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 Ford

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 Stowers

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 reinstitute 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, underfunded agency which already turns away employees seeking to file discrimination claims, based on the opinion of an undertrained, 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