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ALERT

U.S. Supreme Court Rules Unanimously That 'Disparate Impact' Claims of Employment Discrimination Are Revived Whenever an Employer Applies the Offending Policy

By Andrez Carberry and Richard Cohen

Employers are generally familiar with the employment discrimination laws that prohibit an employer from discriminating against an applicant or employee based upon his or her membership in a protected class. However, "disparate impact" discrimination is less known or understood. The typical case of "disparate impact" under Title VII involves a facially neutral pre-employment test or practice that negatively impacts a protected class.

If proven, a case of "disparate impact" can be dire for an employer, because it can result in the striking of test results or a court ordering that a certain number of applicants be hired or promoted with back pay. Therefore, employers have often defended such cases, when possible, by contending that plaintiffs failed to file such a claim with the Equal Employment Opportunity Commission (EEOC) within the required 300 days from the promulgation of the alleged discriminatory hiring practice.

On May 24, 2010, a unanimous Supreme Court raised the stakes for employers when it decided, in the case of *Lewis v. City of Chicago*, that a plaintiff asserting a "disparate impact" claim can challenge the employment policy or practice if the challenge is filed within 300 days of each application or use of the policy or practice. What this means is that the time for an employee or applicant to file a charge of discrimination renews each and every time the employer applies the alleged discriminatory policy.

The City of Chicago's Testing and Hiring Policy

In July 1995, the City of Chicago administered a written examination to more than 26,000 applicants seeking to serve in the Chicago Fire Department. The city ranked the applicants based on their scores achieved on the test: those who scored 89 or above (out of 100) were ranked as "well qualified;" those who scored between 65 and 88 were ranked as "qualified;" and those who ranked below 65 were ranked as "not qualified."

The applicants ranked as "qualified" were notified they had passed the examination but, based on the city's projected needs, it was not likely they would be selected. On January 26, 1996, the city announced it was adopting this hiring policy. On May 16, 1996, and again on October 1, 1996, the city selected candidates first from the "well-qualified" pool and then filled the remaining vacancies with candidates from the "qualified" pool.

Charge of Discrimination

It turned out that African-Americans were underrepresented in the "well-qualified" pool. On March 31, 1997, the first of six African-American applicants representing the class who ranked as "qualified" and had

not been selected filed a charge of discrimination with the EEOC. They alleged that the city's policy of first selecting for advancement those applicants who were ranked as "well qualified" created a "disparate impact" on African-Americans, in violation of Title VII.

In the subsequent court action, the city contended that the aggrieved applicants had to file their charge of discrimination with the EEOC within 300 days after the city's January 26, 1996, announcement that it was adopting the hiring policy described above. Since the applicants had failed to do so, the city contended the applicants' claims should be dismissed as untimely.

The applicants contended there was an "ongoing reliance" of the test results by the city each time it selected applicants from the list, with each selection constituting a "continuing violation" of Title VII, thereby reviving or renewing the 300 days filing period on each such occasion.

Without ruling on the sufficiency of the applicants' proof, the Supreme Court ruled that the applicants complied with Title VII's filing requirements because the earliest EEOC charge was filed within 300 days of the city's October 1, 1996, "use" of the test scores to select candidates from the eligible list.

The Supreme Court acknowledged that employers may now face "disparate impact" suits several years after a policy had been adopted, and that employers may no longer be able to support a "business necessity" defense because the policy makers may be unavailable or their memories impaired by the time a suit is brought. Nonetheless, the Supreme Court reasoned that Congress, not the federal courts, must address this situation.

What This Means for Employers

The Supreme Court's decision makes it much more difficult for employers to defeat "disparate impact" claims based on the timeliness of the filing of a charge of discrimination. In addition, although *Lewis* involved a public employer, its lessons are applicable to private employers as well. *Lewis* signals a clear warning to all employers that the use of standardized examinations, aptitude tests, written tests of verbal skills, English proficiency tests, etc., may unknowingly or inadvertently cause a "disparate impact" on a protected class of employees and subject an employer to liability, with claims of discrimination renewing every time the policy or practice is used. Accordingly, the use of a challenged test may have repercussions years after the test is administered.

Additionally, employers that have, continue to or contemplate using some form of standardized hiring practice or policy, especially tests, should immediately contact counsel and conduct a review of their practices to ensure they do not create or have not created a "disparate impact" on a protected class of individuals. This review should also ensure that the employer's practices are and remain clearly job-related and consistent with business necessity.

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