



U.S. District Court Says Cash Balance Plan ADEA Claim Not Time Barred Under Lilly Ledbetter Act

In Tomlinson v. El Paso Corporation, a federal court in Colorado applied the Lilly Ledbetter Fair Pay Act to allow an age discrimination claim involving a cash balance plan conversion to proceed, reversing its prior dismissal of the lawsuit. The case involves a company that converted its traditional defined benefit pension plan to a cash balance plan in 1997 with a wearaway provision. Although the court initially dismissed the case for not being timely filed, it found that the subsequently enacted Ledbetter Act required it to reconsider this decision. While this is one court's ruling and is limited to Colorado, it demonstrates the potential reach of the Ledbetter Act beyond payroll practices to pension-related claims.

Background

The Age Discrimination in Employment Act (ADEA) makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment because of such individual's age. Before filing suit in federal court, an employee must file his/her initial charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the allegedly discriminatory act.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009 into law (see our February 5, 2009 [For Your Information](#)). The law modifies the time limits for bringing pay bias suits and amends several laws, including ADEA. As amended, these laws provide that an unlawful employment practice occurs when a discriminatory compensation decision or practice is adopted, when a person becomes subject to the compensation decision or practice, or when a person becomes affected by a compensation decision or practice, including each time wages, benefits, or other compensation is paid.

Facts of the Tomlinson Case

El Paso Corporation converted its traditional defined benefit pension plan to a cash balance plan, effective January 1, 1997. During a five-year transition period employees accrued benefits under both the old final average pay formula and the new cash balance account formula, and retiring employees received the higher of the two benefits. Once the transition period expired on December 31, 2001, retirees still received the greater benefit, but the old final average pay formula was frozen at the level earned as of December 31, 2001.

Wayne Tomlinson and other participants sued in 2004, arguing that the "wearaway period," the time during which the old average pay plan benefit was frozen and did not grow until the cash balance benefit "caught up" to the old average pay plan benefit, was discriminatory under ADEA.

In January 2009, the court dismissed the ADEA claim on the basis that the 2004 claim was not filed within the statutory 300 days from the date of the alleged discriminatory act, in this case, the cash balance conversion period (January 1997 through December 2001).

After the Ledbetter Act was enacted in late January 2009 (resulting in a change in the controlling law that applied retroactively), Mr. Tomlinson filed a motion to amend the judgment and reinstate the ADEA claim.

The U.S. District Court Decision

On August 28, 2009, in *Tomlinson v. El Paso Corporation* the U.S. District Court for the District of Colorado amended its previous ruling that the plaintiff's ADEA claim was time barred. Because it found the intervening Ledbetter Act applied, it reversed its prior decision and allowed the ADEA claim to proceed. The court found that a discriminatory act occurs when an individual is "affected" by the application of a discriminatory compensation decision or "other practice" – in this case the accrual of pension benefits under the cash balance plan. Therefore, Mr. Tomlinson's ADEA claim was filed timely because he was still accruing benefits under the cash balance plan wearaway provision at the time of his claim.

BUCK COMMENT. *Importantly, the court noted that the Ledbetter Act does not change current law regarding when pension distributions are considered paid. The U.S. Supreme Court case in Florida v. Long (1988) found that paycheck practices involve a continuing violation each paycheck. However, in the case of pension plans the allegedly discriminatory act applies only once, when the employee retires and the pension benefit is determined, not each time a pension check is paid. Therefore, those principles still apply, i.e., each payment of a retirement benefit does not give rise to a new discriminatory act claim.*

The court must now rule on the ADEA claim. It noted that its decision will be affected by two recent cases: *Hurlic v. Southern California Gas Company* (2008), where the Ninth Circuit held that cash balance plans are not inherently age discriminatory (see our October 20, 2008 [For Your Information](#)) and *Gross v. FBL Financial Services* (2009), in which the Supreme Court held that ADEA does not authorize mixed-motive discrimination claims – i.e., individuals claiming age discrimination have to prove that age was not just a factor, but was the determinative factor, in the challenged employer action (see our July 30, 2009 [For Your Information](#)).

BUCK COMMENT. *The cases the court cites may make it difficult for the retirees to prevail on their ADEA claim.*

Conclusion

The decision confirms that the application of the Ledbetter Act reaches farther than wage payments and could include methods of determining accruals under pension plans. However, the case is limited to Colorado, and may not be indicative of future court decisions. Buck's consultants would be happy to discuss the implications with you.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.