



Supreme Court Holds That Each Application of a Discriminatory Employment Practice Can Lead to a New Violation of Title VII Disparate Impact

If you are among the many people (and courts) who believe that present effects of prior discriminatory decisions cannot lead to Title VII liability – guess again! In *Lewis v. City of Chicago*, decided May 24, 2010, the US Supreme Court held that an employer's later application of a discriminatory practice can amount to a new violation of disparate impact under Title VII, regardless of when the practice was first adopted.

Factual Background

In 1995, the City of Chicago administered a written examination to applicants seeking firefighter positions. In January 1996, the City adopted a practice of selecting only applicants who scored 89 percent or higher on the examination to advance to the next stage of hiring. During May and October of 2006, the City selected its first two rounds of applicants under the new criteria. The City relied upon this same examination and criteria nine more times over the next six years.

Beginning in March 1997, several African-American applicants who scored less than 89 percent on the exam and were passed over during the hiring process filed discrimination charges with the EEOC. Eventually they sued the City as part of a certified class consisting of more than 6,000 African-American applicants, alleging the City's practice of selecting only applicants who scored 89 percent or higher on the exam had a

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disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964.

Legal Analysis

The question before the Supreme Court was whether a plaintiff who does not file a timely charge challenging the *adoption* of a discriminatory employment practice may assert a timely disparate-impact claim based upon the employer's later *application* of that practice. In answering the question unanimously, the Court responded with a resounding "YES."

Writing for the Court, Justice Scalia first pointed out that "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the prohibited bases." Thus, as Justice Scalia explained, the threshold issue is not whether the plaintiff files a charge within 300 days of the employer's *adoption* of a discriminatory employment practice, but whether the plaintiff files a charge within 300 days of the employer's *use* of the discriminatory practice.

Although the City conceded that its January 1996 adoption of the employment practice in question was unlawful, it claimed that its later implementation of the policy was an automatic consequence of its previous adoption and did not amount to separate acts of discrimination. In support of its argument, the City relied on previous Supreme Court decisions that purportedly stood "for the proposition that present effects of prior actions cannot lead to Title VII liability."

In rejecting the City's arguments, the Court responded: (1) "[u]nder the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact" and (2) "the City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact." The Court reasoned that, while it may be true the City's January 1996 decision to adopt the cutoff score gave rise to a freestanding disparate-impact claim, "it does not follow that no new violation occurred – and no new claims could arise – when the City implemented that decision down the road." Finally, the Court distinguished the cases relied upon by the City, clarifying that "those cases establish only that a Title VII plaintiff must show a 'present violation' within the limitations period." As the Court explained, this means something very different for disparate-impact claims as compared to

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initiative is focused on continuously improving our service delivery to maximize the value of our services to clients. Squire Sanders wholeheartedly endorses the Association of Corporate Counsel's Value Challenge® and encourages and manages development and implementation of processes and tools to continually improve staffing and pricing models, training and resource optimization, knowledge management and more.

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disparate-treatment claims. "For disparate-treatment claims – and others for which discriminatory intent is required – that means the plaintiff must demonstrate deliberate discrimination within the limitations period. But for claims that do not require discriminatory intent [such as disparate-impact claims], no such demonstration is needed."

Although the City adopted and announced its intention to implement the 89 percent or higher selection process more than 300 days prior to the filing of the first EEOC charge, it made use of the practice each time it filled a new class of firefighters. As a result, the Supreme Court concluded that the petitioners stated a cognizable claim of disparate impact under Title VII by filing charges with the EEOC within 300 days of each round of selections under the discriminatory practice.

Practical Implications

As the City of Chicago pointed out and the Supreme Court recognized, the implications of this decision may "result in a host of practical problems for employers and employees alike." These problems include: (1) the resurrection of new disparate-impact claims against employers for practices they have regularly used for years; (2) the strong possibility that evidence or reliable memories essential to employers' business-necessity defenses will be unavailable due to the filing of lawsuits alleging historic practices; and (3) affected employees and prospective employees may not know they have claims if they are unaware the employer is still applying the disputed practice.

Despite awareness of these potential issues, Justice Scalia made it very clear that "it is not [the Court's] task to assess the consequences of each approach and adopt the one that produces the least mischief." Instead, the Court's "charge is to give effect to the law Congress enacted[,] and if "that effect was unintended, it is a problem for Congress, not one that federal courts can fix."

Due to the far-reaching implications of this decision, employers should contact their legal counsel to evaluate whether current use of tools or evaluative criteria assisting in making employment decisions may lead to costly litigation and possible liability.

For further information regarding this decision, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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