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LEGAL ALERT



Legal Alert: Supreme Court Rules in Favor of Firefighters in High-Profile Discrimination Case, Sets New Standard for Evaluating Disparate Treatment Versus Disparate Impact

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Today the Supreme Court resolved an inherent tension between Title VII's disparate treatment and disparate impact provisions, holding that the mere desire to avoid liability under Title VII's disparate impact provision does not automatically justify a conscious decision to violate the statute's disparate treatment provision. See *Ricci v. DeStefano* (June 29, 2009). Title VII's disparate treatment provision prohibits intentional discrimination on the basis of a protected category, while the disparate impact provision prohibits certain practices that are not intended to discriminate but, in fact, have a disproportionately adverse effect on minorities. Recognizing the difficulty employers may face in balancing these competing interests, the Court adopted a "strong basis in evidence" test to be used in such situations. Under this standard, employers must demonstrate that a strong basis in evidence exists that their actions might violate Title VII's disparate impact provisions before employers can make race-based decisions.

Applying the standard in this case, the Court held that several white and Hispanic firefighters were entitled to judgment in their favor on their claims that the City of New Haven intentionally discriminated against them when it refused to certify the results of tests administered to determine which firefighters qualified for promotions. The City refused to certify the test results based on a concern that the tests had a disparate impact on minorities. However, the Court held that the City failed to show that it had "an objective, strong basis in evidence to find the tests inadequate."

Factual Background

The City of New Haven, Connecticut, went to great lengths to establish a racially-neutral testing system for its fire department promotional opportunities, including hiring an outside company to create the tests. The company designed the tests based on information obtained from job analyses it developed, which identified particular tasks, knowledge, skills, and abilities essential for the lieutenant and captain positions. Throughout the entire process of developing the tests, the company consciously over-sampled minority firefighters to ensure that the results would not unintentionally favor white candidates. The company developed both written and oral examinations.

In November and December 2003, 77 candidates completed the lieutenant examinations—43 whites, 19 blacks, and 15 Hispanics. Of those candidates, 25 whites, 6 blacks, and 3 Hispanics passed. During that same time, 41 candidates took the captain examinations—25 whites, 8 blacks, and 8 Hispanics. Of those candidates, 16 whites, 3 blacks, and 3 Hispanics passed. Applying the city's collectively bargained for rule-of-three, this meant the top ten candidates for lieutenant, all of whom were white, were immediately eligible for promotion. Nine candidates for captain (seven white and two Hispanic) were eligible for immediate promotion.

Because the test results yielded lower passing rates for blacks (32% on the lieutenant and 38% on the captain examinations) and Hispanics (20% on the lieutenant and 38% on the captain examinations) compared to whites (58% on the lieutenant and 64% on the captain examinations), the City Attorney expressed concern that the test had a disparate impact on minorities that might subject the city to Title VII disparate impact liability if the results were certified by the Civil Service Board (CSB). Over the course of several hearings with the CSB, various people testified regarding whether the CSB should certify the results. Ultimately, the CSB did not certify the test results.

Subsequently, seventeen white and one Hispanic firefighter who passed the examinations but were denied a chance at promotion filed suit under the disparate treatment provision of Title VII. The plaintiffs also brought claims for conspiracy to deprive them of their constitutional rights under 42 U.S.C. § 1985, and they challenged the CSB's decision based on the Equal Protection Clause of the Fourteenth Amendment. The trial court ruled in favor of the City and the court of appeals affirmed.

Majority Opinion

Writing for a majority of the Court, Justice Kennedy (joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito), reversed. First, the Court recognized the tension between the competing provisions of Title VII by noting, "Our analysis begins with this premise: the City's actions would violate the disparate-treatment prohibition of Title VII absent some defense." But, the Court concluded, a mere desire to avoid liability under Title VII's disparate impact provision does not automatically justify a conscious decision to violate Title VII's disparate treatment provision. Thus, recognizing these competing interests and the difficulty employers may face in straddling them, the Court set about adopting a test for employers to use.

Drawing on the Court's equal protection jurisprudence, the Court adopted the "strong basis in evidence" standard laid down in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). This standard requires employers to demonstrate a strong basis in evidence exists that their actions might violate Title VII's disparate impact provisions before employers can make race-based decisions. The Court found this test balanced the competing interests of Title VII's disparate treatment and disparate impact provisions without amounting "to the sort of racial preference that Congress has disclaimed" in § 2000e-2(j). The Court was careful to note that nothing in this test "prohibit[s] 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 race."

Turning to the merits of the case in light of the newly announced standard, the Court went on to hold that the plaintiffs were entitled to summary judgment on

their Title VII disparate treatment claims, because "the record makes clear there is no support for the conclusion that [the City] had an objective, strong basis in evidence to find the tests inadequate" And, while the Court acknowledge that firefighters challenging the test score certification could have made a *prima facie* showing of disparate impact discrimination, "a *prima facie* case of disparate-impact liability – essentially a threshold showing of a significant statistical disparity, and nothing more – is far from a strong basis in evidence that the City would have been liability under Title VII had it certified the results." Based on the record before it, the Court found the test was both job-related and consistent with business necessity, thus meeting the standards set forth in § 2000e-2(k)(1)(A) through (C).

Justice Scalia's Concurrence

Justice Scalia, who joined Justice Kennedy's opinion for the Court, wrote a short concurrence that raised the specter of a future challenge to Title VII's disparate impact section:

I . . . write separately to observe that [the Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?

As Justice Scalia went on to note, while Title VII's disparate treatment provisions do not permit an employer to make race-based decisions when a disparate impact violation would not occur, it is clear that Title VII not only permits but "affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result." Following the logic that the federal government cannot discriminate on the basis of race, Justice Scalia opined that "surely it is also prohibited from enacting laws mandating that third parties – e.g., employers, whether private, State, or municipal – discriminate on the basis of race." According to Justice Scalia, however, "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."

This concurrence may be more significant than the Court's majority opinion and the newly adopted test for balancing Title VII's disparate treatment and disparate impact provisions. If this analysis were employed by a majority of the Court at some future date – something by no means guaranteed, but certainly not a stretch of the imagination given the current make-up of the Court and the early voting trends of the new Roberts Court – it could invalidate an entire section of Title VII. Certainly, there will be those willing to test this pronouncement to see if it does carry a majority of the Court or whether it truly represents Justice Scalia's opinion alone.

If you have any questions regarding this decision, please contact the author of this Alert, Matthew R. Scott, a partner in our Dallas office, mScott@fordharrison.com, 214-256-4706, or the Ford & Harrison attorney with whom you usually work.