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The Retroactivity of the Lilly Ledbetter Fair Pay Act of 2009

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Suppose that, back in the Seventies, a manager, Sexist Supervisor Sam Smith, systematically discriminated against female employees with respect to their pay.

"John Jones has a family to support," Smith reasoned back in the dark ages; "Jane Johnson could stay home and let her husband support her if she chose. She only works because she wants to."

Now, Smith is long gone from the company (dead, in fact), and more enlightened supervisors have taken his place. However, their enlightenment only extended to giving equal pay raises to men and women alike. The years of pay discrimination under Smith, however, resulted in a discrepancy being built into the pay all these years. After all, if John earned more than Jane to start with, giving both a five (5) percent raise will only increase the pay disparity in actual dollar terms.

So, when Jane finally discovers she is underpaid, can she sue

under Title VII of the Civil Rights Act of 1964? The U.S. Supreme Court recently held that she could not, because the actual discrete act of discrimination occurred long ago, and so the action is barred by the 180-day statute of limitations. *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). However, Congress responded to that opinion by amending Title VII so that she could sue, and the bill has now been signed by President Obama.

In drafting the law, Congress rejected an amendment that would have made the change prospective only. Thus, it tries to revive actions based on ancient discrimination such as supervisor Smith's, even though he is not even alive to defend his actions any more. The theory is that each new paycheck that Jane receives is itself a separate discrete act of discrimination, because it carries forward discriminatory disparities from prior years.

That is the new law, which raises the questions, "Can Congress do that?"

The answer is a definite maybe.

The problem is that, to answer this question, you have to look at U.S. Supreme Court precedents that are even older than the discrimination of supervisor Smith. You have to start way back in 1885, when the Court decided *Campbell v. Holt*, 115 U.S. 620 (1885). In *Campbell*, the court held that it did not violate the Due Process Clause for a legislature to revive an expired action to collect personal debts. However, the Court said that the Constitution would bar an action to recover real and personal property that the legislature revived after the statute of limitations expired.

Another important Supreme Court precedent -- *William Danzer Co. v. Gulf Co.*, 268 U.S. 633 (1925) -- dates to 1925. In *Danzer*, the Court held, "On the expiration of the two-year [statute of limitations], it was as if liability had never existed." What makes *Danzer* so significant to the newly passed Ledbetter law is that it involved a federal statute. Thus, it is most similar to Ledbetter, which also involves an action that Congress created, as opposed to an action which exists under the common law.

The last U.S. Supreme Court opinion to address the issue was decided in 1945, when the Court held the revival of an expired lawsuit based on state securities laws does not violate the U.S. Constitution. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). The court in *Chase Securities* was rather critical of the whole notion that it even implicates the Constitution for a legislature to revive an action after the applicable statute of limitations has previously killed it. The court wrote, "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual." *Chase*, 325 U.S. at 314.

Nevertheless, the *Chase Securities* Court did not overturn *Danzer*. Instead, it reaffirmed its core holding regarding federal statutes that create a right of action and include a statute of limitation: "In the *Danzer* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive

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extension of the period after its expiration amounted to a taking of property without due process of law." *Chase*, at 312, fn. 8.

So, is *Danzer* is still good law, or is the whole notion of statutes of limitation creating property rights as old-fashioned as the views of Supervisor Smith?

No one knows for sure, but Congress clearly knows it is skating on thin constitutional ice in trying to revive these expired actions. The "effective date" of the law is May 28, 2007. The Supreme Court issued the Ledbetter decision on May 29, 2007.

Congress obviously knows that *Danzer* may not permit revival of expired discrimination claims, and hopes that it, if *Danzer* is still good law, it can get around it by inventing this fictional effective date.

Be sure to visit our website, gshllp.com, on Friday, February 6, 2009 for new information regarding the Milwaukee Paid Sick Leave Ordinance.

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