

Disparate Treatment v. Disparate Impact

Employers who seek to promote workplace diversity sometimes need to navigate a narrow course between the two forms of discrimination prohibited by Title VII: disparate treatment and disparate impact. The U.S. Supreme Court offered some guidance last term in *Ricci v. DeStefano*.¹

In *Ricci*, a 5-4 decision authored by Justice Kennedy, the Court ruled that New Haven, Connecticut, intentionally discriminated against white firefighters in violation of Title VII by disregarding promotion test results that had a disproportionately adverse impact on black firefighters. The Court reasoned that “[f]ear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals . . . qualified for promotions.” Under *Ricci*, such disparate racial treatment is only proper when an employer has strong evidence that a facially neutral practice with a disparate impact on a protected class is not job-related and consistent with business necessity or if the employer rejected an equally valid, less discriminatory alternative.²

FACTUAL BACKGROUND

The Court record provides this background. The case arose after 118 New Haven, Connecticut, firefighters took exams that their union contract required in order to qualify for promotion to lieutenant or captain. The exams had a “significant” racial impact. Sixty-four percent of white candidates passed the captain exam, while only 37.5 percent of both black and Hispanic candidates passed it. Similarly, 58.1 percent of white candidates passed the lieutenant exam, but only 31.6 percent of blacks and 20 percent of Hispanics passed it. Based

on candidates’ ranking and union selection rules, no blacks were eligible for promotion given the test results.

After multiple hearings regarding whether to certify the test results, the City decided to disregard them in order to avoid potential disparate impact liability under Title VII. Seventeen white firefighters and one Hispanic firefighter then sued the City, alleging that it intentionally discriminated against them in violation of Title VII and the Fourteenth Amendment’s Equal Protection Clause by not certifying the test results. The Court noted that plaintiff Ricci, who had learning disabilities, spent more than \$1,000 to buy the test materials and pay his neighbor to record them so he could listen to them. Ricci also studied 8 to 13 hours a day to prepare for the test.

The federal district court awarded summary judgment to the City, which the Second Circuit Court of Appeals affirmed. The Supreme Court accepted review of the case based in part on the absence of cases in the federal courts of appeal interpreting and reconciling the disparate treatment and disparate impact provisions of Title VII.³

GOOD FAITH MOTIVE NOT A DEFENSE

The City argued its good faith belief that it acted in compliance with Title VII’s disparate impact provision prevented its action from representing disparate treatment. The Court summarily rejected this contention:⁴

Whatever the City’s ultimate aim—however well intentioned or

benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.

COURT ADOPTS “STRONG-BASIS-IN-EVIDENCE” STANDARD

The firefighters asked the Court to hold that disparate treatment is never warranted to avoid a disparate impact under Title VII. The Court concluded this “broad and inflexible” Title VII construction failed to effectuate



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the terms of the statute's disparate impact provision. Similarly, the Court criticized the City's assertion that disparate treatment is justified if motivated by a good faith belief that it is necessary to avoid disparate impact liability as inappropriately minimizing Congress's ban on disparate treatment. The Court theorized that this approach "would encourage race-based action at the slightest hint of disparate impact."⁵

The Court borrowed a standard from its Equal Protection jurisprudence that "strikes a more appropriate balance." It concluded that an employer's sole defense to disparate treatment of employees designed to avoid disparate impact discrimination is to show it had a "strong basis in evidence" to believe that it would be subject to disparate impact liability without the race-based discrimination. The "strong-basis-in-evidence" standard is used in Equal Protection cases addressing certain government actions designed to remedy historical racial discrimination. The Court reasoned:⁶

Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts . . . And the standard appropriately constrains employers' discretion in making race-based decisions.

CITY LACKED "STRONG BASIS IN EVIDENCE" AS MATTER OF LAW

Under the strong-basis-in-evidence standard, the Court ruled that the City could not successfully defend its rejection of the test results. The fact that the test had a significant racial adverse impact merely created a *prima facie* disparate-impact case. This was "far from a strong basis in evidence that the City would have been liable." Under Title VII, the City could have avoided disparate impact liability by showing that the exams were job-related and consistent with business necessity, or that it had not rejected an equally valid, less discriminatory alternative.

The record included extensive testimony presented to the City's Civil Service Board when it debated whether to certify the exam results. According to the majority, this evidence showed the City's test developer took great care to ensure it developed job-related exams, even observing on-duty officers. In gathering data to analyze the jobs, the test developer surveyed an over-representation of minorities. Moreover, the City declined the testing company's offer to provide exam validity data. Given these facts, the Court found the City's claim that the tests were unrelated to the job and inconsistent with business necessity to be "blatantly contradicted by the record."⁷ Further, there were no equally valid and less discriminatory tests to use. Based on this evidence, the City failed to show a genuine fact issue regarding whether it had a strong basis in evidence to believe it would have been subject to disparate impact liability if it had certified the test.

The Court declined to reach the question of whether the City's action comported with the Equal Protection Clause in light of its decision that the City's conduct violated Title VII's disparate treatment ban. It voiced support for the principles behind Title VII.⁸

[W]e need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution. Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact . . . is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.

Title VII does not prohibit an employer from considering, before administering

a test as practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And, when during the test design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussion toward that end.

CONSTITUTIONAL QUESTION'S "EVIL DAY" SIMPLY DELAYED?

In characteristically pointed style, Justice Scalia argued in a concurrence that the Court's resolution of the case "merely postpones the evil day" when the Court must confront whether Title VII's disparate impact provisions violate the Equal Protection Clause. Justice Scalia contended that the disparate impact provisions contravene the Equal Protection guarantee by forcing employers to assess the racial results of their policies.⁹

Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined. Justice Ginsburg advocated a lower standard permitting discriminatory treatment where an employer had "good cause" to believe its selective device had a disparate impact under Title VII's standards. However, he argued that the City raised fact question even under the majority's test, based in part on evidence that most U.S. municipalities use job simulations (i.e., assessment centers) for firefighter training. Justice Alito challenged Justice Ginsburg's characterization of the record in a separate concurrence in which Justices Scalia and Thomas joined. Justice Alito posited that a fact question existed as to whether the City's professed fear of disparate impact liability was pretext. In his view, petitioners presented evidence that the City abandoned the test results to appease a politically potent racial constituency, which precluded summary judgment for the City even under the dissent's lower standard.¹⁰

Ricci's IMPACT

On the one hand, Ricci strongly signals the Court's broad view of Title VII's disparate treatment prohibition, as lower courts have

recognized. In *Humphries v. Pulaski Cty. Spec. Sch. Dist.*, the Eighth Circuit Court of Appeals cited *Ricci* in ruling that proof an employer took adverse employment action pursuant to an affirmative action policy may represent direct evidence of unlawful discrimination.¹¹ In addition, a federal district court in Ohio relied on *Ricci* in declining to extend its 1977 consent decree in a race discrimination suit brought by Cleveland firefighters, despite the fact that the City had not fully complied with the decree.¹² The Ohio court reasoned:

As in *Ricci*, what is integral here is the administration of an examination, as part of an overall hiring process, that is fair to all people—regardless of race. . . . *Ricci* calls to mind . . . that [this court's] decision with respect to the necessity or propriety of race-based remedies has a wide-ranging impact on everyone's lives, regardless of the color of their skin.

Contrary to some of the media hype *Ricci* generated, *Ricci* arguably does not require a strong basis in evidence for all employer conduct intended to avert disparate impact on a protected class.¹³ The Court distinguished between designing employment practices to promote equal opportunity and taking race-based adverse action to further equal opportunity after implementing employment practices. In light of this fact, *Ricci*'s strong-basis-in-evidence test presumably applies only to employer action after the implementation of a selection process, when employees have relied on the process.¹⁴ Accordingly, *Ricci* ostensibly does not alter the principle that Title VII permits an employer to consider protected characteristics among other factors in hiring/promotion in order to attain balance in a manifestly imbalanced, traditionally segregated job category as long as it does not unnecessarily trammel rights of the majority class.¹⁵

The important lesson from *Ricci* is that the test design stage is the best time to ensure that a workplace test is fair to people of varying racial backgrounds. The EEOC's Uniform Guidelines on Employee Selection Procedures (29 C.F.R. §1607.1-1607.18) outline validation procedures for tests and other selection devices. Compliance with the guidelines is a defense to a disparate impact claim based on testing.¹⁶ Focusing

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on racial fairness at the test development stage is highly preferable to litigating whether post-test remedial action meets *Ricci*'s strong-basis-in-evidence test. Undoubtedly, no clear understanding of the proof threshold the test requires will emerge before years of litigation on the question. 

¹ *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009).

² *Id.* at 2678.

³ *Id.* at 2672.

⁴ *Id.* at 2674.

⁵ *Id.* at 2674-75.

⁶ *Id.* at 2676.

⁷ *Id.* at 2678 (citation omitted).

⁸ *Id.* at 2677.

⁹ *Id.* at 2681-3.

¹⁰ *Id.* at 2687-8.

¹¹ 580 F.3d 688, 694 (2009).

¹² See *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 2009 W.L. 260236, *15 (N.D. Ohio 2009).

¹³ See Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn On The Disparate Impact Road?*, 104 Nw. U. L. Rev. Coll. 201, 211 (Nov. 29, 2009).

¹⁴ See, e.g., *U.S. v. City of New York*, 2010 WL 318087, *23, __ F.Supp.2d __ (E.D.N.Y. Jan. 21, 2010) (ruling that City entitled a chance to prove new test was job-related and warranted by business necessity before court could alter use of resulting eligibility list, despite doubts about propriety of new test).

¹⁵ See *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (both applying rule).

¹⁶ 29 U.S.C. § 20003-12(b).