

Labor & Employment  
ALERTJULY  
2009U.S. SUPREME COURT FINDS "REVERSE" RACIAL DISCRIMINATION  
CLAIM HAS MERIT; SCALES BACK USE OF RACIAL PREFERENCES

On June 29, 2009 a sharply divided Supreme Court announced a decision that may significantly affect the use of race-based preferences in the employment setting. Reversing the U.S. Court of Appeals for the Second Circuit, the Supreme Court held in *Ricci et al. v. DeStefano et al.*, Slip Op. No. 07-1428 (June 29, 2009), that Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, did not permit the City of New Haven to throw out the positive results of promotion exams for 17 white and 2 Hispanic city firefighters because of its fear that if the test results were certified, the City might be sued under Title VII for using an exam that had an adverse impact on black firefighters; none of the black firefighters who sat for the exam had earned a high enough score to qualify for promotion. The Court held that, to permit the exam results to be disregarded on race-based grounds, the employer must "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under [Title VII for] disparate-impact. . . ." The Court found that the City could not meet that threshold standard.

**Background**

In November and December 2003, the New Haven Fire Department administered written and oral examinations designed by outside experts to determine qualification for promotion to Lieutenant and Captain. For the 118 firemen who took the qualifying exams, the pass rate for black candidates was around half that of the rate for white candidates. The top 9 scorers on the Captain exam included 7 white and 2 Hispanic firefighters. All of the ten top scorers on the Lieutenant exam were white firefighters. Given that there were only 7 Captain vacancies and 8 Lieutenant vacancies, and the City charter mandated that each position must be filled

from among the three highest scorers on the exam not yet promoted, the exam results meant that no black firefighters would be eligible for promotion to one of the 15 vacancies.

After the results became known, the City's Civil Service Board held hearings on whether to certify the test results or scrap them because of the exam's "adverse impact" on minorities. The City's counsel advised the Board that, in his opinion, the City would be liable for violating Title VII were it to certify the results. The Board split on whether to certify the exams, so the promotional lists were not certified. The City instead threw out the test results and made no promotions, citing its desire to avoid violating Title VII.

In response, Frank Ricci, sixteen other white and one Hispanic test takers, who likely would have been promoted on the strength of their test results, sued the City and others in the U.S. District Court for the District of Connecticut, alleging that by discarding the test results, the defendants discriminated against them based on their race, in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment. The defendants argued that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the black firefighters.

The District Court granted the City's motion for summary judgment and dismissed the case. It found that although the plaintiffs had established a *prima facie* case of discrimination on the grounds of race, the City had proffered a legitimate non-discriminatory reason for tossing out the exam results in its wish to comply with Title VII. The Court also rejected the plaintiffs' Equal Protection claims, finding that every

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applicant literally was treated the same in the City's refusal to certify the lists, and that the decision was made without discriminatory intent.

On appeal to the Court of Appeals for the Second Circuit, a three-judge panel that included Supreme Court nominee Sonia Sotomayor, issued an abrupt 8-sentence opinion affirming the District Court on June 9, 2008, characterizing the trial court's decision as "thorough, thoughtful and well-reasoned," as there were "no good alternatives" to throwing out the test scores. The panel concluded that the Civil Service Board was acting to "fulfill its obligations under Title VII" and adopted the trial court's opinion in its entirety.

The Supreme Court reversed the lower court's ruling and concluded that the City's decision was, in fact, racial discrimination in violation of Title VII. Justice Kennedy, writing for a 5-4 majority (Kennedy, Roberts, Scalia, Thomas, and Alito) declared that where employment testing or a selection process is open and fair, a racial imbalance in the results is not enough, by itself, to permit race-based action by an employer to invalidate or mitigate tests results or selection criteria that have established a disparate impact on a specific group. Rather, an adverse impact on a group can justify a countervailing race-conscious measure only if there is "strong evidence" that the test or selection criterion not only disproportionately excludes more members of that group than whites, but also that the test or selection criterion either is not "job related" or that an equally effective and less discriminatory alternative existed. The Court found that the City threw out the test scores because of the plaintiffs' race and that, even though the exclusion of blacks from the promotion list established a *prima facie* case of race discrimination based on disparate impact, the City could not present "strong evidence" that the tests were not job-related or that an equally effective less discriminatory alternative actually existed.

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The Court cautioned that this new "strong evidence" standard limits only statutory challenges to racial preferences challenged under Title VII, and not constitutional challenges. The Court, however, did not address the constitutional issues presented in the case.

### **The Significance of This Decision**

The long term impact of *Ricci* is difficult to gauge. Clearly the decision reinforces the need for employers to ensure that tests and other selection criteria are validated as job-related and to make genuine efforts to find less discriminatory alternatives to selection devices that adversely affect specific groups. *Ricci* also cautions great care in making efforts to target members of any race, ethnic group or gender for preferential treatment in hiring or promotion decisions without an order or some equivalent directive compelling the preferential treatment. Good intentions are a two-edged sword, and *Ricci* confirms that swords no longer are an effective defensive weapon. ♦

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