Wide Latitude for Retroactive Litigation Proposed in the Lilly Ledbetter Fair Pay Act

*By Donald R. Livingston**

Title VII was built for speed. Discrimination charges are to be filed within a mere 180 days "after the alleged unlawful employment practice occurred" (300 days if the charge is first filed with a state or local agency). The EEOC can sue just thirty days after that, provided the EEOC has been unable to settle. If the EEOC delays more than 180 days without filing suit, the EEOC shall notify the person aggrieved, who has just ninety days to sue. Once a lawsuit is filed, it is the duty of the court "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." If these periods will not get the case to court quickly enough, the EEOC may seek immediate injunctions. This rapid process was once considered "the very backbone" of EEOC's effectiveness.[1]

What happened? It has been nearly forty-five years since the passage of Title VII, and the EEOC never gets a case to court in thirty days, seldom seeks immediate injunctions, and frequently issues its notices of the right to sue beyond 180 days. And now? Congress is considering a special rule to extend the deadline for filing some claims *forever*, by eliminating the deadline for many cases involving a wage payment.

Under the bill that has passed the House of Representatives, called the Lilly Ledbetter Fair Pay Act of 2007, an escalator principle would be applicable. A single pay decision that was made two, five, ten, or even twenty years earlier could be challenged *today* if the employee has not moved up to the pay level he would have had if the earlier decision been more favorable. To take a simple example, an employee awarded a four percent pay raise at the end of 1998 could challenge that pay raise in 2008 by making two assertions: (1) "but for" her gender, race, national origin, religion, age, or disability, she would have received a larger raise; and (2) the larger raise would have caused her paychecks to be larger *now*. It would make no difference whether the employee is currently paid more or less than her peers or how long ago the challenged decision occurred. The only issues would be whether a more favorable decision in 1998 would have resulted in higher current pay, and whether the earlier decision was influenced by a discriminatory intent.

Should the bill become law, it will put considerable pressure on employers to make gender- and race-conscious wage decisions as prophylactic protection against stale claims. This will result from the ease with which an employee can create a prima facie case of pay discrimination using circumstantial evidence. The plaintiff's burden, which establishes a refutable presumption of discrimination, has alternatively been referred to as "minimal,"[2] "not demanding,"[3] and "not onerous."[4] It requires only that the plaintiff prove she was subject to lower pay than a male employee in the same job classification. It is then the employer's burden to clearly set forth, with admissible evidence, the nondiscriminatory reasons for the pay disparity. Generally, the employer cannot rely upon an after-the-fact rationalization by someone who did not participate in the decisions but must offer reasons that were relied upon by actual decision makers. When the claims are stale, this is a near impossible task for an employer relying on supervisors to make thousands, or even hundreds of thousands, of pay decisions each year.

Consider, for example, the allegations in the case that gives the bill its name, *Ledbetter v. Goodyear Tire and Rubber Company.*[5] Lilly Ledbetter became an employee of Goodyear in Gadsden, Alabama, in 1979. She worked for Goodyear until 1998. She was subjected to annual merit-based pay decisions that each year gave her lower pay raises than her male counterparts. Finally, in March 1998, she filed a discrimination claim asserting that the cumulative effects of the annual pay decisions cost her in terms of current pay. This claim placed at issue every salary decision made during Ledbetter's nineteen-year career, and, as stated by the Eleventh Circuit Court of Appeals, "put the onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar of difference between her salary and her male co-workers' salaries."

It was undisputed that Ledbetter's claim was not entirely time-barred. Any decision affecting her pay that was made within Title VII's 180-day limitations period could be challenged. This challenge, observed the court of appeals, "[would be] identical in form to the raise-denial claims courts routinely consider."[6] But Ledbetter also sought to require Goodyear to defend the nineteen years' worth of decisions that resulted in the pay disparity that existed at the end of her career. Her argument, said the court of appeals, is "directly contrary to the central purposes of the time-filing requirement," which is to "encourage prompt resolution of employment disputes."[7]

The proponents of the Lilly Ledbetter Fair Pay Act of 2007 agree that if Ledbetter had been demoted or denied a promotion she would have had to file any sex discrimination claim within 180 days of the event, even though the demotion or promotion loss would have caused reduced paychecks over the course of her career. Or, had she then become disabled by a physical assault during this period, she would have had only two years to bring an intentional tort claim under Alabama law, regardless of whether the assault limited her ability to earn wages into the future. But Lilly Ledbetter was not assaulted, or demoted, or denied a promotion. Instead, she was subjected to annual merit-based pay decisions that each year gave her lower pay raises than her male counterparts.

We are told that the reason wage claims should have a special rule, not applicable to assaults, demotions, or lost promotions is the "reality of wage discrimination." The proponents of the bill say that pay disparities are significantly different from other adverse actions because they often occur

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** Donald R. Livingston is a Partner with Akin Gump Strauss Hauer & Feld, LLP, in their Washington D.C. office. He served as General Counsel of the Equal Employment Opportunity Commission from 1990-1993.*

in small increments, develop over time, and must be shown by comparative pay information that is often hidden by the employer. But it is a distortion of how statutes of limitation are interpreted to suggest they allow the employer to game the judicial system to deprive a victim of recourse by hiding the discriminatory act. Courts have protected claimants from the harsh application of a statute of limitations where the claimant did not have notice of possible discrimination.[8] The existence of this "discovery rule" was recognized in the *Ledbetter* opinion, though the Court declined to address the issue because it was not argued by Ledbetter.[9] It seems that Ledbetter did have notice of possible discrimination. She testified that she knew at least three years before she filed her Title VII charge that her pay was lower than her peers.[10]

If the sponsors of the Lilly Ledbetter Fair Pay Act of 2007 were concerned about wage discrimination being hard to detect during the 180-day charge filing period, they could legislate to codify a discovery rule applicable to wage claims. Instead, they propose to open up decades-old employment decisions to current challenge even in situations where it is undisputed that the claimant knew years earlier that an adverse pay decision had occurred. In other words, this truthful statement in 1990, "Mary, we are giving everyone a raise this year but you," would be treated the same as this lie in 1991, "Mary, we are giving only you a raise this year." Both claims could be challenged in 2008 as having an adverse impact on 2008 pay. Under present law, the 1990 decision would need to be challenged within 180 or 300 days. The 1991 decision could be challenged within 180 or 300 days after Mary knew or should have known of discrimination.

There is a statement in the preamble of the Ledbetter bill that the intent of the bill is to return to pre-*Ledbetter* law. The statement is supported by ample lower court authority, but ignores Supreme Court precedent. In 1976 in *United Air Lines, Inc. v. Evans*, for example, the Supreme Court held that current application of a facially neutral seniority system is not a discriminatory act, even when the seniority system perpetuates the effects of past discrimination.[11] Subsequent opinions in *Delaware State College v. Ricks* (1980), *Lorance v. AT&T* (1989), *National Railroad Passengers Corp. v. Morgan* (2002), and *Ledbetter v. Goodyear Tire & Rubber Company* (2007) consistently hold that an employment decision that pre-dates the charge-filing period under Title VII cannot be challenged as a current violation of Title VII, even where the decision carries forward the effects of prior, uncharged discriminatory decisions.[12]

It is not contested that this precedent rules out Ledbetter's claims. It is asserted, however, that the Supreme Court's 1986 decision in *Bazemore v. Friday* carved out an exception for wage claims under which "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."[13] Numerous lower courts have interpreted *Bazemore* to hold that a claim based on a discriminatory pay decision could challenge the current effects of that decision, even if the decision was made years before the expiration of the limitations period. Each paycheck could be challenged separately regardless of whether the pay differential had its genesis in a discriminatory act years earlier. But the case law has not been entirely consistent on this point, as illustrated by the observation of the Seventh Circuit Court of Appeals that there is "a line of cases decided in this court… that are in tension with the rule that treats each check in a simple discriminatory pay claim as a new violation."[14]

This "tension" corresponds to questions about the holding of *Bazemore*. Did *Bazemore* refuse to insulate a pay scheme that is presently illegal on the basis that it was not illegal when adopted? Or did *Bazemore* hold that a past discriminatory pay decision is a present violation until it is corrected?

It has been described both ways, even by the EEOC. In *Cardenas v. Massey*, the EEOC described *Bazemore* as holding that plaintiffs can currently challenge an ancient discriminatory wage decision under Title VII, where the decision causes current unequal wages. The EEOC distinguished *Evans* on the ground the *Bazemore* is a wage case, subject to a special limitations rule ("the *Bazemore* Court specifically distinguished wage cases from cases like *Evans*").[15] In the EEOC's brief to the Sixth Circuit Court of Appeals in *EEOC v. Ameritech*, however, the EEOC described *Bazemore* as a challenge to a "discriminatory wage structure." Because the pay structure was facially discriminatory, it was immaterial that the pay structure had existed for years. "Each paycheck," said the EEOC, "was a new discriminatory act." The EEOC distinguished *Bazemore* from *Evans,* not on the basis that *Bazemore* creates a special carve-out for wage claims, but because *Bazemore*, unlike *Evans*, involved a facially discriminatory system that could be challenged at any time.[16] This is precisely the way the Supreme Court distinguishes *Bazemore* in its *Ledbetter* opinion. The Court states,

> *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charge filing period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied."

Undoubtedly, a statute of limitations prejudices plaintiffs by cutting off the right to challenge an offense. As the *Ledbetter* facts attest, there are advantages to plaintiffs when there is no time limit to challenge an action. However, a time limit imposes discipline on the judicial process. It protects the parties from speculative claims that have to be tried with foggy memories and lost records, or, as in Goodyear's case, without a key witness who had died.

That wage discrimination may be hard to detect is not an adequate justification for removal of any limitation period. Other offenses are also hard to detect. Courts deal with this. They employ equitable principles to mitigate harsh, unfair results that would flow from a strict application of a time limit in circumstances where a claimant could not have known to file a claim. Because these equitable principles have not been shown inadequate, there is no good justification for Congress to remove Title VII's limitations period for a claim that specific pay decisions, long in the past, were motivated by discriminatory intent. Justice is not served by extending a deadline for a claimant who has neglected timely to assert her right, when by the exercise of reasonable diligence she could have asserted the claim timely.

Endnotes

1 *In re EEOC*, 709 F.2d 392 (5th Cir. 1983).

2 Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1022 (8th Cir. 1998); Cordova v. State Farm, Ins. Co., 124 F.3d 1145, 1148 (9th Cir. 1997).

3 Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998).

4 Brennen v. GTE Gov't Sys. Corp., 150 F.3d 21, 26 (1st Cir. 1998).

5 127 S.Ct. 2162 (2007).

6 421 F.3d 1169, 1180 (11th Cir. 2005).

7 *Id.* at 1181.

8 Numerous decisions on this point are cited in Lindemann & Grossman, Employment Discrimination Law, 4th ed., (BNA 2007), p. 1796, n. 108.

9 Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162, 2177 n. 10.

10 *Ledbetter,* Joint Appendix at 231-33.

11 431 U.S. 553 (1977).

12 Delaware State College v. Ricks, 449 U.S. 250 (1980), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), National Railroad Passengers Corp. v. Morgan, 536 U.S. 101 (2002), and Ledbetter v. Goodyear Tire & Rubber Company, 127 S.Ct. 2162 (2007).

13 478 U.S. 385, 395 (1986).

14 Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007 (7th Cir. 2003).

15 No. 00-522, Brief of EEOC as Amicus Curiae, http://www.eeoc.gov/briefs/cardenas.txt.

16 No. 04-3496, Brief of EEOC as Appellant, http://www.eeoc.gov/briefs/ameritech1.txt.