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# Supreme Court Holds That Disparate-Treatment Discrimination Must Be Based Upon Strong Basis in Evidence of Potential Liability for Disparate Impact Discrimination

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by Daniel P. Westman

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In *Ricci v. DeStefano*, decided on June 29, 2009, the Supreme Court ruled 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." Justice Kennedy wrote the opinion for a 5-4 majority including Justices Roberts, Scalia, Thomas, and Alito. Justice Ginsberg filed a dissenting opinion joined by Justices Stevens, Souter, and Breyer. Justices Scalia and Alito also filed concurring opinions. Because its ruling is grounded on Title VII, the case has significance for all employers in both the private and government sectors.

In 2003, the City of New Haven, Connecticut ("the City") administered examinations in an effort to promote qualified applicants to fill vacant lieutenant and captain positions in its Fire Department. When they analyzed the test results, City officials found that the pass rate for black candidates was approximately half the pass rate of white candidates. Because of the limited number of vacant positions and promotion criteria, no black candidates would receive one of the 19 possible promotions. Based on concerns about being sued by black candidates who would not have been promoted, the City did not certify the exams, and no firefighters of any race received promotions.

Under existing law, employees may sue employers under Title VII under a "disparate treatment" theory alleging that the employer intentionally discriminated on the basis of race, or under a "disparate impact" theory alleging that a facially neutral practice that has the effect of disproportionately excluding members of a racial group. For example, previous Supreme Court cases have held that employers may be liable under the "disparate impact" theory if they use tests that produce a substantial and significant adverse effect on a specific racial group. Also, the Equal Protection Clause of the United States Constitution provides individuals of all races "the equal protection of the law," and courts strictly scrutinize any government action that is based on racial classifications.

The plaintiffs were firefighters who would have received promotions but for the city's refusal to certify the

test results. The plaintiffs argued that the City engaged in disparate treatment based on the plaintiffs' race, arguing that the scores were not certified because the higher scoring candidates were not black, in violation of both Title VII and the Equal Protection Clause. The City argued in the lower courts that its decision to not certify the exam results was not based on race, but instead was motivated by the City's goal to avoid a Title VII disparate impact lawsuit from African-Americans who might allege that they had been denied promotions based on a test that had disparate impact.

The District Court granted summary judgment in favor of the City. A three judge panel of the Second Circuit Court of Appeals, which included Supreme Court nominee Judge Sonia Sotomayor, affirmed without extensive analysis. The plaintiffs sought rehearing before the full Second Circuit, which was denied in a 7-6 vote over a strong dissenting opinion.

Justice Kennedy's opinion was based on Title VII, thereby avoiding the constitutional Equal Protection argument, and framed the issue as follows:

We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination…. Our task is to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them. In providing this guidance our decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity.

Justice Kennedy rejected bright-line standards urged by the firefighters that "it cannot be permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability," and that "an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit," stating that these standards are "overly simplistic and too restrictive of Title VII's purposes." Rather, Justice Kennedy noted that in previous affirmative action cases, the Court had held that "certain 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. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, *supra*, at 277 (plurality opinion)." Justice Kennedy justified use of this standard as follows:

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, which are essential to the statutory scheme and to Congress' efforts to eradicate workplace discrimination…. [B]ut it is not so restrictive that it allows employers to act only when there is a provable, actual violation.

Reversing the judgment of the District Court, and finding that the firefighters were entitled to summary judgment in their favor, Justice Kennedy stated that the racially adverse impact of the test results was significant and "that the City was faced with a prima facie case of disparate-impact liability." However, Justice Kennedy then stated that a prima facie case of disparate-impact liability was "far from a strong basis in evidence" because the City could be liable only if the examinations were not job-related or consistent with business necessity, or if the City refused to adopt equally-valid, less-discriminatory alternatives. Justice Kennedy found that there was no genuine dispute that the examinations were job-related and consistent with business necessity, and that "[t]he City, moreover, turned a blind eye to evidence that supported the exams' validity." Accordingly, Justice Kennedy concluded as follows:

[T]here is no genuine dispute that the City lacks a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results…. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examination and qualified for promotions.

In dissent, Justice Ginsburg emphasized the historical legacy of race discrimination in the firefighting profession, and argued that the lower court's decision should have been affirmed.

The outcome of this case provides guidance for both private and public employers about how to permissibly achieve racial diversity in the workplace while avoiding lawsuits. First, any employment

testing should be carefully validated to avoid disproportionate impact on protected categories of employees. Second, employers should carefully examine test results for clear bias in favor of one racial group, and thoroughly investigate whether other available practices that serve their job-related evaluation purposes have less impact on a protected class. However, Justice Kennedy's opinion makes clear that mere fear of litigation, without a deeper analysis as to potential liability for disparate-impact discrimination, is not sufficient to engage in race-based workplace decisions.

In addition, while *Ricci v. DeStefano* involved promotions, the logic of the opinion is equally applicable to other employment decisions including hiring and termination practices. The clear message from the Supreme Court is that employers must tread carefully when considering race-based actions as a means of avoiding potential disparate-impact liability.

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