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RICCI V. DESTEFANO: DISPARATE IMPACT NO EXCUSE FOR RACE-CONSCIOUS CORRECTIVE MEASURES IN THE WORKPLACE

By David M. Wissert, Esq. and Stacy A. Mikulik, Esq.

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We write to inform you of a recent United States Supreme Court decision that impacts all employers. On June 29, 2009, the Supreme Court issued its highly anticipated decision in *Ricci v. DeStefano*, No. 07-1428, 557 U.S. — (2009), which addresses the interplay between disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964 (“Title VII”).

Title VII prohibits intentional discrimination, called disparate treatment, and practices that are not intentionally discriminatory but result in a discriminatory effect, called disparate impact. For the first time, the Court was called upon to address the conflict that arises when, in an effort to avoid one, here disparate impact, the employer is guilty of the other, here disparate treatment.

In this decision, the Court held that an employer’s intentional discrimination against white employees is not justified by the employer’s fear of a disparate impact claim by minority employees unless the employer is able to demonstrate a “strong basis in

evidence” that the minority employees could in fact prevail on a disparate impact claim. Although the case attempts to resolve the conundrum an employer may find itself in if it engages in disparate treatment of a certain class of people solely to avoid a disparate impact claim by another class of people, the *Ricci* case may have far wider effects on an employer’s ability to correct workplace policies that have a discriminatory effect, implement affirmative action and diversity programs, and engage in other race-conscious measures to correct discriminatory impact in the workplace. The full reach of the *Ricci* decision is unclear and will need to await future decisions.

Facts of the Case

In *Ricci v. DeStefano*, No. 07-1428, 557 U.S. — (2009), the City of New Haven administered written and oral examinations to certain qualified firefighters to identify candidates for promotions to the ranks of lieutenant and captain. The results of the examinations were to be certified by the New Haven Civil Service Board (“CSB”) and the candidates for promotion were to be chosen from

the top scorers. An outside consulting firm developed the examination questions after reviewing training manuals and other written materials and conducting interviews of firefighters already serving in these positions. The consulting firm purposely over-sampled minorities in an effort to ensure that the examination questions and results did not favor white firefighters.

Of the 77 candidates who completed the lieutenant examination (43 whites, 19 blacks, and 15 Hispanics) — 34 candidates passed (25 whites, 6 blacks, and 3 Hispanics) — but all 10 of the eligible top scorers were white. Of the 41 candidates who completed the captain examination (25 whites, 8 blacks, and 8 Hispanics) — 22 candidates passed (16 whites, 3 blacks, and 3 Hispanics) — but the 9 eligible top scorers included 7 whites and 2 Hispanics.

The skewed results of the examinations caused controversy in the town of New Haven so the results were not immediately certified. The CSB conducted five meetings over the

span of several months to discuss the examination results. The CSB solicited witness testimony concerning the examinations from, among others, the consulting firm that had prepared the examinations, firefighters who had completed the examination, an industrial/organizational psychologist, a fire program specialist, and a professor from Boston College. Much of the testimony upheld the validity of the examinations. Ultimately, however, the CSB voted not to certify the examination results. Some of the firefighters who passed the examinations — 17 whites and 1 Hispanic — brought discrimination claims against the City, the two CSB members who voted against certification, a City resident, and other City officials.

On the parties' cross-motions for summary judgment, the City argued that it had a good faith belief that it would have violated the disparate impact provision of Title VII if it had certified the examination results. As such, it could not be held liable for disparate treatment of the white firefighters for attempting to comply with Title VII's prohibition of disparate impact on the non-white firefighters. The District Court sided with the City, as did the Second Circuit Court of Appeals, but the Supreme Court reversed in a 5-4 decision.

The Supreme Court's Decision

The Court emphasized that the City had made an employment decision, no matter how well-intentioned, solely on the basis of race. The question to be resolved, therefore, was not whether the City's actions were discriminatory, but whether the City was lawfully justified in acting on the basis of race. To make this determination, the Court

selected a standard invoked in cases arising under the Equal Protection Clause of the United States Constitution called the "strong basis in evidence" standard. This standard limits an employer's discretion in making race-based decisions to cases in which the employer has "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." To be subject to disparate impact liability, there must be strong evidence that the employer's action was not job-related and consistent with business necessity or that a less discriminatory alternative was available to the employer but the employer refused to implement it. In the Court's view, this standard gives equal effect to both the disparate impact and disparate treatment prongs of Title VII, condones disparate treatment to avoid disparate impact only in very narrow circumstances, and will not chill an employer's voluntary compliance efforts with Title VII.

Applying this standard to the facts of the case, the Court concluded that the City did not have a strong basis in evidence that it would be subject to disparate impact liability to the non-white firefighters and granted summary judgment in favor of the white firefighters. There was no evidence that the lieutenant and captain examinations were not job-related or consistent with business necessity, or that a less discriminatory alternative existed but the City had refused to adopt it. Indeed, the City had deliberated over the examination at length. City officials "thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test

itself and its administration...the process was open and fair." The extensive witness testimony solicited by the CSB yielded much support for the examinations' job-relatedness and consistency with business necessity, and there was no evidence of a *bona fide* alternative, let alone one that the City rejected. In short, the City's only evidence was a "threshold showing of a significant statistical disparity," which, without more, is not a strong basis in evidence.

In Justice Kennedy's words, "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. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim...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."

In other words, the City was caught between a rock and a hard place and was going to be sued no matter what. Interestingly, of the 13 judges to consider the case, 8 sided with the City, but the most important 5 — the majority on the U.S. Supreme Court — determined the City had made the wrong choice.

What Will This Decision Mean For Employers

The *Ricci* decision likely will have a significant impact on employers, and not just governmental employers, who

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utilize workplace examinations. The fact that the Court decided the case on Title VII grounds means that its holding is applicable to all employers who are concerned with disparate impact liability and are otherwise governed by Title VII.

This case restricts what an employer may do after it discovers that a policy, procedure or decision it has implemented has a discriminatory impact. Before taking remedial action, an employer now must have a "strong basis in evidence" that the policy or procedure is not job-related and consistent with business necessity, or that the employer refused to adopt a less discriminatory alternative, which would subject it to disparate impact liability. An employer can no longer use race-conscious measures to remedy disparate impact concerns, such as an affirmative action plan, without being cautious of the effects they have on both minorities and non-minorities.

At the same time, if an employer eliminates all race-conscious measures, the employer may wind up with no minorities on staff or no minority promotions, which also raises concerns under Title VII. Completely unaddressed in the Court's decision is its applicability to the standard disparate impact analysis conducted in connection with mass downsizings today. If a disparate impact is noted in connection with a downsizing, this opinion cautions that employers must be very careful before changing any of its downsizing decisions. Therefore, any employer who suspects that a policy, procedure, or decision has a discriminatory impact on its employees should consult with legal counsel before implementing measures to correct the discriminatory impact.

Further, in *Ricci*, the Court emphasized that Title VII does not prohibit an employer from considering how an examination might best be designed

to provide a fair opportunity to all races before administering that examination, but once the examination is administered, the results may not be invalidated on the basis of race. Therefore, it also would be prudent for employers to discuss proposed policies or procedures that may have a discriminatory impact with counsel prior to implementation.

If you have any questions related to this alert or other employment practices and workplace compliance issues, please contact:

David M. Wissert
973 597 2560
dwissert@lowenstein.com

Alice Stock
646 414 6886
astock@lowenstein.com

Stacy A. Mikulik, Esq.
973 422 6768
smikulik@lowenstein.com

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1251 Avenue of the Americas
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212 262 6700

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590 Forest Avenue
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650 433 5800

Roseland
65 Livingston Avenue
Roseland, NJ 07068
973 597 2500