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AUGUST 2007 $5 www.californialawyermagazine.com

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Employment Law

EXECUTIVE SUMMARY

Employment cases at the U.S. Supreme Court and the California Supreme Court often make headline news. The U.S. Supreme Court's May decision in the discrimination employment case *Ledbetter v. Goodyear Tire and Rubber Company* (127 S. Ct. 2162 (2007)), not only spurred intense discussion nationwide but it also generated a quick reaction from Congress. In June the House Labor Committee led by George Miller (D-CA) passed the Lilly Lebetter Fair Pay Act in response to the Court's ruling, and Hillary Clinton (D-NY) is leading the effort in the Senate. In the Golden State, lawyers were closely following *Murphy v. Kenneth Cole Productions* (40 Cal. 4th 1094 (2007)), in which the justices ruled that an "additional hour of pay" is a premium wage, not a penalty.

Our panel of experts, which includes plaintiffs and defense counsel, discussrs these decisions as well as the impact of the class action litigation on employers and employees. They are Garry Mathiason of Littler Mendelson; Lynne Hermle of Orrick, Herrington & Sutcliffe; Kirby Wilcox of Paul, Hastings, Janofsky & Walker; Anthony Oncidi of Proskauer Rose; and Stephanie Doria of Rukin, Hyland, Doria & Tindall. The roundtable was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported for Barkley Court Reporters by Krishanna DeRita.

MODERATOR: What are the implications of the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company,* which held that employees cannot use Title VII of the Civil Rights Act to sue over past discrimination that continues to affect their pay?

HERMLE: *Ledbetter* doesn't have as many implications for our practice in California as it might in other places, simply because it's focused on a statute of limitations issue, and the California Fair Employment and Housing Act gives plaintiffs a longer one-year period of time to file. Even though there was a lot of outcry over the decision, its impact is pretty minimal here. And Senator Clinton has indicated already that she'll seek to overturn it in Congress; there's likely to be a lot of support for that position as well. The outcry over *Ledbetter* was overblown.

MATHIASON: The implications are a little broader in the sense that *Ledbetter's* approach to the statute of limitations under Title VII for gender-based pay decisions is likely to be extended to other forms of discrimination and harassment actions, and potentially retaliation. Nonetheless, it probably has its greatest immediate impact on pending cases that are under Title VII.

Longer term, two forces will come together mitigating *Ledbetter's* importance. First, there is a high likelihood that Congress will pass an anti-*Ledbetter* amendment, much like it did in 1991 with the Civil Rights Act, which targeted and overturned several Supreme Court decisions. Second, the plainitiffs bar will ground their actions under other statutes with long statutes of limitations. For example, the Equal Pay Act potentially has a three-year statute of limitations. The use of Section 1981 claims in race and national origin cases will take on added importance, reaching beyond the time boundaries of Title VII.

DORIA: From an employee perspective, there are several problems with the decision. As the dissent pointed out, the majority ignored the characteristics that are unique in pay discrimination cases that aren't present in other types of discrimination cases. For example, in a case where there's a pay disparity, it's not always readily identifiable to the victim of that discrimination.

But there are ways that plaintiffs are going to be able to get around this decision. For example, the Court specifically left open the possibility that the discovery rule may toll the statute of limitations during the period that an employee is unaware of the facts that would reasonably lead her to believe that she'd been discriminated against in her pay.

And, as Gary [Mathiason] mentioned, there is also the option of filing Equal Pay Act claims. The downside is that that doesn't provide any relief to employees who are subject to discrimination on some other protected category other than gender. Hopefully, Congress will step in at Justice Ginsberg's invitation and resolve the issue legislatively.

WILCOX: For federal cases, the *Ledbetter* decision will have an impact on litigation that's pending and litigation that's threatened. The bare *Ledbetter* holding is that pay decisions are discrete acts. That's an invitation to plaintiffs to make sure that they don't plead their cases such that those decisions are discrete. In the future, we can expect that plaintiffs will link all complaints regarding a present paycheck to some current and ongoing discriminatory conduct and make it more difficult to dismiss those cases on summary judgment.

HERMLE: The Court recognizes the practical problems that come from not having this type of limitation, and in a footnote they note that the plaintiff is focusing on a supervisor who made pay decisions in the 1980s and the 1990s, and that supervisor had since died. So what the Court says in the footnote is, the outcome that we enforce in this decision allows the testimony of a key witness to be weighed contemporaneously.

ONCIDI: Some have predicted that this case will result in a greater number of claims being filed earlier and more often—perhaps even as a discovery vehicle to find out what co-workers are earning. I disagree. Few employees will start down the road to litigation, even if it's only in the administrative context, simply for discovery purposes. But even if more claims are brought, though at an earlier juncture, that's not necessarily a bad thing for employers.

From an employer's perspective, it's better to have these claims asserted earlier, before you have 15 or 20 years' worth of a pay disparity at issue. At that point, litigation may be the only way of resolving the conflict between the employee and the employer.

DORIA: Practically speaking, it's more difficult to prove intentional discrimination at the beginning because the pay disparity is often less significant in its early stages. Cases are more compelling where the pay gap is wider and the likelihood of a discriminatory cause is smaller. Now, even where a pay disparity is recognized early on, the case brought may be weaker in terms of liability and damages.

WILCOX: There will be more filings because, as everyone predicts, there will be new legislation. How significant that tidal wave is will be dependent on the evidentiary burden placed on the employer. If the new cause of action from this legislation permits a plaintiff to go back in time and the absence of documents can be adversely construed against the employer, then plaintiffs will jump on this bandwagon. If the plaintiff's burden of proof remains the way it is right now, I'm not sure that the cases will grow significantly.

MODERATOR: How will the state Supreme Court decision in *Murphy v. Kenneth Cole* affect class action litgation?

DORIA: Besides the result, which is that meal- and rest-period claims with an extended statute of limitations are more valuable, there are a couple of things that are significant, particularly from the employee perspective. The Court's decision reemphasizes the strong public policy in California in favor of employee rights in the wage-and-hour context. Where there's any sort of competing statutory interpretation, the statute has to be interpreted in the light most protective of employees. Also, the case further opens the door to recovery of punitive damages for willful meal period violations because employers can no longer argue that assessment of punitive damages would constitute an impermissible "penalty on a penalty."

ONCIDI: This case could have gone either way. Like many on the defense side, I was surprised the way it went, and certainly that it was a unanimous decision by the Supreme Court. The issue of whether an additional hour of pay is a penalty versus a wage is not something that is easily discerned from either legislative history or prior cases, despite what the Supreme Court has said.

Now there will be a three-year statute [of limitations] applicable and with the inevitable coupling of these claims with an unfair competition claim under Business and Professions Code Section 17200, in essence we have a four-year statute applicable to these rights. One question that remains is whether an employer can have employees work through the meal and rest periods and then just pay them the one hour as if it were an overtime payment.

WILCOX: For my purposes, the most significant aspect of the decision was the paragraph that addressed self-assessment. The Supreme Court, in very forceful and unambiguous dictum, suggested that meal-period premiums are payments that an employer must self-assess. That poses at least four questions.

If someone was accorded an opportunity [to

PARTICIPANTS

GARRY MATHIASON is vice chair of Littler Mendelson, the nation's largest employment and labor law firm. He supervised over 1,000 employment litigation matters, including wage and hour class actions. Mr. Mathiason is identified by the *National Law Journal* as one of the 100 most influential attorneys and is listed in the 2007 *The Best Lawyers in America*. He chairs the Employment Law Domain of Open Compliance and Ethics Group, and is the founder of ELT, Inc., providing online legal compliance training for nearly 2 million users.
gmathiason@littler.com

LYNNE HERMLE, a partner at Orrick, Herrington & Sutcliffe, was recently named one of the Top 25 U.S Employment Lawyers by *Euromoney*, and has also been named one of America's Top 500 Lawyers and 500 Leading Litigators (*Lawdragon*); one of two top Bay Area employment defense lawyers (*Recorder*); one of California's Top 75 Women Litigators (*Daily Journal*); one of California's Top Women Attorneys (*Recorder*); and one of America's Top 50 Women Litigators (*National Law Journal*). She has substantial trial experience in state and federal court and special expertise in complex class actions.
lchermle@orrick.com

ROUNDTABLE

PARTICIPANTS

KIRBY WILCOX, a partner at Paul, Hastings, Janofsky & Walker, counsels employers on a wide range of employment matters. He has appeared in every issue of *The Best Lawyers in America* and *Chambers*. Mr. Wilcox is a Fellow of the College of Labor and Employment Lawyers and chief editorial consultant to Matthew Bender for California Employment Law. Mr. Wilcox received his B.A. from Harvard, his M.S. from the London School of Economics, and his J.D. from Hastings, where he was Executive Editor of the *Hastings Law Journal*.
kirbywilcox@paulhastings.com

ANTHONY J. ONCIDI is a partner in and Chair of the Labor and Employment Department of Proskauer Rose in Los Angeles. He represents employers in all aspects of employment law, including litigation and preventive counseling, wage/hour and discrimination class actions, privacy, employee raiding and trade secret protection. Mr. Oncidi is the author of *Employment Discrimination Depositions* and is a noted speaker on employment law who has been quoted by *The New York Times*, *Bloomberg News*, *Time* magazine and Fox 11 News.
aoncidi@proskauer.com

take a meal or rest break] and didn't take it, is there an obligation to self-assess? One really can't know how to self-assess until one knows what the word "provide" means. The Supreme Court sent a signal that "provide" does not mean "compel," because there are a number of places in the opinion where, to steer clear of this issue, the Supreme Court described noncompliant meals as those that the employee was forced to miss.

The second is if an employer now wants to self-assess, how many premiums should it assess itself for? The standard that seems to pervade the practice is that no matter how many missing, late, or short meals there are in one day, the burden is one premium. As a defense practitioner, I believe that should remain the rule, but no one has determined that question. It may be decided in the *Wal-Mart* appeal.

The third issue is whether by characterizing these payments as wages, the California Supreme Court opened the possibility that plaintiffs counsel would seek more than Labor Code section 226.7 payments for noncompliance and instead seek penalties that are associated with the nonpayment of wages and not just under Labor Code Section 203, but perhaps under 210, which pertains to late payment of wages, or 558, which pertains to underpayment of wages.

The fourth issue, which we don't have a ruling on, is whether these payments belong on the regular rate of pay. Since the [*Murphy*] decision, the DLSE put out another revised version of its enforcement and interpretations manual leaving intact the advice that the premiums are not part of the regular rate because the premiums are not pay for hours worked.

HERMLE: *Murphy* is unfortunate from an employer's perspective for so many reasons. It was so hard to predict, given that 22 out of 24 appellate justices who looked at the issue ruled that it was a penalty. The vast majority of the decisions, many of which very carefully analyze legislative history, concluded that it was a penalty. And those decisions didn't repeat over and over, as the Supreme Court did, that these statutes would be construed in favor of the employee.

Since when is every employment statute always going to be construed in favor of one side of the debate? Unless good counsel and good employers are prepared to fight about the meaning of "provide," the practical issues around the half-hour unpaid meal period is going to get lost in the shuffle. There are many people who don't want to take a half an hour unpaid during the workday—working mothers who need to get home by a certain time, commuters who face traffic, parents who want to get to soccer games. It's not in everybody's interest, in the patronizing way that the Court seems to suggest, to always have that break.

MATHIASON: I would look at the implications from a different perspective. Prior to the Supreme Court ruling the dominant interpretation of Section 266.7 was that it provided for a one-hour wage penalty. For the many wage-and-hour class actions that all of us here are handling, the value of a missed meal break or rest period was limited to what would accumulate within a single year. The settlement value of such cases is significant, but not crippling, to an employer. Now the litigation threat of these cases has increased four-fold with the application of a four-year statute of limitations.

Contrary to being an advantage for the enforcement of employee rights, the Supreme Court has opened the door to a new gold rush, bringing into question the social value of what is being accomplished. There is something very wrong when enforcement of some of our most cherished workplace rights such as freedom from race, age, and sex discrimination takes an economic backseat to the dollar recovery for missed ten-minute rest periods that are not even required under federal law.

I am embarrassed to tell clients that it may cost more to defend or settle a missed meal-break and rest-period class action than to defend or settle a race discrimination claim from the same alleged class. By dramatically increasing the cost of meal- and rest-break cases for business and the community, the Court has invited the Legislature to clear up the ambiguities we have been discussing.

ONCIDI: *Murphy* is just the latest footfall in a long series of steps taken by both the Legislature and the courts in California that have chilled the business climate in this state. While any single decision may make sense for the individuals whose case is being litigated or in terms of the motivation for a legislative initiative, the cumulative effect of all of this cannot and should not be ignored.

All of us at this table have the largest employers in the state among our client base. What I'm hearing from many of these clients—who can't afford not to be in business in California—is that due to the unrelenting anti-employer drumbeat that exists, it is becoming economically irrational

to expand here as compared to the more business-friendly states that surround California. And that is going to happen more frequently as we continue down this road where you have California so far out of step with federal law as well as the laws in all other states.

DORIA: What is clear in California is that wage-and-hour class litigation has prompted compliance with laws that have existed for a long time. There were many positions and jobs throughout the state that were misclassified. The idea that employees don't really value meal periods is probably an overstatement. There are many employees who do care about having an uninterrupted break from work. The litigation is so prevalent in part because the abuse is so widespread, particularly in certain industries.

HERMLE: I do feel strongly about the lunch break issue and I don't disagree with you that there are physical jobs where it may be important. But they are very small in number and virtually lost in this debate. The more interesting question is the current attack on what we've viewed as professional jobs and their exemptions—for example, software engineers, trainers, or instructors, and similar jobs. As employers reclassify those positions to nonexempt in order to avoid the class action or to settle a class claim, the employees are often making less money. You don't get stock options any more. Typically you don't get management bonuses any longer. Has the employee population been well served? Obviously, it's hard to generalize, but what do you think?

DORIA: Our experience is that the misclassified employees we've represented appreciate receiving overtime pay for overtime hours worked. It's unfortunate that some employers have decided to pay their employees less after a reclassification. But again, it's a compliance issue. Employers need to comply with the law as it currently exists. Unhappiness with the law is not an excuse for noncompliance.

HERMLE: It's not a compliance issue in my mind. It's a fear of the cost of the litigation rather than knowledge or belief that you are violating a law. I did some of the earliest software engineering cases five years ago, and it was unheard of that a software engineer could be considered a nonexempt employee.

MATHIASON: One of the frustrations of the current way this is looked at, especially regarding meal periods and rest periods, is the examination of the cost of litigation and the potential consequences from an adverse ruling. You magnify that by a factor of four given the current decision and suddenly, you see compliance changes made that do not necessarily benefit employees. In a real time digital world where employees are often in control of their schedules, we now have the reemergence of old time factory whistles and time cards signaling that it is time to eat or rest. There is no groundswell of employees raising their voices protesting missed meal periods and rest breaks. A class action can be initiated by a single plaintiff and the cost of settlement is often less than the cost of defense. Class-settlement participation rates for such cases can be as low as 10 or 20 percent, while the attorneys fee awards are often in six or seven digits. We have a couple of vacant offices in our law firm where partners have left to join the other side.

We have several large-chain clients operating in California with excellent wage-and-hour policies under the Federal Fair Labor Standards Act. They struggle with the unique California wage and hour requirements. For example, a highly compensated manager who hires, fires, and directs employees becomes eligible for overtime if more than 50 percent of working time is spent doing non-managerial tasks. Several national clients have estimated that the entirety of their California profit margin is at risk or in fact evaporated by a single wage-and-hour class action. In defense, what I am seeing is the emergence of a third class of employee. Legally the employee is treated as nonexempt, but otherwise he or she is given the responsibilities and characteristics of an exempt manager or administrator.

ONCIDI: Seemingly absent from the debate is what employees want. When you have a highly skilled, well-educated, multifaceted, multitalented workforce, many of those employees who have been treated as exempt from overtime, wish to remain so. They are not interested in having to punch in and punch out or to account for their whereabouts and their time on a minute-by–minute, hour-by-hour basis.

If there were hearings by the Legislature exploring what those employees prefer, I think there would be a significant revision to these laws, and certainly they would be liberalized. These laws were created to inhibit managerial abuses in 1930s smokestack America. That is not the economy that we have today in the United States, and it's especially not the economy we have today in California. ■

PARTICIPANTS

STEPHANIE DORIA is a partner in the law firm of Rukin Hyland Doria & Tindall LLP in San Francisco. She represents clients in all areas of employment law, including discrimination, harassment, wrongful termination, whistleblower/retaliation, leave of absence claims, wage and hour matters, and class action litigation. Her practice focuses primarily on representing employees, both as plaintiffs and individual defendants. Ms. Doria graduated with great distinction from the University of the Pacific, McGeorge School of Law in 1998.
stephaniedoria@rhdtlaw.com

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"Roundtable: Employment Law" originally published in the August, 2007 issue of *California Lawyer*.
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