



## ALFA International 2009 LABOR & EMPLOYMENT SUMMER UPDATE

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### DOES SUPREME COURT HOSE DOWN STANDARD FOR DISCRIMINATORY INTENT IN FIREFIGHTER SUIT?

**Katie Anderson, Esq.**

STRASBURGER & PRICE, LLP

901 Main Street, Suite 4400 | Dallas, Texas 75202

(214) 651-4300

[www.strasburger.com](http://www.strasburger.com)

Today, the United States Supreme Court ruled 5-4 in favor of a group of white firefighters in one of the year's most anticipated racial discrimination cases. The group of firefighters challenged the City of New Haven, Connecticut's decision in 2003 to throw out the results of an exam taken for consideration of promotion to the positions of lieutenant or captain.

The test was written on a tenth grade level, was 60% written and 40% oral, with each panel assessing the oral score made up of one white, one Hispanic, and one African-American judge. The results of the test were not certified by the city because white candidates outperformed minority candidates. No African-Americans and only two Hispanic firefighters were likely to be made lieutenants or captains based on the results.

#### ***Clashing Anti-Discrimination provisions "Spark" a Dispute***

The city engaged in a detailed, heated debate about the test scores, what they meant, and what potential liability existed. The differing sides of the dispute spoke at hearings with evidence

that highlighted the clash between anti-discriminatory provisions under Title VII. Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin. The white firefighters brought this suit alleging that discarding the test results caused disparate treatment based on race.

However, Title VII also prohibits policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities. The minority firefighters alleged that a disparate impact would result if the city relied on the test scores, giving them a basis to sue. The political debate resulted in the city refusing to certify and use the test scores.

#### ***District Court and Appellate Court try to Clear the Smoke***

The federal district court upheld the city's decision and granted it summary judgment, finding that the defendants' "motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, [did] not, as a matter of law, constitute discriminatory intent."

Sonia Sotomayor, President Obama's nominee to replace David Souter, was part of a three-judge panel on the Second Court of Appeals that upheld the ruling. In June 2008, Judge Sotomayor was also part of a 7-6 majority that denied a rehearing of the case by the full court. Given the time, the two-page ruling and analysis will likely be thoroughly questioned during Judge Sotomayor's confirmation hearings, set to begin July 13, 2009.

### **Supreme Court "Blazes" a Trail to disallow intentional consideration of race**

Before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer has to have a strong evidentiary basis to believe it would be subject to disparate-impact liability if it failed to take the race-conscious, discriminatory action.

The Court stated that "race-based action like the city's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable" under the law dealing with "disparate impact."

"Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." The Court found that "the process was open [and] fair" and that the city officials "were careful to ensure broad racial participation in the design of the test itself and its administration."

The majority concluded that "[o]ur holding today clarifies how Title VII applies to resolve competing

expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the city faces a disparate-impact suit, then in light of our holding today it should be clear that the city would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."

### **What happens after the smoke clears?**

While at first glance this opinion appears to have far-reaching implications for all civil servant jobs, a careful analysis reveals that the facts are unique and may not be frequently replicated. The record shows the detailed steps taken by an independent company to develop and administer the test, with a painstaking analysis to ensure the 100 multiple-choice written questions were relevant to the positions of lieutenant and captain and were taken directly and only from approved material. The testing company took steps to "oversample" minority firefighters to ensure the test was not unintentionally favorable to white candidates. Essentially, the evidence showed that the test was helpful to determine who was best qualified for the job duties and that it was as race neutral as possible for a written test.

In the dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, stated that, while "the white firefighters attract this Court's sympathy ... they had no vested right to promotion." She urged that discrimination did not occur because no one was promoted on the basis of the test and that a new procedure would be utilized in the future.

The city was required by its charter to use competitive examinations to fill

vacancies that "shall be practical in nature, shall relate to matters which fairly measure the relative fitness and capacity of the applicants to discharge the duties of the position which they seek, and shall take into account charter, training, experience, physical and mental fitness." Justice Ginsburg stated that the city did not consider what sort of practical examination would fairly measure the relative fitness and capacity of the applicants to discharge the duties of a fire officer. Thus, in her analysis, the city was not bound by the test results.

Nevertheless, the bottom line, at least for now, is that fear of being sued for disparate impact is not sufficient to justify an ultimate employment decision intentionally based on race. Instead, an employer would have to have a reasonable belief that it would be found liable for disparate impact. Specifically, an employer would have to have a reasonable belief that its written test was not race-neutral or that it was not tied to a business necessity, before it could ignore results because of a disparate impact on minority employees. So, we are reminded that where there is smoke, there is not necessarily always fire.

## THE EMPLOYEE FREE CHOICE ACT: A BRAVE NEW WORKPLACE

Ronald G. Polly, Jr. – E. Tyron Brown – Jonathan M. Hill

HAWKINS & PARNELL, LLP

4000 SunTrust Plaza | 303 Peachtree Street, NE | Atlanta, Georgia 30308

(404) 614-7400

[www.hawkinsparnell.com](http://www.hawkinsparnell.com)

On March 1, 2007, the House of Representatives passed the Employee Free Choice Act (“EFCA”) by a wide margin, although several months later the bill died in the Senate after a Republican-announced filibuster. Since then, the political climate in Washington has changed, catalyzed by the election of President Barack Obama.

In his first newspaper interview since the election, President Obama said this about EFCA:

When it comes to unions, I have consistently said that I want to strengthen the union movement in this country and put an end to the kinds of barriers and roadblocks that are in the way of workers legitimately coming together in order to form a union and bargain collectively.

EFCA’s passage would certainly do that and more. EFCA would radically alter more than 75 years of labor law that started in 1935 with the pro-labor Wagner Act, which was amended by the pro-business Taft-Hartley Act of 1947.

Symbolically, EFCA’s passage would mark a major victory for the union, a strong gust in union sails after three decades of declining membership rolls. EFCA played centrally into President Obama’s campaign to court working, middle class voters, and many expect him to introduce EFCA legislation

within the first one-hundred days of his presidency.

Not surprisingly, employers have raised the loudest voices in opposition to EFCA’s passage. Despite the legislation’s strong backing by a Democrat-heavy Congress, EFCA’s passage is by no means guaranteed. If the legislation is introduced in early 2009, it will be at a time when many businesses are struggling to stay afloat as the economy weathers storms from the mortgage crisis, heavy individual and corporate debt, instability in the banking sector, tight credit markets, and increasing unemployment. Straining under the realities of these daunting market forces, employers argue that EFCA’s sweeping labor reforms would come at the worst possible time, and could prove to be the proverbial “last straw” that causes many businesses to move their operations overseas or close their doors.

### *What Changes Will EFCA Bring?*

EFCA would streamline the unionization process, force employers to submit to the binding decisions of a federal arbitration board, and impose stricter penalties on employers who violate the Act.

Under current labor laws, a union can represent a company’s employees if the company either voluntarily recognizes the union or if the union wins a secret

ballot election by a majority vote of eligible employees, called the “collective bargaining unit.” After a union is formed, the union and the employer negotiate the terms and conditions of employees’ employment and memorialize the subsequent agreement in a collective bargaining contract.

Although EFCA would change current labor laws in a variety of ways, three changes in particular are worth noting because they constitute major departures from present practice and would radically alter the workplace landscape. The three major changes are:

- (1) A “card check” process that will replace the secret ballot election;
- (2) Compulsory first contract interest arbitration, binding on the employer for two years; and
- (3) Substantially increased penalties and remedial relief for employer violations.

### *Burying The Secret Ballot Election*

Presently, an election on whether or not a company should unionize is held by secret ballot. Whatever one’s leaning – whether pro-union or anti-union – employees could always take solace in the fact that they could cast their vote anonymously and privately in a secret ballot election, a hallmark of

the democratic process and a voting mechanism thought to represent the electorate's "truest" choice.

EFCA would replace secret ballot elections with "card checks," and employees would no longer be able to cast their vote by secret ballot. Instead, card checks would enable unions to organize simply by getting a majority of employees within the collective bargaining unit to sign authorization cards. While authorization cards exist under the present rules, garnering the requisite majority of authorization card signatures simply opens the door to holding a secret ballot election. In the run-up to a union election, an employer can counter the union message by organizing a competing campaign of its own. Under EFCA, this would no longer be the case. All the union would need to do to organize is collect signatures on authorization cards from more than 50% of the collective bargaining unit.

Since unions can collect signatures on authorization cards without the employer's knowledge or consent, the employer's ability under EFCA to respond to a union organizing within its company would be significantly impaired. Critics argue that under EFCA, employees would make the decision about whether to unionize with less information, not more. Some employers have expressed concern about the union's use of intimidating tactics, unchecked coercion, and the spread of misinformation in the gathering of signatures for authorization cards. Those employers are concerned that such union tactics would increase under EFCA and give union organizers an unfair advantage over employers.

### ***Binding Interest Arbitration***

Under EFCA, after unionization, the union and the employer have 90 days

from commencement of negotiations to come to an agreement on the terms and conditions of employment. If the parties are unable to reach agreement within the 90 days, they must submit to mediation overseen by the Federal Mediation and Conciliation Service ("FMCS"). If, after 30 days, the parties are still unable to reach an agreement, then FMCS "shall refer the dispute to an arbitration board." A federal arbitration board will then decide the parties' collective bargaining contract, and the decision will remain binding on the parties for a period of two years.

### ***Increased Penalties for Employers***

EFCA includes stiff penalties for employers who fail to comply with the new labor rules, or engage in unfair labor practices. Many of these new penalties are punitive, and not merely compensatory, in nature, and range as high as \$20,000 per violation.

### ***A Dickey Political Issue***

EFCA has stirred up a firestorm in Washington as Democrats and Republicans are lobbying hard to either bolster support in favor of the new labor legislation, or foment dissent in the ranks to see EFCA defeated. Both sides are trying mightily to prevent defections. Staunch supporters of EFCA call it the "greatest piece of anti-poverty legislation since the Great Society." Critics say that EFCA's passage will deepen the global recession by driving up the cost of doing business. In addition, requiring that employers submit to the binding decision of a federal arbitrator will encourage the union to replace "good faith negotiation" with "leveraged and interest-based bargaining." Because authorization card signing makes it significantly easier to unionize, employers argue that the checks-and-balances system would be

dismantled since they cannot effectively mount a competing union campaign.

### ***Just The Tip Of The Iceberg***

While EFCA dominates labor law headlines, its passage could be a precursor to other labor legislation battles in Congress. Moreover, EFCA's passage could pave the way for passage of other labor laws such as the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (commonly referred to as the "RESPECT Act") (H.R. 1644/S. 969); the Patriot Employer's Act (S. 1945); the Contractors and Federal Spending Accountability Act (H.R. 3033); the Honest Lending and Accountability in Contracting Act (S. 606); the Working Families Flexibility Act (H.R. 4301/S. 2419); the Right to Work Repeal (H.R. 6477); the National Right to Work Bill (H.R. 697/S. 1301); the Protecting Employees and Retirees in Business Bankruptcies Act of 2007 (H.R. 3652); the Independent Contractor Proper Classification Act (S. 2044); and the Public Safety Employer-Employee Cooperation Act (H.R. 980/S. 2123).

### ***Conclusion***

Labor law stands poised today to undergo its most dramatic change in over 75 years with EFCA's passage. While this polemical issue continues to divide Democrats and Republicans largely down party lines, both sides agree on one thing: it comes at a particularly difficult time in U.S. financial history when the wheels of industry risk slowing to a crawl. How EFCA will either alleviate or exacerbate these social and economic ills is a hotly debated issue.

## ON SECOND THOUGHT: WASHINGTON PASSES THE LILLY LEDBETTER FAIR PAY ACT

David James, Esq.

HALLELAND LEWIS NILAN & JOHNSON P.A.

600 U.S. Bank Plaza South | 220 South Sixth Street | Minneapolis, Minnesota 55402

(612) 338-1838

[www.halleland.com](http://www.halleland.com)

In April 2008, the Lilly Ledbetter Fair Pay Act died in the U.S. Senate. Inspired by a new, post-election Washington, the bill was re-introduced earlier this month. This time, the Act passed the House and Senate and became law upon President Obama's signature on January 29, 2009. As the first bill President Obama has signed into law, the Act represents the impact of a unified President and Congress on federal employment law.

The Lilly Ledbetter Fair Pay Act was drafted in response to a 2007 Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Ms. Ledbetter alleged Goodyear paid her less than her male peers as a result of numerous discriminatory pay decisions over the course of her twenty years of service. The Supreme Court held that each pay decision triggered the statute of limitations for her wage discrimination claim. Because most of the pay decisions occurred beyond the statute of limitations, Ms. Ledbetter was precluded from asserting them. Justice

Ginsburg, in a dissent foreshadowing Ms. Ledbetter's namesake legislation, argued that wage discrimination, like harassment, should be evaluated on a cumulative basis. Judged in this light, each paycheck resulting from a discriminatory pay decision triggers a new statute of limitations, regardless of when the discriminatory pay decision was made. Because, in theory, Ms. Ledbetter's final paycheck was a consequence of the initial discriminatory pay decision decades earlier, her claim would still be ripe under this analysis.

Adopting Justice Ginsburg's argument, the Lilly Ledbetter Fair Pay Act expressly overturns the *Ledbetter* decision. Under the new law, a separate, discriminatory event occurs "each time wages, benefits, or other compensation is paid." Aggrieved employees are entitled to back pay for up to two years before filing a charge of discrimination.

Perhaps more importantly, the Act expands the scope of equal pay

law beyond sex discrimination. The Equal Pay Act, which Ms. Ledbetter mistakenly failed to pursue, prohibits wage discrimination on the basis of sex only. The Lilly Ledbetter Fair Pay Act amends all major federal civil rights laws, effectively granting Equal Pay Act rights to the other federally protected classes, such as race, age and disability.

Employers can expect to see an increase in wage discrimination claims, likely brought in conjunction with other claims. The proof or defense of these claims may be quite difficult if the pay decision at issue occurred years, or as in Ms. Ledbetter's case, decades ago; managers may have moved on and documents may have been routinely discarded. If the Lilly Ledbetter Fair Pay Act is a sign of legislation to come, the new Washington coalition may have a sweeping impact on employment law and litigation in the coming years.

## MARK YOUR CALENDAR FOR ALFA INTERNATIONAL'S UPCOMING TELE-SEMINAR!

### *The First Hundred Days: How Newly Enacted and Proposed Legislation Impacts Employers*

PRESENTED BY ALFA INTERNATIONAL'S LABOR & EMPLOYMENT PRACTICE GROUP  
Wednesday, July 22, 2009 | 12:00 noon to 1:30 p.m. CDT

This tele-seminar will address how the recent change in presidential administrations has produced a wave of legislation having a tremendous potential effect on employers. The panel will discuss the laws which have been passed and which are being considered as well as the practical impact on employers. Highlights of the discussion will be the Lilly-Ledbetter Fair Pay Act, Employee Free Choice Act, Amendments to the Americans with Disabilities Act (ADAAA), and Family Medical Leave Act (FMLA), the COBRA subsidy in the American Recovery and Reinvestment Act of 2009, as well as others.

This program is expected to qualify for 1 hour of CLE credit  
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### **ALFA International**

980 N. Michigan Avenue, Suite 1180

Chicago, Illinois 60611

T 312-642-ALFA (2532) | F 312-642-5346

[www.alfainternational.com](http://www.alfainternational.com)