

Disentangling Various Forms Of Workplace Discrimination

By **Daniel Levy** (December 2, 2024)

Lilly Ledbetter, the outspoken advocate for the equal treatment of women in the workplace, died in October at age 86. Her experience reminds us that there are often multiple forms of discrimination in the workplace.

Ledbetter said that she viewed these various facets of discrimination, including wage discrimination, promotion discrimination and harassment, as connected by a common root cause.[1]



Daniel Levy

Whether or not this is the case, the effects of these various forms of discrimination are interrelated in their effect on observable marketplace outcomes such as wages and hiring, promotions, and termination rates.

The interactions among these forms of discrimination mean that the standard test presented in court to identify discrimination may miss it when it does exist and find it when it does not.

As demonstrated below, when conducting pay equity analyses, accurately assessing the effects of any one facet of discrimination requires measuring the effects of the interacting facets of discrimination simultaneously.

Pay inequity results from one type of workplace discrimination that occurs when an individual receives lower compensation based on:

- Demographic or social identity beyond what is explained by the work-related characteristics of the individual;
- The individual's job performance;
- The type of job the individual does; or
- The conditions under which the individual does the job.[2]

This is the type of discrimination that Ledbetter proved in the famous trial against Goodyear Tire & Rubber Co., but which was reversed by the U.S. Supreme Court in 2007 due to a time bar on her claim. Her case led to the 2009 federal Lilly Ledbetter Fair Pay Act.,[3] expanding the temporal reach of cases brought for pay discrimination.

This type of discrimination can be driven by anything from ill will toward a demographic or social group to nonmalevolent, but still highly damaging, undervaluation of the skills, performance or contribution of individuals in a group, among other potential causes.

A second type of workplace discrimination is exemplified by the #MeToo movement that exploded in the mid-2010s, where an employer or person with career influence harasses or abuses an employee or vulnerable person based on gender.

The #MeToo movement revealed sexual harassment in workplaces targeting women, which,

to say the least, degraded these workplaces for these women.

Similar types of abusive discrimination could target other demographic groups. Decades after she filed her pay discrimination case, and after the enactment of the Lilly Ledbetter Fair Pay Act, Ledbetter described her experience with this second type of discrimination in her 2018 New York Times opinion article.[4]

A third type of workplace discrimination relates to employment outcomes.

This type of discrimination concerns individuals from a demographic or social group who are hired, promoted, trained or terminated from employment at rates that are disadvantageous compared to other groups for no reason explicable by the work-related characteristics of the individuals, their job performance, the type of job they do or the conditions under which they do the job.[5]

Ledbetter also described her experience with this type of discrimination in her New York Times article.[6]

One may be able to catalog additional facets of discrimination. However, these three facets demonstrate that discrimination takes different forms in the marketplace and results in different observable conditions affecting workers.

There are a number of federal and state laws designed to protect against these different facets of discrimination.

For example, the Equal Pay Act prohibits wage discrimination based on gender.[7] Title VII of the Civil Rights Act prohibits discrimination in compensation based on additional demographic characteristics and protects against discrimination in employment outcomes such as hiring.[8]

Commonly, empirical tests to identify discrimination focus on one type of discrimination, such as pay, harassment or hiring/promotion/termination, in isolation. However, as Ledbetter's experience demonstrates, individuals may face multiple facets of discrimination at the same time.

Recognizing that these different facets of discrimination exist, and that they can interact in their effect on the resulting compensation of a demographic group, is important in identifying discrimination and measuring it accurately.

The importance of addressing the interaction of these multiple facets rather than in isolation such as pay differential alone is illustrated in the following examples.

First, when an employer promotes women at a slower rate than men, women and men within a given job title and level may exhibit similar pay, even though women are receiving lower pay due to their slower promotion rates.

Second, when there is harassment of women in a workplace, some women may find it not worthwhile to endure this behavior and choose to leave the company at a higher rate than if this harassment and negative behavior did not exist.

Potentially, if within each job group or pay grade, lower-compensated women are more likely to leave than highly compensated women in the same group, it could result in the remaining women receiving compensation that is on average similar to the men.

This situation can make it appear that women are equally, or even more highly, compensated than men, even if the employer discriminates against women in compensation as well as harasses them.

Third and finally, when a company provides benefits that are particularly attractive to women, even if provided equally to men, it may lead to greater retention of lower-paid women than lower-paid men.

Based on standard statistical tests for pay discrimination, this could result in the appearance that the company discriminates against women in compensation, when actually the company does not, but rather simply provides a work environment that retains women, particularly lower-paid women, at higher rates than lower-paid men.

In these examples, standard forms of pay equity analyses that do not recognize and assess the interactions between these multiple facets of discrimination could result in false conclusions.

This is because the company with employee benefits favorable to women would falsely appear to discriminate against them in pay, while the company that is hostile to women would falsely appear to compensate women very well, passing at least some pay discrimination analyses with flying colors.

Identifying the multiple forms of discrimination and addressing the complicated interactions may seem formidable. Disentangling the effects of these various forms of discrimination, however, may not be as intractable as it first appears.

Pay equity analyses can include adjustments for termination rates, voluntary or forced, of various demographic groups. By including information about termination rates, pay equity analyses can separate the effect of the hostile or beneficial work environment from pay discrimination.

Similarly, and perhaps more obviously, pay equity analyses can take into account promotion rates of different demographic groups to separate the effects of promotion discrimination from pay discrimination.

The solution to identifying an individual form of workplace discrimination is to recognize the multifaceted nature of discrimination.

Whether or not Ledbetter is right that these forms of discrimination come from a common root cause, the solution to identifying pay and other forms of discrimination is often a common, integrated analysis of the symptoms. When testing for pay discrimination specifically, this means including measures of termination and promotion rates.

Daniel S. Levy is the national managing director at the Advanced Analytical Consulting Group Inc.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Lilly Ledbetter, My #MeToo Moment, New York Times, April 9, 2018.

[2] On October 17, 2023, the 2nd Circuit of the Federal Court of Appeals Eisenhauer V. Culinary Institute of America decision, allowed any factor other than gender, whether work-related or not, to be a valid explanation for pay differences as long as such factors were not simply a proxy for gender. See "Anything Goes Except Sex," by Daniel S. Levy at. <https://www.equitypath.com/anything-goes-except-for-sex-says-the-second-circuit/>.

[3] Public Law 111-2 111th Congress available at <https://www.congress.gov/bill/111th-congress/senate-bill/181/text>.

[4] Lilly Ledbetter, My #MeToo Moment, New York Times, April 9, 2018.

[5]See the Op. Cit. fn.2, relating to 2nd Circuit ruling that any factor other than gender can be used to explain differences in compensation by gender, even if unrelated to work. This ruling potentially could apply to different rates in employment outcomes across demographic groups.

[6] Op. Cit, fn.1.

[7] Equal Pay Act of 1963. See <https://www.eeoc.gov/statutes/equal-pay-act-1963>.

[8] Title VII of the Civil rights Act of 1964.
See <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/statutes/title-vii-civil-rights-act-of-1964>.