Trustee in bankruptcy.

[3]In Ledbetter, the plaintiff complained that her employer discriminated against her in the payment of wages by paying her less than her male counterparts throughout

that are a mere reflection of past discriminatory actions are not sufficient to constitute a new violation under Title VII. The Supreme Court reasoned: "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." Ledbetter, 127 S.Ct. at 2169. Based on Ledbetter, all of Plaintiffs' claims (under Title VII and 42 U.S.C. § 1983) are therefore barred by res judicata. The Plaintiffs could have brought their federal claims of reverse racial discrimination claims as part of their April 3, 2003, state court action, but they failed to do so.[4]

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her employment. She alleged that the pay disparity was a result of her supervisors' poor performance evaluations of her in the past and that such past performance evaluations had a detrimental affect on the amount of her pay throughout her employment. Rather than filing a charge of discrimination with the EEOC when the discriminatory actions arose, the plaintiff sat on her claims and did not file a charge with the EEOC until her retirement. The Supreme Court stated that the plaintiff could not prevail on her Title VII pay discrimination claims because she had failed to assert that the "decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998." Ledbetter, 127 S.Ct. at 2167. In other words, the plaintiff had failed to promptly file her charge of discrimination with the EEOC at the time the discriminatory pay decisions giving rise to her claims arose.

[4]The Court notes that state courts have concurrent jurisdiction over both 42 U.S.C. § 1983 and Title VII claims. See Felder v. Casey, 487 U.S. 131, 139 (1988); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 826 (1990).

The Court also notes that even if Plaintiffs' Title VII claims were not barred by the doctrine of res judicata, the claims are untimely. According to Ledbetter, employees alleging pay discrimination under Title VII must file a charge with the relevant agency within either 180 or 300 days (depending on the state) of the alleged discriminatory action in order for their claims to be viable under Title VII.[5] As mentioned supra, this Court found in the December 29, 2006, Opinion that the adverse employment action in this case occurred in December of 2002. Plaintiffs filed their charge with the EEOC on March 2, 2004. Under Ledbetter, Plaintiffs can only recover for discriminatory actions that occurred between May 7, 2003, and March 2, 2004. The December 2002 adverse employment action, however, occurred outside the limitations period. The Plaintiffs have thus failed to allege any discrete, discriminatory actions that occurred within the 300-day charging period. Plaintiffs' Title VII claims are therefore untimely.

The Plaintiffs assert that their equal protection claims under § 1983 are timely because they were brought within the applicable limitations period, which is two years. The Plaintiffs are correct that, unlike their Title

[5]The Court notes that in Illinois, the charging period is 300 days rather than 180 days. Hall v. Bodine Elec. Co., 276 F.3d 345, 352-53 (7th Cir. 2002); 42 U.S.C. § 2000e-5(e)(1).

VII claims, their equal protection claims are timely. As noted supra, the adverse employment action in this case occurred in December of 2002, and the Plaintiffs filed this suit on July 27, 2004. Therefore, Plaintiffs' § 1983 action was brought within the two-year statute of limitations period. However, as explained supra, the Plaintiffs' equal protections claims under § 1983 are barred by res judicata. They could have been brought as part of the April 2003 state court action; res judicata applies to matters that could have been brought in an earlier suit if they arise from the same set of operative facts. After Ledbetter, it is clear that this lawsuit arises from the same set of operative facts as the April 2003 state court action. Thus, even though the § 1983 claims were filed within the applicable limitations period, they are barred by res judicata.

The Plaintiffs next assert that the situation presented here is analogous to the one involved in Bazemore v. Friday, which the Ledbetter Court noted "stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially

nondiscriminatory and neutrally applied." Ledbetter, 127 S.Ct. at 2174 (internal quotations omitted); Bazemore, 478 U.S. 385 (1986) (*per curiam*). Plaintiffs' situation is not analogous to the one in Bazemore. As the Ledbetter Court explained, Bazemore involved a situation where the employer adopted discriminatory pay structures for service employees, one being "a white branch" and the other being a "Negro branch," with the latter receiving less pay. Ledbetter, 127 S.Ct. at 2172. Here, there is no discriminatory pay structure like the one present in Bazemore. The enactment of the Schluter Ordinance was a single act that afforded favorable treatment to one single individual. The situation presented in this case more closely mirrors the one presented in Ledbetter. As such, Bazemore does not help the Plaintiffs.

The Plaintiffs lastly contend that even if Ledbetter is dispositive of the issues presented here, it should not be applied retroactively to bar the instant action. The Plaintiffs rely on Anton v. Lehpamer, which they contend stands for the proposition that a change in controlling law concerning the applicable statute of limitations in a § 1983 claim should be applied prospectively. See Anton, 787 F.2d 1141 (7th Cir. 1986). Plaintiffs' reliance on Anton is misplaced. In Anton, the plaintiff filed suit under §

1983, alleging that various police officers violated his constitutional rights by using excessive force when they arrested him. The plaintiff had filed the lawsuit two years and one month following the event giving rise to his § 1983 claim (namely, the arrest). At the time the plaintiff brought his § 1983 action, it was timely because "federal courts in Illinois applied a five-year statute of limitations in all section 1983 actions." Id. at 1142. While the plaintiff's case was pending in the federal district court, however, the Supreme Court issued its decision in Wilson v. Garcia, finding that the "statute of limitations for all section 1983 actions is the state's personal injury statute of limitations[,]" which for Illinois is two years. Id.; see Wilson, 471 U.S. 261 (1985).

Relying on Wilson, the district judge granted the defendants' summary judgment motion, concluding that the plaintiff's § 1983 claims were untimely. On direct appeal, the Seventh Circuit, however, reversed concluding that Wilson should not be applied retroactively when a federal court in Illinois borrows the state's statute of limitations in a § 1983 action. Anton, 787 F.2d at 1141. In making this determination, the Seventh Circuit applied the three-prong test articulated by the Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Under Chevron Oil, to

determine whether a decision in a civil case should be applied prospectively only, courts must conduct a three-part inquiry, one of which is whether "the decision to be applied nonretroactively . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Id. at 106.

Here, unlike Wilson, the Supreme Court in Ledbetter neither established a new principle of law nor decided an issue of first impression whose resolution was not clearly foreshadowed. The Ledbetter Court simply clarified when a cause of action accrues for purposes of disparate treatment pay discrimination claims under Title VII, by examining the EEOC charging deadline Congress set forth in Title VII and by relying on relevant Supreme Court case law. Anton therefore is inapplicable here.

More importantly, the Supreme Court in Harper v. Virginia Dept. of Taxation held that: "When [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [its] announcement of the rule." Harper, 509 U.S. 86, 97

(1993). The Harper Court further explained:

> When this Court does not reserve the question whether its holding should be applied to the parties before it, however, an opinion announcing a rule of federal law is properly understood to have followed the normal rule of retroactive application and must be read to hold . . . that its rule should apply retroactively to the litigants then before the Court. Furthermore, the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so must prevai[l] over any claim based on a *Chevron Oil* analysis.

Id. at 97-98 (internal quotations and citations omitted). The Seventh Circuit in Anton similarly noted that the general rule is that judicial decisions have retroactive effect. Anton, 787 F.2d at 1143. Here, the Court sees no reason to depart from the general rule set forth in Harper. Based on Harper, therefore, Ledbetter must be given full retroactive effect in this case.

THEREFORE, as set forth above, Defendant's Motion for Summary Judgment (d/e 19) is now ALLOWED as to all claims. The Court vacates the portion of the December 29, 2006, Opinion (d/e 26) that denied summary judgment and directs that judgment be entered in favor of Defendant. The Court cancels the status conference set for July 16, 2007, at 9:00 a.m. All pending motions are denied as moot. The case is closed.

IT IS THEREFORE SO ORDERED.

ENTER: July 11, 2007.

FOR THE COURT:

s/ Jeanne E. Scott
JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE