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D.C. Circuit Holds Failure-to-Promote Claim Is Not Revived by the Ledbetter Act

Since the passage of the Lilly Ledbetter Fair Pay Act of 2009 (“Ledbetter Act”), plaintiffs’ counsel have attempted to resurrect claims previously considered time-barred, forcing employers to defend against claims of discriminatory compensation under Title VII (gender, race, etc.) and the ADEA (age) where the discriminatory decision had been made years ago. Although courts are still trying to determine the scope of the Ledbetter Act, a recent D.C. Circuit opinion appears to allow for a more narrow reading of the Ledbetter Act than anticipated.

The Ledbetter Case and Act

The U.S. Supreme Court decided the controversial *Lilly Ledbetter v. Goodyear Tire & Rubber Co.* case in 2007. The Court determined that a claim for compensation discrimination is untimely if the discriminatory decision occurred outside of the charging period even if the effects of the decision arise during that period. In *Ledbetter*, a female employee alleged that she was given lower performance ratings because of her gender and that as a result of those ratings, she had a lower salary than her colleagues. The Supreme Court found that her claims were untimely because the performance evaluations were made outside of the charging period.

In 2009, Congress overturned the Supreme Court’s decision by enacting legislation, the Ledbetter Act, expanding the time frame for employees to bring compensation discrimination claims against their employers, whether based on sex, race, age or disability. Under the Ledbetter Act, 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 the application of a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. Effectively, the Ledbetter Act adopted the “paycheck rule” under which the time limit for filing pay discrimination claims begins to run anew each time an employee receives a paycheck in which the discriminatory decision is manifested.

The scope of the Ledbetter Act is currently being battled out in the courts, which are attempting to determine exactly how broad Congress intended the phrase “discriminatory compensation decision or other practice” to be.

D.C. Circuit Opinion

Early last week, the federal Court of Appeals for the D.C. Circuit issued its opinion in *Schuler v. PricewaterhouseCoopers, LLP*. The court determined that the Ledbetter Act could not revive a claim of discrimination under the ADEA where the plaintiff alleged that his employer had discriminated against him in a “compensation decision or other practice” by not promoting him to partner because of his age. The court made two important decisions. First, the court found that a failure-to-promote claim **is not** a claim of “discrimination in compensation.” Analyzing case law under both Title VII and the ADEA, the court stated “the phrase ‘discrimination in compensation’ means paying different wages or providing different benefits to similarly situated employees,” not promoting one employee over another to a more remunerative position.

Second, a decision to promote one employee but not another to a higher paying position, which is actionable despite any effect on an employee’s compensation, **is not** a “compensation decision or other practice” under the Ledbetter Act. The court found support for its determination in case law as well as the Congressional intent behind the Ledbetter Act. The court stated, “[t]hat the Congress drafted and passed the [Ledbetter Act] specifically in order to overturn *Ledbetter* strongly suggests the statute is directed at the specific type of discrimination involved in that case and not to other unspecified types of discrimination in employment.” Thus, as in the *Ledbetter* case itself, an example of a discriminatory “other practice” under the Ledbetter Act would be giving an employee a poor performance evaluation based upon an unlawful criterion and then using the evaluation to determine the employee’s rate of pay.

Although other Circuit Courts have not yet weighed in, there are a number of lower court opinions on whether a failure to promote claim is covered by the Ledbetter Act, and some federal courts have taken a more expansive view of the statute. Many U.S. District Courts approach the issue of whether the Ledbetter Act will

revive a claim by looking at whether the plaintiff has alleged a “discrete action” or the ongoing effects of a decision. For example, if a plaintiff alleges that an employer discriminated against him in not promoting him, the “discrete action” of not promoting the employee would not be saved from the statute of limitations by the Ledbetter Act. Conversely, some lower courts have found that if the plaintiff claims the discriminatory decision not to promote him has led to discriminatory pay, then the action may no longer be time-barred under the Ledbetter Act as long as the employee continued to receive paychecks that were too low.

The types of decisions covered under the Ledbetter Act as a “discriminatory compensation decision or other practice” remains an open and contested issue. Although the decision of the D.C. Circuit is an important step in the direction affording finality to some employment decisions and clarifying allowable claims, the issue is one that requires continued monitoring by employers in the hope that other circuits will follow suit.

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