Supreme Court Deals Blow to Employers in Disparate Impact Cases

Insights
5.24.10

The U.S. Supreme Court handed employees and job applicants a victory by recognizing that, in a disparate impact (i.e., unintentional discrimination) case, the Title VII statute of limitations is measured from the employer's adoption *and* each subsequent use of an unlawful employment practice. Each use of an unlawful employment practice – such as multiple rounds of hiring based on a written test that has a disparate impact on minority applicants – is now considered a new violation of Title VII, which will make it easier for employees to file timely claims. *Lewis v. City of Chicago.*

As a result of this ruling, an employee or job applicant may file an EEOC charge even if more than 300 days have passed from the initial violation. This is bad news for employers, who may face an increased number of agency charges and lawsuits because impacted employees have a new time period after each violation to file an EEOC charge.

Facts Of The Case
In 1995, the City of Chicago administered a written test to firefighter job applicants. After the test was scored, the City divided the applicants into three categories based on their scores: "well qualified," "qualified," and "not qualified." These rankings had a disproportionate impact upon African-American applicants: white test-takers were five times more likely than African-American test-takers to be ranked "well qualified," despite the fact that the applicant pool was 45% white and 36% black.

The City notified applicants of the test results at the end of January 1996, and informed applicants that it planned to advance only those applicants in the "well qualified" category to the next steps in the hiring process. The City used the results approximately ten times during a six-year period, each time selecting a new class at random from the "well qualified" group. As a result, between 1996 and 2001, the City's entry-level firefighter hires were 77% white and 9% black – significantly different than the makeup of the applicant pool.

Six African-American applicants who took the test and were rated "qualified" filed EEOC charges, claiming that the test had a "disparate impact" on African-American applicants. Such a claim can be brought when, even though an employer does not make a conscious discriminatory decision (for example, "I'm firing you because you are black"), its decisions tend to have a more adverse impact on one group of employees than another. The applicants subsequently filed a civil action, and the

court certified a class of approximately 6,000 African-American applicants who scored in the "qualified" range.

In most states, charges of discrimination are subject to a 300-day statute of limitations (only 180 days in some states). Here the applicants' earliest EEOC charge was filed more than 400 days after the applicants were notified of the results, but within 300 days of the City's second round of hiring. The trial court ruled that the City's ongoing reliance on the test was a continuing violation of Title VII, so the applicants' suit was timely.

The U.S. Court of Appeals for the 7th Circuit reversed, holding that in a disparate-impact case, once the testing is completed and applicants are sorted into categories such as "qualified" and "well qualified," no further discrimination occurs when the employer uses those categories to make hiring decisions. The 7th Circuit held that subsequent hiring decisions do not trigger a new 300-day period to file an EEOC charge, which meant the applicants' EEOC charge was not filed on time.

Supreme Court Rules In Favor Of Applicants

But today, a unanimous Supreme Court issued a decision reversing the 7th Circuit and handing the applicants a victory. The Court held that a new violation occurred – and a new 300-day period for filing discrimination charges began – each time the City used the scores from the discriminatory examination to hire someone. This means that an employee or applicant who does not file a timely EEOC charge challenging the *adoption* of an employment practice may still file a timely EEOC charge challenging the employer's subsequent *use* of the practice.

What Does This Mean For Employers?

For many employers, this ruling does not change the law that already exists in their jurisdictions. For others, it clarifies that an employee or applicant can file a charge with the EEOC within 300 days after the employer's use of a discriminatory practice, even if that practice was adopted *more* than 300 days prior. Either way, you should discontinue the use of employment practices that have, or are likely to have, an unintentional discriminatory impact on employees or applicants unless those practices are job-related or consistent with business necessity.

To avoid potential liability based on disparate impact, monitor your application and selection practices to see if certain groups are being hired or promoted at a lower rate than other groups. For example, if 35% of your applicants for a particular job are women but as a result of the application test only 10% of your new hires are women, you may need to revise your application and selection practices. A validity study can evaluate whether the test is job-related and conforms to a business necessity. You should also consider alternative screening methods to determine whether there is another test or selection process that will adequately screen applicants without creating the disparate impact.

Employers who choose to counteract the discriminatory impact of a facially neutral employment practice, for example by using an affirmative-action-type approach to hire minority applicants who would have otherwise been ineligible for hire based on their test results, may be at risk for a

would have otherwise been ineligible for hire based on their test results, may be at risk for a reverse-discrimination lawsuit from the non-minority applicants who would have otherwise been selected.

As the Supreme Court set forth last year in *Ricci v. DeStefano*, in order to avoid a reverse-discrimination lawsuit, the employer must have a "strong basis in evidence" to believe that it will be exposed to a disparate impact claim if it follows an employment practice (e.g., hiring applicants based on test scores). Only then may the employer adopt an "affirmative action" type of approach and favor the minority employees or applicants. Otherwise, employers can expect to get hit with a reverse-discrimination lawsuit.

This Legal Alert provides information about a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.