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Supreme Court Finds *Firefighters Were Subjected to Reverse Discrimination*

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Perhaps no employment law decision has been more eagerly anticipated in 2009 than the US Supreme Court's opinion in [Ricci v. DeStafano](#). The case involved 18 white firefighters and one Hispanic firefighter who sued the City of New Haven, Connecticut, arguing they were victims of "reverse discrimination" because the City refused to certify promotional test results that adversely impacted minority applicants. The City cited fears of a lawsuit from African-American candidates under the "disparate impact" theory of discrimination, which led to not certifying the promotional test results. On June 29, 2009, the Court held in a 5-4 majority opinion that the City of New Haven unlawfully and intentionally discriminated (used "disparate treatment") on the basis of race against those who qualified for promotion.

This article examines the [Ricci](#) Supreme Court decision and the legal theories of "disparate impact" and "disparate treatment" discrimination that were at odds for the City of New Haven's Fire Department, as well as the future impact of this landmark case.

Facts of the Case

The facts in [Ricci](#) involved promotional examinations required under a collective bargaining agreement between the City of New Haven and the New Haven's Firefighters Union. Firefighter candidates were measured based on a written exam (accounting for 60% of the scoring) and an oral component (40% of the scoring). The written exam was created by an outside, objective third-party company in order to fill lieutenant and captain positions within the fire department.

For 8 open lieutenant positions, 77 applicants completed the exam (43 white, 19 African-American and 15 Hispanic). Of these, 34 applicants passed the exam (25 white, 6 African-American and 3 Hispanic), and all of the top 10 scorers were white.

While 41 applicants took the captain's exam, only 22 passed (16 white, 3 African-American and 3 Hispanic). There were 7 captain positions vacant, with 7 whites and 2 Hispanics as the top 9 scorers.

Under the City of New Haven's pre-established "rule of three," once the promotional exam results are certified by the City, the Fire Department is obligated to promote the applicants with the top 3 scores. Therefore, no African-American firefighters would have qualified for any of the lieutenant or captain positions.

Legal Dilemma for the Fire Department

The City of New Haven held hearings to consider the possibility that the tests were racially biased based on the disproportionately low number of minority candidates who passed the exams. In the end, the City decided not to certify the results of the exams, citing the fear of being sued by African-American candidates under the legal theory of "disparate impact" discrimination. Refusing to certify the promotional test results thus deprived the successful examinees of a place on the promotion list.

Continued on page 2

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Clearly the City of New Haven found itself “between a rock and a hard place.” In fact, during oral arguments before the Supreme Court, Justice Souter commented on the City’s “damned if you do, and damned if you don’t” position in the possibility of being sued either way. On one hand, the City could face a disparate impact lawsuit from African-American candidates who were adversely impacted by the promotional exam results. On the other hand, the City could face a disparate treatment discrimination claim from the white candidates who qualified for promotion under the City’s examination process but were not awarded the positions.

Analyzing “Disparate Impact” and “Disparate Treatment”

“Disparate treatment” in employment is defined as intentional discrimination on the basis of a protected characteristic (gender, race, national origin, age, disability, religion). In the Ricci case, the non-minority firefighters sued the City of New Haven under a disparate treatment theory, alleging the City violated their civil rights by ignoring the promotional test results, thus engaging in unlawful race-based discrimination.

Before the Supreme Court, the City of New Haven argued that its refusal to certify the promotional test results was based on its good faith belief that doing so would have resulted in unlawful “disparate impact” discrimination. This legal theory for proving unlawful employment discrimination is also referred to as “adverse impact” and may be defined as the adverse effect of a standard or practice that is neutral and nondiscriminatory in its intention, but nevertheless disproportionately affects individuals who are members of a protected class. Even in instances where an employer is not motivated by discriminatory intent, Title VII of the Civil Rights Act of 1964 prohibits an employer from using a neutral employment practice that results in an unjustified adverse impact on members of a protected group.

In cases that apply the disparate impact theory of discrimination, the individual alleging discrimination must prove, usually through statistical evidence, that the challenged practice has a substantial and significant adverse effect on a protected group. If the individual can make this demonstration, the employer may be liable for discrimination unless it can show that the practice in question is job-related and consistent with business necessity. It is the employer’s burden to make this showing, and a failure to provide any justification for the practice will likely result in a finding of liability. Even if an employer can demonstrate that a practice is justified, moreover, the individual will be given an opportunity to prove that there are other available practices that would also serve the employer’s purposes but with less impact on the protected group.

Supreme Court’s Decision

Writing for the majority, Justice Anthony Kennedy held that the City’s action in discarding the tests violated Title VII. Kennedy wrote, “The City rejected the test results solely because the higher scoring candidates were white,” adding that the possibility of a lawsuit from minority firefighters was not a lawful justification for the City’s action. “Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”

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The Supreme Court attempted to explain the competing “disparate impact” and “disparate treatment” provisions that the City of New Haven faced in its “damned if you do, and damned if you don’t” legal dilemma. In this attempt, the Court established a “strong basis in evidence” standard. The Court held that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action.

According to the facts in Ricci, the Court determined that a threshold showing of significant statistical disparity, and nothing more, is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That is because the City could be liable for disparate impact discrimination only if the exams at issue were not job-related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City’s needs, but the City refused to adopt.

What seemed to trouble Justice Kennedy in part was the idea of changing the rules after a test had been set. “Once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed . . . and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.”

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Impact of the Ricci Decision

As always, an employer should analyze its promotional and other selection processes and criteria to ensure its system is related to the job and is unbiased. The Ricci holding also reminds emergency service organizations that “reverse discrimination” claims are viable under Title VII, and they must be cautious with instituting and managing diversity and affirmative action initiatives. Next, Ricci teaches employers that they cannot make race-based decisions that adversely affect employees merely because there is a statistical disparity in the results of a promotion test. Lastly, employers can now be somewhat more confident in backing test results that may demonstrate some disparate impact, so long as the test is objective and no other less-discriminatory alternative exists.