# *LEWIS V. CITY OF CHICAGO*: TITLE VII'S LIMITATIONS PERIOD FOR DISPARATE IMPACT CHARGES

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## I. INTRODUCTION

In *Lewis v. City of Chicago*[1] the Supreme Court will determine when the statute of limitations commences for an employee filing suit against an employer who implements a discriminatory testing practice. Title VII of the Civil Rights Act of 1964[2] ("Title VII") prohibits employment practices that are intentionally discriminatory or have an impermissibly disparate impact—practices that, while neutral on their face, disproportionately affect a protected class.[3] Title VII requires aggrieved employees to file their challenges to these practices with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the allegedly illegal employment activity. *Lewis* gives the Supreme Court the opportunity to resolve a circuit split over whether, in the context of disparate impact claims, the statute of limitations begins to run upon the *announcement* of the alleged discriminatory practice or upon an employer's *use* of that practice.[4]

To examine the complex issue confronting the Court, this Commentary proceeds in five sections. Part II discusses the facts presented in *Lewis*. Part III explores the legal background influencing the Seventh Circuit's reversal of the district court's ruling. Part IV explains the Seventh Circuit's disposition of the case based on its interpretation of the governing Supreme Court precedent. Part V reviews the parties' primary arguments. Part VI discusses the Court's likely disposition of the limitations issue.

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1. Lewis v. City of Chicago, No. 08-974 (U.S. argued Feb. 22, 2010).
2. 42 U.S.C.A. § 2000e-2(a) (West 2003).
3. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).
4. Petition for Writ of Certiorari at i, *Lewis*, No. 08-974 (U.S. Jan. 21, 2009).

## II. FACTS

On eleven occasions from 1996 to 2002, the City of Chicago (the "City") made hiring decisions based on the results of a written test conducted in July 1995 for over 26,000 entry-level firefighter candidates.[5] Forty-five percent of those candidates were white, and 37 percent were black.[6] In developing the test, the City hired expert for the express purpose of reducing the likelihood of the outcome having a disparate racial impact.[7] The City graded the test on a 100-point scale and then placed each applicant into one of three categories based on his or her individual performance.[8] Candidates who scored eighty-nine or above were considered "well qualified," those who scored between sixty-five and eighty-eight were "qualified," and those who scored below sixty-five were deemed "not qualified."[9] For operational and administrative reasons,[10] the City implemented these categories despite the test developer's objection to the eighty-nine cut-off score because of its arbitrariness and failure to reflect any distinction between the candidates' firefighting abilities.[11] Of the 1782 "well qualified" applicants, 75.8 percent were white and 11.5 percent were black.[12]

On January 26, 1996, the candidates were notified of their test scores, corresponding category placement, and the City's intention to use these results for its hiring decisions.[13] On the same day, the Mayor issued a press release announcing the results and the City's plan to randomly select candidates from the "well qualified" category.[14] As the City hired exclusively from this category for the next five years, 77 percent of the entry-level firefighters were white, and nine percent were black.[15]

The petitioners ("the applicants") are a class of approximately 6,000 black firefighters that were deemed "qualified," based on the

5. Petitioners' Brief on the Merits at 3–4, *Lewis*, No. 08-974 (U.S. Nov. 23, 2009).
6. Brief for the United States as Amicus Curiae Supporting Petitioners at 5, *Lewis*, No. 08-974 (U.S. Nov. 30, 2009) [hereinafter Brief for the United States].
7. Brief for Respondent in Opposition at 2, *Lewis*, No. 08-974 (U.S. Apr. 10, 2009).
8. Petitioners' Brief on the Merits, *supra* note 5, at 4.
9. *Id.*
10. Brief for Respondent in Opposition, *supra* note 7, at 5 n.2.
11. Petitioners' Brief on the Merits, *supra* note 5, at 11.
12. Brief for Respondent in Opposition, *supra* note 7, at 3.
13. Petitioners' Brief on the Merits, *supra* note 5, at 5.
14. *Id.*
15. Petition for Writ of Certiorari, *supra* note 4, at 6.

written test results.[16] The first charge was filed with the EEOC on March 31, 1997, more than one year after the initial announcement of the test results.[17] On July 28, 1998, the EEOC issued the necessary right-to-sue letters to the applicants.[18] The applicants filed suit in the U.S. District Court for the Northern District of Illinois on September 9, 1998, alleging impermissible disparate impact.[19]

The district court ruled in favor of the applicants.[20] It held that the July 1995 test—specifically the "statistically meaningless" benchmark between the "qualified" and "well qualified" categories[21]—was not "job related for the position in question [nor] consistent with business necessity,"[22] and had a disparate impact on the black applicants by disproportionately placing them in the "qualified" rather than the "well qualified" category.[23] On appeal, the City did not refute the district court's finding that the test violated Title VII's disparate impact provisions.[24] Instead, the City's sole argument was that the district court erred because applicants' suit was time-barred.[25]

## III. LEGAL BACKGROUND

Under Title VII, it is unlawful for an employer to make hiring decisions or "to limit, segregate, or classify his employees or applicants for employment . . . because of . . . race, color, religion, sex, or national origin."[26] In states with administrative agencies to remedy the employment practices proscribed by Title VII, the time period for injured plaintiffs to file their charges with the EEOC is 300 days after the unlawful act occurs; if there is no such agency, the plaintiff has 180 days to file.[27] Thereafter, if the EEOC or Attorney General does not file a civil action, the EEOC issues plaintiffs "right to sue" letters allowing them to file suit against defendants within ninety days.[28]

16. *Id.*
17. Brief for the United States, *supra* note 6, at 5.
18. *Id.* at 6.
19. *Id.*
20. *Id.* at 7.
21. *Id.*
22. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (West 2003).
23. Lewis v. City of Chicago, 528 F.3d 488, 490 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (2009).
24. Brief for the United States, *supra* note 6, at 7–8.
25. *Lewis*, 528 F.3d at 490.
26. 42 U.S.C.A. § 2000e-2(a).
27. 42 U.S.C.A. § 2000e-5(e)(1) (West 2003).
28. 42 U.S.C.A. § 2000e-5(f)(1) (The EEOC "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the

Supreme Court precedent establishes that two critical questions must be answered to determine when the statute of limitations begins to run: (1) does the conduct rise to the level of an unlawful employment practice and (2) when did that practice occur?[29]

In *Griggs v. Duke Power Co.*,[30] the Supreme Court explained that Congress passed Title VII to remedy the consequences of all discriminatory hiring practices, whether intentional or not.[31] The Court concluded that Title VII's prohibition of illegitimate employment practices encompasses not only overt discrimination where intent is the defining element (disparate treatment), but also facially neutral practices that are "discriminatory in operation" (disparate impact).[32]

The prohibition of disparate impact discrimination was codified twenty years later in the Civil Rights Act of 1991 (the "Act").[33] Under the Act, a plaintiff establishes a prima facie case of impermissible disparate impact by demonstrating that his employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or nation origin," and the employer then fails to satisfy his burden of "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." Even if the employer successfully demonstrates that the practice is job related and consistent with business necessity, the plaintiff can still establish a prima facie case if the employer did not use feasible alternative practices with fewer discriminatory effects.[34]

In its analysis in *Lewis v. City of Chicago*,[35] the Seventh Circuit deemed especially relevant a line of Supreme Court cases that considered disparate *treatment* (rather than disparate impact) claims. These cases distinguished the violation itself from the violation's continuing "adverse effects" for purposes of determining when the limitations period began to run.[36] The inevitable consequences of the initial discriminatory act do not perpetually extend the statute of

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respondent named in the charge . . . .").

29. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002).

30. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

31. *Id.* at 432.

32. *Id.* at 431.

33. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified as amended at 42 U.S.C. § 2000e-2(k)).

34. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

35. Lewis v. City of Chicago, 528 F.3d 488 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (2009).

36. *Id.* at 490.

limitations.[37] But in cases where discrete discriminatory acts occur, each subsequent unlawful action is an independent violation.[38]

*Delaware State College v. Ricks*[39] was one of the first disparate treatment cases raising a limitations issue. In that case, a college intentionally discriminated against a professor when it denied him tenure on the basis of national origin.[40] The professor filed his charge with the EEOC when he was terminated a year later pursuant to a one-year "terminal" contract, not when the school denied him tenure.[41] The Supreme Court held that the filing period begins to run when the intentional act of employment discrimination takes place—here, the denial of tenure, not when a later, but inevitable consequence of that original act occurs.[42] Under this reasoning, the professor's inevitable termination was simply an unfortunate effect of the earlier discriminatory act and did not constitute a "present violation."[43]

In *Lorance v. AT&T Technologies, Inc.*,[44] the Supreme Court again considered a consequence of an intentionally discriminatory employment practice. Here, the intentionally discriminatory act was a change in the way seniority under a collective-bargaining agreement was calculated.[45] Plaintiffs challenged the change four years after receiving demotions as a result of the new system.[46] The Court noted that if the plaintiffs' allegation were one of disparate impact where discriminatory intent is not an element, the charge-filing period would run from the time the impact was felt.[47] But, as in disparate treatment cases, Title VII makes discriminatory intent a necessary element of claims challenging seniority systems.[48] The Court concluded that the date the seniority system was modified governs the limitations period because the discriminatory effect of the facially nondiscriminatory

37. *Id.*

38. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified as amended at 42 U.S.C. § 2000e-5(e)(3)).

39. Delaware State Coll. v. Ricks, 449 U.S. 250 (1980).

40. Id. at 254.

41. *Id*.

42. *Id.* at 258.

43. *Id.*

44. Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 112 Stat. 1071, 1078–79 (codified as amended at 42 U.S.C.A. § 2000e-5(e)(2) (West 2010)).

45. *Id.* at 900.

46. *Id.*

47. *Id.* at 908.

48. *Id.* at 904–05.

practice depended entirely upon the alleged illegality of the change to the system.[49] Thus, the plaintiffs' claim was untimely because it was based on intentionally discriminatory conduct that occurred outside the limitations period.[50] In direct response to this decision, Congress amended Title VII's seniority system provisions to allow applicants to file suit based on either the adoption or injurious application of an intentionally discriminatory seniority system.[51]

Most recently, the Supreme Court addressed how the limitations period applies to Title VII claims in *Ledbetter v. Goodyear Tire & Rubber Co.*[52] In *Ledbetter*, a female employee brought a Title VII claim on the basis that her employer gave her intentionally discriminatory poor performance evaluations that resulted in lower pay raises than her male counterparts until the end of her career.[53] In holding that the claim was time-barred, the Supreme Court determined that the use of a non-discriminatory pay structure does not give rise to a new Title VII claim simply because it furthers the long-term effects of an intentional discriminatory act that occurred outside the charging period.[54] The Court emphasized, however, that an independent violation always commences a new tolling period regardless of its connection to other previous violations.[55] Interestingly, the Court acknowledged that the plaintiff's claim could have succeeded under the Equal Pay Act, which, unlike Title VII, does not require proof of discriminatory intent.[56]

The Lilly Ledbetter Fair Pay Act of 2009[57] effectively overturned the *Ledbetter* holding. The Act amended Title VII's discriminatory compensation provisions to expand the scope of employer liability.[58]

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49. *Id.* at 911.

50. *Id.* at 908.

51. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 112 Stat. 1071, 1078–79 (codified as amended at 42 U.S.C. § 2000e-5(e)(2) ( "[A]n unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.").

52. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified as amended at 42 U.S.C. § 2000e-5(e)(3)).

53. *Id.* at 621–22.

54. *Id.* at 633.

55. *Id.* at 636.

56. *Id.* at 640.

57. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C.A. § 2000e-5(e)(3)(A) (West Supp. 2009).

58. *Id.*

It allows an aggrieved employee to file suit when an employer adopts a discriminatory compensation decision or practice, when an employee becomes subjected to an existing discriminatory compensation decision or practice, or whenever the employee is affected by the application of a discriminatory compensation decision or practice.[59]

## IV. HOLDING

In determining whether the applicants' suit in *Lewis v. City of Chicago* was time-barred, the Seventh Circuit found that neither the doctrine of continuing violation[60] nor the doctrine of equitable tolling applied.[61] The court concluded that the injury occurred and the statute of limitations started to toll when the city evaluated the plaintiffs' eligibility on the basis of the test.[62] The first applicant filed his charge 420 days after the City mailed the notices announcing the test results.[63] The district court concluded the suit was timely because the claim was filed within 300 days of the time that the City first "used" the discriminatory practice by hiring applicants from the "well qualified" category.[64] The Seventh Circuit reversed, holding that the statute of limitations began to run when the applicants were notified of their test results.[65]

The court based its decision on appellate court precedent[66] and the Supreme Court cases discussed above,[67] which held that the

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59. *Id.*

60. Lewis v. City of Chicago, 528 F.3d 488, 493 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (2009) ("The doctrine of continuing violation allows you to delay suing until a series of acts by a prospective defendant blossoms into a wrongful injury on which a suit can be based. . . . Despite its name, it is a doctrine about cumulative rather than continuing violation. . . . Extension of the 'continuing violation' doctrine in the manner urged by plaintiffs would have ludicrous consequences.").

61. *Id.* ("The doctrine of equitable tolling allows a plaintiff additional time within which to sue . . . if even diligent efforts on his part would not have enabled him to prepare and file his suit within the statutory period.").

62. *Id.*

63. *Id.* at 490.

64. *Id.*

65. *Id.* at 491.

66. *Id.* at 490–492 (citing Cox v. City of Memphis, 230 F.3d 199, 204–05 (6th Cir. 2000); Huels v. Exxon Coal USA, Inc., 121 F.3d 1047, 1051 (7th Cir. 1997); Davidson v. Board of Governors, 920 F.2d 441, 445 (7th Cir. 1990)). *But see* Hamilton v. 1st Source Bank, 928 F.2d 86, 87–88 (4th Cir. 1990) (en banc)).

67. *Id.* at 490 (citing Ledbetter v. Goodyear Tire & Rubber, Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (codified as amended at 42 U.S.C. § 2000e-5(e)(3)); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 112 Stat.

tolling period for a disparate *treatment* charge begins to run when the "discriminatory decision is made. . . rather than when it is executed."[68] Invoking the Supreme Court's holding in *Delaware State College v. Ricks*, the Seventh Circuit concluded that hiring only candidates who had scored in the "well qualified" category "was the automatic consequence of the test scores rather than the product[] of a fresh act of discrimination."[69] The Seventh Circuit rejected the applicants' argument that the Supreme Court's holding in *Ricks* applied only to disparate treatment cases by concluding that no fundamental difference exists between the two types of discrimination.[70]

## V. ARGUMENTS

The crux of the applicants' and the City's dispute is whether an actionable claim accrued each time the City made hiring decisions based on the original results of the July 1995 examination. Both sides rely on same line of Supreme Court cases to support their respective positions. The discussion below describes these arguments in turn.

### *A. Petitioners' Primary Arguments*

The applicants' argument has three general facets. First, both Title VII and Supreme Court precedent point to differing accrual periods for disparate treatment and disparate impact claims. Second, practical considerations confirm the logic of making this distinction. Third, the evidentiary concerns supporting a more limited tolling period for disparate treatment claims do not exist in disparate impact cases.

1. First, the applicants argue that each use of a discriminatory written examination in the City's hiring practice is actionable under Title VII.[71] This argument rests primarily upon the remedial aim and plain meaning of Title VII's disparate impact and charge-filing provisions.[72] As long as all the required elements independently exist, they claim, a Title VII claim commences a new charge-filing period

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1071, 1078–79 (codified as amended at 42 U.S.C. § 2000e-5(e)(2));Delaware State College v. Ricks, 449 U.S. 250 (1980)). These cases held that for a Title VII disparate treatment charge to be timely, a plaintiff must identify an act of intentional discrimination within the statutory period of limitations, rather than an effect or consequence of a past act of intentional discrimination.

68. *Id.* at 490.

69. *Lewis*, 528 F.3d at 491.

70. *Id.*

71. Petitioners' Brief on the Merits, *supra* note 5, at 15.

72. *Id.*

even if it is related to a prior violation.[73] The applicants stress the Supreme Court's repeated conclusion that an actionable "claim accrues when all elements of a Title VII violation are present."[74] Accordingly, the applicants assert they timely filed their claim because all of the elements of a Title VII violation were present each time they were passed over for employment.[75] Title VII expressly proscribes all employment actions, including hiring decisions, which have an impermissible disparate impact on a protected class.[76] Here, the applicants argue, the City's use of the hiring selection process constituted an independent violation of Title VII, regardless of how much time has elapsed since the initial announcement of the test results.[77]

Supreme Court precedent has emphasized that a disparate treatment claim is complete when an employer has adopted or announced an *intentionally* discriminatory practice, not when the plaintiff suffered a later consequence of that act.[78] Conversely, in a disparate impact case, where intent is *not* an element, a claim accrues when "that impact is felt."[79] Although the Seventh Circuit regarded the distinction between the two types of claims as "not fundamental,"[80] the applicants insist that this distinction in accrual periods is embodied in Title VII and has been consistently honored by the Supreme Court.[81]

Because of these differing elements in disparate treatment and disparate impact cases, the applicants argue the Seventh Circuit should not have relied on the Supreme Court's decision in *Delaware State College v. Ricks*.[82] *Ricks* was a Title VII disparate treatment case that did not address the timeliness of claims in disparate impact cases.[83] The Supreme Court rejected the claims in *Ricks*, *Lorance v. AT&T Technologies, Inc.*, and *Ledbetter v. Goodyear Tire & Rubber*

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73. *Id.*
74. Petitioners' Brief on the Merits, *supra* note 5, at 15.
75. Brief for the United States, *supra* note 6, at 23.
76. *Id.* at 24 (citing 42 U.S.C. §§ 2000e-2(a)(2), (k)(1)(A)).
77. *Id.* at 28.
78. Petitioners' Brief on the Merits, *supra* note 5, at 15.
79. *Id.* (quoting Lorance v. AT&T Techs., Inc., 490 U.S. 900, 908 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 112 Stat. 1071, 1078–79 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)).
80. Lewis v. City of Chicago, 528 F.3d 488, 491 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (2009).
81. Brief for the United States, *supra* note 6, at 22.
82. Petitioners' Brief on the Merits, *supra* note 5, at 38.
83. *Id.*

*Co.*, not because they stemmed from earlier violations, but because they failed to allege an intentionally discriminatory act during the limitations period.[84] In contrast, discriminatory intent is not an element of the disparate impact claim in *Lewis*.[85] Thus, the existence of such intent is irrelevant to the limitations period, which begins to run only when the challenged practice produces a discriminatory effect.[86]

2. As a practical matter, the accrual rule advocated by the applicants makes sense because once employees realize they have suffered injury due to the disparate impact of an employment practice they have every reason to file promptly since their interests lie in attaining the employment opportunities that they were allegedly denied.[87] On the other hand, the rule espoused by the Seventh Circuit would encourage plaintiffs to file disparate impact charges before they are sure of "whether and how" test results will be used; that is, before all the facts needed to prove a disparate impact claim have "crystallized" and before there is any certainty that the results of an illegitimate test will actually be used and have practical consequences.[88] For example, employers often use test scores to rank candidates to make hiring decisions over time "with individuals often unable to predict when, if ever they might be provided or denied job opportunities based on those ranking."[89] Therefore, the Seventh Circuit's application of Title VII's charge-filing provisions perversely incentivizes individuals to file suit in order not to "forever lose their right to do so," even if no practical consequences have materialized.[90] Under the Seventh Circuit rule, aggrieved employees may face a lose-lose situation when a practice's adverse impact is not immediately apparent: they either do not have standing because they have not yet been adversely impacted by the practices application, or, when a concrete injury occurs and the discriminatory impact is felt, the tolling period has expired.[91]

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84. Brief for the United States, *supra* note 6, at 22.

85. *Id.*

86. *Id.*

87. *Id.* at 29.

88. *Id.* at 31–33.

89. Brief of the National Partnership for Women & Families and the National Women's Law Center et al. as Amici Curiae in Support of Petitioners at 11, Lewis v. City of Chicago, No. 08-974 (U.S. Nov. 30, 2009) (explaining that "the Seventh Circuit's rule . . . fails to address the reality that the consequences of an employer's creation of an eligibility list based rank-order or cut-off scores are often far from clear at the time of its adoption").

90. *Id.* at 13.

91. *See id.* at 17 (explaining that in non-testing contexts, even when a practice's adverse

As noted by the Solicitor General, if the Seventh Circuit's decision is affirmed, the Court would essentially condone an employer's use of implicitly unlawful selection criteria as long as no one filed a charge within 300 days after the test results were announced.[92] Such an interpretation, the Solicitor General warned, would cut against the very purpose of Title VII—"remov[ing] artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[93]

The International Association of Official Human Rights Agencies ("IAOHRA") filed an amicus brief in favor of the applicants making additional arguments regarding the practical implications of the Seventh Circuit's decision.[94] Based on their extensive experience in processing employment discrimination charges,[95] IAOHRA argued that a widespread application of the Seventh Circuit's rule would place additional burdens on the EEOC and local Fair Employment Practices Agencies, which already face the largest caseload in history, due to the increase in volume of charges filed.[96] Potential discrimination claims could be resolved if workers could wait to see if employers hired in a discriminatory fashion as opposed to potential litigants simply filing due to the pressures imposed by an accrual rule limited to the announcement of a hiring practice.[97]

3. Finally, the applicants contended that the legitimate evidentiary concerns existing in disparate treatment cases are not applicable to disparate impact cases.[98] Because evidence of mental culpability is not needed to prove a claim of disparate impact, the pertinent evidence, typically "focus[ing] on statistical disparities, rather than specific incidents," is not weakened or lost as time passes.[99] Thus, the resolution of the merits of a disparate impact case are not

impact is immediately apparent, courts have focused on the practice's impact rather than its adoption).

92. Brief for the United States, *supra* note 6, at 31.

93. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

94. Brief for Amicus Curiae International Association of Official Human Rights Agencies in Support of Petitioners at 2, *Lewis*, No. 08-974 (U.S. Nov. 30, 2009) [hereinafter Brief for IAOHRA]. The IAOHRA represents Fair Employment Practices Agencies (FEPAs) who share administrative responsibilities with the EEOC. Among the responsibilities of IAOHRA is determining the timeliness of discrimination charges.

95. *Id.* at 1.

96. *Id.* at 14.

97. *Id.*

98. Brief for the United States, *supra* note 6, at 30 (explaining that the passage of time does not raise the same concerns in disparate impact cases as it does in disparate treatment cases).

99. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988)).

compromised by allowing employees to recover whenever they are injured by the use of an unlawful practice, even if this occurs years after its implementation.[100] Any unreasonable or prejudicial delay by an employee in filing a charge would warrant an employer's invocation of the laches defense.[101]

### *B. Respondent's Primary Arguments*

The thrust of the City's argument was that the Seventh Circuit was correct in holding that no new violations occurred after the adoption and announcement of the invalid list.[102] Instead, the applicants only experienced "predictable consequences of [that] prior discriminatory act."[103] The City conceded that the applicants successfully proved that using the test results to create the eligibility list had an unlawful disparate racial impact, but not that the consequent hiring of applicants who fell in the well qualified category had any further disparate impact.[104] Highlighting the Supreme Court's holdings confirming that Title VII claims accrue when the unlawful discrete act, not a present effect of that act, occurs,[105] the City maintained that only the initial test score classification injured the applicants and commenced the limitations period.[106] In using the list, no additional act of discrimination (in treatment or impact) was committed and no additional injury was suffered.[107]

The City also pointed out that when Congress has disagreed with Supreme Court rulings, it has amended Title VII's file-charging provisions.[108] The specific amendments following the *Lorance* and *Ledbetter* decisions are not implicated by the applicants' claim, leaving the Court's reasoning in these cases entirely applicable.[109] Thus, the Supreme Court's "discrete act" accrual rule should extend to both disparate treatment and disparate impact claims because nothing in Title VII indicates any reason for applying different rules.[110]

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100. *Id.*
101. *Id.* at 29.
102. Supplemental Brief for Respondent in Opposition at 10, Lewis v. City of Chicago, No. 08-974 (U.S. Sept. 2, 2009).
103. *Id.*
104. *Id.* at 8 (citing 42 U.S.C. §§ 2000e-2(a)(2), 2000e-2(k)(1)(A)(i)).
105. *Id.* at 6.
106. *Id.* (quoting Delaware State Coll. v. Ricks, 449 U.S. 250, 257–58 (1980)).
107. *Id.* at 7.
108. Brief for Respondent in Opposition, *supra* note 7, at 18 (citing 42 U.S.C. §§ 2000e-5(e)(2), 2000e-(e)(3)(A)).
109. Brief for Respondent in Opposition, *supra* note 7, at 13 n.3.
110. *Id.* at 17.

Under this reasoning, the Seventh Circuit determined that the same rule applied to the applicants' case because Title VII distinguishes disparate treatment and disparate impact only as methods of proving discrimination claims, not "types of discriminatory acts in and of themselves."[111] The City argued that there would be no justification in extending the filing period for disparate impact claims that are proven with circumstantial evidence while maintaining the limited filing period for disparate treatment cases that are proven with "direct evidence of discrimination."[112]

In response to the applicants' argument that the broad remedial purpose of Title VII is inconsistent with a relatively short limitations period, the City emphasized that applicants failed to acknowledge that Title VII's intentionally brief filing periods also exist to protect employers' reasonable reliance and repose interests.[113] Congress expressly opted for a short filing period rather than a longer one.[114] This intentionally brief period reflects the "delicate balance" between protecting the civil rights of employees who promptly seek redress and employers from stale claims.[115] A short statute of limitations allows agencies or the courts to resolve claims when "memories are clear; the harm is limited; and reliance interests of employers and other employees have not yet crystallized."[116]

The City dismissed the applicants' "unfounded" fear that a restrictive filing period may "immunize" employers because eligibility lists are only used until a subsequent examination is administered and any instance of present discrimination will always give rise to another claim.[117] In contrast, a liberal filing period would present employers with an uncertain period of liability and frustrate the reasonable reliance interests of both employers and other employees in regard to implemented practices.[118] Regardless, the City insists that applicants' arguments for a broad accrual rule for disparate impact cases are undermined by the fact that every applicant was aware of an actionable claim within the time to meet the tolling deadline but simply chose to wait.[119]

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111. *Id.*
112. Supplemental Brief for Respondent in Opposition, *supra* note 102, at 8.
113. Brief for Respondent in Opposition, *supra* note 7, at 19–20.
114. Supplemental Brief for Respondent in Opposition, *supra* note 102, at 10–11.
115. Brief for Respondent in Opposition, *supra* note 7, at 19–20.
116. Supplemental Brief for Respondent in Opposition, *supra* note 102, at 10–11.
117. Brief for Respondent in Opposition, *supra* note 7, at 20.
118. *Id.*
119. *Id.*

## VI. LIKELY DISPOSITION

This case calls upon the Supreme Court to apply its Title VII statute of limitations precedent in the "slightly different context"[120] of testing practices with an unlawful disparate impact. The Court likely will conclude that the accrual rules for disparate impact and disparate treatment claims differ. The Court will therefore overturn the Seventh Circuit's ruling because the ruling disregarded important distinctions between the elements of disparate impact and disparate treatment claims.[121] The Court has made clear that disparate treatment claims accrue upon notice of an intentionally discriminatory employment practice and not upon the occurrence of its effects because intent is an essential element of such a claim. [122] Hence, to delay the running of the limitations period for a disparate treatment charge until an eventual consequence of an act of intentional discrimination would be to ignore the defining element of the legal claim serving as the basis for a plaintiff's Title VII recovery.[123]

The factors leading to the Court's rejection of certain disparate treatment claims as time-barred—lack of the requisite elements, risk of staleness, and the ability to identify instances of intentional discrimination when they occur—do not apply to the applicants' disparate impact charge. As the applicants emphasize, all the requisite elements of a disparate impact claim exist in their charge based on the use of an illegitimate test.[124] Hence, "each round of hiring only applicants who scored 89 or above on the test constituted a *freestanding, present violation* of Title VII's disparate impact prohibition that started a new and distinct charge-filing period."[125] Further, by limiting the tolling period to the announcement of a discriminatory practice, the Court would require plaintiffs to file charges before a discriminatory impact has come to fruition, *e.g.,* before there is any certainty about the gravity of an injury, if one will

120. *Ledbetter*, 550 U.S. at 621.

121. *See* Brief for the United States, *supra* note 6, at 22 ("Unlike intentional discrimination claims . . . the 'defining element' of a disparate impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice.").

122. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009) (citing Teamsters v. United States, 431 U.S. 324, 355 n.15 (1977)); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988) ("Disparate-treatment cases present 'the most easily understood type of discrimination'. . . . A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action.").

123. *Ledbetter*, 550 U.S. at 624.

124. Petitioners' Brief on the Merits, *supra* note 5, at 15.

125. *Id.* at 40 (emphasis added).

even occur.[126]

The applicants' arguments are consistent with the plain language of Title VII, which the Court has declared as authoritative in its analysis absent any ambiguity.[127] Title VII specifically prohibits an employer from using "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . ."[128] The parties' submissions make clear that the City's hiring selections on the basis of the test results were "uses" of a concededly illegitimate test.[129] And, as the applicants emphasize, neither the language of Title VII nor Supreme Court precedent indicates that an employment practice can be challenged only at the time of its promulgation, and no later.[130] If all the requisite elements of a disparate treatment or disparate impact case are present, a fresh claim of the occurrence of an unlawful employment practice accrues, and an EEOC charge is viable within 180 or 300 days of that time.[131] Further, given Title VII's goal of eliminating discrimination in the workplace, it would be contrary to legislative intent to construe the period of limitations so narrowly as to bar employees from redress simply because they chose to wait for a concrete injury to fully materialize rather than preemptively challenge a seemingly discriminatory hiring practice.[132] The Seventh Circuit's decision is ripe for reversal by the Supreme Court because it failed to look to the statutory language of Title VII itself, and instead relied only upon cases that were factually and theoretically distinct from the applicants' disparate impact claim.

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126. Brief for IAOHRA, *supra* note 94, at 10.

127. *See* United States v. Ron Pair Enters., 498 U.S. 235, 241(1989) (The starting point of the Supreme Court's analysis is "the language of the statute itself." Where "the statute's language is plain" that is "where inquiry should end" because "the sole function of the courts is to enforce [the statute] according to its terms.")

128. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (West 2003).

129. Both petitioners' and respondent's phrasing of the "Question Presented" expressly refer to the City's "use" of the discriminatory test results. *See* Petition for Writ of Certiorari, *supra* note 4, at i ("Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after *the employer's use* of the discriminatory practice?") (emphasis added); *see also* Brief for Respondent in Opposition, *supra* note 7, at i ("Whether the limitations period on a Title VII claim for disparate impact from an examination and eligibility list . . . starts to run only when the list is adopted and announced, or also later, upon *each use* of the same list.") (emphasis added).

130. Petitioners' Brief on the Merits, *supra* note 5, at 15.

131. Brief for the United States, *supra* note 6, at 28.

132. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[R]emedial legislation should be construed broadly to effectuate its purposes.").