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***RICCI V. DESTEFANO:* DISPARATE IMPACT AND TITLE VII IMPLICATIONS ON EMPLOYMENT**

by BILL SCHRAMM

On June 29, 2009, the Supreme Court overturned then Judge Sotomayor's decision in *Ricci v. DeStefano* (*Ricci*), holding that the city violated Title VII of the Civil Rights Act of 1964, which was intended to prevent discrimination.¹ In so holding, the Court gave employers and employees a new standard for evaluating employment promotion examinations.²

Additionally, the Court's decision changed how employers will attempt to avoid employees' potential discrimination claims.³ Therefore, *Ricci* may have a widespread impact on civil rights issues.⁴ If dissenting Justice Ginsburg's pre-

diction holds true, however, the opinion “will not have staying power” because Congress may pass legislation to change these implications in the near future.⁵

A DIVIDED SUPREME COURT RULES IN FAVOR OF THE NEW HAVEN FIREFIGHTERS

In 2003, 118 New Haven firefighters took a written and oral promotional examination.⁶ Though the tests were “carefully constructed,” white and Hispanic candidates scored significantly higher than black candidates.⁷ If New Haven accepted the results, the city would promote almost exclusively white candidates.⁸

Instead, the city rejected the results.⁹ Thereafter, 18 firefighters – 17 white and one Hispanic – filed a lawsuit against the city of New Haven.¹⁰ These candidates alleged that, by not certifying the promotion test results, the city violated the Equal Protection Clause of the 14th Amendment and Title VII.¹¹

The plaintiffs alleged a disparate treatment claim,¹² one of the two kinds of Title VII claims.¹³ Disparate treatment claims are those that are intentionally discriminatory.¹⁴ Disparate impact claims, conversely, have a disproportionately adverse effect on minorities despite the fact that they are not intentionally discriminatory.¹⁵

The Court granted summary judgment for the firefighters and held that by discarding the test results, the city violated Title VII.¹⁶ In holding for the firefighters, the Court noted, “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.”¹⁷ This meant that the city could not discard the test results simply to avoid a potential disparate impact claim.



*New Haven firefighters celebrate after the Supreme Court ruled in their favor.*¹⁸

The Court further held that Title VII does not prohibit an employer from taking into account how to fairly design a test for all individuals, regardless of their race, before the employer administers the test.¹⁹ However, in order to justify abandonment of the test results, the employer must show a “strong basis in evidence” that the employer would lose a disparate impact suit brought by employees who did not pass the test.²⁰

In her dissent, Justice Ginsburg noted that Congress enacted Title VII in order to include those who were previously kept out of the workforce.²¹ Conversely, she thinks the *Ricci* decision makes inclusion more difficult for these very groups.²² While sympathetic to the firefighters, she noted, “concern about exposure to disparate-impact liability, however well grounded, is insufficient to insulate an employer from attack.”²³

CIVIL RIGHTS ACTIVISTS’ REACTIONS

Echoing the beliefs of many civil rights groups, the National Association for the Advancement of Colored People (NAACP) states that *Ricci* “is a step backward for equal opportunity in employment.”²⁴ The NAACP expresses disap-

pointment in the Court's decision "to create a new flawed legal standard."²⁵ Similarly, the Lawyer's Committee for Civil Rights states, "With this decision, the Court has endangered critical equal employment opportunity safeguards that have been in place for decades to encourage employers to utilize tests that are both fair and effective."²⁶

Rep. Eleanor Holmes Norton, D-D.C., former chair of the Equal Employment Opportunity Commission, pledged her dedication to the Civil Rights Act's intent, stating she will introduce a bill to overturn the Supreme Court's decision.²⁷ According to Rep. Norton, the Court's decision goes against the policy of Title VII, which was to encourage employers to correct their own practices and to avoid, rather than invite, litigation.²⁸ As a result of *Ricci*, she believes "the Court invites employers to stare discrimination in the face and keep walking, to their peril."²⁹

EMPLOYER IMPACT

In the aftermath of *Ricci*, it is clear that an employer may not discard a test solely because it may have an adverse impact on minorities.³⁰ Thus, an employer must use the test results regardless of the impact on a minority group unless: (1) there is strong evidence that the result is not job-related and consistent with business activity or (2) there is powerful evidence that another test would have had less of a disproportionate impact on that group.³¹

Ricci thus presents a difficult Title VII situation for employers. If employers use the results of a test that has disproportionate results, they may face a disparate impact suit. However, if the employers discard the same results, they may be subject to a disparate treatment suit.³²

Therefore, according to Loyola University Chicago School of Law Professor Michael Zimmer, "[*Ricci*] is a trap for the unwary."³³ If employers take into account the risk of disparate impact, they have to do it before they administer the test, not after they receive the results.³⁴ The new standard will make it more difficult for employers to discard the results of tests once they are administered, even if there is a disproportionate and negative impact on a racial group.³⁵

THE FUTURE OF TITLE VII

As *Ricci* indicated, there is a recurring conflict in Title VII.³⁶ It can be difficult to avoid disparate impact without intentionally discriminating against others.³⁷

This potential conflict has not gone unnoticed. Justice Scalia wrote in his concurrence, “The resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection.”³⁸ Though Title VII lives on for the present, employers and employees are faced with difficult disparate impact standards and new challenges because of *Ricci*’s reinterpretation of the law.

NOTES

1 James Vicini, *Supreme Court Overrules Obama Nominee in Race Bias Case*, REUTERS, Jun. 29, 2009, <http://www.reuters.com/article/domesticNews/idUSTRE55S36U20090629>; *Ricci v. Destefano*, 129 U.S. 2658, 2664 (2009).

2 Sarah Benjes & John W. Polley, *Ricci v. Destefano: U.S. Supreme Court Rules for White Employees in Race Discrimination Case*, Faegre & Benson, Jul. 2, 2009, <http://www.faegre.com/showarticle.aspx?Show=9926>.

3 *Id.*

4 Vicini, *supra* note 1.

5 *Ricci*, *supra* note 1 at 2691; Interview with Michael Zimmer, Professor of Law, Loyola Univ. Chi. School of Law (Oct. 14, 2009).

6 Benjes, *supra* note 2.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Ricci*, *supra* note 1, at 2664.

12 *Id.* at 2673.

13 *Id.* at 2672.

14 *Id.*

15 *Id.*

16 *Id.* at 2681.

17 *Ricci*, *supra* note 1, at 2681.

18 Grateful acknowledgement to The Yale Daily News for permission to reprint the picture.

19 *Id.* at 2664, 2677; *Employee Testing After Ricci: What to Do Now*, Reed Smith, Sep. 1, 2009, http://www.reedsmith.com/publications/search_publications.cfm?widCall1=customWidgets.content_view_1&cit_id=2577.

- 20 *Id.*
- 21 Posting of Victor Goode to Race Wire, http://www.racewire.org/archives/2009/06/ricci_vs_destefano_one_step_fo.html (Jun. 30, 2009, 16:19 EST).
- 22 *Ricci*, *supra* note 1, at 2701.
- 23 *Id.*
- 24 Press Release, NAACP, Official NAACP Statement on Supreme Court Ruling in New Haven Firefighters Case (Jun. 29, 2009), <http://www.naacp.org/news/press/2009-06-29/index.htm>.
- 25 *Id.*
- 26 *Lawyers' Committee's Sarah Crawford Provides Expert Analysis on Ricci*, Lawyer's Committee for Civil Rights Under the Law, Jul. 2 2009, http://www.lawyerscommittee.org/projects/employment_discrimination/clips?id=0053.
- 27 Press Release, Eleanor Holmes Norton, Norton, a Former EEOC Chair, to Introduce Bill to Return Job Discrimination Statute to Its Intended Meaning Following New Haven Firefighters Decision (June 29, 2009).
- 28 *Id.*
- 29 *Id.*
- 30 Faegre, *supra* note 2.
- 31 *Id.*; Labor & Employment Law Blog, <http://www.laboremploymentlawblog.com/212181-print.html> (Jul. 10, 2009).
- 32 Shiela R. Foster, *Ricci v. DeStefano*, Univ. of Pittsburgh School of Law Jurist, <http://jurist.law.pitt.edu/annotations/2009/08/hold-civil-rights-after-ricci.php>.
- 33 Zimmer, *supra* note 5.
- 34 *Id.*; Reed, *supra* note 19.
- 35 Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, Jun. 30, 2009, *available at* http://www.nytimes.com/2009/06/30/us/30scotus.html?_r=1&scp=8&sq=ricci&st=cse.
- 36 Philip K. Howard, *The Limits of Law: Ricci and the Elusive Quest for Workplace Fairness*, THE ATLANTIC, Jul. 1, 2009, *available at* http://correspondents.theatlantic.com/philip_howard/2009/07/the_limits_of_law_ricci_and_the_elusive_quest_for_workplace_fairness.html.
- 37 *Id.*
- 38 *Ricci*, *supra* note 1, at 2682.