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I'm Late, I'm Late, for a Very Important Date

Missing a statute of limitations is a hare of another color

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Do you feel like the white rabbit in Lewis Carroll's "Alice's Adventures in Wonderland," lamenting about running late? Running late is one thing; missing a statute of limitations is a hare of another color.

The statute of limitations in employment cases has recently been examined by the United States Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), the United States Congress when passing the Lilly Ledbetter Fair Pay Act ("FPA"), and the New Jersey Appellate Division in *Toto v. Princeton Township*, 2009 WL 88499 (N.J. App. Div. Jan. 15, 2009). Each has taken divergent approaches, which have resulted in two important decisions and changes to Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. In *Ledbetter*, the Supreme Court limited an

employee's time to file pay discrimination lawsuits. Congress quickly reacted and reversed that limitation by passing the FPA. Meanwhile, in *Toto v. Princeton Township*, the Appellate Division addressed the statute of limitations for a hostile work environment claim under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD").

The FPA

On January 29, President Barack Obama signed the FPA. The FPA nullifies the Supreme Court's 5-4 ruling in *Ledbetter*, which barred Lilly Ledbetter's claims as outside the statute of limitations. Ledbetter brought claims under Title VII and the Equal Pay Act, asserting that she had been discriminated against based on her sex, resulting in lower pay than her male colleagues through the end of her career. Specifically, Ledbetter alleged that she received poor performance evaluations earlier in her career that resulted in the pay discrepancy.

The Supreme Court held that the time limit for filing an Equal Employment Opportunity Commission ("EEOC") charge ("Charge") alleging discrimination in pay could only be triggered by discriminatory pay

decisions, not later nondiscriminatory decisions that allegedly perpetuated effects of earlier discrimination, nor could it be triggered by the issuance of paychecks without showing facial, structural discrimination. Therefore, the Court found that for purposes of determining timeliness of filing of a charge with the EEOC, under Title VII, a new violation does not occur, and a new charging period does not commence, upon occurrence of a subsequent nondiscriminatory act that entails adverse effects resulting from past discrimination. However, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. The dissent labeled the majority's ruling as a "cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose." Nevertheless, Ledbetter's claims were barred because, according to the majority's ruling, the time period began to run when plaintiff received the poor performance evaluations that led to her being paid less than her male counterparts, not each time she received a paycheck which perpetrated the prior discriminatory decisions regarding her pay.

Congress quickly overturned the *Ledbetter* decision by enacting

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the FPA. The FPA essentially eliminates the statute of limitations in pay discrimination cases. Specifically, it amends Title VII, the ADEA, and the Rehabilitation Act by allowing pay discrimination claims to be filed with state or federal agencies within 180 to 300 days of the issuance of the last discriminatory paycheck, regardless of how long ago the actual compensation decision was made. The FPA is retroactive to May 28, 2007, the day before the Supreme Court's decision in *Ledbetter*.

Employers should be aware that the Act may revive otherwise untimely claims of pay discrimination. In fact, at least one United States District Judge, in *Gilmore v. Macy's Retail Holdings*, 2009 WL 305045 (D.N.J. Feb. 4, 2009), has already retroactively allowed a plaintiff to pursue otherwise barred claims for back pay. Employers take heed. Immediately review any pay disparities and ensure that they were the result of lawful employment decisions.

Toto v. Princeton Township

The statute of limitations' landscape in New Jersey also appears to be changing. In *Toto v. Princeton Township*, the Appellate Division seems to have contradicted its prior holdings that the statute of limitations in many employment cases begins to run from the date a plaintiff is terminated. In *Toto*, plaintiff, who had a speech impediment and was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), alleged that he was verbally taunted and teased by his co-workers because of these conditions.

Plaintiff was unsuccessful in his attempts to alleviate the workplace

harassment. As a result, on January 11, 2002, he took a leave of absence, using his accrued sick, vacation and personal time. On July 17, 2002, the township sent plaintiff's counsel a letter asking whether plaintiff intended to return to work upon the expiration of his leave of absence on July 19, 2002. The letter further advised that if plaintiff did not return to work his employment would be terminated. Plaintiff argued that defendant had not remedied the harassment and, therefore, refused to return to work. The township subsequently terminated him as it indicated it would.

Less than two years later, on March 25, 2004, plaintiff filed a lawsuit asserting LAD claims for hostile work environment and failure to accommodate his handicap. The trial court dismissed the hostile environment claim based upon the applicable two-year statute of limitations. The trial judge reasoned that plaintiff did not suffer from a hostile work environment once he was out of the workplace on leave. On the other hand, the trial judge allowed the failure to accommodate claim to proceed, reasoning that plaintiff sought a reasonable accommodation after he went out on leave.

The issue before the Appellate Division was whether plaintiff's hostile work environment claim began to run from the date plaintiff left the workplace or the date he was terminated. The Appellate Division, distinguishing prior case law, held that where a continuing violation is involved in a hostile work environment claim, plaintiff's cause of action accrues on the date of the last discriminatory act. Therefore, the Court held that plaintiff's hostile work environment claim was time barred.

One of the cases the *Toto* Court distinguished was *Holmin v. TRW, Inc.*, 330 N.J. Super. 30 (App. Div. 2000), where plaintiff alleged he was fraudulently induced to leave his old job to accept employment with defendant. There, the Appellate Division held the claims were not time barred because the statute of limitations period began to run on the last day of employment, rather than on the date plaintiff was notified he was to be terminated. In *Holmin*, the Appellate Division relied, in part, on the fact that the last day of employment was the time when the employee suffered damage and, thus, was the day when the cause of action accrued considering that damages are an element of fraud. Although the plaintiff in *Holmin* did not allege discrimination, the Appellate Division in its reasoning relied on prior decisions in discrimination cases where the court held that the date of termination is the date the statute of limitations begins to run. Although the plaintiffs' claims in *Holmin* and *Toto* differed, it appeared at the time the Appellate Division decided *Holmin* that it was announcing a bright-line rule of beginning the running of the statute of limitations from the date of termination. Based upon *Toto*, that no longer is the case.

Conclusion

Determine what type of employment claim is being alleged. Is it wrongful discharge, a hostile environment claim or a discriminatory pay claim? Don't assume the statute of limitations always runs from the date of termination or you might be late with regard to a very important date. ■