May 2007

CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
35th Floor
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

WWW.EBGLAW.COM

In Ledbetter, Supreme Court Limits Discriminatory Pay Claims

On May 29, 2007, the United States Supreme Court held that an employee who files a discriminatory pay charge under Title VII of the 1964 Civil Rights Act must file within 180 or 300 days, depending on the state, of the initial pay decision or else be forever barred (*Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 05-1074, 5/29/07). In holding that Title VII's statute of limitations begins to run when the "allegedly discriminatory pay decision was made and communicated to her," the Court rejected the plaintiff's arguments that each subsequent paycheck was a separate act of discrimination and that the most recent decision of denying her a raise was unlawful because it accumulated intentionally discriminatory disparities from prior years. Following the precedent set in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when any "[d]iscrete ac[t]" of discrimination occurs, the Court stated that a pay-setting decision is a "discrete act" that starts the time for filing. Employers can doubtless use this decision to limit claims under federal law, but this decision will only further the trend toward bringing such claims under state statutes with more lenient limitations law.

Plaintiff Lilly Ledbetter (Ledbetter), worked for the defendant Goodyear Tire and Rubber Company (Goodyear) from 1979 until 1998. In 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of discrimination on the basis of sex, and she filed a formal EEOC charge in July of that year. After taking early retirement in November 1998, Ledbetter filed a lawsuit in federal District Court alleging, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA). The lower court granted Goodyear's motion for summary judgment on Ledbetter's EPA claim on the basis that Goodyear had demonstrated that any pay disparity resulted from Ledbetter's consistently weak performance, not on the basis of sex. The District Court, however, had allowed Ledbetter's Title VII pay discrimination claim to proceed to trial, and Goodyear appealed.

On appeal to the Court of Appeals for the Eleventh Circuit, Goodyear contended that Ledbetter's pay discrimination claim was barred with respect to all pay decisions made 180 days before the filing of her EEOC

questionnaire and that no discriminatory act relating to Ledbetter's pay had occurred after that date. The Court of Appeals agreed, holding that Ledbetter's Title VII pay discrimination claim was time barred. 421 F.3d 1169, 1182-83 (11th Cir. 2005). Ledbetter filed a petition for a writ of certiorari on the sole question as to whether a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of discriminatory pay decisions that occurred earlier (*i.e*. outside the limitations period). The United States Supreme Court granted certiorari, 126 S. Ct. 2965 (2006), in light of a disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases. *Citing Ledbetter*, 421 F.3d 1169; *Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565 (2d Cir. 2005); *Shea v. Rice*, 409 F.3d 448 (D.C. App. 2005).

The Court, in an opinion authored by Justice Samuel Alito, began its analysis by stating that an individual alleging that an employment practice is discriminatory as to an individual's compensation because of that individual's sex must first file a charge with the EEOC. Such a charge must be filed within a specified period after the alleged unlawful employment practice occurred. The Court explained that the specified period may either be 180 or 300 days, depending on the state, and if the employee does not submit a timely EEOC charge, the employee is barred from thereafter challenging that employment practice in court under federal law.

Ledbetter argued that the paychecks that were issued to her during the EEOC charging period, the 180-day period preceding the filing of her EEOC questionnaire, were each a separate act of discrimination, claiming that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Ledbetter alternatively argued that a 1998 decision denying her a raise violated Title VII because it "'carried forward intentionally discriminatory disparities from prior years.'" In rejecting both of these arguments, the Court relied upon its decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 907-08 (1989), for the settled law that the EEOC charging period runs from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of the alleged discrimination were felt. The Court explained that "[a] new charging period does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." The Court held that Ledbetter's failure to file an EEOC charge within 180 days after the alleged discriminatory pay decision barred her lawsuit, and the subsequent paychecks issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming her prior failure to file a timely EEOC charge.

Ledbetter further argued that the decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), required the Court to treat her claim differently than the claims in *Morgan* and *Lorance*, because her claim related to pay. Ledbetter argued that the statement in *Bazemore* that "'[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII'" established a "paycheck accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the alleged discrimination occurred. Ledbetter claimed that the decision in *Bazemore* dispensed with the need to prove actual discriminatory intent in pay cases. The Court disagreed and explained that *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using an intentionally discriminatory pay structure, "[b]ut 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.'" The Court clarified that precharging period discrimination adversely affecting the calculation of a neutral factor, *i.e.* seniority, that is used in determining future pay does not mean that each new paycheck constitutes a new

violation and restarts the EEOC charging period. The Court held that Ledbetter's lawsuit was barred because there was no evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex.

Ledbetter also relied upon a variety of policy arguments in favor of giving alleged pay discrimination more time before they are required to file a charge with the EEOC, claiming that pay discrimination is harder to detect than other forms of employment discrimination. The Court did not address the issue of whether Title VII suits are amenable to the discovery rule. The Court rejected Ledbetter's policy arguments and quoted the decision in *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980), for the notion that Title VII should be applied as written so as to encourage the "'prompt processing of all charges of employment discrimination.'" The Court explained that the EEOC filing deadline "protects employers from defending claims arising from employment decisions that are long past," and that the short deadline reflects Congress' intent to encourage the prompt processing of all charges of employment discrimination. The Court reasoned that while the challenged acts will almost always be documented by the employer, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time.

Justice Ginsburg authored a dissenting opinion with whom three other justices joined, and took (for her) the somewhat rare step of actually delivering her dissent orally from the bench . Ginsburg suggested that "[p]ay disparities … have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination," and therefore pay disparities do not fit within discrete acts that are more easily identifiable, such as termination, refusal to hire, or failure to promote. The dissent concluded by stating that Congress would have to intervene to overturn the decision. Several members of Congress have already responded to the decision, including Sen. Hillary Rodham Clinton, D-N.Y., who stated she would introduce legislation "to clarify congressional intent" in the matter.

The *Ledbetter* decision is good news for employers as it protects employers from being subject to lawsuits for decisions made many years earlier that would be difficult to defend. Employers should take note that the decision, at least expressly, applies only to claims under Title VII, and different results are possible under the Equal Pay Act and likely under many state statutes. Employers should continue to take all reasonable steps to ensure pay decisions do not have a discriminatory effect. Finally, employers should be cognizant of proposed legislation that may result in response to the *Ledbetter* decision.

* * *

Please feel free to contact James P. Flynn in the firm's Newark office at 973/639-8285 or jflynn@ebglaw.com, if you have any questions or comments. Daniel R. Levy, an associate in the National Litigation Department, assisted in the preparation of this Alert.