



DELAWARE

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FAILURE TO PROMOTE

Lilly Ledbetter has reached her limits

by Lauren E. Moak

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act (FPA), overturning the U.S. Supreme Court's holding in Ledbetter v. Goodyear Tire & Rubber Co. Now, in cases alleging pay discrimination, each paycheck constitutes a new act of unlawful discrimination, starting the statute of limitations anew. However, the Third U.S. Circuit Court of Appeals (which covers Delaware) recently held that the FPA is limited to pay discrimination cases and does not extend the statute of limitations in failure-to-promote claims.

Background

Emmanuel Noel is a black Haitian national. In 1990, he began working at Boeing's Ridley Park facility in Pennsylvania. In reallocating its resources, Boeing sometimes moves its employees to different facilities for temporary assignments. The assignments are highly coveted because they come with a per diem and often include temporary promotions and pay raises.

In November 2002, Noel and two white employees were selected for temporary assignments in Amarillo, Texas. The assignments came with temporary promotions and a raise. In June 2003, after seven months of work at the Amarillo site, the two white employees received a second promotion, but Noel did not. In March 2005, he filed a charge of discrimination with the Equal Employment Opportunity Commission alleging race and national origin discrimination based on Boeing's failure to promote him in June 2003. The court dismissed the case after trial,

finding that it wasn't filed within the 300-day statute of limitations, as required under Title VII of the Civil Rights Act of 1964.

Noel appealed the court's decision, arguing that under the FPA, the statute of limitations started anew each time his paycheck reflected a lower pay rate than that of his promoted counterparts.

Whoa, Lilly!

The Third Circuit disagreed. To resolve the issue, the court considered two questions. First, did Noel state a claim for pay discrimination? In other words, was he denied equal pay for equal work? In reviewing his appeal, the court found that a failure-to-promote claim isn't automatically a pay discrimination claim. Obviously, if an individual is promoted to a higher pay grade, there will be a difference in compensation. Pay differences based on legitimate reasons do not fall within the rubric of pay discrimination.

The second question addressed whether a failure-to-promote claim is covered by the FPA. The court concluded that it isn't. First, the court found that Congress' intent in passing the FPA was to reverse the harsh effects of the Supreme Court's *Ledbetter v. Goodyear Tire* decision in pay discrimination cases. Second, the court emphasized the differences between pay discrimination claims and failure-to-promote claims. While decisions about compensation are "often cloaked in secrecy," an employee is immediately aware when he is denied a promotion. Thus, he may need assistance in a pay discrimination claim — assistance that he wouldn't need in a failure-to-promote claim. As a result, the court limited the FPA to pay discrimination cases, leaving other employment discrimination claims untouched. *Noel v. Boeing Co.*

Bottom line

You can take comfort in the fact that cases alleging a failure to promote do not automatically equate to a claim for pay discrimination with its attendant benefits under the FPA. While it is still possible for an employee to state both failure-to-promote and pay discrimination claims, he must prove the elements of each claim independently. The mere fact that a promotion results in a different rate of pay doesn't create a piggyback claim for pay discrimination.

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