

EMPLOYMENT LAW

A L E R T

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Ricci vs. DeStefano

Supreme Court's recent ruling will require an employer to take greater care in using - or disregarding after the fact - selection criteria in promotion, hiring and perhaps even layoff decisions.

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The United States Supreme Court's recent ruling in a reverse discrimination case provides guidance to employers who face the "tension" between employment law's prohibition of intentional race discrimination and its ban on the use of neutral criteria that have an "adverse impact" on minorities. A dilemma can arise when an employer develops what it believes to be fair and impartial selection criteria but, after the criteria are applied, the results show that no minorities (or very few minorities) remain as eligible candidates.

An employer in this situation faces a difficult choice: (a) use the results and face potential liability for the selection criteria's "adverse impact" on minority candidates; or (b) based upon the race of the qualified applicants, disregard the results and face potential liability for intentional race discrimination.

In a well-publicized reverse discrimination case, the Supreme Court dealt with this very "rock-and-hard-place" predicament. The Supreme Court ruled that the employer cannot disregard the results of the selection criteria just because the employer is afraid of being sued. Rather, the employer must show that, if it used the criteria, there would be a "strong basis in evidence" that it would face actual liability for adversely impacting minorities. This is a higher standard than had been used previously, meaning that an employer must have strong evidence before it disregards selection criteria which the employer had reasonably thought were fair and impartial when developed.

City of New Haven's "Rock-And-Hard-Place" Dilemma

In 2003, the City of New Haven, Connecticut went to great lengths to establish a fair, racially neutral exam for its firefighters seeking promotion to lieutenant and captain positions. However, when the test was administered, white candidates had significantly outperformed the minority candidates, and no African-American candidates were eligible for immediate promotion. The city's Civil Service Board debated whether to certify the results and award promotions on the basis of those results. Some firefighters argued that the test was discriminatory and threatened to sue if the results were not discarded. Others argued that the tests were neutral and fair and

threatened to sue if the results were discarded. Ultimately, the city threw out the exam results and awarded no promotions.

The white firefighters and one Hispanic firefighter – all of whom would have been promoted based on the exam results – sued the city. They argued that discarding the test results based on the qualified candidates' race was unlawful race discrimination. The city defended itself by explaining that if it had awarded promotions based upon a test that was so lopsided in the racial composition of those passing, it would be sued for violating that same employment law's prohibition against "disparate impact" – i.e., a neutral policy which adversely or disparately impacts minorities violates the law too, unless the employer can establish narrowly defined defenses.

The Ruling

The U.S. Supreme Court said that the white firefighters should prevail and granted them judgment. In a 5-4 ruling, issued on June 29, 2009 in *Ricci v. DeStefano*, the Court decided that an employer violates the law when it tries to justify intentional race discrimination in discarding selection results just because it might be sued for disparate impact.

The Supreme Court found that the city did discriminate on the basis of race when it discarded the exam results. That decision was based on the fact that the qualified candidates, who would have been awarded promotions, were predominately white. While the city may have had good intentions in attempting to avoid a disparate impact on minorities, it still engaged in an unlawful race-based decision. The Supreme Court also held that the city's good faith belief that the exam might have had an adverse impact on minorities did not justify the race discrimination. Rather, the Supreme Court said the city had to show a "strong basis in evidence" that it would have faced disparate impact liability in order to excuse its actions. Based upon the record before it, the Supreme Court decided that the city could not establish that defense and awarded judgment to the plaintiff-firefighters who were claiming reverse discrimination.

Why Does It Matter?

Private and public employers alike already face legal scrutiny when they use selection criteria such as tests. In the past, employers generally were considered to have a valid excuse for disregarding those selection criteria if the criteria had resulted in disproportionate outcomes and if the employer had a good faith belief of potential liability. The standard for that defense is now much higher, meaning that employers who use such selection criteria must conduct a more thorough analysis of potential liability to disregard such results. Relying upon the mere threat of a lawsuit is not sufficient.

As an employer, if you are considering the use of selection criteria such as tests, we would advise the following:

1. Conduct a thorough analysis of the criteria before their use to ensure that the criteria are job-related, consistent with business necessity, and racially neutral; and
2. After the selection criteria are applied, if there appears to be a disproportionate number of minorities excluded, perform an analysis of potential exposure before disregarding such results. The employer will be **required to disregard** the results if there is a "strong basis in evidence" of disparate impact liability, but the employer will be **required to use** the results if there is not a "strong basis in evidence" of such liability.

Potential Implications Outside the Promotion Context

The *Ricci* case may have significant implications for employers outside the context of promotion decisions. For example, employers should evaluate whether seemingly neutral selection criteria used for a layoff, when applied, result in an adverse impact on minorities. If the criteria produce such an adverse impact, however, the employer may attempt to “correct” such adverse impact by making “exceptions” to its selection criteria, and thereby layoff a non-minority who otherwise would not have been laid off. Under *Ricci*, that non-minority employee may have a claim for reverse discrimination against the employer unless the employer can demonstrate a “strong basis in evidence” that it would have been subject to disparate impact liability for its RIF selection criteria. Presumably, the employer will have originally crafted the selection criteria for the layoff based upon job-related qualifications and consistent with business necessity. Such thought and care in determining the selection criteria will make it hard for the employer to argue later that there was a “strong basis in evidence” for disparate impact liability absent making an exception to the selection criteria. Ultimately, *Ricci*’s holding means that employers will have to “re-think” which is the more “conservative” course of action. Unfortunately, that “re-thinking” may well mean deciding which lawsuit the employer would rather defend.

Additional Note: This case has garnered much attention because the Supreme Court was reversing the Second Circuit Court of Appeals, the panel where Judge Sonia Sotomayor sits. Judge Sotomayor is the president’s current nominee to replace Supreme Court Justice David Souter, who announced his retirement after this term. The District Court, where the case was first heard, had ruled that while the city made a “race-conscious” decision by considering race in disregarding the results, it did not make a decision based on race. Rather, the decision was race-neutral because all of the results were discarded, no one was promoted, and all of the firefighters would be able to participate in another selection process. The District Court further explained that there was no evidence of discriminatory intent because the city’s actions were actually an attempt to avoid discrimination. The Second Circuit, in a fairly brief opinion written by Judge Sotomayor, affirmed the District Court without a detailed analysis.

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