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## Employment Law

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# Disparate Impact Discrimination Case Not Time-Barred, Justices Rule

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On May 24, the Supreme Court unanimously held that a claimant may bring an employment discrimination claim against the application of an employment practice even if the institution of that practice is beyond the statute of limitations. In *Lewis v. City of Chicago*, more than 6,000 African-American applicants to the Chicago Fire Department alleged that the city's use of a 1995 employment examination had a disparate impact on African-Americans.

In 1995, over 26,000 people applied to the Chicago Fire Department, according to the opinion. They each took a written examination as part of the application process. The city ranked the examination scores into groupings. Those who scored an 89 (out of 100) were told they were "well qualified," and those who fell below a certain score were told they failed the exam and would not be considered for a position. Those individuals whose scores fell between those two groups were informed that they were "qualified" and would remain on the eligibility list. The city announced that applicants would be chosen at random from the "well qualified" candidates, and then the city would select from the "qualified" candidates as needed. Applicants were selected for hiring from the list of eligible applicants 11 times since 1996, and only during the last round of hiring did the city make any selections from the "qualified" grouping. More than 6,000 African-Americans who were "qualified" alleged that the practice of only selecting applicants who scored above a certain score on the examination caused a disparate impact on them because of their race.

The Supreme Court did not address the substantive claims of discrimination. The issue before the court was whether the plaintiffs were time barred from asserting a claim at all. In an unusual strategic move, the city had stipulated that the use of the test had a "severe disparate impact against African-Americans," and then contended that even if it had acted unlawfully the plaintiffs did not file within the limitations period and therefore were barred from bringing a claim, according to the opinion. The plaintiffs countered that the discrimination was a continuing violation, with discriminatory acts occurring at each round of hiring, thus they were not time-barred.

For claims under Title VII, a claimant must file a claim of discrimination with an administrative agency. In this case, the plaintiffs filed with the Equal Employment Opportunity Commission, or EEOC, and had to file their claim within 300 days of the unlawful employment practice. The plaintiffs filed their claim in 1997, more than 300 days from both the date of the examination and the date when the scores were grouped into qualification categories, according to the opinion.

The district court denied the city's motion for summary judgment, deciding that the plaintiffs had not failed to file an EEOC claim within the statutory time period of 300 days. Because the city's "ongoing reliance" on the test results was a "continuing violation," the plaintiffs stated a valid claim, according to the opinion.

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The 7th U.S. Circuit Court of Appeals reversed, however, finding that the only "discriminatory act" was the initial sorting of the scores into the three qualification categories, the opinion said. Because the EEOC claim was not filed until more than 300 days from that date, the 7th Circuit held that the claim was untimely. In contrast to the district court's view, the 7th Circuit interpreted the application of the initial sorting system as a mere "automatic consequence" of alleged discrimination, and not an additional act of discrimination.

The case found its way to the U.S. Supreme Court, where a unanimous court determined that the plaintiffs have a cognizable claim of disparate impact based upon an unlawful employment practice. The "employment practice" was the exclusion of passing applicants who scored below a certain score, according to the opinion. The city made use of this employment practice in each of the 11 rounds of hiring made since 1996. Thus, based on the timing of the EEOC filing, all but the first round of selections fall within the statute of limitations.

The Supreme Court agreed with the plaintiffs' view, essentially that present effects of prior discriminatory actions can give rise to a cause of action. However, the court was careful to point out that this is not contradicting previous case law, which holds that present effects of prior actions cannot make an employer liable for present discrimination. The Supreme Court's holding in *Lewis* limited itself by pointing to the fact that the ability to bring such a claim depends on what type of claim it is.

The court illustrated this point by differentiating between disparate treatment and disparate impact claims. In disparate treatment claims, a plaintiff must show that there was deliberate discrimination. Because this is a requisite showing for the prima facie case, the deliberate discrimination must occur within the statutory period.

However, in disparate impact claims — such as the one in *Lewis* — there is no such requirement for discriminatory intent. The inquiry is into the discriminatory impact. Thus, the fact that the actual sorting of the examination scores is beyond the limitations period does not matter because the initial intent is not part of the relevant inquiry. If an employer makes present use of a long-held discriminatory practice that has an alleged disparate impact on a protected class, an employee may bring a claim of discrimination. The statute of limitations begins to run at the time when the employment practice is used or implemented.

The plaintiffs' use of the "continuing violation" theory, and the Supreme Court's adoption of such logic, is reminiscent of the Ledbetter Fair Pay Act which was signed into law in January 2009. Congress pronounced that the issuance of each paycheck that pays one employee less than another employee, based upon a discriminatory animus, starts anew the running of a limitations period. Like the Ledbetter Fair Pay Act, this Supreme Court decision opens the door to plaintiffs to counter long-held discriminatory practices by employers that employees may not have been aware of at the time of initial implementation.

The Supreme Court did not consider the lawfulness of this employment practice, nor did it consider whether the plaintiffs would be successful on their claims. Because the city had stipulated to the discrimination, the Supreme Court treated the practice as being unlawful for the purposes of the inquiry as to whether a claim could be brought. What is interesting about this unanimous decision is the fact that the court seemed poised to invalidate an application process that disproportionately affects minority applicants at a time when jobs are more scarce than ever. •

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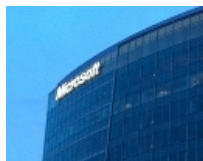
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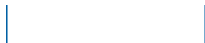
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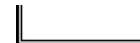
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