

RICCI V. DESTEFANO: GUIDELINES FOR EVALUATING AND AVOIDING A TITLE VII SUIT WHEN USING PROMOTION TESTS

Jason M. Nutzman*
Smith Moore Leatherwood LLP
300 East McBee Avenue Suite 500
Greenville, South Carolina 29601
Phone: 864.240.2430
Fax: 864.240.2498
jason.nutzman@smithmoorelaw.com



INTRODUCTION

Recently, the United States Supreme Court issued an opinion with far-reaching but employer-friendly results. In Ricci v. DeStefano, the Court overturned a Second Circuit decision and found “reverse discrimination” by the City of New Haven (“City”) against the highest-scoring group of test-takers seeking promotions in the fire department. The Court’s decision provides employers guidance when using tests for hiring and promotional purposes; answers the question of whether an employer’s attempt to avoid disparate impact liability excuses otherwise prohibited disparate treatment discrimination; and seemingly affords a greater level of protection against disparate impact Title VII suits.

RICCI V. DESTEFANO: A CLEARER STANDARD FOR TITLE VII ACTIONS

In Ricci, the City refused to certify the results of a professionally designed test because only two minority candidates qualified for a promotion following the test. The City feared that certification would lead the minorities who did not qualify for promotions to bring suit for disparate impact under Title VII.

FACTUAL BACKGROUND OF RICCI

The City charter mandated that the City use a merit system to fill civil service vacancies with the most qualified applicants as determined by “job-related examinations.” After each test, the City’s Civil Service Board (“Board”) certified a list of the applicants ranked solely according to their scores. The charter mandated a “rule of three” requiring the relevant hiring authority to fill its vacancies with one of the top three available scorers on the certified list. To fill vacant captain and lieutenant positions in its fire department and effectuate the examination mandate, the City hired an independent professional company to develop and administer the exam. The

* Carla Patat, a second-year law student at the University of South Carolina, assisted with the preparation of this article.

exam consisted of oral and written components, both of which were developed by observing and surveying existing officers of the fire department and deliberately oversampling minorities to ensure that the exams would not accidentally favor nonminority candidates.

Candidates took the exams in November and December 2003 and, pursuant to the rule of three, ten white candidates were eligible for promotion to lieutenant and nine candidates were eligible for promotion to captain – seven whites and two Hispanics. The City feared that too few minorities qualified for promotions and might have a legal claim against it for racial discrimination based on the disparate impact of the tests, and thus refused to certify the exam results.

Eighteen candidates who were eligible for promotions based on the rule of three - seventeen white and one Hispanic, including the named plaintiff Ricci - subsequently brought suit against the City and others for racial discrimination based on disparate treatment, alleging violations of Title VII and the Equal Protection Clause of the Fourteenth Amendment. The City claimed it had a good-faith belief that certifying the results would have violated the Title VII prohibition on disparate impact and thus they could not be liable for disparate treatment for attempting to avoid a disparate impact violation. The District Court granted the defendants motion for summary judgment and dismissed the case, and the Second Circuit upheld.

SUPREME COURT HOLDING

In a 5-4 decision written by Justice Kennedy, the Court held that the City acted unlawfully in refusing to certify the exam results and make the plaintiffs eligible for promotions. The Court assumed that the Board's actions constituted prohibited disparate treatment absent a valid defense because the Board based its refusal on the fact that "too many whites and not enough minorities would be promoted were the lists to be certified." The Court concluded that "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 improperly discarded the test results under Title VII and the plaintiffs were entitled to summary judgment on their disparate treatment claim.

"STRONG-BASIS-IN-EVIDENCE" STANDARD

To determine whether the City had a valid defense, the Court adopted and applied the "strong-basis-in-evidence" standard "as a matter of statutory construction to resolve any conflict between the disparate treatment and disparate impact provisions of Title VII." This standard recognizes both the disparate treatment and disparate impact provisions of Title VII and allows violations of one in order to comply with the other "only in certain, narrow circumstances." The Court listed two primary benefits of this standard, stating that it "leaves ample room for employers' voluntary compliance efforts," but also "appropriately constrains employers' discretion in making race-based decisions." The strong-basis-in-evidence standard limits the employer's discretion "to cases in which there is a strong-basis-in-evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation." The court concluded that an employer may not "take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible

candidates—absent a strong-basis-in-evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate impact provision.”

USING TESTS FOR EMPLOYMENT PURPOSES

The Court’s decision clearly permits employers to provide equal employment opportunities to all employees, including by use of appropriately developed oral and written examinations. The Court, however, found that once an employer establishes its process for providing these equal employment opportunities and announces its selection criteria, it “may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race” without showing “a strong-basis-in-evidence of an impermissible disparate impact.”

WHAT EMPLOYERS NEED TO KNOW

Following Ricci, discarding exam results poses an increased liability threat for employers. Therefore, the time to stave off litigation is clearly in the exam development stage. Ricci suggests that a professionally developed exam that involves observing and surveying employees currently holding the relevant position(s) and draws exam questions from a publicized list of relevant sources should be sufficiently job-related and able to withstand a legal challenge.

In order to provide more legitimacy to the exam and peace of mind to the employer, it may also be wise to hire a different company to evaluate the exam before administering it, and to test the exam on current employees holding the positions for which the exam is being given. Employers should remember that, in order to discard a test based on racial concerns, they must show that, under the strong-basis-in-evidence standard, the test was flawed and its results must be discarded in order for the employer to avoid a disparate impact violation.