THE LILLY LEDBETTER FAIR PAY ACT OF 2009: EMERGING ISSUES

On January 20, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009.[1] The Act overturned the disastrous Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which had severely limited workers' ability to vindicate their rights under federal anti-discrimination laws that prohibit pay discrimination.[2] In *Ledbetter*, the Court held that employers could not be sued for pay discrimination under Title VII of the Civil Rights Act of 1964 if the employer's original discriminatory pay decision occurred more than 180 days before the employee initiated her claim.[3] The Court concluded that the paychecks Ledbetter continued to receive from her employer were mere "effects" of her employer's earlier discriminatory decisions, and so did not "reset" the 180-day filing period.

Ledbetter upset longstanding precedent under Title VII and other civil rights statutes. It also placed a heavy barrier in the path of workers attempting to fight for fair pay. Employees frequently do not know how their compensation compares to that of their colleagues, so pay discrimination is not often immediately apparent. The Supreme Court's decision in *Ledbetter* limited the period of time during which an employee may initiate a pay discrimination claim, even when the employee is unaware that her pay is lower than her peers' as a result of discrimination.

The Ledbetter Act restored the protection against pay discrimination stripped away by the Supreme Court's decision. The Act made clear that each discriminatory paycheck, not just an employer's original decision to engage in pay discrimination, resets the period of time during which a worker may file a pay discrimination claim. The Act thus explicitly provides that "an unlawful employment practice occurs . . . 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."[4]

The Ledbetter Act has made a critical difference to workers. The Act restored the fair pay claims of many individuals around the country whose claims had been eviscerated by the *Ledbetter* decision. But courts have interpreted the Act in sometimes conflicting ways, and issues surrounding the Act's appropriate interpretation continue to emerge, as discussed in more detail below.

I. The Lilly Ledbetter Fair Pay Act's Restoration of Workers' Pay Discrimination Claims

Since January 2009, courts around the country have applied the Lilly Ledbetter Fair Pay Act as Congress intended for straightforward pay discrimination cases. In cases involving pay discrimination based on sex, race, disability, and age, courts have recognized that the period

during which a worker may file a discrimination claim is renewed by each paycheck marred by discrimination.

Thus, courts have routinely recognized or restored workers' pay discrimination claims in instances in which the claims had not yet been filed, were pending, or were on appeal at the time of the Ledbetter Act. For example:

- In *Mikula v. Allegheny County*, the Third Circuit ultimately made clear that after the Ledbetter Act, each discriminatory paycheck renewed the time for filing a pay discrimination claim.[5] In that case, Mary Lou Mikula was hired by the Allegheny County Police Department in March 2001 as a grants coordinator. Mikula was paid $7,000 dollars less than her similarly situated male coworker from her date of hire, and she continued to be paid less despite her repeated requests for a pay increase.[6]

- In a case involving race discrimination, *Goodlett v. Delaware*, Randolph Goodlett, an African-American man, alleged that he and other African-American employees were paid less than similarly situated Caucasian employees by the Kent County Department of Elections.[7] Based on the Supreme Court's *Ledbetter* decision, the Equal Employment Opportunity Commission (EEOC) determined that Goodlett's pay claims were time-barred. But after the passage of the Ledbetter Fair Pay Act, a federal district court held that Goodlett's pay disparity claim survived and that "the 300 day clock for filing a Title VII pay disparity claim starts anew with each discriminatory pay period."[8]

- In *Johnson v. District of Columbia*, Paul Johnson, a 66-year-old man with blindness in one eye and insulin-dependent diabetes, had worked as an accountant for more than 17 years at the University of the District of Columbia Finance Office.[9] He consistently received evaluations indicating that his work exceeded expectations, but he was the lowest paid accountant in the office. Johnson brought discriminatory pay claims on, among other bases, his gender and disability. Relying partially on the *Ledbetter* decision, a federal district court dismissed several of Johnson's claims as time-barred.[10] After Congress passed the Ledbetter Act, the court reinstated those claims, concluding that "there [could] be no dispute" that Johnson could once again seek relief under relevant federal laws.[11]

II. Emerging Issues in the Courts Regarding the Lilly Ledbetter Fair Pay Act

Not every plaintiff has had her pay discrimination case restored by the Lilly Ledbetter Fair Pay Act, and a few thorny implementation issues have emerged.

First, although the Ledbetter Act states that it applies to all claims pending on or after May 28, 2007—the day that the Supreme Court issued *Ledbetter*—this retroactivity provision has not been sufficient to revive all pay discrimination claims dismissed as time-barred based on the Supreme Court's *Ledbetter* decision. Courts have concluded that if workers' pay discrimination claims were pending or had not yet been filed on January 29, 2009—the day the Ledbetter Act became law—those claims are clearly covered by the Act's retroactivity provision.[12] However, plaintiffs whose claims had already been dismissed and who were not pursuing appeal on January 29, 2009, when the Ledbetter Act became law, have not been so fortunate.

So, for example, in *O'Hara v. LaHood*, a district court had dismissed a plaintiff's claims based on the Supreme Court's *Ledbetter* decision, and the time period during which the worker could have appealed that dismissal closed before the Ledbetter Act became law.[13] After the Act

passed, the plaintiff moved the court to reopen the case. But the district court held, in spite of the Ledbetter Act's retroactivity provision, that it did not have the authority to reopen this case based on an intervening change in statute. The court distinguished the scenario in *O'Hara* from other "cases that [we]re still pending at the trial or appellate level at the time" the Ledbetter Act passed, to which the Act clearly applied to revive plaintiffs' claims.[14]

Second, courts have reached diverging conclusions on the issue whether the Supreme Court's *Ledbetter* rationale applies to employment-related statutes not expressly named in the Ledbetter Act. The Ledbetter Act expressly amended only Title VII, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.[15] It did not mention other statutes under which individuals may raise pay discrimination claims. For example, Section 1981, like Title VII, prohibits race and ethnic discrimination in employment, including pay discrimination. Some courts have held that the Ledbetter Act does not apply to Section 1981 pay discrimination claims, while others have held to the contrary.[16] Still other courts have recognized the difficulty of the issue with respect to Section 1981 without deciding it.[17] Likewise, there exists some tension in the case law with respect to whether the Ledbetter Act applies to constitutional violations raised under Section 1983.[18] And some courts have determined that the Supreme Court's rationale in *Ledbetter* applies to determine when the statute of limitations period begins for violations of the Family and Medical Leave Act, a conclusion they deem unaffected by the Ledbetter Act.[19]

Third, the Ledbetter Act made clear that an unlawful employment act occurs "when an individual becomes subject to a discriminatory compensation decision *or other practice*."[20] The legislative history and language of the Ledbetter Act clarify that the "other practice" must in some way relate to compensation discrimination. However, recent litigation has frequently focused on the scope of the term "other practice." For example:

- Courts have frequently considered whether "**failure to promote**" claims are "other practice[s]" as contemplated by Congress in the Ledbetter Act. A growing number of courts have concluded that they are not.[21]
- Courts have deemed **demotion** claims[22] and claims based on a **reduction in hours**[23] as outside the scope of the term "other practice[s]."
- A district court in Ohio concluded that **retaliation** claims are unaffected by the Ledbetter Act.[24]
- A New York federal court held that claims based on discriminatory **pension** payments are outside the purview of the Ledbetter Act.[25]
- And a Florida district court has suggested that even a **failure to pay promised wage increases** would be outside the bounds of the Ledbetter Act.[26]

However, some courts have interpreted the Ledbetter Act as broader in scope with respect to what constitutes a "compensation decision or other practice."

- A district court in Florida concluded that plaintiffs' Title VII claims regarding **demotions**, alongside those involving pay reductions, were timely in light of the Ledbetter Act.[27]

- In *Gentry v. Jackson State University*, a Mississippi district court held that **denial of tenure** can qualify as a compensation decision or other practice if it affects the plaintiff's salary.[28]

- A district court in Ohio concluded that the term "other practice" in the Ledbetter Act covers "performance-based pay evaluation, **business reassignments, and job classifications**."[29]

- The Seventh Circuit recently concluded that a city's "decisions as to who received **prior service credit within the existing seniority system**" were sufficient to bring a race-based Title VII claim within the scope of the Ledbetter Act's coverage of "discriminatory compensation decisions."[30]

Finally, some state courts have recently examined what impact, if any, the Supreme Court's decision in *Ledbetter* or the Ledbetter Act had on interpretations of state anti-discrimination law. For example, in *Alexander v. Seton Hall University*, workers alleged pay discrimination based on sex and age in violation of the New Jersey Law Against Discrimination. Lower courts had initially dismissed the workers' claims as time-barred based on the rationale of *Ledbetter*, which the lower courts applied to the state law.[31] But the New Jersey Supreme Court reinstated the workers' claims. The supreme court acknowledged that it had in the past "turned for guidance to federal Title VII law" to interpret the analogous state law, but it determined that *Ledbetter* was not persuasive and thus refused to apply it to the workers' claims.[32] In sharp contrast, a federal district court in New York concluded that because "the New York legislature [had not] enacted a statute similar to the Ledbetter Act," a worker's race discrimination claim under that state's Human Rights Law was "governed by the Supreme Court's analysis in *Ledbetter*."[33]

* * *

Even after these emerging issues are resolved, the fact remains that women today are paid, on average, only 77 cents for every dollar paid to men, and women of color are paid even less.[34] While the targeted steps taken in the Ledbetter Act are important, they restored only the protection against pay discrimination stripped away by the *Ledbetter* decision. Even after the Ledbetter Act, our existing equal pay laws remain weakened by a series of other court decisions and insufficient federal tools to detect and combat wage discrimination.

The Paycheck Fairness Act presents at least one opportunity to go beyond the Ledbetter Act and do more to protect workers from discrimination. This Act, which has twice passed the U.S. House of Representatives and fell two votes shy of receiving a Senate vote on the merits in 2010, has been reintroduced in the 112th Congress. It would help address many of the gaps in existing federal equal pay laws by updating and strengthening the Equal Pay Act in several important ways. The Paycheck Fairness Act would:

- Modify the "establishment" requirement of the Equal Pay Act to allow plaintiffs to compare their wages to those of other employees in some commonsense circumstances that are not currently permitted;

- Close a gaping loophole in the Equal Pay Act by tightening the "factor other than sex" defense, thus excusing sex-based pay differentials only where employers show that the differential is job-related and consistent with business necessity;

- Allow plaintiffs to recover full compensatory and punitive damages for sex-based pay discrimination under the Equal Pay Act, as is currently provided under Section 1981 for victims of race- and ethnicity-based pay discrimination;
- Permit class action claims under the Equal Pay Act, consistent with the current rules of civil procedure;
- Prohibit employer retaliation against employees who share salary information with their co-workers.

In short, the Paycheck Fairness Act would help ensure that employees are paid based on the value of their work, rather than their sex.

---

[1] Pub. L. No. 111-2, 123 Stat. 5 (2009).

[2] 550 U.S. 618 (2007).

[3] Under Title VII, a worker seeking to bring an employment discrimination suit must generally initiate her claim by first filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). However, when a potential plaintiff first institutes proceedings with a state or local agency, a charge must be filed with the EEOC either within 300 days of the employment practice in question, or within 30 days of receiving notice that the state or local agency terminated the proceedings, whichever period ends first. *Id.*

[4] 42 U.S.C. § 2000e-5(e)(3)(A).

[5] 583 F.3d 181, 186 (3d Cir. 2009).

[6] *Id.* at 182-83.

[7] Civ. No. 08-298, 2009 WL 585451, at *1 (D. Del. Mar. 6, 2009). The plaintiff's claims in *Goodlett* were ultimately dismissed on other grounds. *See Goodlett v. Delaware*, Civ. No. 08-298, 2010 WL 2164608, at *2 (May 28, 2010).

[8] *Goodlett*, 2009 WL 585451, at *6.

[9] *See Johnson v. District of Columbia*, 572 F. Supp. 2d 94, 99 (D.D.C. 2008).

[10] *Id.* at 102-04.

[11] 632 F. Supp. 2d 20, 22 (D.D.C. 2009).

[12] *See, e.g.*, *Almond v. Unified Sch. Dist. #501*, __ F. Supp. 2d ___, Case No. 07-4064, 2010 WL 4384206, at *1 (D. Kan. Oct. 28, 2010) (noting that the Ledbetter Act passed while the case was pending before the Tenth Circuit, which then granted the parties' motion to voluntarily dismiss the appeal conditioned upon the district court's reconsideration of its dismissal of plaintiff's claims based on *Ledbetter*).

[13] __ F. Supp. 2d ___, Civ. No. 05-1476, 2010 WL 5209253, at *3-*5 (D.D.C. Dec. 23, 2010).

[14] *Id.* at *6 (citing *Johnson*, 632 F. Supp. 2d at 21, 23; *Mikula*, 585 F.3d 181; and *Tomlinson v. El Paso Corp.*, Civ. Action No. 04-2686, 2009 WL 2766718 (D. Colo. Aug. 28, 2009) (amending a final judgment in light of the Ledbetter Act before the plaintiff's time for appeal had lapsed)).

[15] *See* Pub. L. No. 111-2, §§ 3-5.

[16] *See Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560, 586 (E.D. Va. 2009) (collecting cases to illustrate the divergent case law but concluding that the court need not "decide whether to follow the cases which apply the *Ledbetter* decision to § 1981 cases").

[17] *See id.* at 586-87; *Aspilaire v. Wyeth Pharm., Inc*., 612 F. Supp. 2d 289, 303 n.6 (S.D.N.Y. 2009).

[18] *Compare Groesch v. City of Springfield*, __ F. 3d ___, No. 07-2932, 2011 WL 1105593, at *7 (7th Cir. 2011) (holding in a Section 1983 case that the Ledbetter Act "remov[ed] the *Ledbetter* decision as an obstacle to following [the circuit's] earlier precedents," which had long recognized that each paycheck is a discrete discriminatory act resetting the period of time within which a worker may file a pay discrimination claim), *with Frontera v. City of Columbus Div. of Police*, 395 F. App'x 191, 197 (6th Cir. Aug. 30, 2010) (upholding a district court's denial of a motion for relief from judgment, where a plaintiff's First Amendment claim under Section 1983 was dismissed as barred by the statute of limitations, and noting that the plaintiff's claims were not "within the purview" of the Ledbetter Act because they were "in no way related to discrimination in employment, compensation-related or otherwise, under Title VII, the ADEA, the ADA, or the Rehabilitation Act").

[19] *See, e.g., Maher v. Int'l Paper Co.*, 600 F. Supp. 2d 940, 950 & n.5 (W.D. Mich. 2009); *Beekman v. Nestle Purina Petcare Co.*, 635 F. Supp. 2d 893, 907 (N.D. Iowa 2009).

[20] 42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added).

[21] *See, e.g., Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) ("[T]he decision whether to promote an employee to a higher paying position is not a 'compensation decision or other practice' within the meaning of that phrase in the [Lilly Ledbetter Act] and [the plaintiff's] failure-to-promote claim is not a claim of 'discrimination in compensation.'"); *Noel v. Boeing Co.*, 622 F.3d 266, 273 (3d Cir. 2010) (same); *Barnabas v. Bd. of Trs.*, 686 F. Supp. 2d 95, 102 (D.D.C. 2010) (same); *Lipscomb v. Mabus*, 699 F. Supp. 2d 171, 174 (D.D.C. 2010) (same); *Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 745 (S.D. Tex. 2009), *vacated in part on other grounds on reconsideration*, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) (same); *Albritton v. Sec. of State*, No. 5:09-CV-00385, 2010 WL 4312868, at *13-*14 (M.D. Ga. Oct. 25, 2010) (same in apparent dicta); *Ekweani v. Ameriprise Fin., Inc*., No. CV-08-01101, 2010 WL 749648, at *5 (D. Ariz. Mar. 3, 2010) (holding same and noting that under existing Ninth Circuit case law, "alleging a failure to promote claim is not sufficient to state a claim for compensation discrimination").

[22] *See, e.g., Almond*, 2010 WL 4384206, at *13-*14 (reduction in force and job transfer to a lower-paying job); *Tryals v. Altairstrickland, LP*, H-08-3653, 2010 WL 743917, at *6-*7 (S.D. Tex. Feb. 26, 2010) (demotion).

[23] *See Williams v. Target Stores*, No. 4:10CV02397, 2011 WL 1102838, at *3 (E.D. Mo. Mar. 23, 2011) (holding that plaintiff's race discrimination claims under Title VII for failure to promote, refusal to transfer, and reduction of hours were time-barred, and that "work[ing] fewer hours than similarly situated coworkers is merely an automatic effect" of the discriminatory action of reducing a worker's hours (internal quotation marks and alteration omitted)).

[24] *See, e.g., Greenleaf v. DTG Operations, Inc.*, No. 2:09-CV-192, 2011 WL 883022, at *9 (S.D. Ohio Mar. 11, 2011).

[25] *See Zimmelman v. Teachers' Retirement Sys.*, No. 08 Civ. 6958, 2010 WL 1172769, at *9-*10 (S.D.N.Y. Mar. 8, 2010) (Report and Recommendation of Magistrate Judge), *adopted by* 2010 WL 2034436 (S.D.N.Y May 20, 2010), (rejecting a retiree's Title VII and ADA claims based on her employer's allegedly discriminatory setting of pension benefits by excluding service credit for various types of leave during the retiree's years of employment).

[26] *See Powell v. Duval County Sch. Bd*, No. 3:07-cv-361, 2009 WL 3157588, at *7 n.12 (M.D. Fla. Sept. 28, 2009) (noting that the plaintiff "ma[de] no claim that the recently enacted Fair Pay Act applie[d] to her case" but stating that the plaintiff's claims alleging "sexual discrimination and retaliation by failure to promote or pay an allegedly promised wage increase" did "not appear to implicate" the Lilly Ledbetter Fair Pay Act).

[27] *See Bush v. Orange County Corr. Dep't*, 597 F. Supp. 2d 1293, 1296 (M.D. Fla. 2009).

[28] 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009).

[29] *See Greenleaf*, 2011 WL 883022, at *8.

[30] *Groesch*, __ F. 3d ___, 2011 WL 1105593, at *4.

[31] *Alexander v. Seton Hall Univ.*, 8 A.3d 198, 207 (N.J. 2010).

[32] *Id.* at 206-07.

[33] *Russell v. County of Nassau*, 696 F. Supp. 2d 213, 230 (E.D.N.Y. 2010).

[34] NWLC calculations from U.S. Census Bureau, Current Population Survey, 2010 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2009 – People 15 Years Old and Over by Total Money Earnings in 2009, Age, Race, Hispanic Origin, and Sex, *available at* http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm (last visited Mar. 10, 2011).