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### Supreme Court Rules Employer Violated Title VII By Voiding Job Test Results That Were Perceived To Have A Disparate Impact On Minority Applicants

In a much-anticipated decision, on June 29, 2009, the U.S. Supreme Court ruled that an employer's decision to discard results from a job-promotion examination – after all of the African-American candidates failed to qualify – was unlawful because it constituted discriminatory, race-based decision-making which negatively impacted the white applicants who, in fact, had passed the test and would have received the promotions. (*Ricci v. DeStefano*, U.S. No. 07-1428, 6/29/09). The *Ricci* decision was issued by a sharply divided Court, as five Justices joined in the decision, while four Justices dissented. Though the *Ricci* decision is favorable for employers and has been hailed by some as one of the most important employment law cases in the last decade, the Court has adopted an inherently uncertain standard which will be subject to interpretation on a case-by-case basis. Moreover, if the dissent's predictions are given credence, the decision may have limited usefulness for employers in the future.

#### The "Largely Undisputed" Facts

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In its opinion, the *Ricci* majority reviewed in great detail the “largely undisputed” facts and events which lead to the lawsuit.

To address the “intense competition for promotion,” the City of New Haven’s Fire Department contracted with an outside party – at a cost of over \$100,000 – to develop a standardized examination to be used to fill Lieutenant and Captain positions. The applicant pool for the open positions was racially diverse; over 1/3 of the applicants were either African-American or Hispanic. However, the examination scores resulted in promotions for nearly all white candidates. Specifically, 77 candidates took the exam for promotion into the 8 vacant Lieutenant positions. All of the top 10 scorers were white. Similarly, 41 candidates completed the exam for promotion into the 7 vacant Captain positions. Of the top 9 scores for the Captain position, 7 applicants were white and 2 were Hispanic. While African-American candidates scored high enough to potentially be promoted, their scores placed them further down the eligibility list. As a result, under New Haven’s city hiring regulations, for the 16 open positions the pool of individuals qualified for promotion consisted of 17 white candidates, with only 2 Hispanic candidates and no black candidates – despite the fact that 23 Hispanic candidates and 27 black candidates had taken the exams.

When the test results showed that white candidates had outperformed minority candidates, the mayor opened public debate that quickly turned rancorous. Some firefighters argued that the test should be discarded because the results showed the test to have an unlawful discriminatory *impact* upon the minority candidates. This group of complaining firefighters threatened a discrimination lawsuit if the City proceeded to promote the 17 white (and 2 Hispanic) firefighters based on the test results.



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Ultimately, the City sided with the protesters and threw out the examination, lest the City be forced to defend a lawsuit under Title VII alleging that the examination itself was fundamentally flawed and resulted in an unlawful “disparate impact” on the minority candidates. In response, certain white and Hispanic candidates who would have been promoted based on their strong test results then sued the City. Their lawsuit alleged that, by discarding the test results, the City had taken intentional action which discriminated against them based on their race, in violation of Title VII (and the Equal Protection Clause of the 14<sup>th</sup> Amendment). Thus, the plaintiffs argued that the City’s decision to discard the test results in order to avoid a disparate *impact* claim by the minority candidates was unlawful because such action constituted disparate *treatment* of those white candidates who, in fact, had passed the exam.

### **The Supreme Court’s Ruling: The City Violated the White Candidates’ Rights**

In response to the lawsuit filed by the qualifying candidates, the City officials defended their actions. The City’s principal defense against the claim was that the City could have faced liability under Title VII for adopting an examination / practice that had a disparate impact on minority firefighters. The federal trial court agreed with the City’s approach and ruled in its favor. On appeal, the Second Circuit Court of Appeals – which included Supreme Court nominee Judge Sonya Sotomayor – upheld the trial court’s ruling and dismissed the claim of the candidates who sought to certify the exam and proceed with the promotions. The Supreme Court reversed the Court of Appeals, holding as follows:

*We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it*



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*not taken the action, it would have been liable under the disparate-impact statute.*

Thus, the Supreme Court ruled that an employer's fear of a disparate *impact* claim alone is not sufficient to justify disparate *treatment* against a group of employees as a result. Rather, an employer can only take intentional, race-based actions (such as refusing to promote qualified white candidates) if the employer can satisfy the "strong-basis-in-evidence" test set forth by the Court.

Under the facts in *Ricci*, the Supreme Court ruled that the City officials could not, in fact, demonstrate a "strong basis in evidence" that a disparate impact claim by minority firefighter candidates would have succeeded. As a result, the Court ruled that the City officials failed to meet their burden to justify taking intentional action – i.e. failure to promote – against the identified plaintiff-group of white (and Hispanic) employees. In reaching its ruling, the Supreme Court explained that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

## Conclusion

The Supreme Court acknowledged the tension in the employment arena which exists between potentially conflicting disparate impact and disparate treatment claims. After reviewing analogous precedent, the Court explained that it adopted the "strong basis in evidence" test in order to "clarif[y] how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions." However, employers faced with similar employment decisions will have no easy answers. At best, the deck has been stacked slightly in favor of employers, provided that they can legitimately argue that there was no "strong basis" to conclude a disparate impact claim would succeed. However, an



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employer's argument will be just that – an argument that must be decided under the facts and circumstances of each case individually, which leaves the door wide open for dispute / litigation in future cases. Employers should continue to use best practices to ensure that hiring (and other employment) processes are based upon race-neutral criteria. Then, in the event an employer is faced with a disparate impact claim, it will be armed with the *Ricci* decision to argue that its actions were appropriate and should carry the day.

Finally, it is noteworthy that the *Ricci* dissenting Justices have suggested that the decision might not prove to be particularly helpful to employers in the long run. For example, Justice Ginsburg asserted: "The court's order and opinion, I anticipate, will not have staying power." In making this prediction, the dissent argued that the *Ricci* majority did not fully acknowledge the disparate impact provision of Title VII and, under the facts of the *Ricci* case itself, did not properly take into account the "starkly disparate results" of the promotion exam. Further, the dissent's prediction as to the *Ricci* decision's "staying power" no doubt takes into account this Congress' recent action to advance employee rights in the wake of an earlier, employer-favorable decision by the Supreme Court. Specifically, Congress promptly enacted the employee-favorable Lilly Ledbetter Fair Pay Act, in order to respond to the Supreme Court's employer-favorable ruling on compensation discrimination earlier this year. It remains to be seen if Congress will attempt to respond similarly to the *Ricci* decision.