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The U.S. Supreme Court, in *Lewis v. City of Chicago*, unanimously held that plaintiffs in a Title VII disparate impact discrimination class action have a cognizable claim when one plaintiff files a charge of discrimination within 300 days of their employer using an allegedly discriminatory employment practice in a hiring decision, regardless of how long in the past the employer implemented the practice.

## Supreme Court Gives Plaintiffs Multiple Opportunities (Potentially) to File Timely EEOC Charges Alleging Disparate Impact Discrimination

By Dionysia Johnson-Massie

In *Lewis v. City of Chicago*, the U.S. Supreme Court unanimously held that plaintiffs alleged a cognizable claim of disparate impact discrimination under Title VII when one filed a charge of discrimination within 300 days<sup>1</sup> of their employer, the City of Chicago (“City”), using an alleged discriminatory employment practice in a hiring decision. In this case, the City adopted an alleged discriminatory employment practice by allowing only firefighter candidates ranked as “well qualified” (those scoring 89 or higher) – rather than “qualified” (those scoring between 65 and 88) – to be selected for hire. The plaintiffs in *Lewis* alleged this employment practice in subsequent selection rounds disparately impacted approximately 6,000 “qualified” African American applicants.

While the *adoption* of this employment practice (*i.e.*, making the decision to use a cut-off score of 89 or higher) occurred *outside* the 300 day charge filing period, the *application* of this employment practice (*i.e.*, the actual selection of only candidates scoring 89 or higher during a subsequent selection round) occurred within 300 days of when one plaintiff filed his EEOC discrimination charge. In reaching its decision, the U.S. Supreme Court distinguished prior precedent and the burdens of proof for disparate treatment and disparate impact claims. Namely, plaintiffs asserting either type of claim are required to show a “present violation” within the limitations period. For plaintiffs asserting a disparate treatment claim (and others for which discriminatory intent is required), they must “demonstrate deliberate discrimination within the [180 or 300 days’] limitations period.” For disparate impact claims, where discriminatory intent is not a required element for proving a claim, such a showing is not required.

In its decision, the Court specifically indicated that the only question presented for resolution was whether the plaintiffs’ disparate impact claim was cognizable. The Court, therefore, did not analyze whether plaintiffs’ proffered evidence sufficient to show disparate impact or whether the City produced sufficient evidence to successfully defend against such a claim.

## Background

In July 1995, 26,000 applicants took the Chicago Fire Department's written service exam. After scoring the exam, the City of Chicago divided the candidates into three categories: (a) well-qualified – those scoring 89 or above (out of 100); (b) qualified – applicants scoring between 65 and 88; and (c) not qualified – those scoring below 65. 6,000 African American applicants scored in the qualified category.

In January 1996, the City announced it would begin drawing randomly from the well-qualified candidate pool, *only*, for its first phase of selecting candidate firefighters. The second phase required candidates to take physical-abilities tests and to clear background checks, medical examinations and drug tests. Once passed, these candidates would be hired as candidate firefighters.

The City also notified "qualified" candidates that, while they passed the exam, it was unlikely they would be called for further processing in light of the City's anticipated hiring needs and the number of "well-qualified" candidates available for selection. However, their names would remain on the Department of Personnel's eligibility list for as long as the City used the list.

Beginning on May 16, 1996, the City selected its first class of applicants to advance to the second phase using this hiring practice. The City then selected the second class on October 1, 1996, and an additional nine selection rounds occurred over the next six years. During the first ten rounds, the City randomly selected only "well-qualified" candidates from its list. During the eleventh round, the City exhausted its available "well-qualified" candidates and also began selecting "qualified" candidates randomly from the list.

On March 31, 1997, one of the "qualified" African American candidates filed the first Equal Employment Opportunity Commission (EEOC) charge alleging the City discriminated against African American applicants by randomly selecting only "well-qualified" candidates from the list. The Charging Party filed the charge more than 300 days after the City announced it would select only the "well-qualified" candidates, but within 300 days of the second round selection decisions. On July 28, 1998, the EEOC issued its notice of right to sue.

The plaintiffs filed a lawsuit alleging that the City's employment practice of selecting for advancement only applicants scoring 89 or above constituted disparate impact against African Americans in violation of Title VII.<sup>2</sup> In its summary judgment motion, the City argued that the plaintiffs' claims were untimely because they failed to file a charge of discrimination within 300 days of the City's *initial* decision to select for advancement only "well qualified" candidates from the list. In denying the motion, the district court held that the City's "ongoing reliance" on the test results constituted a "continuing violation" of Title VII.

Notably, the City stipulated that the 89-point cut-off had a "severe disparate impact against African Americans," but that its cutoff score was justified by business necessity. After an 8-day bench trial, the district court rejected the business necessity defense and ordered the City to hire 132 randomly selected class members (reflecting the number of African Americans the court found would have been hired but for the City's practices) and to pay back pay in an amount to be divided among the remaining class members.

The Seventh Circuit Court of Appeals reversed, holding that the City's only discriminatory act was sorting the applicants into the three categories.<sup>3</sup> Consequently, "[t]he hiring only of applicants classified as 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination."<sup>4</sup> Because no plaintiff filed a charge of discrimination within 300 days of the City's initial decision to sort the candidates, the Seventh Circuit concluded the litigation was untimely. The plaintiff then appealed to the U.S. Supreme Court.

## Supreme Court's Analysis

The Supreme Court reversed, holding that the plaintiffs' allegations presented a cognizable claim of disparate impact discrimination under Title VII. In so holding, the Court addressed one threshold issue: whether each selection decision applying the cut-off score

(e.g., application of the initial decision) constitutes an unlawful employment practice. The Court explained that Title VII's prohibition against discrimination based on disparate impact (§2000e-2(k)) requires a plaintiff seeking to establish a *prima facie* case to show that the employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases. While Title VII does not define "employment practice," the Court concluded that the conduct the plaintiffs complained of (*i.e.*, excluding from advancement "qualified" applicants scoring below 89 until the "well-qualified" applicants on the list were exhausted) constitutes an employment practice.

Because the City "used" that employment practice each time it filled a new class of firefighters, the plaintiffs presented a cognizable claim. Consequently, since the City's use of its cutoff scores in selecting candidates occurred within the charge filing period, the plaintiffs' disparate impact claim was timely. The Supreme Court, however, specifically withheld any determination on whether the employment practice at issue actually caused a disparate impact.<sup>5</sup>

The Court also clarified its analysis of previous Supreme Court precedent by specifically rejecting the City's argument that "present effects of prior actions cannot lead to Title VII liability."<sup>6</sup> Rather, the Court asserted, its previous decisions stood for the proposition that a plaintiff "must show a 'present violation' within the limitations period" and that the nature of the asserted claim determines what is required. (citations omitted.) For example, disparate treatment – and other claims – requiring discriminatory intent require a plaintiff to demonstrate that deliberate discrimination occurred within the limitations period. However, for disparate impact and other claims where discriminatory intent is not required, "no such demonstration is needed."<sup>7</sup>

Based on this reasoning, an employer adopting an employment practice allegedly having a disparate impact on a protected group remains exposed to *disparate impact* claims whenever it *applies* that employment practice in each subsequent employment decision. Thus, while the adoption of the employment practice escapes liability if no charge was filed within 180 (300) days after implementation, the *application* of the employment practice continues to expose the employer for 180 (300) days after the occurrence of each employment decision applying the employment practice. The Court acknowledged that the effect of applying Title VII's text in this way necessarily results in "some claims that would be doomed under one theory [surviving] under the other..."<sup>8</sup>

## Effect of the Court's Decision

The Supreme Court's decision significantly impacts employers by extending the time period for plaintiffs to file charges of discrimination alleging disparate impact with the EEOC. Because of this, plaintiffs may be incentivized to file more disparate impact charges (and litigation) challenging the employment practices underlying management decisions.

In instances where a plaintiff establishes a *prima facie* case of disparate impact,<sup>9</sup> employers will have to rely even more heavily on record keeping, management and human resources' recollections of decisional processes and procedures and document retention policies in order to preserve job relatedness and business necessity defenses. The same will have to be relied upon to refute plaintiff's evidence, if any, that the employer could have used an available alternative process having less disparate impact while also meeting the employer's legitimate needs. Maintaining this information – potentially for decades and for larger numbers of employees (including comparators) – results in exorbitant document retention and defense costs.

### ***Employer Considerations***

There are several issues prudent employers should consider as a result of this decision:

1. Scrutinize EEOC charges carefully. Maintain timeliness objections to disparate treatment claims, where applicable, even if the disparate impact claims are now timely.
2. Require plaintiffs – early on and at both the EEOC and litigation stages – to identify the *specific* employment practice (*i.e.*, not just the "hiring process" in those instances where the component parts can be easily identified) leading to the alleged

discriminatory impact. Doing so could potentially limit the scope of document and/or discovery (including e-discovery) requests and curtail defense costs and expenses.

3. Review, in an attorney-client privileged manner (where possible), all employment practices, particularly selection procedures (i.e., hiring, compensation, promotions, terminations, job assignments, etc) – including subparts of those procedures (process for recruiting or selecting candidates for promotion or other opportunities, testing considerations and cut-off eligibility requirements, etc) – to determine whether these employment practices allegedly cause disparate impact. If so, make necessary modifications to limit or to eliminate the same.
4. Strengthen documentation of employment practices, including selection procedures and subparts of those procedures, to ensure that each subpart is job-related and consistent with business necessity. Even if a plaintiff establishes a prima facie case of disparate impact via a statistical showing, for example, an employer may ultimately succeed by showing the practices were job related and consistent with business necessity.
5. Ensure that the *application* of these employment practices, *in each selection instance*, also is clearly job related and consistent with business necessity.
6. Be careful when implementing new employment practices, particularly selection policies and procedures and/or when changing subparts of existing selection policies and procedures, to ensure these processes are job-related and consistent with business necessity. Once an employment practice is vetted by legal counsel and implemented, disallow departures unless decision-makers first consult with legal counsel.
7. Consider shortening the time period for *applying* certain selection criteria impacting “groups” of employees in order to minimize the length of the potential exposure period for disparate impact claims. If “eligibility lists” are used, for example, consider limiting their duration to time periods of fewer than 12 months or another, shortened time frame that makes sense within the context of your business.
8. Ensure that selection criteria distinguish between candidates who are qualified and not qualified, only. Once the group of qualified candidates is identified, then consider a process that allows all qualified candidates to be considered for an opportunity. If that is not administratively feasible, then ensure the remainder of the selection process minimizes (within legally compliant statistical ranges) or eliminates altogether any disparate impact on a particular, protected group.
9. Consider modifying document retention policies, where appropriate, to protect documents that could support the employer’s potential defenses for *each* employment practice that a plaintiff might challenge in a selection process. These documents often include relevant policies and procedures regarding selection criteria, score cards, interview notes, test results, resumes, communications between decision-makers, personnel files, collective bargaining agreements, job descriptions, job postings, emails, text messages, production and service reports, sales reports, performance evaluations, reports on projected business and hiring needs, customer or client feedback, etc.
10. Keep meticulous records of employment practices (procedures, criteria, etc) and decision-makers involved in selection decisions. Dates of the selection decisions, notifications to employees about the same and rationales for particular selections are even more critical now. The best defense often uses detailed, contemporaneously prepared documents as a cornerstone.

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<sup>1</sup> In this case, the parties stipulated that the 300-day deadline applied to the plaintiffs’ charges of discrimination pursuant to 29 C.F.R. §§1601.13(a)(4), (b)(1), 1601.80 (2009). Time periods for filing charges of discrimination also are outlined in 42 USC § 2000e-5(e)(1). Notably,

the Court refrained from deciding issues related to whether the earliest charge filed by one plaintiff controls the timeliness of the entire class's claims. "Because the District Court certified petitioners as a class, and because a court may award class-wide relief even to unnamed class members who have not filed EEOC charges . . . petitioners assert and the City does not dispute that the date of the earliest EEOC charge filed by a named plaintiff...controls the timeliness of the class's claims. We assume without deciding that this is correct." (slip op. n.4).

<sup>2</sup> Under Title VII, disparate impact claims are established when a plaintiff shows that an employer "uses a particular employment practice that causes disparate impact on the basis of race..." and the employer fails to show that the employment practice was job related and consistent with business necessity or the plaintiff demonstrates there was an available alternative practice that would have less disparate impact and still serve the employer's legitimate needs. 42 U.S.C. § 2000e-2(k)(1)(A),C; *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009).

<sup>3</sup> The plaintiffs, on the other hand, claimed "that the test had a disparate impact on the black applicants (that is, disproportionately classified them as 'qualified' rather than 'well qualified') and was not a valid test of aptitude for firefighting." *Lewis v. City of Chicago*, 528 F.3d 488, 490 (7th Cir. 2008).

<sup>4</sup> *Id.* at 491.

<sup>5</sup> "Petitioners alleged that this exclusion caused a disparate impact. Whether they adequately proved that is not before us. What matters is that their allegations, based on the City's actual implementation of its policy, stated a cognizable claim." (slip op., at 6).

<sup>6</sup> In clarifying its precedent [*United Air Lines, Inv. v. Evans*, 431 U.S. 553, 558 (1977), *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 907 (1989); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)]. (slip op. at 8)], the Court stated "[o]ur opinions, it is true, described the harms of which the unsuccessful plaintiffs in those cases complained as 'present effects' of past discrimination...[b]ut the reason they could not be the present effects of present discrimination was that the charged discrimination required proof of discriminatory intent, which had not even been alleged. That reasoning has no application when, as here, the charge is disparate impact, which does not require discriminatory intent." (slip op. at 9).

<sup>7</sup> Slip op. at 8.

<sup>8</sup> Slip op. at 9

<sup>9</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009) citing 29 C.F.R. § 1607.4(D)(2008) (selection rate that is less than 80 percent "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."