

Son of *Ricci* – Competitive Exams and When Disparate Impact is "Felt"

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On February 22, the U.S. Supreme Court heard arguments in an employment law case, *Lewis v. City of Chicago*, 528 F.3d 488 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (U.S. Sept. 30, 2009) (No. 08-974). Like last Term's decision in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), dealing with a City's failure to use test results because of a disparate impact, *Lewis* involves written exams for firefighters and alleged race discrimination. *Lewis*, however, focuses on the extent of liability a city attracts when it continues using exam results later found to be problematic.

In 1995, the City of Chicago administered tests to 26,000 applicants for jobs as firefighters. The test-takers were graded as "well qualified," "qualified," and "not qualified" based on the scores. Notice of the individual results was mailed to each test-taker on January 26, 1996. The notice also informed applicants that, due to the large number of applicants who scored in the first category, it was unlikely that anyone in the "qualified" category would be hired. (In fact, only a portion of the "well-qualified" applicants would be selected.) Those in the "qualified " category would, however, remain on the eligible list for as long as the list was used. Significantly, at the time the results were announced, the Chicago Mayor issued a statement that, "after all our efforts to improve diversity [including racial], these test results are disappointing."

The plaintiffs, 6,000 African-American test-takers in the "qualified" group, sued under Title VII of the Civil Rights Act, alleging that the test had a disparate impact (that it disproportionately classified them as "qualified" rather than "well qualified") and did not validly test aptitude, pointing to the fact that, although African-Americans accounted for nearly half of all applicants, just over eleven percent of the "well-qualified" applicants were black. They filed their charge on March 21, 1997— 420 days after the date on which notice of the results of the test had been sent to them—but within 300 days of the City's beginning to hire applicants from the "well qualified" group. At trial, the City did not dispute that the test had an adverse impact on black applicants, but argued that (1) the cut-off score it used was justified by administrative convenience and that the test validly measured some of the skills necessary for performing the job of firefighter; and (2) the suit was untimely because the plaintiffs failed to comply with the 300-day charging period under Title VII (as a prerequisite to being allowed to sue, the applicants were required to file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the time their claim "accrued," pursuant to 42 U.S.C. § 2000e-5(e)(1)). The district court ruled that the City's selection procedure was unlawful under Title VII and that the suit could proceed, because each time the City hired applicants in the "well qualified" group, it committed a fresh violation of Title VII that may have harmed "qualified" applicants, and the City had used the 1995 test list for eleven rounds of hirings in 1996 and beyond.

The U.S. Court of Appeals for the Seventh Circuit reversed on the limitations issue, finding that the suit was untimely. The plaintiffs had acknowledged that, in a "disparate treatment" case, the charging period began when the discriminatory decision was made. At the time the results were announced, the applicants knew that there were other test-takers ranked above them—a priority pool—who were more likely to be hired. "The hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination."

IMLA and the City of New York filed an *amicus* brief in support of the respondent City, arguing against a theory of continuing violation and stressing the substantial uncertainty and negative impact on operational workplace needs that an open-ended limitation period and the resulting protracted litigation would cause:

> [s]uch examinations and the resulting hiring therefrom are the lifeblood for the efficient functioning and operation of government, which needs the finality and the certainty and repose that finite statutes of limitations bring. This is especially important to ensuring a stable workforce to maintain the services, security and well being of cities in these difficult economic and troubled times.

In oral argument, the only issue before the Supreme Court is whether each use of the exam scores in hiring in 1996 and afterwards constituted a separate violation of Title VII. The petitioners, relying on the language of Title VII, Section 703(k), argued that it encompassed each subsequent hiring decision emanating from the unlawful test because an unlawful employment practice was "established" when the respondent used an employment practice that caused disparate impact on the basis of race—in brief, that

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Exculpatory Contracts

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was held unenforceable as against public policy— the use of the term "fault" in the waiver, which stated that visitors assumed all liability without regard to fault and agreed to hold facility harmless for any injuries incurred, made the waiver unenforceable as overly broad and all-inclusive, and did not specify that visitors were releasing the facility for negligent acts; second, it did not provide the signer with adequate notification of the waiver's nature and significance).

23. *See Enforceable Exculpatory Agreements: Do They Still Exist?* Wisconsin Lawyer, Vol. 78, No. 8 (Aug. 2005). ML

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States Reach Agreement on Buy American (5 Feb. 2010). *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca.

85. Ontario Ministry of Economic Development and Trade (MEDT) News Release, *Canada and the United States Reach Agreement on Buy American: McGuinty Government Supports Important Breakthough. See* MEDT website at http://www.ontariocanada.com/ontcan/1medt/en/news_2010_02_12_en.jsp.

86. *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, Part B, Market Access, Thresholds. *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca for the text of the agreement.

87. *Federal Canadian government announcement Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) *Negotiations. See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca. ML

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transportation, promoting bicycle and pedestrian paths, workforce housing, and other projects that fall under the broad umbrella of "smart growth." The Act appropriates $3.75 billion over three years, starting in 2011, for the program. Areas with population under 200,000 may apply for up to $15 million while large population areas with over 500,000 may be awarded up to $100 million. Some rural states and communities see themselves at a disadvantage with the Act. Senator John Thune (R-SD) has stated that the Act "is a program that's going to overwhelmingly focus on urban areas."[9] Even so, this may very well be a bill that will pass President Obama's desk and it will be worth your local government's time to keep track of S.1619's progress.

Notes

1. Livable Communities Act of 2009, S. 1619, 111th Cong. (2009).
2. Press Release, U.S. Senator Chris Dodd, *Dodd Announces Initiative to Coordinate Housing, Transportation, and Environmental Policies* (Aug. 6, 2009) (on file with author).
3. Livable Communities Act of 2010, H.R. 4690, 111th Cong. (2010).
4. Don Stacom, *Dodd Promises to Promote 'Smart Growth' Housing Plans*, Hartford Courant, March 9, 2010, at http://articles.courant.com/2010-03-09/news/hc-hartford-livable-0309.artmar08_1_smart-growth-plans-housing-authority-directors-sen-christopher-dodd. (last accessed Mar. 15, 2010).
5. Press Release, U.S. Dept. of Housing and Urban Development, HUD *Secretary Donovan Announces New Office of Sustainable Housing and Communities* (Feb. 4, 2010) (on file with author).
6. Press Release, U.S. Dept. of Housing and Urban Development, *HUD and DOT Announce Interagency Partnership to Promote Sustainable Communities* (Mar. 18, 2009) (on file with author).
7. Livable Communities Act of 2009, S. 1619, 111th Cong. § 6 (2009). The Act's Interagency Council would be expanded to include the Administrator of the Environmental Protection Agency and "such representatives from other Federal agencies . . . as the President may prescribe."
8. Livable Communities Act of 2009, S. 1619, 111th Cong. § 7(b) (2009).
9. Elana Schor, *Dodd Vows to Pass Livability Bill Amid Skepticism From Rural Senators*, dc.streetsblog.com, available at http://dc.streetsblog.org/2010/03/09/dodd-vows-to-pass-livability-bill-amid-skepticism-from-rural-senators/. ML

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the Act was concerned with the *consequences* of the unlawful employment practice. Benna Ruth Solomon, Corporation Counsel for the City of Chicago, argued that the time when the injury occurred or impact was felt was when the tiered list or priority pool was first created. That was the only practice that had adverse impact as contemplated by the statute, and "in this case the defining feature, namely disparate impact, in the sense defined by the statute, required by the statute to limit or classify in a way that denies people employment opportunities based on race — that defining feature was absent within the charging period." Regardless of how many hiring rounds occurred, it "always goes back to the test and the list." Ultimately, what the petitioners were asking the Court to do was to validate new "opportunities to challenge exactly the same thing that they…would have challenged if they had filed a charge promptly." Illustrating the City's dilemma further, she added that, "in a case like this, it – it wasn't possible simply to take the list down. The Court's opinion in *Ricci* makes that quite clear."

The Court's decision is expected by this June. ML