Promotion and Tenure and the Fair Pay Act of 2009

By Christopher E. Hogan

A year and a half after being the first bill signed into law by President Obama, the Lilly Ledbetter Fair Pay Act of 2009 (FPA)[1] continues to create uncertainty for educational institutions, as they grapple with whether promotion and tenure decisions, which may or may not be accompanied by a pay increase, fall within the ambit of the FPA. The uncertainty is due in no small part to the seeming incongruence between the FPA's language and the circumstances surrounding its genesis, with courts privileging one over the other in reaching differing results. The stakes are high: colleges and universities often make promotion and tenure decisions en masse. And to the extent those decisions are found to be covered by the FPA, they leave a legacy of trailing Title VII liability that endures long after the promotion or tenure decision itself ceases to be actionable. Conversely, to the extent such decisions lie beyond the reach of the FPA, Title VII's relatively short charge filing period applies. The ultimate answer may also cause courts to redraw the boundaries of state anti-discrimination laws, which are often interpreted so as to harmonize with Title VII.

The Ledbetter Decision

Before instituting a private civil action under Title VII, however, an aggrieved employee must have timely filed with the EEOC a charge of discrimination and have received a "right to sue" letter. In states such as Ohio that have "work-sharing" agreements with the EEOC, a charge must be filed within 300 days of the alleged unlawful employment practice. At issue in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[2] was whether for the purposes of Title VII's charge filing period, a discriminatory pay

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decision was a "continuing violation" or a "discrete act" of discrimination. Concluding it was the latter, the court's holding meant that Title VII's charge filing period began to run when the discriminatory decision was made, not when its effects were felt.

Under the court's ruling, then, an employee who did not challenge a discriminatory pay decision under Title VII within the applicable limitations period was forever barred from challenging the decision under Title VII. This was so even if the discriminatory pay decision caused the employee to receive depressed pay for the duration of his or her employment with the employer. And so it was with Ms. Ledbetter, who was left without a remedy under Title VII, because the discriminatory compensation scheme that caused her to earn far less than her male counterparts had been implemented years before she had filed a charge of discrimination.

Congress Acts

In the wake of the Ledbetter decision Congress acted to supersede the ruling by enacting the FPA. Virtually all agree that the central, if not the only, purpose of the FPA was to return the state of the law to that which existed the day before the Ledbetter decision was handed down. This view is bolstered by the FPA's findings and legislative history. However, the FPA's text arguably goes much further, extending the FPA's reach not only to a "discriminatory compensation decision" but also to what the FPA refers to as an "other practice."

To be sure, the FPA's legislative history provides reason to believe that its "other practice" language was inserted to address the particular facts in *Ledbetter* where Ms. Ledbetter's pay disparity appeared to have been indirectly caused, at least in part, by a series of discriminatory performance appraisals. The same legislative history also suggests that Congress did not intend to overturn other Supreme Court precedents delineating between discrete acts of discrimination and continuing violations. Yet the FPA's legislative history also shows that at least one amendment designed to remove the "other practice" language on the ground that the language extended the FPA beyond congressional intent was rejected. Then there's the FPA's "other practice" language itself which suggests that it applies to all practices affecting compensation.

Enter the uncertain status of promotion and tenure decisions. Is a promotion or tenure decision an "other practice" that can be challenged years later?

Text vs. Context

So far the judicial answer appears to turn upon whether the FPA is viewed as having the limited legislative purpose of undoing *Ledbetter* or whether its text requires a broader application. The contextual approach prevailed in *Barnabas v. Board of Trustees of University of the District of Columbia*.[3] Relying on circuit precedent that the FPA was enacted for the limited purpose of undoing *Ledbetter,* the court concluded that a decision to deny the plaintiff a promotion to the rank of full professor was a discrete act of discrimination rather than a compensation decision covered by the FPA. The textual approach prevailed in *Gentry v Jackson State University*.[4] In that case, the court had little difficulty concluding that a denial of tenure that also resulted in a corresponding loss of a raise was an "other practice" affecting compensation. The court reasoned that while it was clear that a denial of tenure was a discrete act of discrimination, the corresponding loss of a raise transformed the decision into a "compensation practice." Unfortunately, the court was apparently unaware of the Supreme Court's holding in *Delaware State College v. Ricks*.[5] There the court held that the charge filing period under Title VII began to run in a denial of tenure case when the decision was made and communicated to the aggrieved faculty member. Nor did the court in *Gentry* grapple with *National R.R. Passenger Corp. v. Morgan*[6] wherein the court identified a "failure to promote" as discrete act. Thus, *Gentry* requires one to adopt a significant set of assumptions.

Whither the FPA

Fueling the outrage felt by many in the wake of the *Ledbetter* decision was the perception that the ruling would let employers escape Title VII liability for covert systematic pay discrimination, given the difficulty of discovering whether one was working within a discriminatory pay system. The risk of such a poignant injustice is far less likely in the promotion and tenure context, where such decisions are announced and often accompanied by a set of procedural protections that would be foreign to Ms. Ledbetter. It's perhaps these differences and the reluctance to brush aside Supreme Court precedent that may ultimately steer courts toward a contextual construction of the FPA.

1. Pub.L No.111-2, sec. 6, 123 Stat. 5 (2009).
2. 550 U.S. 618 (2007).
3. ---F.Supp.2d---, 2010 WL 692785 (D.D.C.).
4. 610 F.Supp.2d 564 (S.D. Miss. 2009).
5. 449 U.S. 250 (1980).
6. 536 U.S. 101 (2002).

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