



EMPLOYMENT AND LABOR UPDATE

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Our Employment and Labor practice has decades of experience litigating virtually all types of employment and traditional labor claims before federal and state courts and agencies, ranging from single-plaintiff cases to complex class actions.

We also provide comprehensive counseling to our clients on a wide variety of employment and labor issues.

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***Ricci v. DeStefano: Supreme Court Holds Strong-Basis-in-Evidence Standard Applicable to Competing Title VII Provisions***

In a 5-4 opinion in *Ricci v. DeStefano* (June 29, 2009), the United States Supreme Court held that the City of New Haven's decision to discard promotional tests that resulted in disproportionately lower scores for minority examinees was discriminatory against the white and other employees who had received qualifying scores. In weighing the competing interests at stake, the Court established that "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."

In *Ricci*, the city of New Haven ("the City") administered exams to firefighters for promotion to the ranks of lieutenant and captain within the fire department. The City hired an outside vendor to design the test and deliberate steps were taken to include minority individuals in the test design and application process to ensure that the tests "would not unintentionally favor white candidates." After the test was administered, the statistics showed that there was significant disparity between the scores of white examinees and minority examinees, such that no African American candidate would be eligible to be considered for either position. The City and the Civil Service Board held hearings on the test results where people spoke for and against certifying the test results. Rather than performing a validation study on the tests, and confronted with threats of litigation either way (by firefighters who agreed and disagreed with the tests' fairness and the results), the test results were not certified based on the statistical racial disparity. The plaintiffs, 17 white firefighters and 1 Hispanic, brought the present action claiming both Equal Protection violations under the U.S. Constitution and violation of Title VII for disparate treatment based on race.

The District Court had ruled for the City. It held that the City had not violated Title VII and that its actions were not based on race because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." The District Court also rejected the plaintiffs' Equal Protection claim with a finding that there was no discriminatory animus toward the plaintiffs. The Court of Appeals for the Second Circuit, in a panel that included

President Obama's Supreme Court nominee Judge Sonia Sotomayor, upheld the District Court ruling in a one paragraph *per curiam* opinion that adopted the District Court's reasoning.

Title VII of the Civil Rights Act prohibits employment discrimination that is direct (known as "disparate treatment") as well as, in some cases, indirect practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact"). Disparate treatment occurs when an employer treats an individual less favorably because of a protected trait, like race. Disparate impact discrimination can occur when an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," even if the impact was unintentional. The Court was faced with competing arguments, on the one hand by the City that it tossed out the test results to avoid a disparate impact claim, and on the other hand by the plaintiffs that they were subject to disparate treatment.

The Supreme Court began its decision by stating that the "City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense." The Court stated that by throwing out the test scores due to concerns about racial disparities in the results, the City had taken an action because of an individual's race, which is prohibited under Title VII absent a valid defense. The Court continued that although the conduct was discriminatory, the City nevertheless would not be liable under Title VII if there was a lawful justification for the race-based action. The Court acknowledged that the City claimed it was justified in its actions of disparate treatment because of the alleged disparate-impact the tests had on the minority candidates. It observed that Title VII's competing provisions "must [be] interpret[ed] . . . to give effect to both provisions where possible."

The parties took diametrically opposed positions in arguing whether concerns about a disparate impact in test results can ever justify disparate treatment in resolving those concerns.

The plaintiffs argued that concerns about unintentional discrimination (disparate impact) can never justify intentional discrimination (disparate treatment), at least without conclusive proof that the test in question actually had a legally prohibited disparate impact. By contrast, the City argued that its actions were justified (even if amounting to disparate treatment) as long as it had a "good faith belief" that the test involved a potential disparate impact based on race or some other legally protected characteristic.

The Supreme Court rejected both of these approaches as too extreme and instead formulated a test that it believed better balanced the competing concerns involved in cases of this nature. Specifically, the Court held that an employer could disregard test results based on concerns about an unlawful disparate impact only when it has "a strong-basis-in evidence" for the concerns. Absolute certainty is not required, but a mere good faith belief will not suffice either. The Court further observed that "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The Court then held that the City had not established the necessary strong basis in evidence for discarding the test results on the facts of the *Ricci* case. The Court noted that a statistical disparity in test results is not necessarily sufficient in and of itself because disparities can, in some cases, be lawful if the test otherwise is job-related and consistent with business necessity, and if there is no other equally valid, less-discriminatory alternative that served the employer's needs. The Court found that the tests in question had been carefully designed to be job-related and consistent with business necessity, and that the City produced no evidence of an equally valid test that involved less of an impact on minority examinees. While the City had relied on various verbal statements expressed by firefighters and certain third parties at hearings involving the test results, the Court found that those statements, unsupported by any

rigorous analysis or even a review of the tests themselves in some instances, did not constitute a “strong basis in evidence” for the City’s concerns.

Because the Court was able to decide the case based on the Title VII holding, it did not consider the plaintiffs’ Equal Protection claim. In a special concurrence, however, Justice Scalia observed that the Court eventually may be called upon to decide whether the U.S. Constitution permits Title VII to be applied as it was in the *Ricci* case, that is, to permit or require a form of *intentional* discrimination based on race (or other protected characteristic) in order to avoid *unintentional* discrimination.

The four-member dissent, authored by Justice Ginsberg, criticized the majority opinion for ignoring the fact that “[f]irefighting is a profession in which the legacy of racial discrimination casts an especially long shadow.” The dissent argued that the majority ignores the fact that there were other equally valid, less-discriminatory alternative tests that could be used, as demonstrated by evidence of other tests used in other fire departments, that would have served the New Haven department’s needs. Further, the dissent warns that the strong-basis-in-evidence standard will make compliance with Title VII expensive for employers because “an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic.”

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