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Employment Law

Two Views: The Death of the "Paycheck Rule" – Ledbetter v. Goodyear Tire & Rubber Co., Inc.

Editor's note: This is the third NH Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both New Hampshire fellows of the College of Labor and Employment Lawyers. The topic is the United States Supreme Court decision in Ledbetter v. Goodyear Tire and Rubber Co., Inc. issued May 25, 2007. In Ledbetter, the Supreme Court held that failure to complain about a discriminatory pay raise within 180 days (or 300 days in a deferral state which has a fair employment practices agency, like New Hampshire with the New Hampshire Commission for Human Rights) precluded any discrimination claim resulting from that pay raise, killing the "paycheck rule" which had been the law in many circuits and which had held that a new limitations period ran from each paycheck reflecting discrimination.

Debra: Nancy, why are you gloating? The employee lost big time. Big time.

Nancy: It's not a gloat; it's defiance, Deb. Justice Ruth Bader Ginsberg read her dissent out loud from the bench, lecturing to the five men on the court who wrote the majority opinion. In that dissent, the sole woman on the nation's highest court sounded the clarion call for a legislative fix and, presto, the call was quickly answered by Congress where the *"Lilly Ledbetter Fair Pay Act"* has already been introduced in the House and will have powerful co-sponsors in the Senate, including Senators Hillary Clinton, Barack Obama, Barbara Mikulski and Tom Harkin.

Debra: You don't think the President will veto it?

Nancy: Unlikely with the gender gap looming. In the meantime, many plaintiffs will have footnote 10 to keep them warm.

Debra: The decision's footnote 10 did allow employees some hope in some cases, but only those where there is a time gap between a discriminatory pay decision and actual knowledge of facts by which a reasonable person could conclude that discrimination occurred. Simply put, the Supreme Court punted on the "discovery rule" with which tort lawyers are so familiar:

Fn 10. We have previously declined to address whether Title VII suits are amenable to a discovery rule. National Railroad Passenger Corporation v. Morgan, 536 U. S. 101, 114, n. 7 (2002). Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.

Nancy: Assuming future plaintiffs plead correctly; footnote 10 can be used to neutralize *Ledbetter* in many cases, and my bet is that not even *this* Supreme Court is likely to undo the discovery rule when it does arrive up there.

Debra: Maybe. But I think that even with footnote 10, a bigger coup for employers is the death of the "paycheck accrual rule," the real basis of *Ledbetter*. The "paycheck rule" had been adopted in many circuits and held that a new statute of limitations began to run with each paycheck when issued, whether or not the employee had earlier knowledge of facts pointing to discriminatory pay. The employees could just sit on their rights until it was convenient for them to sue, because each paycheck brought a new violation. Ledbetter wasn't totally unexpected. Recall that *National Railroad Passenger Corporation v. Morgan*, (536 U.S. 101(2002)) made it clear that discrete acts of discrimination each have their own 180-day/300-day deadline and only harassment claims whose individual events do not rise to the level of illegal discrimination constitute "continuing violations."

Nancy: Yes, you're right. But, in my opinion, the now deceased "paycheck rule" was a recognized, additional type of continuing violation, but no more, until Lilly Ledbetter's Fair Pay Act becomes law. In the meantime, if there is some reason that the employee fails to take immediate action upon suspecting discrimination, she can be stuck with the consequences for the next 40 years of her career, even though each paycheck for her is smaller on the basis of gender (or race, or national origin, or religion, or handicap or age) and even as her lower pay scale impacts promotions and assignments, retirement rights and pension

rights. That's what the Lilly Ledbetter Fair Pay Act will fix. It will re-institute the "paycheck rule" under Title VII, and hopefully under the ADA and ADEA as well.

However, in the meantime, *Ledbetter's* effects are terrible for both employees and employers, but mostly employees. Basically *Ledbetter* requires a woman to file an EEOC complaint within 180/300 days of missing out on a raise or after an evaluation, or lose all remedies for its unknown future cumulative effects. That means employers will be dragged into many more formal proceedings than ever before.

Let's assume that the courts continue to acknowledge the discovery rule (for how could someone be expected to complain about something they can't know is discriminatory?). Until the Lilly Ledbetter Fair Pay Act becomes law, my advice to employees will be this: *Ledbetter* means you can't dilly-dally with any internal grievance or complaint procedure. Run and file with the HRC/EEOC immediately. Why? Because if you turn out to be mistaken that your poor evaluation or your small raise results from discrimination, your internal complaint to your boss can result in retaliation against you, without remedy, under Breeden (*Clark County Sch. Dist.v. Breeden*, 532 U.S. 268, 273-4 (2001)). So, more employees will file at the EEOC: an overburdened, under-funded agency which already turns away employees seeking to file discrimination claims, based on the opinion of an under-trained, private firm's intake worker under the EEOC's ill-advised National Contact Center experiment. Arghh!

Debra: Let's leave a critique of the EEOC and its hiring of private contractors for another day and look back at *Breeden*. It holds that an employee cannot expect protection from retaliation under Title VII if her internal complaint is not based on events that would suggest to a reasonable person that she is the victim of discrimination. In *Breeden*, the employee heard one sexist joke. She complained internally, and later complained that she had been punished and eventually transferred as a result. The Supreme Court held that the anti-retaliation provisions of Title VII did not protect her because she could not have reasonably believed that one joke constituted sexual harassment.

Nancy: *Breeden* gave employers the right to punish employees who resisted harassment with internal complaints. The fact that a woman can be punished for complaining about a disgusting sexist joke by two male colleagues is astounding. But relative to pay disparities, it creates one of two brackets that will force such employees to run to the EEOC, because the retaliation protections are better after you file with the EEOC/HRC (participation retaliation) compared to internal complaints (opposition retaliation). *Breeden* was limited to internal complaints. Unfortunately, it was not limited to harassment cases, and many federal courts, eager to kill cases on summary judgment, have imported its harsh standards to all other types of claims.

Anyway, *Ledbetter* plus *Breeden* mean that the EEOC and state deferral agencies, already overburdened and understaffed, will be deluged. This works against employees asking human resource departments for investigations before invoking the machinery of government agencies. A lot of junk will be filed because there will be no way to assess the claim at the employer level without setting the employee up for irremediable retaliation under *Breeden*. How can you prove that an employee's intuition about pay disparity is "founded," especially when many corporations make it a violation of company policy for employees to discuss wages with each other (although such rules likely violate the National Labor Relations Act in both non-union and union organizations)? Short of a salary transparency law requiring companies to post each employee's salary, how will a woman know that her paycheck is smaller than those of her male colleagues?

Debra: By complaining internally. Retaliation is unlawful, and I think employers are mindful of this cause of action.

Nancy: I strongly disagree that Title VII's anti-retaliation provision deters actual retaliation by employers. Most of the discrimination claims I have brought over the last 30 years for present employees end up with retaliation claims by the time the claims get to court, and by trial, the worker is an ex-employee, either via the employer's retaliatory termination or by other retaliatory actions, which cause constructive termination.

Debra: But why should an employee be able to sit on a claim for years (assuming actual knowledge or a good faith belief she had been the victim of discrimination on the basis of her salary)? The federal courts are unanimous in holding that fear of retaliation is no excuse for not making a timely complaint. Congress created protections from, and remedies for, retaliation.

Nancy: Let's take the important underlying facts of *Ledbetter*, which were not included in either the Supreme Court's opinion or the Eleventh Circuit's opinion.

Debra: You mean "allegations."

Nancy: Well, she won her jury trial, and Ms. Ledbetter made a pretty good witness at the recent Congressional hearings. She said that one of the supervisors who controlled her evaluations, and thus

her raises, told her she could improve her rankings by going to a motel with him. She refused. She went to the EEOC to complain about the rampant gender bias at Goodyear and was told by the EEOC that she needed to get another woman to sign a statement, and then, and only then, would the EEOC investigate. She went to the only other female supervisor, who was a single mom with a handicapped child who was afraid to sign on, so the claim went uninvestigated by the agency. Meanwhile, Ms. Ledbetter suffered retaliation from the "come with me to the motel" supervisor. That she waited until the end of her career and her early retirement to approach the EEOC again is understandable. It is always understandable and reasonable for any employee complaining about anything illegal at work to fear retaliation. The federal courts simply ignore human nature with all sorts of arcane rules about evidence and proof. But revenge is one of the simplest of all human actions to understand. We have all seen it. We have all felt its pull.

Debra: But sticking to the facts as they appear on the record (see the boxed insert in this article), it is simply not fair to the employer to have an employee who has a known claim sit on her rights for years and then file a discrimination charge on the eve of her retirement

Nancy: But Deb, as I said earlier, many companies have policies prohibiting employees from sharing salary and bonus information. Certainly, such policies are illegal, but they are widespread. I have one of those cases right now, against a "Big Box" store. My client learned that her boyfriend, who was more recently hired, was paid more upon hire than she was making over a year into her employment for the same job. She went to her human resource office to complain and was slammed with a stern lecture to never again discuss wages with her co-workers. She was, of course, later fired. Why? For allegedly swearing on a loading dock.

Debra: But a company cannot investigate a discriminatory situation if they have no notice of it.

Nancy: They have notice. Goodyear had notice. Each of the supervisors knew that Lilly Ledbetter was the only woman in her group and she was consistently ranked at the bottom of the group. But they kept her on. If she really were a crummy worker with 70-plus superior male employees in her ranks, they'd have fired her. Instead, they just kept paying her less and getting topnotch work out of her. Had there been any review or audit of gender and pay within this giant company, Ms. Ledbetter would stand out. She didn't complain repeatedly because she had two kids in college and her earlier complaint had been met with a motel date invitation. In the real world, the nice, pat rules set out by the men on the Supreme Court bear no resemblance to the actual conditions under which women labor equally, but to a 77% wage rate of men.

Debra: Ms. Ledbetter's Equal Pay Act claim would not have been subject to the limitations now required for a Title VII case. That case was killed below.

Nancy: On summary judgment, where so many good claims get killed in federal court. Massachusetts Judge Nancy Gertner recently again publicly slammed the use of summary judgment as the default action by federal courts in employment discrimination cases.

Debra: The use of summary judgment proceedings on discrimination claims in the federal courts: sounds like another debate brewing.

But a final note on *Ledbetter*: Not all management/employment lawyers are thrilled with this decision. The ruling may very well make plaintiffs' lawyers even more trigger-happy about suing. If plaintiffs' lawyers suspect there may be a pay disparity, they may feel compelled to file a claim immediately to protect their client's interests. A rush to court is not productive for either plaintiffs' or defendants' lawyers or their clients.

See Facts of the Case (next page)

Facts of the Case:
Ledbetter v. Goodyear Tire & Rubber Co., Inc.

On May 29, 2007, the United States Supreme Court issued a 5-to-4 decision in the case.

Alito, J., delivered the opinion of the Court, in which Roberts C. J., and Scalia, Kennedy and Thomas, JJ. joined. Ginsburg, J., filed a dissenting opinion in which Stevens, Souter and Breyer, JJ., joined. The facts before the appellate courts were nicely described in Justice Ginsberg's dissent:

"Lilly Ledbetter was a supervisor at Goodyear Tire and Rubber's plant in Gadsden, Alabama, from 1979 until her retirement in 1998. For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236. See 421 F. 3d 1169, 1174 (CA11 2005)…."

"Ledbetter launched charges of discrimination before the Equal Employment Opportunity Commission (EEOC) in March 1998. Her formal administrative complaint specified that, in violation of Title VII, Goodyear paid her a discriminatorily low salary because of her sex. See 42 U. S. C. §2000e–2(a)(1) (rendering it unlawful for an employer 'to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex'). That charge was eventually tried to a jury, which found it 'more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex.' App. 102. In accord with the jury's liability determination, the District Court entered judgment for Ledbetter for backpay and damages, plus counsel fees and costs."

"Ledbetter charged, and proved at trial, that within the 180-day period, her pay was substantially less than the pay of men doing the same work. Further, she introduced evidence sufficient to establish that discrimination against female managers at the Gadsden plant, not performance inadequacies on her part, accounted for the pay differential."

"[T]he Eleventh Circuit held, and the [Supreme] Court… agrees, because it was incumbent on Ledbetter to file charges year-by-year, each time Goodyear failed to increase her salary commensurate with the salaries of male peers. Any annual pay decision not contested immediately (within 180 days), the Court affirms, becomes grandfathered, a fait accompli beyond the province of Title VII ever to repair."