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Commentary: Firefighter examinations and disparate impact claims - a hot topic for the Supreme Court

By Jerilyn Jacobs, Esq.

Under Title VII, a plaintiff suing for employment discrimination must file an administrative charge within 300 days after the unlawful employment practice occurred. This means that, ordinarily, when an employee is not hired for a position or denied a promotion, the tolling period begins to run as soon as he or she learns that they were not chosen.

However, in a disparate impact claim - one that focuses on the impact of a neutral policy on a segment of the applicant pool - the analysis is not always so easy. Does the harm occur when the policy is announced and its disproportionate impact discernable, or does the harm occur each and every time the policy is applied?

The U.S. Supreme Court recently agreed to hear oral argument in a case, *Lewis v. City of Chicago* (No. 08-974, cert. granted 9/30/09), that addresses that issue. The Court will decide whether an applicant who is told that he will likely not be hired for a position - though his name will be kept on a list, just in case - has 300 days after being so informed to file an administrative claim, or whether his tolling period begins anew

every time the employer makes a hiring selection based upon that list.

Lewis stems from a written examination administered by the City of Chicago in July 1994 to approximately 26,000 applicants for the position of entry-level fire fighter.

Based upon their results, applicants were placed into one of three groups: (1) the "well qualified" - those who achieved a score of 89 or above; (2) the "qualified" - those who scored between 65 and 88; and (3) the "not qualified" - those who scored below 66.

While 45 percent of the applicants were white, they accounted for 75.8 percent of the "well qualified" group. Meanwhile, only 11.5 percent of the "well qualified" scorers were African-American, although they made up 37 percent of the test takers.

There were 1,782 applicants who were deemed "well qualified," but only 600 job openings were expected to occur over the next few years. Those in the "qualified" group were told that, given the number of "well qualified" applicants, it was unlikely that any of them would be hired. They were also told that they would be placed on an eligible list that would be "maintained by the Department of Personnel for as long as that list is used."

Over the next several years, the city continued to use the list and hire "well qualified" applicants. In 1997, more than 300 days after receiving notice of the test results and the probability they would not be hired, but less than 300 days since the city used the list in making a hiring decision, a group of African-American applicants who had been rated "qualified" challenged the use of the test, charging that it had a disparate impact on the black applicants.

The city argued that the suit was untimely.

The district court sided with the applicants, holding that the city's "ongoing reliance" on the test results constituted "a continuing violation of Title VII."

But the Seventh Circuit overturned the district court. In a decision written by Judge Posner, the court found that the discrimination was complete when the tests were scored and the applicants learned the results. It stated that the subsequent hiring of "well qualified" applicants was the "automatic consequence of the test scores rather than the product of a fresh act of discrimination."

Second review of firefighter test

The Supreme Court granted certiorari in the case on Sept. 30, 2009.

This will be the second time in as many years that the

highest court has reviewed a city's use of an examination in its selection process for firefighters. Earlier this year, the Supreme Court ruled in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), that it was inappropriate for the City of New Haven, Conn. to toss out an examination it had commissioned to use in its selection of city firefighters after the results skewed disproportionately in favor of white applicants.

New Haven had tossed out the results out of a concern that it would have been subject to a disparate impact claim, just like the one raised against Chicago.

Thus, while the question being posed to the Supreme Court in the *Lewis* case is particularized to the statute of limitations, it will be interesting to see if the decision it issues somehow solves the dilemma both New Haven and Chicago faced - should they have used the test or not? Or were both cities doomed to protracted litigation the moment they received the test results?

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