MASSACHUSETTS PAY EQUITY AND ITS LIMITS

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INTRODUCTION

Though overt gender discrimination has become less acceptable in the United States in preceding decades, full-time female employees working today are paid, on average, only about 80% of what male full-time employees make.[1] It is no secret that there is still a workplace wage gap between the genders.[2] Much of this difference is attributable to non-discriminatory factors, but workplace discrimination, whether or not it is the intentional product of employer policies, is not extinct.[3] In Massachusetts, employees who believe that they are underpaid on the basis of their gender have recourse to four statutes when seeking relief: the Federal Equal Pay Act ("FEPA"),[4] Title VII of

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[1] Charles B. Craver, *If Women Don't Ask: Implications for Bargaining Encounters, the Equal Pay Act, and Title VII*, 102 MICH. L. REV. 1104, 1104-05 (2004).

[2] *Id.*

[3] *Id.*

[4] 29 U.S.C. § 206(d) (2000).

the Civil Rights Act of 1964 ("Title VII"),[5] the Massachusetts Equal Pay Act ("MEPA"),[6] and Chapter 151B of the General Laws of Massachusetts ("151B" or "Chapter 151B").[7] Each statute has its own elements that a plaintiff must prove in order to press a claim, and each has its own particular remedies for those plaintiffs who prevail.[8]

In the simplest possible terms, a gender pay equity suit would consist of the following factual scenario: A man and a woman, each with the same background and skills, are hired on the same day by the same employer to perform the same job. When the two employees receive their first paychecks, they compare them and realize that the male employee is paid more than the female employee. Assuming discriminatory intent, the analysis needed to resolve this case under any of the statutes would be easy to perform, and any damages would be fairly easy to calculate.[9] A much more difficult case would be presented, however, if the female employee did not realize for years, or even decades, that she was being comparatively underpaid.[10] Could she then recover damages based on the entire period of her employment? What if the female employee knew the whole time that she was being underpaid, but waited years to sue – would that make a difference? Should it? Before attempting to answer these questions, it would be useful to look first at the continuing violation and discovery doctrines. The continuing violation doctrine "allows courts to consider conduct that would ordinarily be time-barred as long as the untimely incidents represent an ongoing unlawful unemployment practice."[11] The discovery rule, by contrast, "postpones the triggering of a limitations period from the date of injury to the date a plaintiff should reasonably have discovered the injury."[12]

In *National Railroad Passenger Corp. v. Morgan*,[13] the Supreme Court seemed to hold that the continuing violation doctrine could not be used by the plaintiff in a pay equity suit brought under Title VII in order to claim back pay beyond the statutory period.[14] In *Silvestris v. Tantasqua Regional School*

[5] Pub. L. No. 88-352, 78 Stat. 241, 253 (1964), *amended by* Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991) (current version at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

[6] MASS. GEN. LAWS ch. 149, § 105A (2004). Massachusetts was "the first State to adopt legislation requiring equal pay for comparable work," enacting an equal pay statute on July 10, 1945. Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 166 (Mass. 1995).

[7] MASS. GEN. LAWS ch. 151B, §§ 1-10 (2004).

[8] *See infra* Part I.

[9] *See infra* Part I.

[10] *See infra* Part I.

[11] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 107 (2002) (internal quotation marks omitted).

[12] Adams v. CBS Broad., Inc., 61 Fed. App'x 285, 287 (7th Cir. 2003).

[13] 536 U.S. 101 (2002).

[14] *Id.* at 105.

District,[15] the Massachusetts Supreme Judicial Court followed the lead of the federal courts, holding that the continuing violation doctrine did not apply to MEPA suits, and implying that it would not apply in 151B pay equity suits either.[16] The court did not, however, settle the question of whether or not the discovery doctrine would apply in such a suit in a way that would allow the collection of damages beyond the statutory period.[17]

Recently, in *Ledbetter v. Goodyear Tire & Rubber Co.*,[18] the Supreme Court affirmed *Morgan* and definitively foreclosed the possibility of a plaintiff using the continuing violation doctrine to extend the period for which damages could be collected in a Title VII pay equity suit.[19] Justice Alito's majority opinion carried the day over a dissent authored by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer.[20] This 5-4 split speaks to the divisiveness of pay equity issues.

This Note will argue that courts should allow the use of the discovery doctrine by plaintiffs in Massachusetts pay equity suits, particularly in Chapter 151B suits, to extend the period for which damages can be recovered beyond the time frames contained within the relevant statutes. Allowing the use of the discovery doctrine in this way could potentially result in an employer having to pay decades of back pay to an underpaid employee as damages. It is no argument against an anti-discrimination law, however, that its enforcement could result in highly negative consequences for employers who have discriminated against their employees. The fear of incurring such consequences could certainly act as an effective deterrent against employer discrimination. The simplest way to avoid a potentially devastating judgment is to refrain from discriminating against one's employees in the first place.[21]

Before conducting an in-depth examination of the case law, and of the continuing violation and discovery doctrines in the state and federal contexts, it may be helpful to provide an outline of the relevant state and federal statutes, including their substantive provisions, defenses available to an employer, and potential damages. The interplay between the statutes, and the ways in which various doctrines apply to them, is often quite complex, so it is important to start by setting out the statutes themselves.

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[15] 847 N.E.2d 328 (Mass. 2006).

[16] *Id.* at 338-39.

[17] *Id.* at 344 n.29.

[18] 127 S. Ct. 2162 (2007).

[19] *Id.* at 2165 ("Because a pay-setting decision is a 'discrete act,' it follows that the period for filing an EEOC charge begins when the act occurs."). The *Ledbetter* Court was not faced with an Equal Pay Act claim, because the plaintiff did not pursue that claim on appeal. *Id.*

[20] *Id.* at 2178 (Ginsburg, J., dissenting).

[21] The matter is not so simple under MEPA, which is a strict liability statute that does not have the same affirmative defenses available to an employer as those available under FEPA. See Parts I.B and IV for a discussion of MEPA.

Part I of this Note discusses the statutes. Part II deals with the continuing violation doctrine, and explains why the doctrine would probably not be helpful to a plaintiff in a pay equity suit in either the state or federal contexts. Part III addresses the discovery doctrine and argues that the use of the doctrine to extend the period for which damages can be collected should be allowed in state law, particularly in a suit brought under Chapter 151B. This Note will continue in Part IV with a section discussing the implications of potential liability for employer compensation policies, and then will offer a short conclusion.

I. FEDERAL AND STATE STATUTES

This section lays the groundwork for a more in-depth discussion of the terms of the various statutes, and of the judicial precedents surrounding them. In order to fully discuss the continuing violation and discovery doctrines, it is necessary to examine the language of the statutes.

A. *Federal Equal Pay Act*

The Equal Pay Act was passed in 1963 as an amendment to the Fair Labor Standards Act.[22] Prior to its passage, female employees working full-time were earning on average only about 60% of the amount earned by male full-time employees.[23] This is not meant to suggest, of course, that the entire disparity between the amounts of money earned by men and women stemmed solely from discriminatory factors.[24] Indeed, whatever the cause, that wage gap has now diminished to the point where women make 80% of what men make, as previously noted.[25]

1. Provisions

The Federal Equal Pay Act prohibits sex discrimination in the setting of employee salaries.[26] It states that:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .[27]

[22] Craver, *supra* note 1, at 1114.

[23] *Id.*

[24] *See id.* at 1105.

[25] *Id.* at 1104-05.

[26] 29 U.S.C. § 206(d) (2000).

[27] *Id.* § 206(d)(1).

Therefore, FEPA requires that men and women who perform the same work for the same employer be paid the same wages,[28] with four exceptions.[29] A man and a woman can be paid different amounts for performing the same work "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[30] These affirmative defenses are the only justifications that an employer can offer for unequal pay given to employees of the opposite sex for their equal work.[31] FEPA is a strict liability statute; it is no defense against liability that the employer did not intend to discriminate.[32]

2. Potential Damages

The potential damages for a FEPA violation are back pay in the amount of the disparity, an equal amount of liquidated damages, and reasonable attorney's fees.[33] A claimant cannot recover back pay for the entire term of her employment. Rather, such recovery is limited to the two years, or three years if the violation was willful, before the complaint was filed.[34]

In sum, under FEPA, the employer's liability on the claim of each individual female employee would be at worst twice the difference between her pay and that of a male comparator over the previous three years, plus reasonable attorney's fees. The best result for the employer in a FEPA suit where liability is established would be double the difference between the pay of the male and the female for the previous two years, plus reasonable attorney's fees.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 298 (1st Cir. 1998); Mullenix v. Forsyth Dental Infirmary for Children, 965 F. Supp. 120, 143 (D. Mass. 1996).

[33] 29 U.S.C. §§ 216, 260.

[34] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), COMPLIANCE MANUAL § 10-IV (2000), *available at* http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION [hereinafter EEOC]; *see also* Campbell v. Mitre Corp., No. 98-11768-RWZ, 2001 WL 1408385, at *4 (D. Mass. June 1, 2001). There is substantial support for the position that the continuing violation doctrine does not apply to FEPA cases. *See* Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 118-19 (2d Cir. 1997). At least one court has extended this reasoning to conclude that the discovery doctrine does not apply either. Hildebrandt v. Ill. Dep't of Natural Res., 132 F. Supp. 2d 674, 683 (C.D. Ill. 2001), *aff'd in part, rev'd in part, vacated in part*, 347 F.3d 1014 (7th Cir. 2003).

B. *Massachusetts Equal Pay Act*

The Massachusetts Equal Pay Act ("MEPA") is the state equivalent of FEPA. Unlike FEPA, however, "MEPA does not specify a particular set of factors to be used in determining whether work is comparable rather than equal."[35] Although it was passed in 1945,[36] "the Supreme Judicial Court had never had an opportunity to interpret its provisions" until the mid-1990s.[37] "Massachusetts was the first State to adopt legislation requiring equal pay for comparable work,"[38] but the Supreme Judicial Court was for decades surprisingly silent about what constituted comparable work.[39] Indeed, the amount of authoritative case law on MEPA is noticeably lacking, which is particularly striking when the breadth of its provisions is considered.[40]

1. Provisions

MEPA provides that:

> No employer shall discriminate in any way in the payment of wages as between the sexes, or pay any person in his employ salary or wage rates less than the rates paid to employees of the opposite sex for work of like or comparable character or work on like or comparable operations.[41]

The MEPA "comparable" work standard is distinct from a FEPA analysis of work equality, and does not "follow slavishly the Federal approach"[42] of evaluating positions solely "in terms of skill, effort, responsibility, and working conditions."[43] Instead, the court in a MEPA suit must perform a two-part analysis, first "determin[ing] whether the substantive content of the jobs is comparable,"[44] and then conducting the skill, effort, responsibility, and working conditions inquiry.

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[35] Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 166 (Mass. 1995).

[36] *Id.*; Margaret M. Pinkham & Emanuel Alves, *Employment Law Decisions: A First Look at the Massachusetts Equal Pay Act, and a Second Look at Employee Handbooks as Contracts*, BOSTON B.J., Jan.–Feb. 1997, at 10, 11.

[37] Pinkham & Alves, *supra* note 36, at 10.

[38] *Jancey*, 658 N.E.2d at 166.

[39] *Id.*

[40] *See infra* Part IV for a discussion of MEPA's terms.

[41] MASS. GEN. LAWS ch. 149, § 105A (2004).

[42] *Jancey*, 658 N.E.2d at 167.

[43] *Id.*; *see also* 29 U.S.C. § 206(d)(1) (2000).

[44] *Jancey*, 658 N.E.2d at 167-68. The added stage of analysis is necessary because the text of MEPA requires only that jobs be "comparable," rather than "equal," in order to demand equal pay. MASS. GEN. LAWS ch. 149, § 105A. In *Jancey*, female public school cafeteria workers filed suit filed suit alleging that they were underpaid in comparison to male custodial public school workers. *Jancey*, 658 N.E.2d at 164-65. Considering only whether "the work of cafeteria workers and custodians required substantially comparable skills, efforts, responsibilities, and working conditions," the trial judge found that the two jobs were of "comparable character." *Id.* at 165. On appeal, the Supreme Judicial Court

Like FEPA, MEPA is a strict liability statute, and the plaintiff does not need to prove discriminatory intent.[45] Unlike FEPA, however, MEPA provides only seniority as an affirmative defense; nothing else can justify a pay disparity under Massachusetts law.[46] A MEPA claim, then, could be substantially harder for an employer to defend against than one brought under FEPA.

2. Potential Damages

Potential damages in a MEPA suit are the amount of the pay disparity for the previous year, an equal amount in liquidated damages, and reasonable attorney's fees.[47] MEPA thus exposes the employer to liability for double the disparity in the previous year's salaries and attorney's fees.[48] A court, however, could theoretically allow plaintiffs to collect for damages outside the one year limitation, because "pursuant to the so-called 'discovery rule,' the statute of limitations for a particular cause of action does not begin to run until the plaintiff knows, or should have known, that she has been harmed by the defendant's conduct."[49] In *Silvestris*, the Supreme Judicial Court considered the discovery rule in the context of a MEPA suit, but declined to definitively resolve the question of what damages are available in such a case.[50] The defendant in a MEPA pay equity suit would argue that it would be inequitable to allow the discovery rule to extend the time period for which damages can be collected under MEPA, as allowing the use of the rule in that way "would eviscerate the one-year statute of limitations set forth in [MEPA]."[51]

C. *Title VII*

Unfortunately for the employer, events giving rise to FEPA and MEPA claims can also implicate the broader anti-discrimination statutes, such as Title VII. Title VII, a federal statute, was originally adopted as part of the Civil Rights Act of 1964,[52] one year after the passage of the Federal Equal Pay

found this result perplexing, in that "[i]t is difficult to see how jobs could have 'comparable character' within the meaning of the statute, if their substantive job content was not also comparable." *Id.* at 167.

[45] *Id.* at 170.

[46] MASS. GEN. LAWS ch. 149, § 105A.

[47] *Id.*; Campbell v. Mitre Corp., No. 98-11768-RWZ, 2001 WL 1408385, at *3 (D. Mass. June 1, 2001).

[48] The continuing violation doctrine does not apply to MEPA suits. Silvestris v. Tantasqua Reg'l Sch. Dist., 847 N.E.2d 328, 338-39 (Mass. 2006).

[49] *Id.* at 336.

[50] *Id.* at 344 n.29. The Supreme Judicial Court did make it clear, however, that the continuing violation doctrine is not applicable to a MEPA pay equity suit. *Id.* at 338-39.

[51] *Id.* at 339.

[52] Pub. L. No. 88-352, 78 Stat. 241, 253 (1964), *amended by* Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991) (current version at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

Act.[53] One of its purposes was the creation of the Equal Employment Opportunity Commission.[54]

1. Provisions

Title VII, among other things, makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin."[55] Unlike FEPA and MEPA, Title VII is not a strict liability statute. In order to succeed on a typical Title VII claim, a plaintiff must prove that the employer acted with discriminatory intent.[56] Discriminatory intent is proved using the *McDonnell Douglas Corp. v. Green*[57] burden-shifting framework.[58]

Because discriminatory intent is an element of a Title VII claim,[59] assuming a salary disparity, the employer's best defense against a claim brought under this statute is that any discriminatory results of its salary practices were completely unintentional. It can be very difficult for a plaintiff to overcome such a defense, given the nature of the burden of proof in discrimination cases. In the absence of direct evidence of discrimination, a Title VII plaintiff must "raise an inference of discrimination through the familiar *McDonnell Douglas*

[53] Craver, *supra* note 1, at 1114.

[54] Pub. L. No. 88-352, 78 Stat. 241, 253 (1964), *amended by* Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991) (current version at 42 U.S.C. § 2000e-2000e-17 (2000)).

[55] 42 U.S.C. § 2000e-2(a).

[56] *Cf.* Mullenix v. Forsyth Dental Infirmary for Children, 965 F. Supp. 120, 143 (D. Mass. 1996). Exceptions to this general rule are outside the scope of this Note.

[57] 411 U.S. 792 (1973).

[58] In simple terms, the burden-shifting framework consists of the prima facie case, the employer's opportunity to state a non-discriminatory reason explaining its action, and the plaintiff's opportunity to refute that reason. *Id.* at 802-04.

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Exactly what makes up the plaintiff's prima facie case varies depending upon the situation and the exact nature of the claim being pressed. *See id.* at 802 n.13. After the plaintiff has established a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection," *id.* at 802, or other adverse action. The plaintiff is then "afforded a fair opportunity to show that [the employer]'s stated reason for [the adverse action] was in fact pretext." *Id.* at 804. The framework applies in many types of cases, but it is phrased in terms of racial discrimination because *McDonnell Douglas* itself was a suit based upon a claim of racial discrimination. *Id.* at 796.

[59] *Cf. Mullenix*, 965 F. Supp. at 143.

burden-shifting framework."[60] Under this framework, the plaintiff first must meet the "low standard of showing prima facie discrimination."[61] Next, "the employer must articulate a legitimate nondiscriminatory reason in response."[62] It is then up to the plaintiff to prove that the articulated reason is a mere pretext, and that the employer's true motive was discriminatory.[63]

2. Potential Damages

The damages for a successful Title VII claim can include compensatory, nominal, and punitive damages.[64] The deadline to file a complaint with the EEOC in Massachusetts and other states with agencies like the Massachusetts Commission Against Discrimination ("MCAD") is "within three hundred days after the alleged unlawful employment practice occurred."[65] Under federal law, "[a] cause of action accrues . . . when the plaintiff knows or has reason to know of the injury which is the basis of the action."[66] Therefore, a plaintiff could potentially recover for pay disparities which occurred more than 300 days before filing a charge with the EEOC if the plaintiff first discovered an ongoing pay disparity within the filing deadline. However, back pay awards to compensate for pay disparities in a Title VII suit are limited by statute to the two years prior to the filing of a charge with the EEOC.[67]

Under the continuing violation doctrine, if an employee:

> [C]an show that a series of similar discriminatory acts were perpetrated by . . . her employer, and that the acts emanate[d] from the same discriminatory animus, [and that] each act constitute[d] a separate wrong

[60] Fontánez-Núñez v. Jansen Ortho LLC, 447 F.3d 50, 55 (1st Cir. 2006). See *supra* note 58 for a detailed explanation of the framework.

[61] Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 44 (1st Cir. 2002); *see also* Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 114-17 (Mass. 1995) (applying the *McDonnell Douglas* framework to Chapter 151B).

[62] *Zapata-Matos*, 277 F.3d at 45 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)).

[63] *Id.*

[64] *See* Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 237 (1st Cir. 2006).

[65] 42 U.S.C. § 2000e-5(e)(1) (2000).

[66] Molina-Acosta v. Martinez, 392 F. Supp. 2d 210, 218 (D.P.R. 2005).

[67] 42 U.S.C. § 2000e-5(g)(1). The disparity between the length of the filing period and the amount of the back pay that could be collected was at least an "implicit[ ] recog[nition] and endorse[ment] of the [judicially created] continuing violation doctrine." Michael Lee Wright, *Civil Rights – Time Limitations for Civil Rights Claims – Continuing Violation Doctrine*, 71 TENN. L. REV. 383, 385 (2004) (citing Sumner v. Goodyear Tire & Rubber Co., 398 N.W.2d 368, 377 (Mich. 1986), *overruled on other grounds by* Garg v. Macomb County Cmty. Mental Health Servs., 696 N.W.2d 646, 659 (Mich. 2005)). It is not entirely clear how *Ledbetter*'s definitive rejection of the continuing violation doctrine in Title VII suits would affect this two-year window. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007).

> actionable under Title VII, then the entire series of acts can be considered collectively as a "continuing violation" of Title VII.[68]

Significantly, in continuing violation cases "the plaintiff may reach back and recover for portions of the persistent process of illegal discrimination that antedated the limitations period."[69] The "continuing violation" doctrine, however, does not apply to Title VII pay equity claims.[70]

D. *Chapter 151B*

The Massachusetts anti-discrimination statute, 151B, is in part the state equivalent to Title VII. 151B provides Massachusetts with state law governing discrimination based on "race, color, religious creed, national origin, sex, [and] sexual orientation."[71] It was originally enacted in a different form in 1946,[72] one year after the passage of the Massachusetts Equal Pay Act.[73]

1. Provisions

151B makes it an "unlawful practice . . . [f]or an employer . . . because of the . . . sex . . . of any individual . . . to discriminate against such individual in compensation . . . unless based upon a bona fide occupational qualification."[74] As in Title VII, to establish liability, the 151B plaintiff must prove that the employer acted out of discriminatory animus.[75] Therefore, 151B is not a strict

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[68] Forsythe v. Microtouch Sys., Inc., 945 F. Supp. 350, 358 (D. Mass. 1996) (internal citations and quotations omitted).

[69] *Id.* (citing McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982)) (internal quotations omitted).

[70] *Ledbetter*, 127 S. Ct. at 2169 ("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."); *see* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); *see also* Hildebrandt v. Ill. Dept. of Natural Res., 347 F.3d 1014, 1026-28 (7th Cir. 2003). Prior to *Ledbetter*, the EEOC disagreed with this position, stating that "[b]ecause systemic compensation discrimination often is a 'continuing violation,' relief for a systemic violation generally is available for all discriminatory actions that occurred in furtherance of the policy or practice (e.g., each paycheck), including those that occurred outside the charge filing period, subject to generally applicable limitations on remedies." EEOC, *supra* note 34, at § 10-VI.

[71] MASS. GEN. LAWS ch. 151B, § 4 (2004).

[72] Nathan A. Olin, *In Defense of Charities: A Case for Maintaining the Massachusetts Damages Cap for Certain Employment Discrimination Claims*, 28 W. NEW ENG. L. REV. 11, 16 (2005).

[73] *See* Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 166 (Mass. 1995).

[74] MASS. GEN. LAWS ch. 151B, § 4.

[75] Forsythe v. Microtouch Sys., Inc., 945 F. Supp. 350, 356-57 (D. Mass. 1996).

liability statute. Discrimination in a 151B claim is proved using a modified version of the *McDonnell Douglas* burden-shifting framework.[76]

151B suits follow the same burden-shifting framework as Title VII suits, with the exception that if the plaintiff proves pretext, she does not necessarily also have to prove that the employer's true motive was discriminatory.[77] Instead, "[a] showing that the employer's reasons are untrue gives rise . . . to an inference that the plaintiff was a victim of unlawful discrimination."[78] This inference is "sufficient basis for the jury to return a verdict for the plaintiff."[79]

2. Potential Damages

A prevailing plaintiff in a Chapter 151B claim may be awarded "actual and punitive damages," in addition to "reasonable attorney's fees and costs."[80] There may not be a cap on how far back an employee can go in claiming damages in a 151B pay equity suit; rather, as suggested by the First Circuit in *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*,[81] 151B "shall be construed liberally for the accomplishment of its purposes."[82] The actual damages can potentially include back pay for the entire period of employment, as 151B is intended to provide "make-whole relief."[83]

There is a strong argument to be made, however, that the federal *McMillan* court incorrectly predicted the course of development in Massachusetts state law, and that the damages available in pay equity claims brought under 151B should be limited. In *Cuddyer v. Stop & Shop Supermarket Co.*,[84] the Supreme Judicial Court ("SJC") recognized the continuing violation doctrine as applying to hostile work environment claims brought under 151B.[85] In *Ocean Spray Cranberries, Inc. v. Massachusetts Commission Against Discrimination*,[86] however, the SJC declined to extend the continuing violation doctrine to cases of an employer's failure to accommodate an employee's disability.[87] In *Silvestris*, the Supreme Judicial Court held explicitly that the continuing violation doctrine did not apply to MEPA claims.[88] Further, the court held that "an unequal compensation claim . . . is based on discrete

[76] *Id.*

[77] *Id.*

[78] Abramian v. President & Fellows of Harvard Coll., 731 N.E.2d 1075, 1085 (2000).

[79] *Id.*

[80] MASS. GEN. LAWS ch. 151B, § 9 (2004).

[81] 140 F.3d 288, 306 (1st Cir. 1998).

[82] MASS. GEN. LAWS ch. 151B, § 9.

[83] *McMillan*, 140 F.3d at 306.

[84] 750 N.E.2d 928 (Mass. 2001).

[85] *Id.* at 930.

[86] 808 N.E.2d 257 (Mass. 2004).

[87] *Id.*

[88] Silvestris v. Tantasqua Reg'l Sch. Dist., 847 N.E.2d 328, 338-39 (Mass. 2006).

acts."[89] The same logic should apply to unequal compensation claims brought under 151B, and an employer could argue that the state courts should follow the U.S. Supreme Court's lead in finding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[90]

If such an argument proved successful, the employer's potential liability could be dramatically reduced because complaints with the MCAD must be filed "within 300 days after the alleged act of discrimination."[91] In the absence of the continuing violation doctrine, only complaints about pay in the previous 300 days would be timely. This might only be the case, however, if the plaintiffs had previously been, or should have been, aware of the disparity. As with federal claims, the discovery rule applies in state courts.[92] If there is no reason that female employees should have known what male employees were being paid, plaintiffs could potentially use the discovery rule to circumvent the 300 day statute of limitations, rendering irrelevant the employer's argument that pay inequities do not constitute continuing violations. Unlike in Title VII, there is no explicit statutory cap in 151B limiting how far into the past plaintiffs can claim back pay. The employer could argue, though, that it would be inequitable to allow the use of the discovery rule, even after the rejection of the continuing violation doctrine, to lengthen the period for which back pay can be collected. Such an extension of liability could be crippling, particularly for small employers.

II. THE CONTINUING VIOLATION DOCTRINE

A. *Federal Continuing Violation Case Law*

The continuing violation doctrine is applied in some work discrimination cases to allow employees to collect damages for continuing wrongs which would otherwise largely fall outside of the limitations period. When determining how or whether to apply the continuing violation doctrine in a specific case, a court must "strike[] a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past."[93] This is no easy task; it would be galling to allow employer discrimination to go unpunished, but it would be similarly problematic to hold an employer

[89] *Id.* at 338.

[90] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). State interpretation of a state statute is of course not bound by federal interpretation of a parallel federal statute, but the federal law can still provide "guidance," as the state court can "look . . . to the analytical framework utilized by the federal courts in assessing federal law." Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1019 n.5 (N.D. Iowa 2002).

[91] 804 MASS. CODE REGS. 1.10(2) (1999).

[92] *Silvestris*, 847 N.E.2d at 336.

[93] *Inglis*, 235 F. Supp. 2d at 1021 (quoting Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 168 (8th Cir. 1995)).

responsible for misdeeds which could have occurred decades ago. The pattern that has emerged in both state and federal courts in workplace discrimination cases is to apply the continuing violation doctrine only in certain types of claims.

Continuing violation doctrine case law has been justifiably "characterized as 'inconsistent and confusing.'"[94] In federal courts, the continuing violation doctrine is alive and well in hostile work environment cases, but the Supreme Court has curtailed its use in claims of discrete discriminatory acts under the federal anti-discrimination statutes.[95] Given the breadth of case law regarding the continuing violation doctrine, this section will focus solely on the doctrine as it relates to pay equity claims.

Before the Supreme Court decided *Morgan* in 2002, the case law implied that "pay claims are continuing violations of Title VII because each gender-based discriminatory salary payment constitutes a fresh Title VII violation."[96] In *Bazemore v. Friday*,[97] the Supreme Court held that every "paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[98] Under this reasoning, an employee who was discriminated against could potentially sue to recover back pay for the entire period of discrimination, no matter how long ago the discrimination began. *Morgan*, nonetheless, showed that the Supreme Court was not willing to go that far, and "clarified and dramatically shifted the landscape surrounding the filing of a timely charge of discrimination under Title VII."[99]

Morgan involved a black male who charged his employer with discrimination and retaliation.[100] The plaintiff detailed a litany of perceived discriminatory acts, some of which occurred within the limitations period for filing a charge, but many of which did not.[101] The Court was left to resolve a circuit split and settle the question of exactly what conditions would permit

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[94] Wright, *supra* note 67, at 383 (citing Dumas v. Town of Mount Vernon, 612 F.2d 974, 977 (5th Cir. 1980) (quoting Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 585 (D. Minn. 1978))).

[95] *Id.* at 393 (citing *Morgan*, 536 U.S. at 113, 115); *see also* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2165 (2007).

[96] *Inglis*, 235 F. Supp. 2d at 1020; *see also* Hildebrandt v. Ill. Dept. of Natural Res., 347 F.3d 1014, 1025-26 (7th Cir. 2003).

[97] 478 U.S. 385 (1986).

[98] *Id.* at 395-96 (1986) (Brennan, J., concurring).

[99] Susan Strebel Sperber & Craig R. Welling, *The Continuing Violations Doctrine Post-*Morgan, COLO. LAW., Feb. 2003, at 57, 57.

[100] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002).

[101] *Id.* at 105-06 (stating that Morgan's complaint alleged discrimination in hiring him as an electrician helper rather than an electrician, in terminating him for refusal to follow orders, in refusing to allow him to participate in an apprenticeship program, in "written counselings" for absenteeism, and in the use of racial epithets against him by managers).

application of the continuing violation doctrine to extend the period for which damages could be collected.[102]

The *Morgan* Court "distinguished between discrete acts of discrimination and hostile work environment claims,"[103] and "foreclosed the use of the continuing violation doctrine to incorporate untimely claims for discrete discriminatory actions even though they may be related to a timely claim."[104] Given that *Bazemore* had previously held that each discriminatory paycheck was a discrete discriminatory act, "reading *Bazemore* in light of *Morgan*, a plaintiff cannot make timely any prior time-barred discrete acts of discriminatory pay by filing within the time frame of one discriminatory paycheck."[105] The employee should still, however, have been able to recover back pay, at least for the time within the statutory limitation period.

Nevertheless, in *Ledbetter*, the Court even further restricted the remedies available to plaintiffs in Title VII pay equity suits.[106] After taking early retirement, the female plaintiff sued her employer of twenty years, alleging that she received "poor evaluations because of her sex, [and] that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment."[107] The case went to the Supreme Court to resolve the question of if "'a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.'"[108] The Supreme Court answered this question in the negative,[109] holding that "current effects alone cannot breathe life into prior, uncharged discrimination."[110] Thus, even though the plaintiff had consistently received less money than any of her male counterparts within the charging period,[111] she was left with no remedy.[112]

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[102] *Id.* at 106-08.

[103] Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1022 (N.D. Iowa 2002).

[104] Hildebrandt v. Ill. Dept. of Natural Res., 347 F.3d 1014, 1027 (7th Cir. 2003) (quoting Peters v. City of Stamford, No. 3:99-CV-764 CFD, 2003 WL 1343265, at *5 (D. Conn. 2003)); *see also Morgan*, 536 U.S. at 113, *quoted in Hildebrandt*, 347 F.3d at 1026.

[105] *Hildebrandt*, 347 F.3d at 1027; *see also Inglis*, 235 F. Supp. 2d at 1023.

[106] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2178 (2007).

[107] *Id.* at 2165-66.

[108] *Id.* at 2166 (quoting plaintiff's petition for certiorari). The plaintiff's Equal Pay Act claim was not pursued on appeal. *Id.* at 2165.

[109] *Id.* at 2169 ("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.").

[110] *Id.*

[111] *Id.* at 2166.

Disallowing the use of the continuing violation doctrine in a gender pay equity suit can have interesting, albeit unfortunate, results. Even before *Ledbetter*, some courts had already held that, if the decision to set pay at a certain level was made well in the past, it is possible for a continuing pay disparity to be "a lingering effect of time-barred discrimination, and this lingering effect is not actionable."[113] For example, a man and a woman could have been hired by the same employer ten years before, with identical qualifications to do identical work, with the woman receiving a discriminatorily lower wage based solely on the fact that she is a woman. The woman found out she was being paid less than the man five years ago, but only decided to sue now.[114] In this example, the employee "was aware of the pay discrepancy long before the limitations period expired,"[115] and could potentially be without any remedy under the broad anti-discrimination statutes,[116] unable even to force the employer to increase her pay to match the male employee's pay going forward.

There is something that seems fundamentally unfair about this scenario, and, in Massachusetts, at least, the female employee would still have the protection of MEPA to fall back on.[117] MEPA is a strict liability statute, and thus does not require discriminatory intent on the part of the employer; if the female employee is being paid less than the male employee for the same work, her pay

[112] The Supreme Court was not faced with the question of whether or not the discovery doctrine could apply in a Title VII pay equity suit. *Id.* at 2177 n.10.

[113] Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1027 (N.D. Iowa 2002); *see also* Dasgupta v. Univ. of Wis. Bd. of Regents, 121 F.3d 1138, 1140 (7th Cir. 1997). This viewpoint is difficult to reconcile with *Bazemore*'s finding that every discriminatory paycheck is an actionable wrong. *See* Bazemore v. Friday, 478 U.S. 385, 395-96 (1986). If each paycheck represents a separate, independent action, it is hard to see how a paycheck could be nothing more than "a lingering effect of time-barred discrimination," *Inglis*, 235 F. Supp. 2d at 1027, rather than simply another instance of discrimination.

[114] There are numerous reasons a person might not want to sue as soon as she or he has discovered a workplace practice that may be discriminatory, not least the desire to maintain a positive working environment and to avoid illegal retaliation. Additionally, the employee simply may not realize that discrimination was the cause of the decision. The argument that finding out about a pay disparity should toll the limitations period only when the motivation behind the disparity is known to be discriminatory would likely be unsuccessful; "a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong." Wastak v. Lehigh Valley Health Network, 333 F.3d 120, 126 (3d Cir. 2003) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994)).

[115] *Inglis*, 235 F. Supp. 2d at 1029 (citing Krough v. Cessford Constr. Co., 231 F. Supp. 2d 914, 921 (S.D. Iowa 2002)).

[116] This assumes that the Supreme Judicial Court declines to recognize the continuing violation doctrine in a 151B gender pay equity suit.

[117] FEPA would be somewhat less helpful because of the greater number of affirmative defenses available to the employer to excuse its conduct and shield it from liability. 29 U.S.C. § 206(d)(1) (2000).

must be brought up to the same level.[118] Thus, even in the presence of broad anti-discrimination statutes like Title VII and Chapter 151B, a relatively narrow provision like MEPA still has an important role to play and a gap to fill.

B. *State Continuing Violation Case Law*

In *Cuddyer v. Stop & Shop Supermarket Co.*,[119] the plaintiff sought damages for workplace discrimination, in the form of sexual harassment, in violation of Chapter 151B.[120] A Superior Court judge granted summary judgment in favor of her employer because most of the acts took place outside of the statutory limitations period for filing a complaint with MCAD.[121] The Supreme Judicial Court, however, vacated the grant of summary judgment and found that the continuing violation doctrine could be used to reach beyond the limitation period.[122]

The plaintiff in *Cuddyer* was subjected to over twenty years of sexual harassment, perpetrated by a number of different fellow employees, before she finally filed suit.[123] In trial court, the defendant employer argued that only two of the incidents were timely and that "these were not sufficiently egregious or pervasive to constitute actionable sexual harassment under [Chapter] 151B."[124] The judge agreed, finding that only the two most recent incidents "could be considered as evidence of a hostile work environment,"[125] and that the incidents "did not rise to the level of an actionable claim of sexual harassment."[126]

On appeal, the Supreme Judicial Court took a markedly different view, recognizing that "[i]ncidents of sexual harassment serious enough to create a work environment permeated by abuse typically accumulate over time, and many incidents in isolation may not be serious enough for complaint. However, when linked together, the seemingly disparate incidents may show a prolonged and compelling pattern of mistreatment."[127] In a hostile work environment sexual harassment claim, the plaintiff need only show "at least one incident of sexual conduct"[128] falling within the limitations period, "which, standing alone might not necessarily support her claim, but which substantially

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[118] MASS. GEN. LAWS ch. 149, § 105A (2004); *see also* Jancey v. Sch. Comm. of Everett, 658 N.E.2d 162, 170 (Mass. 1995).

[119] 750 N.E.2d 928 (Mass. 2001).

[120] *Id.* at 930.

[121] *Id.*

[122] *Id.*

[123] For a lengthy list of incidents, see *id.* at 931-34.

[124] *Id.* at 934.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 937 (citations omitted).

[128] *Id.* at 938.

relates to earlier incidents of abuse, and substantially contributes to the continuation of a hostile work environment, such that the incident anchors all related incidents, thereby making the entirety of the claim for discriminatory conduct timely."[129] The Supreme Judicial Court thus held that the continuing violation doctrine applied to hostile work environment claims brought under Chapter 151B, one of the statutes under which a pay equity complaint can be brought.

In 2004, the Supreme Judicial Court made clear that the holding of *Cuddyer* should not be construed overly broadly. In *Ocean Spray*, the employee complainant and the plaintiff MCAD attempted to use the continuing violation doctrine to extend the period for which the employee could recover damages in a failure to accommodate a disability claim brought under Chapter 151B.[130] The employer never accommodated the complainant's disability, and the complainant cast this refusal as one continuing violation extending forward from the day he first made a request for accommodations.[131] The complainant succeeded at the trial level, but on appeal, the Supreme Judicial Court vacated the lower court's order awarding complainant damages for the entire period during which his employer failed to accommodate his disability.[132] The employer's failure to accommodate beyond the statutory limitation could be used as "background evidence"[133] for the suit, but it could not be a basis for damages.

The continuing violation doctrine did not apply to the failure to accommodate claim. If a failure to accommodate were considered to occur every day after the making of a request, then:

> [N]othing in principle [would] distinguish[] any discrete act of discrimination from a continuing violation . . . . [A] refusal to hire or a decision to terminate could also be recharacterized as unlawfully denying the employee a job "each day" thereafter. This would eviscerate the purpose of a statutory limitations period, and permit what should be a limited exception to such a stricture to swallow it whole. When an employer refuses an employee's request for a reasonable accommodation, the refusal is a discrete discriminatory act triggering the statutory limitations period.[134]

Therefore, simply bringing a Chapter 151B suit does not entitle an employee to use the continuing violation doctrine to extend the period for which damages could be collected, even in cases where the offending conduct could be construed as continuing or ongoing.

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[129] *Id.*

[130] Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 257, 260 (Mass. 2004).

[131] *Id.* at 267-68.

[132] *Id.* at 272.

[133] *Id.* at 269-70.

[134] *Id.* at 268.

To gain the benefits of the continuing violation doctrine, a plaintiff must satisfy a three-part test.[135] First, the plaintiff must prove that "at least one discriminatory act occurred within the six month limitations period."[136] Next, the plaintiff must prove that "the alleged timely discriminatory acts have a substantial relationship to the alleged untimely discriminatory acts."[137] Finally, the plaintiff must prove that violations which occurred outside of the limitations period "did not trigger [the plaintiff's] 'awareness and duty' to assert his [or her] rights, i.e., that [the plaintiff] could not have formed a reasonable belief at the time the employment actions occurred that they were discriminatory."[138] This three-part test effectively incorporates aspects of the discovery doctrine into the continuing violation doctrine.

The Supreme Judicial Court has never determined exactly how this three-factor test would be applied to a pay equity suit brought under Chapter 151B, but it has implied that pay equity suits cannot gain the benefits of the doctrine. In *Silvestris*, plaintiff teachers brought suit against their school district, alleging unequal pay under both Chapter 151B and MEPA.[139] Starting salaries in the school district were "governed by the provisions of a collective bargaining agreement," under which the superintendent would assign a pay level on the basis of prior experience.[140] The plaintiffs eventually "came to believe that, when they were hired, they were started at lower salary levels than male colleagues with purportedly comparable backgrounds."[141] The plaintiffs won at trial on their MEPA claim,[142] but lost at trial on their Chapter 151B claim, so that issue never reached the Supreme Judicial Court.[143] However, the logic behind the Supreme Judicial Court's refusal to apply the continuing violation doctrine to a claim brought under MEPA could also apply to a pay equity suit brought under Chapter 151B.

In *Silvestris*, the Supreme Judicial Court characterized *Ocean Spray* as holding that a "discrete discriminatory act triggers [the] statute of limitations."[144] The rationale behind a continuing violation doctrine is "that some claims of discrimination involve a series of related events that have to be viewed in their totality in order to assess adequately their discriminatory nature

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[135] *See id.* at 266-67.

[136] *Id.* at 266 (citing Desrosiers v. Great Atl. & Pac. Tea Co., 885 F. Supp. 308, 311 (D. Mass. 1995)). The relevant period has since been lengthened from 180 to 300 days. MASS. GEN. LAWS ch. 151B, § 5 (2004); Silvestris v. Tantasqua Reg'l Sch. Dist., 847 N.E.2d 328, 339 n.20 (Mass. 2006); 804 MASS. CODE REGS. 1.10 (2004).

[137] *Ocean Spray*, 808 N.E.2d at 266 (citing *Desrosiers*, 885 F. Supp. at 311-12).

[138] *Id.* at 266-67 (quoting *Desrosiers*, 885 F. Supp. at 312).

[139] *Silvestris*, 847 N.E.2d at 330-31.

[140] *Id.* at 332.

[141] *Id.* at 334.

[142] *Id.* at 331.

[143] *Id.*

[144] *Id.* at 339.

and impact."[145] A claim for unequal compensation brought under MEPA "is based on discrete acts. An alleged inequality can be identified on examination of individual paychecks, rather than on the evaluation of ongoing wrongful conduct."[146] The Supreme Judicial Court was further concerned that "expanding the continuing violation doctrine beyond discrimination claims brought under [Chapter] 151B to unequal wage claims brought under [MEPA], would eviscerate the one-year statute of limitations set forth in [MEPA]."[147]

The Supreme Judicial Court thus seemed to agree with the United States Supreme Court's reasoning that unequal paychecks constitute discrete discriminatory acts that do not allow the use of the continuing violation doctrine.[148] The Supreme Judicial Court could conceivably still allow the use of the continuing violation doctrine in a pay equity suit brought under Chapter 151B. Because there must be a finding of discrimination for a plaintiff to prevail in a Chapter 151B suit,[149] courts might be more sympathetic to a prevailing plaintiff in such a suit on appeal. However, this seems unlikely to affect the result, given that under any theory employed by the plaintiff each paycheck would still be a discrete discriminatory act. Additionally, the same concern over the evisceration of the statute of limitations would remain. Furthermore, the Supreme Judicial Court already showed in *Ocean Spray* that the continuing violation doctrine did not apply indiscriminately to suits brought under Chapter 151B.[150] Added together, all of these factors weigh very heavily against the allowance of the use of the continuing violation doctrine in a gender pay equity suit brought under Chapter 151B. The discovery doctrine, however, might still offer at least some hope to a plaintiff in such a suit.

III. THE DISCOVERY DOCTRINE

The discovery rule "postpones the triggering of a limitations period from the date of injury to the date a plaintiff should reasonably have discovered the injury."[151] Thus, if someone has no reasonable way to know that he or she has been harmed by another's action, the statute of limitations does not begin to run on any cause of action stemming from the harm at the time that it occurs. Only when the person had actual or constructive notice that he or she had

[145] *Id.* at 338 (quoting Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination, 808 N.E.2d 257, 266 (Mass. 2004)).

[146] *Id.*

[147] *Id.* at 338-39.

[148] *See supra* notes 103-105 and accompanying text.

[149] *See supra* notes 75-76 and accompanying text.

[150] *Ocean Spray*, 808 N.E.2d at 268.

[151] Adams v. CBS Broad., 61 Fed. App'x 285, 287 (7th Cir. 2003) (citing Clark v. City of Braidwood, 318 F.3d 764, 767 (7th Cir. 2003)).

suffered the harm would the statute of limitations begin to run.[152] The discovery doctrine could be a valuable tool for plaintiffs in a suit brought to remedy long-term gender pay discrimination. If a court allowed the use of the discovery doctrine, a plaintiff could potentially still recover damages for pay inequity beyond the statutory limitation period, even if the court did not permit the plaintiff use of the continuing violation doctrine.

Though the Supreme Court limited the times when the continuing violation doctrine could be used in *Morgan* (and later in *Ledbetter*), the Court also reaffirmed that the "time period for filing a charge is subject to equitable doctrines such as tolling or estoppel."[153] In employment discrimination suits, "[c]ourts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly."[154] This Note argues that pay equity suits under Chapter 151B present a situation where "it would be proper to apply such doctrines."[155]

In denying the use of the continuing violation doctrine in a MEPA suit, the Supreme Judicial Court of Massachusetts left open the possibility that the discovery rule could still be used.[156] The Supreme Judicial Court stated that "[b]ecause pay claims do give rise to a cause of action each time they occur and are easily identifiable, it is not unreasonable to expect a plaintiff to file a charge of discrimination within the limitations period, *so long as [the plaintiff] is aware of the discrimination*."[157] The Supreme Judicial Court suggested that the discovery doctrine could apply in a MEPA (and perhaps a Chapter 151B) suit, but, frustratingly, never had to actually reach a decision on the issue.[158] Because the trial court decision for the plaintiffs was overturned on the merits, the SJC never resolved questions regarding the discovery doctrine and how it might have applied in the case, noting tersely at the conclusion of its opinion that "we need not address the issue of damages."[159]

The use of the discovery doctrine to extend the period for which damages can be collected in a Massachusetts pay equity suit, particularly one brought under Chapter 151B and charging intentional discrimination, should be

[152] In *Silvestris*, the defendants effectively conceded that the discovery doctrine applied with respect to the question of whether a suit could be brought at all. *See Silvestris*, 847 N.E.2d at 335-36. For this Note, the relevant question is whether the discovery doctrine does, or should, apply with respect to damages.

[153] Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

[154] *Id.*

[155] *Id.*

[156] *See Silvestris*, 847 N.E.2d at 338-39.

[157] *Id.* at 339 (quoting Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1028 (N.D. Iowa 2002)) (emphasis added).

[158] *Id.*

[159] *Id.* at 344 n.29.

allowed.[160] The Supreme Judicial Court of Massachusetts and the United States Supreme Court may be entirely correct that every discriminatory paycheck received by an employee is a discrete act, and that there is thus no place for the continuing violation doctrine in a pay equity suit. If an employee knows how much her coworkers make and fails to protest year after year, only to eventually complain after some final straw, she would not be able to collect for the entire period. The inapplicability of the continuing violation doctrine in this situation should be enough to allay any misgivings about the possibility of strategically delaying bringing suit in an attempt to maximize potential damages. In this hypothetical, the employee knew that she was being treated unfairly and had the opportunity to protect her rights by bringing suit earlier. She could have prevented some of the discriminatorily low pay by bringing her suit upon learning of the unfairness.[161]

If the employee did not know that she was being underpaid, however, there was nothing she could have done differently (other than snooping through her coworkers' paychecks) to prevent herself from being harmed. Here, the discovery doctrine makes sense because the plaintiff is blameless; she could not have complained earlier because she did not know that she had any reason to complain. In *Inglis*, a federal district court succinctly summarized the problem:

> The rationale underlying application of this principle to pay discrimination cases is obvious: it would be unfair to require a plaintiff to file a charge of discrimination when she has no knowledge of and could not have reasonably ascertained what similarly situated male coworkers

[160] One could argue that the one year limit on damages contained within MEPA should be an absolute bar to the extension of damages, particularly considering that MEPA is a strict liability statute and, at least on its face, is very easy to violate. MEPA provides that "[a]ny action based upon or arising under section[] one hundred and five A . . . shall be instituted within one year after the date of the alleged violation," MASS. GEN. LAWS ch. 149, § 105A (2004), and courts could well interpret that provision as a strict limit. There is no such explicit statutory limit on damages under Chapter 151B, and the First Circuit has indicated that there should be no limit on the damages available thereunder. McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 306 (1st Cir. 1998); *see supra* Part I.D.2.

[161] There are many reasons, of course, why someone might not want to sue his or her employer at the first sign of any trouble. *See, e.g.*, *supra* note 114. This is one of the justifications for having a continuing violation doctrine in the first place; there is no punishment for a plaintiff who does not run to the courthouse at the first sign of trouble. It might not be realistic to expect an employee to bring immediate suit upon first learning of his or her discriminatorily low pay. However, denying the use of the continuing violation doctrine in this situation means that a plaintiff must bring a claim before the statutory limitation period on the first known discriminatory paycheck has elapsed in order to recover back pay over the entire period. From a policy standpoint, this could be problematic in that it would encourage people to file a complaint before knowing whether they are actually being discriminated against, resulting in a waste of both time and resources.

> were earning. Not until a discriminatory pay claimant knows she is earning less than similarly situated males does she know she is being discriminated against and is on notice of the need to assert her rights. If equitable tolling did not apply, maintaining strict salary confidentiality policies in most circumstances would isolate employers from Title VII liability because the filing period would pass before a victim of discrimination learned that she was being discriminated against.[162]

Between the extremes of allowing the continuing violation doctrine in pay equity suits on one end, and not allowing any extension of the statutory limitations period on the other, the discovery doctrine represents a sensible compromise. There is seemingly little potential for strategic abuse by a plaintiff, but a blameless plaintiff's rights are still fully protected.

This Note proposes that the discovery doctrine be applied at least to Massachusetts Chapter 151B pay equity suits, if not to suits brought under the other statutes as well. An employer, of course, could mount many arguments against a court allowing a plaintiff to extend the period for which he or she can collect damages. It is in employers' interests, however, to avoid employment discrimination litigation in the first place. An employer can minimize its potential liability for pay equity violations by carefully considering its compensation policies. This would be a particularly wise step for an employer to take given the potential for further developments in Massachusetts law that might serve to extend the period for which damages can be collected in a pay equity suit brought under one or both of the state statutes. It would be better for an employer to avoid liability with carefully considered compensation policies than to seek to limit the extent of the damages once liability has already been established.

IV. EMPLOYER COMPENSATION POLICIES

In order to establish liability against an employer under Chapter 151B and Title VII, a plaintiff must provide sufficient evidence for a finding of discrimination.[163] For these anti-discrimination statutes, liability turns on intent.[164] Thus, it should not be particularly difficult for a well-meaning employer to avoid liability under these statutes. As long as an employer does not intentionally discriminate against its employees, it will be very difficult for any plaintiff to establish an employer's liability under these statutes. The federal and state equal pay acts, however, greatly complicate matters.

The fact that FEPA and MEPA are strict liability statutes means that employers need to be very careful when considering the consequences of their compensation policies such as, for instance, the negotiation of starting salaries

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[162] Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1025 (N.D. Iowa 2002).

[163] *See supra* notes 55-58 and 74-76 and accompanying text.

[164] *See supra* notes 55-58 and 74-76 and accompanying text.

and annual raises,[165] or the matching of outside offers received by an employee. Any of these practices could potentially create a situation in which men were consistently paid more than women, simply because men may be more assertive on their own behalf in seeking to maximize their pay.[166] Employers, then, should examine the affirmative defenses available under FEPA and MEPA.

FEPA's four affirmative defenses available to an employer charged with inequitable pay are that any payments were "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[167] The first three factors are fairly straightforward. The EEOC provides that "[a] seniority, merit, or incentive system must be bona fide to operate as an EPA defense."[168] A system is bona fide if it "was not adopted with discriminatory intent; is an established system containing predetermined criteria for measuring seniority, merit, or productivity; has been communicated to employees; has been consistently and even-handedly applied to employees of both sexes; and is in fact the basis for the compensation differential."[169] It should not be overly difficult to determine whether an employer's compensation policy is justified by one of the first three available affirmative defenses.

The fourth available affirmative defense to a FEPA claim is more complicated. The affirmative defense that a "factor other than sex" explains the gender pay disparity is not a catch-all provision. To use this defense:

> [T]he employer must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity. An employer asserting a "factor other than sex" defense also must show that the factor is related to job requirements or otherwise is beneficial to the employer's business. Moreover, the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.[170]

A number of different "factors other than sex" could fall within this fairly imprecise framework. One such "factor other than sex" can be an employee's market value, which "qualifies as a factor other than sex only if the employer proves that it assessed the marketplace value of the particular individual's job-related qualifications, and that any compensation disparity is not based on sex."[171] A policy of matching outside offers received by employees would be a consistently applied, gender-neutral factor which could be used to explain the

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[165] For a general discussion of these issues, see Craver, *supra* note 1.

[166] *See generally id.* This is not necessarily the case, but it is a possibility that employers would be well-served to consider.

[167] 29 U.S.C. § 206(d)(1) (2000).

[168] EEOC, *supra* note 34, at § 10-IV(F)(1).

[169] *Id.* (emphasis omitted).

[170] *Id.* (footnotes omitted).

[171] *Id.*

pay disparity between a male and a female employee, because the act of matching actual outside offers forces the employer to consider the marketplace value of individual employees.[172] An employer that raised a female employee's pay in response to an offer from an outside firm, without similarly raising the pay of a male employee who did not receive such an offer, should not run afoul of FEPA (though MEPA may lead to a different outcome).

Alternatively, an employer could attempt to claim economic benefit as a factor other than sex to explain a gender pay disparity. Male employees who brought in more money to the business could be paid more than female employees who brought in less money, so long as that consideration was in fact the basis for the differing rates of pay.[173] It could also be a gender-neutral factor that the employer negotiates starting salaries with anyone who initiates such a discussion, women and men alike, even if men tended to avail themselves of this opportunity more frequently, though this is a controversial point.[174] The "factor other than sex" defense, then, is fairly flexible and could be invoked to justify a fairly wide range of compensation practices.

The "factor other than sex" affirmative defense, however, is not available under MEPA.[175] Nor are the merit or productivity justifications.[176] Under the

[172] *See, e.g.*, Winkes v. Brown Univ., 747 F.2d 792, 793 (1st Cir. 1984) (finding no sex discrimination where female professor received larger raise than male professor when female professor had received offer from another institution); Horner v. Mary Inst., 613 F.2d 706, 714 (8th Cir. 1980) (finding no sex discrimination where school district paid male teacher a higher starting salary after he refused an initial offer equal to that of the female teacher, because his previous salary was higher).

[173] Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 594 (3d Cir. 1973) ("[E]conomic benefits to an employer can justify a wage differential."). *But see* Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542, 547-48 (5th Cir. 2001) (finding university's claim that pay disparities could be explained by differing success in securing grant funding to be a mere pretext).

[174] The question of what obligations are created for an employer when women are less likely to negotiate starting salaries than men seems to be unsettled. Even a facially gender-neutral policy, such as negotiating with anyone who asks for more money, could have a disparate effect by gender. At least one scholar argues that:

> If an employer were to succumb to male bargaining entreaties with respect to jobs that are substantially equal to those of women who do not ask about the possibility of more advantageous employment terms, the women would have claims under the EPA. . . . If the employer thinks the higher salary given to males is appropriate for the position, it should provide the same compensation to women – even if they failed to take the initiative and request more beneficial terms.

Craver, *supra* note 1, at 1115-16. The same logic could be extended to include situations where an employer is willing to raise an employee's salary in order to induce her to stay; if the services of someone in that position are worth that amount to the employer, then perhaps the employer should pay that amount to other employees who are not contemplating leaving their current job.

[175] MASS. GEN. LAWS ch. 149, § 105A (2004).

[176] *Id.*

plain terms of the statute, the only defense available to an employer to justify a pay disparity between a man and a woman is that of seniority.[177] MEPA stipulates that "variations in rates of pay shall not be prohibited when based upon a difference in seniority."[178] The other affirmative defenses available under FEPA[179] are conspicuous in their absence. It is difficult to imagine a court finding liability where a female employee is paid more than a male co-worker holding an identical position if the disparity is based on demonstrable and quantifiable superior work production. However, that result is compelled by a literal reading of the statute. Nonetheless, it seems highly unlikely that this is the kind of result that the state legislature intended when it passed MEPA.

Because of the lack of the FEPA affirmative defenses, MEPA may be seen as an anachronistic statute. Within Massachusetts, MEPA has been largely superseded by Chapter 151B, a much more vital area of case law. Either the Massachusetts legislature or the Supreme Judicial Court could step in to correct the poorly conceived lack of flexibility within MEPA.

CONCLUSION

Plaintiffs who believe that they are underpaid on the basis of their gender in Massachusetts have four avenues for remedy open to them. The state statutes are largely parallel to the federal statutes, but there are important divergences that could produce differing outcomes. The continuing violation doctrine is inapplicable to a pay equity suit under the federal statutes, and very probably is inapplicable to suits under both of the state statutes as well. There is still room, however, for a plaintiff to extend the period for which damages can be collected through the use of the discovery doctrine. The courts have given no indication that they will foreclose this possibility, though it may be difficult to take full advantage of the doctrine. Given the extremely broad wording of MEPA, and the one-year limitation contained within its text, courts probably should be skeptical of attempts to invoke the discovery doctrine in that context. By contrast, for claims brought under Chapter 151B, which is intended to "[b]e construed liberally for the accomplishment of its purposes,"[180] and which requires a showing of intent to establish liability, courts should be more generous in allowing the use of the doctrine.

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[177] *Cf. id.*

[178] *Id.*

[179] *See* 29 U.S.C. § 206(d)(1) (2000).

[180] MASS. GEN. LAWS ch. 151B, § 9.