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Determining the Reach of the Lilly Ledbetter Fair Pay Act

IN JANUARY 2009, PRESIDENT OBAMA signed the Lilly Ledbetter Fair Pay Act, which extends the time period in which employees may sue employers for discriminatory compensation practices. The LLFPA appears to apply exclusively to discriminatory pay, but recent decisions have construed the legislation more expansively. Several U.S. district courts are finding the LLFPA applicable to any employment decision that ultimately affects an employee's pay, such as allegedly discriminatory denials of promotions, negative performance evaluations, and unfavorable job assignments. According to these cases, employees may presumably sue and recover two years of back pay for discrimination that occurred years or decades before, so long as the discriminatory practice results in the employee experiencing an adverse impact on pay within the two years preceding the filing of an administrative charge of discrimination.

Nevertheless, other district courts have strictly construed the LLFPA. Practitioners await further guidance from the federal appellate courts, which have not yet weighed in on the issue of the LLFPA's breadth. In the meantime, plaintiffs and their counsel perceive new opportunities to press their claims, while employers and their counsel face increasing challenges that require new strategies.

The truth lies somewhere in between the Spector and Mikulski arguments. Indeed, the court decisions issued in the wake of the passage of the LLFPA fall into contrasting lines of authority.

Prior to the LLFPA, a claim for a discriminatory nonpromotion that occurred before the charge-filing period—for example, 300 days for Title VII claims—was time-barred. Now, an employee can sue and recover back pay for a discriminatory nonpromotion if it "affects" pay, and the aggrieved employee received less pay during the two years preceding the filing of the charge.

It is no secret that the LLFPA is a response by Congress to the U.S. Supreme Court's controversial decision in *Ledbetter v. Goodyear Tire and Rubber Company, Inc.*[1] In *Ledbetter*, the Supreme Court held that a long-time Goodyear employee, Lilly Ledbetter, could not challenge ongoing pay discrimination that she maintained resulted from discriminatory performance evaluations received many years earlier. Although she had not filed timely discrimination charges with the Equal Employment Opportunity Commission challenging those discriminatory performance evaluations, she argued that paychecks received during the charge-filing period were discriminatory and thus actionable because her paychecks "would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charge period."[2]

Writing for a divided court, Justice Samuel Alito rejected Ledbetter's argument:

> Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her. Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period.…But current effects alone cannot breathe life into prior, uncharged discrimination.[3]

In her dissent, Justice Ruth Bader Ginsberg challenged the majority opinion for its disregard of what she characterized as fundamental workplace realities:

> The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[4]

In response to what she perceived as the "parsimonious reading of Title VII," Justice Ginsberg called for Congress to act: "Once again, the ball is in Congress' court." Congress did act, declaring that "[t]he *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[5]

Under the provisions of the LLFPA, an act of discriminatory compensation occurs when 1) a discriminatory compensation decision is adopted, or 2) an individual becomes subject to it or is affected by its application, "including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision *or other practice*."[6] The LLFPA amends Title VII of the Civil Rights Act, the American with Disabilities Act, the Age in Discrimination Act, and the Rehabilitation Act.

Congressional opponents of the LLFPA argued that the "other prac-

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tice" language could encompass employment practices beyond pay decisions. Just days before the bill's passage, the U.S. Senate Republican Policy Committee warned that the text of the LLFPA "essentially eliminates time limitations for claims of employment discrimination in many cases because non-pay discrimination claims (including, for example, a wrongful denial of a promotion) often have some effect on compensation."[7] Fearing that the LLFPA would open the litigation floodgates, Senator Arlen Specter proposed an amendment that would have stricken the "other practice" language. Senator Barbara Mikulski, one of the LLFPA's chief proponents, rejected Specter's amendment: "Senator Specter has said that his amendment is necessary because the bill, as drafted, is overbroad and could apply to discrete personnel decisions, like promotions and discharges. That's not true. The bill specifically says that it is addressing 'discrimination in compensation.' That limiting language means that it already only covers such claims—nothing more, nothing else."[8]

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Strict and Expansive

Several district courts have relied on the LLFPA's "discrimination in compensation" language in limiting the LLFPA to compensation claims—"nothing more, nothing else." For example, in *Rehman v. State University of New York at Stony Brook*,[9] the court explained, "It is well-settled that certain adverse employment practices such as the failure to promote, failure to compensate adequately, undesirable work transfers, and denial of preferred job assignments are discrete acts." Therefore, the "plaintiff has no right to recover damages based upon discrete acts of discrimination occurring prior to June 16, 2006 under Title VII."[10] Other courts have followed suit.[11]

Indeed, by following the Supreme Court's pre-*Ledbetter* holding in *National Railroad Passenger Corporation v. Morgan* that an "employment practice" typically refers to "a discrete act of single 'occurrence,'"[12] several U.S. district courts have applied the LLFPA narrowly. They did so by finding that claims based on discrete acts, including job assignments and promotions, are time-barred if they fall outside the limitations period—even if the acts arguably affected compensation.

According to a district court in the Northern District of Iowa, "There is no indication Congress intended the Ledbetter Act to serve as a trump card that [plaintiffs]… might use to supersede all statutes of limitations in our nation's various civil rights acts."[13] A finding by the district court in New Jersey is in accord: "While the Act certainly contains expansive language in superseding the holding in *Ledbetter*…it does not purport to overturn *Morgan*, and thus does not save otherwise untimely claims outside the discriminatory compensation context."[14] Also in agreement is a district court in the Eastern District of Virginia, which held in *Masterson v. Wyeth Pharmaceuticals*[15] that promotion and job assignment claims based on age and gender were time-barred and stated that the LLFPA "do[es] not affect this analysis" since the LLFPA "only pertain[s] to discrimination claims respecting unfair compensation, which is not an issue in this case."

Because of this line of cases, plaintiffs have tried to circumvent *Morgan* by characterizing their LLFPA claims as "continuing violations" instead of one-time discrete acts that would trigger the charge-filing period.[16] For example, in *Holloway v. Best Buy*,[17] the plaintiffs filed a putative nationwide race and gender class action alleging discriminatory hiring, job assignment, promotion, and compensation practices. Defendant Best Buy moved for judgment on the pleadings on the named plaintiffs' claims for discriminatory initial job assignments on grounds that none had filed timely charges. The plaintiffs opposed the motion by arguing that the LLFPA saved their claims because initial job assignments could not be divorced from job assignments that occurred within the charge-filing period. The court rejected the plaintiffs' argument, stating that the "plaintiffs have not established that the FPA [LLFPA] provides support for the proposition that the court should consider any claims of 'initial assignments' that are outside the limitations period as actionable under a 'continuing violations' theory."[18]

Despite these decisions, other courts have allowed employees to challenge otherwise time-barred nonpromotions and job assignment decisions under the LLFPA on grounds that these practices "affect" compensation. For example, in *Bush v. Orange County Corrections Department*,[19] a district court in the Middle District of Florida permitted the plaintiffs to challenge "demotions and pay reductions that occurred in 1990"—16 years before filing their lawsuit. The plaintiffs maintained that the alleged discriminatory nonpromotions were accompanied by pay reductions. The court held that the challenged nonpromotions were "no longer administratively barred" under the LLFPA:

> Under *Ledbetter*, Plaintiffs' claims would plainly be barred. However, the *Ledbetter* decision prompted a Congressional response, and just last week…President Obama signed into law the "Lilly Ledbetter Fair Pay Act of 2009." Thus, while [the defendant]'s untimeliness argument was valid prior to last week, with the passage of the Act Plaintiffs' title VII claims are no longer administratively barred.[20]

The plaintiffs' victory was short-lived, however, since the court ultimately granted the employer's motion for summary judgment. The court did so because the plaintiffs failed to present a prima facie case of discrimination—that is, they did not prove that they occupied similar jobs to higher-paid white employees—and could not rebut the employer's legitimate nondiscriminatory reasons for the pay disparities.[21]

A district court in the Southern District of Mississippi also expanded the scope of the LLFPA in *Gentry v. Jackson State University*.[22] The case involved a claim for the allegedly discriminatory denial of tenure at a university. The court noted that "the denial of tenure, which plaintiff has contended negatively affected her compensation, qualifies as a 'compensation decision' or 'other practice' affecting compensation within the recently-enacted Lilly Ledbetter Fair Pay Act of 2009."[23]

Other courts have gone even further by effectively inviting plaintiffs to plead that challenged, otherwise time-barred employment actions adversely affect compensation. For example, in *Stewart v. General Mills, Inc.*,[24] a district court in the Northern District of Iowa concluded that the LLFPA did not apply because "[t]his legislation pertains to discriminatory compensation, which is not at issue in the instant action and does not affect the court's analysis." However, the court noted in its ruling that the "[p]laintiff has not suggested or submitted evidence that her temporary reassignment caused a reduction in salary, benefits or prestige."[25] A district court in the Eastern District of Pennsylvania similarly stated that "[t]he Ledbetter Act does not help Plaintiff here because she pressed no discriminatory compensation claim with respect to her failure to promote."[26]

Some decisions, moreover, suggest that a plaintiff need only plead a plausible nexus between the employment decision and an adverse effect on pay in order to overcome timeliness challenges. In Minnesota, for example, a district court held in *Onyiah v. St. Cloud State University*[27] that the plaintiff's claim based on a alleged refusal to hire was time-barred because "the Fair Pay Act applies only to pay discrimination claims" and the plaintiff "failed to provide the essential nexus between the alleged refusal to hire and the Plaintiff's pay discrimination claims." Likewise, a district court in the Southern District of Mississippi held in *Johnson v. Watkins*[28] that the LLFPA did not apply to a

claim of quid pro quo sexual harassment because the plaintiff's "compensation was not affected."

Impact of the Discovery Rule

Still another series of court decisions have focused on whether a claim is barred under the "discovery rule"—a creation of case law addressing discrimination claims.[29] Under the rule, claimants must take prompt action to file a discrimination charge when they know or should have known of the alleged wrongdoing. The Southern District of New York addressed this issue in *Vuong v. New York Life Insurance Company*.[30] The plaintiff in *Vuong* alleged discrimination based on race and national origin in the plaintiff's January 1998 denial of promotion to the position of sole managing partner. The denial of promotion arguably affected the plaintiff's compensation because the plaintiff would have received all performance-related compensation typically given to managing partners. Unlike other, non-Asian managing partners from other offices in the firm, the plaintiff had to split his performance-based bonus with a comanaging partner. The court nevertheless held that Vuong's promotion claim was time-barred because "[i]t is clear that New York Life committed a 'discrete' act in January 1998 when it promoted plaintiff and DeBuono to be co-Managing Partners of the SFGO, rather than promoting plaintiff to be sole Managing Partner. Of course, plaintiff knew what was occurring at that time. This was more than 300 days before plaintiff filed with the EEOC on August 2, 2002, and any claim of wrongdoing at that time is time-barred."[31]

Interestingly, the court allowed Vuong to challenge a February 1998 decision concerning the allocation of the performance-related bonus that left the plaintiff with a smaller percentage of the bonus. The court stated that the LLFPA "clearly governs the compensation claim in the instant case."[32] Not only does the *Vuong* decision illustrate the application of the discovery rule, it suggests that the ability to successfully challenge an otherwise time-barred employment practice affecting pay will depend on how a plaintiff frames the connection between the employment practice at issue and its effect on compensation. Had Vuong characterized the January 1998 denial of promotion differently, the employer may have had to defend this decision on the merits.

The Eastern District of Louisiana reached a similar conclusion in *Olubadewo v. Xavier University*[33] by finding that the plaintiff had failed to take prompt action when he knew of the discrimination. The plaintiff alleged that the defendant university terminated and failed to rehire him in October 2005 because of his race and national origin. Rather than dismiss the termination and failure to rehire claims because they arguably did not affect compensation under the LLFPA, the court dismissed these on the ground that the plaintiff failed to take prompt action by waiting until April 3, 2007, to file his discrimination charge—"long after the limitations period had run." Although it did not explicitly reference the discovery rule, its imprimatur on the court's reasoning is obvious:

> According to his own testimony, plaintiff knew in late October 2005 that his employment had been terminated and that other faculty members who were younger, white, female and non-Nigerian had been rehired for the January 2006 semester, while he had not been. Dr. Olubadewo believed at that time that he was not being rehired because of discrimination…and that was why he contacted attorney Luscy for legal counsel.[34]

The court granted the employer's motion for summary judgment, stating that "the limitations period would have begun to run in October or early November 2005 when plaintiff knew these facts and believed that he had suffered discrimination."[35]

The Southern District of Texas also examined the plaintiff's diligence under the discovery rule in a post-LLFPA environment. In *Leach v. Baylor College of Medicine*,[36] an African American plaintiff sued his former employer for discrimination, including "disparate job responsibilities." While acknowledging that it was "unclear from the record" whether the plaintiff "had notice of the disparate job responsibilities more than 300 days before he filed his EEOC discrimination charge," the court side-stepped the timeliness issue under the LLFPA because the plaintiff could not establish a prima facie case of discrimination in any event. Even though it avoided making a decision under the LLFPA, the court demonstrated a willingness to apply principles derived from the discovery rule to a claim of discrimination based on disparate job responsibilities—a claim that, at best, possessed a tenuous connection to compensation and was not tethered to any impact on compensation. According to the *Leach* court, "Although the Supreme Court in *Ledbetter* 'declined to address whether Title VII suits are amenable to a discovery rule,' the Fifth Circuit has held that 'the operative date from which the limitations period begins to run is the date of notice of the adverse action.'"[37]

Nonetheless, at least one court recently applied the LLFPA to claims alleging the discriminatory accrual of pension benefits and deemed them timely even though the plaintiff indisputably knew about the alleged discrimination years earlier. In *Tomlinson v. El Paso Corporation*,[38] a district court in Colorado initially held that plaintiff Tomlinson's age discrimination claim was time-barred because "the discriminatory act and Mr. Tomlinson's actual knowledge of that act and its alleged disparate effect on older workers occurred more than 300 days before he filed his charge of discrimination." The court later reversed course while acknowledging that the "policy justifications for enacting the Ledbetter Act include the difficulty of detecting pay discrimination, since pay-setting decisions are unlikely to be viewed as discriminatory and information about comparators is generally confidential."

Post-LLFPA World for States and Defense Counsel

State courts are also beginning to grapple with the LLFPA's impact on state antidiscrimination statutes. For instance, a New York state court held that the plaintiffs' gender discrimination claims were time-barred because the LLFPA "does not affect this court's analysis."[39] The plaintiffs alleged that the employer's method of assigning jobs and favoring less qualified males caused the plaintiffs "to earn significantly less money than men in comparable positions." However, a district court in the Middle District of Pennsylvania interpreting Pennsylvania's antidiscrimination law held that the plaintiffs' claims alleging discriminatory paychecks were timely under the LLFPA even though the plaintiffs knew of their salary disparity but failed to file timely administrative charges: "[T]he Court concludes that each paycheck issued pursuant to a discriminatory pay scheme is independently actionable under [Pennsylvania's antidiscrimination law]."[40]

Employment law practitioners in California who are more likely to litigate discrimination claims under the state Fair Employment and Housing Act should be aware that while the LLFPA does not apply to FEHA claims, courts may use the LLFPA to support California's continuing violations theory set forth in *Richards v. CH2M Hill, Inc.*[41] In *Richards*, the California Supreme Court held that a plaintiff could challenge an allegedly discriminatory employment practice even if the employee unreasonably failed to file a timely administrative charge. However, the plaintiff could only do so if the alleged discrimination had achieved a certain degree of permanence that rendered futile an employee's conciliation efforts with the employer. A district court in the Eastern District of California avoided this issue in *Harris v. City of Fresno*:

> No party has discussed whether to and what extent the Lilly Ledbetter Fair Pay Act impacts the statute of limitations issue in this case. Given

that neither party has raised or briefed this issue, and because the City's motion can be decided on another ground, it is unnecessary to decide whether the Lilly Ledbetter Fair Pay Act brings the reclassification denials within the statute of limitations.[42]

As district courts continue to wrestle with the scope of the LLFPA, it seems certain that some district courts will be willing to interpret the LLFPA broadly and thus allow plaintiffs to challenge employment practices that occurred years ago so long as they affect compensation. This is welcome news for plaintiffs but not for employers, who now face the prospect of defending employment decisions that occurred in the more distant past. However, some key themes emerge from these early decisions that will help employers adapt to their new reality—at least until the federal appellate courts flesh out this emerging body of law to reconcile the competing interests of remedying discrimination and providing employers with closure and predictability.

First, a plaintiff's ability to challenge an otherwise time-barred employment practice will largely depend on the ability to show a nexus between the alleged discriminatory practice and compensation as well as sufficient diligence under the discovery rule. Second, the list of employment practices that can arguably affect compensation is virtually limitless when left to the creativity of plaintiffs' attorneys, who already benefit from antidiscrimination laws and fee-shifting statutes. As a result, employers should ensure that their pay decisions are well documented and factually supported in a manner sufficient to provide an effective defense in court should the need arise. This is especially critical when the decision maker no longer works for the employer or is otherwise unavailable—or unable—to explain any pay disparities.

Employers should also strive to make personnel decisions more transparent, especially those decisions that affect an employee's compensation, such as performance reviews. They should inform employees whether their decisions will have an impact on pay. Indeed, the recent decision by the Third Circuit Court of Appeals in *Mikula v. Allegheny County of Pennsylvania* serves as a speed bump for employers. The court held that a "failure to answer a request for a raise qualifies as a compensation decision [under the LLFPA] because the result is the same as if the request had been explicitly denied."[43]

The inescapable reality is that businesses and human resources professionals must always operate with an awareness of the latest developments in employment law. Not only are they at greater risk of defending personnel decisions that occurred decades

ago, but they also face increased monetary exposure for liability and more costly litigation. Proactively implementing solid employment practices now will help avoid problems in the future. Employers and their counsel need only read the court's decision in *Bush v. Orange County Corrections Department*[44] to get a glimpse of what it is like in the post-LLFPA legal landscape to defend and explain a nonpromotion that occurred 16 years prior to the filing of the lawsuit. Fortunately for employers, plaintiffs must still prove their cases to ultimately prevail.

Bush shows that an employee plaintiff's inability to establish a prima facie case of pay discrimination or rebut an employer's proffered legitimate nondiscriminatory reasons for pay disparities will still doom the plaintiff's claims. Plaintiffs still face a steep climb even as the LLFPA does what Justice Alito claimed "current effects alone" could not do: "breathe life into prior, uncharged discrimination."[45] ■

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[1] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007).
[2] *Id*. at 624.
[3] *Id*. at 619.
[4] *Id*. at 645.
[5] H.R. 11, 111th Cong. (1st Sess. 2009).
[6] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §3, 123 Stat.5 (emphasis added).
[7] U.S. Senate Republican Policy Committee Legislative Notice, Jan. 14, 2009.
[8] *See* note 6, *supra*, S. Deb. (Jan.21-22, 2009).
[9] Rehman v. State Univ. of N.Y. at Stony Brook, 596 F. Supp. 2d 643 (E.D. N.Y. 2009).
[10] *Id*. at 651.
[11] *See* Leach v. Baylor Coll. of Med., 2009 U.S. Dist. LEXIS 11845 (S.D. Tex. Feb. 17, 2009); Maher v. International Paper Co., 600 F. Supp. 2d 940 (W.D. Mich. 2009); *and* Schuler v. Pricewaterhouse Coopers, LLP, 595 F. 3d 370 (D.C. Cir. 2010).
[12] National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).
[13] EEOC v. CRST Van Expedited, Inc., 2009 U.S. Dist. LEXIS 40251 (N.D. Iowa May 11, 2009).
[14] Richards v. Johnson & Johnson Consumer Prods. Cos., 2009 U.S. Dist. LEXIS 46117 (D. N.J. June 2, 2009).
[15] Masterson v. Wyeth Pharms., 2009 U.S. Dist. LEXIS 34968 (E.D. Va. Apr. 23, 2009).
[16] *See*, *e.g*., Holloway v. Best Buy Co., Inc., 2009 U.S. Dist. LEXIS 50994 (N.D. Cal. May 28, 2009).
[17] *Id*.
[18] *Id*. at *24.
[19] Bush v. Orange County Corr. Dep't, 597 F. Supp. 2d 1293 (M.D. Fla. 2009).
[20] *Id*. at 1296.
[21] *Id*. at 1297-98.
[22] Gentry v. Jackson State Univ., 610 F. Supp. 2d 564 (S.D. Miss. 2009).
[23] *Id*. at 566.
[24] Stewart v. General Mills, Inc., 2009 WL 350639 (N.D. Iowa Feb. 11, 2009).
[25] *Id*. at *13.
[26] Rowland v. Certainteed Corp., 2009 U.S. Dist. LEXIS 43706 (E.D. Pa. May 21, 2009).
[27] Onyiah v. St. Cloud State Univ., 2009 U.S. Dist. LEXIS 85333 (D. Minn. Aug. 27, 2009).
[28] Johnson v. Watkins, 2009 U.S. Dist LEXIS 45080 (S.D. Miss. May 29, 2009).
[29] *See*, *e.g*., Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 887-88 (1979) (applying discovery rule to strict liability action).
[30] Vuong v. New York Life Ins. Co., 2009 U.S. Dist. LEXIS 9320 (S.D. N.Y. Feb. 6, 2009).
[31] *Id*. at *21.
[32] *Id*. at *24.
[33] Olubadewo v. Xavier Univ., 2009 U.S. Dist. LEXIS 29318 (E.D. La. Apr. 6, 2009).
[34] *Id*. at *31.
[35] *Id*. at *31-32.
[36] Leach v. Baylor Coll. of Med., 2009 WL 385450 (S.D. Tex. Feb. 17, 2009).
[37] *Id*. at *18; *see also* Schengrund v. Pennsylvania State Univ., 2009 WL 3182490, at *9 (M.D. Pa. Sept. 30, 2009) ("[The plaintiff] cannot simply ignore the facts of discrimination being uncovered around her and thereby receive benefits in court above and beyond those of the women who actively sought to remedy discrimination in the workplace for both her benefit and their own.").
[38] Tomlinson v. El Paso Corp., 2009 U.S. Dist. LEXIS 77341 (D. Colo. Aug. 28, 2009).
[39] Siri v. Princeton Club of N.Y., 2009 N.Y. slip op. 1357 (N.Y. App. Div. Feb. 24, 2009).
[40] Schengrund, 2009 WL 3182490, at *11.
[41] Richards v. CH2M Hill, Inc., 26 Cal. 4th 798 (2001).
[42] Harris v. City of Fresno, 625 F. Supp. 2d 983, 1000 (E.D. Cal. 2009).
[43] Mikula v. Allegheny County of Pa., 583 F. 3d 181 (3d Cir. 2009).
[44] Bush v. Orange County Corr. Dep't, 597 F. Supp. 2d 1293 (M.D. Fla. 2009).
[45] *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 619 (2007).