

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

REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS,
KEVIN GROESCH, GREG SHAFFER and SCOTT ALLIN

JAMES P. BAKER
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701
Telephone: (217) 522-3445
Telefax: (217) 522-8234

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. THE “LEDBETTER ACT” DOES APPLY TO THE OFFICERS’ CLAIMS AGAINST THE CITY JURISDICTIONAL STATEMENT	1
II. THE OFFICERS’ CLAIMS ARE NOT BARRED BY <i>RES JUDICATA</i> ISSUES PRESENTED FOR REVIEW	8
III. CONCLUSION	10
Certificate of Compliance with F.R.A.P. Rule 32(a)(7)	11
Circuit Rule 31(e) Certification	12
Certificate Of Service	13

TABLE OF AUTHORITIES

CASES

AT & T Corporation v. Hulteen, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) 3

Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) 3,5

Bazemore v. Friday, 478 U.S. 385, 92 L.Ed.2d 315 (1986) 6,9,10

Brown v. Felsen, 442 U.S. 127, 131, 60 L.Ed.2d 767 (1979) 8

Car Carriers, Inc. v. Ford Motor Company, 789 F.2d 589 (7th Cir.1986) 8

Delaware State College v. Rick, 449 U.S. 250, 66 L.Ed.431 (1980) 3

Doe v. Allied-Signal, Inc., 985 F.2d 908 (7th Cir.1993) 8

Herrman v. Cencom Cable Associates, Inc., 999 F.2d 223, 226 (7th Cir.1993) 9

Hildebrandt v. Illinois Department of Natural Resources, 347 F.3d 1014
 (7th Cir.2003) 4,6

Ledbetter v. Goodyear Tire and Rubber Company, Inc., 421 F.3d 1169
 (11th Cir.2005) 3

Mikula v. Allegheny County of Pennsylvania, 583 F.3d 181, 186
 (3^d Cir.2009) 2,4,5,6,7

National Rail Passenger Corp. v. Morgan, 536 U.S. 101, 153 L.Ed.2d 106
 (2002) 6,9,10

Perkins v. Board of Trustees of the University of Illinois, 116 F.3d 235
 (7th Cir.1997) 9

Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007 (7th Cir.2003) 4,5,6

Speer v. Montaineer Gas Company, 2009 WL 2255512 (N.D. W.Va.) 6

Sunrise Orchards, Inc. v. Pet Calvert Company, 2010 WL 1194203 (N.D. Ill.) N.6 9

United Air Lines, Inc. v. Evans, 431 U.S. 553, 52 L.Ed.2d 571 (1977) 5,6

Statutes

42 U.S.C. § 2000e-5(e)(3)(A) 2

42 U.S.C. § 2000e-5 1,2,4, 5,6,8,9,10

42 U.S.C. § 2000e et.al. 1

42 U.S.C. § 20003(k) 3

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,)	Case No. 04 CV 3162
ILLINOIS, a municipal corporation,)	Hon. Jeanne E. Scott,
)	Presiding
Defendant-Appellee.)	

REPLY BRIEF OF KEVIN GROESCH, GREG SHAFFER AND SCOTT ALLIN

**I. THE “LEDBETTER ACT” DOES APPLY TO
THE OFFICERS’ CLAIMS AGAINST THE CITY¹**

As its primary argument in this appeal, the City contends that the Officers’ reliance upon the *Ledbetter Act* is misplaced. As its reasoning goes, the discriminatory event giving rise to the Officers’ claim was the action of its City Council in passing the Schluter Ordinance on March 29, 2000. Because it was adopted more than two years prior to a charge of discrimination being filed by the Officers (the *Ledbetter Act* permits the recovery of backpay going back as much as two years before a charge of discrimination is filed), their claims are time barred

¹ As used in this document: a) the “Officers” refers to Kevin Groesch, Greg Shaffer and Scott Allin; b) the “City” refers to the City of Springfield, Illinois; c) the “Ledbetter Act” refers to the “*Lilly Ledbetter Fair Pay Act of 2009*” [42 U.S.C. § 2000e-5]; d) the “Act” refers to Title VII of the “*Civil Rights Act of 1964*” [42 U.S.C. § 2000e et.al.]; and e) the “Schluter Ordinance” refers to the ordinance adopted by the City granting certain benefits to Don Schluter, an African-American patrol officer.

[p.8 of the City's brief].

For multiple reasons, this argument is a non-starter.

First, it ignores what the *Ledbetter Act* provides. Even if the action of the City Council is considered the discriminatory event which initially gave rise to the Officers' claims, the *Ledbetter Act* provides that an employment practice forbidden by the Act occurs in three separate situations. At most, the City's argument applies to only one. Under that law, a separate unlawful practice occurs each time a plaintiff receives wages or other compensation resulting in whole or part from a discriminatory decision [42 U.S.C. § 2000e-5(e)(3)(A)]. Thus, the Officers may recover backpay lost as a result of a discriminatory decision for losses occurring during the two year time period preceding the date their charge of discrimination was filed regardless of when the discriminatory decision was made.

Second, the City incorrectly identifies when the discriminatory decision occurred. While the Schluter Ordinance was passed in March of 2000, the discriminatory event did not then occur. After the Illinois Appellate Court reversed the decision of the Sangamon County Circuit Court invalidating the Schluter Ordinance, the Officers, on December 11, 2002, made a written request of the City that they receive the same benefits as those given Schluter [SA11; R22, Harris Dep.66-68,72]. It was after that request was ignored that the Officers pressed their claim. The failure of the City to respond to the Officers' request qualifies as a compensation decision within the meaning of the *Ledbetter Act* [*Mikula v. Allegheny County of Pennsylvania*, 583 F.3d 181, 186 (3rd Cir.2009)].

Third, *AT & T Corporation v. Hulteen*, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009), does not help the City. The question in that case involved whether an employer violated the “*Pregnancy Discrimination Act*” [42 U.S.C. § 20003(k)] when it paid pension benefits calculated under a then lawful accrual rule which predated the enactment of that law. The plaintiff’s claim in that case hinged upon a rule adopted by the employer prior to the enactment of the foregoing law which, according to the Court, was lawful at that time. Because the plaintiff, in receiving pension benefits, was not impacted by conduct which violated the Act, the Court held that she could not avail herself of the right afforded under the *Ledbetter Act*. Unlike *Hulteen*, the District Court, in denying the City’s motion for summary judgment prior to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 167 L.Ed.2d 982 (2009), concluded that a genuine issue of fact exists concerning whether the difference in treatment between Schluter and the Officers violated the Act [SA54-67]. Thus, unlike the situation in *Hulteen*, no conclusion can be drawn that the conduct of the City challenged in this case was permissible as a matter of law.

Fourth, the City, in relying upon *Delaware State College v. Rick*, 449 U.S. 250, 66 L.Ed.2d 431 (1980) and *Abramson v. University of Hawaii*, 594 F.2d 202 (9th Cir. 1979) to bolster its argument, is at best mixing legal apples and oranges. Neither case has relevance to the case at bar. Furthermore, applying those cases to the present situation cannot be reconciled with the express provisions of the *Ledbetter Act*. The *Rick* Court held that a college professor’s cause of action for

purposes of triggering the applicable statute of limitations occurred when he was first informed that his application for tenure had been denied even though the effects of the denial (the professor's termination from employment) occurred much later [p.258]. In reaching this result the Court favorably referred to the holding in *Abramson*, another tenure denial case. Both cases recognized that the "proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." This Court, prior to *Ledbetter*, did not apply that principle to discriminatory compensation practice cases. Instead, it applied the paycheck accrual theory in which each payment arising out of a discriminatory compensation practice represented a new cause of action [*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)]. This principle was embodied in the *Ledbetter Act* which recognizes that a separate unlawful employment practice occurs "each time wages, benefits, or other compensation is paid, resulting in whole or in part from such decision or other practice" [42 U.S.C. § 2000e-5(e)(3)(A)].²

Fifth, the City argues that this case is dissimilar to what occurred in *Ledbetter* because the Officers (unlike what happened in *Ledbetter*) were not subject to discriminatory performance evaluations and "the Plaintiffs were not denied raises or benefits based upon their gender nor was there a discriminatory

² The purpose of the *Ledbetter Act* was to reinstate the law regarding the timeliness of pay compensation claims to what it had been prior to the *Ledbetter* decision [see *Mikula* at p.184].

motive behind the pay and benefits that the Plaintiffs received compared to Schluter” [pp.11-12 of the City’s brief]. The fact that this is a race rather than gender discrimination case and did not arise from discriminatory performance evaluations is, for purposes of this appeal, a distinction without difference. The holding in *Ledbetter* was applied by the District Court to bar the Officers’ claims. The *Ledbetter Act* was enacted to undo the effects of that decision. The failure of an employer to respond to an employee’s request for parity in compensation (the situation at hand) qualifies as a compensation decision for purposes of the *Ledbetter Act* [*Mikula* at p.186].

The City’s argument that the benefits extended to Schluter through the enactment of the Schluter Ordinance but later denied to the Officers was not based upon a discriminatory motive is, to say the least, disputed. In a detailed decision initially denying the City’s request for summary judgment, the District Court noted that a genuine issue of material facts exist as to whether the City’s conduct was motivated by race [SA54-67]. The City in this appeal raises no issue challenging that determination [p.1 of the City’s brief].

Sixth, the City’s reliance upon *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed.2d 571 (1977), is mistaken. The City contends that in view of *Evans*, the Officers’ reliance upon this Court’s holding in *Hildebrandt* and *Reese* “is unfounded” [pp.14-16 of the City’s brief].

In *Evans* the Supreme Court reasoned that the Act does not foreclose an attack on the current operation of a seniority system which is discriminatory. But a

challenge to a neutral system may not be based merely on the fact that a past event which has no present legal significance effected calculations made pursuant to that neutral system [p.560].

The City reasons that the Officers do not claim that the City's "pay and benefit scheme" which ties compensation to the length of a police officer's service is itself discriminatory and thus *Evans* applies to this situation. According to the City, the arguments the Officers advance in this appeal "was rejected in *Evans*" [p.16 of the City's brief].

The City's reliance upon *Evans* would rest on better legs if the law in this area had been silent in the thirty-three years since *Evans* was decided. Unfortunately, for the City, this has not been the case.

In reaching its decisions in *Hildebrandt* and *Reese*, this Court relied upon the Supreme Court's view concerning the timeliness of claims in pay discrimination cases as stated in both *Bazemore v. Friday*, 478 U.S. 385, 92 L.Ed.2d 315 (1986) and *National Rail Passenger Corp. v. Morgan*, 536 U.S. 101, 153 L.Ed.2d 106 (2002). Each of those cases which was decided well after *Evans*, the Court held that each paycheck received as the result of a discriminatory compensation practice represented a separate and discrete act of discrimination which start a new clock running for statute of limitations purposes. The *Hildebrandt* Court noted that:

"The existence of past acts and the employee's prior knowledge of their occurrences, 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” [*Hildebrandt* at p.1027 quoting from *Morgan* at p.113].

The *Ledbetter Act*, in setting aside the effects of the *Ledbetter* decision, codifies this rule.

Finally, contrary to its argument, *Speer v. Montaineer Gas Company*, 2009 WL 2255512 (N.D. W.Va.) does not help the City in this appeal. The plaintiff in that case alleged that his employer discriminated against him on account of his age when it: a) terminated his long term disability benefits; and b) refused to return him to work. Because he failed to file a charge of discrimination within 300 days of either event, the Court held that his claim was time barred. It refused to apply the *Ledbetter Act* to save his claims reasoning that by its terms the *Ledbetter Act* applies to discrimination in compensation. According to it, the plaintiff’s claims were not directed toward a discriminatory compensation practice.

Unlike the *Speers* situation, the Officers claim that, if treated like Schluter, their compensation would be greater because they would receive service credit for the years worked for the City during their first period of employment with it, is directed toward a discriminatory compensation practice.

A situation more reminiscent to the present case was presented in *Mikula*. In that case, the plaintiff, a female, claimed gender discrimination on the part of her employer in paying her less than a male employee whose performed substantially similar work. The Court reasoned that the *Ledbetter Act* applied because her employer’s failure to respond to her request for a raise qualified as a “compensation decision” within the meaning of that law and, accordingly, the

Ledbetter Act applied to her case. In this case the Officers (like the *Mikula* plaintiff) made a written request to the City that they, like Schluter, be credited with their prior years of service for purposes of determining their wage rates and benefits [SA11]. That request, like the situation in *Mikula*, was ignored by the City [R22, Harris Dep.66-68,72].

II. THE OFFICERS' CLAIMS ARE NOT BARRED BY *RES JUDICATA*

Relying upon the same transaction test developed by this Court [see *Carriers, Inc. v. Ford Motor Company*, 789 F.2d 589 (7th Cir.1986) and *Doe v. Allied-Signal, Inc.*, 985 F.2d 908 (7th Cir.1993)], the City claims that the state court judgment bars the Officers' claims in this case because both arose from a single core of operative facts giving rise to a remedy. Case law and the *Ledbetter Act* suggests otherwise.

Res judicata is designed to ensure the finality of judicial decisions. Under that doctrine, "a final judgment on the merits bars further claims by parties or their privies based upon the same cause of action" [*Brown v. Felsen*, 442 U.S. 127, 131, 60 L.Ed.2d 767 (1979)]. For federal *res judicata* to apply, there must be: 1) a final judgment on the merits in an earlier case; 2) an identity of the cause of action in both the earlier and later cases; and 3) an identity of the parties or their privies in the two case [*Doe* at 913].

The same transaction test was developed to prevent a plaintiff from bypassing *res judicata* by altering the theory of his case if it arises out of the same fact pattern as the earlier case. "Once a transaction has caused injury, all claims

arising from that transaction must be brought in one suit or lost” [*Car Carriers* at 593]. *Res judicata* requires the joinder of all legal challenges to a wrong. However, it does not require the joinder of separate wrongs [*Herrman v. Cencom Cable Associates, Inc.*, 999 F.2d 223, 226 (7th Cir.1993); and *Perkins v. Board of Trustees of the University of Illinois*, 116 F.3d 235 (7th Cir.1997)].

In this case the Officers have suffered separate wrongs. The wrongs prior to the entry of the state court judgment and those occurring thereafter are not the same cause of action.

This Court in *Hildebrandt* and *Reese* recognized that each time a plaintiff received a discriminatory paycheck a separate discriminatory act occurred giving rise to a separate actionable claim. Thus, compensation received by the Officers at various times prior to the state court judgment represented different causes of action from those received by them after the state court judgment.³

The Supreme Court in *Bazemore* recognized that “each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII” [pp.395-396]. In *Morgan*, the Court, relying upon *Bazemore*, cited a paycheck paid at a discriminatory rate as an example of an actionable “discrete act or single occurrence, even when it has a connection to other acts” [p.111].

The *Ledbetter Act* codifies this view. By its terms, a separate “unlawful

³ The same transaction doctrine cannot be used to bar a debt or liability which accrues after the initial judgment [*Sunrise Orchards, Inc. v. Pet Calvert Company*, 2010 WL 1194203 (N.D. Ill.) N.6].

employment practice” occurs “each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or practice” [42 U.S.C. § 2000e-5(e)(3)(A)].

Because each paycheck received by the Officers after the state court judgment represents under *Bazemore*, *Morgan* and the *Ledbetter Act* a separate cause of action, unlike the situations covered by the same transaction test, the District Court correctly concluded that *res judicata* does not bar those causes of actions.

III. 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 request for summary judgment and remand this case to it for purposes of trial.

KEVIN GROESCH, GREG SHAFFER
AND SCOTT ALLIN

By: _____
One of their Attorneys

James P. Baker
Bar #: 0097802
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701
Phone: (217) 522-3445
Fax: (217) 522-8234
email: bschrader2@gmail.com

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, )	)	Case No. 04 CV 3162
ILLINOIS, a municipal corporation, )	)	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 reply brief of the Appellants complies with the type volume limitation. The reply brief contains 2590 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

November 9, 2010

James P. Baker
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701
(217) 522-3445

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,)	Case No. 04 CV 3162
ILLINOIS, a municipal corporation,)	Hon. Jeanne E. Scott,
)	Presiding
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

November 9, 2010

James P. Baker
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701
(217) 522-3445

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, )	)	Case No. 04 CV 3162
ILLINOIS, a municipal corporation, )	)	Hon. Jeanne E. Scott,
	)	Presiding
Defendant-Appellee.))	

CERTIFICATE OF SERVICE

The Plaintiffs-Appellants, Kevin Groesch, Greg Shaffer and Scott Allin, hereby certify that on November 9, 2010, three copies of the Reply Brief 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:

Jennifer Johnson
Frank Martinez
Office of the Corporation Counsel
Municipal Building East, #313
800 East Monroe Street
Springfield, Illinois 62701

Kevin Groesch, Greg Shaffer and Scott Allin

By: _____
Their Attorney

James P. Baker
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701
(217) 522-3445