



Labor and Employment Practice

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Supreme Court Rules Race-Based Actions to Remedy Employer's Exam with Disparate Impact Violates Title VII

The Supreme Court ruled (in a 5-4 opinion) today that a city's decision to discard results from promotion qualification exams after most minorities failed to qualify violated Title VII of the Civil Rights Act of 1964. (*Ricci v. DeStefano*, U.S., No. 07-1428, 6/29/09). Because white firefighters passed the exams at a disproportionately higher rate than minorities, discarding the exam results for fear of liability under the disparate-impact statute was a race-motivated decision that violated Title VII absent a valid defense. Writing for the majority, Justice Kennedy held that such race-based actions were impermissible under Title VII "unless the employer can demonstrate a strong basis of evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."

In *Ricci v. DeStefano*, the city of New Haven, Connecticut administered objective examinations to determine which firefighters were best qualified for promotion. When the test results showed that whites had vastly outperformed minority candidates, a public debate ensued over what should be done with the exam results. The City ultimately opted to discard the results due to the statistical racial disparity. White and Hispanic firefighters who passed the exams but were denied promotions because the results were discarded sued the City, claiming the action discriminated against them based on their race in violation of Title VII of the Civil Rights Act. The City responded that had it certified the test results, it could have faced Title VII liability for utilizing a practice that had a disparate impact on minority firefighters. The district court and the U.S. Appeals Court for the Second Circuit affirmed the City's decision to discard the results. Supreme Court nominee Judge Sonya Sotomayor was part of the Second Circuit panel that affirmed the district court's decision in favor of the City. The Supreme Court reversed the lower courts' finding that the City's "motivation to avoid making promotions based on a test with a racially disparate impact... does not, as a matter of law, constitute discriminatory intent."

Title VII prohibits employment practices that involve disparate treatment or that have a disparate impact upon a protected class. In this case, the City feared it would face liability if it did not discard the results because, although the promotion exam appeared non-discriminatory on its face, the results were racially-skewed and would have had a disparate impact upon minorities. Under the disparate impact statute, if a plaintiff can demonstrate that an employer uses a practice "that causes a disparate impact on the basis of race, color, religion, sex, or national origin," an employer may defend against liability by showing that the practice is job-related to the position in question and consistent with business necessity. Even if an employer proves the practice is job-related, the plaintiff can still succeed by showing that the employer refused to adopt an alternative employment practice that is less discriminatory and serves the employer's needs.

The Court recognized the tension between the disparate-treatment and disparate-impact provisions of Title VII in this case. To strike the appropriate balance, the Court considered similar cases

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decided under the Equal Protection Clause of the Fourteenth Amendment. Ultimately, the Court adopted the “strong basis in evidence” standard formulated in *Richmond v. J. A. Croson Co.* to give effect to both provisions of Title VII. Under this standard, the City would only be justified in discarding the exam results if there was a strong evidentiary basis to show the exam was deficient, and discarding the results was necessary to avoid violating the disparate impact provision. However, the record evidence demonstrated that the exams *were* job-related and consistent with business necessity, and there was no evidence of a valid, less-discriminatory testing alternative to the exam in question, there was not a strong basis in evidence to support the City’s decision. The Court explained that “fear of litigation alone cannot justify an employer’s reliance on race to the detriment of those who passed the examination and qualified for promotion.”

Justice Ginsburg, joined by three other Justices, dissented. Ginsburg predicted the opinion would not have “staying power” because it did not fully acknowledge the disparate impact provision

of Title VII; nor did it adequately address the “starkly disparate results” of the exam in the context of the history of discrimination in the New Haven Fire Department.

It is worth noting that Judge Sotomayor participated in the Second Circuit opinion that the Supreme Court narrowly reversed. Ordinarily, appointing a new Supreme Court Justice can jeopardize the staying power of closely-decided cases. In this situation, however, Sotomayor stands to replace Justice Souter, a member of the dissent arguing in favor of the City’s actions. Moreover, this decision may make it more difficult to prove discrimination absent evidence the discrimination was intentional. Under this ruling, employers must take great care when attempting to remedy employment practices that appear to have a disparate impact upon a protected class. If the practice is job-related and without a valid, less discriminatory alternative, employers will be prohibited from remedying the practice through actions that adversely affect a Title VII protected class.

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