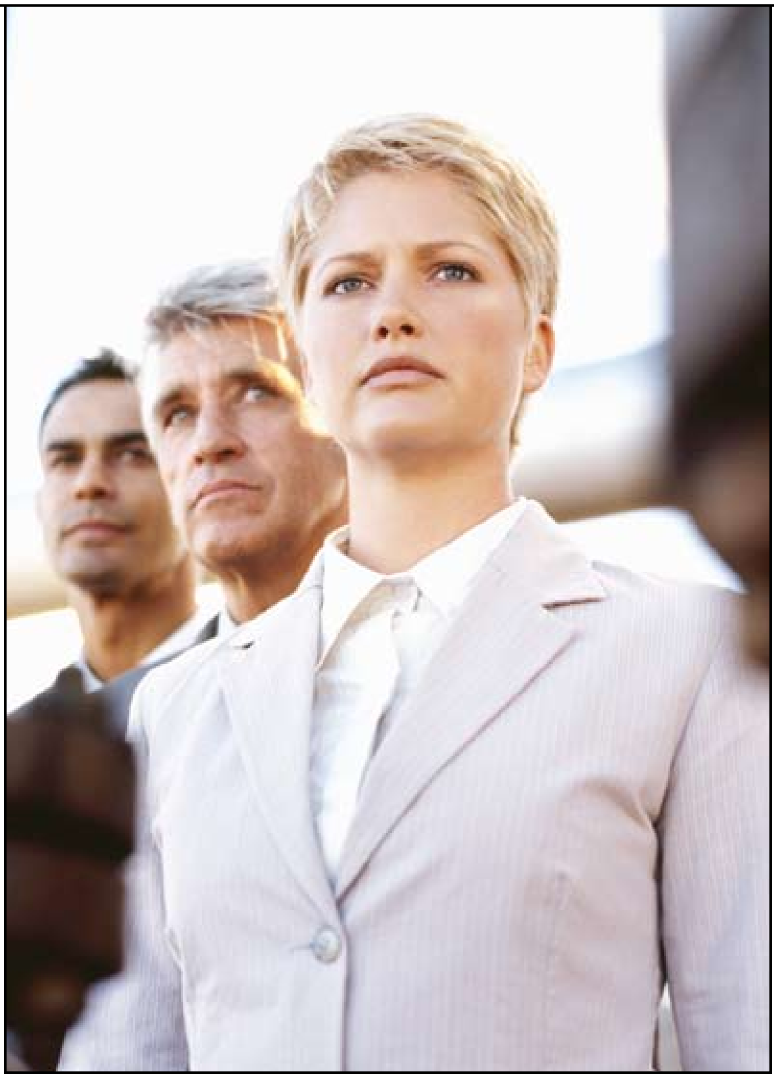
Employment Law Briefing



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New wage bias act reverses Supreme Court's *Ledbetter* decision

The Lilly Ledbetter Fair Pay Act, signed into law in January by President Obama, reverses the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* That decision put a substantial hurdle in the path of employees who sue for discrimination by requiring them to file wage-discrimination allegations within 180 or 300 days (depending on the state) after first discovering they'd been discriminated against.

The new act permits employees to file charges within 180 or 300 days after each instance of receiving compensation based on discriminatory motives.

Who was Lilly Ledbetter?

Lilly Ledbetter worked in a Goodyear plant for nearly 20 years. During much of that time, Goodyear based raises to salaried employees on supervisors' performance evaluations. At trial, she introduced evidence showing that several supervisors had given her poor evaluations because she was a woman, resulting in smaller raises than if she had been evaluated fairly.

As a result, she lost more than $200,000 in wages and benefits that her male counterparts received for doing the same work. By the time she retired, Goodyear was paying her significantly less than any of her male colleagues, in violation of Title VII.

The jury found for Ledbetter and awarded back pay and damages.

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Her claim was time barred

On appeal, the Eleventh Circuit held that Ledbetter's pay-discrimination claim was time barred with respect to all pay decisions made before she filed a questionnaire with the EEOC. (Title VII requires a person challenging an employment practice to first file a charge with the EEOC within either 180 or 300 days, depending on the state. In Alabama, where Ledbetter worked, it was 180 days.)

The Eleventh Circuit then concluded that the evidence was insufficient to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span. Ledbetter appealed to the U.S. Supreme Court.

A narrow decision

In a 5-to-4 opinion, the Supreme Court held that the EEOC charging period is triggered when an unlawful practice takes place. If an employer engages in a series of acts, each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Ledbetter contended that each paycheck issued to her during the charging period was a separate discriminatory act. Disagreeing, the Supreme Court found that the paychecks gave present effect only to discriminatory conduct that occurred before the charging period.

Thus, the Court held that those effects alone couldn't breathe life into previous uncharged discrimination. The Court reasoned that Ledbetter should have filed an EEOC charge within 180 days after the plant made each previous allegedly discriminatory pay *decision* and communicated it to her.

The clock renews

Now the Lilly Ledbetter Fair Pay Act reverses the Supreme Court's *Ledbetter* decision. The act retains the 180/300-day time frame under Title VII, but now the clock will renew each time an employee receives compensation based on a discriminatory employer decision.

So when an employee receives a final paycheck or severance payment, or when beneficiaries receive payment from an employer-provided pension or life insurance plan — even years after the employee has retired — the employee or beneficiary has another 180/300 days to file a complaint. ♦

Wage discrimination and the Equal Pay Act

In *Virgona v. Tufenkian Import-Export Ventures*, a federal trial court had to decide whether a staff accountant could bring a sex-based wage-discrimination claim under the Equal Pay Act (EPA). After being fired, she alleged that she had been paid less than the company's controller, a male who allegedly performed substantially equal duties.

The court threw out her suit without a trial. It found that an employer can establish a legitimate business reason for wage differentials when the business pays more to employees who have greater experience than their counterparts. Similarly, though the EPA doesn't explicitly address the issue of professional credentials, courts have recognized that employees with higher professional credentials or educational degrees may be more generously compensated.

Here, the male employee held a bachelor's degree in accounting, an MBA, and a CPA license and had 12 years of experience in the field, including three years as an assistant controller or controller and at least three years of management experience. By comparison, the plaintiff held a GED and had completed only a handful of college courses. She had no college degree — much less an MBA. Moreover, though she had seven to ten years' experience in the field when hired, she had never worked as an assistant controller or as a controller.

This case demonstrates how wage differentials are presently evaluated in an Equal Pay Act case. Although the new Ledbetter Act may open the door to the filing of these lawsuits, it doesn't ease the actual criteria in proving them.

Did employee's cooperation lead to employer's retaliation?

One of the stated purposes of Title VII is to protect workers from employment retaliation. But does its protection extend to employees who are fired after they *cooperate* with an employer's discrimination investigation — even though they themselves didn't initially complain of the discrimination at issue? This was the question before the U.S. Supreme Court in *Crawford v. Metropolitan Government of Nashville*.

The case arises

After a school district began looking into sexual-harassment rumors, its HR officer asked a 30-year employee whether she had witnessed "inappropriate behavior." She described several instances of sexually harassing behavior by the employee-relations director. Two other employees also reported that he had sexually harassed them.

The employer took no action against the alleged harasser, but completed its investigation and fired the 30-year employee and the other two accusers. She sued, claiming she was fired for reporting his behavior, in violation of Title VII.

Discrimination barred

Title VII's antiretaliation provision contains two clauses:

1. The "opposition clause," which bars an employer from discriminating against an employee for opposing any unlawful employment practice, and

2. The "participation clause," which bars an employer from discriminating against an employee for making a charge or testifying, assisting, or participating in any way in a Title VII investigation, proceeding or hearing.

The plaintiff alleged violations of both clauses. The trial court ruled for the employer without a trial.

It held that the plaintiff couldn't satisfy the opposition clause because she hadn't "instigated or initiated any complaint" but had "merely answered" investigators' questions "in an already-pending internal investigation initiated by someone else." And she also couldn't satisfy the participation clause, because Sixth Circuit precedent confined trial courts to protecting "an employee's participation in an employer's internal investigation … where that investigation occurs *pursuant to a pending EEOC charge*," which wasn't the case here.

The employee appeals

The Sixth Circuit affirmed on the same grounds, but the U.S. Supreme Court focused on the opposition clause. Because Title VII doesn't define the term "oppose," it must carry its ordinary meaning, which according to Webster's Dictionary is "to resist or antagonize; to contend against; to confront; resist; withstand."

Also, EEOC guidelines provide that, "when an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication" virtually always "constitutes the employee's *opposition* to the activity."

The Court explained that if the law was that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy — as the employer here contended and the lower courts held — prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or others.

So, the Supreme Court held that the opposition clause covered the plaintiff's statements to the HR officer. Because that clause covered the plaintiff's conduct, the Court needn't address whether the Sixth Circuit had also misread the participation clause.

Title VII's "opposition clause" bars an employer from discriminating against an employee for opposing any unlawful employment practice.

A commonsense analysis

Although the current Supreme Court has taken an increasingly conservative bent on many issues, it has consistently (with the exception of *Ledbetter v. Goodyear Tire & Rubber Co.*; see "New wage-bias act reverses Supreme Court's *Ledbetter* decision" on page 2) and sometimes unanimously supported pro-employee interpretations of employment language. Here, the Supreme Court reached its conclusions using a commonsense analysis of Title VII's provisions. ♦

Think twice before firing someone on qualified leave

In *Martin v. Brevard County Public Schools*, the Eleventh Circuit decided whether a hiree was eligible for leave under the Family and Medical Leave Act (FMLA) to care for a grandchild when acting in a parent's place. The opinion sheds light on why employers should be wary of firing someone on qualified FMLA leave.

Leave leads to termination

The plaintiff's contract with a school district to supervise its payroll was renewable annually. Following a poor performance review, the assistant superintendent gave the plaintiff an "improvement plan" that allowed him a month and a half to "demonstrate significant progress" in improving his performance.

Living with the plaintiff was his daughter — a student and member of the Army Reserve — and her infant daughter. Ten days after getting the improvement plan, the plaintiff requested 12 weeks of FMLA leave to care for his granddaughter beginning one week hence, because his daughter's unit had been called to active duty for deployment overseas.

The assistant superintendent granted the FMLA leave. But four days before it started, he learned that the plaintiff's contract wouldn't be renewed if the leave kept him from fulfilling the improvement plan.

The plaintiff took the leave as scheduled, the district notified him that it wouldn't renew his contract, and he sued — alleging interference with his FMLA rights and retaliation for taking leave.

The trial court, finding that the facts were undisputed, ruled for the district as a matter of law without a trial, and the plaintiff appealed.

Did in loco parentis apply?

The Eleventh Circuit found that the FMLA affords eligible employees 12 weeks of unpaid leave in any one-year period because "of the birth of a son or daughter of the employee and in order to care for such son or daughter." A son or daughter "means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis," literally "in the place of a parent."

The Eleventh Circuit held that a reasonable jury could find that the plaintiff, while he was on FMLA leave, stood in loco parentis to his granddaughter. He provided substantial support — including a home, food and health insurance to his daughter and granddaughter. He also played a significant role in caring for his granddaughter even though his daughter ultimately was never deployed overseas. He helped care for the granddaughter when his daughter was at home and assumed sole responsibility when his daughter attended school or Army Reserve drills.

The court, concluding that he had presented sufficient evidence to create a genuine issue of material fact, held that the trial court erred in concluding otherwise.

FMLA interference?

To prove FMLA interference, employees must demonstrate that they were denied a benefit to which they were entitled under the FMLA. Employees returning from FMLA leave must be restored to the same or equivalent positions they held when the leave began.

But this right isn't absolute. An employer can deny reinstatement "if it can demonstrate that it would have discharged" the employees had they not been on FMLA leave.

The plaintiff alleged that the school district interfered with his right to reinstatement by not renewing his contract. The district countered that it had terminated his contract for failure to complete his improvement plan.

But the Eleventh Circuit found that, even if that were the true discharge reason, no evidence showed that the district would have discharged him had he not taken FMLA leave, because in that scenario he might have been able to complete his improvement plan. So, the court held that ruling for the district without a trial wasn't appropriate.

A pretext for discrimination?

As for the retaliation claim, the Eleventh Circuit noted that employees must show that their employers intentionally discriminated against them for exercising an FMLA right. The court found that the close temporal proximity between the employee's leave and contract termination was more than sufficient to create a genuine issue of material fact of causal connection and thereby established a prima facie retaliation case.

The school district argued that it had terminated his contract because he'd failed to fulfill his improvement plan, not because he'd taken FMLA leave. The court rejected the argument, noting that, though the district's explanation might ultimately prove true, a genuine dispute of material fact existed as to whether it was a pretext for discrimination. Thus a trial was necessary.

Never assume

This case demonstrates the importance of carefully reviewing the exact FMLA text and rules in making decisions that may be covered by the act. Instead of making assumptions, savvy employers consult an attorney. ♦

Similar facts, different outcome

In another Eleventh Circuit opinion, *Bass v. Lockheed Martin Corp.*, the court refused to find that an employee was fired in retaliation for having requested leave under the Family and Medical Leave Act (FMLA).

Several times while employed by Lockheed, the plaintiff took FMLA leave because of his obesity. In September 2003, Lockheed granted his request to take a one-year medical leave to participate in an inpatient weight-loss study. This leave consisted of FMLA leave through May 2004. The rest was a combination of vacation time and unpaid personal-business leave.

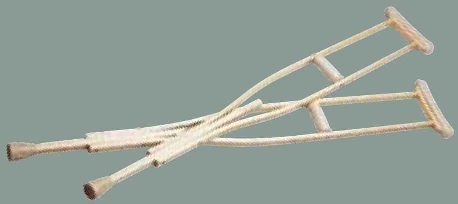
After he briefly returned to work, he asked for two additional months for medical attention, again using a combination of vacation time and unpaid personal-business leave, having exhausted his FMLA leave.

About this time, he claimed that a supervisor had told his mother that, "in the past, Lockheed went along with [him] and his health problems, but the company was not going to do that anymore and [he] would be fired." Nevertheless, Lockheed granted his request for a two-month leave, and he returned to work in January 2005.

Three months later, Lockheed terminated his employment as part of a reduction in force caused by budgetary constraints. He sued, alleging that he was let go in retaliation for taking FMLA leave. The trial court granted Lockheed's motion to dismiss, and he appealed.

The Eleventh Circuit found that, to establish a prima facie case of FMLA retaliation, the plaintiff had to demonstrate that:

1. He engaged in statutorily protected conduct,
2. He suffered an adverse employment action, and
3. The two were causally connected.



The plaintiff argued that the proximity of the protected conduct and the adverse action satisfied the causal connection. The Eleventh Circuit disagreed, finding that his last FMLA leave had occurred about 11 months before he was laid off.

The Eleventh Circuit also stressed that the supervisor's alleged comments were made after Lockheed had accommodated the plaintiff's one-year leave request and that Lockheed had granted his later request for leave.

Acting in good faith at question in FLSA case

A five-restaurant chain failed to pay overtime to employees whose weekly hours totaled more than 40 when working at more than one location. When the case went to court, the owners claimed they weren't aware that they owed overtime pay. And so arose the case of *Chao v. Barbeque Ventures LLC*, in which the Eighth Circuit had to decide whether those owners had acted in good faith.

No one kept track

Each restaurant manager independently hired and scheduled employees without input from other restaurants or senior management. The area director oversaw all five restaurants and visited each about twice a month. He testified that he knew some employees worked at more than one location.

Restaurant managers reported the hours worked by their employees to Payroll Management Inc., an independent third party that processed the payroll and issued paychecks and W-2 forms. No one combined the hours of employees working at more than one location to see whether they were owed overtime pay.

A costly mistake

The Secretary of Labor sued the owners in 2006, alleging failure to pay overtime compensation to 25 employees in violation of the Fair Labor Standards Act (FLSA). The complaint sought — on behalf of those employees — $90,055 in unpaid overtime compensation, liquidated damages (damages agreed on in advance) and postjudgment interest.

The trial court ruled for the government without a trial. The owners appealed only the grant of liquidated damages.

The good-faith issue

First, the Eighth Circuit noted that, under the FLSA, an award of liquidated damages is mandatory unless employers can show that they acted "in good faith" and with "reasonable grounds for believing" that they had complied with the FLSA. Then "the court may, in its sound discretion, award no liquidated damages."

This "good faith" requirement is a subjective standard. Employers must establish "an honest intention to ascertain and follow" the dictates of the FLSA. To carry their burden, employers must show that, though they "took affirmative steps to ascertain" the act's requirements, they "nonetheless violated its provisions."

3 owner arguments

The owners argued that they had demonstrated good faith on three grounds:

1. Lack of specific knowledge. They claimed they hadn't known that employees worked at multiple locations. The Eighth Circuit found this argument failed to meet the burden of showing an "honest intention" to ascertain and follow the FLSA's requirements. Thus, lack of knowledge wasn't sufficient to establish good faith.

2. Lack of employee complaints. The owners claimed that they had proved that no employees complained about not getting overtime pay. The Eighth Circuit held that the fact that an employer has broken the law for a long time without employee complaints doesn't demonstrate the good faith required by the statute.

3. Payroll outsourcing. The owners claimed that they had established good faith by outsourcing their payroll. The Eighth Circuit noted that it had previously rejected (in *Goldberg v. Kickapoo Prairie Broadcasting Co.*) the proposition that delegating the payroll function to a subordinate satisfies the FLSA.

Thus, the Eighth Circuit concluded that the owners had failed to establish an honest intention to meet FLSA requirements and upheld the award of liquidated damages.

No easy task

This case demonstrates how complying with the FLSA is no easy task. To be safe, wise employers conduct periodic self-audits to determine whether all employees not receiving overtime compensation are actually exempt under the FLSA's provisions. ♦