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THE U.S. SUPREME COURT'S LABOR AND EMPLOYMENT DOCKET

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An overriding theme of the U.S. Supreme Court's recently completed term was the impressive number of business victories. In no area of law have business successes been more apparent than labor and employment. The Supreme Court issued decisions this term, and granted review for the next term, in significant cases affecting numerous aspects of the employment relationship.

ANTI-DISCRIMINATION LAWS

In *Ledbetter v. Goodyear Tire & Rubber Company*,[1] the Court held, 5-4, that Title VII bars a plaintiff from bringing an intentional pay discrimination claim challenging pay decisions that occurred outside of the statutory limitations period, even if those decisions continue to affect paychecks received within the limitations period. (The authors' firm represented the defendant.)

Lilly Ledbetter worked for Goodyear Tire & Rubber Company for 19 years. During that time, several different managers made discrete annual decisions regarding what merit pay increase she should receive. Ms. Ledbetter filed a charge with the Equal Employment Opportunity Commission (EEOC), and subsequently a complaint, challenging the cumulative effect of these 19 years of salary determinations and alleging

1 127 S. Ct. 2162 (2007).

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that Goodyear intentionally discriminated against her by paying her less than her male co-workers. As the case reached the Supreme Court, Ms. Ledbetter did not argue that she was given a discriminatory raise within Title VII's limitations period (the 180 days preceding her EEOC charge), but rather that her present paychecks gave effect to earlier pay decisions that were allegedly discriminatory.

The Supreme Court held that Ms. Ledbetter's claim was time-barred. Justice Samuel A. Alito, Jr., writing for the Court, explained that Title VII's limitations period begins to run when the alleged intentional discrimination occurred—at the time each allegedly discriminatory pay decision was made and communicated. To be sure, decisions regarding salary increases (like other employment decisions) may have effects long after the limitations period has lapsed. But, applying a series of its precedents spanning 30 years, the Court held that the "current effects" of past conduct alone "cannot breathe life into prior, uncharged discrimination."[2] The Court stressed the need to "give effect to the statute as enacted" and the political compromise it embodies, including a short charge-filing period that protects employers against "stale claims" and encourages conciliation.[3]

Ledbetter was the only labor and employment case of the term in which the result was not unanimous. Faulting the majority for ignoring "the realities of the workplace," Justice Ruth Bader Ginsburg wrote in dissent that each paycheck that perpetuates past discrimination should trigger a new limitations period.[4] Such a rule is necessary, she found, because pay discrimination is particularly difficult to detect within 180 days. Because comparative pay information is often unavailable to employees, and because pay discrimination often occurs in small increments, an employee may not be aware of discrimination or have sufficient reason to bring a charge until multiple discriminatory pay decisions have been made. Justice Ginsburg urged Congress to "correct" the Court's "cramped interpretation" of Title VII.[5]

Congress swiftly held hearings about *Ledbetter,* and the House of Representatives passed H.R. 2831, the Lilly Ledbetter Fair Pay Act of 2007. The bill purports to undo *Ledbetter* by allowing an individual to bring a claim under Title VII and other anti-discrimination statutes within 180 days of being "affected by" 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."[6] The bill does not distinguish between claims brought by employees who took longer than 180 days to discover pay discrimination and those brought by plaintiffs who simply slept on their rights.

The *Ledbetter* Court reserved the question whether intentional pay discrimination claims are subject to a discovery rule (whereby a limitations period may be tolled until a plaintiff knew or should have known of the basis for the cause of action) because Ms. Ledbetter did not argue that she lacked sufficient information to bring a charge of discrimination earlier.[7] She knew by 1992 that she was earning less than some of her male colleagues,[8] but she waited to sue until 1998, when she was ready to retire.[9] Because the Bush administration has announced its opposition to H.R. 2831,[10] the impact of *Ledbetter* (and the question whether some form of a discovery rule applies to intentional pay discrimination claims) may be resolved by litigation rather than legislation.

As businesses streamline their workforces, discrimination claims under the Age Discrimination in Employment Act (ADEA) have proliferated. The Court recently granted review in two cases with a potentially significant impact on how ADEA claims are litigated.

First, like *Ledbetter*, *Federal Express Corporation v. Holowecki* concerns the filing of a charge—specifically, whether an intake questionnaire (a preliminary form submitted by an employee to the EEOC) satisfies the ADEA's charge-filing requirement, even absent evidence that the EEOC treated the

2 *Id.* at 2169.
3 *Id.* at 2170-71 (internal quotation marks and citations omitted).
4 *Id.* at 2179.
5 *Id.* at 2188.
6 H.R. 2831, 110th Cong. § 3 (placed on Senate calendar, Aug. 2, 2007), 2007 CONG US HR 2831 (Westlaw).
7 127 S. Ct. at 2177 n.10.
8 Ledbetter J.A. 231-33.
9 127 S. Ct. at 2165.
10 Statement of Administration Policy, H.R. 2831—Lilly Ledbetter Fair Pay Act of 2007, http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf

questionnaire as a charge or that the employee reasonably believed that it was a charge. Permitting an intake questionnaire to constitute a charge under such circumstances could thwart Congress' intent to provide notice to the employer of alleged discrimination and to trigger the conciliatory function of the EEOC.

While *Holowecki* may bear on whether an intake questionnaire satisfies the charge-filing requirements of other statutes, the analysis is not necessarily the same under the ADEA as under Title VII and the Americans with Disabilities Act, which expressly require that a charge be made under oath or affirmation (though a subsequent verification may relate back to the date a charge was filed).

Second, the Court granted review in *Sprint/United Management Company v. Mendelsohn*, an ADEA case following a reduction in force. The U.S. Court of Appeals for the Tenth Circuit held that a district court is required to admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the plaintiff's lawsuit nor were similarly situated to the plaintiff (such as workers who were laid off by other supervisors or at different times than the plaintiff). Other circuits have held that such evidence is either inadmissible, or that its admissibility lies within the district court's discretion. In the context of punitive damages, the Court recently held that due process requires that defendants not be held liable or punished because of conduct directed at non-parties.[11]

EMPLOYEE BENEFITS

The move by employers away from defined benefit pension plans to defined contribution plans (such as 401(k) plans) is unmistakable. Approximately $3 trillion in assets—more than half of all private pension funds—are held in defined contribution plans.[12] In contrast, defined benefit plans have declined from about 114,000 in 1985[13] to around 29,000 today, though 34 million Americans remain covered by such plans.[14] The Supreme Court recently decided one case and granted review in another affecting this transformation in the pension landscape.

Beck v. Pace International Union[15] concerns the scope of an employer's fiduciary liability for a decision to terminate a defined benefit plan. The employer, Crown Paper Company, terminated its defined benefit plan after filing for bankruptcy. The plan was overfunded by approximately $5 million, and purchasing annuities to satisfy the plan's obligations to participants and beneficiaries allowed Crown to retain the surplus for its creditors. The Pace International Union proposed that Crown instead merge its plan with a possibly underfunded multiemployer pension plan that Pace administered, allowing Pace's plan to obtain the Crown plan's surplus. When Crown rejected Pace's proposal, the union brought an action alleging that Crown breached its fiduciary duties under the Employee Retirement Income Security Act (ERISA).

The Supreme Court unanimously reaffirmed that an employer's decision to terminate a defined benefit plan is a business decision "immune from ERISA's fiduciary obligations."[16] An employer does have a fiduciary obligation in choosing the method of termination, such as picking an appropriate annuity to cover the plan's obligations. But, the Court explained, the decision to merge a plan is not a method of termination; it is a business alternative to termination not subject to ERISA's fiduciary requirements.[17]

Acknowledging ERISA's complexity, the Court noted that resolving this case "without the views of the agencies responsible for enforcing ERISA," the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor, "would be to embar[k] upon a voyage without a compass."[18] The Court validated the PBGC's judgment that merger would contravene the interests of participants and employers: Beneficiaries of Crown's plan are better off with a fully funded annuity than with a potentially underfunded multiemployer plan, and

11 *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).
12 Flow of Funds Accounts of the United States, First Quarter 2007, http://www.federalreserve.gov/releases/z1/20070607/z1.pdf, at 113.
13 Pension Benefit Guar. Corp., Annual Report to Congress, Fiscal Year 2001, Trends in Defined Benefit Pension Plans, http://www.pbgc.gov/txtfiles/2001txt/2001plantrends.htm
14 Pension Benefit Guar. Corp., Annual Management Report, Fiscal Year 2006, http://www.pbgc.gov/docs/PBGCAMR.pdf, at 9.
15 127 S. Ct. 2310 (2007).
16 *Id.* at 2316.
17 *Id.* at 2317-20.
18 *Id.* at 2317 (internal quotation marks and citation omitted).

Crown, which "diligently fund[ed]" its plan, should not become "the bait for a union bent on obtaining a surplus that was rightfully Crown's."[19]

The Court also granted review in *LaRue v. DeWolff, Boberg & Associates, Inc.* to decide whether ERISA allows a 401(k) plan participant to sue for a fiduciary breach. The participant claims that his retirement account is $150,000 short because his employer failed to make investment changes that he requested. Section 502(a)(2) of ERISA allows a participant to sue a fiduciary for "losses to the plan"; section 502(a)(3) allows claims for "equitable" relief. The U.S. Court of Appeals for the Fourth Circuit held that the participant was not seeking to recover "losses to the plan" because the recovery would benefit him alone, and that the monetary relief that he sought was legal rather than equitable.

Supported in his petition for certiorari by the United States, the participant argues that he is seeking to recover losses to the plan insofar as the assets of a defined contribution plan are held in a single unitary trust, and that a suit against a fiduciary is inherently equitable. *LaRue* presents what some view as a quandary of ERISA: The statute's pre-emption provision broadly supersedes state laws that relate to ERISA plans, but its narrow enforcement provisions may leave participants without a federal remedy for breaches of fiduciary duty.

Whether *LaRue* resolves these questions remains to be seen, because the employer filed a pending motion to dismiss the case as moot after learning that the plaintiff withdrew all funds from his 401(k) account. The circuits are split about whether an employee who cashes out a 401(k) plan qualifies as a "participant" with standing to sue under ERISA for lost value to his plan assets caused by a fiduciary breach.

FAIR LABOR STANDARDS ACT

In another unanimous decision deferring to an agency's pronouncements, *Long Island Care at Home, Ltd. v. Coke*,[20] the Court upheld regulations by the Department of Labor providing that home care workers employed by an outside agency (rather than the recipient of care) are exempt from the minimum wage and overtime rules of the Fair Labor Standards Act (FLSA). The FLSA exempts individuals "employed in domestic service employment to provide companionship services for individuals who . . . are unable to care for themselves."[21]

Writing for the Court, Justice Stephen G. Breyer concluded that the agency's regulation providing that the exemption covers workers employed by third parties was entitled to *Chevron* deference[22] because Congress left a definitional gap in the statute and the agency's interpretation was reasonable. Moreover, the Court held that the fact that the department's view was found in a section of the regulation entitled "Interpretations" did not make it an "interpretive rule" outside the scope of *Chevron* deference.[23] The regulation affects "individual rights and obligations," fills a statutory gap, and was promulgated using full notice-and-comment procedures.[24]

LABOR LAW

In *Davenport v. Washington Education Association*,[25] the Court unanimously upheld a Washington law requiring public-sector unions to obtain consent from nonmembers that they represent before spending the nonmembers' mandatory fees for election-related purposes. The Court explained that "it is undeniably unusual" for a state to give a union, a private entity, "the power, in essence, to tax government employees."[26]

19 *Id.* at 2321.
20 127 S. Ct. 2339 (2007).
21 29 U.S.C. § 213(a)(15).
22 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984) (providing for deference to an agency's reasonable interpretation of a statute where the statute is silent or ambiguous about the question at issue).
23 127 S. Ct. at 2350-51.
24 *Id.* at 2350 (internal quotation marks and citation omitted).
25 127 S. Ct. 2372 (2007).
26 *Id.* at 2378.

The Court viewed the requirement imposed by Washington as a "modest limitation upon an extraordinary benefit" conferred upon unions by the state.[27] Because Washington could eliminate agency fees by public-sector employees entirely, "the far less restrictive limitation" imposed on the union's "authorization to exact money from government employees" does not violate the First Amendment.[28]

Davenport is unlikely to have far-reaching impact, at least not directly. The Court limited its holding to public-sector unions.[29] Moreover, Washington has since eliminated the provision that the Court upheld, and no other state has a similar law.

In another labor case, *Chamber of Commerce of the United States v. Brown*, the Supreme Court has asked the Solicitor General to file a brief expressing the views of the United States about whether certiorari should be granted. This case concerns a California law that prohibits employers that receive state funds from using those funds to promote or deter union organizing. The Chamber of Commerce, which is represented by the authors' firm, contends that the National Labor Relations Act preempts California's law. At least 15 other states are considering legislation similar to California's law.

UNANSWERED QUESTIONS

The Court did not reach questions presented in two other employment cases that were before it this term. *BCI Coca-Cola Bottling Company v. EEOC*, which the Court dismissed before argument at the parties' request, raised the question whether an employer is liable where the unapproved, biased acts of a subordinate lead an unwitting decisionmaker to carry out a discriminatory act. And *Office of Senator Mark Dayton v. Hanson*, which the Court dismissed for lack of jurisdiction after argument,[30] raised unanswered questions about the application of the Speech or Debate Clause to suits under the Congressional Accountability Act challenging the personnel decisions of legislators, and about whether the expiration of a legislator's term moots such a suit.

27 *Id.*
28 *Id.*
29 *Id.* at 2382.
30 127 S. Ct. 2018 (2007).

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The views set forth herein are the personal views of the authors and do not necessarily reflect those of the firm.