

To: Our Clients and Friends

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## *Ricci v. DeStefano* Supreme Court Finds that City Discriminated Against White Employees

On June 29, 2009, the United States Supreme Court rendered its much-anticipated decision in the case of *Ricci v. DeStefano*, 2009 WL 1835138 (2009), and declared that the City of New Haven, Connecticut had engaged in unlawful disparate treatment discrimination when it refused to implement the results of a promotional exam that revealed a substantial disparate impact on African-American employees. Specifically, the Court held that an employer may not use statistical disparity as the sole basis for changing an employment practice unless there is strong evidence indicating that continuing the practice would violate the disparate impact provisions of Title VII. *Ricci* is a significant development in the area of discrimination law, and will require employers to consider carefully a wide range of employment practices and decisions.

### **The Facts**

The City of New Haven utilizes standardized examinations in order to determine which civil service employees will be eligible for promotions. Promotional vacancies are then filled by selecting candidates from among the top three scorers on the examinations. In 2003, the City administered a test in order to determine which New Haven firefighters would be eligible for a promotion to the ranks of lieutenant or captain.

The results of the test showed that white candidates dramatically outperformed minority candidates. For example, with respect to the percentage of candidates who passed the lieutenant examination, 58.1% of white candidates passed, but only 31.6% of African American candidates passed. Based on the test results, 10 of the 10 then-existing lieutenant vacancies and 7 of the 9 then-existing captain vacancies would be filled by white firefighters.

This statistical disparity triggered a heated public debate as to whether the examination results should be accepted, i.e., "certified," or whether the results should be discarded because of their "disparate impact" on minority firefighters. Ultimately, the Civil Service Board split evenly on whether to certify

the test results, resulting in non-certification and the best-performing, predominantly white candidates not being immediately promoted.

A group of white and Hispanic firefighters who had passed the test, but were denied an opportunity to be promoted then sued the City, alleging that, “by discarding the test results, the City ... discriminated against [them] based on their race, in violation” of Title VII. *Ricci*, 2009 WL at \*4. The City argued that, if it had certified the test results, it could have faced liability under Title VII for adopting a practice that had a disparate impact on minority firefighters. The City further asserted that it could not be held liable under Title VII’s disparate-treatment provision for attempting to comply with Title VII’s disparate-impact provisions. The district court entered summary judgment in favor of defendants, and the Second Circuit affirmed.

## The Decision

In a 5-4 decision, the Court overruled the Second Circuit, and granted summary judgment in favor of the white and Hispanic firefighters. The Court announced a new standard for determining when an employer may engage in intentional disparate treatment in order to remedy an apparent disparate impact discrimination violation. Borrowing from its own Equal Protection jurisprudence, the Court declared that, “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a ‘strong basis in evidence’ that, had it not taken the action, it would have been liable under the disparate impact statute.” *Id.* The Court found that the City could not meet this standard.

The Court’s analysis began with the premise that, “absent some valid defense,” the City of New Haven’s refusal to certify the test results because of their adverse impact on African-American candidates constituted race discrimination in violation of the disparate-treatment prohibition of Title VII. The Court explained, “[w]ithout some other justification, [such] express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race ... We consider, therefore, whether the [goal of] avoid[ing] disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.” *Id.*

In articulating the “strong basis in evidence” standard, the Court explained that examination results and other facially neutral employment practices cannot be discarded because they unintentionally favor one group over another; an employer must have a “strong basis in evidence” to believe that, if corrective action is *not* taken - albeit corrective action that constitutes disparate treatment - the employer will be subject to disparate impact liability at the hands of the inadvertently disfavored group.

The Court explained that a mere finding of a statistical disparity, without more, does not constitute a strong basis in evidence that the City would have been liable under Title VII if it had certified the test results. While the Court acknowledged that the record evidenced a *prima facie* case of disparate impact discrimination, the Court held that the City could only be liable for disparate-impact discrimination if the examinations were not job-related and consistent with business necessity, or if the City had refused to adopt an equally valid, less discriminatory alternative that served the City’s business needs.

Based on the record, including the great lengths to which the City went in order to devise a fair and substantively-relevant test, the Court found that the City's test was undoubtedly job-related, that its inquiries were clearly consistent with by business necessity, and that no viable alternative test existed, but was ignored by the City. Thus, the City lacked an objective, strong basis in evidence to discard the tests. The Court also noted that an employer's mere fear of litigation cannot justify the disparate treatment of a group of individuals in the name of remedying an employment practice that has a disparate impact on another group of individuals.

## What Now?

The *Ricci* lawsuit placed the City of New Haven in the unusual position of trying to prove that the tests it had originally adopted resulted in disparate impact discrimination in order to defend itself against disparate treatment liability. Going forward, *Ricci* will continue to present employers with this awkward paradox, along with a host of other perplexing tasks and questions. For example:

- **Am I in *Ricci* territory?** While promotional exams like the one challenged in *Ricci* are usually an issue in public sector employment, *Ricci* also applies to private sector practices. For instance, if a company maintains a policy requiring an MBA as an educational prerequisite for promotion to a particular position (an "MBA Policy"), and the MBA Policy disproportionately excludes African American employees from promotional eligibility, and the company decides to consider changing the policy because of its adverse impact on African American employees, the white employees who benefit from the MBA Policy could challenge the change under *Ricci*.
- **How much is enough? How do you satisfy *Ricci*?** *Ricci*'s strong-basis-in-evidence test presents a high standard of proof for an employer considering a policy change that would involve the disparate treatment of a group of employees. While statistical disparities alone are insufficient to prove that a change would trigger disparate impact liability, how much evidence *is* enough? Under *Ricci*, an employer would have to demonstrate that the policy was not job-related and not justified by business necessity, or that an equally-viable, less adverse policy could have been adopted instead. Using the MBA Policy example, evidence that industry experience and job performance ratings are more reliable than an MBA as predictors of employees' future performance in the position might be sufficient evidence that the policy was not job-related.

*Ricci*'s high evidentiary bar re-emphasizes the need for careful, well-documented decision-making, and the importance of a studied, analytical approach. Critical questions must be asked: Why were certain decisions made? Were alternatives considered in arriving at those decisions? Is there another, equally-viable way to accomplish the goal? While such an analysis can be an expensive and protracted endeavor, as the Court has made clear, "evidence" is the key to reducing liability risks.

- **Does the *Ricci* rule apply to each stage of the decision-making process?** Another confounding issue is whether *Ricci* must be heeded whenever an employer considers statistical disparities in the context of making an employment decision, or whether it is limited to changes in employment practices. For example, how does *Ricci* affect employer decision-making that takes into account litigation risks in selecting employees for a reduction-in-force.

For instance, if an employer conducts a 10% reduction in force (“RIF”) in a 1,000 employee division that is 20% African-American, but 40% of the employees selected for the RIF are African-American, *Ricci* suggests that employers may review their selection decisions in order to determine whether any of the selections were motivated by race. However, if that review does not yield any “strong evidence” of intentional discrimination, but does identify 10 decisions in which the neutral criteria applied by the decision-makers could be challenged as pretextual, may an employer change its selection decisions and select a white employee rather than an African-American employee for termination of employment because there is a lower litigation risk? If the decision is changed, must the employer prove that it had “strong evidence” that the initial selection was unlawful?

- **What should I say to my employees?** Situations that fall within the *Ricci* framework also have serious employee relations implications. By definition, an employer grappling with a *Ricci* question will either engage in legally-sanctioned disparate treatment discrimination, or decision-making that may be perceived as constituting disparate impact discrimination. Decisions like this are sure to elicit emotional responses by employees, regardless of the technical, “legalistic” responses that an employer may have at its disposal. This raises questions of how best to address such issues with employees who have been – or believe that they have been – aggrieved. How can an employer most effectively communicate to its employees the basis upon which certain decisions have been made? At the same time, what information should not be shared with employees? The approach to these questions can directly impact the likelihood of litigation, as well as an employer’s working environment.

It is clear that *Ricci* has far-reaching effects, potentially including an increase in reverse discrimination litigation. As such, it is more important than ever for employment practices and decisions to be well-reasoned, deliberate, and, most of all, based on reliable evidence. In the words of the Court, *Ricci* endeavors to “provide guidance to employers and courts for situations when [the disparate treatment and disparate impact] prohibitions [are] in conflict.” Clearly, the resolution of such conflicts must be handled with great care.

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