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Divided Supreme Court Tackles Reverse Discrimination

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The Supreme Court ended its 2008 Term by holding that, at least in some contexts, employers violate Title VII when they engage in race-conscious decision-making to address statistical workforce imbalances unless they can demonstrate a "strong basis in evidence" that failing to do so will result in disparate-impact liability. *Ricci v. DeStefano*, ___ U.S. ____, 2009 WL 1835138 (U.S., June 29, 2009). The *Ricci* decision could force employers to re-evaluate the way they approach statistical anomalies that can arise in reductions in force or other employment decision-making processes, and may compel employers to consider formal "validation" studies for a wide variety of decision-making processes that previously were less formally structured.

The decision's impact on business will depend, of course, on whether it has "staying power"; Justice Ginsburg, in dissent, predicted it would not. Underscoring her prediction, Senator Patrick Leahy (D. Vt.), chair of the Senate Judiciary Committee, announced just hours after the decision was announced that it "interprets the critical protections of Title VII in a way never intended by Congress." Undoubtedly, Congress will look closely at addressing the *Ricci* decision with "corrective" legislation.

With Statistical Imbalances, Employers Are "Damned If You Do, Damned If You Don't"

In 2003, the New Haven, Connecticut Fire Department hired a consultant to create a test that would identify qualified candidates for promotion to lieutenant and captain. This examination was a key part of the promotion evaluation process, and was "content-validated" under the EEOC's Uniform Employee Selection Guidelines, *i.e.,* it was created to be job-related and consistent with "business necessity." Seventy-seven candidates took the lieutenant's examination: 43 white, 19 African Americans, and 15 Hispanic. Under the rules of the selection process and based on the test results, all ten firefighters who became eligible for immediate promotion to lieutenant were white. Similarly, 41 candidates took the captain's examination: 25 white, eight black, and eight Hispanic. As a result of the test, nine candidates were found eligible for immediate promotion to captain — seven whites and two Hispanics.

Threatened with a lawsuit by disappointed African American test-takers, the City's counsel, among others, urged the City to reject the test results and start the promotions process over. After lengthy hearings, the New Haven Civil Service Board split 2-2 on whether to certify the promotion test results. Because the Board was deadlocked, the test results were not certified, and the highest-ranking test-passers lost their opportunity to receive immediate promotions.

Predictably, 17 disappointed white firefighters and one Hispanic firefighter brought suit against the City. They alleged disparate treatment — intentional discrimination — in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

On cross-motions for summary judgment, the district court concluded that the City had acted reasonably in tossing out the test results given the litigation risks inherent in such patent statistical disparities; something had to be "wrong" with the test if it resulted in such lopsided results. The City, the court observed, was not obligated to "certify a test [simply because it could not] pinpoint [the test's] deficiency explaining its disparate impact . . . [or] because [it had] not yet formulated a better selection method." The district court granted summary judgment to the City on both Title VII and constitutional claims, holding that when the City rejected the test, it did not act "based on race" because the test results of all applicants were discarded, regardless of race.

A panel of the United States Court of Appeals for the Second Circuit, including Circuit Judge and now Supreme Court nominee Sonia Sotomayor, affirmed the district court's decision in a one-paragraph, unpublished summary order without analysis. Nearly four months later, the panel withdrew that order and replaced it with a similar order — this time explicitly adopting the district court's reasoning. Three days after the reissued order, the Second Circuit voted 7-6 to deny rehearing en banc, over sharply written dissents by Chief Judge Jacobs and Judge Cabranes. The Supreme Court granted certiorari to hear the case.

A Pure Heart Offers No Safe Haven for Employers, Supreme Court Holds

In a 5-4 decision along the Court's familiar ideological divisions, the majority reversed, holding that it is illegal for an employer to disregard the results of an employment test just because the employer fears disparate-impact liability, unless there is a strong basis in evidence for believing the test results were indefensible. Justice Kennedy wrote the majority opinion and was joined by Justices Scalia, Thomas, Alito, and Chief Justice Roberts. Justices Ginsburg, Stevens, Souter and Breyer joined to form the dissent, in an opinion written by Justice Ginsburg.

For Justice Kennedy and the majority, the case required the Court to harmonize the disparate-treatment and disparate-impact prohibitions of Title VII. Under a disparate treatment theory, employers are generally prohibited from taking adverse employment actions against employees "because of" a prohibited characteristic — if they do, they commit intentional discrimination. Disparate-impact theory requires no such demonstration of intent; it prohibits employers from adopting employment practices that, while fair in form, operate in practice to the disadvantage of a given protected group, whether in hiring, promotions, or layoffs, unless "business necessity" requires them to do so.

The City of New Haven threw out the firefighters' promotion test to avoid suit on a disparate impact theory. But because throwing out the test was based unquestionably on the race of those who would have been selected, and operated to the disadvantage of the whites and Hispanics who had passed the test, it constituted disparate treatment of the white and Hispanic candidates:

> Whatever the City's ultimate aim — however well intentioned or benevolent it might have seemed — the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race based action.

The majority explained that under these circumstances, unless an affirmative defense existed to protect the City, this discrimination was unlawful. Just as an employer could not "rescore a test based on the candidates' race," so too an employer could not "discard[] the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates — absent a strong basis in evidence

that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision [of Title VII]."

Fear of Litigation No Defense

The majority surveyed a number of alternative standards they might employ to judge the propriety of employer responses to statistical demographic imbalances. It would not be enough, the Court held, for the employer to show that it had a good-faith fear of being sued because such a "minimal standard" could "cause employers to discard results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. Even worse, employers could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance."

Equally unworkable, the Court held, was the alternative offered by the white firefighters: race-conscious decision-making is permissible only where liability under a disparate-impact theory is certain. "Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring voluntary compliance to a near standstill."

In striking a balance between the two prohibitions in Title VII — disparate-treatment and disparate-impact — the Court adopted what it viewed as a middle course, a test borrowed from its Equal Protection Clause case law. Under this test, an employer can take otherwise unlawful race-conscious actions only where there is a strong basis in evidence to believe that failing to do so would result in disparate-impact liability. It is not enough for there to be evidence of a disparate impact *prima facie* case — a statistically significant imbalance. Rather, there must be strong evidence that the decisional criteria would fail the business necessity standard as well.

Ricci Brings Both Good and Bad News for Employers, But Also Many Unanswered Questions

Ricci may have a significant and negative impact on some employer efforts to ameliorate the demographic impact of hiring, promotion, reductions in force or compensation decision-making. *Ricci* suggests that the use of race or gender statistics alone as the basis for adjusting the results of the employer's normal decision-making processes may run afoul of Title VII. To make such an adjustment lawfully, the employer would have to have a "strong basis in evidence" to believe that the underlying decision-making process was substantively flawed, *i.e.*, that the decision-making criteria it had used were not job-related or consistent with business necessity. Of course, employers will want to think twice before taking steps to impeach their own selection processes in that way.

Some employers facing disparate-impact claims will undoubtedly welcome *Ricci*, especially those relying on formal validity studies. Where plaintiffs have alleged that a particular decision-making process — a reduction in force, a set of hiring criteria, or an evaluation and pay program, for example — has had a discriminatory impact on a protected group, the defendant will now be able to assert that it was powerless to correct any statistical imbalance resulting from the process because its validity studies gave it every reason to believe that the process was valid — *i.e.*, that it was job-related and consistent with "business necessity."

In fact, the opinion provides something of a road map for those designing a job analysis or content validation study. It outlines in some detail the steps the City took to analyze the jobs at issue and connect the test items to the job analysis. The Supreme Court's favorable discussion of those efforts

will no doubt motivate employers and test designers to incorporate these steps, as well as other professional standards, into their validation methods.

The impact of the decision will be less clear, however, where no professionally validated employer process is involved. Most employer decision-making processes are not formally or professionally validated. Of course, nothing in Title VII expressly obligates employers to validate their processes formally, and as Justice O' Connor previously observed:

> "[V]alidating" subjective selection criteria . . . is impracticable. Some qualities — for example, common sense, good judgment, originality, ambition, loyalty, and tact — cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks . . .

Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) (O'Connor, J.).

Because employers typically do not have professional validation studies to support most of their employment decision-making processes, and because validation studies are not useful for many kinds of employment decisions, the full reach of *Ricci* is an open question. Until the lower courts flesh out how they will implement *Ricci* in these more typical contexts, employers will face potential liability no matter which way they turn, putting employers in precisely the "damned if you do, damned if you don't situation" Justice Souter identified during oral argument of the case.

Nevertheless, there will be many ways in which employers can take affirmative steps to address anomalies unearthed by statistical analyses without relying on suspect race-based decision-making. For example, *Ricci* would permit an employer to use statistics to pinpoint individual decisions that appear to be unfair or that are difficult to explain based on the race-neutral criteria; and an employer would be permitted under *Ricci* to address those specific problems.

The only "sure thing" coming out of *Ricci* is that employers relying on competent, professionally validated decision-making processes are likely to be safe from disparate impact challenges. The prudent employer will examine its decision-making processes with *Ricci* in mind and ask how it would establish "job-relatedness" if it were sued, and will adjust decisions based on statistical goals or targets with caution.

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