How Might *Ledbetter v. Goodyear* Impact California Law?

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Considerable fanfare has accompanied the United States Supreme Court's May 29, 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,*[1] including the Senate Committee on Education and Labor's passage of the Lilly Ledbetter Fair Pay Act on June 27, 2007 to overturn its effect. This article examines whether and to what extent the decision will impact pay discrimination cases based on alleged violations of the California Fair Employment and Housing Act (FEHA),[2] in which the timeliness of a plaintiff's administrative charge is at issue.

THE *LEDBETTER* DECISION

Ledbetter worked as a supervisor for Goodyear Tire in Alabama from 1979 until November 1998 when she took early retirement. She completed an intake questionnaire with the Equal Employment Opportunity Commission (EEOC) in March 1998, and subsequently filed her lawsuit, which asserted pay discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII),[3] and the Equal Pay Act of 1963 (EPA).[4] The district court granted summary judgment in favor of Goodyear on the EPA claim but allowed her Title VII claim to proceed to trial.

At trial, Ledbetter presented evidence that her salary was in line with her male counterparts initially but that over time, her pay decreased in comparison. In 1997, she was the only woman working as an area manager and was paid $3,727 per month whereas her fifteen male counterparts were paid from $4,286 to $5,236 per month. Ledbetter presented evidence that a supervisor retaliated against her when she rejected his sexual advances in the early 1980s and in the mid-1990s when he falsified deficiency reports about her work which resulted in her poor performance evaluation in 1997. The supervisor, however, died before the trial. Goodyear maintained that the evaluations were nondiscriminatory. The jury found in favor of Ledbetter, awarding $223,000 in back pay and punitive damages of more than $3 million.

On appeal, Goodyear contended that petitioner's pay discrimination claim was time-barred to the extent it was based on events prior to September 1997 (180 days before the filing of her EEOC questionnaire), and that no discriminatory act occurred after that date. The Eleventh Circuit agreed and reversed the jury's verdict, finding insufficient evidence that Goodyear discriminated against Ledbetter in the only two pay decisions occurring after September 1997.[5]

The issue presented to the high court was whether an action under Title VII may proceed when the disparate pay is received during the statutory limitations period but is the result of intentionally discriminatory pay decisions occurring outside the limitations period.[6] The Court noted that the time for filing an EEOC charge begins when the discrete act of discrimination occurs.[7] It held that a pay-setting decision is such a discrete act and, thus, the period for filing an EEOC charge begins when that act occurs.[8]

The Court relied on *National Railroad Passenger Corp. v. Morgan,*[9] which clarified that the term "employment practice" in Title VII refers to "a discrete act or single 'occurrence'" that takes place at a particular point in time[10] such that "[i]f 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."[11] The *Morgan* Court, however, recognized that a hostile work environment is made up of a series of acts that together form an actionable wrong and, thus, acts occurring prior to the limitations period may be actionable so long as they are part of a continuing course of conduct with acts occurring during the period, generally referred to as the continuing violations doctrine.[12] In making this distinction, the *Morgan* Court limited the applicability of the doctrine to harassment claims.

The *Ledbetter* Court rejected the notion, advanced by Justice Ginsburg in a sharply worded dissent,[13] that pay discrimination claims are akin to hostile work environment claims, finding instead that they are discrete acts.[14] The Court also pointed out that Ledbetter did not claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions occurred which were not communicated to her.[15] Rather, Ledbetter focused on the paychecks that were issued to her during the charge filing period, each of which she contended was a separate act of discrimination. Alternatively, she contended that Goodyear denied her a raise in 1998 that carried forward the intentional discriminatory disparities from prior years.[16]

The court distinguished its earlier decision in *Bazemore v. Friday,*[17] involving an action against a state agency that had segregated employees according to their race with white employees receiving more pay. In *Bazemore,* the court stated, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[18] The *Ledbetter* majority rejected petitioner's claim, and the EEOC's long-standing position, that *Bazemore* called for a "paycheck accrual rule" under which each paycheck triggers a new EEOC charging period.[19] It noted that a distinction exists between the commission of a discrete discriminatory act with continuing adverse results and the intentional carrying forward of a discriminatory pay structure. The latter was at issue in *Bazemore* and the former in *Ledbetter,* thus rendering *Bazemore* of no support to petitioner's claim.[20]

DIFFERENCES BETWEEN TITLE VII AND FEHA

California courts have not yet weighed in on whether each paycheck in a pay discrimination claim under FEHA constitutes a continuing violation for purposes of the charge filing limitations period.[21] To determine whether *Ledbetter*

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would be applied to similar facts under FEHA requires first an examination of any differences between Title VII and FEHA.

FEHA provides a longer, one year, period of time for would-be plaintiffs to file their administrative charges with the Department of Fair Employment and Housing.[22] The one-year period runs from the date that the alleged unlawful employment practice occurred, or within ninety days thereafter if the employee first discovered the facts of the unlawful practice after expiration of the one-year period.[23]

Unlike Title VII, FEHA specifically requires that its statute of limitations be liberally construed to promote the resolution of potentially meritorious claims on their merits.[24] Moreover, the term "unlawful practice" under FEHA has been broadly construed by the California Supreme Court. For example, in *Richards v. CH2M Hill, Inc.,*[25] the court noted that the term "practice" means a course of conduct or a succession of acts similar in kind. In contrast, the *Ledbetter* majority pointed out that the term "employment practice" under Title VII refers to discrete acts.[26]

CALIFORNIA'S CONTINUING VIOLATIONS DOCTRINE

Prior to 2001, the continuing violations doctrine was applied to FEHA claims involving a systematic policy and practice of discrimination on a company-wide basis, commonly promotion or placement decisions made from eligibility lists that used discriminatory criteria.[27] Courts also applied the doctrine to FEHA-based hostile work environment and other harassment claims that involved a series of related acts against an individual over the course of time that together comprised an actionable claim.[28] In contrast, in *Morgan v. Regents of the University of California,*[29] the court did not apply the doctrine to a series of rejected job applications for rehire following a layoff, finding that different decisionmakers were involved and there was no evidence that the rejections were connected.

In 2001, the California Supreme Court, in *Richards,* considered whether the continuing violations doctrine should be applied to disability accommodation and disability harassment claims. The *Richards* court noted the directive of FEHA that its statute of limitations is subject to liberal construction.[30] It then held that an employer's failure to reasonably accommodate a disabled employee over time or to eliminate a hostile work environment targeting disabled employees is a continuing violation if the employer's unlawful actions: (1) are sufficiently similar in kind, recognizing that such acts may take different forms; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence in that an employer's actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment would be futile.[31] Thus, the statute of limitations begins to run either when the course of conduct is brought to an end when an employee resigns or is terminated, when the employer ends the conduct, or when the employee is on notice that further efforts to end the unlawful conduct would be in vain.[32]

In 2005, the California Supreme Court revisited the continuing violations doctrine in *Yanowitz v. L'Oreal USA, Inc.,*[33] in the context of retaliation claims. There, the plaintiff alleged that her refusal to follow her manager's discriminatory directive to fire another employee resulted in the company's campaign of retaliation, including solicitation of negative feedback from subordinates resulting in a negative performance review.[34] The court noted that subsequent to its decision in *Richards,* the United States Supreme Court decided *Morgan,* which limited the continuing violations doctrine to harassment claims.[35] It reasoned that a "rule categorically barring application of the continuing violation doctrine in retaliation cases . . . would mark a significant departure from the reasoning and underlying policy rationale of our previous cases interpreting the FEHA statute of limitations."[36] As such, it held that the continuing violations doctrine applies to retaliation cases if the requisite showing of a temporally related and continuous course of conduct has been established.[37] In so holding, the court found *Morgan* to be inapposite in concluding that discrimination and retaliation claims are based on discrete acts, each of which triggers the limitations period.[38]

The court made clear that Yanowitz's allegations of retaliation constituted a series of separate retaliatory acts and that she alleged a course of conduct rather than a discrete act of retaliation.[39] It stated a rule that would force employees to bring actions for discrete acts of retaliation that have not yet become ripe for adjudication and that the employee may not yet recognize as part of a pattern of retaliation is incompatible with the goals of encouraging informal resolution of disputes and avoiding premature lawsuits.[40] Therefore, the acts occurring prior to the limitations period were actionable.

WILL THE CONTINUING VIOLATIONS DOCTRINE BE EXTENDED TO PAY DISCRIMINATION CLAIMS UNDER FEHA?

If facts similar to those at issue in *Ledbetter* were before the California Supreme Court, it would first determine if a continuous course of conduct were established. Assuming that hurdle were cleared, how would Ledbetter's facts have fared under the *Richards* three-part test?[41] The first prong, whether the acts are sufficiently similar in kind, would be easily met since pay discrimination typically would involve a discriminatory pay decision with the effects appearing on subsequent paychecks.

The second prong, whether the acts occurred with reasonable frequency, depends upon whether the court would focus on the paychecks themselves as occurring with reasonable frequency to constitute a continuous and temporally related course of conduct that ties back to the original discriminatory decision, or whether each paycheck is a "fresh violation" as *Ledbetter* holds. As noted, *Yanowitz* focused on the retaliatory acts not yet being ripe for adjudication but being part of an overall course of conduct that together may constitute retaliation. It may prove difficult for a plaintiff to establish that each paycheck that reflects a differential in pay based on gender is not ripe for adjudication and is not a discrete act. However, the court has repeatedly relied on the liberal construction of FEHA's statute of limitations to promote the resolution of potentially meritorious claims.

The third prong, whether the acts (i.e., paychecks) have acquired a degree of permanence, depends upon whether the court would look to the date the plaintiff

had actual knowledge of the discrimination to determine when the act was deemed permanent, for example, following a denial of an employee's request for a pay increase. Prior to *Ledbetter,* courts routinely took into account the plaintiff's discovery of the discrimination.[42] Moreover, although not recognized by the *Ledbetter* majority as a salient point, the realities of the workplace are that employees' comparative salaries and incentive compensation are not disseminated. Thus, under appropriate facts, a plaintiff may be able to demonstrate the timeliness of a FEHA claim based on when the discriminatory conduct came to light.

CONCLUSION

The future impact of *Ledbetter* under FEHA will most likely depend upon how liberal the construction of its one-year statute of limitations is interpreted. The existence of this statutory directive may be just enough to prompt California courts to depart from *Ledbetter*'s conclusion that pay discrimination occurring outside the limitations period is time-barred even though a plaintiff may experience its present adverse effects. However, predictions of future California court rulings will become a moot issue if the California legislature enacts legislation to overturn the effects of *Ledbetter.*[43] ⚖

ENDNOTES

1. __ U.S. __, 127 S. Ct. 2162 (2007).
2. Gov't Code § 12940 et seq.
3. 42 U.S.C. § 2000e-2.
4. 29 U.S.C. § 206(d).
5. *Ledbetter,* 127 S. Ct. at 2166.
6. *Id.*
7. *Id.* at 2165.
8. *Id.* The Court also noted that a claim under the EPA, which Ledbetter had abandoned, would have dictated a different result since there is no requirement to exhaust administrative remedies before filing suit and there is no requirement to prove discriminatory intent. *Id.* at 2176.
9. 536 U.S. 101 (2002).
10. *Ledbetter,* 127 S. Ct. at 2169 (*quoting Morgan, supra,* 536 U.S. at 110–111).
11. *Id.* at 2164.
12. *Id.* at 2175.
13. *Id.* at 2181.
14. *Id.* at 2175.
15. *Id.* at 2169.
16. *Id.*
17. 478 U.S. 385, 395 (1986).
18. *Ledbetter,* 127 S. Ct. at 2172 (*quoting Bazemore, supra,* 478 U.S. at 395).
19. *Id.* at 2173.
20. *Id.* at 2174.
21. There are no reported cases applying California law which address this question.
22. Gov't Code § 12960(d)(1).
23. *Id.* FEHA provides three other narrow exceptions to the one-year rule: for minors, for situations where the employer was misidentified, and for victims of workplace violence or threats where the identity of the person responsible is not known. Gov't Code § 12960(d)(2)-(4).
24. Gov't. Code § 12993(a); *Romano v. Rockwell Int'l., Inc.,* 14 Ca1.4th 479, 498–494 (1996) (holding that the time for filing a discriminatory discharge administrative charge under FEHA begins to run from the date of the actual termination rather than when the employee was notified that it would occur).
25. 26 Ca1.4th 798 (2001), *citing Walnut Creek Manor v. Fair Employment & Housing Comm'n,* 54 Ca1.3d 245, 267–273 (1991).
26. *Ledbetter,* 127 S. Ct. at 2169.
27. *See Morgan v. Regents of the Univ. of California,* 88 Cal.App.4th 52 (2000); *City & Cty of San Francisco v. Fair Employment and Housing Comm'n,* 191 Cal.App.3d 976 (1987) (discriminatory promotional examination used to establish eligibility list).
28. *See Accardi v. Superior Court,* 17 Cal.App.4th 341 (1993).
29. 88 Cal.App.4th 52, 66–67 (2000).
30. *Richards,* 26 Ca1.4th at 819.
31. *Id.* at 823.
32. *Id.*
33. 36 Ca1.4th 1028 (2005).
34. *Id.* at 1059.
35. *Id.* at 1057.
36. *Id.*
37. *Id.* at 1058–1059.
38. Justice Chin, dissenting in *Yanowitz,* pointed out that the majority did not need to distinguish *Morgan* since the plaintiff had asserted a course of retaliatory conduct that collectively comprised retaliation rather than a series of unlawful discrete acts. *Id.* at 1072–1073.
39. *Id.* at 1059.
40. *Id.* at 1058–1059.
41. *See Roger-Vasselin v. Marriott Int'l., Inc.,* No. C04–4027, 2006 WL 2038291 (N.D. Cal. July 19, 2006) (noting the implication in *Yanowitz* that the court would apply the three-part test in FEHA discrimination claims where some of the acts occurred beyond the limitations period).
42. *See, e.g., Morgan,* 88 Cal.App.4th at 66.
43. *See, e.g.,* Gov't Code § 12926.1.