

Client Alert

Supreme Court Rules Against the City of New Haven in Highly Publicized Reverse Discrimination Case: What Does *Ricci vs. DeStefano* Mean For Employers?

Yesterday, in a highly anticipated 5-4 decision, the U.S. Supreme Court held in *Ricci v. DeStefano* that the City of New Haven engaged in unlawful intentional race discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”) when it discarded a firefighter promotional test because of the racial makeup of the successful test takers. The City claimed that the test had a disparate impact on minorities and that, if it certified the test results and proceeded with promotions, it would have been sued for discrimination by minority test takers. The Court held that the City had to show a strong basis in evidence that it would be liable in such a suit – something more than the statistical results of the test – in order to justify throwing out the test and discriminating against the successful test takers, most of whom were white. It further held that, upon its review of the factual record, the City could not meet this burden. Reversing the Second Circuit (which had affirmed the trial court decision), it found that summary judgment should be entered against the City. The factual background of the case, opinion of the Court and the implications of the case for employers are discussed below.

Background

In 2003, the New Haven Fire Department developed examinations for promotion to the ranks of Lieutenant and Captain in conformance with both (1) the City charter, which mandates that promotions be awarded on the basis of merit as determined by job-related exams, and (2) the collective bargaining agreement, which also requires that promotions be made in part on the basis of results of a written exam. It engaged a professional testing service that specializes in the development of tests for police and firefighters to assist in developing its promotional exam, which was designed to be job-related. After administering the test and learning that black and Hispanic candidates failed at a much higher rate than white candidates and that certifying the test would have resulted in no black firefighters and only two Hispanic firefighters being promoted, the City decided not to complete validation of the exam and not to certify the results of the test. The City’s decision resulted in no firefighters being promoted and a lawsuit by seventeen successful test takers. The plaintiff firefighters claimed that the City had engaged in intentional race discrimination in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Defending its actions, the City claimed that had it certified the exam and proceeded with promoting the successful test takers, it would have faced an employment discrimination lawsuit under Title VII’s disparate impact provision from minority applicants who were not promoted. In support of this claim, the City pointed to the statistical results of the exam, which indisputably were sufficient to state a prima facie case of disparate impact discrimination. It also pointed to evidence supporting its belief that it would have faced a lawsuit from the unsuccessful test takers and to evidence suggesting that an equally valid alternative test might be developed that would have had a lesser adverse impact on black and Hispanic candidates. The plaintiffs countered with evidence that they said demonstrated that the City’s articulated motive of voluntary compliance with Title VII and avoidance of Title VII liability was not its true motive

and that the real reason for its actions was that it desired a greater number of black and Hispanic firefighters to be promoted so that the ranks of Lieutenant and Captain more closely mirrored the racial demographics of the City, regardless of merit (as determined by the exam).

The district court granted the City's motion for summary judgment, holding that the City did not discriminate against the plaintiffs because its motivation – to avoid making promotions based on a test with racially disparate impact – did not constitute discriminatory intent. Additionally, it found that while the City was “race conscious” in deciding to disregard the examination results, since no one was promoted, there was no basis for finding that it intended to discriminate against the plaintiffs on the basis of race or engaged in intentional race discrimination. The Second Circuit (with Judge Sotomayor on the panel) affirmed, accepting wholesale the decision and rationale of the lower court. The Circuit Court judges then voted 7-6 to deny a rehearing en banc, with the dissenting judges arguing that the decision raised novel questions that were indisputably of “exceptional importance.”

The Supreme Court granted review, for the purpose of resolving the question of how far an employer can go to avoid discrimination against one group before it crosses over the line and discriminates against another group.

The Supreme Court's Decision

Justice Kennedy, writing for majority, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, rejected the notion that an employer's “mere good-faith fear” of liability was a legally sufficient basis for taking race-based actions. Instead, the Court held that an employer will be liable for making a race-based action like the City's, purportedly undertaken for compliance purposes, unless the employer can demonstrate a “strong basis in evidence” that, had it not taken the action in question, it would have been liable for disparate impact discrimination.

The Court also explicitly approved of an employer's “affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made.” But, the Court warned that once a selection process “has been established and employers have made clear their selection criteria, they may not invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.” It bolstered the rationale for this standard by explaining that this standard properly balanced the competing disparate treatment and disparate impact provisions of Title VII and gives meaning to other provisions of Title VII, including its proscription on the adjustment of test scores

based on race and protection of bona fide promotional exams.

Applying its newly articulated standard, the majority held that there was insufficient evidence that the tests given to the New Haven firefighters were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available. Thus, the Court found that New Haven did not meet the strong basis in evidence standard that would justify its action. On this basis, the Court reversed the decisions below and ruled that the plaintiff firefighters were entitled to summary judgment in their favor.

The Court did not reach the firefighters' claim that the City violated their rights under the Equal Protection Clause of the Fourteenth Amendment, having already found against the City based on Title VII.

Justice Scalia wrote a separate concurrence, noting that the Court's decision “merely postponed the evil day” when the Court will have to confront the question of whether Title VII's provisions that forbid employment actions that have a disparate impact on one group, which “place a racial thumb on the scales,” are consistent with the Constitution's guarantee of equal protection. Justice Alito also wrote a separate concurrence detailing facts in the record that, in his opinion, required the same result even if the dissent's legal analysis and “good faith” standard had been adopted by the Court.

Justice Ginsburg authored a dissenting opinion, joined by Justices Stevens, Souter and Breyer, taking issue with the factual premise of, legal standard articulated by and ultimate outcome of the majority decision. In particular, she questioned the majority's “enigmatic standard” of requiring that there be a strong basis in evidence that an employer will be liable under Title VII's disparate impact provision before it can take race-based action in the name of compliance with that provision. She also suggested that the majority's standard denies employers the ability to rely on U.S. EEOC guidance regarding affirmative action as a defense to liability. Justice Ginsburg warned that “[a]s a result of today's decision, an employer who discards a dubious selection process can anticipate costly disparate treatment litigation in which its chances for success – even for surviving a summary-judgment motion – are highly problematic.” Stressing the “dominant Title VII theme” of voluntary compliance, she asserted that the proper standard, as mentioned above, would be to examine whether New Haven had good cause to believe the selection process was flawed and not justified by business necessity.

Implications for Employers

Benjamin Franklin put it best when he said, “an ounce of prevention is worth a pound of cure.” Employers should try to avoid ever getting to the point of discarding a selection process because it has a disproportionate impact on one race. Yesterday’s decision only heightens the importance of careful planning and vetting of selection processes and criteria. Employers must work diligently at the outset to make sure tests and other selection processes are race neutral, job related and consistent with business necessity. They should review and comply with the Uniform Guidelines on Employee Selection Procedures. This may entail conducting an extensive and rigorous evaluation of various different selection methods and consulting with outside experts to analyze procedures.

Once an employer implements a selection process, the Court’s decision limits its flexibility in determining whether to discard the test based on the results. An employer is no longer free to disregard the test, even if the results have a disproportionate impact on one race, unless it is able to meet a fairly high and somewhat nebulous threshold of showing that there is a strong basis in evidence that, had it not discarded the test, it would have been liable under Title VII’s disparate impact provision based on the content and results of the test. As the dissent points out, the majority does not clarify what factors courts should consider in determining whether there is such a strong basis in evidence. Employers will have to wait for lower courts to flesh out how they will apply this standard in the Title VII context.

The majority opinion also makes clear that employers are free to take affirmative efforts to ensure that all employees have an equal opportunity to gain promotions before choosing a particular test or procedure. Thus, employers should continue to pursue diversity initiatives that are designed to eradicate artificial and discriminatory barriers to employment opportunities. Employers should continue their previous lawful efforts to voluntarily comply with Title VII. If an employer seeks to avoid implementing a selection procedure that disproportionately affects employees of a certain race, it should consider consulting an attorney to weigh its options and decide on the best path going forward to avoid liability.

While the *Ricci* case involved public employees, the ruling affects private employers as well because Title VII applies to both private and public employers. However, public employers are often required by local law to utilize tests for hiring and promotion decisions and have less flexibility in the design of selection criteria. Public employers will now have a more onerous burden in establishing valid selection criteria at

the beginning of a hiring or promotion process because of the unique restrictions applicable to them.

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Proskauer’s nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

New York

Katharine H. Parker

212.969.3009 – kparker@proskauer.com

Gregory I. Rasin

212.969.3940 – grasin@proskauer.com

Elise M. Bloom

212.969.3410 – ebloom@proskauer.com

Paul Salvatore

212.969.3022 – psalvatore@proskauer.com

Los Angeles

Anthony J. Oncidi

310.284.5690 – aoncidi@proskauer.com

Washington, D.C.

Lawrence Z. Lorber

202.416.6891 – llorber@proskauer.com

Leslie E. Silverman

202.416.5836 – lsilverman@proskauer.com

Special thanks to associate, **Rebecca Berkebile**, for her contribution in drafting this Client Alert.

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