PERSPECTIVES

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Between a Rock and a Hard Place: The United States Supreme Court Decision in *Ricci v. DeStefano*

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Employers often find themselves walking the tightrope of trying to eliminate bias in the workplace without favoring employees in protected classes or appearing to show favoritism to those employees. This was the predicament in the City of New Haven, Connecticut. When a promotional exam was given to firefighters and 18 people qualified for promotion, none of the African-American firefighters scored high enough to qualify. Concerned that the testing resulted in a "disparate impact" on the African-American employees and seeking to avoid litigation, the City did not promote any firefighters based upon the test results. The firefighters who had qualified for promotion (11 white and 1 Hispanic) sued, claiming the City had unfairly used their race in refusing to promote them.

Title VII Claims

Title VII of the federal Civil Rights Act of 1964 prohibits intentional acts of employment discrimination based on race, color, religion, sex and national origin. 42 U.S.C. § 2000e-2(a)(1). This is known as "disparate treatment." The firefighters who were not promoted sued the City claiming disparate treatment based upon their race. This type of lawsuit brought by "non-minorities" is sometimes referred to as a "reverse" discrimination claim. The claim is brought under Title VII, just as any other claim of discrimination under Title VII.

Title VII also prohibits policies or practices that have a disproportionately adverse effect on minorities, whether intentional or not. 42 U.S.C. § 2000e-2(k)(1)(A)(i). This is known as "disparate impact." It was this type of claim the city was trying to avoid by invalidating the test results because no African-American employees had qualified for promotion. An employer **can** engage in an act of intentional discrimination to avoid or remedy disparate impact if there is evidence that the employer would be subject to liability for disparate impact. This means an employer must evaluate whether there is a strong basis in evidence to determine whether remedial action – like invalidating the tests – is necessary. Therefore, if the test would have subjected the City to liability because it unlawfully and disparately impacted the African-American employees, the City could throw out the test results and not promote the white employees.

An employer can defend against a disparate impact claim by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer meets that burden, a plaintiff can still succeed by showing that the employer refused to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C). As such, if the City's test was not job-related or consistent with business necessity, or if there was an alternative practice or test that met the City's legitimate needs and had less disparate impact and the City refused to use the alternative, it could have been liable to the African-American employees had they sued.

In *Ricci*, all the evidence showed that the City rejected the test results because the higher scoring candidates were white. Therefore, the City had to show that there was a strong basis in evidence supporting the decision to reject the test results. That is, the City had to show either that the test was not job-related or consistent with business necessity, or that the City had refused an equally valid alternative with less disparate impact. Otherwise, the express race-based decision-making was a violation of Title VII.

This was a strange position for an employer – to have to argue that one of its employment practices (in this case, the test) was flawed in order to justify a subsequent remedial action that was race-based.

The Result

On June 29, 2009, the United States Supreme Court ruled five to four that the firefighters in *Ricci v. DeStefano* were unfairly denied promotions because of their race, reversing the decision from the Second Circuit.[1] The Court noted, "Fear of litigation alone cannot

justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions," therefore, "this express, race-based decision making is prohibited." The Court found that even if the City was trying to protect minorities against an unfair test, there was "no substantial basis in evidence [this] test was deficient." Therefore, because there was not enough evidence that there was a problem with the test, the Supreme Court found that the City could not use the potential for disparate impact liability as a basis for invalidating the test.

Specifically, the Court reiterated the standard that there needed to be a "strong basis in evidence" to support the employer's belief that it will be subject to disparate-impact liability unless it engages in intentional (reverse) discrimination to avoid the unintentional disparate impact. In *Ricci*, the Court found that city officials lacked a strong basis in evidence to believe the test was not job-related or that there was an equally valid, less discriminatory alternative to the examinations that served the City's needs. Because of the significant racial disparity in the test results, the City met the initial threshold of disparate impact; however, this alone did not meet the strong basis in evidence test.

What This Means for Employers

Be a savvy consumer. Employers that use testing as the basis for promotions should fully investigate the proposed testing to determine if there is a track record regarding issues of disparate impact. Some questions to ask include:

- Does the testing directly relate to qualifications for the position?
- Has the testing been used in diverse workplaces and what were the results?
- What equally valid alternatives are there to the testing and do those alternatives produce less of a disparate result?

Based upon that research, an employer must be ready to defend the testing.

Watch for disparate impact. While you do not want to inject race into the evaluation of a situation unnecessarily, employers should keep an eye out for disparate impact. Remember, however, that statistics are not the only way to measure liability for disparate impact.

Don't be "over-protective." Even though employers should keep the potential for disparate impact on the radar, if there is no evidence of discrimination or a need for remedial action, don't engage in so-called "reverse" discrimination.

Get help. If you find yourself in a situation with the potential for disparate impact liability, contact legal counsel for a thorough review of the situation.

If you have questions regarding discrimination claims, please contact a member of the Firm's Employment and Labor Law Group or the Dickinson attorney with whom you normally work.

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[1] This case was of special interest this summer because the unanimous ruling affirming the district court's granting of summary judgment in favor of the City was handed down by a panel of judges which included now-confirmed Supreme Court Justice Sonia Sotomayer. When the Supreme Court ruled on *Ricci*, Justice Sotomayer was still in the process of being vetted for the high court.

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