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**CLIENT ALERT**

**U.S. Supreme Court Rules Against the  
City of New Haven in Reverse Discrimination Case**

On June 29, 2009, the United States Supreme Court ruled that the city of New Haven (the “City”) violated Title VII of the 1964 Civil Rights Act when it refused to promote firefighters to open lieutenant and captain positions solely because no black candidates scored high enough on the employment exam to be eligible for immediate promotion. In Ricci, the Court held that the City was barred from discounting the test results and not promoting high-scoring white individuals because it could not demonstrate a “strong basis in evidence” that the exam was flawed and improperly favored white test-takers. Ricci v. DeStefano, (Docket No. 07-1428).

**Background**

In 2003, the City hired a consulting company to formulate an exam assessing candidates seeking promotions to the Fire Department’s open captain and lieutenant positions. The City contends that it took great care to ensure that the exam did not improperly favor white test-takers. However, the passing rates of black and Hispanic candidates were disproportionately lower than that of white candidates. In fact, none of the 19 candidates eligible for immediate promotion was black and only one was Hispanic.

Under Title VII, not only is intentional discrimination (“disparate treatment”) prohibited, but so are practices that unintentionally contribute to disproportionate adverse effects on minorities (“disparate impact”). The City was thus forced to decide whether to use the lopsided test results and leave itself vulnerable to disparate impact litigation, or to deny white high-scorers promotions and face a disparate treatment suit. The City decided to throw out the test results, reasoning that it might face a disparate-impact discrimination lawsuit from minorities who were not promoted if it chose to promote on the basis of the exam.

After the City threw out the test results, the firefighters eligible for promotion based on the exam results sued. They alleged that the City's refusal to certify the results based on the race of the successful candidates constituted disparate-treatment discrimination, and that an employer cannot justify intentional discrimination just because the alternative is unintentional disparate impact discrimination. Both the United States District Court for the District of Connecticut and the Court of Appeals for the Second Circuit ruled for the City in light of its "motivation to avoid making promotions based on a test with a racially disparate impact."

### **The Ruling**

The Supreme Court reversed the lower courts' decisions and ruled that Plaintiffs were entitled to summary judgment in their favor. The Court determined that the City violated Title VII's disparate-treatment provision because it rejected the test results "solely because the higher scoring candidates were white" without demonstrating, through a "strong basis in evidence," that it would have been liable under a disparate impact theory.

The Supreme Court recognized that "[the City] was motivated...by a desire to avoid committing disparate-impact discrimination," but concluded that, "...[t]here is no evidence- let alone the required strong basis in evidence- that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the city. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who...qualified for promotions."

While the Supreme Court rejected the City's argument that an employer's "good-faith fear" of liability constitutes a sufficient basis for taking race-based actions, it also refused to accept Plaintiffs' argument that an employer is never justified in attempting to avoid unintentional discrimination by taking a race-based action. The Court instead emphasized that Congress has expressly prohibited both disparate treatment and disparate impact discrimination and that the Court "must interpret the statute to give effect to both provision where possible." The Court required an employer faced with threats of both types of lawsuits to inquire into whether, absent some form of intentional discrimination on its part, it would be open to disparate impact liability. Strong evidence of true disparate impact is a "threshold standard" that would justify an employer in taking an employment action that amounts to explicit disparate treatment in order to ameliorate an unintentionally disproportionate adverse impact. Such "strong basis" would include a showing, not made by the City, that the tests were not job-related or other equally valid nondiscriminatory tests were available.

### **Significance for Employers**

While Ricci involved a public sector employer, the ruling affects private sector employers as well because Title VII applies to both public and private sector employers.

The Supreme Court's ruling in Ricci makes clear that an employer may only throw out tests that yield disparate results when there is strong evidence of a test's flaws, but otherwise provides little explicit guidance as to how an employer can determine when it should discount employment measures that disfavor minority candidates. Litigation on the exact parameters of the new standard is likely.

The best way for employers to ensure that they will not have to decide whether to use disparate results is for them to take extra care in developing selection processes that are fair and flexible before administering them. Before implementation, tests and other selection criteria should be carefully vetted to make sure they are race neutral, job-related and consistent with business necessity.

If you should have any questions regarding the Supreme Court's decision in Ricci, please contact us.

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