

Client Advisory | July 2009

## A Catch-22 for Employers: Supreme Court Rules Against City of New Haven in Reverse Discrimination Case

In a 5-4 decision, the United States Supreme Court in *Ricci v. DeStefano* offered little in the way of practical guidance to employers walking the fine line of race-neutral hiring and employment practices, but provided no shortage of controversy for pundits and commentators. Not only did the five-justice majority side with plaintiffs, a group of predominantly white firefighters, in this contentious, high-profile reverse discrimination lawsuit, they also criticized and overturned a Second Circuit Court of Appeals panel which included Supreme Court nominee Sonia Sotomayor.



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Setting aside the political implications of its decision, the Court addressed an issue of first impression in the civil rights framework by resolving an open conflict between competing anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 (“Title VII”).

The plaintiffs in this case are 18 New Haven, Connecticut (“the City”) firefighters (17 white and one Hispanic) who took and passed an examination designed by the City to identify candidates for promotion within the fire department. To create the examination, the City hired an outside consultant who took a number of what were determined to be precautionary steps to create a racially unbiased examination. However, when the City received the results of the examination, it was clear that white candidates had performed better across the board than their black and Hispanic peers. Based on the examination, disparately few minority firefighters would be selected for promotion. Accordingly, the City held a series of meetings to debate the results with City officials, the City’s attorney, firefighters, citizens and various experts and, ultimately, refused to certify the examination results because the examination clearly had a disparate impact on minority firefighters.

Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin, including discrimination that is

intentional (“disparate treatment”) and discrimination that is unintentional, but nonetheless has a disproportionately adverse effect on minorities (“disparate impact”). Plaintiff firefighters alleged that the City’s refusal to certify the examination results on the basis of race was a violation of the disparate treatment prong of Title VII because the City’s action was based solely on the fact that white firefighters outscored minority firefighters. The City argued that it was justified in refusing to certify the examination because the results demonstrated a disproportionately adverse effect on minorities. The City concluded that its use of examination results in awarding promotions would violate the disparate impact prong of Title VII and subject it to liability. The District of Connecticut granted the City’s motion for summary judgment, and the Second Circuit affirmed.

The Supreme Court granted *certiorari* and reversed, holding that the City’s refusal to certify the examination results violated the disparate treatment prong of Title VII. First, the Court found as a matter of law that the City’s decision to throw out the examination based on the racial disparity of the results was *per se* disparate treatment. In other words, the City made its decision solely based upon the racial disparity of the examination results. The Court then examined whether the City’s

refusal to certify the examination based on its clearly discriminatory results was justified. The Court likened the City's refusal to certify the examination to the creation of a *de facto* quota system, which is prohibited by **Richmond v. J.A. Croson Co.** The Court held that an employer cannot engage in such disparate treatment unless it can articulate a "strong basis in evidence" that its failure to do so would have a disproportionately adverse effect on minorities. While the Court's holding did not overrule **Griggs v. Duke Power Co.**, which requires that employment practices such as the examination must be directly tied to job requirements and "business necessity," it certainly limits an employer's ability to disregard results of examinations which it believes do not comply with **Griggs**.

The Court's reasoning in **Ricci** applies most directly to public hiring and screening practices, the results of which examinations are often required to be made public. Still, a private employer should be wary of

utilizing any standardized examination, test or other criteria to determine priority for employee hiring or promotion. If such a process is deemed necessary, it is critical that all efforts be made to ensure that the test or process used for the evaluation be racially neutral. For instance, the **Ricci** Court approved of the City's hiring of a consultant to design the a race-neutral examination. Once the decision has been made to utilize an examination, an employer generally must accept the results, even in the face of evidence and accusations that the process has a disparate impact on a protected group. After all, under **Ricci**, an employer can only throw out examination results where it can articulate a "strong basis in evidence" that the examination had a discriminatory impact. For these reasons, an employer wishing to avoid the City's "no-win" dilemma should ensure that any standardized selection process be racially neutral and closely tied to the particular requirements of the job.

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