



Supreme Court Revives Chicago Firefighter Applicants' Disparate Impact Claims

By: Thomas R. Bagby

In a unanimous decision, the United States Supreme Court recently determined that a Title VII lawsuit brought by a group of City of Chicago African-American firefighter applicants was timely because the 300-day EEOC charge filing period starts to run each time the employer uses or applies the selection procedure alleged to have a discriminatory impact, even if that use or application occurs long after the test results are announced. Lewis v. City of Chicago, No. 08-974 (U.S. May 24, 2010). In doing so, the Court rejected the City's argument that the suit was untimely because the firefighters failed to file EEOC charges within 300 days of when they learned the City likely would select only those candidates determined to be "well qualified" based on the test results.

In 1995, the City of Chicago gave a written examination to applicants seeking firefighter positions. In January 1996, the City announced it would draw candidates randomly from a list of applicants who scored at least 89 out of 100 points on the examination, whom it designated as "well qualified." It informed those who scored below 65 that they had failed and would not be considered further. It informed applicants who scored between 65 and 88, whom it designated as "qualified," that it was unlikely they would be called for further processing but that the City would keep them on the eligibility list for as long as the list was used. In May 1996, the City selected its first class of applicants, a process it repeated multiple times

over the next six years. Beginning in March 1997, several African-American applicants who scored in the "qualified" range, but who had not been hired, filed discrimination charges with the EEOC and received right-to-sue letters. They then filed suit, alleging that the City's practice of selecting only applicants who scored 89 or above had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964.

Reversing a lower court decision, the Supreme Court held that a plaintiff who does not file a timely charge challenging the adoption of a practice may still assert a disparate impact claim in a timely charge challenging the employer's later application of that practice. The challenged practice here, which was the City's selection of firefighter hires who had been determined to be "well qualified" in 1996, occurred within the charge-filing period.

Because most private employers do not use written tests, the impact of this case is likely to be limited to the public sector. The case could have long-term significant effects in the public sector, however, where many employers maintain hiring lists based on the results of written tests for lengthy periods. Under the Court's ruling, potential liability could occur each time the employer uses the results of a written test that has disparate impact, even if the use of the test occurs years after the test results are announced.

Another Privacy Concern

By: Dudley F. Woody

Just when you think you have finally come to grips with protecting electronic information on your computers, another threat has arisen. Since 2002, almost every digital copier contains a hard drive which stores images of documents you have processed. There is the potential that an image of every document you scanned, copied or e-mailed using the copier remains stored in the copier and capable of being accessed by others. Your confidential, proprietary and potentially embarrassing information which was processed by your copier remains in the copier to be accessed by someone who wishes you harm.

There are two main risks to your organization. Those risks come primarily from thieves and lawyers. As knowledge and understanding of this situation increases, thieves will buy or steal used copiers and mine the hard drive for information about your company, clients or employees which can be used for identity theft or other types of fraud. The Federal Trade Commission has taken an interest in this issue, but so far, the FTC has indicated only that they are reaching out to copier manufacturers and office supply stores to ensure they are aware of the privacy risks associated with digital copiers.

In recent years, plaintiff's attorneys have increasingly sought electronically stored information and have successfully utilized it in litigation. The electronic discovery process (e-discovery) is becoming increasingly complex and expensive. In many circumstances, an e-mail or other electronic document is becoming the "smoking gun" in litigation. You can expect that information from copier hard drives will soon be added to the electronic discovery requests served in litigation. Consider a sexual harassment claim alleging that one of your employees has been subject to a hostile environment. Among other claims, the employee alleges that inappropriate photos or cartoons were passed around among employees. Your employees claim that this never happened, but a search of the copier's hard drive finds images of inappropriate cartoons and photos.

Depending on the type of information you copy and scan, you should take steps to protect your information. Information is particularly at risk when you discard copiers or return them after a lease. You should make certain that you or your copier supplier has effective procedures in place to cleanse copier hard drives before discarding or repurposing.

Labor & Employment Group:

THOMAS R. BAGBY, Chair

540.983.7766
bagby@woodsrogers.com

VICTOR O. CARDWELL

540.983.7529
cardwell@woodsrogers.com

AGNIS C. CHAKRAVORTY

540.983.7727
chakravorty@woodsrogers.com

ELIZABETH HOPE COTHRAN

540.983.7525
hcothran@woodsrogers.com

BAYARD HARRIS

540.983.7717
bharris@woodsrogers.com

RJ LACKEY

434.797.8202
rjlackey@woodsrogers.com

JOSHUA F.P. LONG

540.983.7725
jlong@woodsrogers.com

ANTHONY H. MONIOUDIS

434.797.8202
monioudis@woodsrogers.com

WILLIAM B. POFF

540.983.7649
poff@woodsrogers.com

DANIEL C. SUMMERLIN

540.983.7546
summerlin@woodsrogers.com

JOSHUA R. TREECE

540.983.7730
jtreece@woodsrogers.com

THOMAS M. WINN, III

540.983.7702
winn@woodsrogers.com

DUDLEY F. WOODY

540.983.7683
woody@woodsrogers.com