

ALEXANDER V. SETON HALL UNIVERSITY

REFUSAL TO DEPART FROM PRECEDENT ALIGNS THE NEW JERSEY LAW AGAINST DISCRIMINATION WITH THE LILLY LEDBETTER FAIR PAY ACT OF 2009

by Kelly D. Gunther and Jay S. Becker

In a departure from United States Supreme Court precedent, the New Jersey Supreme Court recently ruled that each paycheck resulting from a prior discriminatory pay decision constitutes an actionable act of discrimination under the New Jersey Law Against Discrimination (LAD).¹ The continuing violation doctrine, however, is not applicable to disparate pay discrimination claims under the LAD.

In *Alexander v. Seton Hall University, et al.*,² three female tenured professors at Seton Hall University (SHU), claimed they were paid less than younger and/or male employees, in violation of the LAD. The plaintiffs alleged they did not discover the basis for an actionable unequal wage LAD claim until 2005, when they obtained a copy of an internal 2004–2005 SHU annual report that detailed the salaries of its full-time faculty members by college, gender, rank and salary. Their complaint sought damages back to their dates of initial hire 29, 25 and 20 years ago, respectively.³

The defendants moved to dismiss, arguing that the LAD's two-year statute of limitations barred the plaintiffs' claims. In considering the motion to dismiss, the trial court framed the issue as whether the plaintiffs could bring a pay discrimination claim when the unequal pay was received during the statute of limitations period, but was a consequence of a claimed discriminato-

ry pay decision that took place outside that limitations period.

Relying on the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁴ the trial court granted the defendants' motion, holding that any and all disparate wages paid to the plaintiffs were the result of allegedly intentional discriminatory pay decisions that occurred outside of the two-year limitations period.⁵ In affirming the trial court's final order of dismissal, the Appellate Division rejected the plaintiffs' argument that the continuing violation doctrine applied to a wage discrimination claim.⁶

The New Jersey Supreme Court granted the plaintiffs' petition for certification⁷ to determine whether LAD jurisprudence should be aligned with the United States Supreme Court's *Ledbetter* analysis. In a 5–1 decision,⁸ finding neither a necessary nor beneficial purpose in conforming to the *Ledbetter* approach, the Court reversed and remanded based on New Jersey case law and the Lilly Ledbetter Fair Pay Act of 2009 (FPA), which amended Title VII to clarify that an unlawful act occurs "each time wages, benefits, or other compensation [are] paid" resulting from an earlier discriminatory practice.⁹

In its departure from federal court precedent, the Court emphasized that prior New Jersey decisions treated the payment of discriminatory wages just as the dissent would have held in *Ledbetter*—wage disparity based on invidious, proscribed discrimination is a violation of the LAD for which a remedy is available if the discriminatory wage continues.¹⁰ The Court also found it noteworthy that Congress legislatively overturned the *Ledbetter* decision in the FPA.

Recognizing the public policy of New Jersey to treat each issuance of a paycheck that reflects discriminatory treatment toward a protected group as an actionable wrong under the LAD, the Court rejected the *Ledbetter* approach. In other words, under the LAD, each discriminatory paycheck is treated as the equivalent of a 'discrete' and separable violation of the LAD, if the wage remains tainted by the original act of discriminatory intent. Critical to the Court's decision, however, was its refusal to extend the applicability of the continuing violation doctrine to the plaintiffs' wage discrimination claims. Applying the LAD's two-year statute of limitations, the Court found the plaintiffs' complaint to be timely with respect to the allegedly discriminatory wages paid during the two years immediately prior to the filing of their lawsuit, but untimely with respect to the allegedly discriminatory wages paid outside the two-year limitations period. As a result, the untimely portion of the claim was severed and recovery of back pay was limited to wages received within two years of the filing of the plaintiffs' complaint.

A New Jersey employee can now make out a timely claim under the LAD by arguing that the discriminatory pay decision resulted in the payment of unequal wages during the two-year limitations period if the employee can demonstrate that the non-time-barred wages remain tainted by the original time-barred discriminatory pay decision(s). The impact of the holding in *Alexander*, however, is somewhat tempered by the Court's rejection of the plaintiffs' continuing violation argument, and the Court's corresponding

finding that the plaintiffs could not recover for any discriminatory wages paid earlier than the two-year period preceding their lawsuit.

The practical effect of *Alexander* may likely result in an increase of disparate pay claims under the LAD. Rather than bring suit under federal employment law statutes (which require exhaustion of administrative remedies and impose caps on damages), New Jersey plaintiffs now have a much easier, and potentially more lucrative, avenue to challenge any decision that affected any paycheck received within the LAD's two-year limitations period, regardless of when it was made. ■

Endnotes

1. N.J.S.A. 10:5-1, *et seq.*
2. 204 N.J. 219 (2010).
3. Seton Hall University hired plaintiffs Paula Alexander, Joan Coll, and Cheryl Thompson-Sard in 1976, 1981, and 1987, respectively.
4. 550 U.S. 618 (2007). In *Ledbetter*, the Supreme Court held that discrete discriminatory acts triggering the time limit for filing an Equal Employment Opportunity Commission (EEOC) charge could only be discriminatory pay decisions, not later nondiscriminatory pay decisions that allegedly perpetuated effects of earlier decisions, nor issuance of paychecks without a showing of facial, structural discrimination.
5. Adopting the reasoning in *Ledbet-*

ter, supra, the trial court dismissed the plaintiffs' allegations "that related to wage decisions made prior to July 27, 2005, or the impact of those decisions upon plaintiffs' salaries following July 27, 2005," effectively limiting the plaintiffs' surviving claims to any fresh discriminatory pay actions that occurred during the two years prior to the filing of the complaint. In moving to amend the order into a final order dismissing the entire complaint, the plaintiffs represented that because they claimed a "continuing pattern" of discriminatory compensation, all of their claims were impacted by original paysetting decisions made outside the statute of limitations period. In their motion, the plaintiffs certified, "[w]hile the wording of the Court's Order of May 2, 2008 appears to dismiss only parts of the Complaint, it effectively dismisses the entire Complaint since nothing remains to be pursued. No discrete acts of discrimination are alleged during the statute of limitations period." The earlier order was amended per the plaintiffs' request, and a final order was entered dismissing the plaintiffs' complaint.

6. *Alexander v. Seton Hall Univ.*, 410 N.J. Super. 574, 586-87 (App. Div. 2009).
7. 201 N.J. 498 (2010).
8. Justice Rivera-Soto concurred in part and dissented in part. In dis-

sent, Justice Rivera-Soto emphasized that the plaintiffs' sole and intentionally exclusive grounds for appeal was an extension of the continuing violations doctrine, which was properly rejected by the majority. Poignantly, Justice Rivera-Soto commented that "despite repeated attempts by this Court during argument to inject some moderation into plaintiffs' 'all-or-nothing' gamble, plaintiffs steadfastly have rejected the remedy the majority today gratuitously awards: the recovery of provable discriminatory pay differential arising during the limitations period immediately preceding the filing of the complaint." 2010 WL at *10.

9. 42 U.S.C.A. § 2000e-5(e)(3)(A).
10. *See Decker v. Bd. of Educ. of Elizabeth*, 153 N.J. Super. 470, 474 (App. Div. 1977), *cert. denied*, 75 N.J. 612 (1978) (treating each pay period as a continuing violation under the LAD); *see also Terry v. Mercer County Bd. of Chosen Freeholders*, 173 N.J. Super. 249, 253 (App. Div. 1980), *mod. on other grounds*, 86 N.J. 141 (1981) (payment of unequal wages is a continuing violation under the LAD).

Kelly D. Gunther is an associate and **Jay S. Becker** is a shareholder and chair of the labor and employment law practice group of Giordano, Halleran & Ciesla, P.C., which specializes in the representation of management.