

## Supreme Court Rules in Ricci v. DeStefano

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By International Municipal Lawyers Association

In the 5-4 decision, the U.S. Supreme Court released its decision in Ricci v. DeStefano this morning. The case, an appeal from a ruling of the Second Circuit Court of Appeals, deals with Title VII of the Civil Rights Act of 1964 in the context of firefighter testing and promotion procedures. Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin. The plaintiffs were all firefighters employed by the City of New Haven, Conn., who applied for promotion and took the necessary exams in 2003. The exams were prepared by an Illinois company that specialized in entry-level and promotional examinations for police and fire departments. The company's vice-president subsequently testified that all of the questions were drawn from or based in the syllabus, and that the exam was facially neutral. However, when the results came in, all but one of the top candidates was white (the exception was Hispanic). New Haven's Civil Service Board, charged with certifying the results, held hearings in which the "very significant disparate impact" was raised by the City's corporation counsel, who "strongly advocated against certifying the exam results" (because "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies – even . . . race-conscious remedies"). The Board ultimately decided not to certify the results, relying on federal, state and local anti-discrimination laws. It argued that it had a good-faith belief that Title VII mandated non-certification, and that the City could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters.

When Ricci and some of the other applicants sued, alleging violations of Title VII and their equal protection rights, the district court upheld the City's decision and granted it summary judgment, finding that the defendants' "motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, [did] not, as a matter of law, constitute discriminatory intent;" and that there was no Equal Protection violation in the decision not to use the promotional exams. "None of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took" the exams. The Second Circuit – a panel that included now Supreme Court nominee Sonia Sotomayor – affirmed in a very brief, two-page decision. After the Supreme Court agreed to hear the case, IMLA filed an amicus brief in support of the City.

In today's ruling, the Supreme Court reversed and remanded, focusing only on the Title VII issue and finding it unnecessary to deal with the Equal Protection arguments. Justice Kennedy delivered the opinion of the Court, ruling that the City's action in discarding the tests violated Title VII: a "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. The [City], we further determine, cannot meet that threshold standard." Fear of litigation alone could not justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.

Certain government actions to remedy past racial discrimination – actions that were themselves based on race – were constitutional only where there was a "strong basis in

evidence" that the remedial actions were necessary. Applying the strong-basis-in-evidence standard to Title VII, before an employer could engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer had to have a strong basis in evidence to believe it would be subject to disparate-impact liability if it failed to take the race-conscious, discriminatory action. Here, the Board's hearings produced no strong evidence of a disparate-impact violation. The majority of the Court concluded that all of the evidence demonstrated that the City rejected the test results only because the higher-scoring candidates were white. Without some other justification, the Court held that this express, race-based decision-making was prohibited.

A threshold showing of a significant statistical disparity and nothing more was far from the required strong basis in evidence that the City would have been liable under Title VII had it certified the test results. That was because the City could be liable for disparate-impact discrimination only if the exams at issue were not job-related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt. Based on the record the parties developed through discovery, there was no substantial basis in evidence that the test was deficient in either respect.

Accordingly, the City's race-based rejection of the test results could not satisfy the "strong basis in evidence" standard. "On this basis, we conclude that petitioners have met their obligation to demonstrate that there is 'no genuine issue as to any material fact' and that they are 'entitled to judgment as a matter of law.'"

The majority concluded that "[o]ur holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."

The decision is available online at <http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf>

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