



## Legal Alert: Supreme Court Finds Firefighters' Disparate Impact Claims Timely

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In a unanimous decision issued May 24, 2010, the U.S. Supreme Court held that plaintiffs complaining of disparate impact discrimination under Title VII filed a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) because the charge was filed within 300 days of the employer's *application* of the allegedly discriminatory employment practice; the charge did not have to be filed within 300 days of the employer's *adoption* of the practice. See *Lewis v. City of Chicago* (May 24, 2010). Based on this determination, the Court held that the plaintiffs in *Lewis* should be permitted to proceed with their disparate impact lawsuit; however, the Court did not rule on the merits of their claims.

In *Lewis*, the plaintiffs were a group of African American firefighters who were among 26,000 entry-level firefighters who took a written aptitude test to determine their eligibility for employment with the City of Chicago Fire Department. The plaintiffs' test scores placed them in the "qualified" category (that is, they scored between 65 and 88 out of 100); however, the City only hired applicants whose test scores placed them in the "well qualified" category (those who scored 89 or above). Several months after notifying the plaintiffs of their test results, the City began hiring applicants from the "well qualified" group.

The plaintiffs sued the City, claiming the aptitude test had an adverse impact on African American applicants. The City claimed the plaintiffs could not pursue this lawsuit because they did not file a timely discrimination charge with the EEOC. Before filing a lawsuit claiming discrimination under Title VII, a complaining party must file a charge of discrimination with the EEOC within 300 days "after the alleged unlawful employment practice occurred." The Supreme Court held that the question to be determined in *Lewis* was whether the employer's practice of picking only those applicants who scored 89 or above on the examination when it later chose applicants to advance could be the basis for a disparate impact claim at all. The Court determined that it could.

Under Title VII an unlawful employment practice based on disparate impact is established only if a complaining party demonstrates that the employer uses a particular employment practice that causes a disparate impact on the basis of race (or color, religion, sex or national origin) and the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Relying on its earlier decision in *Ricci v. DeStefano*, 557 U. S. \_\_\_\_, \_\_\_\_ (2009) (slip op., at 18), the Court held 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. (Emphasis in the Court's opinion). Although Title VII does not define an "employment practice," the Court held that this term encompasses the City's exclusion of applicants who scored below 89 on the examination when selecting individuals for advancement. Although the city adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list at the time it was adopted, "it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters."

The Court rejected the City's argument that the unlawful employment practice complained of in this case occurred when the City used the examination results to create the hiring eligibility list, limited hiring to the well qualified classification and notified the applicants. The City argued that because the exclusion of the plaintiffs when selecting classes of firefighters followed inevitably from its earlier decision to adopt the cutoff score, no new violations could have occurred. The Court rejected this argument, holding that if the plaintiffs could prove that the City used the practice that caused a disparate impact, they could prevail.

The Court rejected the City's argument that it should find the plaintiffs' claims untimely based on earlier Court decisions holding that the present effects of prior actions cannot lead to Title VII liability. The Court held that those cases establish only that a Title VII plaintiff must show a "present violation" within the limitations period. The Court held that what this requires depends on the type of claim asserted. For disparate treatment claims, and other types of claims that require a showing of discriminatory intent, this means the plaintiff "must demonstrate deliberate discrimination within the limitations period." (Citing, among other cases, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007)).

However, the Court held that for claims such as disparate impact claims, which do not require discriminatory intent, "no such demonstration is needed." The Court acknowledged that its earlier opinions described the harm of which the plaintiffs in those cases complained as the "present effects of past discrimination," but held that those plaintiffs could not complain of the "present effects of present discrimination" because they were required to prove 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." The Court further held that "if the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written."

### **Employers' Bottom Line:**

The Court's decision in this case could subject employers to liability for unintentional discrimination based on practices they have used for years. Thus, employers should examine their employment practices to ensure that they do not have an adverse impact on a protected category of workers or that if they do, such practices are job related to the position in question and consistent with business necessity.

If you have any questions regarding this decision or other labor or employment related decisions, please contact the Ford & Harrison attorney with whom you usually work.