

FEDERAL LAW UPDATE (2007)

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A. U.S. SUPREME COURT

1. Employee's right to sue for pay discrimination limited by rejection of "paycheck accrual rule"

In *Ledbetter v. Goodyear Tire & Rubber Co.*, ___ U.S. ___ 127 S.Ct. 2162 (2007), the U.S. Supreme Court affirmed the dismissal of an employee's Title VII pay discrimination claim, holding that the later effects of past discrimination do not restart the clock for filing a charge with the EEOC within the required statute of limitations.

Ms. Ledbetter worked as a manager at Goodyear's Gadsden, Alabama plant for 19 years, from 1979 until 1998. During much of that time, Ms. Ledbetter and other salaried employees at the plant received or were denied raises based on performance evaluations completed by their supervisors. Ms. Ledbetter claimed that her gender played a role in poor evaluations she received in the past, eventually resulting in a \$6,000 per year lower salary than her male counterparts.

Before taking early retirement in November 1998, Ms. Ledbetter filed an EEOC charge of discrimination, alleging she received lower pay because of the trailing historical effects of past discrimination that occurred in the 1980's and mid-90's. The jury awarded her over \$3.5 million, which was later reduced by the presiding judge. The 11th Circuit Court of Appeals reversed the jury's decision, holding that the plaintiff's pay discrimination claims were time barred given that all of the alleged discriminatory pay decisions occurred before September 26, 1997 - 180 days before Ms. Ledbetter went to the EEOC.

Ms. Ledbetter appealed, claiming that each new paycheck constituted a separate act of discrimination. In fact, the EEOC had been using the "paycheck accrual rule" for years. The Supreme Court affirmed the Court of Appeals, rejecting the rule, because "a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied."

B. LEGISLATION AND REGULATION

1. U.S. Congress reacts to *Ledbetter* and is pushing legislation to reinstate the “paycheck accrual rule”

In response to the U.S. Supreme Court’s decision in *Ledbetter*, U.S. House of Representatives passed the Ledbetter Fair Pay Act, which amends various federal discrimination laws to provide that an unlawful employment practice occurs *each time* an employee receives pay that is the result of a discriminatory compensation decision – even if the discriminatory decision occurred many years ago. Thus, the bill provides that the 180-day limitations period under Title VII starts over “each time compensation is paid pursuant to the discriminatory compensation decision or other practice.”

After the House passed the Ledbetter Pay Act, Senator Ted Kennedy introduced a bill that would repeal limits on damages that federal law currently imposes on the amount that can be awarded to employees in certain types of federal discrimination claims. The proposed legislation, titled the Equal Remedies Act of 2007, does not directly reverse the ruling in *Ledbetter*. However, the bill plainly arises out of the attention that the Supreme Court’s decision focused on Ms. Ledbetter’s case.

The Equal Remedies Act of 2007 would remove the compensatory and punitive damage caps for violations of the anti-discrimination laws under Title VII (which currently range between \$50,000 to \$300,000, depending on the size of the employer). Senator Kennedy’s bill would lift damage caps for all federal discrimination claims.

2. New ADEA Regulations allow favoring older vs. younger employees.

In July, the EEOC issued new regulations on age discrimination in the workplace, clarifying that the Age Discrimination in Employment Act (“ADEA”) does not prohibit “reverse age discrimination.” More specifically, the new regulations provide that the ADEA does not prohibit employers from favoring an older employee over a younger one when both are protected by the Act.

The new regulations conforms with the U.S. Supreme Court’s 2004 ruling in *General Dynamics Land System Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236 (2004), which held that the ADEA only prohibits discrimination based on “relatively older age” and not discrimination based on age generally. In addition the new regulation expressly deletes language in the old ADEA regulations that prohibited discrimination against “relatively younger individuals.” The revised rule now states:

It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older unless one of the statutory exceptions applies. *Favoring an older individual*

over a younger individual because of age is not unlawful discrimination under the ADEA even if the younger individual is at least 40 years old.

29 C.F.R. 1652.4 (emphasis added).

The new ADEA rule also provides some guidance to employers regarding help wanted notices or advertisements. Specifically, according to the new regulation:

- Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals (e.g., age 25 to 35, young, college student, recent college graduate, boy, girl).
- However, employers may post advertisements or notices expressing a preference for older individuals (e.g., terms such as over age 60, retirees, or supplement your pension).

The EEOC declined to provide further guidance in the text of the regulation regarding how employers may structure advertisements without violating the ADEA. The Commission felt that providing a definitive list of legally acceptable advertising language could hamper employers' unique efforts to fill their workforce needs.

3. Pro-Labor Legislation Proceeds in Congress

Organized labor continues to exert its influence in the new Congress. At least three bills aimed at reversing current labor law principles are pending or expected to be introduced in the near future.

(a) Employee Free Choice Act

In March, Senator Kennedy introduced legislation identical to legislation the House passed. The proposed legislation would:

- Require employers to recognize unions based on card checks;
- Impose mandatory mediation and arbitration in first contract negotiations; and
- Substantially increase penalties imposed on employers for labor law violations during organizing campaigns and first contract efforts.

(b) Definition of "supervisor"

In reaction to NLRB decisions clarifying the definition of a "supervisor" that organized labor believed improperly benefited employers, several Congressmen introduced the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers ("RESPECT") Act. Supervisors are generally excluded from the NLRA's protections, so the definition of a supervisor is important.

RESPECT proposes to change the statutory definition of "supervisor" which has remained unchanged for sixty years. Section 2(11) of the National Labor Relations Act (NLRA) defines a supervisor as an individual who possesses authority over subordinates in one or more of twelve categories. The proposed legislation would mandate that no employee could be a supervisor unless he or she exercises the requisite authority a majority of his or her working time. It would also delete authority to "assign" and "responsibly to direct" from that list of twelve categories. Nursing associations believe such legislation will help assure that the majority of nurses are granted the right to unionize under the NLRA.

(c) Captive Audience Meetings

Consistent with the express language of the NLRA, employers have the right to mandate that employees attend meetings in which management may express its views that employees should remain union-free. Organized labor has long argued that granting management the right to hold such "captive audience" employee meetings is unfair. Upon prodding from organized labor, legislation is expected to be introduced that would prohibit employers from requiring employees to attend such meetings.

4. Amendments to the Federal Rules of Civil Procedure require companies to produce electronic data

Electronic data is now an integral part of our lives. The use of electronic data in litigation has produced a great deal of debate and discussion over the past 10 years. As a result, as of December 1, 2006, new rules govern the procedure for seeking and producing electronic data as part of litigation. These rules require parties to litigation to produce data electronically, and allow the opposing party to seek such data in various forms.

In light of these rules, it is important for companies to think about what kind of electronic data they produce and how it is retained. We recommend, at the very least, companies take the following steps:

- Review your document retention policy and ensure that it includes a policy for electronic data. The key is to be consistent and make sure everyone is following the policy in place.
- At the first sign that you have a significant problem with an employee that may result in litigation, *save every email or other electronic document relevant to that employee*. Courts have held that companies “anticipated litigation” even before the employee was fired.

If you have any questions about your current retention policy, or how to include electronic data in your policy, please contact your employment counsel.

C. NINTH CIRCUIT

1. Violent behavior may have ADA protection if the conduct results from a disability

In *Gambini v. Total Renal Care d/b/a Davita*, 486 F.3d 1087 (9th Cir. 2007), the Ninth Circuit reversed a jury verdict in favor of an employer who fired an employee, who was diagnosed with bipolar disorder, for violent behavior in the workplace.

Stephanie Gambini was a contract clerk for Davita, a company who provides dialysis. She suffered from bipolar disorder. As a result she was irritable, moody and caustic toward her co-workers. Her manager, who was aware of her condition, held a meeting for the purpose of placing her on a performance improvement plan. Ms. Gambini became enraged at the meeting, shouted profanities at her supervisor, threw the plan across the desk and slammed the door on the way out. She continued to kick and throw things after she left. DaVita received emails from co-workers requesting Ms. Gambini not come back because they feared her. As a result of the outburst, DaVita fired Ms. Gambini.

Ms. Gambini sued under Washington state disability discrimination law arguing that her outburst was a symptom of her bipolar disorder and, therefore, her employer could not use it as a basis for termination. The Ninth Circuit overturned the trial court verdict in favor of DaVita, agreeing with Ms. Gambini that the trial court should have instructed the jury as follows: **“Conduct resulting from a disability is part of the disability and not a separate ground for termination.”**

Although EEOC guidelines state that “an employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity,” the Ninth Circuit applied its analysis under an ADA framework, giving an indication that it would issue a similar holding when applying federal law.

While this holding is alarming, the Ninth Circuit did not hold that DaVita was liable. It only remanded the case for another trial so that the jury could take into account the law that symptoms of a disability are part of the disability and not a separate ground for termination. DaVita still has the right to argue its defenses.

2. Court affirms class action in Wal-Mart discrimination case

The Ninth Circuit Court of Appeals recently affirmed the certification of a class action lawsuit against Wal-Mart. This action will include an estimated 1.5 million current and former female employees. The action asserts the company engaged in sex discrimination in violation of Title VII of the 1964 Civil Rights Act. Wal-Mart, which denies the allegations and has contested the class designation, has vowed to ask the 11 judges of the full appeals court to reconsider the February 6, 2007 ruling and, if that fails, to seek review by the United States Supreme Court.

Plaintiffs, seven female employees of Wal-Mart, claim that the retailer's female employees nationwide receive lower pay, and receive fewer and slower promotions than their male counterparts. They also allege gender-based discrimination in company-wide corporate practices and policies based primarily on statistical data and subjectivity in personnel decisions.

Plaintiffs offered certain common factual, expert, statistical and anecdotal evidence of alleged gender disparities in support of their class claims. The District Court agreed with their contentions and in 2004 allowed the case to proceed as a class action. Wal-Mart appealed. The Ninth Circuit agreed with the District Court that "it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly."

The Court zeroed in on expert testimony that focused on the subjective discretion of managers. The plaintiffs' expert was of the opinion that "social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors," because substantial decision-maker discretion tends to allow people to "seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes."

While many local employers do not face the type of nationwide lawsuit present in the *Wal-Mart* case, those employers with multiple locations should look at whether they use any subjective decision-making in employment: salary, promotions, and performance management decisions typically have significant subjective components.

D. OTHER CIRCUITS

1. Pre-employment physical strength test determined discriminatory

In *E.E.O.C. v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006), the Eighth Circuit Court of Appeals affirmed a \$3.4 million dollar verdict against the employer due to its physical strength test's disparate impact on female applicants.

The Dial Corporation is an international company with a meat processing plant in Fort Madison, Iowa. Entry level workers assigned to the Company's meat packing area are required to lift and carry up to 18,000 pounds of meat daily, walking approximately 4 miles in the process. In addition, employees in this area experienced a disproportionate number of injuries when compared with the rest of the plant.

As a result, beginning in 2000, the Dial Corporation instituted a physical strength test as part of its application process. Prior to being hired, all applicants were required to carry a 35 pound bar between two frames, approximately 30 and 60 inches off the floor, and to lift and load the bar onto the frames for a period of 7 minutes. The applicants' performance was observed and rated by an occupational therapist and a plant nurse.

The Equal Employment Opportunity Commission ("EEOC") brought suit against the Dial Corporation on behalf of over 50 women who applied and were not selected for positions as a result of their performance on the test. The matter was initially tried to a jury, during which each party presented expert testimony regarding the impact of the test on female applicants and whether it was predictive of employee performance. The EEOC's expert claimed that the test was not representative of actual work being performed by employees, because applicants were lifting the weights at a much faster pace and without any breaks. The Dial Corporation countered with an expert in work physiology who testified that the test effectively measured skills representative of the job. It also argued that the test was justified by business necessity because it "drastically decreased" the number of workplace injuries. The jury found in favor of the EEOC.

The Eighth Circuit affirmed the trial court ruling in favor of the EEOC. In doing so, it noted that the number of female applicants selected for jobs dropped from nearly 46% to 15%, and continued to decline each year the test was in use. The Court also found it was significant that the Dial Corporation knew the test had a large impact on women, but decided to continue using it.

Next, the Court examined whether the test was related to “safe and efficient job performance” and was “consistent with business necessity.” Despite the Dial Corporation’s evidence to the contrary, the Eighth Circuit concluded it was not.

Employers should be mindful that federal regulations govern the use of screening tools, including the type of pre-employment test implemented by the Dial Corporation. The collection of regulations, known as the Uniform Guidelines on Employee Selection Procedures, govern any tool or procedure that is used to screen applicants for hiring, promotion or other employment opportunities. If a selection tool or procedure is shown to have an adverse impact on the basis of sex, race or ethnic group, the Guidelines require a showing that the test has been validated by a psychological professional for use as a selection tool for the particular job. Therefore, although employers should not shy away from pre-employment or employment tests altogether, employers who wish to use a screening tool (or already have a test in place) should consider the impact such a test has on protected classes.

2. Past service can count for purposes of FMLA

Federal law requires that, in order to be eligible to request Family and Medical Leave, employees must meet three initial conditions:

- They must work for an employer who employs at least 50 employees within a 75-mile radius,
- They must have been employed by the employer for at least 12 months, and
- They must have worked at least 1,250 hours in the twelve months prior to requesting the leave.

The First Circuit recently overturned a trial court decision and concluded that it is a reasonable interpretation of the law that all prior employment with the employer must be counted toward the 12 month employment requirement. *Rucker v. Lee Auto Malls*, 471 F.3d 6 (1st Cir. 2006).

Kenneth Rucker had worked for Lee Auto Malls for five years before resigning to take a job elsewhere. Five years after leaving, Rucker returned and was rehired in June 2004. In January 2005, he ruptured a disc in his back and began missing work. The dealership terminated him in March, 2005. Rucker was not offered family and medical leave because he had only been reemployed for about nine months, less than the 12 months required under the law. Rucker argued that his prior service with the dealership must be counted toward the 12 month requirement. Because he had worked

1,250 hours in the time he had been back, he contended that he was eligible for leave and that he was wrongfully terminated.

The trial court agreed with the dealership but the First Circuit saw it differently. While this case is not authoritative in Washington, it is important to know that it is possible for courts to interpret the FMLA very liberally.

3. Fourth Circuit reaffirms prohibition on private releases of FMLA claims

In July, a divided panel of the Fourth Circuit Court of Appeals reinstated a decision it rendered in 2005, but later vacated, that employers cannot enforce a release of claims under the Family and Medical Leave Act ("FMLA") unless the release has been approved by a court or the U.S. Department of Labor ("DOL"). The DOL had never interpreted the regulation at issue to apply to a private settlement of FMLA claims arising from past alleged violations. The DOL expressed concern that the result of the opinion would be to increase the burden on the DOL in supervising FMLA settlements and to harm employees by delaying resolution of disputes.

Following its 2005 ruling in *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir.2005), the Fourth Circuit granted Progress Energy's motion for reconsideration, vacated its previous decision, and ordered a panel rehearing to consider the arguments raised by the DOL. The Fourth Circuit returned to its original decision, reasoning that private settlements of FMLA claims undermine the purpose for providing minimum protection because employers would "have an incentive to deny FMLA benefits if they could settle violation claims for less than the costs of complying with the [FMLA]."

Although Fourth Circuit law does not apply to any employer in Washington, it is worth taking note of this case. For now, employers in Washington can still obtain a release of employee's FMLA claims without court or DOL approval. This may, however, change if the Ninth Circuit follows the same reasoning as the Fourth.