



Labor and Employment News Alert

July 1, 2009

The New Haven Firefighters Case – Supreme Court Establishes New Standard For Balancing Disparate Impact Against Disparate Treatment

Earlier this week the United States Supreme Court issued its long-awaited decision in the case of Ricci v. DeStefano. The Court held that the City of New Haven, Connecticut violated Title VII when it refused to certify results of a promotional examination after it learned that the test results, in combination with the City's promotion rules, meant that no African-American candidates were eligible for promotion. The political and societal implications of the Court's decision will be debated for some time. We write today to brief our clients and friends about the immediate implications of this decision for employers covered by Title VII.

Key Takeaways

- *Employers should be careful in developing or implementing standard tests, examinations or other selection criteria to ensure that such selection standards do not have a disparate impact on protected groups.*
- *When an employer has taken appropriate precautions to develop appropriate employment standards, it should be very cautious about rejecting the results of such selection standards based on fears of being sued for discrimination. If an employer discovers that its selection criteria or any other employment practice has a statistically significant disparate impact on any protected class of individuals, the employer should confer with legal counsel before disregarding the selection criteria or taking any other action in response to that discovery.*
- *The mere fact that application of an employment standard has a disparate impact is not sufficient to disregard or ignore the results of such application. An employer may not make any decision based upon a showing of disparate impact unless the employer has a strong basis in evidence to conclude that a plaintiff or class of plaintiffs would prevail if he, she, or they were to bring a claim for disparate impact discrimination.*

Legal Background: Disparate Treatment And Disparate Impact Discrimination

Before we review the Court's ruling, it is important to remember that Title VII of the Civil Rights Act of 1964 prohibits two types of workplace discrimination:

- **Disparate Treatment:** The primary purpose of Title VII is to prohibit intentional discrimination based on race, color, religion, sex or national origin. This type of unlawful discrimination is known as disparate treatment discrimination.
- **Disparate Impact:** Title VII also prohibits disparate impact discrimination. Under the disparate impact standard, a plaintiff establishes a prima facie violation by showing that an employer uses a facially neutral employment practice that causes a statistically significant disparate impact on the basis of race, color, religion, sex or national origin. An employer may defend against liability by demonstrating that the practice is job-related for the position in question and consistent with business necessity. Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.

Disparate impact concerns usually arise in job selection processes or with regard to reduction-in-force criteria. In the Ricci case, the issue was selection criteria for promotion of firefighters.

The Facts

The controversy in Ricci started with the City of New Haven's attempt to fill vacant lieutenant and captain positions in its fire department. The City's charter required the fire department to select the most qualified individuals as determined by job-related examinations.

The City contracted with an outside firm to develop such an examination (there was a written component of the examination and an oral component). All parties agree that the contractor went to extraordinary lengths to make the examination race-neutral, valid and relevant for the positions being filled. Nonetheless, the pass rate for white candidates was significantly higher than the pass rate for African-American and Hispanic candidates. Based on the test results, no African-American candidate who took the examination was eligible to fill any of the 19 captain and lieutenant vacancies that existed at the time.

The City believed that it had a dilemma on its hands: Despite its efforts to create a race-neutral selection process, its promotional examination had a statistically significant negative impact on African-American candidates. Based upon its disparate impact analysis, the City believed ***the examination would be unlawful under Title VII unless the City could prove that it was job related and consistent with business necessity***. After consulting with testing experts and legal experts, the City's Civil Service Board deadlocked 2-2 on the question of whether to use the examination results. Without the majority needed to approve the use of that examination, the examination scores were discarded and the City decided to start the job selection process all over again.

In response to the City's action, a group of white and Hispanic firefighters filed a lawsuit in which they claimed the City engaged in unlawful discrimination in violation of Title VII when it used race-based criteria in making its decision to discard the examination results.

What The Court Decided

In a 5-4 decision, the Supreme Court held that New Haven's decision not to use the examination results violated Title VII because the decision was improperly based on race-based criteria. In other words, the City's decision constituted intentional disparate treatment race-based discrimination in violation of Title VII. **According to the Court, it will usually be unlawful to engage in intentional *disparate treatment* discrimination in order to avoid claims of *disparate impact* discrimination. The only exception is when the employer has a "strong basis in evidence" by which to conclude that it will be liable for disparate impact discrimination.** In this case, the Court concluded the City of New Haven did not have a strong basis in evidence to conclude that it would lose a disparate impact discrimination lawsuit. Specifically, the Court noted that there was no genuine dispute that the examination designed by New Haven was job-related and consistent with business necessity. In addition, the City lacked a strong

basis in evidence of an equally valid, less-discriminatory testing alternative that the City would necessarily have refused to adopt. Critically, the Court rejected the City's arguments that it would have changed the parameters of the test had it known of the results. The Court reminded the City that such changes would have violated Title VII because they would be based on race.

Justices Ginsburg, Stevens, Souter and Breyer voted to uphold New Haven's decision to discard the results of the promotional examination.

What This Means For Employers

The import of this decision for employers is twofold: First, it is permissible, and indeed strongly advisable, for an employer to consider how to design a test, practice or other policy in order to make it fair to all individuals regardless of race, color, religion, national origin or sex. **Second, once an employer implements a policy or practice, be it an entrance exam, promotional exam, reduction-in-force design or similar policy or practice, and later determines that the policy or practice has a disparate impact on a minority group or groups, the employer must proceed with extreme caution.** The law now requires employers to engage in a full legal analysis of their potential liability before making any decision to rescind or alter a facially neutral policy that may have a disparate impact on a protected group. The risk of not acting may result in liability for the disparate impact itself, the risk of acting can lead to liability for making a deliberately discriminatory decision in violation of Title VII that will not withstand scrutiny under the new "strong basis in evidence" test.

Stay tuned as this case may be subject to Congressional modification (as it involves an interpretation of Title VII). Better yet, the Supreme Court has reserved the question of whether Title VII's disparate impact provisions violate the Equal Protection Clause of the U.S. Constitution should Congress take action.

As always, should our clients or friends have any questions about this or any other labor or employment related matter, please do not hesitate to contact us.

We are happy to answer any questions you may have about this new case or how it will affect your business.

Save These Dates

September 23, 2009 Breakfast Briefing: Wage/Hour Pitfalls

November 18, 2009 Breakfast Briefing: Topic TBD

Seating is limited so please reserve your space by calling 206.389.1710 or sending an email to ktran@riddellwilliams.com.

The **Riddell Williams Labor and Employment Group** helps businesses comply with labor and employment laws and resolve disputes with employees. Our practice consists of four primary areas: counseling, litigation, training, and traditional labor law.

Riddell Williams P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192

Telephone: 206.624.3600
Facsimile: 206.389.1708
www.riddellwilliams.com