ON THE LEGAL FRONT

Ledbetter v. Goodyear Tire Co.: A Divided Supreme Court Causes Quite a Stir

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We briefly previewed *Ledbetter v. Goodyear Tire Co.* in the April 2007 *TIP*. The case was a disparate treatment claim made by a woman under Title VII, and the "employment decision" at the center of the case was pay. The case centered upon whether pay discrimination was a continuous phenomenon or a series of discrete discriminatory acts. The Supreme Court ruled on the case on May 29, 2007, and no matter which way the Court ruled, it was going to cause some controversy. If the Court ruled in favor of Lilly Ledbetter, organizations could potentially be held liable for discrimination that occurred in the long-forgotten past, potentially under different policies, procedures, and leadership. On the other hand, if the Court ruled in favor of Goodyear Tire, anyone protected by Title VII who recently discovered evidence of long-standing pay discrimination may not be "protected" for the full term of that discrimination. Additionally, as was the case with Lilly Ledbetter, these persons might not even be able to make a claim of discrimination under Title VII. Clearly, not everyone was going to be happy with the ruling. However, a 5 to 4 split ruling and a strongly worded dissenting opinion that essentially urged Congress to reverse the ruling was unexpected.

Justice Alito delivered the opinion of the majority and was joined by Justices Roberts, Scalia, Kennedy, and Thomas. Justice Ginsberg filed the dissenting opinion and was joined by Justices Stevens, Souter, and Breyer. If you read our last **On the Legal Front** column about *Parents v. Seattle School District*, this partition of justices should look familiar; essentially the same plurality[1] of justices that struck down the affirmative action plans in the *Parents case also ruled as a majority in favor of Goodyear Tire in the Ledbetter* case. We suggested that Justice Kennedy may represent the diversity and discrimination "swing vote" on the current Supreme Court; that appears to have been the case in both recent rulings.

[1] Roberts, Scalia, Alito, and Thomas were in agreement, but Kennedy was closer in agreement to this group than to the dissenting group of Justices Ginsberg, Stevens, Souter, and Breyer.

On its face, *Ledbetter* sounds like a simple challenge to the statute of limitations (i.e., the amount of time that an individual has to file a claim of discrimination) under Title VII, which reflects legislative preference for speedy resolution of employment discrimination claims. However, the Court was required to wrestle with what pay discrimination is under a disparate treatment theory of discrimination. To do this, the Court considered whether pay discrimination is more similar to discrete discriminatory employment events like promotion and termination, or whether pay discrimination is more similar to continuous discrimination commonly found in hostile environment harassment. The majority and dissenting opinions were strongly divided on this issue, with the majority treating pay discrimination as a discrete event that either happened or didn't happen during the statute of limitations. What makes *Ledbetter* one of the more interesting rulings for this Supreme Court is the dissenting opinion, which was combined with strong public and legislative reaction to the decision. Specifically, many civil rights groups considered the ruling a setback to equal employment opportunity, and the four dissenting Justices concluded that:

> Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.

At various points in U.S. history Congress has enacted law that essentially reversed Supreme Court rulings that missed the intention of equal employment opportunity law. For example, the Civil Rights Act (CRA) of 1991 was created in response to, among other things, the *Wards Cove Packing v. Atonio* and *Price Waterhouse v. Hopkins* Supreme Court rulings that ignored precedent in burden of proof standards for disparate impact and treatment claims (Gutman, 2000). Although CRA 1991 is probably most well known for adding legal relief and jury trials to Title VII, this act also "corrected" the burden of proof and psychometric requirements of disparate impact and treatment claims. We may be in the process of a similar legislative correction now, with proposed state and federal laws intended to reverse the *Ledbetter* ruling and treat pay discrimination as a continuous phenomenon similar to hostile environment harassment.

The Ruling

Lilly Ledbetter worked at the Goodyear Tire and Rubber from 1979 to 1998 and claimed that Goodyear paid her a lower salary than her male coworkers because she was a woman. A jury from the U.S. District Court of Northern Alabama found that Ledbetter was paid less than her male counterparts because of her sex. Importantly, the jury was allowed to consider *a series of discrete pay review decisions made at different times by different people over Ledbetter's long career* at Goodyear. The jury initially awarded her over $3.5 million in back pay, suffering, and punitive damages.

However, Goodyear appealed based on the notion that *no discriminatory act related to her pay had occurred 180 days before Ledbetter filed her Equal*

Employment Opportunity Commission (EEOC) questionnaire. Upon appeal, the Eleventh Circuit chose not to consider the entirety of Ledbetter's career in their decision. Instead, the Court held that, in cases where employers have a system for evaluating employee pay, Title VII's protection only extends to the last discrete act affecting pay before the start of the limitations period. That is to say, a claim under Title VII must stem from a specific discriminatory act, like a particular paycheck or a small raise. This ruling suggested that a discriminatory act has an expiration date of sorts, and if a claim isn't made after 180 days (or 300 in some states) then it cannot be made at all, regardless of whether a claimant was aware of discrimination or not. The Circuit Court reversed the jury verdict and dismissed the lawsuit.

Ledbetter submitted a questionnaire to the EEOC in March of 1998 and made a formal EEOC charge in July of 1998. After her November 1998 retirement, she filed her lawsuit asserting, among other things, a sex discrimination claim under Title VII of the Civil Rights Act of 1964. Ledbetter essentially argued that the paychecks received during the 180-day period and the absence of a raise in 1998 violated Title VII and triggered a new EEOC charging period. However, there was no evidence that these specific events in the relevant 180-day statute of limitations were intentionally discriminating. Recall that the original jury ruling in the District Court of Northern Alabama ruled based *on compelling evidence of intentional discrimination that occurred throughout Lilly Ledbetter's career at Goodyear, going back many years in the past.* Thus, Ledbetter identified (a) paychecks she received during the statute of limitations that would have been larger if she hadn't been discriminated against in the past and (b) denial of a raise as the discriminatory acts of interest in her case.[2] In their ruling, the majority treated this argument as follows:

> Current effects alone cannot breathe life into prior, uncharged discrimination. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory employment decision was made and communicated to her. Her attempt to shift forward the intent associated with prior discriminatory acts to the 1998 pay decision is unsound, for it would shift intent away from the act that consummated the discriminatory employment practice to a later act not performed with bias or discriminatory motive, imposing liability in the absence of the requisite intent.

The majority relied upon previous Supreme Court rulings to demonstrate that this precedent had already been set, with particular focus on *Bazemore v. Friday.* Specifically:

> Bazemore's rule is that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. It is not, as Ledbetter contends, a "paycheck

[2] Note that Ledbetter also made a claim under the Equal Pay Act (EPA), but that claim was dismissed by the District Court and thus was not considered by the Supreme Court at all.

accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted that paycheck's amount, no matter how long ago the discrimination occurred. (c) Ledbetter's "paycheck accrual rule" is also not supported by either analogies to the statutory regimes of the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938, or the National Labor Relations Act, or policy arguments for giving special treatment to pay claims….We have explained that this rule applies to any "[d]iscreteac[t]" of discrimination, including discrimination in "termination, failure to promote, denial of transfer, [and] refusal to hire.

The majority also referred to *United Air Lines, Inc. v. Evans* as another precedent that their ruling was consistent with, stating:

(In *United*) we rejected an argument that is basically the same as Ledbetter's. Evans was forced to resign because the airline refused to employ married flight attendants, but she did not file an EEOC charge regarding her termination. Some years later, the airline rehired her but treated her as a new employee for seniority purposes. Evans then sued, arguing that, while any suit based on the original discrimination was time barred, the airline's refusal to give her credit for her prior service gave "present effect to [its] past illegal act and thereby perpetuate[d] the consequences of forbidden discrimination….United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §706(d). A discriminatory act which is not made the basis for a timely charge…is merely an unfortunate event in history which has no present legal consequences.[3]

In categorizing pay discrimination as a discrete event and not a continuous phenomenon, the majority differentiated pay discrimination from hostile environment harassment. Similar to the Court's recent treatment of employer retaliation, the majority reasoned that hostile environment acts may not be actionable by themselves but, when aggregated, become so. In other words, a hostile work environment doesn't exist one day and not another but exists everyday because the actionable behavior is the environment itself and not a discrete act. Thus, the majority essentially ruled that pay discrimination happens only on the day of a check, raise, or promotion, and not on the day before or after those employer actions.

In contrast to the majority, the dissenting group of justices focused on *(a) the notion that the absence of pay information makes the recognition of pay discrimination somewhere between difficult and impossible, and (b) the inherent and daily aggregation affect that previous pay discrimination can have on lost*

[3] The Court also referred to *Delaware State College v. Ricks, Lorance v. AT&T Technologies, Inc*., and *National Railroad Passenger Corporation v. Morgan* as similar cases.

salary. The dissent argued that considering pay discrimination as similar to hostile environment harassment more accurately reflects the reality of the workplace, the phenomenon of the discrimination in question, and the purpose of Title VII: to stop discrimination in the workplace. Specifically, the dissent wrote:

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, …or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory.

Thus, the dissenting justices considered the notion that a worker knows immediately if they are hired, promoted, or fired because these are generally public events at work that become known to everyone. *In these cases, applicants or employees can immediately question that decision, formally request explanation, and consider whether they may be a victim of discrimination.* This is not the case with pay decisions, and the dissent also noted that Goodyear Tire kept salaries confidential.

The dissent also suggested that the majority view is inconsistent with both legislative purpose and the enforcement landscape. With regard to Congress, the dissent pointed to Title VII's back pay provision, which ensures that back pay may be awarded for a period of up to 2 years before the discrimination charge is filed. Concerning the enforcement landscape, the dissent specifically referred to the EEOC compliance manual, which states:

> Repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period.

In summary, the majority and dissenting justices disagreed on the definition of pay discrimination and, as such, disagreed about whether enforcing a statute of limitations is appropriate. If pay discrimination is continuous, each and every paycheck after an initial discriminatory act represents a lower salary as compared to what a salary would have been without discrimination. Although this treatment may mirror the reality of pay discrimination, it may be difficult to impossible for employers to defend against allegedly discriminatory pay decisions made years earlier under different performance appraisal, promotion, and compensation systems. Again, we knew that one side of the room was going to be upset by the ruling, and that side ended up including Lilly Ledbetter, other victims of long standing pay discrimination, and

various civil rights groups. Additionally, the ruling has some interesting implications for the enforcement of pay discrimination by both the EEOC and Office of Federal Contract Compliance Programs (OFCCP).

EEOC and OFCCP Enforcement

The *Ledbetter* ruling may have some interesting implications for the EEOC and its claim-based pay discrimination policies. Essentially, under Title VII the statute of limitations differentiates viable claims from unviable claims based on how soon after the alleged discrimination those claims were made. Pay discrimination claims made under other statutes like the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) have the same statute of limitations as Title VII, so essentially the same rules apply to these statutes as well.

Of course, it will be interesting to see how the EEOC "formally" reacts to the *Ledbetter* decision, particularly because the ruling is in direct contrast to language from the EEOC's own compliance manual. Perhaps the EEOC will have stronger reason to investigate pay disparities regardless of whether an original claim specifically identified pay as a condition of employment, particularly because compensation information is usually unknown. Although pay discrimination is often considered in pattern or practice claims where a class is being discriminated against via an assortment of policies and procedures, perhaps the *Ledbetter* ruling will give the EEOC even more freedom to consider pay discrimination if there is evidence of discrimination in other employment decisions.

Additionally, Title VII may no longer be the "preferred" statute for pay discrimination claims. That is to say, in some cases it may make more sense for a claimant to file pay discrimination claims under the Equal Pay Act (EPA) instead of Title VII. The financial awards are generally smaller under the EPA as compared with Title VII, which is obviously a deterrent. However, the EPA has the same statute of limitations as the Fair Labor Standards Act (FLSA), where the time limit to file a claim is generally 2 years and, in the case of willful violations, 3 years. Additionally, this statute of limitations renews at each discriminatory paycheck, as noted by a footnote in the dissenting opinion in *Ledbetter*. In theory, claims ineligible for Title VII consideration may find a home under EPA because of the longer statute of limitations and its renewal policy.

It is worth noting that claims under the EPA have decreased substantially in the last decade, most likely because Title VII was more attractive for (a) individual pay claims because of financial awards and (b) pay claims combined with claims of discrimination in other employment decisions (e.g., hiring, promotion, etc.). It will be interesting to see if filing claims of potentially long-standing pay discrimination under the EPA will become a reactive strategy to the *Ledbetter* ruling. Of course this is speculation.

The *Ledbetter* ruling also has potential implications for the OFCCP, which enforces affirmative action for federal contractors under Executive

Order (EO) 11246. As part of their federal contractor audit strategy, the OFCCP usually reviews compensation data in addition to data on hires, promotions, and terminations. In fact, in 2006 the OFCCP published New Systemic Compensation Discrimination Standards and Voluntary Guidelines for Compensation Self-Evaluation, which are intended to help remedy compensation discrimination under a pattern and practice theory of disparate treatment. Generally, the enforcement of EO 11246 is intended to capture discrimination at a single point in time and often includes analyses of 1–2 years of personnel data. For some federal contractors, a disparate treatment approach to years of compensation data seems to be exactly what the majority in *Ledbetter* rejected.

The OFCCP eventually concluded that there is nothing in the *Ledbetter* decision that would require changes to their standards of EO 11246 enforcement. Specifically, the OFCCP differentiated an individual claim of pay discrimination from an evaluation of a contractors' entire pay system, which they consider a "class" analysis. Additionally, the OFCCP referenced the flexible nature of EO 11246 as another reason why the *Ledbetter* ruling does not affect their audit policy. Although EO 11246 is designed to mirror Title VII in terms of the terms and conditions of employment, the nature of the executive order allows for more flexibility in investigation. In other words, the OFCCP can extend time period for filing complaints and enacting an audit for "good cause shown" (referenced as 41 CFR 60-1.21). Section 201 of Executive Order 11246 states:

> The Secretary of Labor shall be responsible for the administration and enforcement of…this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes…of this Order.

This notion has been further supported by the Supreme Court ruling in *Lawrence Aviation Industries v. Herman*, which stated:

> If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above.

In other words, there is no time limit on the initiation of administrative enforcement proceedings under the executive order. Interestingly, some federal contractors chose to take a literal interpretation of the *Ledbetter* ruling as it relates to EO 11246. At a conference a few months after the *Ledbetter* ruling, employees from the OFCCP mentioned that there is currently one feder-

al contractor that has refused to provide compensation data to OFCCP, citing the *Ledbetter* decision. The OFCCP warned that contractors who refuse to provide such data will find themselves in court immediately. Of course, all of these implications for the EEOC and OFCCP might be moot if the ruling is eventually reversed by Congress.

The Ball Is in the Legislature's Court

Apparently Congress took the dissent's call for a legislative reversal of the ruling to heart. A bill to reverse the ruling was passed in the House of Representatives on July 31, 2007 by a 225 to 199 vote. As of the writing of this column, a companion bill is scheduled to be voted on by the Senate in late 2007/early 2008. The house bill, known as the "Ledbetter Fair Pay Act of 2007" (H.R. 2831), would essentially amend Title VII, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973. The bill is intended to:

> Clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes. An unlawful employment practice occurs with respect to compensation discrimination 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.

One interesting phrase used to describe employment outcomes throughout the proposed bill is "compensation decision or other practice." If "other practices" refer to discrete employment events related to compensation like promotion, performance appraisal, and so forth, this bill could in theory remove the statute of limitations for more than just compensation discrimination. It will be interesting to see if this language changes.

A similar bill, AB 437, was passed in the California State Senate on September 11, 2007. This bill was also in direct response to the *Ledbetter* ruling and clarifies that the time period for alleging pay discrimination claims runs from the date of each payment where there is a discriminatory wage. Given the "more stringent" stance on employment discrimination enforcement in California, it isn't surprising that it was the first state to introduce its own version of legislation intended to reverse the *Ledbetter* ruling. Perhaps the more interesting question is whether it will be the only state to do so.

Interestingly, the Bush administration has indicated that the bill will be vetoed if passed by the Senate, as set forth in a Statement of Administration Policy[4]:

[4] http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf

The Administration strongly opposes the Ledbetter Fair Pay Act of 2007. H.R. 2831 would allow employees to bring a claim of pay or other employment-related discrimination years or even decades after the alleged discrimination occurred. H.R. 2831 constitutes a major change in, and expanded application of, employment discrimination law. The change would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved. Moreover, the bill far exceeds the stated purpose of undoing the Court's decision in *Ledbetter* by extending the expanded statute of limitations to any "other practice" that remotely affects an individual's wages, benefits, or other compensation in the future. This could effectively waive the statute of limitations for a wide variety of claims (such as promotion and arguably even termination decisions) traditionally regarded as actionable only when they occur.

Conclusion

For the reasons described above, the *Ledbetter* ruling has caused quite a stir. This is another ruling that divided the Supreme Court justices and produced majority and dissenting opinions that couldn't be more opposite. Given the current makeup of the Court, this division may become a trend in cases related to diversity and discrimination. Clearly the Supreme Court is wrestling with an important issue in trying to operationalize what pay discrimination is. The Court is also wrestling with whether current law is consistent with the purpose of equal employment opportunity law, which is obviously a complex and multifaceted question that will influence the employment discrimination enforcement context that we all work in. In this case, the ball has ended up in the court of Congress, where a larger sample of decision makers has the opportunity to decide what equal employment opportunity law should and should not cover.

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