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Ricci: New Haven Fire Department Race Discrimination Case

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White Firefighters Win! Disparate Impact Survives?

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WHITE FIREFIGHTERS WIN! DISPARATE IMPACT SURVIVES?

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In a 5-4 decision, the Supreme Court in *Ricci, et al v. DeStefano, et al.* (07-1428 and 08-328) held that white firefighters were victims of discrimination when the City of New Haven refused to certify the results of a promotional examination based upon the racial composition of the promotional list. The Supreme Court reversed, and remanded the case in an opinion 5-4 opinion written by Justice Kennedy, and joined by Chief Justice Roberts, and Justices Scalia, Alito and Thomas. Justice Scalia filed a concurring opinion. Justice Alito also filed a concurring opinion, in which Justices Scalia and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined.

The majority held “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.” While the white firefighters also raised a constitutional claim under the Equal Protection Clause of the 14th Amendment, the Court did decide the constitutional issue because the case was resolved under Title VII.

The majority rejected arguments by the City, as well as those of the Solicitor General and several of *amici* supporting the City, that the decision refusing to certify the promotional list was not a race based decision. Justice Kennedy explained “[w]ithout some other justification, this *express, race-based* decision making violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.” On this point the majority could not have been more explicit “[w]hatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race based action.”

Justice Kennedy then turned to what would constitute that “lawful justification.” The white firefighters had argued that Title VII does not permit an employer to take race based action employment actions to avoid disparate impact liability. Noting that the 1991 changes to Title VII authorized both types of claims, the majority rejected this argument. Justice Kennedy explained “[f]orbid[ding] employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill. Even in the limited situations when this restricted standard could be met, employers likely would hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment.”

The majority likewise rejected the “good faith” standard urged by the City. “Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination.”

Justice Kennedy, borrowing from cases analyzing race based action under the constitution, explained that the justification must have a “strong basis in evidence.” Justice Kennedy was careful to caution that there was no need in this case to decide the issue of whether the limitations on the use of race based employment actions under Title VII must mirror those under the constitution, but he observed they are clearly relevant. In support of the standard he explained “[a]pplying 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’s efforts to eradicate workplace discrimination.”

One issue that had been raised and briefed was whether the City’s action here was a violation of Title VII’s prohibition on the discriminatory use of test scores, commonly referred to as race norming. While the Court did not decide this issue, it did use it as support for the decision noting “[I]f an employer cannot rescore a test based on the candidates’ race, §2000e–2(f), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate impact provision.”

In adopting the “strong basis in evidence standard” Justice Kennedy explained that the Court was adopting the standard to resolve any potential conflict between Title VII’s disparate and disparate treatment provision, and were not “hold[ing] that meeting the strong-basis-in-evidence standard would satisfy Equal Protection.”

Justice Kennedy goes on to highlight other issues that were not being addressed. This portion of the opinion may lend significant insight into the the majority’s holding. It appears that here in a majority of the Court’s view, the City was just too far along in the promotional process to fail to move forward unless they had a “strong basis in evidence” to show the certifying the promotions would result in a viable disparate impact claim – “once th[e] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race.” Significantly, Justice Kennedy explained the majority opinion did not “question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. He continued “Title VII does not prohibit an employer from considering, before