

in this issue:

MAY 2007

U.S. Supreme Court holds that neutral pay practices are not actionable under Title VII even if they perpetuate pay disparities resulting from earlier discriminatory pay decisions that were made before the limitations period.

The Real Lessons of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*

By Allan G. King and Nancy E. Pritikin

What the Supreme Court Decided

On May 29, 2007, the Supreme Court announced its decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, limiting the potential liability of employers for pay discrimination under Title VII. The fact pattern it considered is rather common, which is one reason why this case is so important. Suppose that during the 1980s, a female employee was paid less than comparable males working for the same employer. Thereafter, the female employee and these male employees receive the same pay raises, but because the salary paid to the female employee was initially lower, she continues throughout the 1990s to earn less in each year than her male counterparts. The question before the Court was whether a claim of pay discrimination is timely under Title VII when it reflects a salary disparity established before the 180 or 300-day statute of limitations, but which disparity continues despite gender-neutral pay increases during the actionable period. The Court held that, because Title VII prohibits discriminatory employment *decisions*, a plaintiff can prevail only by proving that within the limitations period the employer based a decision regarding plaintiff's pay on a discriminatory motive. The plaintiff cannot succeed if during the actionable period her pay is merely a reflection of a discriminatory decision taken beyond the limitations period, because the present effects of past discriminatory decisions do not provide a cause of action. This holding should apply to discrimination claims of all types under Title VII, not just claims of sex discrimination.

Ledbetter's Claim

In *Ledbetter*, the plaintiff claimed that she was discriminated against under Title VII and the Equal Pay Act (EPA) because the pay decisions during her employment (from 1979-1998) were based on her gender. The Eleventh Circuit Court of Appeals held that Ledbetter's pay discrimination claims under Title VII prior to September 1997 were time barred. The Supreme Court affirmed the Court of Appeals' decision.

In a 5-4 decision, the Supreme Court held that Title VII pay discrimination claims cannot be based on pay decisions that were made beyond the EEOC charge period (minimally 180 days, but 300 days in a "deferral" state). Essentially, in order for a plaintiff to recover, she must show that a pay *decision* within the charge-filing period was discriminatory. In other words, instead of the plaintiff being able to show that as a result of a long ago discriminatory pay decision (e.g. her starting pay), every paycheck thereafter continues the discrimination, she now will have the burden of establishing that the most recent employment *decisions*, i.e., raises and promotions, were discriminatory. This is a significant change from how the law was interpreted in many of the circuit courts of appeal.

The Supreme Court majority stated: "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then

a fresh violation takes place when each act is committed.” The Supreme Court also noted that if an employer intentionally retains an earlier adopted facially discriminatory pay structure during the actionable period, the employer engages in intentional discrimination whenever it issues a check to one of its disfavored employees. However, a facially nondiscriminatory and neutrally applied policy during the actionable period does not give rise to ongoing claims of discrimination.

The Supreme Court expressly distinguished pay decisions under the Equal Pay Act from the law governing *Ledbetter*’s claim under Title VII. The majority noted that the Equal Pay Act does not require plaintiffs to prove intentional discrimination and does not require the filing of a charge with the EEOC. Consequently, even if present pay disparities are not actionable under Title VII, they may be actionable under the Equal Pay Act or Section 1981.

What *Ledbetter* Means for Employers

In the Short Term

The Court’s holding in *Ledbetter*, because it relates to Title VII, is not specific to gender discrimination, but should apply with equal force to all claims alleging intentional discrimination on the basis of a protected characteristic, such as race, religion, national origin, and color, as well as sex. In addition, the same reasoning may be applied to claims asserting age and disability discrimination, which, although they arise under different statutes, often are decided under Title VII principles. Furthermore, many state laws that prohibit discrimination look for guidance to the Supreme Court’s interpretation of Title VII law, and these too should be influenced by the Court’s holding. Therefore, the impact of *Ledbetter* should be widespread.

However, the immediate impact on employers of this decision may be quite different than its long-term effect. *Ledbetter* will have an impact on all employers with pending cases and charges alleging pay discrimination under Title VII, because it greatly narrows the scope of actionable claims. If plaintiffs have complained of discrimination solely under Title VII, it will require them to identify a discriminatory decision within the 180 or 300-day window or else be subject to dismissal; it will extinguish

potential liability for previous pay decisions that merely set the base from which current pay decisions are measured.

For example, suppose a female employee is paid \$40,000 per year and a comparable male is paid \$50,000 as a result of compensation decisions made before the limitations period. Next, suppose each is given a 10 percent raise during the actionable period. Although the female employee now earns \$44,000, and the male now earns \$55,000, *Ledbetter* holds that no actionable discrimination has occurred because during the limitations period each received an identical 10 percent raise. Moreover, suppose that during the actionable period, the pay of the male employee was increased by 10 percent but the pay of the female employee was discriminatorily increased by only five percent. *Ledbetter* would recognize this as a discriminatory act, however, the liability for this action would be far less than some courts would impose under previous interpretations.

Under *Ledbetter*, the discriminatory act would consist of the employer’s failure to provide the same 10 percent pay increase to the female employee as the male employee. It already had given her a 5 percent increase and the remedy would be an additional 5 percent pay increase. This amounts to just \$2,000, rather than the entire difference between the male’s \$55,000 salary and the female’s \$42,000, which equals \$13,000. This suggests that employers that regularly decide the amount by which to increase or decrease an employee’s pay level, by perhaps a given percentage, may have greater protection under *Ledbetter* than employers that regularly consider and adjust the pay level of each employee. In the latter case, the decision regarding total compensation may be claimed to recur regularly, thereby creating potential liability for the entire difference in compensation rather than just the incremental change.

By stating that pay discrimination claims brought under a Title VII disparate treatment theory must point to a specific discriminatory act, the *Ledbetter* decision may also have the effect of substantially undermining the legal theory upon which the OFCCP bases its standards on systemic discrimination in compensation. OFCCP’s standards are based on looking at pay disparities to remedy “dis-

crimination under a [Title VII] pattern or practice theory of disparate treatment.” 71 Federal Register 35124. This approach seems to be exactly what *Ledbetter* rejects. How the OFCCP will adjust its compensation standards and approach to conform with *Ledbetter* is something that federal government contractors will need to watch.

In the Long Term

Although the protection it affords is no doubt substantial, we anticipate that the benefit of the *Ledbetter* decision will be short-lived for employers, for a variety of reasons. First, other statutes prohibit discrimination, in addition to Title VII. Indeed, the *Ledbetter* majority notes that the Equal Pay Act prohibits gender discrimination even when pay inequities are unintentional. Consequently, the fact that there was no evidence of the employer’s discriminatory intent during the limitations period, which doomed *Ledbetter*’s Title VII claim, would be of no relevance to a claim under the EPA. Because the statute of limitations that applies to an EPA claim can be as long as three years, as opposed to the much shorter limitations period under Title VII, employers should expect to see a greater number of cases alleging EPA violations as plaintiffs attempt to challenge disparities in initial pay setting.

Discrimination on the basis of color, read broadly to include race, ethnicity, and some religions and ancestry, may also be challenged under 42 U.S.C. section 1981. That statute prohibits intentional discrimination, the same as Title VII, but it is subject to a four-year statute of limitations. Once again, by pleading under this statute in addition to Title VII, plaintiffs may be able to challenge a greater number of employment decisions, including possibly those setting initial compensation levels.

Finally, we anticipate lobbying by various interest groups seeking to have Congress legislatively overrule *Ledbetter*. Indeed, the dissenting Justices in *Ledbetter* essentially invited such a course of action. With the ink on that decision barely dry, a number of interest groups already have denounced the decision and promised legislative action in Congress. This may also be an issue that comes to the fore in the upcoming presidential primaries and election. As a result, the window that *Ledbetter*

appears to have narrowed may shortly be thrown open again.

Conclusion

Ledbetter is among the most important Supreme Court decisions of the past several years. It potentially can curtail liability for employers presently faced with lawsuits alleging pay discrimination under Title VII. Further, it strongly suggests that employers that structure their compensation systems to focus on deciding incremental changes in compensation, rather than compensation *levels*, may derive greatest benefit from the decision. However, because there are a panoply of anti-discrimination laws, many with much longer limitations periods, in the long run employers may find that *Ledbetter* primarily has changed the way in which plaintiffs plead their case as opposed to limiting the employer's exposure.

Allan G. King is a Shareholder in Littler Mendelson's Dallas office. Nancy E. Pritikin is a Shareholder in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. King at aking@littler.com, or Ms. Pritikin at nepritikin@littler.com.
