

Employment Alert

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Supreme Court Clarifies Limitations Period In Disparate Impact Cases

In a unanimous decision authored by Justice Scalia, the Supreme Court ruled that African American firefighter applicants who were denied jobs based on an allegedly discriminatory eligibility test score cutoff timely stated a disparate impact claim under Title VII of the 1964 Civil Rights Act even though the test was adopted as a key selection device more than 300 days before any plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010).

The eligibility test at issue in *Lewis* was adopted in 1995. In January 1996, the City of Chicago announced that only applicants with test scores of 89 or above (the "Well Qualified range") were likely to be hired. In May 1996, the City selected its first class of applicants by drawing randomly from the Well Qualified range of scores. The City repeated this process 10 more times between 1996 and 2002, each time hiring only persons who scored in the Well Qualified range.

In March 1997, several African American applicants who scored in the Qualified range on a 1996 exam filed an EEOC charge alleging that the test was discriminatory in that hiring firefighters from only the Well Qualified range had a disparate impact on African American applicants. At the time that they filed their charge, more than 300 days had passed since the City announced that it would only hire applicants with test scores in the Well Qualified range.

The U.S. Court of Appeals for the Seventh Circuit dismissed the suit, holding that the sole potentially discriminatory act was the City's January 1996 announcement of the cutoff scores. Since no plaintiff had filed an EEOC charge within 300 days of this act their claim was time barred under Title VII's statute of limitations provision. The Supreme Court disagreed and unanimously reversed, holding that under a disparate impact theory, each time the City used the Well Qualified cutoff score as a selection device, it committed an alleged act of discrimination such that the limitations period began anew.

In reaching this conclusion, the Court ruled that the issue of **when** an act of discrimination occurs under Title VII might vary significantly depending on the type of claim asserted. For disparate treatment claims, which require proof of intentional discrimination, the Court reaffirmed its contention set forth in its 2007 *Ledbetter* decision that an act of discrimination occurs only at the time that an employer acts to discriminate intentionally against an employee and not when the employee suffers the effects of that act.

Relying on the premise that discriminatory intent is not required to prove disparate impact, the Court refused however to apply the same analysis to disparate impact claims. Rather, the Court ruled that the discriminatory act triggering the limitations period in a disparate impact claim occurs only at the time when employees are **disparately impacted**.

The new dichotomy established by the Court in *Lewis* is a significant development in Title VII law, and suggests that an employer's ability to assert a statute of limitations defense may turn on what type of Title VII claim is alleged. In response, employers should strongly consider assessing, for disparate impact, any selection device they use that automatically disqualifies people based on hard and fast cutoffs for hiring, promotions or pay increases. No matter how long such a selection device has been in place and depending on a variety of circumstances, *Lewis* suggests that such a device may be the subject of a timely Title VII disparate impact claim so long as the device remains in use or has been used at some point within Title VII's 300-day limitation period.

For more information, please contact Paul Garry, Erika Dillon, or any other MBT labor and employment lawyer at (312) 474-7900.

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