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Labor and Employment Law Alert

Supreme Court Decision Balances Disparate “Treatment” and Disparate “Impact” Race Discrimination Protections

On Monday, June 29, 2009, the Supreme Court issued a significant decision for the future of Title VII disparate impact claims, *Ricci v. DeStefano*, No. 07-1438, ___ U.S. ___ (June 29, 2009). This decision reverses the one endorsed by Supreme Court nominee Judge Sotomayor in the lower appeals court.

In *Ricci*, the New Haven, Connecticut Fire Department administered a proficiency test to determine which firefighters would be eligible for promotion to the level of lieutenant and captain. After the results of the test determined that no African American firefighters and only one Hispanic firefighter would be eligible for promotion, the City decided to throw out the results to avoid a race discrimination lawsuit by minority firefighters. The City’s actions, however, failed to avoid a lawsuit. Certain white and Hispanic firefighters who would have been promoted sued, alleging disparate treatment race discrimination under Title VII and violation of the Fourteenth Amendment.

Disparate treatment occurs where an employer treats a person less favorably than others because of a protected trait (race, sex, religion, etc.). Disparate impact occurs where a facially neutral practice impacts a protected group more than others. An employer may defend against disparate impact liability if the practice is job related and consistent with business necessity. A plaintiff still may succeed by showing that the employer refused to adopt an alternative practice that has less disparate impact and serves the employer’s needs.

Analyzing the facts in *Ricci*, the Court started with the premise that without some justification, the City’s race-based decision making violates Title VII. Simply looking at race-based statistics was not enough of a justification for throwing out the test results: the City needed a “strong basis in evidence” that it otherwise would have been liable under Title VII. A “strong basis in evidence” exists only if: (1) the tests were not job related and consistent with business necessity, or (2) there was an equally valid, less discriminatory alternative that served the City’s needs but that the City refused to adopt.

There was no dispute that the test was job related and consistent with business necessity. Thus, the analysis turned on the second factor. The Court found that there was no evidence of an equally valid, less discriminatory alternative that the City refused to adopt. As “[f]ear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions,” the City violated Title VII when it discarded the test results.

Four of the nine justices dissented, opining that the majority’s decision “will not have staying power.” The dissent argued that the firefighters had no vested right to promotion and that the majority ignored substantial evidence of flaws in the tests used. The dissent further stated that the majority failed to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes, and did not consider the backdrop of entrenched inequality before which the practice at issue should have been assessed.



The majority's opinion confirmed that voluntary compliance is the preferred means of achieving the non-discrimination objectives of Title VII. However, the bottom line of the Court's decision is that if the proposed action to achieve compliance is itself based on race, sex or other factor prohibited by Title VII, the issue will be whether there is a lawful justification for the action which otherwise would itself constitute a violation of Title VII.

The holding of the Court clarifies that activities undertaken to remedy past discrimination which themselves are based upon factors otherwise prohibited by Title VII are lawful only where there is a "strong basis in evidence" that the remedial actions were "necessary". What is "necessary" will vary from case to case, but the Court's decision makes clear that more is needed than simply taking action out of fear of charges or lawsuits, and less is needed than the existence of a provable, actual violation of law.

The impact of the Court's decision should be carefully considered by employers who are subject to federal and, increasingly, state and local government affirmative action plans. Employers who consider taking race, sex, national origin, etc. based decisions under affirmative action plans should ensure that those actions are indeed "necessary" and required by the terms of a lawful plan, and they are not simply acting as volunteers. Employers with such plans should carefully conduct both workforce and availability analyses to determine whether underutilization or other adverse impact in fact exists, and then narrowly tailor goals and remedial actions to meet, but not exceed, actual deficiencies. Recruitment or placement goals should not be equated with selection goals or quotas which could result in impermissible decisions based upon race, sex, etc. in violation of Title VII, subjecting the employer to the "strong basis in evidence" defense that the remedial actions were necessary, the event of reverse discrimination lawsuits. Again, fear of litigation (or threats of cancellation of government contracts) alone will not be enough to justify an action taken on the basis of a factor prohibited by Title VII in an effort to achieve voluntary compliance.

The same considerations apply to employers who may reject a pool of otherwise qualified individuals for hire or promotion because the pool lacks sufficient diversity. However noble the motivation may be, those in the qualified but rejected group may well have an actionable claim under Title VII after *Ricci*.

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