

## **The Supreme Court Announces Heightened Standards For Justifying Race-Based Remedial Efforts Under Title VII**

**June 29, 2009**

In one of the most significant rulings of this 2009 term, the Supreme Court today announced in *Ricci v. DeStefano* that employers must have a “strong basis in evidence” for taking race-conscious remedial actions in response to concerns that their employment practices would have a disparate impact based on race, national origin, gender, or other unlawful classifications under Title VII. The Court split 5-4 in an opinion authored by Justice Anthony Kennedy, and ruled that a statistically significant disparity alone would not be sufficient to meet this heightened standard. Employers should review their efforts to avoid disparate impact claims and their diversity practices in light of the increased risk of reverse discrimination claims under this decision.

In *Ricci*, the City of New Haven contracted with a consultant to develop written and oral examinations to select among candidates for promotions into lieutenant and captain positions in its fire department. The first administration of these tests had a statistically significant adverse impact on African-American and Hispanic candidates. Under the test results, 17 of the 19 available promotions would have gone to white candidates, two of the 19 would have gone to Hispanic candidates, and none would have gone to African-American candidates. The City decided not to certify the promotion test results, based primarily on its review of the adverse impact statistics and the advice of the City’s counsel that “‘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.’”

After the City declined to certify the test results, the white candidates who would have been promoted under the test results sued the City under Title VII and the Equal Protection Clause of the Fourteenth Amendment. The Court ultimately did not address the Equal Protection challenge because the case could be resolved entirely on Title VII grounds.

In assessing the Title VII challenge, the Court first explained that Title VII (as amended by the Civil Rights Act of 1991) prohibits both intentional discrimination, known as “disparate treatment,” and practices not intended to be discriminatory but that nevertheless have a disproportionately adverse effect on minorities, known as “disparate impact.” Rejecting the City’s and the United States’s arguments that the challenged action was not race-conscious, the Court noted that the City’s decision not to certify the test results based on a concern that the tests had a disparate impact on minority candidates was “express race-based decisionmaking” that would “violate the disparate-treatment prohibition of Title VII absent some valid defense.”

Turning to the question of a valid defense, the Court framed the issue as “whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.” The Court rejected the white firefighters’ argument that a desire to avoid disparate-impact liability can never be sufficient to justify race-conscious remedial efforts. The Court also rejected the suggestion that “an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit.” The Court observed that such a rule “would run counter to what we have recognized as Congress’s intent that ‘voluntary compliance’ be ‘the preferred means of achieving the objectives of Title VII’” and that “[f]orbid[ding] employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill.”

On the other hand, the Court also rejected the City’s and the United States’s arguments that an employer’s good-faith belief that the challenged actions are necessary to comply with Title VII should be sufficient to justify race-conscious remedies. The Court opined that “[a]llowing employers to violate the disparate-treatment prohibitions based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact” which would “amount to a *de facto* quota system, in which a ‘focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.’”

Borrowing from the Court’s equal protection jurisprudence, the Court turned to the plurality decision in *Wygant v. Jackson Board of Education*, in which Justice Lewis Powell announced the “strong-basis-in-evidence” standard as a resolution of the tension between the competing equal protection goals of eliminating segregation and of ending governmentally imposed discrimination. The Court held that “race-based action . . . 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.” In describing this standard, the Court noted that race-conscious remedial action would be justified in “narrow circumstances” based on “an objective, strong basis” and “evidentiary support,” but explained that it does not require a demonstration of a “provable, actual violation.”

Applying this new standard to the facts of *Ricci*, the Court found that the City did not have a strong basis in evidence for refusing to certify the test results. The Court was critical of the City’s “sole reliance upon race-based statistics” even though the “racial adverse impact was significant, and . . . [because of such statistics] the City was faced with a *prima facie* case of disparate-impact liability.” The Court observed that the City could not be liable under a disparate-impact theory unless (1) the tests were not job-related for the positions in question and consistent with business necessity, or (2) the City rejected less-discriminatory alternatives that also would have served the City’s needs. The Court found that there was no strong basis in evidence for concluding that the tests were deficient on either of these grounds.

Lastly, the Court explained that if the City had implemented the test results, it could have avoided liability under a disparate-impact theory based on the strong basis in evidence that not certifying the results would have led to liability under a disparate-treatment theory.

This decision likely will encourage reverse discrimination challenges to employers’ diversity practices and efforts to avoid disparate-impact claims. Employers should review their current practices and consider whether there may be revisions that make sense in light of this decision.

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