

Collaborate

Advocate

Educate

SUPREME COURT HOLDS THAT EMPLOYER VIOLATED THE FEDERAL PROHIBITION AGAINST RACIAL DISCRIMINATION

In the recent U.S. Supreme Court case *Ricci v. DeStefano* (2009) WL 1835138, the court held that the city of New Haven, Connecticut violated the federal prohibition against racial discrimination. The City chose not to certify a promotional examination after it found the test results disproportionately favored white and Hispanic candidates over African-American candidates.

The fire department in the City of New Haven, Connecticut had vacancies for the Lieutenant and Captain positions. The City and the fire department worked with an independent contractor to develop a civil service examination that would meet the necessary requirements of the New Haven Civil Service Board, the applicable collective bargaining agreement with the firefighter's union and state and federal laws. The promotional exam consisted of a written exam weighted at 60% and an oral exam weighted at 40% of the total score. The outside contractor conducted extensive research in developing the examination in an attempt to avoid racial bias. Despite these efforts, the exam results showed that white and Hispanic candidates disproportionately succeeded on the examinations, compared to African-American candidates. The City believed that it would have faced liability under Title VII, 42 U.S.C. section 2000e-2(k)(1)(A)(i), due to the discriminatory impact of the testing procedures on African-American firefighters, none of whom was subsequently eligible for promotion based on the results. In the City's attempt to avoid a potential lawsuit based on the disparate impact, the City chose not to certify, or validate, its test results, and instead threw them out.

The individuals who would have benefitted from the exam sued the City for a different form of racial discrimination. Plaintiffs alleged they suffered disparate treatment, or intentional racial discrimination in violation of the Civil Rights Act of 1964, as well as discrimination in violation of the U.S. Constitution's Equal Protection Clause.

The Supreme Court addressed the claim by 17 white firefighters and one Hispanic firefighter that the City of New Haven, Connecticut violated the discriminatory treatment provision of Title VII of

the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(a)(1), when it declined to use the results of a civil service examination devised for purposes of evaluating candidates for promotions to high-level positions. The question the Court had to decide was whether it is permissible for an employer to take intentionally an adverse action based on race against one group, in order to avoid a racially discriminatory impact on another.

The Court looked at the Equal Protection Clause standard in dealing with the conflict of disparate-treatment and disparate-impact. Under the Equal Protection Clause, “government actions to remedy past racial discrimination actions – that are themselves based on race – are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.” (*Id.* at p 13.) In order to satisfy the new standard, the City needed to show that it had a "strong basis in evidence" for concluding (1) that the statistical disparity between white and African-American test results was caused by the test not being job-related or consistent with business necessity, or (2) that the City refused to adopt an existing, equally valid, less discriminatory alternative testing method. Under the “strong basis in evidence” standard, the Court decided that the City of New Haven did not have sufficient support for meeting this standard. The Court concluded that the City violated Title VII when it discarded the exam results on the basis of race in order to avoid a disparate-impact situation.

Although the Supreme Court provided little guidance as to what constitutes a "strong basis in evidence," it would be prudent for a public (or other) employer to complete a comprehensive evaluation of the justification (or lack thereof) for administering any specific test or procedure for promotions or hiring. Such a review should be well-documented and all reports and records should be preserved. In evaluating its promotion/hiring procedures, an employer should consider issues including:

- If a test or other procedure has not yet been implemented, assessing the necessary level of resources and efforts, including evaluations by test-makers, subject matter experts and employment law attorneys and input by employees and others, to provide a basis for validating or certifying a test or other promotion or hiring procedure prior to implementing and administering the exam or other procedure;
- Whether the employer can use or customize existing exams or other promotion/hiring procedures which have been used in similar circumstances and have already been validated or survived legal scrutiny;
- The adequacy of the expertise and qualifications of the individual(s) who will develop job analyses, promotion/hiring tests or other procedures, a process for evaluating candidates, and a promotion/hiring eligibility process;
- Whether an independent testing expert also should be retained to evaluate a newly-created job analysis, test development, the process for evaluating candidates, and the

promotion/hiring eligibility process;

- The requirements imposed on the employer under the current state of the law in the employer's jurisdiction regarding disparate impact and disparate treatment, as well as the potential application of the 14th Amendment's equal protection clause to an employer's decision to disregard test results in an attempt to remedy a disparate impact on a protected group;

- For any currently-used promotion or hiring test or other procedures which have a disparate impact on a protected group, whether the merits of a disparate impact lawsuit warrant discontinuation of such tests or procedures.

As these issues arise, we strongly recommend that employers consult with qualified legal counsel with respect to each of the steps of a promotion or hiring process. Close and early coordination with an employment law attorney is the safest course. In light of the Supreme Court's ruling, employers are still without clear guidelines of do's and don't's as they navigate the difficult waters of employment discrimination law.

This information is meant to provide a general overview and is not intended to provide comprehensive legal guidance. The reader is advised to consult legal counsel with specific questions on particular matters.