

U.S. Supreme Court Holds That City Discriminated Against White Firefighters

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Yesterday, the U.S. Supreme Court held in a case of so-called reverse discrimination that the City of New Haven, Connecticut discriminated against 17 white firefighters and one Hispanic firefighter by refusing to certify the results of a promotional exam. The City argued that if it had certified the results, it risked litigation by black firefighters who claimed that the exam had a disparate impact upon minorities. The Supreme Court rejected this defense, holding that there was not a strong basis in evidence to demonstrate that the exam itself discriminated against minority candidates.

In *Ricci v. DeStefano*, the City of New Haven retained an outside consultant to design and implement an exam to identify candidates for promotion to lieutenant and captain positions within the fire department. In developing the test, the consultant assessed the knowledge, skills and abilities required by the positions and, in doing so, over-sampled minority firefighters to ensure that the examination would not favor white candidates. All candidates were directed to the source material for the test questions. Although the exam included an oral component, as well as a multiple choice written exam, two-thirds of the panelists for the oral exam were minority firefighters and every three-member panel consisted of two minorities. Nonetheless, the results of the examination were skewed in favor of white candidates. In fact, had the City certified the results, no black candidates would have been entitled to immediate promotion to lieutenant or captain under the City's established practices. Thus, the City held a hearing on whether to certify the results. Several witnesses and city officials stated that the results suggested that the examination had a disparate impact upon minorities. Ultimately, the City deadlocked on the issue, resulting in a decision to not certify the results.

Eighteen white and Hispanic firefighters who passed the exam and who would have been promoted if the results had been certified, sued the City for race discrimination under Title VII of the Civil Rights Act. The City argued that its decision was justified because its intent was to avoid a disparate impact lawsuit. The District Court granted summary judgment to the City, concluding that it was not motivated by discriminatory intent and was not obligated to certify the test results. The Second Circuit affirmed the District Court's decision and adopted its reasoning.

The Supreme Court, in a 5-to-4 decision, reversed and granted summary judgment to the plaintiff firefighters. The Court explained that absent some valid defense, the City's refusal to certify the results constituted intentional discrimination in violation of Title VII's disparate treatment provision. The City had argued that it had a good faith belief that its actions were necessary to avoid a disparate impact in violation of Title VII and that such belief constituted a valid defense. A majority of

the Court rejected this argument and held that the employer must have a “strong basis in evidence” that a race-conscious act was necessary to avoid disparate impact liability. In this respect, the Court explained that the City’s fear of litigation by minority firefighters was insufficient. Instead, a “strong basis in evidence” required a showing that the test was flawed because it was not job-related or that there were other equally valid but less discriminatory tests available to the City. The Court found that the City did not meet such a showing because the exam was developed in a race neutral manner and there was little evidence of an equally-valid alternative testing method. It thus held that the City had discriminated against the white and Hispanic firefighters by refusing to certify the results of the promotional exam.

Although *Ricci* involved a public employer, the Court’s analysis applies equally to private employers. The bottom line is that all employers must tread carefully when attempting to correct an apparent racial or gender disparity in the workforce. Rather than disavow the results of a hiring or promotional policy, employers should focus on developing processes that are open, fair and neutral and then accept the results of those processes. Unfortunately, this exposes employers to disparate impact claims, but *Ricci* implicitly suggests that plaintiffs will face an uphill battle in bringing such claims.