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In This Issue:

May 2009

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Supreme Court Decides in *AT&T Corp. v. Hulteen* in Favor of Employer and Addresses Lilly Ledbetter Fair Pay Act for First Time

By Sue M. Douglas and Blake Andrews

On May 18, 2009, the Supreme Court announced its decision in *AT&T Corp. v. Hulteen*. In a 7-2 decision authored by Justice Souter (with Justice Ginsberg and Justice Breyer dissenting), the Court held that an employer does not necessarily violate the Pregnancy Discrimination Act (PDA) when it pays pension benefits calculated in part based on an accrual rule – in use prior to the PDA's enactment – that gives less retirement credit for pregnancy than for short-term disability leave. The Court held that the employer's method of calculating benefits was insulated from a Title VII challenge because it was part of a *bona fide* seniority system. The decision is also the first Supreme Court ruling to address the recently enacted Lilly Ledbetter Fair Pay Act (Ledbetter Act), and it limits to a degree the Ledbetter Act's reach in the narrow circumstance where disparities in benefits are based on past, completed actions which were legal when taken. For additional information regarding the Lilly Ledbetter Fair Pay Act, see Littler's ASAP *Paycheck Rule Revived for Pay Discrimination Claims with Signing of the Lily Ledbetter Fair Pay Act*.

Ledbetter v. Goodyear and the Ledbetter Act

On January 29, 2009, President Obama signed into law the Ledbetter Act, which expressly overturned the U.S. Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). In that case, the U.S. Supreme Court expressly rejected the "paycheck rule" advanced by the plaintiff – *i.e.*, that each time a paycheck evidencing disparate compensation was issued, a separate act of discrimination arose. The effect of the Court's decision was to limit the timeframe in which employees could bring pay discrimination claims. To maintain a timely claim of pay discrimination under Title VII, the *Ledbetter* Court held, an employee was required to file his or her claim with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 days of the original discriminatory pay-setting decision, even if the violation continued to affect the employee's compensation long after the 180-day period expired.

In overturning the Supreme Court's decision, the Ledbetter Act has broadened the occurrences that are considered unlawful actions for purposes of triggering a pay discrimination claim. Under the Ledbetter Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid. With the "paycheck rule" now in effect, employees may seek to reclaim lost compensation long after the initial discrimination took place, so long as the claim is filed with the EEOC within 180 days (or 300 days in some states) of the receipt of any compensation affected by the initial pay decision. In addition, while the Ledbetter Act does not require employers to repay employees for decades of discriminatory pay differentials, employees can recover back pay up to two years prior to when the employee filed the discrimination claim.

Although combating gender-based pay discrimination was the impetus for the legislation, the Ledbetter Act prohibits pay discrimination based on all of the protected categories under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, *i.e.*, race, color, religion, national origin, age, and disability.

The statutory enactment of the paycheck rule allows employees to challenge pay-related decisions years after they have occurred. As a result, before the decision in *AT&T v. Hulteen*, it was uncertain whether pay decisions made long ago could be challenged as discriminatory when those decisions were unquestionably legal under the state of the law at the time they were made.

Hulteen's Claims against AT&T

Prior to 1978, AT&T based its pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for medical leave generally. In 1978, Congress passed the PDA which amended Title VII of the Civil Rights Act of 1964 to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." The PDA was enacted in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that differential treatment of pregnancy leave was not sex-based discrimination prohibited by Title VII. With the passage of the PDA, AT&T adopted a new pension plan, which provided the same service credit for pregnancy leave as for other temporary disability leave. AT&T made these changes prospectively, such that no retroactive adjustments were made for the pre-PDA leave calculations.

Because Hulteen took pregnancy leave before AT&T changed its pension plan, she received less service credit for her leave than she would have received had she taken general disability leave. This resulted in a reduction in her total employment term and, consequently, a smaller AT&T pension. Hulteen, along with other affected coworkers and their union, filed EEOC charges alleging discrimination based on sex and pregnancy in violation of Title VII. The EEOC issued a determination finding reasonable cause to believe AT&T had discriminated and provided Hulteen with a notice of right-to-sue. Hulteen filed suit in federal district court, which, based on Ninth Circuit precedent that was in conflict with Sixth and Seventh Circuit precedent, ruled in favor of Hulteen. On appeal, the Ninth Circuit Court of Appeals affirmed the district court's decision.

In response to AT&T's appeal to the Supreme Court, Hulteen argued that, even though AT&T's pre-PDA decision to give less retirement credit for pregnancy absences was legal at the time it was made, AT&T's post-PDA decision at the time of her retirement to calculate her pension on the basis of the credit she had accrued partly under the pre-PDA rules violated the PDA when that decision was made. After oral argument but before the Court issued its opinion, President Obama signed the Ledbetter Act into law. In supplemental briefing, Hulteen argued that the Ledbetter Act further supported her position. According to Hulteen, whether AT&T's pre-PDA decision was legal when made was irrelevant under the Ledbetter Act. Instead, she argued that the calculation of her pension by AT&T post-PDA was made using a measure of company service that it knew afforded unequal credit for equal service to women who took pregnancy leave prior to 1978. Therefore, Hulteen argued, AT&T's calculation was an "unlawful employment decision or practice" under the Ledbetter Act, one which affected her each time she received her pension payment.

The Supreme Court's Decision in *AT&T v. Hulteen*

In its decision in *Hulteen*, the Supreme Court overruled the Ninth Circuit, holding that an employer does not necessarily violate the PDA when it pays pension benefits calculated in part under an accrual rule that gave less retirement credit for pregnancy than for medical leave generally when that rule was applied only before the enactment of the PDA. In reaching its ruling, the Court noted that seniority systems are afforded special treatment under Section 703(h) of Title VII, which provides: "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a bona fide seniority ... system ... provided that such differences are not the result of an intention to discriminate because of ... sex." Citing Section 703(h), the Court explained that benefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are the result of an intention to discriminate. The Court reasoned that, because AT&T's system must be viewed as bona fide, *i.e.*, as a system having no discriminatory terms, Section 703(h) governed, and the key determination was whether AT&T had intended to discriminate when it implemented its pre-PDA accrual rules.

As the Court noted, under *Gilbert*, the exclusion of disabilities related to pregnancy was not sex-based discrimination within the meaning of Title VII prior to 1978. Thus, AT&T's intent when it adopted the pre-PDA pregnancy leave rule at issue was to give differential treatment that, as a matter of law under *Gilbert*, was not gender-based discrimination. In other words, because AT&T's decision to utilize an accrual rule limiting seniority credit for time taken for pregnancy leave was not discriminatory under *Gilbert*, it could not be the case that it was intentionally discriminatory. In addition, AT&T had adopted a new pension plan, which provided service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities on the day the PDA took effect.

The Court next held that, even though AT&T could have chosen to give Hulteen post-PDA credit for her pre-PDA pregnancy leave when she retired, its failure to do so was not a discriminatory act. As the Court explained, if a choice to rely on a favorable statute turned every past legal differentiation into contemporary illegal discrimination, Section 703(h) would never apply.

Finally, the Court rejected Hulteen's argument that AT&T's calculations were made unlawful under the Ledbetter Act because the payment of her pension benefits were in effect "the application of a discriminatory compensation decision or other practice, including each time ... benefits [are] paid, resulting ... from such a decision." Following its reasoning above, the Court held that AT&T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory at the time it was made, and, therefore, Hulteen had not been "affected by application of a discriminatory compensation decision or other practice."

What *Hulteen* Means for Employers

Employers should understand that the holding in *Hulteen* is limited. In *Brazemore v. Friday*, 478 U.S. 385 (1986), the Supreme Court held that a pattern or practice that was not illegal prior to Title VII but that would constitute a violation of Title VII did in fact became a violation upon Title VII's effective date. Thus, to the extent an employer continued to engage in that act or practice after the Act's effective date, the employer would be liable under Title VII. In *Hulteen*, the Court distinguished the facts before it from Brazemore on two grounds. First, the Court noted that *Brazemore* did not involve a seniority system, indicating that the holding in *Hulteen* may not extend beyond the context of bona fide seniority systems. Indeed, at the end of its opinion, the Court emphasized the importance of the predictable financial consequences provided by bona fide seniority systems for both employers and employees.

Second, the Court explained that the employer in *Brazemore* failed to eliminate the discriminatory practice at issue in that case, even though the newly enacted Title VII had turned what was once legally permissible into something unlawful. In contrast, AT&T had adopted a new pension plan on the effective date of the PDA that complied with the PDA, and therefore AT&T's calculation of Hulteen's pension payments was based on past, completed events that were not illegally discriminatory when they occurred. Thus, *Hulteen* appears to limit the reach of the Ledbetter Act only in those circumstances where the allegedly discriminatory compensation at issue is based on past, completed decisions that were lawful when they were made.

Keeping in mind these limitations, the *Hulteen* decision clearly strengthens the protection afforded under Section 703(h) to bona fide seniority systems, even in light of the enactment of the Ledbetter Act. The Ledbetter Act does not define "discriminatory compensation decision or other practice," leaving this important phrase subject to varying interpretations. Had the Court agreed with Hulteen's interpretation, employers could have been liable for decisions made years ago relating to their seniority-based compensation systems, even though the decision itself was not illegally discriminatory when made and even though the seniority system was brought into compliance, each time a discrimination law was enacted or amended. Under *Hulteen*, however, if a decision regarding the bona fide seniority system at issue was not illegally discriminatory at the time it was made and the seniority system itself complies with the law going forward, then Section 703(h) applies to protect the seniority system at issue. Thus, although employers must regularly evaluate their seniority systems to determine whether those systems comply with current laws (including newly enacted and amended laws), *Hulteen* serves to protect bona fide seniority systems that were not adopted for a purpose that was illegally discriminatory.

Conclusion

The *Hulteen* decision curtails liability in those circumstances where employers are faced with claims alleging pay discrimination arising out of compensation decisions involving bona fide seniority systems that were legal when made. The decision is also the first to provide some guidance on the limits of the Ledbetter Act. The holding, however, is very narrow, and how the Supreme Court continues to interpret the Ledbetter Act remains to be seen.

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