



U.S. Supreme Court Provides Employers Guidance on How to Avoid Disparate Impact and Disparate Treatment Claims

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On June 29, 2009, the United States Supreme Court issued its ruling in *Ricci v. DeStefano*, the "White Firefighter" case that involved dueling discrimination claims arising from a fire department's promotion practices. And, while the case was somewhat of a dud in Judge Sonia Sotomajor's confirmation hearings, it provides employers further guidance on how to evaluate problems that may arise in using objective data in personnel practices.

Discrimination Claims: Disparate Treatment v. Disparate Impact. As you probably know, Title VII (and the Washington Law Against Discrimination) prohibits employment discrimination on the basis of various protected classes. For example, they specifically prohibit intentional discrimination on the basis of race. Courts designate this as "disparate treatment" discrimination. Disparate treatment cases arise when discriminatory bias is alleged to have caused an employer to take an adverse employment action (*i.e.*, termination, failure to hire, etc.) against the plaintiff. With only a few exceptions, employers do not have valid defenses to justify intentional discrimination based on an individual's protected status.

Anti-discrimination statutes also prohibit practices that do not intentionally discriminate, but result in a disproportionately adverse effect on individuals in a protected class. Courts designate this as "disparate impact" discrimination. Disparate impact cases sometimes arise when an employer uses an objective testing or scoring mechanism to help determine an applicant's rank or eligibility in connection with hiring or promotion. Generally, employers may justify these practices by demonstrating that they are "job related for the position and consistent with business necessity." Even if the employer meets that burden, a plaintiff may still succeed in establishing disparate impact discrimination by showing the employer refused to adopt an alternative practice that would have less disparate impact and still serve the employer's needs.

In *Ricci*, the U.S. Supreme Court addressed the seemingly intractable problem of whether an employer may invalidate test scores that adversely impact minorities even if that action results in disparate treatment of white employees who have more favorable scores.

Ricci v. DeStefano: Reported Facts. In 2003, 118 firefighters of the New Haven, Connecticut Fire Department took examinations to qualify for promotion to the rank of lieutenant or captain. This was not unusual — many employers rely on "objective examinations" to avoid any suggestion of bias in a highly competitive promotion process. Due to the contentious nature of the process, the City also spent \$100,000 to hire a firm to develop a test that could withstand legal scrutiny and avoid any appearance of bias toward any particular class of applicants.

When City administrators reviewed the test results, they confronted a highly divisive problem: the white candidates had significantly outperformed minority candidates. To make matters worse, the Mayor and other politicians decided to address the issue through a public debate. Not surprisingly, some firefighters argued the tests should be discarded because their results had a disparate impact on minorities. Other firefighters said the exams were neutral and fair, and invalidating them would result in disparate treatment of the white candidates.

In a no-win situation, the City opted to invalidate the test results. As a result, seventeen white and one Hispanic firefighter sued the City and its Administrators for violating Title VII by engaging in disparate treatment discrimination on the basis of their race.

In district court, the City prevailed on summary judgment. The plaintiffs then appealed to the 2nd Circuit Court of Appeals. As you probably know, then-Judge Sonia Sotomayor and two other judges affirmed the district court's ruling. The plaintiffs then appealed to the U.S. Supreme Court.

On June 29, 2009, the Court reversed the 2nd Circuit. It concluded that invalidating the tests constituted disparate treatment discrimination under the circumstances of the case. In reaching that result, the Court indicated that the issue was not whether the conduct was discriminatory (the Court held that it was), but whether the City had a lawful justification for it. The Court noted that the City only *feared* a disparate impact lawsuit from the minority firefighters. This, according to the Court, did not justify invalidating the test scores. The Court held that the City could only invalidate the test results if there were a "*strong basis in evidence*" that the results created disparate impact liability.

The Court then examined the facts to ascertain whether there was a "*strong basis in evidence*" that the test results created illegal disparate impact discrimination. First, the Court found that the City and the test designer took exhaustive steps to ensure the tests were job related and consistent with business necessity. Second, the Court found that there were no alternative practices that would have had less disparate impact. Given these factors, the Court concluded, the City was not subject to disparate impact liability and was not legally entitled to disqualify the test results that favored the white firefighters. As a result, the Court entered judgment for the plaintiffs.

How Employers Should Respond to Ricci

- Ensure all testing for hiring or promotions is job related and consistent with business necessity
- Investigate whether alternative methods of evaluating employees might result in a reduced adverse impact on minorities
- Even though Ricci was a promotion case, its holding applies in the context of hiring, layoffs, and reductions in force. Conduct an adverse impact analysis *before* finalizing decisions to ascertain if any of these issues arise!

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