

# Employment Bulletin - May 27, 2010

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## U.S. SUPREME COURT UNANIMOUSLY HOLDS DISPARATE IMPACT CLAIM IS TIMELY DESPITE NO CHALLENGE TO ADOPTION OF HIRING PRACTICE

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This week, the U.S. Supreme Court unanimously held that a class of plaintiffs could assert a disparate impact claim based upon a hiring process even though the plaintiffs did not challenge the adoption of that process within the 300-day statute of limitations period. The Court ruled that the limitations period began anew each time the results of that process were used to choose candidates for hire.

In *Lewis v. City of Chicago*, the City administered a written examination in July 1995 to thousands of applicants seeking a position on the Chicago Fire Department. As a result of the examination, applicants were graded as either “well-qualified,” “qualified” or “not qualified.” The City announced that it would randomly select applicants from the “well-qualified” pool to proceed to the next phase of the hiring process. Those in the “qualified” group were told that they would be kept on the eligibility list, but were not likely to be called for further processing. In May 1996, the City selected its first class of “well-qualified” applicants to advance to the next stage. It repeated this process nine more times over the next six years. During the final round, the “well-qualified” pool of candidates was exhausted, so the City selected “qualified” applicants to fill the remaining slots.

In March 1997, an African-American applicant who had scored in the “qualified” range filed a charge of discrimination with the Equal Employment Opportunity Commission, alleging that the City’s practice of selecting for advancement only those who scored in the “well-qualified” range had a disparate impact on African-Americans in violation of Title VII. He later brought a class action in federal district court on behalf of more than 6,000 African-Americans who scored in the “qualified” range but had not been hired. After a bench trial, the District Court ruled for the plaintiffs, rejecting the City’s business-necessity defense. The Court of Appeals for the Seventh Circuit reversed the decision and held that the suit was untimely because the first charge of discrimination was filed more than 300 days after the only discriminatory act -- the sorting of examination scores into categories. The Seventh Circuit reasoned that the actual selection of the candidates was not a new act of discrimination, but rather an automatic consequence of categorizing the test scores.

In a unanimous decision, the U.S. Supreme Court reversed the Seventh Circuit. It described the relevant question as whether the act of selecting candidates itself could be an independent basis for a disparate impact claim. Looking to the language of Title VII, the Court stated that a plaintiff establishes a prima facie disparate impact claim by showing that the employer “uses” a particular employment practice that causes a disparate impact on one of the prohibited bases. The Court found that this requirement was satisfied each time the City excluded from consideration those applicants in the “qualified”

category. Because each use of the categories, with the exception of the first round of selection in May 1996, occurred within the 300-day period for filing a charge of discrimination with the EEOC, the Court held that the plaintiffs' claim was viable.

The decision in *Lewis* comes almost a year after the U.S. Supreme Court's decision in *Ricci v. DeStefano*. In that case, the City of New Haven was sued by white firefighters who claimed they were discriminated against when the city failed to certify the results of an exam that officials believed could have a disparate impact on minorities. There, the Court also ruled in favor of the firefighters, holding that the city should not have discarded the test results. These two decisions place employers in a classic Catch-22 situation: discarding the results of a selection process that seemingly favors one group over another may result in a disparate treatment lawsuit, whereas the use of a potentially flawed process exposes employers to the risk of a potential disparate impact case. The bottom line is that employers should develop hiring processes that are open, fair and neutral and then accept the results of those processes.