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## *Ricci v. DeStefano*: Supreme Court Articulates Anti-Discrimination Standard for Employers

The Supreme Court, in a divided decision, recently held that the City of New Haven discriminated against one Hispanic and 17 white firefighters, Plaintiffs in *Ricci v. DeStefano*, by disregarding promotion examinations where racial minorities as a group performed poorly. The Court's legal analysis of Title VII of the Civil Rights Act of 1964 is important to private as well as public employers, all of whom are covered by Title VII's anti-discrimination mandate.

The basis of the lawsuit was a selection method for promotion that many employers use: a test. As mandated by its charter, New Haven relies on examinations to choose the most qualified firefighters for promotion. The results of the examinations that were administered in November and December of 2003 varied considerably among racial groups. For example, on the captain exam, 64% of white candidates passed while only 37.5% of minority candidates passed. On seeing the results, some candidates threatened a discrimination lawsuit against New Haven based on the impact of the test on minorities. The City initiated an investigation and held five public meetings to evaluate the fairness of the test. It decided that the test might disproportionately and unlawfully affect minorities and thus decided to throw out the results. Plaintiffs, who had scored well and would have likely received promotions had the test results not been invalidated, sued the City and some of its officials. The case wound its way through the courts and the Supreme Court issued its decision on June 29, 2009.

In holding that the City's decision was racially discriminatory, the Court analyzed two principles that govern employers' actions in the racial discrimination arena: "disparate impact" and "disparate treatment." Under a "disparate treatment" analysis, it is unlawful for employers to treat people differently because of a protected characteristic without proper justification. Under a "disparate impact" analysis, employers are prohibited from engaging in practices that are not meant to be discriminatory but that in fact have a disproportionately negative effect on a protected group.

*Ricci* demonstrates the dilemma that many employers can find themselves in when faced with these two sometimes competing principles. Although the promotion test was administered in good faith and meant to be neutral, the City feared that, if it certified the test results, it might be liable for racial discrimination under a "disparate impact" analysis because of the relatively poor performance of minorities. On the other hand, a decision to throw out the test results could—and eventually did—expose it to "disparate treatment" liability for making a decision based on race without enough justification. Many employers have to ask themselves exactly what New Haven had to ask itself in this situation: Under what circumstances can the employer make a decision

based on race in order to avoid possibly unlawful discrimination that might be the inadvertent result of its practices?

The Court's answer is that a "race-based action," like that of New Haven's in *Ricci*, is impermissible unless there is a "strong basis in evidence" that it is necessary to avoid disparate impact liability. It rejected both extremes of the spectrum: A mere good-faith belief that it is necessary to take race-based action in order to avoid unlawful disparate treatment does not suffice to justify a decision based on race. At the same time, an employer need not in fact be in violation of the disparate impact principle before it can take race-based measures. The reality of making decisions that fall in the middle of these extremes will be difficult for employers, but the Court provided some rough guidance: A purely statistical disparity—even one so "significant" that almost no minorities would be represented in firefighter leadership positions despite a 60% city-wide minority population—does not alone suffice to justify race-based remedial action. However, it is enough for employers to initiate an investigation into what actions created the statistical disparity and the likelihood that they would give rise to "disparate impact" liability. Employers will be able to implement a race-based solution to the impact problem only if the investigation reveals that there is a strong basis in evidence that the cause of the disparity is not job related and consistent with business necessity, or that there exists an equally valid, less-discriminatory alternative that serves an employer's needs that the employer refused to adopt.

These principles should be more generally applied by employers to all characteristics protected by Title VII: color, religion, sex, and national origin. In addition, they should be applied to analogous situations, such as screenings for new hires or termination standards that seem to result in a disproportionate impact on a protected group.

Nevertheless, employers might not have to second-guess all of their practices motivated by protected characteristics. The Court was careful to point out that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race." That is to say, *Ricci* should not affect an employer's ability to consider racial issues in the development of its policies and practices even though that consideration is arguably a "race-based action." This is because it is only when an employer engages in "intentional discrimination" with the goal of "remedying an unintentional disparate impact" that an employer must have a "strong basis in evidence" for its race-based actions. Thus, *Ricci* will probably not affect the status of most diversity groups, awareness programs, anti-discrimination training sessions, and other actions in the workplace motivated by a protected characteristic that are designed to promote the inclusion and fair treatment of traditionally under-represented groups generally rather than remedy a particular situation of possibly disparate impact.

Although the *Ricci* case should not influence many of employers' decisions regarding protected characteristics, it nevertheless creates a difficult situation when it does apply. Employers who are considering correcting a possibly discriminatory situation with a racially-motivated action may have to interpret how "strong" a "strong basis in evidence" really is with little practical guidance from the Court. The split nature of the decision also reflects the divisiveness of opinion on the matter and thus, the uncertain long-term sustainability of the current standard. For now,

employers can only be diligent in the scrutiny of their practices and seek legal advice when faced with the difficult balancing act they are required to perform under *Ricci*.