



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW JERSEY SUPREME COURT: EFFECT OF TIME-BARRED DISCRIMINATORY PAY DECISIONS CAN CONSTITUTE TIMELY, ACTIONABLE WRONGS

By Ian W. Siminoff

In *Alexander v. Seton Hall University* (A-87-09), 11/23/10, the New Jersey Supreme Court addressed the question of whether a plaintiff can — where a discriminatory pay decision is made outside the New Jersey Law Against Discrimination's (LAD) two-year limitations period — make out a timely claim under the LAD by arguing the discriminatory pay decision resulted in the payment of unequal wages during the two-year limitations period.

The court answered in the affirmative, as long as the employee can demonstrate the non-time-barred wages remain tainted by the original time-barred discriminatory pay decision(s).

In so doing, the court rejected the U.S. Supreme Court's majority decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held where the discriminatory pay decision occurs outside the limitations period, a Title VII claim is time-barred, notwithstanding that the impact of the decision results in unequal wages paid during the limitations period.

Instead, the *Alexander* court followed earlier New Jersey jurisprudence, the dissent in *Ledbetter* and the subsequent Congressionally enacted Lilly Ledbetter Fair Pay Act of 2009 (FPA). The FPA provides each payment of discriminatory wages constitutes an actionable wrong,

allowing for the recovery of back pay for the two-year period preceding the filing of the lawsuit.

Alexander involved the July 2007 claims of three 19-year-plus tenured female Seton Hall professors aged 60 or over, who claimed they were paid unequal wages in comparison to younger and male employees. They sought damages based upon this purported unfair differential, dating from their respective dates of hire. The plaintiffs allegedly became aware of this disparity in August 2005, after reviewing a Seton Hall annual report that detailed the salaries of its faculty members.

The lower courts dismissed the plaintiffs' claims on timeliness grounds, given that the purported discriminatory pay decisions occurred well outside the two-year limitations period (arguably at the time of their hire).

Disagreeing, the New Jersey Supreme Court held the complaints were timely with regard to the discriminatory wages paid during the two-year period preceding the lawsuit.

Notwithstanding the ostensibly plaintiff-friendly result, the court did not find the plaintiffs could recover for any discriminatory wages paid earlier than the two-year period preceding their lawsuit, thereby rejecting the plaintiffs' continuing violation argument.

Final Thoughts

- While the *Alexander* case involved disparate payment based upon gender and age, the same analysis would apply to disparate pay based on other protected characteristics, such as race.
- It is unclear whether New Jersey courts will apply the *Alexander* analysis to forms of unlawful conduct other than pure wage discrimination, such as unequal wages resulting from an unlawful failure to promote or poor performance evaluation.

- In the wake of *Alexander*, employers should self-police (potentially with attorney assistance) their compensation schemes to ensure they do not disparately treat or impact individuals in protected classes, given that employers could be on the hook for the effect of such policies years down the road.

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