American Bar Association Young Lawyers Division
The Young Lawyer

Congress Acts Aggressively to Strengthen Employment Protections, Fight Discrimination

By Kenneth A. Rosenberg and Brett D. Halloran

After years of inactivity in the employment law realm, Congress recently has developed a renewed interest in fighting workplace discrimination and strengthening employment protections for workers. Last year, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) and the Americans with Disabilities Act (ADA) Amendments Act of 2008 into law. GINA makes it illegal for employers to acquire, disclose, or make employment decisions based on genetic information. Likewise, the ADA Amendments Act of 2008 revises the federal Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, to broaden the class of individuals who qualify as disabled and are protected under ADA. This trend has continued under the current administration with President Obama extending the protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. to make it easier for plaintiffs to bring pay discrimination claims.

The Civil Rights Act of 1964 stands as a legislative landmark in the federal government's efforts to fight discrimination in employment, public accommodation, public facilities, schools, government agencies, the courts, and voter registration. In particular, Title VII of the Act prohibits discrimination in employment based on race, color, religion, sex, and national origin. At the same time, Congress created the federal Equal Employment Opportunity Commission (EEOC) to enforce Title VII's protections. Since the passage of Title VII, however, Congress has rarely revisited the statute. In the meantime, many states enacted laws with employment protections that surpass those in Title VII, including, but not limited to, protections against employment discrimination based on sexual orientation, gender identity, ancestry, marital status, and familial status. In 2009, Congress significantly changed Title VII with the passage of the Lilly Ledbetter Fair Pay Act of 2009, and further reforms are likely on the horizon.

The Ledbetter Act was a legislative response to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Lilly Ledbetter was hired as a factory worker at the Goodyear Tire & Rubber Company's Gadsen, Alabama, plant in 1979 and initially received the same salary as her male counterparts. By the time she retired in 1998, however, she was earning significantly less money than the plant's male factory workers. Ledbetter claimed that the pay disparity was due to several poor evaluations that she received because of her sex. Without reaching the question of whether those evaluations were, in fact, discriminatory, the Court held that Ledbetter's claims were barred because the evaluations occurred outside Title VII's 180-day statute of limitations. The Court rejected Ledbetter's argument that each new paycheck she received reset the statute of limitations. The Court reasoned that tolling the statute of limitations in that way would improperly diminish a plaintiff's burden to prove intentional discrimination. It shifted the "intent" element away from the discriminatory act itself to later effects of that act that were not performed with a discriminatory bias or motive and would further distort Congress' preference for a prompt resolution of employment discrimination claims.

In its findings, Congress rejected the Court's view of congressional intent and stated that the *Ledbetter* decision (1) impaired and undermined statutory protections against compensation discrimination by unduly restricting the time period for which victims can recover, (2) ignored the reality of compensation discrimination, and (3) was contrary to statutory intent. The Ledbetter Act effectively overturned the Court's decision by providing that employers are liable for compensation discrimination under Title VII when discriminatory practices are adopted, when employees become subject to such practices, and when employees are "affected by application of" such decisions, "including each time wages, benefits, or other compensation is paid." The Ledbetter Act made similar changes to ADA, the federal Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794, and the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq*.

Published in *The Young Lawyer*, Volume 14, Number 3, December 2009.

The Ledbetter revisions mean, in part, that each paycheck that is issued subsequent to any decision to discriminate in compensation starts the running of a new statute of limitations period regardless of when such a decision is first made. Thus, companies should be advised to review their compensation and merit-increase structures to identify any pay discrepancies and ensure that they are able to articulate justifications for any disparities that may exist.

Congress has not shown that it is content to revert to another long period of inactivity in the area of employment discrimination. Rather, Congress is considering taking further action that would alter the employment landscape. In particular, the Employment Non-Discrimination Act of 2009 (ENDA) is currently pending in Congress. If passed by Congress and signed by President Obama, ENDA would follow many state laws that make it illegal for employers to discriminate in employment based on sexual orientation or gender identity. Notably, ENDA would not require employers to extend spousal benefits to same-sex couples as it specifically provides that employers are not required to treat unmarried couples similar to married couples (the term "married" is defined under the federal Defense of Marriage Act).

Congress also is considering the Paycheck Fairness Act (PFA). The PFA would amend the federal Equal Pay Act (EPA) of 1963 to strengthen its equal pay provisions. Under EPA, employers defending a pay discrimination claim can show that any pay differential between men and women is based "on any other factor other than sex." The PFA, among other changes, would sharply limit this defense to instances when employers could prove that the "other factor" is (1) not based on or derived from a sex-based differential in compensation; (2) job-related to the position in question; (3) and consistent with business necessity.

The renewed congressional attention to employment discrimination will likely engender a new wave of litigation by plaintiffs and enforcement efforts by EEOC. In the coming months and years as these new bills work their way through Congress, young lawyers should follow Congress' actions closely to provide timely and practical guidance to clients on these important issues. Ultimately, given the current downturn in the U.S. economy, whether these legislative initiatives prove to be effective in eviscerating employment discrimination in the workplace remains to be seen.

NEXT STEPS

EEO Update 2009 (Audio CD Package PC # CET09EEOC or MP3 Download CET09EEOPOD) Center for CLE and the Section of Labor and Employment Law.

Order online at www.ababooks.org.

Kenneth A. Rosenberg is a partner and Brett D. Halloran is an associate with Fox Rothschild LLP in Roseland, New Jersey. They can be contacted at krosenberg@foxrothschild.com and bhalloran@foxrothschild.com.