RECENT UNITED STATES SUPREME COURT DECISIONS HAVE NOT ENDED AFFIRMATIVE ACTION

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Many were afraid that Affirmative Action was down for the count as a result of the Supreme Court's ruling last year in *Ricci, et al. v. DeStefano,* --U.S.--, 129 S.Ct. 2658, 174 L.Ed.2d 490 (June 29, 2009). In its 5-4 decision the Court held that the City of New Haven, Connecticut violated Title VII when it refused to make promotions from a list composed primarily of Caucasian firefighters. It rejected the argument that such promotions would be illegal because they would have a disparate impact on African American firefighters.

Ricci has not been the harbinger of doom as was originally feared. On May 24, 2010, the Supreme Court decided an employment case that will have wider ramifications than *Ricci*. In *Lewis v. City of Chicago*, 08-974, the Supreme Court unanimously ruled the 300 day statute of limitations for filing a charge with the Equal Employment Opportunity Commission ("EEOC") begins to run when the last discriminatory act occurred, not when the discriminatory policy or practice was first put into effect.

A Federal District Court in New York is credited with not only distinguishing *Ricci* but providing some of the most powerful arguments in support of affirmative action in recent history. *United States of America and The Vulcan Society, Inc., et al. v. City of New York, et al.*, 637 F. Supp.2d 77 (E.D.N.Y. 2009) ("The *Vulcan* Lawsuit") involves a class action lawsuit originating from the Equal Employment Opportunity Commission ("EEOC") charges filed on behalf of the Vulcan Society ("Vulcan") and three individual African American firefighter

[1] The opinions, word chose and tone of this article are solely that of the authors and should not be deemed to necessarily reflect the position of the NAACP, the authors' law firm, their clients or any other entity.

applicants. The New York City Fire Department ("FDNY") is charged with racially discriminatory hiring practices stemming from the use of two tests used to screen applicants for firefighter positions.

The original EEOC Charge was filed in 2002 and was amended in 2005. The EEOC issued a determination in favor of the African American firefighters and the Department of Justice filed its lawsuit against the City of New York ("City") in 2007. Later that year Vulcan and the individual Plaintiffs intervened.

The *Vulcan* Lawsuit is almost the mirror opposite of *Ricci*. In *Ricci* the City of New Haven failed to certify test results which it feared would result in promotions that would have a disparate impact on African American firefighters. The basic premise of the District Court's ruling in *Vulcan* is since 1999 the FDNY "used written examinations with discriminatory effects and little relationship to the job of a firefighter…[that] unfairly excluded hundreds of qualified people of color from the opportunity to serve as New York City firefighters." [2] To express differently, the department has remained so white for so long due to the racism embedded in the institution's fiber.

The FDNY employs in excess of 11,000 uniformed firefighters making it the largest fire department in the United States. It is also the least diverse fire department of any major city in America. As of October 2007, African Americans comprised 27% of the City's population but African American firefighters comprised only 3.4% of the FDNY. By contrast 57% of Los Angeles, 51% of Philadelphia and 40% of Boston firefighters are people of color. Also, the New

[2] Citations and footnotes are being kept to a minimum but the three major *Vulcan* Opinions are included as part of the presentation material.

York City Police Department has recruited a force that is approximately 50% minority and fully represents the demographics of the City. It is against this backdrop that the *Vulcan* lawsuit was decided.

On July 22, 2009, the District Court issued its first substantive Order in the *Vulcan* lawsuit. ("*Vulcan 1*") While partially granting the Plaintiffs' Motion for Summary Judgment, it found the Plaintiffs demonstrated a prima facie case of disparate impact against African American applicants because of the City's utilization of the qualifying examinations. It also held that the City failed to establish its reliance on the tests was justified by legitimate job-related considerations.

The District Court began its Order with the following paragraph:

> From 1999 to 2007, the New York City Fire Department used written examinations with discriminatory effects and little relationship to the job of a firefighter to select more than 5,300 candidates for admission to the New York Fire Academy. These examinations unfairly excluded hundreds of qualified people of color from the opportunity to serve as New York City firefighters. Today, the court holds that New York City's reliance on these examinations constitutes employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

The District Court also noted this was not the first time that the City had been brought to federal court to defend its entry-level firefighter examinations against charges of discrimination.

The District Court said it referenced *Ricci* not because it controlled the outcome of *Vulcan* but that it mentioned *Ricci* to precisely point out that it does not control the outcome. The Supreme Court confronted the narrow issue of whether New Haven could defend a violation of Title VII's disparate treatment provision by asserting that its challenged employment action was an attempt to comply with Title VII's prohibition against employment practices that create a

disparate impact. The Court held that such a defense is only available when "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." In contrast, this case presents the entirely separate question of whether Plaintiffs have shown that the City's use of the exams in question, numbers 2043 and 7029, have actually had a disparate impact upon African American and Hispanic applicants for positions as entry-level firefighters. The District Court concluded that *Ricci* did not confront that issue.

The District Court found that a prima facie showing of disparate impact requires plaintiffs to establish by a preponderance of the evidence that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin. To make this showing, a plaintiff must: (1) identify a policy or practice; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two.

The District Court went on to say that statistics alone can establish the prima facie case and that it almost always occupies center stage in a disparate impact claim. To do so, the statistics must reveal the disparity is substantial or significant. A plaintiff's statistical evidence must reflect a disparity so great that it cannot be accounted for by chance.

The District Court explained there are at least two widely recognized statistical measures of disparate impact: 1) the 80% or four-fifths rule; and 2) statistical significance or standard deviation analysis. In the 80% or four-fifths rule, a selection rate for any protected class that is less than four-fifths of the rate for the group with the highest performing group will generally be regarded by Federal enforcement agencies as evidence of adverse impact. Essentially, this

means that if the minority group performs less than 80% as well as the highest performing group, disparate impact will generally be inferred.

The District Court went on to explain that Courts have also relied upon standard deviation analysis (or statistical significance analysis) in determining whether there has been a disparate impact. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result ─ the more standard deviations, the lower the probability the result is a random one. Looking at standard deviations indicate how far an obtained result varies from an expected result.

Plaintiffs argued the presented statistics established a prima facie case of disparate impact for the challenged employment practices. They pointed out that the calculated disparities between African American and minority candidates resulting from the challenged practices were much greater than three units of standard deviation. For each of the rank-ordering uses of the examinations, the analysis demonstrated that the disparities between rankings of Caucasian and minority candidates were between 4.6 and 9.7 units of standard deviation.[3] Put differently, significantly more African American applicants would have scored higher on the firefighter examination but for this disparity.

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[3] All normal density curves satisfy the following property which is often referred to as the *Empirical Rule*. 68% of test takers would fall within 1 standard deviation of the mean. 95% of test takers would fall within two standard deviations of the mean. 99.7% of test takers would fall within three standard deviations of the mean.

In its opposition to the Plaintiff's Motions for Summary Judgment, the City offered several iterations of the same basic argument. The City asked the Court to reject Plaintiffs' statistical significance analysis because it improperly assumed "perfect parity" among groups of people and erroneously produced a finding of disparate impact solely on account of large sample sizes. In other words, the statistical analysis infers there are no differences between the capability (intelligence) and preparedness (the time they spent studying) of the groups being compared. The City asked the Court to rely exclusively upon the 80% Rule in determining whether there has been a disparate impact between Caucasian and minority candidates. Because application of this statistical rule would result in a finding of disparate impact for some, but not all, of the challenged employment practices, the City asked the Court to deny summary judgment relating to those practices that do not meet the 80% Rule.

The District Court wrote that the Second Circuit has repeatedly recognized that standard deviations of more than 2 or 3 units can give rise to a prima facie case of disparate impact because of the low likelihood that such disparities have resulted from chance. A finding of two or three standard deviations means there is a one in 384 chance the result is random. The calculated standard deviations in this case are all well beyond 2 to 3 units, strongly supporting a conclusion of a casual relationship between the observed disparities and the employment practices at issue.

The District Court concluded its Order by finding the City failed to raise a triable issue that this disparate impact was the result of business necessity. The City failed to demonstrate a sufficient relationship between the tasks of a firefighter and the abilities intended to be tested by the exams in question. The District Court wrote:

> It has failed to take measures to ensure the reliability of those examinations; it has failed to take steps to ensure that the reading level of the examinations was appropriate; it has failed to test for various recognized important abilities of a firefighter; it has failed to test for abilities needed upon entry in to the Academy, rather than abilities to be learned on the job; it has failed to retain testing professionals to devise the examination questions; and it has failed to demonstrate that the examinations it administered actually tested the abilities it intended to test.

Compounding these failings, the City has imposed arbitrary pass/fail scores, unrelated to the qualifications for the job of entry-level firefighters, and has constructed eligibility lists based on distinctions in test scores that are unrelated to corresponding differences in the qualifications of firefighter candidates.

On January 13, 2010, the District Court issued its Opinion holding that neither the FDNY department nor the City's department of administrative services were suable entities. *United States and The Vulcan Society, Inc. et al. v. The City of New York, et al.*, 683 F. Supp.2d 225 (E.D.N.Y. 2010) ("*Vulcan 2*"). It also held that the City's Mayor and Fire Commissioner were entitled to immunity under federal qualified immunity doctrine and New York's official immunity doctrine.

The City itself did not fare so well. The Opinion's introduction includes, "today the Court holds that New York City's use of these examinations constitutes a pattern or practice of intentional discrimination against Blacks, in violation of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, and State and City Human Rights Laws." This is perhaps the worst language a defendant in an employment case could ever hear.

The District Court said the disparate treatment claim differs significantly from the disparate impact claim decided by the Court seven months earlier in *Vulcan 1*. Once again citing *Ricci*, the Court stated, "Whereas disparate impact liability can be established by proof that an employer's policy had unjustified adverse effects on a protected group, a disparate treatment claim requires additional proof that the challenged policy was adopted with the intent to discriminate against the protected group." *Ricci v. DeStefano,* --U.S.--, 129 S.Ct. 2658, 2672-73, 174 L.Ed.2d 490 (2009). In pattern or practice disparate treatment cases, plaintiffs must establish by a preponderance of the evidence that the defendant took the challenged action because of its adverse effects on the protected class and that such intentional discrimination was the defendant's standard operating procedure.

The District Court offered a thorough explanation of the mode and order of proof. Courts recognize that direct evidence of intentional discrimination is hard to come by and plaintiffs will rarely be able to produce eyewitness testimony as to the employer's mental processes. Accordingly, the Supreme Court has devised a system of shifting evidentiary burdens for Title VII disparate treatment claims intended to progressively sharpen the inquiry into the elusive factual question of intentional discrimination. The plaintiff bears the initial burden of offering evidence adequate enough to create an inference that an employment decision was based on discriminatory criterion. The burden then shifts to the defendant to provide a nondiscriminatory explanation for the apparently discriminatory result. This general back-and forth framework applies to both individual and pattern or practice suits.[4]

[4] The plaintiff in an individual disparate treatment suit bears the additional burden of proving that the nondiscretionary explanation offered by the defendant is in fact a pretext for discriminatory motive. This showing is not required in class-action pattern or practice suits.

In order to meet this burden plaintiffs depend on two types of circumstantial evidence: 1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and 2) testimony from protected class members detailing specific instances of discrimination. As the Supreme Court has observed statistical evidence of workforce disparities is particularly probative of widespread intentional discrimination.

The District Court said the Plaintiffs presented undisputed statistical evidence to support a prima facie case that the City had a pattern or practice of discriminating against African American applicants. Using reasoning that was similar, if not identical, to that used in *Vulcan I*, the District Court said the calculated standard deviations in this case range from 6.5 to 33.9 unites, well in excess of both the Second Circuit's benchmark and the statistical showings that have established a prima facie case of pattern or practice disparate treatment in similar cases. The statistical evidence was supplemented with extensive historical, anecdotal and testimonial evidence that intentional discrimination was the City's standard operating procedure.

Following its two liability rulings, the District Court proceeded to the remedial phase with its Order issued on January 21, 2010. *United States and The Vulcan Society, Inc. et al. v. City of New York, et al.,* 681 F. Supp.2d 274 (E.D.N.Y. 2010) ("*Vulcan 3*"). This 35 page Order was shorter than that issued for the District Court's disparate impact decision in *Vulcan 1* or its disparate treatment decision in *Vulcan 2*.

The Plaintiffs said they will seek: (1) full compensation for the African American applicants who took the City's exam; (2) changes to the City's firefighter hiring practices going forward; and (3) additional affirmative measures by the City to correct the decades long underrepresentation of African Americans in the FDNY. The District Court said it was not

ordering any particular form of relief. Instead, the District Court outlined the "broad contours" of relief and resolved several basic disputes regarding the implementation of a remedy. The Court reserved ruling on many of the subsidiary details that require further information from the parties, and the numerous details raised regarding those details.

This is not to imply the Court did not provide some details within its broad contours, especially as it related to the individual victims of the discrimination. The Court said:

> As set forth in more detail below, the court will order the following measures designed to compensate identified victims of discrimination: (1) there will be a notice-and-claims procedure by which the approximately 7,400 minority applicants who sat for Written Examinations 7029 and 2043 will have the opportunity to claim entitlement to relief; (2) the City will have the opportunity, and the burden to show that any of these individual candidates were not victims of discrimination because they were not hired for legitimate reasons; (3) the remaining identified victims of discrimination will be eligible for monetary relief, apportioned on a pro rata basis among them; (4) 293 victims of discrimination-the shortfall of minority hires resulting from the City's use of Written Examinations 7029 and 2043-will be eligible for priority hiring relief, provided that they meet the current requirements for appointment as an entry-level firefighter; and (5) retroactive seniority will be available to priority hires, as well as to those whose hiring was delayed by the City's discrimination. The court provides further detail on these areas below and raises several issues for the parties to address at the February conference.

The District Court also indicated that it will order additional remedial relief such as the development of a new test and retroactive seniority to those victims whose employment was delayed as a result of the City's discriminatory antics.

The ramifications of the *Vulcan* lawsuit should not be deprecated simply because it involves a government defendant or the issue of whether a certain exam is racially biased. Although it hails from the Second Circuit, the *Vulcan* opinions provide an excellent primer

regarding what is required to prove disparate impact or disparate treatment no matter what Circuit you are in. It also illustrates the "broad contours" available when crafting remedies for pattern or practice discrimination.

To paraphrase Mark Twain, rumors of affirmative action's demise have been grossly exaggerated. The *Ricci* decision notwithstanding, most Courts are still willing to draft solutions to eradicate the effects of disparate impact and disparate treatment when the evidence supports it. Indeed, most Americans are willing to work toward leveling the playing field when the issues are presented in the proper terms.

Commentator Earl Ofari Hutchinson has noted that in countless polls and surveys, a solid majority of Americans do vehemently oppose the use of quotas, preferences, set asides and what's deceptively labeled "reverse discrimination." They have also backed anti-affirmative action initiatives that have cannily and deceptively played on words to stir outrage and indignation that affirmative action subverts the cherished American values of equality, fair play and reward for merit. The same polls, however, show that when the pollsters avoid an all or none choice between affirmative action as it currently exists and no affirmative action whatsoever a majority of Americans support affirmative action at some level.

As demonstrated by *Vulcan*, *Ricci* has not ended affirmative action. And that is still fine with most Americans.