

[U.S. Supreme Court Issues Unanimous Opinion Allowing African-American Firefighters To Sue City Of Chicago Asserting Racial Discrimination Disparate Impact Claims](#)

May 26, 2010 by [Adam Santucci](#)

This post was contributed by [Bruce D. Bagley, Esq.](#), a Member in McNees Wallace & Nurick LLC's Labor and Employment Practice Group.

It's not often that all nine members of the U.S. Supreme Court agree on the disposition of an employment law matter, but that's what happened in [Lewis v. City of Chicago, issued on May 24, 2010 \(No. 08-974\) \(pdf\)](#).

The City of Chicago gave a written test in 1995 to 26,000 applicants for firefighter positions. In January 1996, the City notified the applicants of their test results, and depending on their scores, applicants were designated well-qualified (scoring 89 or above), qualified (scoring between 65 and 88), or not qualified (scoring below 65). They were further informed that only the well-qualified were likely to be hired but that the list of those who were merely qualified would be retained in case the well-qualified list was exhausted as positions were filled.

On March 31, 1997, Crawford Smith, a Black applicant who had scored in the qualified range and had not been hired, filed an EEOC Charge along with five other similarly situated applicants. They alleged that the City's practice of hiring only applicants who scored over 89 had a disparate impact on Black applicants. Under Title VII of the Civil Rights Act, an employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin is unlawful, unless the employer can demonstrate that the challenged practice is job-related for the position in question. 42 U.S.C. §2000e-2(k)(1)(A). Smith argued that since he was deemed qualified there was no job-related reason to limit hiring to those who scored over 89.

The EEOC issued a right-to-sue notice and the applicants filed suit in federal district court. The City filed a motion for summary judgment, contending that the applicants had waited too long to file with the EEOC. There is a 300 day limitations period under Title VII for filing with EEOC, and in this case the Charge was filed more than a year after the applicants had received their test results. But, the City hired applicants from the well-qualified pool during the 300 day period prior to the filing of the Charge, and continued to periodically hire from the pool as additional fire fighters were needed.

At the district court level, Crawford and the other applicants prevailed. The court denied the City's summary judgment motion, finding that the City's "ongoing reliance" on the 1995 test results constituted a continuing violation under Title VII. On appeal, the Court of Appeals for the Seventh Circuit reversed the district court, holding that "the hiring only of applicants classified

'well-qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." The Court of Appeals found that the applicants should have filed their Charge with EEOC within 300 days of receiving the test results.

The Supreme Court strongly disagreed with the Seventh Circuit Appeals Court. Even if a plaintiff does not file a timely charge challenging the adoption of a practice, the Court stated, the plaintiff may nevertheless assert a disparate impact claim in a timely charge challenging the employer's application of that practice. Writing for the unanimous Court, Justice Scalia was unmoved by arguments from the City and its *amici* (or "friends of the court") that employers could now face disparate impact suits for practices they have used regularly for years, noting "...it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted."

It is fair to say that few observers would have predicted such a unanimous holding in this matter by the Court. Could the Court have been influenced by Congress' enactment of the Lilly Ledbetter Fair Pay Act, reversing the Court's 2007 decision in [Ledbetter v. Goodyear Tire and Rubber \(pdf\)](#)? In *Ledbetter* the Court had held a gender-based discrimination claim was not timely filed where the employee claimed her wage disparity with male co-workers resulted from personnel decisions made years earlier.

In any event, employers must now devote even greater attention to determining whether seemingly benign practices such as relying on higher test scores may disproportionately impact members of a protected class. Years can go by but each time the employer applies that practice employees will have a fresh 300 day period in which discrimination allegations can be raised.

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