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Lewis v. City of Chicago: The Expansion of Disparate Impact Claims

In *Lewis v. City of Chicago,*[1] which the U.S. Supreme Court decided in May 2010, the Court unanimously held that a charge filed with the Equal Employment Opportunity Commission (EEOC)—alleging that a policy disparately impacts a protected group—is deemed timely if it is filed within 300 days of the application of the policy, rather than from the date of its initial adoption.

The City's Written Examination

In 1995, the city of Chicago administered a written test to more than 26,000 applicants who were seeking positions as firefighters.[2] At the conclusion of the testing period, the city separated the applicants into three categories based on their test scores: "well-qualified" (scoring 89 or above), "qualified" (scoring 65–88), and "not qualified" (scoring below 65).[3] In January 1996, the city announced that it would select individuals randomly drawn from the "well-qualified" group to proceed to the next phase of the hiring process.[4] Applicants in the "qualified" pool of applicants were notified that, although they had passed the examination and their applications would be kept on file, it was unlikely they would be selected for hiring given the large numbers of individuals in the "well-qualified" category.[5] Applicants in the "not qualified" category were notified that they were ineligible for hiring.[6]

Beginning in May 1996, the city, drawing from the "well-qualified" pool, selected its first class of applicants to advance to the next stage of the hiring process.[7] In October 1996, the city selected its second class of applicants.[8] Over the course of the next six years, the city selected nine more classes, using the "well-qualified" pool until it was exhausted.[9] The last class was selected from the group of "qualified" applicants.[10]

Lower Court Proceedings

In March 1997—more than 300 days after Chicago adopted its hiring policy but within 300 days of the city's second round of hiring—an African-American applicant from the "qualified" pool, who was not hired, filed an EEOC charge.[11] Subsequently, five other African-Americans also filed charges. After receiving letters indicating that they had the right to sue, the six applicants filed a class action lawsuit, alleging that the city's practice of selecting only from the "well-qualified" applicant pool had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964.[12] The district court certified a class consisting of more than 6,000 African-Americans who fell within the "qualified" category but were not hired.

On motion for summary judgment, the city argued that the lawsuit was untimely because none of the plaintiffs had filed EEOC charges within 300 days after the city's announcement that it would draw candidates only from the "well-qualified" pool and notification to plaintiffs of their inclusion in the "qualified" class of applicants. Rejecting the city's arguments, the Northern District of Illinois held that the city's ongoing application of the examination results constituted a continuing violation of Title VII. The district court also held that the plaintiffs' lawsuit was timely because a new disparate impact claim was triggered each time the city hired an applicant using the January 1996 hiring criteria.[13] Summary judgment was denied, and the case proceeded to trial.

Because the city of Chicago stipulated that its hiring selection process had a disparate impact on African-Americans, the trial centered on, inter alia, the city's defense that its conduct was justified by a business necessity.[14] After a bench trial, the district court found for the plaintiffs and ordered the city to hire 132 randomly selected class members and award back pay that was to be divided among the remaining class members.

On appeal, the Seventh Circuit reversed the district court's ruling, holding that the plaintiffs' lawsuit was time-barred because of the named plaintiffs' failure to file EEOC charges within 300 days of the city's January 1996 decision to classify applicants as "well-qualified," "qualified," or "not qualified."[15] Moreover, the Seventh Circuit held that the city's subsequent hiring decisions were simply the consequences of the initial hiring decision made in January 1996, "rather than the product of a fresh act of discrimination."[16]

Supreme Court Decision

In reversing and remanding the Seventh Circuit's decision, the U.S. Supreme Court first addressed the question of whether or not the alleged unlawful conduct at issue—the exclusion of "qualified" applicants from the hiring selection process—constituted an employment practice within the meaning of Title VII.

After noting that a prima facie case of disparate impact under Title VII is shown if an employer "uses a particular employment practice that causes a disparate impact on one of the prohibited bases,"[17] the Court concluded that the city's challenged hiring selection practice was included in the term "employment practice."[18]

The Court then shifted its analysis to Chicago's argument that the only actionable unlawful conduct occurred in January 1996, when the city applied the test results to establish the employment eligibility list and informed applicants that hiring would be restricted to those in the "well-qualified" class. The city contended that the lawsuit was time-barred because no plaintiff had filed a charge within 300 days from that date and that no new violations had occurred thereafter because the subsequent exclusions of the plaintiffs from the hiring process were merely the inevitable result of the city's initial hiring selection decision made in 1996.[19] In bolstering these arguments, the city contended that *United Air Lines Inc. v. Evans*[20] and the cases following it[21] established that "present effects of prior actions cannot lead to Title VII liability."[22]

Rejecting Chicago's arguments, the Court held that, even though "[i]t may be true that 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."[23] In concluding that the city's reliance on *Evans* and its progeny was misplaced, the Court drew a clear distinction between disparate treatment and disparate impact cases. The Court explained that *Evans* and the other referenced decisions merely established that, in Title VII cases, the plaintiff must demonstrate a "present violation" occurring within the statutory period.[24] The Court held that, in cases alleging disparate treatment, for which discriminatory intent *is* required, a plaintiff cannot rely on the present effects of past discrimination but, rather, must establish intentional discrimination within the statutory period.[25] The Court noted, however, that the same analysis does not apply to disparate impact cases; in these cases, where intentional discrimination is *not* required, each use or application of the unlawful employment practice gives rise to a possible present Title VII violation.[26]

In reaching this conclusion, the Court conceded that its decision could well have far-reaching implications for both employers and employees. The Court stated that, "[e]mployers may face new disparate-impact suits for practice they have used regularly for years," and that "[e]vidence essential to their business-necessity defenses might be unavailable … by the time the later suits are brought."[27] The Court also observed that "affected employees and prospective employees may not even know they have claims if they are unaware the employer is still applying the disputed practice."[28] Undaunted by these concerns, the Court emphasized that its charge was "to give effect to the law Congress enacted" and that, if Congress did not intend for Title VII to have such results, it was a matter for Congress, and not the courts, to resolve.[29]

Impact of the Decision

As a result of the Supreme Court's decision, an employer that adopts an employment policy with a purported disparate impact on a protected group is vulnerable to disparate impact claims each time it subsequently applies the employment policy in rendering employment decisions. Consequently, employers may be subjected to an increasing number of disparate impact suits for practices that have been in place for many years. Because employees may bring claims against employers well after these employment practices were adopted, employers must make a concerted effort to retain personnel files, human resource policies (including the underlying reasoning for such policies), hiring criteria, and other relevant evidence that is "essential to their business necessity defense."[30] In addition, employers should analyze their various employment practices—including hiring, promotion, termination, and compensation policies and procedures—to ensure that such practices do not have an adverse impact on protected groups. Furthermore, when adopting and implementing employment policies, employers should make certain that such policies are job related and justified by business necessity. **TFL**

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Endnotes

[1]*Lewis v. City of Chicago,* __U.S.__, 130 S. Ct. 2191 (2010).

[2]*Id.* at 2195.

[3]*Id.*

[4]*Id.* at 2196.

[5]*Id.* at 2195–2196.

[6]*Id.* at 2195.

[7]*Id.* at 2196.

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.*

[13]*Id.*

[14]*See Lewis, supra* note 1, Brief for Respondent at 8 (stating that because the city "had admitted petitioners' *prima facie* case that the examination and [hiring eligibility] list had an adverse impact ... the January 2004 liability trial focused on Chicago's defenses of

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may often result in the voluntary transfer of a domain name registration. Either way, it is far more expensive not to be proactive and subsequently to have to forcefully remove a portfolio of domain name registrations from a variety of registrant owners by use of various measures.

The ownership and use of domain name registrations is beneficial to U.S. trademark registrations. Each domain name (such as www.wyattfirm.com) displays content that provides a platform for displaying trademarks and descriptions of the goods or services offered by a company. When maintaining existing U.S. trademark registrations, it is common to submit a printout of a Web page to the U.S. Patent and Trademark Office as a specimen of proper trademark use for a service mark. Furthermore, as a company's marketing slightly changes or is modified, it is easy to update or alter such a Web page.

Without question, it is difficult to anticipate all domain names that are confusingly similar to a company's mark. Knowing that, a company must still attempt to be proactive in the protection of its marks. One way to do so is to make use of the synergism resulting from the combined ownership of domain name registrations and U.S. trademark registrations. **TFL**

Douglas W. Schelling, Ph.D., is a registered patent attorney and a member of the Intellectual Property and Technology Licensing Group of Wyatt, Tarrant & Combs LLP, where he practices patent, trademark, and copyright law. He may be contacted at dschelling@wyattfirm.com.

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Our Chapters, Sections, and Divisions are the backbone of this Association, and our Members are its heart. Together we can ensure that the FBA's vision is realized and that the FBA is recognized as the premier bar association serving federal practitioners and the judiciary. I am honored to become your National President and to be part of the championship team that will work to increase the visibility, relevance, and value of our membership. **TFL**

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dispute.

Model contract language to incorporate the civil litigation prenup into contracts is available for download at no cost for lawyers and companies at www.cpradr.org, the Web site of the International Institute for Conflict Prevention & Resolution, a nonprofit organization. The use of litigation prenups in business contracts will help bridge the practices of corporate lawyers, who draft business agreements, and trial lawyers, who litigate the disputes arising from those agreements. The potential savings of costs, time, and human resources have encouraged several major companies to take a hard look at the economical litigation agreement as the newest tool available to American businesses. It is a tool whose time has come. **TFL**

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job relatedness, validity, and business necessity and the petitioners' rebuttal that less discriminatory alternatives were available but not adopted").

[15]*Lewis v. City of Chicago,* 528 F.3d 488, 491–492 (7th Cir. 2008).

[16]*Id.* at 491.

[17]*Lewis, supra* note 1, at 2197 (citing Title VII, 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

[18]*Id.* at 2198.

[19]*Id.*

[20]*Id.* at 2198 (citing *United Air Lines Inc. v. Evans,* 431 U.S. 553 (1977)).

[21]The city relied on *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007), *Lorance v. AT&T Technologies Inc.,* 490 U.S. 900 (1989), and *Delaware State College v. Ricks,* 449 U.S. 250 (1980).

[22]*Lewis, supra* note 1, at 2199.

[23]*Id.* at 2198–2199.

[24]*Id.* at 2199.

[25]*Id.*

[26]*Id.* at 2199—2000.

[27]*Id.* at 2200.

[28]*Id.*

[29]*Id.*

[30]*Id.*