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LEGAL ALERT



## Legal Alert: Supreme Court to Determine First Title VII Statute of Limitations Case in Post-"Ledbetter Fair Pay Act" Era

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Since its passage in January 2009, the Ledbetter Fair Pay Act ("the Act") has created as many questions as it has answered, including whether it applies to disparate impact cases (that is, cases involving claims that an employment practice or policy that appears neutral on its face actually affects a protected group more harshly than an unprotected group) and whether the courts will extend coverage beyond cases of pay discrimination. The U.S. Supreme Court has decided to hear a case that may give it the opportunity to answer these two questions.

The Supreme Court has agreed to review the Seventh Circuit's decision in *Lewis v. City of Chicago* (7th Cir. 2008), in which the Seventh Circuit held that a group of African American firefighter applicants could not proceed with their discrimination claims against the City of Chicago because the discrimination charge they filed with the Equal Employment Opportunity Commission (EEOC) was untimely.

In *Lewis*, the plaintiffs 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; however, the City only hired applicants whose test scores placed them in the "well qualified" category. 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 argued that the plaintiffs' lawsuit was untimely because they filed their EEOC charge more than 300 days after they learned of their test results. The plaintiffs claimed their charge was timely because it was filed within 300 days of the date the City hired the first applicant in the "well qualified" group.

Advancing a position similar to that of the plaintiff in *Ledbetter v. Goodyear Tire & Rubber Co.* (the U.S. Supreme Court decision that the Act overruled), the plaintiffs in *Lewis* argued that the charge filing period began to run not when the test results were communicated but when the city began using the test results to hire applicants. The Seventh Circuit rejected this argument, holding that the discrimination was complete when the tests were scored and the discrimination was discovered when the applicants learned the test

results.

The Seventh Circuit's opinion, decided before the passage of the Act in January 2009, follows very closely the Supreme Court's analysis in *Ledbetter*. However, since the Act overruled *Ledbetter*, it is not clear how the Supreme Court will evaluate the Seventh Circuit's decision in *Lewis*. Under the Act, at least for purposes of discrimination in compensation based on a theory of disparate treatment (that is, intentional discrimination), discrimination occurs (1) when the discriminatory practice is *adopted*, (2) when an employee becomes *subject to* the discriminatory practice, or (3) when the discriminatory practice *affects* the employee. Given the expansive language and intent of the Act, it is possible the Court will find that it applies to the plaintiffs' claims in *Lewis*. Regardless of whether the Supreme Court determines that the Act applies to disparate impact cases or cases unrelated to discrimination in compensation, the Court's decision in this case likely will have a significant effect on employers. The Court is expected to be hear oral arguments in *Lewis* in early 2010.

We will keep you updated on the status of this case. If you have any questions regarding this case or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work. Dylan King is the author of this Alert.