

Supreme Court Issues Opinion on Limitations Periods in Disparate Impact Cases

In a unanimous opinion, the U.S. Supreme Court recently clarified the scope of Title VII's 300 day limitation provision in disparate impact cases. Specifically, in *Lewis v. City of Chicago*, 560 U.S. ____ (May 24, 2010), Chicago administered a written examination to applicants who wanted to become firefighters. Based on the test results, applicants were divided into three groups: (1) Well Qualified – Applicants who scored 89 or above (out of 100); (2) Qualified – Applicants who scored between 65 and 88; and (3) Failed – Applicants who scored below 65.

On January 26, 1996, the City announced that it would randomly draw names from the pool of Well Qualified applicants to determine who would advance to the next stage in the application process. Qualified applicants were told that their names would be maintained on an eligibility list, but they would not be considered unless and until all Well Qualified applicants had been drawn in the lottery for further processing. On May 16, 1996, October 1, 1996, and nine more times over six years, the City drew names exclusively from the pool of Well Qualified applicants to continue the application process.

On March 31, 1997, an African-American "Qualified" applicant filed a charge of discrimination alleging that the City's preference for Well Qualified applicants created an unlawful disparate impact against African-American applicants. The City responded that the charge of discrimination was untimely because the applicant had known of the Well Qualified / Qualified distinction since January 26, 1996 (428 days before filing the charge of discrimination), and under Title VII, a charge of discrimination must be filed within 300 days of the challenged act of discrimination. The City cited to disparate treatment cases under Title VII which had held the 300 day limitation period runs from the date a discriminatory action is known – not from the date the impact of a discriminatory action is felt.

The Supreme Court was not persuaded by the City's citations to disparate treatment case law. The Court noted that, in a Title VII disparate treatment case, the charging party must show an action motivated by discriminatory intent occurred within the 300 days of filing the charge. But, in a disparate impact case, the charging party never has to show discriminatory intent. Quoting Title VII, the Court noted that a disparate impact claim exists when the employer "uses a particular employment practice that causes a disparate impact" against a protected class. Focusing on the word "uses," the Court held that anytime an employer "uses" a rule that creates a disparate impact the 300 day period begins based on that particular "use."

Applying the rule to the present case, the Court essentially held that each of the eleven applicant lotteries constituted a separate "use" of the City's alleged unlawful employment practice (which was excluding Qualified applicants if any Well Qualified applicant remained). Only one of the eleven lotteries was found barred by limitations because it occurred more than 300 days before the charge was filed.

This case creates a potential problem for employers who might adopt an employment practice and use it for years and years before a charge of discrimination challenges the action as unlawful under a disparate impact theory. And by that time, the evidence explaining why the practice was adopted may have been lost. The Court acknowledged this concern, but basically said the Court applies the law as written and does not legislate.

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