



Supreme Court Decides Reverse Discrimination Case By Reconciling Disparate-Treatment and Disparate-Impact Provisions of Title VII

In *Ricci v. DeStefano*, a highly anticipated and closely watched case, the US Supreme Court held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."

Background

The City of New Haven, Connecticut (City) used objective examinations to identify the best qualified candidates for promotions of firefighters. In 2003, the City tested 118 firefighters for possible promotion to the rank of lieutenant or captain. The pass rate for minority candidates fell well below the benchmark set by the EEOC known as the Four-Fifths Rule or the 80-percent standard. (Pursuant to EEOC regulations, if the pass rate for minority candidates is less than 80 percent of the pass rate for nonminority candidates, the test in question is presumed to have a disproportionately adverse effect on minority candidates, raising the potential for disparate-impact liability under Title VII.)

Based on the statistical disparities reflected in the test results, the City reconsidered the validity of the exams and held a series of hearings to determine whether certifying the results would have had an impermissible disparate impact on minority candidates. During the hearings, the City was

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confronted with arguments for and against certification, as well as threats of lawsuits from both sides. Faced with this dilemma, the City chose to discard the exam results, thereby promoting no firefighters. As a result, the plaintiff firefighters (17 white firefighters and one Hispanic firefighter who passed the examinations and were likely to be promoted) sued the City alleging that they were discriminated against on the basis of their race in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. The City asserted it could not be held liable under Title VII's disparate-treatment provision because it had a "good-faith" belief that had it certified the exam results, it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.

The district court granted the City's motion for summary judgment, finding its actions did not violate Title VII or the Equal Protection Clause. On appeal, a three-judge panel of the Second Circuit Court of Appeals, which included Judge Sonia Sotomayor – President Obama's pick to replace Justice David Souter on the US Supreme Court – affirmed the lower court's decision.

The *Ricci* Decision

In *Ricci*, the Court was faced with the task of interpreting and reconciling the disparate-treatment and disparate-impact provisions of Title VII. Under the disparate-treatment provision, employers are prohibited from engaging in intentional discrimination on the basis of an employee's race or other protected classification. At the same time, employers may also be liable under Title VII for employment practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minority employees. These two provisions were at odds when the City made the race-conscious decision to discard the promotion exam results in an attempt to avoid potential liability for disparate-impact discrimination because white firefighters statistically outperformed minorities at a disproportionate rate.

Writing for a 5-4 majority, Justice Anthony Kennedy declared that, without some other justification, the City's decision to discard the test results because "too many whites and not enough minorities would be promoted" was a race-based discriminatory action in violation of the disparate-treatment provision of Title VII. Thus, the true question to be decided by the Court "[was] not whether [the City's] conduct was discriminatory but whether the City had a lawful justification for its race-based action" and whether avoiding disparate-impact liability served as that lawful justification.

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At one end of the spectrum, the plaintiff firefighters argued that at no time can an employer take race-based adverse employment actions in order to avoid disparate-impact liability and, to the extent it can, the employer must demonstrate that it was in fact in violation of the disparate-impact provision of Title VII before it can use voluntary compliance as a legal defense to a disparate-treatment lawsuit. In rejecting this argument, Justice Kennedy recognized that "[f]orbidden employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill" and would render "Congress' intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII'" null and void.

At the other end of the spectrum, the City argued that an employer's "good-faith belief" that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to legally justify race-conscious employment decisions. Justice Kennedy also rejected this argument, explaining that allowing employers to violate the disparate-treatment provision based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of a statistical disparity and defeat the primary aims of Title VII. As Justice Kennedy put it, "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

In an attempt to identify a standard that would appropriately balance the competing aims of the disparate-treatment and disparate-impact provisions, the Supreme Court turned to its past decisions addressing somewhat similar issues under the Equal Protection Clause of the Fourteenth Amendment. In the context of the Equal Protection Clause, the Supreme Court previously held that "certain government actions to remedy past racial discrimination – actions that are themselves based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." The majority in *Ricci* adopted the "strong-basis-in-evidence" standard and concluded that applying it to Title VII would give effect to both the disparate-treatment and disparate-impact provisions and allow "violations of one in the name of compliance with the other only in certain, narrow circumstances."

After determining the appropriate standard to be applied, the Court then looked to the particular facts of the case to determine whether the City in fact had a "strong basis in evidence" to objectively believe that it would have been liable under Title VII for disparate-impact discrimination had it certified the statistically disproportionate exam results. The Court

acknowledged that the exam results had a significant adverse impact on minorities and the statistical disparity alone was sufficient to make out a *prima facie* case of disparate-impact liability. Despite these undisputed facts, the majority held that the City was far from being able to demonstrate that it had a strong basis in evidence to believe that it would have been liable under Title VII had it certified the exam results. The majority reasoned that once you moved beyond the *prima facie* case, the City could be liable for disparate-impact discrimination *only if* the examinations were not job-related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that the City refused to adopt. Because the promotion exams were clearly job-related and consistent with business necessity, and there was no evidence (other than a few stray remarks) to suggest that equally valid and less discriminatory tests were available, the City had no lawful justification for discarding the test results and was liable to the plaintiff firefighters under the disparate-treatment provision of Title VII.

By resolving the statutory issue in favor of the plaintiff firefighters, the Court avoided the underlying constitutional question as to whether the City's actions also violated the Equal Protection Clause of the Fourteenth Amendment.

Bottom Line

While the *Ricci* decision was one of the most anticipated cases to be decided by the Supreme Court this term, its practical application is likely to be somewhat limited for several reasons:

- Most employers do not administer similar written hiring and promotional examinations. These examinations are often limited to the civil service sector, used for job applicants seeking civil service employment or promotions. Most employers have adopted better methods for assessing a candidate's on-the-job skills and base their employment decisions on a multitude of other relevant factors.
- To the extent an employer does utilize similar hiring and promotional examinations, the Supreme Court expressly reserved the employer's right to take affirmative steps to develop the exams in such a manner to ensure equal employment opportunities and promotions for all groups. Thus, an employer is likely to avoid liability by simply adopting the necessary measures to effectuate its legitimate aim *before* establishing the selection criteria and *before* administering the actual exams.
- The *Ricci* decision provides employers with very little guidance as to what is required to

demonstrate a "strong-basis-in-evidence." While we know that a *prima facie* case of disparate-impact liability, standing alone, is insufficient to meet the strong-basis-in-evidence standard, it remains unclear as to how much or what type of evidence is actually required to meet the standard.

- *Ricci* failed to address whether meeting the strong-basis-in-evidence standard under Title VII would satisfy the requirements of the Equal Protection Clause. As Justice Antonin Scalia pointed out in his concurring opinion, the majority's decision in *Ricci* "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?" According to Justice Scalia, "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how – and on what terms – to make peace between them."

For further information regarding this decision, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

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