

## Supreme Court Rules for White Firefighters in Bias Claim

In a much-awaited decision issued on its last day in session, the U.S. Supreme Court has ruled that the City of New Haven improperly discriminated on the basis of race when it refused to certify the results of a promotional test on which white and Hispanic firefighters outperformed their black colleagues. *Ricci v. DeStefano*, Nos. 07-1428 & 08-328 (June 29, 2009). A 5-4 majority of the Court rejected the City's argument that it disregarded the test results to avoid violating Title VII's disparate-impact provisions.

Writing on behalf of the majority, Justice Kennedy said, "[R]ace-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." According to the Court, the City of New Haven did not demonstrate a "strong basis in evidence" for invalidating the results of its promotional test.

### **Facts are "Largely Undisputed"**

The majority opinion reviewed at length the "largely undisputed" series of events leading to the firefighters' lawsuit. The City of New Haven's Fire Department contracted with Industrial/Organizational Solutions, Inc. ("IOS") to develop promotional examinations to fill lieutenant and captain positions. Of the 77 candidates who took the examination for promotion to 8 lieutenant vacancies, all of the top 10 scorers were white. Of the 41 candidates who took the examination for promotion to 7 captain vacancies, the top 9 scorers included 7 whites and 2 Hispanics. While African-American candidates qualified for promotion, they were further down on the eligibility list.

City regulations known as the "rule of three" require that once test results are "certified," the Fire Department must promote applicants with the top three scores. The "rule of three" would not have allowed for the promotion of any of the black firefighters who took the lieutenant and captain exams.

The City's independent exam review board held hearings to consider the possibility that the tests were racially biased based on the disproportionately low number of minority candidates that passed the exams. Ultimately, the City declined to certify the test results.

## **Proceedings Below**

Seventeen white firefighters and one Hispanic firefighter filed a lawsuit in federal court, asserting that by throwing out the test results, the City violated Title VII's prohibition against disparate-treatment based on race, as well as the Equal Protection Clause of the U.S.

Constitution. The City argued that its refusal to certify the results was permissible because it could not make promotion decisions based on a test that has a racially disparate impact.

The district court granted the City's motion for summary judgment. The U.S. Court of Appeals for the Second Circuit in New York affirmed in a brief opinion, finding that the City was "simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact...."

## **Supreme Court: New Haven Lacked "Strong Basis in Evidence" of Disparate-Impact Liability**

The Supreme Court disagreed. "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions," Justice Kennedy wrote, rejecting the City's argument. However, the high court also rejected the plaintiffs' suggestion that employers should be required to show that there is in fact a disparate-impact violation before scrapping test results, calling this approach "overly simplistic and too restrictive."

Instead, it established a "strong basis in evidence" standard to reconcile what the majority viewed as two competing provisions within Title VII prohibiting "disparate-treatment" on the one hand, and "disparate- impact," on the other. The Court held that "under Title VII, 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 standard "leaves ample room for employers' voluntary compliance efforts," the Court said.

The City would only be liable under a disparate-impact theory, the Court explained, if the examinations were not job-related and consistent with business necessity or if the City could have adopted an equally effective and less discriminatory alternative for selecting candidates

who should be promoted. “[A] threshold showing of significant statistical disparity, ... and nothing more[,] is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results,” Justice Kennedy wrote. According to the majority, the City of New Haven failed to demonstrate a strong basis in evidence that the promotion exams were not job-related and consistent with business necessity or that there was an equally valid, less-discriminatory alternative.

In so concluding, the majority seemed to indicate that an employer can avoid disparate impact liability “based on the strong basis in evidence” by showing that, “had it not certified [test] results, it would have been subject to disparate-treatment liability.”

The majority opinion authored by Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito.

### **Equal Protection Claim Not Addressed**

Although the firefighters alleged that the City’s decision to not certify the test results constituted a violation not only of Title VII, but also the Fourteenth Amendment’s Equal Protection Clause, the Court’s decision on statutory grounds avoided a ruling on the constitutional question. In a concurring opinion, however, Justice Scalia observed that the majority’s opinion — which he joined — “merely postpones the evil day” when the Court must decide whether Title VII’s disparate-impact provisions are consistent with equal protection guarantees.

### **Dissent: Disparate-Treatment and Disparate-Impact are Complementary**

Justice Ginsburg, joined by Justices Breyer, Souter and Stevens, authored a strongly-worded dissenting opinion. “Title VII’s disparate-treatment and disparate-impact proscriptions must be read as complementary,” Justice Ginsburg said, chiding the majority for “set[ting] at odds the statute’s core directives.” The dissent emphasized that the Court has repeatedly held that Title VII “should not be read to thwart” efforts at voluntary compliance.

After a lengthy review of the facts and the origins of Title VII’s disparate-impact provisions, Justice Ginsburg wrote, “The strong-basis-in-evidence standard ... as barely described in general, and cavalierly applied in this case, makes voluntary compliance [with Title VII] a hazardous adventure.” Describing the majority’s standard as “enigmatic,” the dissent said,

“[o]ne is left to wonder what cases would meet the standard and why the Court is so sure this case does not.”

The dissent further found that the district court’s decision was rooted in Second Circuit precedent, which it found consistent with its view of the law. Three justices from the majority (Justices Alito, joined by Justices Scalia and Thomas), however, in a separate concurring opinion, criticized the dissenters for offering an “incomplete description of events” leading to New Haven’s rejection of the exam results, after the dissent itself had accused the majority of omitting “important parts of the story.”