I. Lilly Ledbetter Fair Pay Act

A. Overview

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009, 2009 Pub.L. No. 111-2, § 6, 123 Stat. 5 (2009) (“Ledbetter Act” or “the Act”). The Ledbetter Act was designed to reverse the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). Ledbetter uprooted years of Title VII jurisprudence and held that the limitations period for a charge of pay discrimination begins to run from the date of the underlying discriminatory decision, and that subsequent unequal paychecks do not constitute new violations so as to commence a new charging period.

In pertinent part, the Ledbetter Act states:

[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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, the Ledbetter Act provides that each unequal paycheck stemming from a discriminatory pay decision is a new violation that restarts the statute of limitations for challenging that underlying decision. As a result of the Ledbetter Act, employers may now be liable for long-past discriminatory decisions if an employee continues to receive discriminatory pay checks stemming from that decision. Furthermore, the Ledbetter Act explicitly allows up to two years' backpay for pay discrimination that is "similar or related to" the unlawful pay discrimination that occurred within the charging period. Id. at § 3.

B. Interaction with State Law


II. Application of the Ledbetter Fair Pay Act

A. General Application

The Ledbetter Act has only recently begun to be interpreted by the courts. Many courts applying Ledbetter have simply permitted pay discrimination claims to go forward that would otherwise have been ruled untimely under the Supreme Court’s decision in Goodyear. See e.g., Hester v. North Alabama Center for Educational Excellence, 353 Fed. App’x. 242, 243-44 (11th Cir. 2009); Haase v. Gov’t of the Virgin Islands, No. 02-110, 2009 WL 3855888, at * 5 (Nov. 17, 2009); Grant v. Pathmark Stores, Inc., No. 06 Civ. 5755(JGK), 2009 WL 2263795, at * 9 (S.D.N.Y. July 29, 2009); Vuong v. New York Life Ins. Co., 03 Civ. 1075(TPG), 2009 WL 306391, at * 9 (S.D.N.Y. Feb. 6, 2009); Bush v. Orange County Corr. Dep’t, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009). However, some early cases suggest that its application may not be as easy as expected. Courts have recently started to contend with the more difficult question of what actions other than straightforward discriminatory pay determinations constitute a “discriminatory compensation decision or other practice” under the Act.

B. Scope of the Ledbetter Act

Ledbetter decision with respect to the timeliness of discriminatory compensation claims.... The rule set out in Ledbetter and prior cases [i.e., Morgan ] – that ‘current effects alone cannot breathe new life into prior uncharged discrimination’ – is still binding law for Title VII disparate treatment cases involving discrete acts other than pay.”); see also Rowland v. Certainteed Corp., No. 08-3671, 2009 WL 1444413, at *1 (E.D. Pa. May 21, 2009); Arters v. Univision Radio Broad. TX, L.P., 3:07-CV-0957-D, 2009 WL 1313285, at * 6 (N.D. Tex. May 12, 2009) (rejecting application of the Ledbetter Act where plaintiff did not explicitly plead compensation related claim).

A number of district courts have specifically distinguished failure to promote claims from compensation claims and have held that, even after the enactment of the Ledbetter Act, failure to promote claims are still time-barred if the plaintiff does not file a timely EEOC charge within the required number of days from the complained-of discriminatory action. See Ekweani v. Ameriprise Fin., Inc., No. CV-08-01101, 2010 WL 749648, at * (D. Ariz. Mar. 3, 2010) (failure to promote claims are not “discrimination in compensation” and thus the Ledbetter Act does not apply); Vuong v. New York Life Ins. Co., No. 03-cv-1074, 2009 WL 306391, at *7-9 (S.D.N.Y. Feb. 6, 2009) (holding that, while the plaintiff’s Title VII compensation claims were resurrected by the Ledbetter Act, his failure to promote claims were not); Grant v. Pathmark Stores, Inc., No. 06-Civ-5755, 2009 WL 2263759, at *7-9 (S.D.N.Y. July 29, 2009) (failure to promote claims not timely); Rowland v. Certainteed Corp., et al, No. 08-3671, 2009 WL 1444413, at *6 (E.D. Pa. May 21, 2009) (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) and holding that, since the plaintiff’s failure to promote claims were not ultimately related to compensation issues, their timeliness was unaffected by the Ledbetter Act); see also Richards v. Johnson & Johnson, No. 05-cv-3663, 2009 WL 1562952, at *9 (D.N.J. June 2, 2009); Harris v. Auxilium Pharm., Inc., No. 4:07-cv-3938, 2009 WL 3157275, at * 31 (S.D. Tex., Sept. 28, 2009) (holding that the promotions in question were “discrete acts” that the plaintiff knew about and could have identified as discriminatory within the 300 day filing period and finding that 300 day statute of limitations applied to plaintiff’s failure to promote claims).

Other courts have interpreted the Ledbetter Act more broadly and found that promotion denials and demotions that would otherwise be deemed to be time-barred may in some cases violate the Act because the decisions are tied to the plaintiff’s compensation. See, e.g., Moore v. Napolitano, No. 07-2666, 2009 WL 4723169, at * 10 (E.D. La. Dec. 9, 2009) (finding a denial of upgrade in pay classification claim timely under Ledbetter Act); Rehman v. State Univ. of New York at Stony Brook, 596 F. Supp. 2d 643, 651 (E.D.N.Y. 2009) (finding a tenure denial timely under the Ledbetter Act); Shockley v. Minner, No. 06-478 JF, 2009 WL 866792, *1 (D. Del. March 31, 2009) (finding a failure to promote claim timely); Bush v. Orange County Corr. Dept., 597 F. Supp. 2d 1293, 1295 (M.D. Fla. 2009) (complaint about demotions and pay reductions that occurred sixteen years before EEOC charge [were] no longer administratively barred following passage of the Ledbetter Act); Gertskis v. New York City Dept. of Health and Mental Hygiene, No. 07 Civ. 2235 (TPG), 2009 WL 812263, at *4 (S.D.N.Y. March 26, 2009) (holding that that "the crux of plaintiff's claims is that she received inadequate compensation after [the defendant’s] repeated and alleged discriminatory failure to promote her to the Associate Chemist position."); Gentry v. Jackson State Univ., 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009) (denial of tenure to a university professor, which resulted in her not receiving a salary increase, qualified as a “compensation decision” or “other practice” affecting her compensation).
Thus far, there has only been one Supreme Court decision and a couple of United States Court of Appeals decision construing Ledbetter. In AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009), the Supreme Court considered the application of the Ledbetter Act to allegations of sexually discriminatory calculation of pension benefits. The plaintiffs alleged that they suffered from a discriminatory lower rate of accrual of benefits during pregnancy leave as compared to other medical leaves. Plaintiffs 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 held that because the discriminatory conduct had occurred prior to the passage of the Pregnancy Discrimination Act, AT&T had subsequently eliminated the disparity in accrual rate, and the benefit calculation rule was a part of a bona fide seniority system under Title VII, the plaintiffs suffered no discrimination. Despite the continuing impact on plaintiffs’ pension from the lower rates they received during maternity leave, the Supreme Court held that the Ledbetter Act did not apply since there was no discriminatory conduct at issue.

In Mikula v. Allegheny County of PA, No. 07-4023, 2009 WL 2889742 (3d Cir. Sept. 10, 2009), the Third Circuit considered the question of how broadly to construe a “compensation decision” under the Ledbetter Act.

Prior to the Ledbetter Act, the district court dismissed Mikula's claim as untimely, holding that the relevant unlawful practice occurred in 2001, when Mikula was first hired at a lower salary than her male comparator. While her appeal was pending, Congress passed the Ledbetter Act and made it retroactive to cases pending on or after May 28, 2007, when the Ledbetter decision was issued. Initially, a panel of Third Circuit judges affirmed the district court's dismissal of the Title VII claim, holding that an August 2006 letter from county officials rejecting her request for a raise, which was sent within 300 days of when Mikula filed her charge of discrimination, was not a "compensation decision or other practice" under the Act.

On rehearing, the same Third Circuit panel issued a revised opinion, and reversed the district court’s dismissal of Mikula's Title VII claim. In its second decision, the Third Circuit held that an employer's refusal to answer a request for a raise has the same result as an outright denial and was therefore a “compensation decision” within the meaning of the Ledbetter Act.

The result in this case is consistent with the Congressional goals that led to passage of the Ledbetter Act. However, on closer inspection, the Third Circuit seems to have misinterpreted the essential meaning of the Act. By rooting the viability of Mikula's claim in the county's refusal to respond to her requests for a raise, the court seems to require some additional employer practice or compensation decision aside from the initial decision – however old – to pay an employee less on the basis of sex. Her claim should still have been ruled timely simply because the paychecks she received after June 20, 2006 (300 days before she filed the charge) paid her less than her male counterpart.

Additionally, the court continued to treat a letter from the County in August 2006 which responded to Mikula's complaint about her compensation as outside of the "compensation
decisions" covered by the Ledbetter Act. The Court justified its decision by arguing that employers should not be penalized for responding to internal discrimination complaints.

More recently, a D.C. Circuit case declined to find that a failure to promote qualified as an “other practice” under the Ledbetter Act. See Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 374-75 (D.C. Cir. 2010). The plaintiffs alleged discrimination in violation of the Age Discrimination in Employment Act (“ADEA”) due to the Company’s denial of their promotions to partners, but they failed to file an EEOC charge within 300 days of the denial of partnership. Though the plaintiffs argued that their failure to attain partnership status within the Company resulted in significantly lower remuneration, the court held that “the phrase ‘discrimination in compensation’ means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position.” Id. at 374. The court further noted that it need not look further than the Act itself, and the case upon which it was predicated, to interpret the meaning of “other practice” as the specific type of discrimination that Lilly Ledbetter faced, such as giving an employee a poor performance evaluation based upon her sex and using that evaluation to determine her rate of pay. The court distinguished the failure to promote an employee to a higher paying position and concluded that it was not a claim of “discrimination in compensation.”

III. On the Horizon for Equal Pay

As courts iron out the application of the Ledbetter Act, Congress has recently been considering three other important pieces of legislation which, if passed, would have a significant impact on pay equity legislation.3

A. The Paycheck Fairness Act

The Paycheck Fairness Act (H.R.12 and S.182) was introduced in January 2009 by then-Senator Hillary Clinton and Congresswoman Rosa DeLauro. The bill is designed to strengthen the Equal Pay Act.

Under the Equal Pay Act, as currently enacted, an individual subject to wage discrimination must initially establish that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions. See 29 U.S.C. § 206(d). Even if the individual makes each of these showings, the defendant employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses – that the disputed pay disparity is the result of “(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.” Id.

The Paycheck Fairness Act narrows the Equal Pay Act’s very broad fourth affirmative defense which currently allows employers to defend against pay discrimination claims by arguing that their decision was based on a “factor other than sex.” Id. Employers have

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3 The National Women’s Law Center has excellent resources on pending equal pay legislation available at: http://www.nwlc.org/fairpay/paycheckfairness.html.
successfully defended against Equal Pay Act claims arguing that factors other than sex include market forces such as higher previous salaries and higher qualifications (without any analysis of whether those qualifications were necessary for the job). See e.g., Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697, n6 (7th Cir. 2006); Sparrock v. NYP Holdings, Inc, No. 06 Civ. 1776(SHS), 2008 WL 744733, *16 (S.D.N.Y. Mar. 4, 2008); Glunt v. GES Exposition Servs., Inc., 123 F. Supp. 2d 847, 859 (D. Md. 2000).

If passed, the Paycheck Fairness Act will allow employer practices which result in unequal pay to be evaluated on whether they actually serve a legitimate business purpose and whether there are comparable alternatives that will not result in gender-based pay disparities. The Act requires that the “factor other than sex” defense be based on a *bona fide* factor, such as education, training or experience that is not based upon or derived from a sex-based differential. See H.R. 182 § 111th Cong. 3(a). The “factor other than sex” must be job-related to the position in question and consistent with business necessity. Id. Finally, the defense will not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same business purpose without producing a pay differential and the employer has refused to adopt the alternative practice. Id.

In addition to strengthening protections for employees by limiting the “factor other than sex” defense, the Paycheck Fairness Act will strengthen the Equal Pay Act in several other important ways including the following:

- Allowing prevailing plaintiffs to recover compensatory and punitive damages. See H.R. 182 111th Cong. § 3 (c).
- Proposing voluntary guidelines to show employers how to evaluate jobs with the goal of eliminating unfair disparities. See H.R. 182 111th Cong. § 6.
- Barring retaliation against workers who disclose their wages to other employees. See H.R. 182 111th Cong. § 3 (b).
- Making it easier for plaintiffs to bring class action lawsuits by reversing the opt-in rule and providing that employees are automatically considered part of the class until they choose to opt out. See H.R. 182 111th Cong. § 3 (c).
- Allowing comparisons between or among employees in offices in the same county or similar political subdivision as well as between or among broader groups of offices in some commonsense circumstances. See H.R. 182 111th Cong. § 3 (a).
- Reinstating the collection of gender-based data in the Current Employment Statistics survey and setting standards for conducting systematic wage discrimination analyses by the agency that oversees the nondiscrimination and affirmative action obligations of federal contractors. See H.R. 182 111th Cong. § 9 (a, b).
- Directing implementation of the Equal Opportunity Survey, a vital tool for detecting wage and other types of discrimination. See H.R. 182 111th Cong. § 9 (b).
• Establishing a competitive grant program to develop training programs for women and girls on how to negotiate better compensation packages, and directing the Secretaries of Labor and Education to integrate negotiation training programs into education and job training programs under their respective jurisdictions. See H.R. 182 111th Cong. § 5 (a).

The Paycheck Fairness Act was passed by the House of Representatives on January 9, 2009. Action by the Senate is pending.

B. Fair Pay Act

The Fair Pay Act of 2009 (S. 904, H.R. 2151) is sponsored by Senator Tom Harkin (D-IA) and Delegate Eleanor Holmes Norton (D-DC). Although passage is highly unlikely in this Congress, the bill is remarkable in its scope and potential for addressing the pervasive problem of pay inequality. The legislation is designed to address wage discrimination against those who work in female-dominated or minority-dominated jobs by establishing equal pay for equivalent work. The bill also protects workers on the basis of race or national origin. S. 904 § 3(a). The Fair Pay Act makes exceptions for different wage rates based on seniority, merit, or quality of work and contains exemptions for small businesses. S. 904 111th Cong. § 3(b), 6 (b).

The Fair Pay Act proposes the following:

• Equalizing wages between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions. S. 904 111th Cong. § 3(a).

• Providing punitive and compensatory damages to victims of wage discrimination. S. 904 § 5. It also prohibits retaliation against employees who exercise their rights under the Act or who disclose their wages to other employees. S. 904 111th Cong. § 4.

• Requiring all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity. S. 904 111th Cong. § 6.

C. Equal Remedies Act

The Equal Remedies Act was introduced in the 110th Congress (S. 1928) by the late Senator Edward M. Kennedy. The Act eliminates the caps on compensatory and punitive damages for intentional discrimination claims under Title VII, thereby treating wage discrimination on the basis of sex, disability and religion the same as wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available under 42 U.S.C. § 1981. The Act has not been introduced in the current Congress.