Cray • Huber

Labor and Employment Law Notes

THE UNITED STATES SUPREME COURT AND PRESIDENT OBAMA WASTE NO TIME IN MAKING DECISIONS AND ENACTING LAWS THAT ARE SURE TO INCREASE EMPLOYMENT LAW CLAIMS

1. The first law that President Obama signed was the "Lilly Ledbetter Fair Pay Act of 2009."

On January 28, 2009, Congress passed the Lilly Ledbetter Fair Pay Act of 2009. This was in direct response to the United States Supreme Court decision (U.S.S.C.) in *Ledbetter v. Goodyear Tire and Rubber Co.*, that held that the time for filing a Title VII charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins with discrete discriminatory acts, e.g. termination, failure to promote, denial of transfer or refusal to hire. The Ledbetter Fair Pay Act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination In Employment Act of 1967, and modifies the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice. The bill would make it unlawful each time an employer writes a paycheck that gives some workers less than others because of race, sex, disability, religion or national origin.

The *Ledbetter* decision ruled that a person must file a claim of discrimination within 180 days of a company's initial decision to pay a worker less than it pays another worker doing the same job. Under the *Ledbetter* law, every new discriminatory paycheck would extend the statute of limitation for another 180 days. The end result is that claims that might have otherwise been barred by the statute of limitations are resurrected each time the employer writes a paycheck and not only the first time the employer writes the paycheck that gives a worker less than others because they are in a protected class, e.g. race, sex, disability, religion or national origin. The Ledbetter Fair Pay Act will strip employers of a statute of limitations defense and breathe new life into old claims at a time when many businesses are struggling financially. Without the protection of a reasonable time limit for bringing pay discrimination claims, employers will have a difficult time in defending suits, as evidence of past pay determinations may no longer exist, and witnesses may not recall the underlying facts if they can even be located.

In a related action, the House of Representatives also passed the Paycheck Fairness Act on January 9, 2009. If enacted, the legislation would alter key provisions of the Equal Pay Act of

1963 (EPA). The EPA prohibits employers from paying women less than men for performing the same or "substantially equal" work in the same "establishment," with some exceptions. The Act awaits a vote in the Senate.

2. <u>One of the first decisions issued by the U.S.S.C in this new term was Crawford v. Metropolitan Government of Nashville in Davidson County, Tennessee-Title VI/meaning of "opposed" in retaliation action</u>.

During an internal investigation into rumors of sexual harassment by the respondent local government Metro School District (Metro) employee relations director (Hughes), petitioner Crawford, a 30-year employee, reported that Hughes had sexually harassed her. Metro took no action against Hughes, but soon fired Crawford, alleging embezzlement. Crawford filed suit under Title VII of the Civil Rights Act of 1964, claiming that Metro was retaliating for report of Hughes' behavior, in violation of 42 U.S.C. § 2000e-3(a) which it makes it unlawful "for an employer to discriminate against any . . . employe[e] who (1) has opposed any practice made an unlawful employment practice by this subchapter," or (2) "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The court granted Metro summary judgment, and the Sixth Circuit affirmed, holding that the opposition clause demanded "active, consistent" opposing activities, whereas Crawford had not initiated any complaint prior to the investigation. The court found that the participation clause did not cover Metro's internal investigation because it was not conducted pursuant to a Title VII charge pending with the EEOC.

The U.S.S.C held that the anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her initiative, but in the answering questions during an employer's internal investigation. Because "opposed" is undefined by statute, it carries its ordinary dictionary meaning of resisting or contending against. Crawford's statement was thus covered by the opposition clause, as an ostensibly disapproving account of Hughes' sexually obnoxious behavior toward her. "Opposed" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken action at all to advance a position beyond disclosing it. Thus, a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question.

This decision is a victory for worker's rights. What is even more amazing is that the court was unanimous in its decision that employees who speak out about discrimination during internal company probes are protected under the anti-retaliation provision of Title VII of the Civil Rights Act. This decision will also undoubtedly lead to additional retaliation claims by individuals who would have previously been precluded from filing a retaliation claim pursuant to Title VII.

3. <u>Employment lawsuits still on the rise</u>.

While the numbers show a small decline in federal court filings since 2004, employment lawsuits continue to dominate the ligation landscape in the U.S. With the economy in turmoil and a new administration promising to usher in a band of pro employee legislation, (see the Fair Pay Act and the Ledbetter Law), legal action by unhappy workers is expected to remain a major headache

for corporate America and, as a result, their liability insurance carriers. In particular, class action workplace litigation was hot in 2008, fueled in part by the floundering economy, and it is not showing any signs of slowing down in 2009 based on a report that analyzed 2008 class action and corrective action workplace filings, rulings and settlements in state and federal court. If the first two weeks of the Supreme Court's current session and President Obama's current term are any indication, employment claims and lawsuits will be on the rise.