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Supreme Court Sets Deadline to File Certain Employment Discrimination Suits under Title VII

Lewis, et al. v. City of Chicago – U.S. Supreme Court - 08-974 – May 24, 2010

Statistical results issued by the Equal Employment Opportunity Commission (“EEOC”) for the year of 2009 indicate that the number of work-place discrimination complaints filed with the Commission was the second highest on record, falling just short of the number filed in 2008. A recent decision from Supreme Court extending the time within which employees can file complaints should help keep this trend going in the near future. Below is a discussion of the background, Supreme Court decision and potential impact this ruling may have going forward.

In July 1995, the City of Chicago (the “City”) issued written examinations to 26,000 individuals who had applied for jobs in the Chicago Fire Department. In January 1996, the City disclosed the results of the examinations and issued a press release stating that it would begin using a lottery to fill openings from those applicants who scored an 89 or above on the exam (100 points being a perfect score). These applicants were categorized by the City as “well qualified.” Applicants who scored between 65 and 88 on the exam were categorized as “qualified” and were informed that it was unlikely that they would be further considered for employment, but that they would be kept on the list of potential employees for as long as that list was used. Applicants who scored below 65 on the exam were classified as “unqualified” and informed by letter that they would not be further considered for employment.

In May 1996, the City used a lottery to select a group of applicants from among the “well-qualified” scorers who would advance to the next stage of consideration. This procedure was used again in October 1996 and nine additional times thereafter in the following six years. During the final lottery, the City included some applicants who were categorized as “qualified” as the entire “well-qualified” pool had been expended by that time.

In March 1997, an African-American member of the “qualified” category, Crawford Smith, filed a discrimination charge with the EEOC alleging that the City's reliance on the aforementioned examination produced an illegal disparate impact on African-American applicants. After five additional “qualified” applicants brought similar charges against the City, the EEOC issued to all of the claimants “right-to-sue” letters, which are a prerequisite to filing a civil lawsuit under Title VII. In September 1998, claimants filed their lawsuit against the City of Chicago alleging disparate-impact discrimination on the basis of race, and the federal district court certified a class action consisting of more than 6,000 African-Americans who fell into the “qualified” category of applicants and had not been hired by the City.

Thereafter, the City moved for summary judgment arguing that claimants had not timely filed their complaints with the EEOC. Pursuant to statute (42 U.S.C. § 2000e), if there is no applicable State anti-discrimination law, an employee must file a complaint with the EEOC within 180 days after the unlawful employment practice occurred. If an applicable State anti-discrimination law does exist, an employee must file their complaint with the EEOC within 300 days of the occurrence of the unlawful employment practice. In this case the 300 day deadline applied. In denying the City's motion, the District Court ruled that the City's ongoing reliance on the 1995 test results constituted a continuing Title VII violation and, therefore, claimants had filed within the deadline.

The District Court's finding was reversed at the appellate level when the Seventh Circuit ruled that the only violation of Title VII committed by the City occurred when the City initially sorted the exam scores into the three categories in 2005. Accordingly, because the first complaint to the EEOC was not made within 300 days of this act, all of the claims were untimely. The Seventh Circuit further found that the hiring decisions made by the City following the initial categorization were automatic consequences of the initial categorization and not new discriminatory acts.

The Supreme Court began its analysis of the issue by first detailing the specific nature of the alleged discriminatory conduct by the City. Under Title VII, there are two types of discriminatory violations: (1) overt/intentional discriminatory policies based on race, color, religion, sex or national origin (e.g. such as disqualifying any applicant who is female); or, (2) disparate impact violations where the policy does not discriminate on its face (e.g. exam administered to all applicants), however, when used, the policy causes a disparate impact on one of the prohibited bases and the employer cannot demonstrate that the challenged policy is job related and consistent with a business necessity. As an initial matter, the Supreme Court determined that claimants' action was brought under the "disparate impact" arm of Title VII.

Next, the Court addressed the City's argument that claimants could only maintain a disparate impact claim by challenging the establishment of the policy at its inception. However, relying on statutory language which states that a disparate impact violation occurs whenever, "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact" the Court determined that for discriminatory impact actions, the use of the discriminatory practice is actionable, separate and apart from the point at which the employment policy was initially adopted. Accordingly, the Court found that each time the City selected another class of applicants from those who had tested in the "well-qualified" range, it used a practice that produced a disparate impact. Next, the Court determined that, because Congress's application of the term "use" allowed claimants to sue at multiple junctures, the fact that claimants were placed on notice of the policy when it was initially announced and that those falling in the "qualified" category were not likely to be hired, was not dispositive on the issue of timeliness.

In support of its position, the City relied upon two prior Supreme Court decisions: *Ledbetter v. Goodyear Tire and Rubber Co.*, (No. 05-1074) and *United Air Lines, Inc. v. Evans*, (No. 76-333) for the proposition that "present effects of prior [discriminatory] actions cannot lead to Title VII liability." Thus, the City argued, because the exclusion of

the “qualified” claimants directly resulted from the initial categorial designations (i.e. a present effect of a past discriminatory act), and claimants did not challenge the initial categorization in a timely fashion, claimants cannot resurrect their untimely challenge by claiming that new acts of discrimination took place each time new employees were chosen off of the initial list.

In rejecting this argument, the Court distinguished *Ledbetter* and *United Air Lines* on the grounds that those actions alleged disparate treatment which, unlike disparate impact actions, includes the necessary element of intent. The Court further explained that the intent element for disparate treatment cannot be met when a party simply ministerially applies a discriminatory policy previously adopted and that such ministerial application does not constitute using the policy per the statutory language. In other words, the intent to discriminate (and thus, the violation of Title VII) occurs at a single point in time, triggering the deadline within which a challenge must be filed with the EEOC. Conversely, the essential elements for disparate impact claims are simply the “use” of an “employment practice” that produces a “disparate impact.” Thus, the Supreme Court did not find the City’s reliance on *Ledbetter* and *United Air Lines* persuasive.

Finally, the Court tackled the public policy arguments advanced by the City. First, the City argued that interpreting the statute in the manner urged by claimants would leave employers open to new claims based on policies which may have been in place for years and thus, important evidence and witnesses could be absent by the time the claim was filed. While conceding that this was a valid concern, the Court also noted that serious consequences were attendant to interpreting the statute pursuant to the City’s wishes. Namely, “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.” Secondly, potential claimants will be induced to file complaints as soon as new hiring policies are announced in order to avoid being time barred, but before any disparate impact is apparent. Ultimately, while the Court acknowledged that there were drawbacks to its interpretation of the statute, re-writing the statute to avoid such consequences is the job of Congress and not the Court.

At first glance, one may be surprised at the seemingly liberal (or at least expansive) interpretation of Title VII applied by what is viewed as a conservative Court, not to mention that the decision was unanimous. However, the conclusion arrived at by the Court may have been a predictable result of the Court’s 2009 ruling in another Title VII case involving firefighters, *Ricci v. DeStefano* (No. 08-328). *Ricci* stemmed from a civil service exam that the City of New Haven, Connecticut administered to firefighters to determine eligibility for promotions. The results of the exam clearly and disproportionately favored white candidates over African-Americans. Based upon the City of New Haven’s concern that this could result in a disparate impact claim, it did not certify the exam results. Thereafter, suit was brought against the City of New Haven by a group of white firefighters who, based upon the exam results, would have been eligible for immediate promotions. The claimants alleged that the City of New Haven violated the disparate treatment arm of Title VII. The district court disagreed and granted summary judgment on behalf of the City of New Haven. The district court’s ruling was upheld by the Second Circuit Court of Appeals.

In a 5-4 decision, the Supreme Court overturned the Second Circuit, finding that: (1) the City of New Haven violated Title VII by engaging in disparate treatment of the caucasian firefighters; (2) such overt race-based action is permissible under Title VII only when the employer can "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute"; and, (3) that the City of New Haven had not met this standard. More specifically, the Supreme Court stated that the City had not shown that the tests were flawed because they were not job-related or a business necessity, or that certifying the exam results would have prevented that City from adopting a different, equally valid and less discriminatory test which was available to the City. The Court further stated that, "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

In essence, the Supreme Court appears to suggest that it is better to risk a disparate impact violation than knowingly commit an intentional disparate treatment violation of Title VII. Part of the reasoning for this conclusion is that, while disparate treatment violations are almost always apparent shortly following the violation, indicia of a potential disparate impact violation often do not become apparent until well after the policy is adopted. Thus, employers should resist attempting to rectify potential disparate impact violations until strong evidence of the violation has surfaced. The Court's guidance that employers delay addressing potential disparate impact violations has been interpreted as overtly hostile to employees generally, and minorities specifically.

Ultimately, when read together, these seemingly inconsistent decisions may actually seek to achieve the same goal. Namely, whereas *Ricci* aims to decrease the number of disparate treatment claims (potentially at the risk of allowing disparate impact violations to continue), *Lewis* provides greater protection to victims of disparate impact violations by extending the deadline to file complaints with the EEOC.

What does this all mean for employers? Unfortunately, both rulings may add additional levels of complexity to the already difficult task of finding an appropriate balance between assuring that employment opportunities are filled with the most qualified candidates, while avoiding the disparate impact which can result from even the most well-meaning of exams and other forms of merit based analysis of candidates. With the extension of the statute of limitations for filing disparate impact complaints, employers would be wise to review old policies which can now be challenged. However, if such questionable policies are found, employers must be extremely careful in addressing the issue lest it open itself up to a claim for disparate treatment discrimination. An undesirable "Catch-22" to be sure. Lastly, with race-based discrimination (36%) and sex-based discrimination (30%) cases consistently accounting for well over half of all EEOC complaints filed, the pressure on employers to find the correct balance between increasing merit-based hiring and decreasing work-place discrimination can only continue to mount.

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