Employment Law Letter

Summer 2007

LAWSUITS OVER PAY DISPARITIES ARE NOW HARDER TO WIN

Just before our last edition went to press, the U.S. Supreme Court issued an important employment discrimination decision, Ledbetter v. Goodyear Tire & Rubber Company, and we weren't able to give it the attention it deserved. Basically, the justices ruled that the statute of limitations on claims of unequal pay begins to run when the discriminatory decision is made, and each new paycheck does not reset the clock. Critics say this will make it much more difficult for race and sex discrimination plaintiffs to bring successful wage bias claims.

IN SUMMARY:

Ms. Ledbetter was one of the few female supervisors in a Goodyear plant in Alabama for almost 20 years. She was paid significantly less than her male counterparts, and at one point was even below the bottom of the rate range for her position. However, in the last few years before she took early retirement and sued, she got the same percentage increases as males did. Therefore, the court said no discriminatory action occurred within 300 days (the limitation period for Title VII claims) prior to her lawsuit.

The majority opinion in the 5-4 decision was written by Justice Alito, who cited several cases he thought dictated rejection of Ms. Ledbetter's claim. One involved a United Air Lines flight attendant who was fired because she was married, but didn't sue until she was later rehired without any credit for prior service. Her claim was rejected because the firing that was the basis for the denial of service credit was not within the 300 day limitations period. Another involved a college librarian who was denied tenure, but lost his lawsuit because he waited until his contract expired a year later to bring it. In a third case, the same fate was in store for female workers at AT&T who challenged a longstanding union contract provision because it gave seniority benefits to males who were in historically all-male positions.

The majority distinguished a case on which Ledbetter relied, which said when an employer sets up a pay structure that systematically treats black employees less favorably than whites, each week's paycheck is an "actionable wrong." Justice Alito

SHIPMAN & GOODWIN LLP
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said there was no evidence that Goodyear adopted its pay structure in order to discriminate against females. The dissenters, especially Justice Ginsberg (the court's sole remaining woman) were outspoken in their disagreement. They said it often takes years for employees to find out what their peers are earning, and they shouldn't be prevented from suing just because the employer is perpetuating past discrimination rather than making new decisions based on bias.

Our opinion is that legislation aimed at overturning Ledbetter, or at least modifying its result, has a good chance of passage. Senator Ted Kennedy (D-Mass) has introduced a bill that would in effect overturn the court's decision, and several lawmakers, including Connecticut's Chris Dodd and Ross DeLauro, have expressed support. The Ledbetter ruling has also sparked a debate over employer rules prohibiting workers from disclosing their compensation. Hillary Clinton (D-NY) has introduced a bill in the Senate that would make such prohibitions illegal, and Rosa DeLauro has done the same in the House. California already has such a law, and the NLRB takes the position that discussion of wages and benefits among co-workers constitutes concerted protected activity.

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NLRB RULES AGAINST ONE HARTFORD EMPLOYER; DECIDES IN FAVOR OF ANOTHER

The National Labor Relations Board has just ruled on two labor disputes dating back several years, both involving employers in Hartford. One dodged a bullet by having a narrow union election victory overturned, the other suffered what may be a costly defeat.

The latter involved the well-publicized strike at Avery Heights, a nursing home at which about 180 members of District 1199 went on strike late in 1999. The owner, Church Homes, started replacing strikers after about a month, but didn't tell the union for fear of picket line violence. When the union found out, the strikers made an unconditional offer to return, but more than half of them had already been replaced.

When the Board first heard the case in 2004, it said Church Homes had done nothing wrong by failing to inform the union about hiring permanent replacements, because it had no obligation to do so. However, when the case went to court, the Second Circuit Court of Appeals found the Board's reasoning "arbitrary and capricious," because the employer's secrecy suggested an illicit motive, such as destroying the union's majority support. The case was remanded to the Board, with instructions to examine the conclusion of the administrative law judge who heard the case, to the effect that the Avery Heights administrator's testimony that the reason for secrecy was fear of violence "lacked credibility."

On remand, the Board deferred to the Court's conclusion that the employer's secrecy raised an inference of unlawful motive, though the majority "respectfully disagreed" with that logic, since it effectively put the burden on the employer to prove a lawful motive, rather than requiring a showing of an unlawful one. The Board agreed with the conclusion that the administrator's testimony about fear of violence lacked credibility, in part because there was

no confirmation by any other management representatives.

Because the Board found no lawful motive for secrecy had been established, it concluded the motive must have been unlawful. Therefore, it ordered the employer to offer employment to all the strikers, dismissing replacements if necessary, and make them whole for any lost earnings. Presumably this could cost millions.

The other case involved a union election in 2000 among about fifty workers at the Hartford Civic Center, in which AFSCME Council 4 prevailed by about five votes. The employer, Madison Square Garden – Connecticut, challenged the outcome because several supervisors made it clear to employees they supported unionization.

The regional director rejected that claim, but the Board found there was strong evidence that the supervisors had influenced the election outcome. They had significant authority over the voters, they maintained their pro-union views notwithstanding the employer's opposition, and the margin was narrow enough so even a few votes could have changed the results. The Board ordered a new election.

The Bush appointees to the NLRB seem more willing than their predecessors to set aside the results of union elections where voters feel pressured to vote in favor of representation. On the same day as it decided the Civic Center case, the Board set aside an election at PPG Industries because of voter threats by union supporters, even though there was no evidence the union itself knew about them.

Our opinion is that while NLRB regional offices make decisions promptly, and even courts move cases along at a reasonable pace, the NLRB in Washington takes too long to decide cases. The Avery Heights case now has built up almost seven years of potential back pay, and the Civic Center decision is now likely moot. After all, how many employees who voted in the 2000 election are still working at the Civic Center?

LEGAL BRIEFS
. . . and footnotes

EEOC Finally Issues New Age Rules: It took them three years, but the EEOC has finally issued revised regulations reflecting a 2004 ruling of the U.S. Supreme Court, to the effect that the Age Discrimination in Employment Act does not prohibit employers from favoring older workers over younger ones, even when employees on both sides of the comparison are over age 40. This confirms the validity of plans such as early retirement incentive programs that offer extra benefits to employees over 50, but not to those between 40 and 50.

How to Measure Distances for FMLA Coverage: Employees are entitled to federal FMLA rights only if their employer has at least 50 workers located within 75 miles of where the employee works. But is that 75 miles by road or "as the crow flies?" The U.S. Supreme Court has let stand an appellate court decision holding the measurement is by road. In that case, the employee was denied FMLA coverage because a handful of employees he wanted to count to meet the threshold were under 75 linear miles away, but over 75 miles away by road.

Can Employment At Will Apply Before Work Starts? In a previous issue, we reported on two lower court decisions involving a question that seems to come up frequently these days. Can an offer of employment be withdrawn after it has been accepted but before the employee actually starts work? The first Appellate Court decision in Connecticut on this subject says that where an offer clearly states it is for employment at will, the employer can withdraw it even before the employee starts work, and even if he has quit another job to accept the offer. The employer's action resulted from negative responses to reference checks. The decision does not explain why those checks were not completed before the offer was made.

Change in Paycheck Schedule Justifies Quit: A paralegal's claim for unemployment benefits has

been upheld after she resigned due to a change in the paycheck schedule she was promised when she was hired. Instead of being paid Friday afternoon for the week just ended, the law office where she worked started paying her the next week like everyone else in the office. A panel of judges said that while this might not generally be justification for quitting, in this case it constituted a breach of contract.

"Apply Online" Means Just That: An employee fired by Pratt & Whitney Aircraft in 1991 brought suit when the company failed to rehire him in 2004, alleging race, national origin and age discrimination. However, when he sent in his resumé, he was told to submit his application to the company's online database. He admitted in a deposition that he failed to take that step, so the court rejected his discrimination claims. The judge said employers are entitled to decide how people must apply for employment. Besides, there was no evidence that HR personnel in 2004 even knew about the 1991 discharge.

SHIPMAN & GOODWIN LLP
COUNSELORS AT LAW
One Constitution Plaza
Hartford, CT 06103-1919

The Labor and Employment Law Department of Shipman & Goodwin LLP includes:

Andreana Bellach	Anne Littlefield
Gary Brochu	Eric Lubochinski
Brian Clemow*	Lisa Mehta
Erin Duques	Rich Mills**
Brenda Eckert	Tom Mooney***
Julie Fay	Saranne Murray
Vaughan Finn	Kevin Roy
Robin Frederick	Rebecca Santiago
Susan Freedman	Robert Simpson
Gwen Goodman	Gary Starr
Shari Goodstein	Linda Yoder
Gabe Jiran	Henry Zaccardi

* Employer Defense and Labor Relations Practice Group Leader and editor of this newsletter
** Labor and Employment Law Department Chair
*** School Law Practice Group Leader