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## CivilLITIGATION

### 'Ricci v. DeStefano': A strong basis in evidence

In a 5-4 decision, the U.S. Supreme Court found the City of New Haven, Conn., engaged in reverse discrimination and violated Title VII of the Civil Rights Act of 1964 when it discarded a test used to determine promotions in the Fire Department. *Ricci v. DeStefano, et al.*, 129 S.Ct.2658 (2009).

The court attempted to resolve the question of whether an employer may intentionally discriminate against members of a protected class in order to avoid a disparate impact claim by individuals in another protected class.

New Haven administered examinations in 2003 to city firefighters seeking promotions, and 118 firefighters took the test. Although the company that created the test took a number of precautions to ensure it was not racially biased, the results dictated virtually no minorities would be eligible for promotion to any of the 15 vacancies.

The city held numerous public hearings on whether the test results should be certified. A group of minority firefighters threatened a lawsuit, alleging the test created a disparate impact on minority examinees. After much public debate, the city determined the test results would have resulted in a disproportionate number of non-minority promotions and threw out the test.

A group of Caucasian and Hispanic firefighters who scored well on the test sued the city, alleging race discrimination in violation of Title VII and the Equal Protection Clause of the U.S. Constitution. In its defense, the city asserted that it had a good faith belief that if it the test results had been certified, it would have been subject to a disparate impact claim by minority firefighters. The district court granted the city's request for summary judgment, and the Second Circuit — with now Supreme Court Justice Sonia Sotomayor sitting on the panel — affirmed.

The U.S. Supreme Court reversed. The majority asserted the city of New Haven's reason for throwing out the results did not justify an action that constituted disparate treatment based on race.

The city's refusal to certify the results was a *prima facie* violation of Title VII's anti-discrimination provisions; however, the more taxing question was whether such discrimination ever can be justified because of legitimate business reasons. The court considered that the city engaged in disparate treatment conduct in an effort to avoid disparate impact litigation. Its ruling

changed the standard for evaluating an employer's behavior, establishing the "strong basis in evidence" test. The standard recognizes both the disparate treatment and disparate impact provisions of Title VII and allows violations of one in order to comply with the other only in narrow circumstances. In order to justify such race-based action, an employer must demonstrate a strong basis in evidence that, had the action not been taken, it would have been liable under the disparate impact statute. The court found the city could not meet that standard. 129 S.Ct. at 2664.

The court concluded the "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examination and qualified for promotions."

The court also noted that the evidence indicated the city's decision not to certify the test results was based solely on racial disparity, therefore it was race-based and, without some other justification, in violation of Title VII's prohibition on employers' taking action because of race. The court determined that once a process is established and employers make clear their selection criteria, they may not then invalidate test results, upsetting an employee's legitimate expectation not to be judged on the basis of race.

"Doing so, absent a strong basis in evidence or an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, §2000-2(j), and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunities regardless of race." *Id.*, at 2677.

*Ricci* does not provide employers with much guidance as to when a strong basis in evidence exists. Prior to the ruling, if a test resulted in a disparate impact an employer simply could throw out the test. If a company keeps the test now, it can face a discrimination suit.

On the other hand, if an employer throws out the test, it will need to prove it had a strong basis in evidence that the test was not job-related, or that there were less discriminatory alternatives. As a result, employers will have to scrutinize a test before it is administered to determine whether the potential for a disparate result exists.

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