

LABOR AND EMPLOYMENT UPDATE

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Supreme Court Provides Guidance On Whether Disparate Impact Justifies Disparate Treatment Under Title VII

On June 29, 2009, the U.S. Supreme Court held in Ricci v. DeStefano (No. 07-1428), that under Title VII of the Civil Rights Act (Title VII), an employer cannot engage in intentional discrimination based on race (known as “disparate treatment”) to avoid an unintentional adverse effect on minorities (known as “disparate impact”) unless the employer has “a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the . . . discriminatory action.” (26).¹

The plaintiffs, a group of several white and one Hispanic firefighters for the City of New Haven, Connecticut (the City), brought a disparate treatment claim under Title VII against the City, alleging that it intentionally discriminated against them based on their race by refusing to certify the results of a promotional examination. Although the City took measures to ensure that the exam was professionally designed and fair, white firefighters passed the exam at significantly higher rates than minority firefighters. Moreover, under the pre-established procedures for selecting candidates for promotion, no black firefighters and only two Hispanic firefighters would have been eligible for promotions. As a result, the City refused to certify the results of the exam because it feared a disparate impact claim from the minority firefighters.

The District Court granted summary judgment in favor of the City, rejecting the plaintiffs’ disparate treatment and Equal Protection claims, concluding that “the result was the same for all because the test results were discarded and nobody was promoted,” and therefore the City’s actions were not “based on race.” (16). The Second Circuit Court of Appeals affirmed in a one-paragraph opinion that adopted the District Court’s reasoning.

In a 5-4 decision written by Justice Kennedy, the Supreme Court reversed and ruled that summary judgment should have been granted in favor of the plaintiffs on their Title VII claim, without addressing the constitutional Equal Protection question. The Court concluded that all the evidence showed that the City rejected the test results based on race — because of the statistical disparity between how minorities performed compared to white firefighters — and held that without a valid defense, this was “express, race-based decisionmaking” in violation of Title VII’s disparate

¹ The page numbers in this Client Update reference the Supreme Court’s slip opinion. The slip opinion is available at <http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf>.



treatment provision. (19). Thus, the Court framed the issue before it as whether “the purpose to avoid disparate impact liability excuses what otherwise would be prohibited disparate treatment discrimination.” (20).

The Court rejected the plaintiffs’ arguments that disparate treatment should not be excused unless it is certain that the practice in fact violates Title VII’s disparate impact provision, and it also rejected the City’s argument that disparate treatment should be excused if the employer acts with a “good-faith belief” that its actions are necessary to avoid violating Title VII’s disparate impact provision. Instead, the Court articulated a middle ground, holding that an employer may engage in intentional discrimination (disparate treatment) for the purpose of avoiding or remedying an unintentional disparate impact, but only when it has “a strong basis in evidence to believe that it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action.” (26).

The Court’s holding rested in part on the legislative history of Title VII, which requires a balancing of Title VII’s disparate treatment and disparate impact provisions, and which also favors voluntary compliance with Title VII. The Court also borrowed from cases decided under the Fourteenth Amendment, which hold that the government can only take race-based action to remedy past racial discrimination when there is a “strong basis in evidence” that it is necessary. The Court noted that allowing acts of disparate treatment on a mere good-faith belief that disparate impact otherwise would occur would “encourage race-based action at the slightest hint of disparate impact,” potentially creating a “de facto quota system.” (22). This would defeat Title VII’s goal of encouraging employers to hire solely on the basis of job qualifications.

Although the City presented evidence of a significant gap in passage rates between whites and minorities, the Court stated that a mere “significant statistical disparity, and nothing more — is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.” (28). Nor is fear of litigation alone sufficient. To justify discarding the test results due to the statistical disparity, the City needed a “strong basis in evidence,” either that the examination was not job-related and consistent with business necessity, or that there existed an equally valid, less discriminatory alternative that the City refused to adopt. Based on the record, the Court concluded there was no genuine dispute that the City lacked the necessary strong basis in evidence to believe it would face disparate impact liability.

Justice Ginsburg, joined by three other Justices, dissented, arguing in favor of the City’s proposed good-faith test. The dissent emphasized that the disparate impact and disparate treatment provisions of Title VII were codified as co-equal provisions under Title VII. Under the dissenters’ view, “an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII’s disparate treatment bar” as long as the employer has “good cause to believe the device would not withstand examination for business necessity.” (19). The dissenters strongly disagreed with the majority Justices’ assessment of the evidence in the record concerning the job-relatedness of the test and the existence of alternatives.

Ricci vividly illustrates the dilemma an employer faces when an examination or other practice for selection, promotion or evaluation causes a significant statistical disparate impact on the basis of race, gender, or any other factor protected by Title VII. As the Court stated, an employer is “compelled to take a hard look “ at such a practice to determine whether it is impermissible and must be altered, but avoiding the impact by adversely affecting the group statistically favored by the practice will itself violate Title VII unless the “strong basis in evidence” test is met. After Ricci, employers should seek to avoid such dilemmas by taking even greater care to ensure that any selection program is designed in such a way to minimize the potential for adverse impact. The Court encouraged a process during the design stage to ensure that a test will provide a fair opportunity for all individuals regardless of race or other discriminatory factors.

For more information about Title VII, anti-discrimination laws generally, or any issues relating to legal issues in the workplace, contact the authors below or the Hogan & Hartson attorney with whom you work.

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