

SAN FRANCISCO

Daily Journal

February 13, 2009

Lilly Ledbetter's Good Year

by D. Gregory Valenza

The Lilly Ledbetter Fair Pay Act of 2009 amends the statutes of limitations applicable to Title VII of the Civil Rights Act, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990 and the Rehabilitation Act of 1973. The law overturns the U.S. Supreme Court's 5-4 decision in *Ledbetter v. The Goodyear Tire and Rubber Company*, 550 U.S. 618 (2007). One of the first bills passed by the new Congress, President Obama signed it into law on Jan. 29.

The new law will make it possible for employees to assert claims of discrimination in compensation virtually without any time limit. Depending on how the statute is construed, it could affect other discrimination claims as well. As a result, employers not only will face increased discrimination claims, but also difficulty defending against them.

The Supreme Court's opinion arose out of claims by Lilly Ledbetter, an employee of The Goodyear Tire and Rubber Company. She worked at its Gadsden, Ala., plant from 1979 until 1998. Ledbetter filed a complaint with the Equal Employment Opportunity Commission in 1998. She alleged her supervisors gave her poor performance evaluations because of her sex in violation of Title VII of the Civil Rights Act of 1964 (as well as the federal Equal Pay Act). As a result, she claimed, her salary increases were lower than her male counterparts'.

But no allegedly discriminatory performance appraisals or other

discriminatory compensation *decisions* occurred within the 180-day limitations period applicable to Ledbetter's Title VII claim. The Supreme Court previously held the statute of limitations in Title VII cases begins to run when a discrete discriminatory act occurs, not when the claimant experiences the consequences (such as a pay disparity). The Supreme Court's majority therefore rejected Ledbetter's principal argument: that every paycheck was a continuation of the initial discriminatory decision, thereby making her claim timely.

In the court's view, because Ledbetter's Title VII claim alleged intentional discrimination, it was time-barred. The discriminatory decisions pre-dated her complaint by too long. Ledbetter abandoned her claim under the Equal Pay Act, which does not require proof of intent. The majority pointed out that she might have prevailed had she pressed her Equal Pay Act claim because that statute's limitations period is not triggered by an intentionally discriminatory decision.

Justice Ruth Bader Ginsburg, writing in dissent, argued the claim was timely, in keeping with the remedial purpose of Title VII. She likened Ledbetter's claim to sexual harassment cases, where a series of acts over time may constitute a timely, continuing violation. She pointed out that the Equal Pay Act applies only to sex-based compensation and would not protect employees alleging pay disparities on other protected bases. At the end of the opinion, she called on Congress to overturn the majority's decision.

The Lilly Ledbetter Fair Pay Act makes two important changes to the federal anti-discrimination laws. The act first specifies that an "unlawful employment practice" occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

Therefore, an aggrieved employee may timely file a discrimination complaint based on the receipt of a paycheck, lower vacation pay, bonuses or other benefits based on compensation, or just about anything else affected by the earlier decision.

In fact, at least for liability purposes, it apparently is enough to show that a discriminatory practice exists and that the employee is merely "subject[ed]" to it, without proof the employee is actually "affected" by it. Under the new law, it does not matter whether the payment itself was intentionally discriminatory, or whether the people administering pay knew of the earlier discriminatory decision.

The act's second principal provision clarifies that employees may recover back pay based on discriminatory pay practices for up to two years before the filing of the administrative complaint,

even if the harm during the applicable limitations period was based on just one paycheck. Therefore, the act does not authorize damages going back to the date of the decision.

The law applies not only to sex discrimination claims, but also to race, disability and all other bases prohibited by the amended statutes. The act is also retroactive to May 26, 2007, the date the court issued the Ledbetter opinion. Therefore, it apparently will revive claims pending as of that date.

The act's express intent was to overturn the *Ledbetter* decision relating to discriminatory compensation decisions. The act may sweep more broadly than that. The "unlawful employment practice" definition includes not only "compensation decisions" but also "other practice[s]." Does this mean that "disparate impact" claims are covered? Will old decisions affecting compensation, such as promotions, demotions and transfers, be actionable so long as the decision continues to "affect" the employee's pay in the present? Even the dissent in *Ledbetter* noted that such discrete acts are obvious and, therefore, different from a discriminatory wage-setting. It will be up to the courts to interpret what Congress intended by adding the term "other practice."

No exaggeration: The act will dramatically increase employment discrimination lawsuits based on compensation decisions and "other practices." Any decision affecting

compensation, made at *any time* during the employment relationship, is actionable, albeit only if the effects of that decision (impaired pay or benefits) carry forward within the limitations period.

Employers may find it hard to defend against such claims. Let's say an employee with 20 years' service is given a bad review in year three, resulting in a lower wage increase. If the employee's compensation is impaired by that decision throughout the employee's service, perpetuating that low raise, that old performance appraisal is now actionable. How will the employer demonstrate its 17-year-old appraisal was based on legitimate, non-discriminatory factors? Will witnesses to the employee's performance be available? Will the manager who reviewed the employee be alive, or remember the employee or the basis for the review? Will documentation supporting the review's conclusions be preserved for 17 years? Anyone? Bueller?

Not all decisions will be actionable years later. If a pay disparity is equalized at some point outside the limitations period, the case presumably will still be time barred. Also, as Ginsburg pointed out in her dissent, it is possible that an employer may raise a "laches" defense, arguing that the employee waited so long that she prejudiced the employer so much that equity should bar the claim. The act is silent on this issue, which courts will decide case by case.

The damages in these cases will be limited to two years' back pay. If the

pay disparity is small, that may result in low awards. But discrimination claims authorize damages for emotional distress, punitive damages and attorney fees. A 20-cent per hour pay disparity easily may result in a six-figure judgment.

Prevention is always the best way to avoid costly discrimination lawsuits. Some options for employers could include de-coupling performance appraisals from salary increases, awarding uniform wage increases and rewarding good performance with one-time bonuses that do not perpetuate decisions later found to be based on discrimination. Objective criteria for performance appraisals may help explain legitimate business reasons once memories fade and witnesses disappear.

Employers should review periodically employees' compensation to ensure not only those performing like work are compensated within a given range, but also that disparities are explained or eliminated. This act may result in full employment for compensation analysts and consultants.

Finally, as always, training supervisors and managers is key. Line managers and supervisors must learn the potentially costly consequences of the performance review process and their compensation recommendations. Human resources professionals must be ready to review compensation decisions early to ensure they are legitimate and can be defended years later if need be.

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