

Employment Edge 102nd Edition—Ricci v. DeStafano: Supreme Court (Almost) Reconciles Conflict for Employers Under Title VII

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Yesterday, in a much-anticipated decision, the U.S. Supreme Court held that Title VII requires employers not to discriminate on the basis of race even when they are attempting to remedy a past decision that had a negative statistical effect on minorities. The Court found that an employer could not throw out the results of a job-related test for applicants for promotions—and thereby take away promotions for the top candidates—unless the employer had "a strong basis in evidence" to believe that it would be subject to Title VII liability because of the results of the decision.

The case, *Ricci v. DeStafano*, has made headlines because of the role of Supreme Court Nominee Judge Sonia Sotomayor in the decision under review, which has now been overturned. Regardless of the decision's political importance, the case provides lessons for employers, particularly when considering testing or any otherwise-neutral decision which could have an adverse statistical impact on certain races or any other category protected by law.

Title VII—the federal nondiscrimination law—prohibits discrimination based on race and other categories listed in the statute. Title VII prohibits two different types of discrimination: 1) disparate treatment, generally defined as adverse actions which are intentionally based on race or other protected categories; and 2) disparate impact, generally defined as an action which is not intentionally based on a protected category but nonetheless has a disproportionate negative impact on a certain category of employee or applicant. Actions which have a disparate impact, such as testing for applicants, may nonetheless be allowed if the action is "job related and consistent with business necessity."

In 2003, the New Haven, Connecticut, Fire Department administered tests as part of the process to promote firefighters to fill certain vacancies in the department. Pursuant to its regulations, the City was required to promote from the group of applicants achieving the top three scores. After the City administered the test, if this rule had been applied, the City would not have promoted any black firefighters. Moreover, the minority applicants' pass rate overall was significantly below the pass rate for white applicants. Based on the test results, New Haven's political leaders debated the City's response. Certain firefighters argued the tests should be discarded because the statistical results showed a disparate impact. They threatened a lawsuit if



the City moved forward with the promotions. Other firefighters said the exams were neutral and fair, and threatened to sue if the City threw out the test results because of the statistical racial disparity.

In the end, the City threw out the results and white and Hispanic firefighters, who likely would have been promoted, sued the City alleging race discrimination in violation of Title VII. A federal district court endorsed the City's actions and the Second Circuit Court of Appeals, in a now somewhat controversial, one-paragraph opinion, affirmed the district court's decision.

On Monday, a 5-4 majority of the Supreme Court disagreed, overturning the lower courts' decisions. The Court first found that the City's decision to throw out the test results and related promotions was an adverse employment action that was based on race. Rejecting the relevance of the City's allegedly benign motive, the Court found that "[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 question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action."

The City argued that it was justified in its action because of Title VII's prohibition on actions which have a disparate impact. Were it to accept the exam results, the City argued, it could have been sued under Title VII because minorities did significantly worse on the exam. The Court rejected this justification because the City's concern about the risk of litigation was not sufficient to outweigh its intentional discrimination. 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."

The Court then applied this standard to the facts of the case. While first noting that the two sides in the case agreed that the impact of the test on minority applicants was statistically significant, the Court rejected the City's concerns and found, as a matter of law, that: 1) the test was "job related and consistent with business necessity;" and 2) there was no "equally valid, less-discriminatory testing alternative..."

The Court's analysis ultimately does not change what most employers will and should do in hiring and promotion decisions, but it provides several helpful takeaways. First, it should be noted that the Court did not even discuss the race of the plaintiffs, some of whom were white. Some may believe that discrimination laws protect only minority groups, but Title VII and similar laws prohibit discrimination based on race and other general characteristics, not minority status. The Court made clear that an employer's perhaps benevolent purpose (such as correcting past discrimination or increasing minority representation in the higher ranks) does not justify discrimination.



Second, the Court's discussion and approval of the City's test provides some guidance for employers considering testing or other neutral decisions which could have a statistical impact on one or more protected groups. The Court specifically endorsed the city's contractor's analysis of the positions and the inclusion of minority groups in the test's development. Ultimately, the Court found that there was no evidence of any deficiencies. The Court also rejected certain testing alternatives because the alternatives were not demonstrably superior to the method chosen and some could have resulted in other types of discrimination.

Finally, the Court made clear its view that once a decision is made to implement a testing or evaluation process which is neutral as to protected categories, employers cannot subsequently reverse the decision if reversal would have a negative impact on any other employees based on their race or other protected characteristic.

While the Ricci decision will be discussed largely for its implications on Judge Sotomayor's nomination, employers should take note of its more practical guidance. The decision also suggests that the Court's views on affirmative action and so-called "reverse discrimination" are, for the time being at least, essentially unchanged over the past decade.

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