NO. 07-2932

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN GROESCH, GREG SHAFFER, and SCOTT ALLIN,	)
Plaintiffs-Appellants,	)
v.	)
CITY OF SPRINGFIELD, ILLINOIS, a municipal corporation,	)
Defendant-Appellee.	)

Appeal from the United States District Court
For the Central District of Illinois, Springfield Division
Case No. 04-CV-3162
The Honorable Judge Jeanne E. Scott

BRIEF OF THE DEFENDANT-APPELLEE

CITY OF SPRINGFIELD, ILLINOIS
Frank Martinez
Assistant Corporation Counsel
Attorney for Defendant-Appellee

City of Springfield, Illinois
Office of Corporation Counsel
Room 313, Municipal Center East
800 E. Monroe Street
Springfield, IL 62701-1689
Telephone: (217) 789-2393
Fax: (217) 789-2397
Email: Frank.Martinez@cwlp.com

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JURISDICTIONAL STATEMENT

The Defendants-Appellees agree that the jurisdictional summary provided by the Plaintiff-Appellant is complete and accurate.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court correctly rule that the evidence presented no genuine issue of material fact and that it was appropriate to enter summary judgment in favor of the City of Springfield?

Should the Ordinance passed by the Springfield City Council be considered a discriminatory compensation decision or a discrete act of discrimination which falls outside the Lilly Ledbetter Fair Pay Act?

STATEMENT OF FACTS

Plaintiffs (collectively hereinafter "Plaintiffs") Kevin Groesch (hereinafter "Groesch"), Greg Shaffer (hereinafter "Shaffer") and Scott Allin (hereinafter "Allin") are white police officers employed by the City of Springfield, Illinois, (hereinafter "City"). Each officer was previously employed by the City, left employment with the City for an extended time and returned at a later date. Upon their return, Plaintiffs were not given credit for their prior years of service for purposes of seniority, pay or benefits. Donald A. Schluter (hereinafter "Schluter") is an African-American police officer employed by the City. Schluter was previously employed by the City, left employment with the City for a short period of time and returned at a later date. Upon Schluter's return, an Ordinance was passed by the City Council allowing Schluter to receive credit for his prior years of service for purposes of seniority, pay and benefits.

Groesch began employment with the Springfield Police Department in June 1981. [R19, Ex. A-3]. Groesch obtained a sixty-day leave of absence in December 1988. [R19, Ex. A-3]. Groesch did not return to the Springfield Police Department at the conclusion of his leave. [R19, Ex. A-3]. Groesch returned to employment with the Springfield Police Department on September 10, 1996. [Ex. B]. Based upon the lack of the exact date when Groesch was granted his sixty-day leave, it is assumed, taking the facts in the light most favorable to Groesch, that the date is December 31, 1988. Therefore, there was a gap of 2,750 days during which Groesch was not employed by the Department . [R19, Ex. A-3, B].

Shaffer began employment with the Springfield Police Department in January 1980. [R19, Ex. A-1, D]. Shaffer left the Department in July 1987. [R19, Ex. A-1, D]. Shaffer requested, but was denied, a leave of absence when he left. [R19, Ex. A-1]. Shaffer returned to employment with the Department on July 6, 1993. [R19, Ex. C]. Based upon the lack of the exact date when Shaffer left the Department, it is assumed, taking the facts in the light most favorable to Shaffer, that the date is July 31, 1987. Therefore, there was a gap of 2,167 days during which Shaffer was not employed by the Department. [R19, Ex. A-1, C, D].

Allin began employment with the Springfield Police Department on January 7, 1980. [R19, Ex. E]. Allin left the Department on November 22, 1986. [R19, Ex. F]. Allin requested, but was denied, a leave of absence when he left. [R19, Ex. G], Allin returned to employment with the Department on

January 9, 1989. [R19, Ex. H]. Therefore, there was a gap of 779 days during which Allin was not employed by the Department. [R19, Ex. E, F, G, H].

Schluter began employment with the Springfield Police Department on April 4, 1994. [R19, Ex. I]. Schluter left the Department on November 12, 1999. [R19, Ex. J, K]. Schluter requested, but was denied, a leave of absence when he left the Department. [R19, Ex. L, O]. Schluter returned to employment with the Department on March 29, 2000; therefore, there was a gap of 139 days during which Schluter was not employed by the Department. [R19, Ex. J, K, L, M, N, O].

Schluter was given a retroactive leave of absence by the City of Springfield City Council, pursuant to Ordinance 198.3.00. [R19, Ex. N-1 to N-3]. The City Council determined that the retroactive leave of absence for Schluter was justified because 1) Schluter was an officer in good standing when he voluntarily left the Department; 2) there was a need for police officers; 3) there was no Eligibility List in place from which to hire; 4) the Police Chief desired to return Schluter to service; 5) the City would save $2,200.00 by not sending Schluter to the Police Academy; 6) the City would save $350.00 for pre-employment medical screening; 7) the City would save $352.00 for pre-employment psychological screening; 8) it was in the public interest and furthered the goal of public safety to have qualified individuals serving as police officers for the City; and 9) it is in the public interest to have diversity in the police force. [R19, Ex. N-2, N-3].

SUMMARY OF ARGUMENT

The Lilly Ledbetter Fair Pay Act of 2009 is not applicable to the Plaintiffs. The alleged discrete discriminatory act occurred when the City Council passed an ordinance allowing Schulter to be credited with his prior years of service on March 29, 2000. This is when the alleged discriminatory act was adopted by the City and when the Plaintiffs became subject to and were affected by the ordinance. Thus, the two year statute of limitations for the Plaintiffs' claims expired on March 29, 2002, but the Plaintiffs did not file their Complaint until April 3, 2003. Furthermore, the Plaintiffs do not allege that the seniority system used to pay officers and accrue benefits is discriminatory on its face.

The Plaintiffs claims are barred by the doctrine of *res judicata*. The Plaintiffs could have brought their reverse discrimination claims (Title VII and 42 U.S.C. Section 1983) as part of their April 3, 2003, state court action, but failed to do so. The failure to do so by the Plaintiffs bars the reverse discrimination claims from being litigated.

The operation of a non-discriminatory seniority system that forms the basis for pay and benefits constituted an intervening cause which locked in Plaintiffs' reduced salary and benefits. The impact of such seniority system could not be subjected to liability unless the Plaintiffs proved that the system itself was intentionally discriminatory. The Plaintiffs in the case at bar do not argue that the pay and benefit scheme used by the Police Department was discriminatory. The Plaintiffs' Complaint focuses on the fact that pay and benefits are determined based upon length of employment [R1, Complaint, ¶9a-

d], and that because Plaintiffs were not given credit for their prior service, they did not receive the same treatment as Schulter.

The Plaintiffs' failure to obtain a right-to-sue letter from the EEOC does not escape the effects of the doctrine of *res judicata.* The Plaintiffs could have delayed the filing in state court or they could have stayed the proceedings in state court in order to obtain the right-to-sue letter. Additionally, the state court provided the Plaintiffs an adequate forum in which they could have brought Title VII, Section 1983 and equal protection claims, though they chose not to do so

ARGUMENT

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

This Court's review of the district court's grant of summary judgment is *de novo*. See *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003). A court must grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

In conducting this inquiry "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). However, not every dispute over the facts can foil summary judgment; only ones "that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510. In addition, the United States Supreme Court has held in several cases that if the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against him. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); *Celotex Corp.,* 477 U.S. at 322-24, 106 S.Ct. at 2552-53; *Anderson,* 477 U.S. at 249-252, 106 S.Ct. at 2510-12; see also *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920-21 (7th Cir. 1994). The non-movant may not rely upon mere allegations, but must present specific facts to show that a genuine issue of material fact exists. *Celotex,* 477 U.S. at 322-26, 106 S.Ct. at 2552-54; *Buscaglia v. U.S.,* 25 F.3d 530, 534 (7th Cir. 1994).

Summary judgment is appropriately entered "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc.,* 39 F.3d 784, 787 (7th Cir. 1994)(quoting *Celotex Corp.,* 477 U.S. at 322, 106 S.Ct. at 2552). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512.

B. THE LILLY LEDBETTER FAIR PAY ACT IS NOT APPLICABLE TO THE PLAINTIFFS

The Lilly Ledbetter Fair Pay Act of 2009 (hereinafter "Fair Pay Act") was enacted on January 29, 2009, and became immediately effective and retroactive back to May 29, 2007. The law amends four anti-discrimination laws: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Rehabilitation Act of 1974 and the Americans with Disabilities Act of 1990. The law states:

> (3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory decision or other practice, or when a individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such decision or other practice.
>
> (B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge. 42 U.S.C. Section 2000e-5(e)(3(A) & (B).

Thus, the Fair Pay Act provides three points at which an unlawful employment practice with respect to discrimination in compensation occurs: (1) when a discriminatory compensation decision or other practice is adopted; (2) when an individual becomes subject to a discriminatory compensation decision or other practice; or (3) when an individual is affected by application of a discriminatory compensation decision or other practice. *Id.* The new law also authorizes recovery of back pay for up to two years preceding the filing of the

charge where the unlawful employment practices during the charge filing period are similar to those which occurred outside the charge filing period. *Id.*

Contrary to the district court's ruling, the actual act of alleged discrimination occurred when the City passed the ordinance allowing Schluter to be credited with his prior years of service on March 29, 2000. That is when the alleged discriminatory act was adopted by the City and when the Plaintiffs became subject to and were affected by the alleged discriminatory act. See *Richards v. Johnson & Johnson, Inc.*, 2009 WL 1562952, at *9 (D.N.J. 2009) ("While the Act certainly contains expansive language in superseding the holding in *Ledbetter*....it does not purport to overturn *Morgan*, and thus does not save otherwise untimely claims outside the discriminatory compensation context"). The two year statute of limitations for Plaintiffs' claims therefore expired on March 29, 2002. Plaintiffs did not file their Complaint until April 3, 2003. For these reasons, the Lilly Ledbetter Fair Pay Act is not applicable to the Plaintiffs' claims nor changes the lower court's ruling.

The passage of the ordinance by the City Council is similar to *Delaware State College v. Ricks*, 449 U.S. 250 (1980), where the Court held that the denial of academic tenure, the only act alleged to be discriminatory, constituted the unlawful employment practice which began the charge filing period. In *Ricks*, the Court found that the plaintiff's failure to file his charge within 300 days of the tenure decision rendered his claim untimely even though his employment formally ended one year later. Given that the plaintiff identified only the denial of tenure as discriminatory, his continuing employment during

his terminal one-year contract with the college was insufficient to prolong the life of his cause of action. *Ricks,* 449 U.S. at 267. Thus, the Court held "'the proper focus is upon the time of the discriminatory acts, not upon the time as at which the consequences of the acts became most painful."' 449 U.S. at 258 (citing *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)). Similarly, the passage of the ordinance by the City Council is the only act that the Plaintiffs are alleging is discriminatory against them.

Further support for the City's position can be found in *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962, 1973 (2009), where the Supreme Court held that the plaintiffs' allegations of sexually discriminatory calculation of pension benefits due to a lower rate of accrual of benefits during pregnancy leave than during other medial leaves were not discriminatory under the Fair Pay Act. The plaintiffs in that case argued that under the Ledbetter Act, the payment of pension benefits at issue in the case marked the moment in which they were affected by discriminatory compensation practices. The Court rejected the plaintiffs' claim that they were affected by application of the discriminatory compensation decision when they began receiving benefits. The Court reasoned that AT&T's elimination of the disparity in the accrual rates following passage of the Pregnancy Discrimination Act brought the employer into compliance with the law notwithstanding the continuing impact of the pre-PDA disparate rates on the plaintiffs' future benefits. Despite the continuing impact of the plaintiffs' pension from the lower rates they received during maternity leave, the Supreme Court held that the Fair Pay Act did not apply since there

was no discriminatory conduct at issue. The same analogy can be made to the case at bar. The pay and benefit scheme of the Department has been non-discriminatory in its application since its inception; therefore, the Fair Pay Act did not apply since there was no discriminatory conduct at issue.

Thus, for the reasons explained above the Fair Pay Act is not applicable to the Plaintiffs' claims since they have identified an alleged discrete discriminatory act (passage of the ordinance), not a discriminatory compensatory decision. The pay and benefit system used by the Department, which is based on seniority is not discriminatory in its application.

C. THE PLAINTIFFS' CLAIMS ARE NOT SIMILAR TO THE EMPLOYEE IN *LEDBETTER*

The Fair Pay Act overturned the holding in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Court held that a female managerial employee who claimed that she smaller salary increases than her male counterparts as a result of years of sexually discriminatory evaluations by her supervisors could not use pay checks issued within 180 days of her EEOC charge as the basis for a timely filed claim because the evaluations which caused the salary disparity occurred more than 180-days before she filed her charge. Ledbetter worked for nineteen years and during much of that time raises were given or denied based on supervisory performance evaluations. *Ledbetter,* 550 U.S. at 621. Ledbetter introduced evidence that several of her supervisors had given her poor evaluation because of her sex and these actions limited her pay increases over the years, diminishing her pay throughout her employment compared with those of her male counterparts regardless of their

length of service. *Ledbetter,* 550 U.S. at 622. At the end of her career, Ledbetter filed an EEOC charge against Goodyear using the issuance of paychecks within the charge filing period as the unlawful practice which promoted her claim.

The Supreme Court framed the issue as "[w]hether and under what circumstances 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 limitation period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." *Ledbetter*, 550 U.S. at 623. The Court held that Ledbetter's claim was time-barred because the discriminatory evaluations were past discriminatory activity and the paychecks were subsequent nondiscriminatory acts that entailed adverse effects resulting from the past discrimination. *Id.* at 632. The *Ledbetter* Court relied on *National Railroad Passenger Corp., v. Morgan*, 536 U.S. 101 (2002), definition of a discrete act under Title VII, stating that *Morgan* instructed finding an EEOC charge begins when the act occurs. *Ledbetter*, 550 U.S. at 621.

The Plaintiffs argue, like the employee in *Ledbetter*, they were paid less than what they would have received had they been treated in the same manner as an African-American officer. The facts in the case at bar are not similar to the plaintiff in *Ledbetter*. In *Ledbetter*, the plaintiff was subject to employee evaluations that resulted in her receiving less pay than her male counterparts. The Plaintiffs in this case were not subject to sexually discriminatory

performance evaluations. Furthermore, the Plaintiffs were not denied raises or benefits based upon their gender nor was there a discriminatory motive behind the pay and benefits that the Plaintiffs received compared to Shulter. The reasons identified by the City Council for passing the Ordinance were non-discriminatory and said ordinance was not passed to in order to harm the Plaintiffs. Specifically, the City Council determined that the retroactive leave of absence for Schluter was justified because 1) Schluter was an officer in good standing when he voluntarily left the Department; 2) there was a need for police officers; 3) there was no Eligibility List in place from which to hire; 4) the Police Chief desired to return Schluter to service; 5) the City would save $2,200.00 by not sending Schluter to the Police Academy; 6) the City would save $350.00 for pre-employment medical screening; 7) the City would save $352.00 for pre-employment psychological screening; 8) it was in the public interest and furthered the goal of public safety to have qualified individuals serving as police officers for the City; and 9) it is in the public interest to have diversity in the police force. [R19, Ex. N-2, N-3]. More importantly, when the Plaintiffs returned to the Police Department after being gone for a number of years, none of these factors were present.

D. THE PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA*

As the Plaintiffs correctly assert, the doctrine of *res judicata* requires litigants to join in a single suit all legal and remedies theories that concern a single transaction. A single transaction is a "common core of operative facts." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). *Res*

judicata "serves the interests of judicial economy and finality in disposing disputes by barring both the parties to a judgment and their privies from relitigating the identical cause of action." *Crop-Maker Soil Servs., Inc. v. Fairmount State Bank*, 881 F.2d 436, 438 (7th Cir. 1989). To this end, "'a final judgment on the merits of an action precludes the parties…from relitigating issues that were or could have been raised in that action.'" *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985)(quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). As the District Court pointed out, the Plaintiffs could have brought their reverse discrimination claims (Title VII and 42 U.S.C. Section 1983) as part of their April 3, 2003, state court action, but failed to do so. The failure to do so by the Plaintiffs bars the reverse discrimination claims from being litigated. See *Maher v. FDIC*, 441 F.3d 522, 526 (7th Cir. 2006)("*Res judicata* also bars litigation of claims that 'could have been raised' in the previous litigation, but were not.").

Three requirements must be met for *res judicata* to bar a claim: (1) an identity of the parties or their privies; (2) an identity of the causes of actions; and (3) a final judgment on the merits. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). The Plaintiffs and the City were parties in the previous state litigation that rendered a final judgment on the merits. The Plaintiffs had the opportunity to raise their reverse discrimination claims in the state court action.

For *res judicata* purposes, the Seventh Circuit defines a "cause of action" using the "operative facts" or "same transaction" test under which "a cause of

action consists of a single core of operative facts giving rise to a remedy." *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 913 (7th Cir. 1993)(citation and internal quotation marks omitted). The result is that "[o]nce a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost." *Allied-Signal*, 985 F.2d at 913 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). The Seventh Circuit has explained that the intent of the inquiry is "to discover whether the plaintiff could have raised the issue in the first suit." *Id.* (citing *Moitie*, 452 U.S. at 398). Once the ordinance was passed by the City Council, the Plaintiffs should have filed all their claims in state court and its failure to do so results in a bar from further litigating those claims.

The Plaintiffs rely on *Perkins v. Board of Trustees of the University of Illinois*, 116 F.3d 235 (7th Cir. 1997), for the proposition if the wrongful events are separated by time and function, multiple suits are permissible. There is only one wrongful event that occurred which forms the basis of this lawsuit--the passage of the ordinance. In addition, there have not been numerous events giving rise to multiple suits.

The Plaintiffs then rely on *Hildebrandt v. Illinois Department of Natural Resources*, 347 F.3d 1014 (7th Cir. 2003) and *Reese v. Ice Cream Specialities, Inc.*, 347 F.3d 1007 (7th Cir. 2003), for the proposition that each payment made to an employee that was the product of discrimination was a discrete act triggering the statute of limitations. The reliance on these cases is unfounded because in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885 (1977),

the Court held that a flight attendant's claim which alleged that her employer discriminated against her upon rehire by not crediting her with the seniority she earned before she was fired several years earlier pursuant to a discriminatory policy was time barred. The Court reasoned that the plaintiff's failure to file an EEOC charge within 180/300 days following her discharge meant that the employer's discriminatory act was the legal equivalent of a discriminatory act committed before the passage of Title VII. *Evans,* 431 U.S. at 558. In short, *Evans* held that a discharge is a discrete act which must be challenged within the charge filing period following the act of discharge.

More importantly, the Court rejected the plaintiff's claim that the seniority system's continuing impact on her rights and benefits upon reemployment constituted a continuing violation. *Id.* The Court reasoned that where there is no present violation, the continuing impact of a neutral seniority system did not produce a continuing violation. *Id.* Thus, the operation of a non-discriminatory seniority system constituted an intervening cause which locked in plaintiff's reduced salary and benefits. The impact of such seniority system could not be subjected to liability unless the plaintiff proved that the system itself was intentionally discriminatory. *Id.* at 558-59; 42 U.S.C. Section 2000e-2(h)(703(h)).

The Plaintiffs in the case at bar do not argue that the pay and benefit scheme used by the Police Department (hereinafter "Department") was discriminatory. The Plaintiffs' Complaint focuses on the fact that pay and benefits are determined based upon length of employment [R1, Complaint, ¶9a-

d], and that because Plaintiffs were not given credit for their prior service, they did not receive the same treatment as Schulter. The Plaintiffs' theory of the case was rejected in *Evans* and should be by this Court because the pay and benefit scheme itself was not discriminatory. See *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983) (finding liability only because the plaintiffs challenged defendants' assignment and compensatory policy as being itself discriminatory).

Similarly in *Speer v. Mountaineer Gas Co.*, 2009 WL 2255512 (N.D.W.Va. 2009), the court held that the mere fact that a diminution in or termination of wages results from alleged discriminatory practices did not bring those claims within the scope of the Fair Pay Act. *Id.*, slip op. at 7 & n.6. The court in Speer reasoned that:

> Speer does not allege that he was paid differently from others doing the same work because of his age. Rather, he asserts that Mountaineer Gas refused to return him to an M&R job because of his age. This is a discrete act. Similarly, Speer does not allege that he received lower payments of LTD benefits than others because of his age, but rather that the decisions to terminate his LTD benefits were because of his age. This, too is a discrete discriminatory act. *Id.*, slip op. at 7 & n.6.

Accordingly, the court ruled that the plaintiff's age discrimination claims were untimely.

The same can be said for the case at bar. The Plaintiffs do not allege that they are being paid differently because of their race. Rather, the Plaintiffs complain that the ordinance passed by the City Council prevents them from receiving the same seniority rights for the calculation of benefits and pay as Schulter. This is an alleged discrete discriminatory act. Further, the Plaintiffs

do not allege they received less seniority or benefits than Schulter because of their race, but rather because of the ordinance passed by the City Council. This is an alleged discrete discriminatory act as well. However, discrete discriminatory acts are immediately actionable unlawful employment practices which are not subject to the continuing violation theory. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). Discrete discriminatory acts generally relate to an individual's "compensation, terms, conditions, or privileges of employment." See *Id.* at 111-114. The passage of the ordinance that triggered the alleged discrete discriminatory act does not constitute a discriminatory compensation action and the Fair Pay Act does not apply in this case.

E. THE RIGHT TO SUE LETTER DID NOT PREVENT THE PLAINTIFFS FROM BRINGING THEIR CLAIMS IN STATE COURT

The Plaintiffs argue that the District Court was mistaken in dismissing their claims for damages prior to the state court judgment under the *res judicata* doctrine because they could not have asserted their Title VII claims in the state court proceedings since they had not received their right-to-sue letter. "The Seventh Circuit has addressed this precise issue and held that a plaintiff cannot rely upon the fact that he has not yet received a right-to-sue letter from the EEOC *to escape the effects of res judicata.*" *See Huon v. Johnson & Bell, Ltd.,* 2010 WL 3404967, (N.D.Ill. 2010) *citing Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995)(plaintiff awaiting right-to-sue letter from EEOC "could have delayed the filing of his first suit or requested that the

court postpone or stay the first case. What he cannot do, as he did here, is split causes of actions and use different theories of recovery as separate bases for multiple lawsuits."). Thus, the Plaintiffs cannot argue that they could not have brought their Title VII claims in state court because they had not received their right-to-sue letter.

As the court in *Brzotowski* pointed out, the Plaintiffs could have delayed the filing in state court or they could have stayed the proceedings in state court in order to obtain the right-to-sue letter. Additionally, the state court provided the Plaintiffs an adequate forum in which they could have brought their Title VII, Section 1983 and equal protection claims, though they choose not to do so.

CONCLUSION

Based on the foregoing, Defendant City of Springfield, Illinois, respectfully submits that the District Court correctly ruled that there is no genuine issue of material fact and, as a matter of law, the Defendant is entitled to judgment in its favor. Therefore, the Defendant respectfully requests that this Court affirm the decision of the District Court.

Respectfully Submitted,
City of Springfield, Illinois,
Defendant-Appellee

By: _____
Frank Martinez
Assistant Corporation Counsel
Attorney for Defendant-Appellee

City of Springfield
Office of Corporation Counsel
Room 313, Municipal Center East
800 E. Monroe Street

Springfield, Illinois 62701-1689
Telephone: (217) 789-2393
Fax: (217) 789-2397

Certificate of Compliance with F.R.A.P. Rule 32(a)(7)

1. This Brief complies with the requirements of Fed. R. App. P. 37(a)(7)(A) because it does not exceed 30 pages.

2. This Brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This Brief contains 5,842 words, including the parts of the Brief otherwise exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12 point Bookman Old Style.

Dated: October 19, 2010

City of Springfield, Illinois,
Defendant-Appellee

_____
Attorney for Defendant-Appellee

Circuit Rule 31(e) Certification

The full contents of the Appellees' Brief has been furnished to the Court in PDF format by uploading to the Court's website and a copy has been provided to counsel for Appellant via electronic mail.

Dated: October 19, 2010

City of Springfield, Illinois,
Defendant-Appellee

_____
Attorney for Defendant-Appellee

Proof of Service

The undersigned counsel for the Defendant-Appellee, City of Springfield, Illinois, certifies on October 19, 2010, two copies of the Brief of Appellee was served by placing said copies in a properly addressed envelope, postage fully prepaid, in U.S. Mail to:

James P. Baker
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, Illinois 62701

And 15 copies of the Brief were placed with the United States Post Office for delivery to:

Clerk of Court
United States Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

Dated: October 13, 2010

City of Springfield, Illinois,
Defendant-Appellee

_____
Attorney for Defendant-Appellee