



MEMORANDUM

TO: Members of the Assembly Labor Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: Assembly Bill 2349
DATE: May 12, 2014

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose A-2349.**

Clarity and predictability are important elements in a well-functioning civil justice system.

Unfortunately, A-2349, the Unfair Wage Recovery Act, addresses a point where the case law is already clear, and instead introduces considerable uncertainty.

Existing New Jersey case law and federal statutory law provide that where an employee's compensation has been tainted by an earlier act of discrimination, a separate violation occurs with each pay period. The applicable two year statute of limitations is effectively restarted as each pay check is treated as a separate, new, discriminatory act.

Whether the act of discrimination itself triggers the statute of limitations, or whether the effects of the discrimination constitute successive new violations, has been an especially controversial question at the federal level, as the courts interpreted the analogous provision in Title VII. The Supreme Court's majority opinion determined that as a matter of statutory interpretation, the statute of limitations applied to the initial act of discrimination. So that if that act of discrimination took place prior to the two year statute of limitations, the claim was barred.

Congress disagreed with the Court's decision and subsequently amended Title VII, with the Lilly Ledbetter Fair Pay Act (FPA), clarifying that an unlawful act occurs "each time wages, benefits, or other compensation [are] paid."¹ Critically, however, Congress also took care to specify that the effect of the two year statute of limitations remains. The FPA provides for "recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred. . ."²

¹ 42 U.S.C.A. § 2000e-5(e)(3)(A).

² 42 U.S.C.A. § 2000e-5(e)(3)(B).

New Jersey case law has struck the same balance, permitting recovery for discriminatory wages, while preserving the effect of the two year statute of limitations. The New Jersey Supreme Court most recently considered the question in *Alexander v. Seton Hall University* in 2010. Specifically declining to follow the U.S. Supreme Court, the Court instead reaffirmed the New Jersey approach, and confirmed that each pay check based on a discriminatory basis constitutes a separate violation.

But the Court drew the line at effectively eliminating the two year statute of limitations altogether. The plaintiffs in *Seton Hall* had actually argued for even more. They had claimed that not only was each pay check a separate act of discrimination with its own two year statute of limitations, it was also part of an ongoing “continuing violation” – such that the recovery period for back pay could stretch back for decades to the initial discriminatory act.

The New Jersey Court rejected that approach, declining to effectively waive the two year statute of limitations. The Court also pointed out that the approach would go beyond even the minority dissent in *Ledbetter*, noting that even Justice Ruth Bader Ginsburg, writing in dissent, had argued that “prior [pay-setting] decisions, outside the 180-day charge-filing period, are not themselves actionable.”

As a result, where an unlawful discriminatory pay decision has been made, and where the effects of that decision continue to cause injury, a plaintiff already has the ability to seek redress and recover back pay for up to the full two years of the applicable statute of limitations.

The Unfair Wage Recovery Act would enter this area of relatively settled law and create new questions. It provides that an unlawful employment practice occurs with each affected paycheck, a point that is already well-established. The bill then invokes the “continuing violation” model, which was proposed and rejected in *Seton Hall*, and confirms the court’s authority to apply the “continuing violation” doctrine to “any appropriate claim as that doctrine currently exists in New Jersey common law.” While not directing the court to apply the doctrine, the bill lacks the clarifying language found in the federal Lilly Ledbetter law which limits the duration of available back pay.

The result is new confusion on a point where the law had been both stable and predictable. We would urge the legislature to amend the bill to mirror both the federal law, existing New Jersey case law, and the policy advocated in Justice Ginsberg’s *Ledbetter* dissent.

As Gov. Christie noted in his Conditional Veto message the last time such a bill crossed his desk, there should be some “limitation on the amount of back pay an employee can recover.” We urge the committee to amend this bill so that New Jersey law remains consistent with federal statutory and state case law.

The New Jersey Civil Justice Institute respectfully requests that the committee hold the bill.