

[Third Circuit Holds Ledbetter Fair Pay Act Does Not Save Untimely Failure-to-Promote Claims](#)

November 9, 2010 by [Adam Santucci](#)

A recent decision by the Third Circuit Court of Appeals allows employers to breathe a sigh of relief. In [Noel v. Boeing Co. \(pdf\)](#), the court concluded that an otherwise untimely discrimination claim, alleging that the employer discriminated against an employee by failing to promote the employee, is not rendered timely by the [Ledbetter Fair Pay Act \(the "Act"\) \(pdf\)](#). The court's decision limits the reach the Act, and it is now clear that claims involving discrete acts of discrimination are not covered by the Act.

The decision involved discrimination claims under Title VII of the Civil Rights Act brought by Emmanuel Noel, an African-American employee at Boeing's Ridley Park, Pennsylvania facility. Basically, Noel claimed that Boeing failed to award him off site job assignments, which allowed for higher pay and per diem payments, and failed to promote him to a higher pay grade around September 2003. At that time, two white employees were promoted to a higher pay grade. In March 2005, Noel filed a complaint with the Equal Employment Opportunity Commission (EEOC), and eventually filed a lawsuit in June 2006. Noel's suit alleged multiple counts of race and national origin-based employment discrimination and retaliation, but the trial court held for Boeing on all counts. Noel appealed only the trial court's finding that his failure to promote claim was untimely.

Under Title VII, an employee in Pennsylvania must file a complaint with the EEOC within 300 days of the alleged discriminatory act or it will be deemed untimely. Noel's complaint was filed with the EEOC in March 2005, well beyond the 300 day filing period following the alleged discriminatory promotion decision in September 2003. For this reason, the trial court dismissed his failure to promote claim. On appeal, Noel argued that the Act saved his otherwise untimely failure to promote claim.

The Act, passed by Congress in 2009, was in response to the Supreme Court's decision in [Ledbetter v. Goodyear Tire & Rubber, Co., Inc.](#) On [January 29, 2009](#), we posted information regarding the Act and the Court's *Ledbetter* decision. The Act extended the time line for filing complaints of discrimination and states that "in **pay discrimination matters** an unlawful employment practice occurs each time an individual is affected by application of a discriminatory **compensation decision.**" As a practical matter, this means that each time an employee receives a pay check that contains the effects of a discriminatory pay decision, the 300 day countdown for filing a complaint of discrimination with the EEOC is restarted.

Noel argued that the Act's paycheck rule made his claim timely because each time he received his pay check he felt the effects of the 2003 failure to promote decision. The Third Circuit disagreed. The court found that in order for an untimely claim to be saved by the Act, the claim

must involve pay discrimination and the plaintiff must point to some discriminatory compensation decision or practice.

The court first held that Noel did not allege a pay discrimination claim because he did not allege that he received less pay for doing equal work. The court noted that the white employees were promoted, and as a result, they were not doing the same work as Noel. The court concluded that this was not a pay discrimination claim, which alleges lower pay for equal work.

The court then went on to address whether a failure to promote claim is a discriminatory compensation decision under the Act. The court concluded that in accordance with the plain language of the Act, only decisions involving compensation are covered, and discrete employment decisions, such as promotion decisions, are not within the scope of the Act. A failure to promote claim is not a discriminatory compensation decision, and therefore Noel's untimely failure to promote claim was not saved by the Act.

The court also found support for its decision in Justice Ginsburg's blistering dissent in the *Ledbetter* decision, which many believe prompted Congress to pass the Act. In her dissent, Justice Ginsburg distinguished discriminatory compensation decisions, which may go undetected by employees for years, and discrete actions which are immediately felt by employees. Justice Ginsburg specifically referenced failure to promote decisions as discrete acts.

The court held that the Act was only intended to save untimely discriminatory pay decisions, and not all employment decisions. The court's rationale and decision should apply to other discrete employment actions, such as demotions and terminations. This is a good sign for employers, who under the Act may face liability for discriminatory pay decisions years or even decades after those decisions are made.

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