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Supreme Court Finds Discrimination in City's Rejection of Test Scores

In a 5 to 4 vote, the United States Supreme Court today held that the decision by the city of New Haven, Connecticut, not to certify the results of its firefighters' promotion exams because too few minorities passed violated Title VII. *Ricci v. DeStefano*, 07-1428 and 08-328, June 29, 2009. The Court held that where there is a conflict between Title VII's prohibition against disparate treatment and its prohibition against disparate impact, it is to be resolved under a "strong-basis-in-evidence" standard. In essence, absent a strong basis in evidence that there will be disparate-impact liability (*i.e.*, that an employer **cannot** likely defend its practices that led to the disparate impact), an employer may not use fear of litigation to intentionally act adversely toward one race in an effort to avoid an unintended adverse impact on another race.

New Haven decided not to certify the results of the exams because it feared litigation by minority candidates. Seventeen white firefighters and one Hispanic firefighter accused the city of discriminating against them by scrapping the results of a promotional exam that too few blacks and Hispanics passed. The firefighters alleged that by refusing to certify the results because a higher percentage of whites passed, New Haven violated Title VII's prohibition against intentional discrimination based on race. In the trial court, New Haven filed for summary judgment, arguing that it held a good-faith belief that had it certified the test results, it could have faced liability under Title VII for the test's disparate impact upon minorities. The district court agreed with the city and the Second Circuit Court of Appeals affirmed, reasoning that because the city "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." The case is particularly noteworthy because Supreme Court nominee Sonia Sotomayor was one of the three judges on the Second Circuit panel. The Supreme Court granted certiorari to determine whether New Haven's refusal to certify test results that favored whites because of fear of a Title VII disparate-impact claim by minorities violated Title VII.

The Supreme Court held that the city's actions in discarding the test results did indeed violate Title VII. Writing for the majority, Justice Anthony Kennedy first acknowledged that there is a conflict between Title VII's prohibition against disparate treatment and its prohibition against disparate impact. The conflict stems from the Court's 1971 decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which recognized that in some cases where an employer's practices disproportionately affect one racial group of workers (*i.e.*, disparate impact), even though unintentional, it violated Title VII (Title VII was then amended in 1991 to essentially codify the *Griggs* decision). The problem is that avoiding disparate impact against one racial group sometimes means intentionally taking actions that are adverse to another racial group.

Recognizing the conflict, the Court's analysis started from the premise that, absent a valid defense, by rejecting the test results solely because the majority of those who passed were white, New Haven violated Title VII's disparate-treatment provision. The Court noted that its task was to

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“provide guidance to employers and courts for situations when” the disparate-treatment and disparate-impact prohibitions could be in conflict without a rule to reconcile them. The Court considered several arguments from both parties regarding the proper means of reconciling the conflicts. In rejecting their arguments, the Court held that before an employer can engage in intentional discrimination against one race to avoid or remedy an unintentional, disparate impact against another, 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 reasoned that reconciling the conflict in this way “allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII.”

Finding that a strong basis in evidence is required to justify intentional discrimination against one racial group to avoid a disparate impact to another, the Court found that New Haven could not meet this standard. The Court noted that a “statistical disparity” without more was not a strong basis in evidence that New Haven would have been liable for disparate impact by certifying the test results. The Court explained that an employer would be liable under the disparate-impact theory only where the practice at issue was either not job-related or the employer refused to adopt an equally valid, less-discriminatory alternative that served the employer’s legitimate needs. The Court found no evidence in the record that either of these situations existed. Specifically, the Court noted the “painstaking analyses” undertaken by New Haven officials to develop and administer the exam in a manner consistent with the job requirements—and noted that it was done to ensure that minorities were actually **overrepresented**. Moreover, New Haven’s arguments regarding various less-discriminatory alternatives it could take would actually have violated Title VII’s prohibition, in its 1991 amendments, against adjusting the scores of a valid test to avoid a racial or gender imbalance. Thus, the Court held that New Haven’s sole basis for not certifying the test results was a fear of a disparate-impact claim by minorities. Such fear was insufficient by itself to justify taking adverse action against the white firefighters.

This holding provides guidance for employers that use testing methods to assess employees’ qualifications for promotions, and will likely mean that disparate-impact cases will be more difficult to prove.

FOR MORE INFORMATION

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