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Supreme Court: Employers May Face New Disparate Impact Liability for Old Actions

In a unanimous decision authored by Justice Scalia, the U.S. Supreme Court held on May 24 that a disparate impact discrimination charge may be considered timely if it is filed within the appropriate time after the date a discriminatory policy is *applied*, even if the charge would not be considered timely to challenge the adoption of the policy itself. *Lewis v. City of Chicago*, No. 08-974. This decision is significant for employers as it creates potential liability for “old” actions. Employers who have made employment decisions within the last 300 days, and going forward, based on criteria established even decades ago now face possible disparate impact claims if such criteria are applied in a way that has a disparate impact on a protected class of employees.

Lewis stems from a 1996 decision by the city of Chicago to hire firefighter candidates randomly from a list of “well-qualified” applicants, which it defined as those who scored at least 89 out of 100 points on a written examination taken in 1995. That hiring criteria was ultimately adopted for the city’s firefighter hiring decisions in 1996 and years thereafter. In 1997, 6,000 African American applicants who were not hired because their test scores only rendered them “qualified” filed a claim alleging that the city’s practice of hiring only “well-qualified” applicants created an unlawful disparate impact on African Americans.

The city argued in their summary judgment motion that the plaintiffs’ EEOC charges were not timely filed. The District Court ruled against the city, stating the claims were not time-barred since the city continued to rely on the test results within the filing period. After the plaintiffs prevailed on the merits of their claim at trial, the city appealed to the Seventh Circuit, arguing that the EEOC charges were not timely. The Seventh Circuit reversed the District Court, holding that the discrimination “was complete when the tests were scored and, especially in light of the mayor’s public comment about them, was discovered when the applicants learned the results.”

The Supreme Court reversed the Seventh Circuit, holding that “[a] plaintiff who does not file a timely charge challenging the *adoption* of a practice may assert a disparate-impact claim in a timely charge challenging the employer’s later *application* of that practice as long as he alleges each of the elements of a disparate-impact claim.” In reaching this decision, the Court first relied on the statutory language itself. In relevant part, section 2000(e)-2(k) of Title VII provides that a disparate impact claim may be proved by showing that the “respondent uses a particular *employment practice* that causes a disparate impact on the basis of race[.]” The Court noted that the city’s conduct of excluding applicants with passing scores was an “employment practice” and that each time the city filled positions based on those scores it “use[d]” that practice.



The Court also rejected the city’s argument that the only “use” of an employment practice was the city’s 1996 decision to adopt the hiring eligibility list. The city argued that because the later hiring selections were ultimately based on that same 1996 decision, no new violations occurred within the filing period. The Court stated, however, that while the 1996 decision could not be timely challenged, later hiring decisions to which that initial discriminatory decision was applied created their own violations. The Court distinguished its earlier decisions, including *Ledbetter v. Goodyear Tire and Rubber Co.*, which held that the present effects of past discrimination cannot lead to Title VII liability. The Court explained that while a plaintiff must show a present violation within the limitations period, what constitutes a “present violation” for a disparate *treatment* claim is not the same as for a disparate *impact* claim. In essence, the Court held, a disparate treatment claim cannot be based on the present effects of past discrimination because the requisite discriminatory intent is absent. Conversely, a disparate impact claim does not require such intent to be proven.

FOR MORE INFORMATION

If you have questions about how this decision may impact your company’s termination or hiring policies, contact any member of our **Labor & Employment** practice group.

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