



McKENNA
EMPLOYMENT BULLETIN

James P. DeNardo

www.mckenna-law.com

LILLY LEDBETTER FAIR PAY ACT OF 2009

President Obama signed into law a bill to provide fair pay in the workplace, the Lilly Ledbetter Fair Pay Act. The law extends the time period in which employees can bring a charge for disparate pay claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act. The Act states that a discriminatory pay decision, which starts the 180 or 300 day time period for filing an EEOC charge, occurs every time a discriminatory pay check is issued. This would include the last pay check of a terminated or retired employee.

Employers should remember though that if the most recent pay check does not show a difference in pay between an employee in the protected class and those outside of the protected class, there may be no claim at all.

A discriminatory or unlawful employment action occurs when an "individual" becomes subject to or is affected by a discriminatory pay decision or other practice. Language in the statute may be broad enough to allow pay discrimination charges filed by non-employees, such as the spouses or dependents of deceased workers. But, the EEOC has stated that only an individual who believes that his or her employment rights have been violated, or an individual, organization or agency in order to protect an aggrieved person's identity, may file charges with the EEOC.

In addition to the normal relief provided under Title VII, a person filing a charge under the Act may obtain back pay for up to two years preceding the filing of the charge. However, the employee may recover for those two years only where the unlawful employment practice which occurred during the charge filing period is similar or related to the unlawful employment practice occurring outside the time for filing the charge, the 180 or 300 day period.

The effective date of the Act is May 28, 2007. The EEOC presently receives upwards of 5,000 wage bias charge filings nationwide each year. The retroactive effect of the Act may increase that amount.

Apparent problems with the Act are that employers may likely be called upon to defend against compensation actions and decisions made by retired, transferred or terminated managers and supervisors that occurred years, and maybe decades in the past.

Employers may wish to consider the following actions: (1) review pay practices; (2) apply pay decisions and criteria uniformly throughout your work force; (3) draft procedures for reviewing compensation decisions; (4) develop plans to retain compensation documents perhaps indefinitely; (5) train compensation decision makers to support decisions with work related criteria; and (6) examine compensation results to check for disparities showing up by gender, race or age.

EMPLOYER SHOULD CONDUCT CONTINUED TRAINING OR SUFFER PUNITIVE DAMAGES

In Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 2009 WL 161868 (1st Cir. 2009), an employee alleged sexual harassment by her manager. The manager was acting within the scope of his employment and should have been aware that his actions were against the employer's sexual harassment policy and federal law. The Court in Monteagudo held that the sexual harassment warranted a punitive damages award against the employer because of the employer's lack of good faith compliance with its own sexual harassment policy. The Court found that the employer did not have an active mechanism for renewing employees' awareness of the policy either through specific education programs or periodic re-distribution or revision of the written sexual

harassment policy. Furthermore, the employer could not identify any anti-discrimination training given to supervisors and provided no examples of successful implementation of the sexual harassment policy.

RACIAL AND GENDER COMMENTS DID NOT CONSTITUTE A HOSTILE WORK ENVIRONMENT

In Ladd v. Grand Trunk Western R.R., Inc., 2009 WL 77908 (6th Cir. 2009), an African-American female employee's coworkers made general derogatory race-based and sex-based comments. These comments allegedly occurred throughout the entire time the employee worked for the employer. But, the comments were not directed at her. Other comments were that the employee could not and should not be working because she was a woman, some alleged tampering by coworkers with the employee's equipment, and one alleged reference to the employee as a "black bitch."

The Court found these comments did not rise to the level of severity necessary to support the employee's Title VII hostile work environment claim. This was because the employee admitted that she did not complain about any of the general derogatory comments she overheard. She did not complain because they were not said to her face or because she did not feel that she needed to complain about them. Further, none of the comments came from the employee's supervisors. There was also no showing that the alleged equipment tampering presented a physically threatening work environment. Finally, after the employee complained about the one remark directed to her, she did not hear any further race-based or sex-based comments.

INABILITY TO PERSPIRE DID NOT LIMIT ANY MAJOR LIFE ACTIVITY

In E.E.O.C. v. Agro Distribution LLC, 2009 WL 95259 (5th Cir. 2009), an employee had a condition which made him unable to perspire. The Court ruled that this condition did not substantially limit the employee in the major activity of working. Therefore, it was not a disability under the Americans with Disabilities Act. The Court found that the employee was able to regulate his body temperature without significant side effects in the same manner as the average person. The employee could use ordinary methods to cool himself, such as drinking cold liquids, sitting in front of a fan, spraying himself with water, resting when laboring on hot days and using air conditioning.

STALE RACIAL COMMENTS DO NOT SUPPORT DISCRIMINATION

In Nagle v. Village of Calumet Park, No. 07-1157 decided February 4, 2009, the Court affirmed the granting of summary judgment for the employer where the employee alleged that the employer discriminated against the employee, a 54 year old white police officer, by suspending him for failing to assist another police officer and by re-assigning him to undesirable duties because of his age and race. The police officer supported his claim with his supervisor's several references to the employee and others as "old white mother f**kers." The Court ruled that the comments did not constitute direct evidence of discrimination because the comments were made several months before or after the alleged discriminatory acts. The police officer did not present any other facts to support his claim that his supervisor treated younger, non-white officers more favorably. Furthermore, the police officer did not show that his assignments to a strip-mall evidence room or as the Department's senior liaison were actionable adverse acts.

McKenna Storer has offices located at:

33 N. LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

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