

# Labor & Employment Advisory

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## Supreme Court Holds that an Employer Cannot Make a Race-Based Decision to Avoid Possible Title VII Adverse Impact Claims Unless there is a Strong Basis in Evidence of Disparate Impact Liability

By David J. Laurent and Jay Glunt

In *Ricci v. DeStefano*, 2009 WL 1835138 (June 29, 2009), a 5-4 majority of the Supreme Court held that the city of New Haven, Connecticut unlawfully discriminated against top-scoring white and Hispanic firefighters by rejecting the results of a promotion-qualifying exam to avoid a possible claim from black candidates who had not tested as well. In so doing, the court ruled 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 fact to believe that it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action."

**Factual background.** In 2003, the city spent \$100,000 establishing a written and oral examination to be used as a facially neutral means of determining the order in which firefighters would be considered for promotion to lieutenant and captain positions over the next two years. After its consultant developed the examination, the city announced its implementation and many firefighters spent considerable effort and personal cost preparing for the new exam. These promotional opportunities were rare, so the stakes were high.

After the eligible candidates took the exam, the city evaluated the results. For the eight vacant lieutenant positions, ten candidates were eligible to be considered for immediate promotion — all ten were white. For the seven vacant captain positions, nine candidates were eligible to be considered for immediate promotion — seven whites and two Hispanics. Some black candidates would have been eligible for later vacancies, but it seemed clear to the city that white candidates had significantly outperformed minority candidates on the new exam. Based on comments made during a series of public meetings over the exam results, the city feared it would be sued by black candidates under a disparate impact theory unless it ignored the exam results and denied promotions to the top-scoring candidates. Therefore, the city decided to scrap the test results, to the disadvantage of the white and Hispanic candidates who had done well on the exam. Some of those white and Hispanic candidates then sued the city, alleging that the city had unlawfully discriminated against them on the basis of their race by not certifying the results of the promotion exam.

**Legal analysis.** Title VII prohibits intentional discrimination, known as disparate treatment, on the basis of race, as well as unintentional discrimination on the basis of race, known as disparate impact. A plaintiff establishes a prima facie claim of disparate impact by showing that an employer's facially neutral practice disproportionately impacts individuals belonging to a certain protected class. The burden then shifts to the employer to show that the practice is job-related for the position in question and consistent with business necessity. If the employer meets this burden, the plaintiff still can prevail by showing that the employer refused to adopt an available alternative employment practice that has less of a disparate impact and still serves the employer's legitimate needs.

The *Ricci* court initially determined that by rejecting the white and Hispanic candidates who had tested well on the basis of their race, the city — regardless of any well-intentioned aim — intentionally discriminated against them based on their race. The court then proceeded to address the city's defense, which was that it had to reject the test results because some minority candidates had threatened to sue the city under a disparate impact theory.

The court acknowledged that the minorities could have established a prima facie case of disparate impact discrimination; however, the court ruled that this alone was not sufficient to justify the intentional discrimination against the white and Hispanic applicants who had tested well. Instead, the court ruled that the city should have considered how it would fare on its remaining defenses and only if there was a strong basis to believe the it would lose — that (1) the test was not job-related for the position in question and consistent with business necessity, or (2) the city refused to adopt an available alternative employment practice that would have had less of a disparate impact and still served the city's legitimate needs — could the city justify intentional discrimination against the white and Hispanic candidates. The court ultimately determined that the city failed to meet this burden and, therefore, ruled in favor of the white and Hispanic candidates.

**Practical implications.** The *Ricci* decision identifies the analysis that an employer must undertake when reviewing the results of a facially neutral test or practice that appears to adversely and disproportionately impact a protected class. An employer cannot unilaterally disregard the results of the test or practice, to the disadvantage of successful candidates who are not in a protected class, for the purpose of avoiding a possible claim of disparate impact discrimination from members of the protected class, unless (1) the employer thoroughly analyzes how it may fare under the available affirmative defenses, and (2) the employer determines that there is a strong basis in evidence to believe that it would lose a claim for disparate impact discrimination.

In other words, the fact that a facially neutral test or practice appears to give rise to a potential disparate impact claim, by itself, is not an appropriate basis for refusing to implement the test or practice as planned. Instead, employers with concerns regarding a facially neutral test or practice must undertake the complete analysis set forth in *Ricci*, and only when warranted under that analysis, should an employer make a clean break to a new test or practice.

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