Employment, Labor and Benefits Alert: U.S. Supreme Court Rules for White Firefighters in Title VII Disparate Treatment Suit

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On June 29, 2009, in *Ricci et al. v. DeStefano et al.,* the United States Supreme Court found in favor of white firefighters and against the City of New Haven, Connecticut (the City), holding that the City engaged in intentional discrimination when it refused to certify the results of a civil service exam. The results of that exam evidenced a statistical disparity in favor of Caucasian test takers, and the City feared that it would be sued if it accepted the racially skewed results. The Supreme Court's decision highlights a dilemma for employers which, like the City, are sometimes faced with difficult, no-win situations.

Background

When the City undertook to fill vacant lieutenant and captain positions in its fire department, the promotion and hiring process was governed by the City's charter, state and federal law, and the City's collective bargaining agreement with the firefighters' union. As part of this process, candidates for promotion were required to take a written exam, the results of which were to play a significant role in determining who would be awarded promotions. The City retained an outside consultant to develop and administer the exam, which it did after conducting extensive research and analysis. Despite efforts to ensure that the exam would not unintentionally favor white candidates, white test takers outperformed minority test takers on the exam.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin ("disparate treatment") as well as policies or practices that are not intentionally discriminatory, but have a disproportionate adverse impact on minorities ("disparate impact"). With respect to disparate impact, once a plaintiff has established that the challenged policy or practice does, in fact, adversely impact minorities, the employer may defend by demonstrating that its policy or practice is job-related for the position in question and consistent with business necessity. If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs.

Here, the promotion exam had a clear and significant disparate impact on minority test takers. The City, concerned that if it certified the results of the test it would be faced with lawsuits asserting claims for disparate impact under Title VII, refused to certify the results. Eighteen white and Hispanic firefighters, who would likely have been promoted based on their test performance, sued the City, the Mayor, and other officials, claiming that the City's action constituted unlawful disparate treatment under Title VII.

The parties filed cross motions for summary judgment. Defendants argued that they were not liable for disparate treatment because they had a good-faith belief that the City would have faced disparate-impact liability under Title VII if the tests results were certified. Plaintiffs argued that the City's desire to avoid disparate-impact litigation was not a valid defense to their claims for disparate, discriminatory treatment. The United States District Court for the District of Connecticut granted summary judgment to the defendants; the United States Court of Appeals for the Second Circuit, including Supreme Court nominee Judge Sonia Sotomayor, affirmed.

The Supreme Court's Decision

The Supreme Court, in a 5-4 majority, found in favor of the white firefighters. Specifically, the Court found that before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. In this instance, the Court held that the City could have defended disparate-impact claims by showing that the examination was job-related and consistent with business necessity, and that an equally valid and less discriminatory alternative was not available. Therefore, the Court concluded, the City had no strong basis in evidence to establish that the test was legally deficient and the City, which discarded the examination based solely on its fear of litigation, discriminated against the firefighters who passed the examination and qualified for promotions, and violated Title VII.

Implications for Employers

This case illustrates the difficult choices with which employers are often faced. Here, had the City certified the results of the exam, it would likely have been sued for disparate impact; however, when it refused to certify the results, it was sued for disparate treatment. In either case, the City would have been faced with significant costs and an uncertain result.

Employers should consult with counsel if they are concerned whether policies or practices may have a disparate impact on minority employees and, if so, what may be lawfully done to minimize or eliminate the adverse impact. Counsel can help analyze the risk of liability by considering whether the policy or practice at issue is job-related and a business necessity, and whether there is an equally valid alternative measure that will not result in the disparate impact. Counsel can also help determine whether adverse employment actions may constitute adverse treatment.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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