THE UNITED STATES SUPREME COURT LIMITS EMPLOYERS' EXPOSURE FOR DISCRIMINATORY PAY CLAIMS BY REQUIRING TIMELY CHALLENGE TO PERIODIC PAY DECISIONS

by M. Trevor Lyons

On May 29, 2007, the United States Supreme Court announced its decision (5-4) in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[1] limiting the potential liability of employers for pay discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII).[2] Specifically, the Court held that decisions made at the time of an employer's periodic salary treatment are discrete acts triggering Title VII's administrative charge filing deadline at the time they are made. Therefore, employees can no longer sue their employers for the lingering effects of pay decisions made long before the relevant limitations period by asserting that the receipt of subsequent paychecks is a continuing violation that breathes life into the otherwise time-barred pay decision. Moreover, because New Jersey's Supreme Court has previously indicated that it will apply federal precedent in this area, there is a strong likelihood this decision will bar similar claims brought under New Jersey's Law Against Discrimination (LAD).[3]

Lilly Ledbetter's Claim

Lilly Ledbetter worked for Goodyear Tire and Rubber Company at its Alabama plant from 1979 until 1998, serving most of that time as an area manager. Although she admitted she was initially brought on at the same pay as her male colleagues, she asserted that over the years she was progressively paid less than men in the same position, and that by 1997 her male colleagues were paid 15 to 40 percent more than she received. Ledbetter filled out an Equal Employment Opportunity Commission (EEOC) questionnaire in March 1998, and filed a formal charge of sex discrimination four months later. She took early retirement later that year to avoid being laid off, and sued Goodyear in federal court in Nov. 1999, under both Title VII and the Equal Pay Act.[4]

Importantly, Ledbetter presented no evidence that Goodyear's treatment of her during the requisite limitations or charging period—180 days prior to her filing of an EEOC charge in July 1998—was motivated by a discriminatory *animus*. The evidence did show that in her last two years of employment, Ledbetter was in a job slated for layoff, and, consistent with Goodyear's policy, did not receive any raises during that time period. Given Goodyear's incontrovertible evidence that this policy had been uniformly applied to male and female employees, Ledbetter admitted that sex was not a motivating factor in the decision not to grant her raises during that time period.

Instead, Ledbetter advanced the position that her receipt of lower paychecks during the applicable limitations or charging period gave present effect to discriminatory conduct that happened outside of that period, and, thus, she had a timely Title VII salary-based gender discrimination claim. She alleged that poor evaluations by her supervisors based on her gender constituted the discriminatory conduct that occurred outside of the limitations period. Ledbetter argued that as a result of the past poor performance reviews her pay was not increased as it would have been if she had been evaluated fairly, and that such past pay decisions continued to affect the amount of her pay throughout her employment, including during the relevant limitations period.

The U.S. District Court for the Northern District of Alabama granted summary judgment to Goodyear on Ledbetter's Equal Pay Act claim, but allowed her Title VII claim to go to trial. Most importantly, the district court allowed Ledbetter to present evidence of sex discrimination in pay throughout her entire 19-year Goodyear career. A jury subsequently found in Ledbetter's favor.

Goodyear appealed, and the 11th Circuit overturned the verdict, finding that the operative act of discrimination is the decision about what to pay the employee, not the act of issuing paychecks. The appeals court looked only at Goodyear's 1997 and 1998 decisions not to grant Ledbetter a pay raise (the pay determinations that occurred during the limitations or charging period), and found no evidence of sex discrimination. To resolve a circuit split on this issue, the United States Supreme Court granted *certiorari* in 2006.

The Supreme Court's Decision

The specific question reviewed by the Supreme Court was:

> Whether 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 limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside of limitations period?[5]

In answering that question, the Supreme Court agreed with the 11th Circuit's decision. Specifically, Justice Samuel A. Alito Jr., writing for the majority, found Ledbetter's arguments that the paychecks she received during the charging period and the denial of a raise in 1998 violated Title VII and triggered a new EEOC charging period failed because those arguments would require the Court, in effect, to jettison the defining element of the disparate-treatment claim, discriminatory intent. He stated:

> However, Ledbetter does not assert that the relevant Goodyear decision makers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period. Similarly, she maintains that the 1998 decision was unlawful because it "carried forward" the effects of prior, uncharged discrimination decisions. In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. This argument is squarely foreclosed by our precedents.[6]

Justice Alito then exhaustively examined Supreme Court precedent, including *United Air Lines, Inc.* v. *Evans,*[7] *Delaware State College* v. *Ricks,*[8] *Lorance* v. *AT&T Technologies, Inc.,*[9] and *National Railroad Passenger Corporation* v. *Morgan,*[10] and explained that each of these cases clearly instructed that the EEOC charging period is triggered when a discrete unlawful practice takes place, but that a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that simply reflect the adverse effects resulting from the past discrimination. Simply put, the Court found that the effects of untimely discrimination were of "no present legal consequences."[11]

The Court also went to great pains to find that its prior decision in *Bazemore v. Friday*[12] did not require a different result, and to distinguish that case. Specifically, the majority opinion rejected Ledbetter's, and the EEOC's, interpretation of *Bazemore* as creating a "paycheck accrual rule," under which each new paycheck impacted by a past discriminatory pay decision triggered a new charging period. Instead, Justice Alito read *Bazemore* to create a new charging period only when an employer actually applies a discriminatory pay structure within the 180-day charge filing period. The Court essentially reconciled its current decision with *Bazemore* by distinguishing between the continued application of a facially discriminatory pay policy (which triggers a new charging period) and the nondiscriminatory application of a facially neutral policy regarding pay raises (which does not trigger a new charging period, even if the employee's existing pay rate is lower because of a past discriminatory decision outside of the charging period). It then found that Ledbetter had not offered any evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of gender, or that it later applied this system to her within the charging period with any discriminatory *animus*.

Finally, the majority emphasized the importance of statutory time limitations in protecting employers from having to defend allegations of intentional discrimination based on conduct that allegedly occurred many years before. Justice Alito stated that in disparate pay cases, "the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time..."[13] He concluded by further asserting that "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened."[14]

Justice Ginsberg's Dissent

Justice Ruth Bader Ginsburg authored the dissent, which was joined by Justices John Paul Stevens, David Souter and Stephen Breyer. Justice Ginsburg argued that the unlawful practice under Title VII is the "current payment of salaries infected by gender-based (or race-based) discrimination," even if the "infection" occurred long before the plaintiff filed a charge.[15] Justice Ginsburg's most strenuous point, however, was that the majority was ignoring the realities of the workplace and of wage discrimination. Specifically, she argued that pay claims should be considered different from other forms of disparate treatment because it is often difficult for an employee to discover that he or she is receiving unequal pay. Justice Ginsberg concluded her opinion by referencing the fact that the Legislature had previously overturned Supreme Court precedent in passing the Civil Rights Act of 1991. She invited Congress to take similar legislative action to address the holding in this case.

New Jersey's Law Against Discrimination

Initially, the most direct result of the *Ledbetter* decision was that the general holding in *Cardenas v. Massey,*[16] that "in a Title VII case claiming discriminatory pay the receipt of each paycheck is a continuing violation," was no longer good law. Equally important, however, is the fact that in *Shepherd v. Hunterdon Dev. Ctr.,*[17] and *Mancini v. Twp. Of Teaneck,*[18] New Jersey's Supreme Court cited to and adopted the analytical framework first articulated in *National Railroad Passenger Corp. v. Morgan,*[19] when evaluating a claim bought under the LAD. Specifically, Justice Peter G. Verniero relied upon *Morgan's* distinction between discrete act discrimination and cases in which only an entire series of activities combined can represent discriminatory conduct such as sexual harassment cases, in deciding whether to permit the application of the continuing violation doctrine in each of those types of cases.

Given that the distinction between discrete act and serial discrimination first articulated in *Morgan* was at the core of the decision in *Ledbetter*, it is likely that New Jersey's Supreme Court would apply *Morgan's* and *Ledbetter's* analytical framework when evaluating a discriminatory pay claim brought under the LAD. Accordingly, *Ledbetter* may substantially limit a New Jersey employer's potential exposure for disparate pay claims brought under the LAD, as well. ■

Endnotes

1. Case number 05-10754.
2. 42 U.S.C. § 2000e.
3. N.J.S.A. 10:5-1 *et seq.*
4. 29 U.S.C. § 206(d).
5. *Ledbetter*, 05-1074 at 3.
6. *Id.* at 5 (internal citations omitted).
7. 431 U.S. 553 (1977).
8. 449 U.S. 250 (1980).
9. 490 U.S. 900 (1989).
10. 536 U.S. 101 (2002).
11. *Ledbetter*, 05-1074 at 9.
12. 478 U.S. 385 (1986).
13. *Ledbetter*, 05-1074 at 12.
14. *Id.*
15. *Id.*, dissent at 8.
16. 269 F.3d 251, 258 (3rd Cir. 2001).
17. 174 N.J. 1, 23 (2002).
18. 179 N.J. 425, 432 (2004).
19. 536 U.S. 101 (2002).

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