Employment Law

3rd Circuit Limits Reach of Ledbetter Fair Pay Act

Jeffrey Campolongo and Jennie Maura McLaughlin Contact All Articles
The Legal Intelligencer | October 22, 2010

Jeffrey Campolongo

The 3rd U.S. Circuit Court of Appeals has taken its first step toward limiting the reach of the Lilly Ledbetter Fair Pay Act of 2009 (FPA). Earlier this month, the 3rd Circuit rendered a decision in *Noel v. The Boeing Co.* in which it disagreed with the plaintiff-employee's position that a "failure to promote" claim can arise under the FPA.

According to the opinion, Emmanuel Noel, a black Haitian national, worked for Boeing as a metal assembler. At times, Boeing was able to offer work at offsite locations, which provided greater pay. Noel's Title VII claim alleged that while Noel was working at one of these offsite locations, two white males also working there were promoted whereas Noel was not. Noel also claimed that employees with less seniority than him were selected for offsite work instead of him. He alleged that these decisions were made because of intentional discrimination and disparate treatment based on his race and national origin.

RELATED ITEMS

- **Fair Pay Act Limitations Period Doesn't Apply to Failure to Promote Claim**
- **Firing Not Only Consideration in Whether Non-Solicitation Agreement Still Applies**

At issue at the appellate court was whether Noel's claims were time-barred. Noel's claims were based on decisions his employer made in 2002 and 2003. He did not file his claim with the EEOC until March 2005. Under Title VII, a claim must be filed with the EEOC within 300 days of the last incidence of discrimination (or with a state agency like the PHRC within 180 days). His 2005 filing was well beyond the 300-day limitation period, which the district court said barred his claims.

Noel's appeal of the district court decision was on the basis that the FPA revived his claim. He argued that since he was not promoted he did not receive a pay increase, and each time he received a paycheck he was being paid less than those who were promoted as a result of discrimination against him.

The FPA was written by Congress in direct response to *Ledbetter v. Goodyear Tire & Rubber Co. Inc.* In *Ledbetter* , the U.S. Supreme Court in 2007 barred a female employee's claim of pay discrimination because she had failed to bring the claim within 300 days of the pay-setting decision. In fact, the employee brought the claim many years after the pay-setting decision because she had only just become aware of the pay disparity between herself and the male employees.

Recognizing that employees generally do not know how management makes salary decisions or how much their co-workers are being paid, Congress responded to *Ledbetter* by enacting the FPA. The FPA provides that each paycheck that is issued as a result of a discriminatory pay structure starts the charging period anew. This allows an employee to bring a claim beyond the 300-day statutory filing period provided by Title VII.

In Noel's attempt at using the FPA to make his filing timely, he claimed that the decision not to give him a promotion was "perpetuated each time the resulting lower compensation was thereafter paid" to him. The 3rd Circuit first considered whether Noel actually alleged pay discrimination, which would put him within the reach of the FPA and make his claim timely.

The purpose of the FPA is to enforce equal pay for equal work. Here, Noel was arguing that he was not being paid more because he was not promoted. Thus, he was comparing his pay to the pay for a position he was not working in. That puts him squarely in the "failure to promote" type of claim. He is not alleging that he is being paid less than people who are in the same position as him, which is what would put him in the realm of the FPA.

The 3rd Circuit determined that Noel did not allege pay discrimination, as his claim alleged a failure to promote and this claim lacked a "nexus between his promotion claim and the resultant lower salary before the district court."

This explanation seems to miss the mark. It generally goes without saying that a promotion comes with a pay raise. So a nexus should exist between a promotion and a salary. The problem seems to be that Noel did not frame his case as being about pay discrimination, so it did not fall squarely within the FPA. Rather, it was about promotions, with corresponding compensation as an assumed facet of that issue.

Because the 3rd Circuit found Noel's case to be about a failure to promote, it had to determine whether the FPA could apply to such a case. The FPA applies to "discrimination in compensation," which the court did not find to be the case here. Again, it seems like a natural connection to say that not promoting an employee for a discriminatory reason results in discrimination in employee compensation. However, the 3rd Circuit was looking at the policies behind the FPA as well as the need to leave Title VII's requirements intact.

When one is denied or passed over for a promotion, it is generally at a set point in time and one is aware of it when it happens. Thus, the statutory filing period set forth in Title VII can be applied without any unfairness. By contrast, when one is being paid less than another co-worker in the same position, the person often is not immediately aware of this and it is an ongoing, or continuing, violation. The unfairness of requiring an employee to discover the salaries of his or her co-workers within 300 days of pay-setting decisions is what the FPA seeks to address in allowing claims to be brought later in time.

Noel is in accord with a recent decision by the D.C. Circuit, *Schuler v. Pricewaterhouse Coopers* , which also held that the FPA does not address failure to promote claims. Using similar reasoning as the 3rd Circuit, *Schuler* says that a plaintiff must point to a discriminatory compensation decision to fall under the FPA and differentiated between a decision amounting to discrimination in compensation and a decision to promote one employee but not another.

In explaining why a failure to promote claim is outside the reach of the FPA, both circuits pointed to Justice Ruth Bader Ginsburg's dissent in *Ledbetter* , which was basically an invitation to Congress to enact legislation countering the *Ledbetter* decision. Ginsburg explained that unequal pay for equal work is simply a different employment action than other actions because of the non-public nature of pay setting decisions. She specifically pointed to the difference between paying people unequally and an employer making a promotion decision. A decision about promotions is a definitive action immediately made known to employees. Thus, there is no inherent unfairness in maintaining the Title VII statute of limitations period, and is not the type of action that Congress intended the FPA to include.

In sum, the 3rd Circuit determined that a failure to promote claim does not constitute discrimination in compensation under the Lilly Ledbetter Fair Pay Act. It could be argued that any employment decision can have an effect on compensation, but the 3rd Circuit has taken the stance that the FPA should not be stretched to the extremes in such a way that the Title VII statute of limitations would be rendered moot. Thus, if an employee wishes to rely on the FPA to make a claim timely, pay discrimination should be an essential part of the claim or at least be alleged as a separate claim. •

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at* ***jcamp@jcamplaw.com*** *or 215-592-9293.*

Jennie Maura McLaughlin *works on employment discrimination and workers' compensation cases for the Law Office of Jeffrey Campolongo and the Law Office of Christian Petrucci.*

From the Law.com Network

THE LEGAL INTELLIGENCER