Supreme Court Trims Reach of Lilly Ledbetter Fair Pay Act of 2009 and
Reaffirms Settled Law on Retroactive Application of Statutes

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Just months ago, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, reversing the Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2172 (2007). A 7-2 majority of the Court has now denied the legislation a far-reaching construction urged by the plaintiffs and in the process reaffirmed settled law regarding the retrospective application of discrimination laws.

The question presented in AT&T Corp. vs. Hulteen, 556 U.S. ___, No. 07-543, 2009 WL 1361539 (May 18, 2009), was “whether an employer necessarily violates [Title VII] when it pays pension benefits calculated in part under an accrual rule [that was lawful when adopted] that gave less retirement credit for pregnancy leave than for medical leave generally.” AT&T, 2009 WL 1361539 at *2. The Court held that no violation occurred because “the benefit calculation rule in this case is part of a bona fide seniority system under §703(h) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(h), which insulates it from challenge.” Id.

Many Court observers were surprised that the Court acted so quickly to trim the reach of the Ledbetter legislation. Because the legislation was passed while the AT&T case was pending in the Court, no split of authority had developed in the lower courts regarding the new legislation’s application. The Court is not typically eager to become the first appellate court to reach important questions of statutory construction. Under such circumstances, the Court often remands a decision for consideration by the court of appeals. The Court’s unusual decision to take the novel Ledbetter question — and the one-sided vote that decided it — may suggest that the Court is troubled by the vague and potentially destabilizing language of the statute and could foreshadow the treatment other aspects of the statute may get when they reach the Court.

Pregnancy Leave Treated Unfavorably When Compared To Other Types of Leave

As was common during the 1960s and 1970s, AT&T treated pregnancy leave less favorably for pension accrual purposes than it did other forms of disability leave. The typical pension plan at the time gave employees on “disability” leave full pension accrued credit for the period during which they missed work, but those on “personal” leaves of absence received either diminished pension accruals or no accruals at all. These plans often treated pregnancy leave as personal leave, and thus pregnant women were treated less favorably than those on other kinds of disability leave.

In a number of cases during the 1970s, this disfavored status was challenged as sex discrimination, culminating in the Supreme Court’s decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). In Gilbert, the Court held that discrimination on the basis of pregnancy did not
constitute discrimination on the basis of sex within the meaning of Title VII.

Congress swiftly responded to *Gilbert* with the Pregnancy Discrimination Act of 1977 ("PDA"). That legislation amended Title VII to provide that: "The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise . . . .” 42 U.S.C. § 2000e(k) (2009).

This amendment to Title VII made it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 684 (1983).

Aware that its prior disability plans were no longer lawful, on April 29, 1979, the effective date of the PDA, AT&T adopted its Anticipated Disability Plan. This new plan provided service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities. However, when AT&T adopted its Anticipated Disability Plan, it did not make any retroactive adjustments to the service credit calculations of women who had been subject to its pre-PDA disability policies.

**Lower Courts: It Can Be Unlawful Not to “Fix” Present Consequences of Prior Acts, Even if the Acts Were Lawful at the Time**

A group of AT&T employees filed charges with the EEOC alleging, among other things, that their pension calculations were discriminatory because they failed to “fix” the accrual calculations attributable to their pregnancy leaves. The EEOC found reasonable cause to believe that AT&T’s pension plan was unlawful. The trial court subsequently held that the company violated Title VII because its post-PDA retirement eligibility calculations incorporated pre-PDA accrual rules that differentiated on the basis of pregnancy and, therefore, the plaintiffs were entitled to regain the lost time retroactively. Rejecting prior decisions by the Sixth and Seventh Circuits, the Ninth Circuit affirmed the trial court in an 11-4 en banc decision.

**Supreme Court Review and Supplemental “Ledbetter” Briefing**

The Supreme Court granted *certiorari* to review the Ninth Circuit’s decision. After the Court had already heard arguments in the case, Congress passed, and the President signed, the Lily Ledbetter Fair Pay Act of 2009. That Act was intended to extend indefinitely the charge-filing period for individuals alleging compensation discrimination under Title VII and other discrimination statutes. The filing period ends 180 (or 300) days after “a discriminatory compensation decision or other practice is adopted . . . an individual becomes subject to a discriminatory compensation decision or other practice, or . . . an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.” 42 U.S.C. § 2000e-5(e)(3)(A) (2009).

In supplemental post-argument briefing on the impact of the Ledbetter law, the plaintiffs argued that they became “subject to a discriminatory compensation decision or other practice” when their pension benefits were paid and thus that the Ledbetter legislation had effectively made AT&T’s 1960s era treatment of pregnancy a present violation of Title VII even though it was lawful when it was adopted and the plaintiffs were denied service credits for their leave. *AT&T*, 2009 WL 1361539 at *8.

In light of the Court’s extraordinary step of taking supplemental post-argument briefing to reach a question of first impression in the appellate courts, it rejected the Ledbetter argument in an oddly
brief aside. AT&T’s pre-PDA decision not to award plaintiffs service credit for pregnancy leave was not discriminatory, the Court said. AT&T’s pre-PDA decision to deny credit for pregnancy leave “was not discriminatory [at the time it was made and thus when the pensions were paid, the plaintiffs were] not . . . ‘affected by application of a discriminatory compensation decision or other practice.’” Id.

With Ledbetter out of the way, the case was resolved on rather settled principles. The pension plan at issue, the Court held, was part of a “bona fide seniority system,” and thus its provisions are lawful — even if they perpetuate prior discriminatory results — so long as they were not adopted with a discriminatory intent:

Although the PDA would have made it discriminatory to continue the accrual policies of the old rule, AT&T amended that rule [and] the new one, treating pregnancy and other temporary disabilities the same way, remains a part of AT&T’s seniority system today.

* * * *

AT&T’s intent when it adopted the pregnancy leave rule (before the PDA) was to give differential treatment that as a matter of law, as Gilbert held, was not gender-based discrimination. Because AT&T’s differential accrual rule was therefore a permissible differentiation given the law at the time, there was nothing in the seniority system [that can be considered discriminatory].

Id. at *6.

Where Does AT&T Leave Ledbetter?

In Ledbetter, 127 S. Ct. at 2172 the Court “reject[ed] the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period.”

Plaintiffs’ lawyers around the country have argued, in varying contexts, that this straightforward and longstanding rule of law was abrogated by the Lilly Ledbetter Fair Pay Act of 2009. The Court’s decision in AT&T suggests that the most adventurous readings of the Ledbetter legislation may be unfounded, and it provides particular clarity to employers with respect to length of service-related benefit calculations.

The AT&T case will be a fascinating case study for law professors and students of political science. The Court’s 1976 decision in Gilbert led to the PDA, which later led to lower court disagreement over the Act’s “retroactive” application to pension plans, which led to the Supreme Court’s decision, which narrowly construed the Ledbetter Act, which overturned the result reached by the Court in the Ledbetter case. One naturally must wonder whether this legislative/judicial ping-pong match has concluded, or whether Congress might enter the field of battle yet again.

Moreover, with one position on the Court open and others the subject of speculation, one might reasonably question the solidity of the result in AT&T. A 7-2 result normally ends such speculation, but the soon-to-depart Justice Souter wrote for the AT&T majority, and his replacement may be more inclined to give the Ledbetter law an expansive reading. One also has to wonder how long 89 year old Justice Stevens — also in the majority — will remain on the Court.

Questions regarding the reach of the Ledbetter Act have only just begun to play out in the lower courts.

Employers should be relieved that the AT&T decision denies the Act the broadest possible construction plaintiffs lawyers have urged, but it is far too early to suggest that the Ledbetter Act will be narrowly construed in other respects.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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