IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR L. LEWIS, JR., ET AL., :

Petitioners : No. 08-974

v. :

CITY OF CHICAGO, ILLINOIS. :

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Washington, D.C.

Monday, February 22, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

JOHN A. PAYTON, ESQ., New York, New York; on behalf of Petitioners.

NEAL K. KATYAL, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioners.

BENNA RUTH SOLOMON, ESQ., Deputy Corporation Counsel, Chicago, Illinois; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-974, Lewis v. The City of Chicago.

Mr. Payton.

ORAL ARGUMENT OF JOHN A. PAYTON

ON BEHALF OF PETITIONERS

MR. PAYTON: Mr. Chief Justice, and may it please the Court:

On 11 separate occasions, Chicago used an unlawful cutoff score to determine which applicants it would hire as firefighters. There is no dispute that the cutoff score had an adverse impact on qualified black applicants and was not job-related.

The only question presented is whether each use of the cutoff score in each of the hiring rounds was a separate violation of Title VII. An affirmative answer to that question is both the best reading of the statute and the soundest policy.

Section 703(k) of Title VII provides that in a disparate impact case, as this case, an unlawful employment practice is established -- those are the words -- "is established" when, quote, "a Respondent uses an employment practice that causes disparate impact on the basis of race," close quote.

Section 703(h) states that, quote, "a test, its application, and action upon the results," close quote, are each violations of Title VII if they are, quote, "used to discriminate."

Section 703(a)(2) prohibits racially discriminatory classifications.

CHIEF JUSTICE ROBERTS: So under your position, say the city adopts a discriminatory -- takes a -- issues a discriminatory test; people take it; they come out with the results; the city says these -- this is the test we are going to use, but, you know, we don't have any vacancies. Nobody can sue at that point.

MR. PAYTON: No, no. Our position is that in fact there was an additional violation when the classification occurred when the city announced what it intended to do in the future. That is also a violation.

But if I could make the contrast, Mr. Chief Justice, when the city -- suppose they didn't announce anything at all and what they did was in all those occasions, the 11 I just described, they used the unlawful cutoff score and made hiring decisions.

Title VII's disparate impact looks at the consequences of decisions like that. And those consequences, the results of that clearly occur in the future on those 11 hiring occasions, and then we would

clearly have a cause of action each of those 11 times.

And I'll come back and say that Chicago announces before it does any of that, that it intends to do that in the future. That announcement is an independent violation. But that announcement does not change the impact and the consequences that in fact still would happen in the future when they happen.

JUSTICE SCALIA: There is an independent violation without an impact? I mean, it's not the impact provision that you quoted which makes that a violation. It must be some other provision that makes it a violation. What other provision is it?

MR. PAYTON: Well, there is an impact. You mean when the announcement is made?

JUSTICE SCALIA: Right.

MR. PAYTON: When the announcement is made -- let me make two points. First of all, I believe we -- you could clearly seek to enjoin Chicago from doing something unlawful in the future.

JUSTICE SCALIA: Sure.

MR. PAYTON: Since you clearly have a cause of action at the announcement. We know that.

JUSTICE SCALIA: Because of an impending violation. But you say -- you say it is an actual violation.

MR. PAYTON: That's right. Yes. And the question is whether or not the announcement itself is in violation of the statute. I believe section 703(a)(2), and actually, all three provisions, make it unlawful to actually have a classification that has the effect I just said and the effects would simply be in how they were sorting the results.

So I think there is an impact. It's not the same impact that ripples through time. And the reason I said, If they had not made an announcement it is clear there are consequences that happen in the future each of those 11 times, there is an additional violation when they actually use the announcements to say what they intend to do. They say what they intend to do and then they do it. Those are two different violations.

JUSTICE SOTOMAYOR: Counsel, the language of the statute of 703 is to "limit, segregate, or classify."

MR. PAYTON: Yes.

JUSTICE SOTOMAYOR: So is it your position that the violation occurs at the classification that is announced and that every subsequent hiring has limited someone's opportunities so that they -- there is a violation subsequently under the limit clause as opposed to the classification clause, or it's -- each event is a

classification violation?

MR. PAYTON: It's our position that, in fact, all three of the sections I quoted from are implicated in the actions that Chicago took.

Clearly, there is a classification, but when they actually exclude from actual consideration for any of the jobs in the 11 occasions, that's a limitation. It's clearly a limitation. When they use the test results, that's an action upon the test results. When they use that to make decisions, that's clearly a violation of (k).

All three provisions are in fact implicated, sometimes in similar ways, sometimes in different ways. All of them have consequences.

And the way disparate-impact law works is, you have an employment practice -- it's always facially neutral -- that has an adverse impact on the basis of race that causes there to be a disparate impact on consequences. We look at consequences, and the elements of the disparate impact violation are not complete until we have all of those elements.

JUSTICE ALITO: Your position may follow from the language of Title VII, but you began by saying that it also represents the best policy. And I wonder if you could explain why that is so.

Here, the city of Chicago continued to use this test for quite a number of years after it was administered. So as you interpret the statute, I gather that someone could still file a disparate impact claim six or seven years after the test was first administered, and quite a few years after it was first used in making a hiring decision. And how can that be squared with Congress's evident desire in Title VII to require that an EEOC charge be filed rather promptly after the employment action is taken?

MR. PAYTON: I think the answer is that this is completely consistent with how the statute works, but I'm going to address the policy concern as well. But how the statute works is, there is a violation every time there is a use.

If we looked at disparate treatment, there is a violation every time there is an intention to discriminate. If there was a future intention to discriminate, there would be a new violation. So if there is a next use, there is a next violation. And that's how that ought to work.

But look at how this worked. Chicago used an unlawful cutoff score on those 11 occasions to make decisions. Chicago should have stopped using the discriminatory cutoff score and it should have looked at

all of the qualified applicants that it had judged qualified in making its decisions.

JUSTICE GINSBURG: But if it stopped using it, it might be vulnerable to a Rizzo-type suit from the people who were benefiting.

MR. PAYTON: I actually think that that conflict is not present. Chicago can always make a decision that responds to something that is unlawful. And I think this Court has always made it clear the standard may be in Ricci, but the law is clearly that if Chicago has reason to believe -- very good reason to believe that it is doing something that is unlawful, it can stop doing something unlawful. That is especially the case here.

JUSTICE GINSBURG: I thought in Ricci that was New Haven's position, that they thought that the test was unlawful because of the disparate impact.

MR. PAYTON: I understand. The standard that may apply to Chicago's decision may be different, but let me give you the example in this case.

Chicago used a cutoff score that the district court finds and that their expert who designed the test told them was problematic, to make decisions that has nothing job-related about it at all. It's arbitrary. The group that are qualified are as

qualified as the group that are well-qualified and visa-versa. They had available to them the option of picking randomly from that group, both groups combined, and making the decisions on a random draw. That is, in fact, how they made all of the decisions inside of the groups that they used. That is always available. Chicago could have done that at any time.

The policy point here, Justice Alito, is that I'd say the animating purpose behind Title VII is, as this Court has said, "the eradication of discrimination from our workplace." And you want it to be eradicated. Chicago should not have continued doing this. And the law ought to say, and I think it does say, that when they use something that is unlawful, they can be challenged every time they use something that is unlawful. If the --

JUSTICE GINSBURG: How long does the city's exposure persist? Let's say that the -- in the tenth round, someone is selected for the job from the qualified group. And then there's a cutback and there are going to be layoffs. So the last hired is the first fired. Could -- would there be a Title VII suit when that last hired is laid off, on the ground that if Chicago had done what it was supposed to do, this person would have had the job long ago and would be higher up

on the seniority list?

MR. PAYTON: Let me give you two responses to that.

The first answer is that the statute of limitations is 300 days after every use and it's no longer. So for whatever it is, if you violate Title VII, the statute of limitations is 300 days. If there is a use that goes into the future, it's 300 days after the last use. Right now, Chicago has stopped using that. The doors are closed. No one else can challenge this.

To your specific question about how would it work if there was a layoff arrangement, the proposed -- the remedy order in this case -- it's not in effect because we are where we are -- but the remedy order in this case includes shutting down the use of this, but it also has provisions for seniority to in fact address, I believe, exactly the circumstances you just described, Justice Ginsburg. So I believe that is contemplated and handled in the remedial order.

The issue about the policy here, though, is that if you don't say that a use, in fact, can be challenged, a use of something unlawful can be challenged, what you could end up with here is that Chicago would then take the message that it's okay once

they are past the first 300 days, and they could just go on using the discriminatory cutoff score over and over and over again, and that is inconsistent with the overall policy of what Title VII is trying to root out of our economy and in our workplace.

JUSTICE STEVENS: Mr. Payton, can I ask this general question? Am I correct that each firefighter in the qualified group who did not make the well-qualified has a cause of action as though he had been refused employment when anyone else is hired? There were 11 people hired, as I understand. Did each one of those hirings give everybody else in the class a cause of action?

MR. PAYTON: The group of the black qualified applicants that are in the qualified category, but the qualified category is qualified as the other category, every time the city made decisions about filling jobs in the fire department it excluded every single one of those applicants, even though they were qualified. So every single one was excluded.

So they all have a cause of action because they were excluded and that clearly fits very easily within how --

JUSTICE STEVENS: But surely they couldn't all recover it, because only one job was available.

MR. PAYTON: That's correct. That's about what the remedy would be. So the remedy, you know, obviously wouldn't be to give all of them jobs. That's not the remedy, and that's not the remedy that's sought -- was sought here. But they were all excluded from consideration and that's a violation of Title VII's disparate impact prohibition. So they all have a cause of action.

The way the remedy would work --

JUSTICE STEVENS: What is -- what is the remedy other than saying change your practice? What is the -- if one person sues and asks for damages, what would the remedy be for a single applicant who was not hired at the time somebody else was hired?

MR. PAYTON: It may be very little. So if it's a single applicant who sues and not a class -- this is a class. So if a single applicant sues, the remedy would be to stop using the unlawful cutoff score, okay, and then to figure out what would have happened if that unlawful cutoff score hadn't have occurred, and that would have created a very miniscule chance of ever becoming a firefighter and perhaps turning that into some sort of damage award, but it would be miniscule.

In the actual event, the award includes some actual jobs being allocated to the 6,000 members of the

class. It was 132, to be decided upon in some random way that they would be hired. But that's how it would work. But they are all clearly injured when they are all excluded from consideration in all 11 rounds, in violation of Title VII.

CHIEF JUSTICE ROBERTS: But that -- each -- each qualified firefighter who did not get a job because the well-qualified one did has a new cause of action, I guess, every time somebody is hired from the -- the well-qualified pool?

MR. PAYTON: Every time --

CHIEF JUSTICE ROBERTS: In other words, somebody is hired, that constitutes discrimination against the qualified black firefighter who was not hired, and then another -- then somebody else is hired -- each time it's a new cause of action?

MR. PAYTON: They had 11 rounds of hiring that are relevant to this case, 11 rounds afterwards. They exhaust the first category. But in the 11 rounds of hiring, when in every one of those rounds the unlawful cutoff score is used, that is action upon the results, that is a limitation. You know, that is the use of something that causes an adverse impact on the basis of race -- and, yes --

CHIEF JUSTICE ROBERTS: Yes, so it would be

a new cause of action, sure. Now, but they -- if 300 days go from the first round of hiring, they don't -- they cannot sort of piggyback that onto a later cause of action?

MR. PAYTON: Yes, if they sue -- in this case, the EEOC charge was filed after the second round of hiring, and in this case then, therefore, no remedy can take account of the first round of hiring. If they had sued only on the seventh round of hiring, no remedy could take account of those forgone opportunities. So, that would also play out in how the remedial order would work.

And I think I want to reserve the rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE, SUPPORTING PETITIONERS

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

As the questions I think reveal, I think the bottom line question in this case is whether or not under the text of Title VII there was a present violation in each of the 11 rounds of hiring when the

City of Chicago relied on its concededly discriminatory test to exclude the plaintiffs from consideration. And we think that Title VII has three mutually reinforcing provisions in it, each of which point to the same conclusion.

A violation of Title VII occurred in this case when Chicago, in each of those 11 rounds, used its hiring practice with -- and caused a disparate impact, thereby limiting the employment opportunities of certain applicants. Chicago gave an ability test and relied on that ability test in a way that Title VII forbids. It took action upon the results of that discriminatory test in a way that arbitrarily excluded qualified applicants from being hired.

Justice Alito, I think in response to your question, I think our position follows entirely from the text of the statute. We are not as concerned about the policy consequences, though we do think that if the Court were concerned about the policy consequences, we think that there is a good reason why Congress distinguished between disparate treatment and disparate impact litigation. But it's the language of Title VII itself, and in particular 703(h), which forbids action upon the results.

JUSTICE ALITO: Why would Congress have

wanted to allow a question like this to be left open for such an extended period of time? Why would it not have wanted everybody who is potentially affected by it to understand where things stand at a much earlier point, at some reasonable period of time after all of the information is in the -- in the possession of a potential plaintiff to determine whether there has been a disparate impact and whether that -- that person is going to be adversely affected by it, particularly if at a later point the affect of a remedial decree can be to upset the employment -- the employment status of other people who have been hired in the interim?

MR. KATYAL: I agree that there -- there might be policy arguments against it as well as for it, but here's the way I think we look at it. The United States is the nation's largest employer and we face similar concerns. We give certain tests.

But I think what might have been -- what was probably animating Congress was the fear that if the rule of the City of Chicago were adopted then an employer who made it 300 days without an EEOC charge being filed, 300 days after the announcement of the test results, would then be able to for all time use that discriminatory test and it would lock in that period, that test, for as long as 10, 20 years, and Congress

could have legitimately worried about if a test made it 300 days, an employer essentially had a get-out-of-jail-free card to use for all time. And I would say that that precise thing appears to have happened in this very case.

An Joint Appendix page 54, when the city announced its test -- test results in January of 1996, it said it intended to use this test for only three years through 1999. Afterwards, 1999 came, the city, in the city's own briefs -- this is a court of appeals brief at page 12 -- they admit they made a new decision to continue using this test and the test results for subsequent hirings. That was a new decision, and indeed that's a decision, I think, many employers would logically make after three years, because then they don't have to worry about the possibility of a disparate impact lawsuit.

And since, as this Court said in Ricci, one of the goals of Title VII is really to encourage voluntary compliance on the part of employers, adopting a rule like the City of Chicago's is really antithetical to that, because then it will essentially lock in for all time that old discriminatory test.

I think another reason policy -- another policy reason Congress may have thought about is that a

rule that forced people to file within 300 days might be damaging to the EEOC and divisive to employers, because it would say you only have that 300-day period to file, even before all the consequences of the -- of the -- of the employment decision are fully understood.

JUSTICE KENNEDY: Well, actually in -- in this case, am I correct that 9 years has gone by, but that's because of the litigation? The suit was filed, what, 4 months after the 300-day period ran?

MR. KATYAL: The first charge was filed, I believe, 420 days after the January 26th announcement of the test results. And, yes, Justice Kennedy, then there was a period of discovery and litigation over business necessity and the like.

And in this case, the city admitted in other litigation that there was no basis for giving this 89 cutoff score, that a person who scored 65 was just as likely to succeed as a firefighter as a person who was -- who had scored 89.

Justice Stevens, you had asked about the remedy in the case and here's how we understand the way remedies work in disparate impact litigation. It's largely injunctive in nature. It's mostly about preventing future problems.

There is a back pay claim that is available

that is statutorily capped at 2 years. Not everyone in this 6,000-person class could get that full amount of back pay obviously. Instead, what happened here, there was a remedial phase at trial and what they did was they decided that -- the experts on both sides admitted that 132 people, approximately, would have been hired out of that class, and that provided the appropriate amount of back pay.

JUSTICE KENNEDY: So was it 132 named people or was it just 132 undifferentiated?

MR. KATYAL: I think it was 132 undifferentiated people, and then I think there -- Mr. Payton can, I think, fully explain how the randomization of awards was allocated.

CHIEF JUSTICE ROBERTS: So everybody gets 132 over 6,000 times whatever the number of people who would have been hired?

MR. KATYAL: Right. And, Mr. Chief Justice, to respond to your concern before, that amount of money is not -- you couldn't go back and look to earlier periods of time outside of the statute of limitations, outside of the 300-day period, rather only any subsequent use. For example, in this case the remedy couldn't look to the first round of hiring because no lawsuit was brought within that first round of hiring.

It was brought at the -- it was brought after the second round of hiring.

JUSTICE GINSBURG: I think you had a footnote in your reply brief that said that if your position prevails there would need to be an adjustment in the relief granted by the district court.

MR. KATYAL: That is correct. And I think that the Petitioners agree with that as well. And that's I think a further limit on the way in which this present violation theory operates as a matter of practice. Now this Court has said in cases such as Ledbetter that -- that there must be a present violation, and disparate-impact litigation looks quite different than disparate-treatment litigation in practice, because disparate-impact litigation doesn't need that missing element that has been at issue in Ledbetter and Evans and Ricks, of discriminatory intent at that subsequent time of action.

Here in a disparate-impact case, all that need be shown by the plaintiff is adverse impact, and that adverse impact happens in each of those 11 rounds of hiring. Each of time -- each time the city used its test results and drew a line and said, you under 89, we are not looking at you, that was action upon the results, to use the language of (h)(2).

JUSTICE SCALIA: And that would be clear even though it had not been established much earlier that the test was invalid. So a city could go along using a test that was an invalid test, not declared such; ten years later, somebody comes up and says: This test that is being applied to me is an invalid test.

MR. KATYAL: That's exactly correct, Justice Scalia.

JUSTICE SCALIA: What -- of what use is a statute of limitations that -- that -- that operates that way?

MR. KATYAL: Let me say two things. First is I think (h)(2) refers to "action upon the results," and that thing happening in ten years is itself action upon the results, and so I think as a statutory matter the language decides it.

Now, with respect to the policy reason, I think the reason is that otherwise Congress had to fear precisely what you are saying, that an employer ten years from now would use that discriminatory test, because they knew they had made it past the 300-day initial phase of time, and then could use it for all time. And so the statute of limitations and the concerns that I would pose work hand in hand with other concerns of Title VII, and in particular incentivizing

employers to ensure voluntary compliance with the law of Title VII, and which this Court said in Griggs, the goal of which is to eradicate discrimination from the United States' labor markets.

CHIEF JUSTICE ROBERTS: So I suppose the benefit is not that the city knows it's safe; it can rely on a test and all that, but knows that it only has to pay 300 days back.

MR. KATYAL: That is -- that is -- that is the benefit of that particular back pay limitation, yes. But in a case like this, where the city knows very well, this test is discriminatory, and indeed has said so in litigation, I think Congress wanted to incentivize and make sure there was an ability for people to sue at each time that discriminatory test was used.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Solomon.

ORAL ARGUMENT OF BENNA RUTH SOLOMON

ON BEHALF OF RESPONDENT

MS. SOLOMON: Thank you, Mr. Chief Justice, and may it please the Court:

In January 1996 the city adopted and announced an eligibility list for hiring candidates who sat for the firefighters' examination. Petitioners were

told that a priority pool had been created, that based on their scores they were not classified in that pool, and that further consideration of candidates would be limited to those who were in the priority pool, at least until everyone in that pool had been called for processing.

The city also publicly admitted that this tiered eligibility list had adverse impact on African-Americans and Petitioners were aware of this. But Petitioners did not file charges challenging the exam and the cutoff score within 300 days after the tiered eligibility list was adopted and announced.

Now they contend that charges can be filed to challenge the same exam and the same cutoff score every time the city hired from the priority hiring pool. That position cannot be squared with the statute. Calling other applicants from a hiring pool from which Petitioners had already been excluded did not limit or classify Petitioners in any way.

JUSTICE GINSBURG: Suppose there were no lists, but each time there was a hiring round the city just took from the top -- from the top score down. So there is no list, but each time the city uses the test results, and hires the people with the top scores.

MS. SOLOMON: If I understand correctly,

that would be the same case as this, for this reason: list is used in a couple of different ways. A list might be used to describe the strict rank ordering that Your Honor is describing, and in that case, once there is that kind of a list, it's the same as this case.

What happened in this case after that kind of a list was made, we also drew another line which was the priority hiring pool.

JUSTICE GINSBURG: No, my -- my hypothetical is there was no list at all. Just go back to the raw scores and each time they picked the top people.

MS. SOLOMON: So that actually -- if we are going back to the scores but no announcement has been made ever that we are going to use the scores in a certain way, we agree that every time the city actually consulted the scores, there would be a new claim. But that's because --

JUSTICE GINSBURG: Well, what is the list, other than an administratively convenient way to use the scores?

MS. SOLOMON: The list was the device that limited and classified Petitioners in this case, and that's why it's so important. Because in order to have a present cause of action, section (a)(2) -- under section (a)(2), which is the disparate-impact provision,

Petitioners have to point to something in the charging period that actually limited and classified them. And that was the effect of the list, and including the priority hiring pool.

In a case where there is no general practice, no announcement, no decision, nothing, but rather every time the city makes hiring, the city undertakes a new decision with new criteria, then it is making a decision at that point; it is engaging in a practice that is then at that time limiting and classifying the Petitioners. What --

JUSTICE GINSBURG: So even though there is a clear case on the merits of disparate impact, unless the suit is commenced within 30 days of the announcement, then it's as though it were wrong. That's your position.

MS. SOLOMON: The statute (a)(2) requires an unlawful --

JUSTICE GINSBURG: Is -- is that -- there's a free pass; you don't sue within 30 days of the compilation of the list, the notice of the list, you sue 420 days later; the discriminatory practice gets frozen, the status quo gets frozen forever. That's -- that is your position, is it not?

MS. SOLOMON: That is the function of the

operation of the statute of limitations, and of course it's not unique to Title VII.

JUSTICE GINSBURG: But this is not exactly a title -- a statute of limitations. It's a time you have to file your charge. It's a charge file. There is also a two-year statute of limitations in Title VII, you can't get back pay, I think, for more than two years.

MS. SOLOMON: The 300-day charging period under Title VII functions like a statute of limitations and when a timely charge is not filed, no recovery can be had for that claim. And the Court has said that over and over in a series of disparate-treatment cases.

Now the defining feature --

JUSTICE GINSBURG: You -- you don't have one case, I think, certainly not from this Court, of disparate impact. All the cases that you cite are disparate treatment cases.

MS. SOLOMON: The cases are disparate treatment cases, Justice Ginsburg, but the rule should be the same in this case for several different reasons. First, those cases reflect that the reason there is not a present violation when the consequences of a prior discriminatory act are felt is because the defining feature of the claim is absent within the charging period.

Now that is a perfectly good rule, no matter whether it's discriminatory treatment or discriminatory impact. 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.

JUSTICE BREYER: How is it absent? Because the statute says that the established -- the -- it's established -- namely, the unlawful employment practice -- it's established only if -- certainly if the Respondent uses a particular employment practice that has a disparate impact. That refers back to (a)(2).

So in that period, on a certain date, he used that limiting practice, and therefore, on that particular date, he established the unlawful employment practice by using a test that limited, et cetera.

MS. SOLOMON: I have two responses, Justice Breyer, and the first is that section (k), which is what Your Honor is quoting from does not describe accrual and it does not define the underlying violation. It talks about when an -- excuse me, when a violation is established. And what's so interesting is that the reliance on those words "uses an employment practice,"

is a few words plucked out of the middle of section (k).

You actually can't apply section (k) literally to this case and have anything that approaches anything that makes sense. And that's because section (k) actually goes on after those words that get highlighted over and over, and it -- and it refers to the rest of what happens in a case when a claim of disparate impact is tried.

And so can reasonable --

JUSTICE SOTOMAYOR: So why don't we look at subsection (h) --

MS. SOLOMON: Subsection --

JUSTICE SOTOMAYOR: -- that says -- and it's an -- "it shall be an unlawful employment practice for an employer to give" -- "and," conjunctive -- "and act upon the results. "

MS. SOLOMON: Correct.

JUSTICE SOTOMAYOR: So when you hire, aren't you acting upon the results? And how are you acting upon -- you may be acting upon it, as Petitioner argues, when you classify, but why aren't you acting upon when you hire?

MS. SOLOMON: Because there is no act that limits and classifies. And what is interesting about section (h) -- it's not --

JUSTICE SOTOMAYOR: I -- I go back to Justice Breyer's point. Isn't it, in the very act of hiring, you are using the test results, and saying -- each time you do it, you are saying, I'm going to cut off at this limit and I'm not going to consider someone outside of this limited period.

MS. SOLOMON: Well, that's what is actually missing in this case. The city did not go back to the test results and it did not create -- engage in a new decision or a new practice.

JUSTICE SOTOMAYOR: But isn't that what "practice and policy" means? Meaning that each time, as you continue forward, you are using a particular practice, a particular policy?

MS. SOLOMON: Petitioners continued to be ineligible for as long as the list was used in the way that we said at the outset it was going to be used; namely, that the well-qualified pool, the priority hiring pool, would be called first.

The reason they continued to be ineligible is because they had been limited and classified as ineligible until the priority pool was hired first. That was the only practice that had adverse impact within, as required by the statute, meaning limit and classify.

Now, to complete my answer to Justice Breyer --

JUSTICE STEVENS: May I ask this question, Ms. Solomon? Would your argument be the same if the practice in this case were -- required a high school diploma?

Did you understand my question?

MS. SOLOMON: I'm sorry, I didn't realize you were finished.

JUSTICE STEVENS: Suppose the practice were high school diploma. Could that -- would you make the same argument there as you're making today?

JUSTICE GINSBURG: And let's add to that, that it was adopted ten years ago and Duke Power announced to the world that it was going to use a high school diploma. Indeed, it listed in the county all of the high school graduates and said, This is the list.

MS. SOLOMON: A case like that might present different accrual problems for this reason. There might be several appropriate times when a person affected by a policy like that could be said actually to have been limited and classified in their employment opportunities. And it could be when they enter grade school, but that is not an appropriate time, so if it's ten years before the act -- so that person is -- is

roughly eight years old.

It could be when they apply to the employer. It could be a variety of other times. But those cases, whatever difficult accrual problems and questions they present, they are not presented here, because this was a closed universe. Everybody affected by the city's eligibility list and the test and the cutoff score knew from the moment --

JUSTICE STEVENS: But in my example, everybody who was not a high school graduate would have been affected right away.

MS. SOLOMON: But if they are not interested in employment with that employer, then they are not -- if it -- they are certainly affected in one sense of the word, but they are perhaps -- it would not be possible to say their employment opportunities had been affected.

We certainly agree that there should be one time to challenge every employment practice that has an unlawful disparate impact, but the question in this case is whether there is more than one to challenge exactly the same thing? Petitioners --

CHIEF JUSTICE ROBERTS: You force people to challenge the practice when they don't even know if it's going to affect them. In the hypothetical that has been discussed, somebody who didn't graduate from high

school, you know, wants to be something other than a firefighter.

Well, that doesn't work out, and he says, Well, now I want to be a firefighter. And they say, Well, you can't, because you didn't graduate from high school. And I think your position is that, well, he should have filed that suit earlier, no?

MS. SOLOMON: Our position is that the charging period runs from the unlawful practice. And the Court has stressed it is important to confirm --

CHIEF JUSTICE ROBERTS: What is the unlawful practice?

MS. SOLOMON: The unlawful practice here was limiting and classifying Petitioners in a way that deprived them of their employment opportunities. This is what -- this --

JUSTICE GINSBURG: Can you put that in concrete terms? It was the 89 percent cutoff, so that anybody who got below 89 percent of the test was never going to be considered until all the first people who got 89 to 98.

MS. SOLOMON: Correct. And after that decision was made, there was nothing else that Chicago did that affected Petitioners in the terms required by the statute. Hiring others did not adversely affect

Petitioners because they were --

JUSTICE SOTOMAYOR: So could you answer Justice Stevens' hypothetical? What is the difference between those people and each person who does not have a high school diploma, is not -- and is not hired? Does that mean that the moment that they announce the high school diploma requirement, that everybody who had already received one, whether they wanted to work at this job or not, had to sue, and it's only those people who just received the high school diploma who can sue ten years later?

MS. SOLOMON: The statute requires the -- the complainant be limited and classified in their employment opportunities.

JUSTICE SOTOMAYOR: So what is the difference between the policy announcement that each time I hire, I'm not going to use a high school -- I'm not going to look at people who don't have a high school diploma and I'm not going to look at people who don't have a test score above 89. What's the difference between those?

MS. SOLOMON: The difference is that once Petitioners here were classified out of the eligible pool for priority hiring, they were out. They were simply out. They were not being considered any more at

all. We didn't go back to look at the test, we didn't consider Petitioners, we didn't reject them each time --

JUSTICE ALITO: Someone getting a letter that you sent to people who were qualified didn't know that. The only thing that I see that you sent to the people who fell into the qualified category was that it was unlikely, which I take it means less than 50 percent, that they would be called for further processing, but it was possible they would be called for further processing. You didn't tell them anything about -- you didn't tell them that you were going to fill all of your available positions with people who were classified as well-qualified in that letter, did you?

MS. SOLOMON: With respect -- with respect, Justice Alito, the letter does say that because of the large number of people who were classified well-qualified, a step ahead of where Petitioners were classified, it was not likely that they were going to be hired.

JUSTICE ALITO: Right. That's right.

MS. SOLOMON: And for that reason, that's when the injury and the impact was felt. Whatever else later happened, whether Chicago hired a lot of people, Chicago hired no one, whether Chicago ever hired some of

the Petitioners, they had years' worth of delay. And at this point in the litigation it is undisputed. The city made 149 hires from the first use of the list. That's more than any other class --

CHIEF JUSTICE ROBERTS: Just to follow up on Justice Alito's question, what if it were different? What if the letter said, Look, we didn't get, you are not well-qualified but we really do expect to hire a lot more, so, you know, keep your fingers crossed. There is a good chance that you are going to be hired.

And you say those people should have sued right then?

MS. SOLOMON: Correct. Because the impact, at a minimum, is the delay in hiring. And the Court has made quite clear that you don't -- a complainant or Plaintiff does not have to feel all the consequences right at the outset.

CHIEF JUSTICE ROBERTS: Well, that's kind of a bad policy, isn't it, you are telling people who may probably not be injured at all, you are saying, Well, you still have to go to the federal court and sue.

MS. SOLOMON: With respect, Chief Justice Roberts, they are injured. Their hiring will be delayed, possibly substantially.

CHIEF JUSTICE ROBERTS: Oh, sure. Yeah, I

understand that.

MS. SOLOMON: But, you know, let's say we think we are going to hire -- if the budget plan go through, we think we are going to hire everybody else by -- in four months, and you are saying, Well, those people have to sue anyway because they are injured by the four-month delay.

CHIEF JUSTICE ROBERTS: Yeah.

MS. SOLOMON: They are injured by a four-month delay. But there may be circumstances in which information is not conveyed in a way that would put a reasonable person on notice that he or she had a claim right at the outset, and that relates also to the high school diploma hypothetical.

JUSTICE ALITO: Well, what didn't the city say that it was planning to give a new test in three years and then wait more than a decade before giving a new test? If I received one of these qualified letters, and I also -- and I knew in addition that the city was going to give the test in three years, that might well affect my incentive about bringing a lawsuit to challenge this.

MS. SOLOMON: But it wouldn't change the fact that there had been, at least if you wait for the next list, you still have been delayed at least three

years in your ability to be hired as a firefighter; and as far as the reason why we didn't follow through on the aspirational goal of giving another test within three years, the tests are very difficult and expensive to deliver, I think -- to develop, excuse me; the record in this case actually makes that clear.

Despite rather significant steps, including the use of a prominent African-American industrial psychologist to develop this test, it had severe adverse impact. The test actually compares rather favorably to the test that was given in the City of New Haven, but the district court invalidated it, and, you know, we did undertake to develop a new test. But surely the Court --

JUSTICE ALITO: But you don't challenge that. You don't challenge that. You now acknowledge that the Plaintiffs were treated unlawfully.

MS. SOLOMON: We have not pressed that claim, that is correct, Justice Alito.

JUSTICE ALITO: And were you prejudiced by the delay in the filing of the EEOC charge?

MS. SOLOMON: There was some testimony and we quoted in our brief about things that the person responsible for setting the cutoff score could not remember. But a statute of limitations actually doesn't

require prejudice, so we didn't undertake to try to prove that. The -- repose arises naturally at the end of the charging period. It's not something that -- that the defendant has to earn either by capitulating to the plaintiffs' demands or otherwise proving prejudice.

And 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. Our expert told us all the way through the trial, he testified --

JUSTICE GINSBURG: He didn't have to take the list down. He simply could have said anyone who got a passing score, anyone who is qualified, we are not going to make the distinction between qualified and unqualified.

MS. SOLOMON: I -- I believe --

JUSTICE GINSBURG: You didn't have to throw out the list.

MS. SOLOMON: I believe --

JUSTICE GINSBURG: You didn't have to throw out the test.

MS. SOLOMON: The Court's opinion in Ricci addresses that as well. That that's a -- a misuse of the test scores. The expert was resolute even through the trial --

JUSTICE GINSBURG: I thought the expert

said -- the test devisor said he didn't make up that 89 percent cutoff. That was Chicago that made that -- that decision.

MS. SOLOMON: He -- his reason for suggesting the 65 cutoff score was because of the adverse impact. That was an attempt to deal with adverse impact, but his position was the test was valid to measure the cognitive aspects that it was attempting to measure, and that those related to the training firefighters had to undergo in the academy.

And he was clear as well, that a higher score created an inference that the person was more qualified to -- to perform in the way --

JUSTICE GINSBURG: But you -- you've lost -- you've lost on that.

MS. SOLOMON: We have. But the reason that I am mentioning it is because it's not simply a matter of -- of why didn't you take the list down. At the time that the expert is telling us the test is valid and it can -- it gives rise to an inference that people closer to the top are better -- possess more of the cognitive abilities that the test was testing for, we would have at a minimum been courting disparate treatment liability to adjust the scores, to randomize them further or to take the list down. But to --

JUSTICE GINSBURG: No, but going to 65, opening up the classification, is not adjusting the scores; it's not taking the list down; it's just saying anyone who passes the test can proceed to the next step.

MS. SOLOMON: It seriously diminished the opportunities of the people who were at 89 and above. There were about 1,700 applicants at 89 or above, and there were 22,000 65 or above. So calling in random order --

CHIEF JUSTICE ROBERTS: You've got to -- I mean, you have just got to take your -- get as good legal advice as you can, and determine is it -- are we going to be in more trouble if we follow the test or more trouble if we -- if we take it down?

People have to do that all the time. You know, well, if I do this, I'm going to be in trouble; if I do this, I'm going to -- but I have got to decide what I should do.

MS. SOLOMON: Correct, but read in conjunction with the 300-day charging period. And I would like to follow up just briefly on answers to Justice Breyer and Justice Sotomayor.

CHIEF JUSTICE ROBERTS: Well, I'm sorry. But read in conjunction with the 300 -- you have got to finish that sentence at least, before --

MS. SOLOMON: All right, I'm sorry. That was the -- so, yes, at the point where the employer is assessing the options, the city was not sued within -- excuse me, charges were not filed within 300 days after the tiered eligibility list was adopted and announced. Petitioners were aware that it had adverse impact. No charges were filed then; no charges were filed after the first use of the list.

So at some point when the employer is weighing the options the employer can also factor in, the time to challenge this has passed.

What Petitioners seek here is new opportunities -- 11, 10 opportunities to challenge exactly the same thing that they -- that they would have challenged if they had filed a charge promptly. They continue to emphasize that the eligibility pool when compared with the pool of applicants had a disparate impact. But that's not a new violation. That's not a new classification, and it doesn't limit anybody's opportunities in any way beyond what they were already limited. That's the old violation. That's the one they didn't charge.

Now Petitioners do claim that the shortfall evidence showed that they -- showed and the use of the list had disparate impact each time. But it actually

didn't, either. That also was the old violation. That shortfall was compiled by comparing the number of African-Americans who were hired using the 89 cutoff score and the number who would have been called for further processing if --

JUSTICE SCALIA: How do you -- the problem I have with all of this -- it makes entire sense, except when you read subpart (k), it says an unlawful employment practice based on disparate impact is established if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race.

MS. SOLOMON: Correct. But you have --

JUSTICE SCALIA: Which is what happened here.

MS. SOLOMON: But the fact --

JUSTICE SCALIA: They used --

MS. SOLOMON: Excuse me, Justice Scalia. The statute goes on and it describes the later things that happened at trial. So in our view, read literally --

JUSTICE SCALIA: Where -- where -- where does it go on? To say what?

MS. SOLOMON: It goes on to say that the Respondent fails to demonstrate that the challenged

process is job-related, or subpart little (ii), there is an alternative practice with less disparate impact. So -- so (k), if (k) is going to be consulted at all, and we do not think that it should be, because section 706(e) which has always been thought of as the charging period, talks about an alleged unlawful practice, and that's what the person knows at the outset.

Section (k) talks about the burden of proof and how you go about proving these at trial, and that's why it uses the word "established." But that's also why it describes the entirety of what happens at trial. Read literally, you can pluck a few words out of the -- out of one of these provisions and say, aha, they used an employment practice. You have to read the whole thing together if you are going to read it at all, and when you read the whole thing together, you come up with the absurd result that the charging period doesn't run until the district court brings the gavel down and determines that an unlawful practice has been established.

In this case that would have meant that the people 65 and below could file charges within 300 days after the district court's decision, which is something like 11 years after the practice in this case. And that's because that was the moment at which it was

established, and that's why we think that (k) does not bear on this. And (h) --

JUSTICE BREYER: Is my impression -- is there anything else in that (k)? You see, it lists about ten things, let's say ten -- imagine. One of those things is that it was used. Now all the other things there will not have been -- are things that -- that -- to do with the test, basically. So you have like six or seven that have to do with the test, and the criteria, and then you have one that it was used.

MS. SOLOMON: Right, and that's why --

JUSTICE BREYER: And -- and so I thought, looking at the list, it's quite right it's used for a different purpose but --

MS. SOLOMON: It's not --

JUSTICE BREYER: This (k) has to do with a different thing, but -- but the critical element of it was that the practice be used.

MS. SOLOMON: You -- but again, even if (k) is consulted and for the reasons I just outlined we don't think it should be; it doesn't bear on accrual. But even if (k) is consulted, it doesn't -- it doesn't say that any use of an employment practice is -- is a new unlawful act. It has to be an employment practice that actually has disparate impact.

JUSTICE BREYER: Well, you've got to then say that all the things that are there, the other nine and so forth -- all those nine things --

MS. SOLOMON: This is actually --

JUSTICE BREYER: Well --

MS. SOLOMON: Excuse me, Justice Breyer. This is actually a slightly different point. At the outset I indicated why section (k) does not bear on accrual at all; it describes what happens at trial and for that reason you really can't pluck a few words out of --

JUSTICE BREYER: No, well, that's true -- it doesn't --

MS. SOLOMON: But even if one is going to consult it to determine accrual, what it says is that the use of an employment practice with adverse impact. And in this case there was only one, and that one was when Petitioners were limited and classified based on the test scores. Nothing that happened after that, including hiring others, was an unlawful practice with disparate impact in a way that affected the Petitioners. They had already been rejected.

When an employer says, I will not consider you for the position, or perhaps it says, I will not consider you for the position until I have considered a

lot of other people first, that is a rejection. Nothing that happens after that, whether the person hires somebody else, whether the person doesn't hire somebody else, whether they change their mind and later hire the person whom they had previously rejected. Ricks, after all had a grievance pending. It was certainly possible that would change the outcome in the case but the Court, nonetheless, says you cannot wait for the consequences to --

JUSTICE GINSBURG: That was a disparate treatment case.

MS. SOLOMON: Correct, but there's no --

JUSTICE GINSBURG: And the argument here is disparate impact is different because there is no need to show intent of disparate impact.

MS. SOLOMON: Correct. But the only practice in this case that had a disparate impact in the sense used by the statute was when the tiered eligibility list was made. After that, of course there was a consequence of that. Consequences can be felt in employment for a long time. The people in the well-qualified pool were hired before Petitioners, they were paid before Petitioners, they are going to get their pensions before Petitioners. Those things continue to have consequences.

But the Court has made clear that the consequences cannot be challenged by themselves unless there actually is a present violation. Now, there is not even an argument in the other side's briefs, neither of them, that explains why there was an adverse impact based on race under (a)(2) at any point when the city used the list. If one reads the briefs very carefully, one will see that those times when a claim is made in the briefs that we used an unlawful practice. It always goes back to the test and the list.

Simply keeping the list up after we announce it is not a new violation. It is quite clear in the cases that the employer does not have to change a decision in order to obtain repose.

And of course, the disparate treatment and disparate impact are simply different methods of proving a claim. They are not different claims by themselves. In this case, in addition to the statutory language, there are a number of policy reasons that while we don't rely on them heavily, we do rely on the statute. They should nonetheless be considered in deciding this. There was no sense in which a claim filed to challenge the list was premature. It was the one act that actually limited and classified Petitioners.

Everything else that happened after that

either didn't affect the Petitioners at all, as in hiring people who had made the cut, or it affected them only in the colloquial sense, that the consequences of the prior act continued.

Chicago did not have to revisit this in order to obtain repose. The statute makes that quite clear.

Mr. Payton emphasizes only the policy of righting employment wrongs but there are other policies in the statute. In addition to repose, the statute makes clear that claims should be brought to the EEOC at the earliest opportunity.

Excuse me. We ask that the judgment be affirmed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Payton, you have five minutes remaining.

REBUTTAL ARGUMENT BY JOHN A. PAYTON

ON BEHALF OF PETITIONERS

MR. PAYTON: Thank you.

This is a case about jobs. And I want to read from the letter that Justice Alito was referring to. This is the letter that the qualifieds received. It's in our Joint Appendix at JA-35 and it's the last sentence of the first paragraph.

This is the letter that they all got. This

is the letter that Arthur Lewis, the named person in the case, got. However, it says: You are qualified; you are qualified; there are well-qualifieds. And it's unlikely that language is their nemesis.

"However, because it is not possible at this time to predict how many applicants will be hired the next few years, your name will be kept on the eligible list maintained by the department of personnel for as long as that list is used."

I did focus on the word "used." And it's not only in section (k). It's also in section (h), where it says, "used to discriminate." Because it's an ordinary word that the city used itself in advising Petitioners in this case.

In the answer to the complaint in this case, which is at Joint Appendix 19, the -- I'm sorry, Joint Appendix 16, the answer to -- actually, the first paragraph in the complaint of this case, the city says as follows -- this is the second sentence in the answer to the complaint: "Defendant, the city, admits that it has used and continues to use results of the 1995 firefighter entrance examination as part of its firefighter hiring process. Using an unlawful cut off score and the eligibility list is nothing other than the functional equivalent of the cutoff score, using that to

make decisions on those 11 times is a violation of Title VII.

And the argument that there is no additional impact, it is the dramatic difference between being told what someone intends to do and then they do it. You are told that maybe your chances are going to be minimal in the future, or maybe 50/50, but then when it actually starts happening and you see other people start getting jobs, that's an impact. That's a consequence.

When I said the animating principle and disparate impact is results in consequences it's result in consequence. Those are additional impacts that go with the additional uses that clearly establish a violation of Title VII's disparate impact prohibition in this case.

I don't think the statutory language is actually. I think the best reading, as I said, of the statutory language is as I said. I think the policies behind how that works, it is 300 days after every use. There is a statute, but, in fact, the control over that is entirely within the city. If they stopped using this unlawful cutoff score after 300 days, they are completely done with any consensual liability.

And the point is you want that to be challenged, because we don't want unlawful employment

practices to continue to go forever, and ever and ever and ever out there. And we can see in this very case that if you don't allow the challenge, the practice goes on, and is inconsistent with what I would say the national policy to rid our workplace of discrimination.

Any other questions otherwise?

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)