Supreme Court Reverses Lower Court; Rules for Firefighters in Reverse Discrimination Case

by Martha L. Boyd

On June 29, 2009, the United States Supreme Court reversed a decision from the Second Circuit Court of Appeals, and held that white firefighters employed by the City of New Haven, Connecticut were the victims of reverse discrimination, having been denied promotions because of their race. The decision in *Ricci v. DeStefano*, No. 07-1428 (Jun. 29, 2009), should serve as a warning to employers who make employment decisions based on race solely to avoid litigation.

In 2003, the New Haven Fire Department administered an examination designed to gauge eligibility for promotions. Scores for white firefighters were significantly higher than those for African American and Hispanic firefighters such that no African American and only one Hispanic firefighter would have received any of the fifteen promotions at issue. Fearing litigation, the City decided to throw out the results. A group of white firefighters who scored high on the exam and were nevertheless denied promotion sued the City, asserting they were the victims of reverse discrimination. The City countered that if it had certified the test results as the white plaintiffs advocated, it could have faced liability under Title VII of the Civil Rights Act of 1964 (“Title VII”) for adopting a practice having a disparate impact on minority firefighters.

A federal district court ruled in favor of the City, finding that it did not discriminate against the plaintiff firefighters. A three-judge panel from the Second Circuit Court of Appeals, which included current Supreme Court nominee Sonia Sotomayor, affirmed the lower court’s decision. In a 5-4 opinion, the United States Supreme Court reversed the Second Circuit, finding that the City’s action in discarding the results of the promotion examination violated Title VII. The Court acknowledged that Title VII proscribes policies or practices that are not intended to discriminate but that nevertheless have a disproportionately adverse impact on minorities. However, once an employee establishes disproportionate impact, the employer may defend the procedure in question by showing that it is “job related for the position in question and consistent with business necessity” and that the employer has not rejected an equally valid, less discriminatory alternative that would serve the employer’s needs. The Court noted that the record in the case clearly established that the examination was job-related and consistent with business necessity; indeed, the City had taken great pains to develop and administer tests that were relevant to the positions. The Court also noted a lack of any evidence of equally valid, less discriminatory alternatives for selecting firefighters for promotion. Ultimately, what drove the City of New Haven’s decision to discard the test was the fear of possible
litigation. The Court found this fear was not a good reason to discriminate against the white firefighters.

Clearly, what troubled the Supreme Court in this case was that the City based its decision not to promote upon race – that is, the City felt that too many white firefighters would have been promoted. Any time an employer considers race or any other protected category (gender, disability) in making an employment decision, it is embarking on a very risky course, even if there are laudable motives behind the decision. Those motives could be the desire to promote diversity or the desire to avoid litigation as was the case here.

Although the employer in this case lost, the decision is being hailed as a victory for employers because the Court seems to raise the bar on employees who wish to bring disparate impact race discrimination cases. The reverse of this, however, is that if employers are using occupational tests to select individuals for promotions, and particular groups score lower on those tests, employers must ensure that the tests are job-related and consistent with business necessity.

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**Pay Discrimination Game Changer: The Ledbetter Fair Pay Act**

by Kathleen Shields O'Beirne

For many pay discrimination plaintiffs, the Lilly Ledbetter Fair Pay Act has proved a significant boon. The Ledbetter Act, which applies to any claims filed on or after May 28, 2007, extends the time period for filing claims. Accordingly, claims once considered untimely have been revived.

Signed into law in January, the Ledbetter Act has already played a significant role in pay discrimination lawsuits. The Act essentially reverses the Supreme Court’s ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that Ms. Ledbetter’s pay discrimination claim was untimely because she failed to bring suit within 180 days of any allegedly discriminatory decision affecting her pay. Under the new law, an employee may file a claim up to 180 days (or 300 days in some states) from the application of any discriminatory pay decision. This means that each paycheck begins a new charge filing period.

A number of courts have applied the Ledbetter Act to pending litigation. In *Gentry v. Jackson State University* (S.D. Miss. 2009), the court denied defendant’s motion for summary judgment on the pay claim. Dr. Laverne Gentry filed suit against her employer because she was denied tenure and a salary increase, allegedly because of her gender. In addition to her pay discrimination claim, Gentry asserted a Title VII retaliation claim, as well as a state law claim for intentional infliction of emotional distress. Although the court granted the University’s motion for summary judgment on many of the claims (because of the Eleventh Amendment and procedural grounds), it allowed her retaliation claim pay discrimination claim to proceed, thanks in large part to the Ledbetter Act.

The University argued that Gentry’s claim was time barred because she filed her EEOC charge two years after being denied tenure, which is well over the 180 day time limit for filing suit under Title VII. While this argument likely would have been successful before the Ledbetter Act, the court ruled that the 2004 denial of tenure was a “compensation decision” or “other practice” affecting Gentry’s compensation, and that the 180 day filing period began
The Ledbetter Act made timely the plaintiff’s claims in Vuong v. New York Life Insurance Company (S.D.N.Y. 2009). Pheng Vuong brought claims against his employer for discrimination based on race (Asian). Among his several claims was a Title VII claim for pay discrimination based on the company’s February 1998 decision to pay him less than his co-managing partner. New York Life argued this claim was time barred because it was not brought within 300 days of the unlawful employment practice. The court concluded the claim was timely under the Ledbetter Act because Vuong had received three paychecks – the amounts of which were determined based on New York Life’s February 1998 decision – within the 300 days before Vuong filed his charge. Fortunately for the defendant, in spite of the timeliness of Vuong’s claim, the court nevertheless granted summary judgment in favor of New York Life on all claims, in part due to Vuong’s admissions regarding his poor performance on the job.

In Goodlett v. State of Delaware (D.Del. 2009), the Ledbetter Act kept alive a computer technician’s discriminatory compensation claim against his employer, the state elections department. The State argued that Goodlett’s claim was untimely because it was based on a pay-setting decision that occurred more than three years prior to his EEOC charge. The court concluded, however, that Delaware’s 300 day clock for pay discrimination claims “starts anew with each discriminatory pay period,” under the newly enacted Ledbetter Act. The Ledbetter Act proved a significant game changer in Goodlett, as the pay discrimination claim was the only one of plaintiff’s three claims that survived the State’s motion to dismiss.

As is clear from these three cases, the enactment of the Lilly Ledbetter Fair Pay Act only five months ago has already had a dramatic impact on discriminatory pay litigation. Because the Act applies to all cases filed on or after May 28, 2007, parties involved in such litigation should consider whether the Act is relevant to any claims involved in their cases.
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