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Ricci: New Haven Fire Department Race Discrimination Case

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Supreme Court Ruling in Ricci v. DeStefano Puts Employers Between a Rock and a Hard Place (Epstein Becker & Green, P.C. Client Alert)

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By

Peter M. Pankin
Epstein Becker & Green, PC
Washington, D.C.

Submitted by
Frank C. Morris, Jr.
Epstein Becker & Green, PC
Washington, D.C.

The banner features the firm name 'EPSTEIN BECKER GREEN' in a gold, sans-serif font on the left, followed by a vertical line and the words 'CLIENT ALERT' in a larger, white, sans-serif font on the right. The background is a dark blue-grey color.

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Supreme Court Ruling in *Ricci v. DeStefano* Puts Employers Between a Rock and a Hard Place

by **Peter M. Panken**

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Title VII of the Civil Rights Act of 1964 bars intentional discrimination—intentionally different treatment—on the basis of race (Disparate Treatment). 42 U.S.C. § 2000e-2(a). Title VII also makes it illegal to use a facially neutral selection criteria which has an adverse statistical impact on the basis of race (Disparate Impact), unless the employer can demonstrate that (1) the challenged selection criteria is “job related,” and (2) “consistent with business necessity” and the employer did not refuse to substitute an alternative selection practice which would not have the Disparate Impact effect. 42 U.S.C. § 2000e-2(k).

The City of New Haven paid six figures to a professional organization to devise a test for promotion to lieutenant and captain in the Fire Department. In 2003, when the test results produced a Disparate Impact in favor of White firefighters, and against minorities, the Civil Service Review Board threw out the results on the grounds that they feared a lawsuit by minorities based on the Disparate Impact theory.

Instead, they were sued by the White firefighters who aced the test, on the theory that the City had been guilty of intentional discrimination (Disparate Treatment) because of their race—White.

On June 29, 2009, the United States Supreme Court split 5 to 4 in favor of the White firefighters. Justice Kennedy wrote the majority opinion, joined by Justices Scalia, Thomas, Alito and Roberts.

The majority held that New Haven could not use race as a basis to ignore the results of the test because of a Disparate Impact, unless it could prove there was “strong evidence” that had it not ignored the results it would have been liable (not just sued) under the Disparate Impact theory. In other words, the threat of a lawsuit was not enough to justify ignoring the test results. The City had to show “strong evidence” that it would have lost a Disparate Impact lawsuit by minorities.

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, dissented, asserting that the majority ignored substantial evidence of multiple flaws in the tests New Haven used and

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failed to acknowledge that better tests used in other cities, which could have yielded less racially skewed outcomes and, in any event, the threat of a lawsuit was enough to justify the City's actions. Justice Ginsburg stated: "By order of this Court, New Haven, a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions." Justice Ginsburg also predicted that the majority opinion would not long endure.

Background

Six years ago, the City of New Haven administered examinations to qualified firefighters for promotion to the rank of lieutenant or captain. One hundred eighteen New Haven firefighters took the examinations, and many studied for months at considerable personal and financial cost.

The examination results showed that White candidates had outperformed minority candidates. This led to a rancorous public debate among politicians, the public, the firefighters' union, firefighters and the Civil Service Board. Those arguing that the results were discriminatory threatened lawsuits against the City if the City made promotions based on the tests. Others, claiming the exams were neutral and fair, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the largely White candidates who had performed well. In the end, the City threw out the results of the examination (based upon a 2 to 2 deadlock of the Civil Service Board), and certain White and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials, alleging that by discarding the test results, the defendants intentionally discriminated against the plaintiffs based on their race (*i.e.*, White and Hispanic).

As noted, the City's response was that if the results were certified, it could have faced a lawsuit under Title VII of the Civil Rights Act for adopting a practice that had a disparate impact on the minority firefighters. The District Court upheld the City's position and dismissed the lawsuit, and the Court of Appeals for the Second Circuit, in a panel that included Judge Sotomayor, affirmed, in a one-page, unsigned opinion.

The Disparate Impact theory derived from the case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court held that a selection criteria (high school diploma) established absent discriminatory intent but which had a disparate impact on minorities could violate Title VII of the Civil Rights Act of 1964, unless the employer was able to show a "business necessity" for the requirement in relationship to the employment in question.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court stated that the employer must demonstrate a "manifest relationship" between the test and the job, but left open the ability of a plaintiff "to show that other tests or selection devices without a similarly undesirable racial effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship."

Congress amended Title VII in 1991 with respect to the Disparate Impact test so that if the employer carries the burden to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity, the plaintiff may respond by