Race Discrimination and the Supreme Court: A Legal Analysis of *Ricci v. DeStefano*

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Summary

This report discusses *Ricci v. DeStefano*, a recent Supreme Court case involving allegations of reverse discrimination by a group of white firefighters who challenged city officials in New Haven, Connecticut, over their refusal to certify a promotional test on which black and Hispanic firefighters had performed poorly relative to white firefighters. In a 5-4 vote, the Court held that the city's actions violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. The case has drawn considerable attention, not only because of the controversial nature of the reverse discrimination allegations but also because the Court reversed a decision by a three-judge appellate panel that included Judge Sonia Sotomayor, who was, at the time, a nominee for the Supreme Court and who has since become a member of the Court.

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In June 2009, the Supreme Court issued a decision in *Ricci v. DeStefano*,[1] a case involving allegations of reverse discrimination by a group of white firefighters who challenged city officials in New Haven, Connecticut, over their refusal to certify a promotional test on which black and Hispanic firefighters had performed poorly relative to white firefighters. In a 5-4 vote, the Court held that the city's actions violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.[2] The case has drawn considerable attention, not only because of the controversial nature of the reverse discrimination allegations but also because the Court reversed a decision by a three-judge appellate panel that included Judge Sonia Sotomayor,[3] who was, at the time, a nominee for the Supreme Court and who has since become a member of the Court.

Background

In 2003, the City of New Haven administered an examination to determine which firefighters would qualify for promotion to lieutenant and captain positions over the following two years and the order in which they would be considered for promotion. Of the 77 candidates who took the lieutenant examination, 43 were white, 19 were black, and 15 were Hispanic; 25 whites, 6 blacks, and 3 Hispanics passed the exam. Based on the number of lieutenant positions available, the top 10 candidates, all of whom were white, were eligible for promotion. Of the 41 candidates who took the captain examination, 25 were white, 8 were black, and 8 were Hispanic; 16 whites, 3 blacks, and 3 Hispanics passed the test. Based on the number of captain positions available, the top 9 candidates, 7 of whom were white and 2 of whom were Hispanic, were eligible for promotion.[4]

Confronted with the significant racial disparity revealed by the test results, city officials held a series of public meetings to determine whether to certify the exam. Some firefighters, claiming that the statistical disparity demonstrated that the test was racially discriminatory, threatened to sue if the city made promotions based on the test results. Other firefighters argued that the test was fair and threatened to sue if the city denied promotions to the candidates who had performed well. Ultimately, the city declined to certify the exam, and a group primarily composed of white firefighters sued, claiming that the city's actions violated Title VII of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

The district court sided with the City of New Haven, holding that the "[d]efendants' motivation to avoid making promotions based on a test with a racially disparate impact ... does not ... as a matter of law, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim."[5] Likewise, the district court rejected the plaintiffs' equal protection claim, ruling that the city's attempt to remedy the disparate impact of the test did not constitute an intent to discriminate against the non-minority firefighters and that the rejection

[1] 129 S. Ct. 2658 (2009).

[2] 42 U.S.C. § 2000e-2(a).

[3] For more information on Judge Sotomayor's decision in *Ricci* and other civil rights cases, see CRS Report R40649, *Judge Sonia Sotomayor: Analysis of Selected Opinions*, coordinated by (name redacted) and (name redacted).

[4] Ricci v. DeStefano, 129 S. Ct. 2658, 2666 (2009).

[5] Ricci v. DeStefano, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

of the test results did not amount to an unlawful racial classification because all applicants were treated the same with respect to the administration and invalidation of the tests.[6]

Subsequently, a three-judge panel of the Court of Appeals for the Second Circuit that included Judge Sonia Sotomayor issued a one-paragraph affirmation of the "well-reasoned opinion" of the district court, noting that because the city, "in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected."[7] Neither Judge Sotomayor nor the other judges provided additional insight into their legal reasoning in the decision. The Supreme Court granted review in order to consider the Title VII and equal protection claims at issue in the case.

Title VII and the Equal Protection Clause

Under Title VII, two different types of discrimination are prohibited. The first is disparate treatment,[8] which involves intentional discrimination, such as treating an individual differently because of his or her race. The second type of prohibited discrimination is disparate impact,[9] which involves a neutral employment practice that is not intended to discriminate but that nonetheless has a disproportionate effect on protected individuals. An employer may defend against a disparate impact claim by showing that the challenged practice is "job related for the position in question and consistent with business necessity," although a plaintiff may still succeed by demonstrating that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.[10]

Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."[11] To maintain an equal protection challenge, government action must be established; that is, it must be shown that the government, and not a private actor, has acted in a discriminatory manner. Although the Fourteenth Amendment requires equal protection, it does not preclude the classification of individuals. A classification will not offend the Constitution unless it is characterized by invidious discrimination.[12] Over the years, the Court has interpreted the equal protection clause in a way that requires different degrees of scrutiny for such classifications, depending on the category of persons affected. Under the strict scrutiny test, which is the most stringent form of review and applies to classifications based on race, the government must show that the classification drawn by a statute is narrowly tailored to meet a compelling governmental interest.[13]

The question that arose in *Ricci* was whether the city's failure to certify the test results violated Title VII's prohibition against disparate treatment or the constitutional requirement for equal protection. The firefighters who sued argued that the city's refusal to promote them constituted

[6] *Id.* at 161-62.

[7] Ricci v. DeStefano, 530 F.3d at 87 (2d Cir. 2008).

[8] 42 U.S.C. § 2000e-2(a)(1).

[9] Id. at § 2000e-2(k).

[10] Id.

[11] U.S. Const. amend. XIV, § 1.

[12] *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963).

[13] *See* San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).

discrimination on the basis of race in violation of both Title VII and the Equal Protection Clause. City officials defended their actions, arguing that the city was attempting to comply with Title VII and avoid a lawsuit when it refused to certify test results that had a disparate impact on minority firefighters. The Supreme Court granted review to resolve the dispute.

The Supreme Court's Decision

Ultimately, the Court ruled in favor of the white firefighters, holding that the city had violated Title VII's prohibition against disparate treatment when it discarded the test results. According to Justice Kennedy, who wrote the majority opinion,[14] the city's rejection of the racially disparate exam results was, despite its seemingly well-intentioned attempt to avoid disparate impact liability, an explicitly race-based decision that would violate the disparate treatment prohibition in the absence of a valid defense. In order to reconcile what the majority viewed as two competing provisions of Title VII, the Court established a new standard ─ imported from its equal protection jurisprudence ─ for evaluating when attempts to avoid disparate impact liability excuse what otherwise would be prohibited disparate treatment under Title VII. According to the Court, "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."[15] The Court explained:

> Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that 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.[16]

Applying this new standard, the Court found that the city did not have a strong basis in evidence to conclude that the promotion examination would constitute a disparate impact violation. Although the minority firefighters could have established a prima facie case of disparate impact based on the statistical results of the test, such a showing is not sufficient to establish a violation of Title VII. Rather, the city would have been liable only if the tests were not job-related and consistent with business necessity or if a less discriminatory alternative that would have met the fire department's needs was not adopted. The Court held that there was no evidence that the tests were not job-related or that there was a less discriminatory test available and therefore the city lacked a strong basis in evidence for believing that it would be subject to disparate impact liability.[17] Because the case was ultimately decided on statutory grounds, the Court did not reach the constitutional question related to the firefighters' Equal Protection claim.

[14] Justices Roberts, Scalia, Thomas, and Alito joined in the majority opinion.

[15] Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

[16] Id. at 2676.

[17] Id. at 2677-78.

Two justices filed concurring opinions in the case. Justice Scalia, writing for himself, indicated that Title VII's disparate impact provisions may warrant closer constitutional scrutiny. Although Justice Scalia agreed that it was unnecessary to reach the constitutional question in the current case, he noted that the Court's "resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[18] Justice Alito also wrote a concurring opinion in which he was joined by Justices Scalia and Thomas. The primary purpose of Justice Alito's opinion appeared to be to rebut several arguments made by the dissenting Justices, particularly the dissent's interpretation of the evidentiary record.[19]

Justice Ginsburg, writing for the dissent, criticized the Court's opinion, arguing that it failed to recognize the "centrality of the disparate-impact concept to effective enforcement of Title VII" and the legacy of race discrimination in the firefighting profession.[20] In addition, the dissenting justices, disagreeing with the notion that Title VII's disparate impact and disparate treatment provisions stand in conflict, rejected the Court's newly established "strong basis in evidence" standard. Rather, the dissenting justices would have held that an employer who discards a policy or practice that has a disparate impact does not violate Title VII's prohibition against disparate treatment, as long as the employer has good cause to believe the policy or practice is not a business necessity.[21] Because "New Haven had ample cause to believe its selection process was flawed and not justified by business necessity," the dissenting justices would have held that the city did not violate Title VII.[22]

In the wake of the Court's ruling, the U.S. District Court for the District of Connecticut, to which the case had been remanded for entry of judgment, issued an order instructing state officials to promote the firefighters who had sued.[23]

Significance of the Decision

The Court's decision in *Ricci* is likely to affect the workplace in several different ways. Although employees will still be able to bring Title VII disparate impact claims against their employers, the decision will make it more difficult for employers to voluntarily comply with Title VII by altering employment policies or practices that have an unintentionally discriminatory effect. Perhaps more importantly, the decision also signals that laws that prohibit disparate impact discrimination may face increasing constitutional scrutiny in the future, a trend that could fundamentally alter the current structure of Title VII and several other civil rights laws, as well as significantly limit the ability of employees to sue for unintentional discrimination.

In addition, the *Ricci* decision has implications for Congress. Since *Ricci* was decided on statutory grounds, legislators who disagree with the Court's interpretation could introduce

[18] Id. at 2681-82.

[19] Id. at 2683-89.

[20] Id. at 2690. Justice Ginsburg was joined in dissent by Justices Stevens, Souter, and Breyer.

[21] Id. at 2699.

[22] Id. at 2703.

[23] Ricci v. DeStefano, No. 3:04cv1109 (D. Conn. November 24, 2009), available at http://www.ctemploymentlawblog.com/uploads/file/ricciorder1124.pdf.

legislation that overturns the new "strong basis in evidence" standard or that provides an exception to the statutory prohibition against disparate treatment in the case of disparate impact. Such congressional action is not uncommon, particularly in the civil rights context. For example, the 111th Congress recently passed the Lilly Ledbetter Fair Pay Act of 2009,[24] which superseded the Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[25] The difficulty for Congress, however, is that such legislation could potentially be subject to constitutional challenge if it offends the Equal Protection Clause's prohibition against disparate treatment and fails to pass the strict scrutiny test.

Finally, as noted above, the Court's ruling in *Ricci* overturned a Second Circuit decision in which Judge Sotomayor participated. Although the Court's ruling did not appear to significantly affect her nomination, it is important to note that this new standard was not in effect when the Second Circuit issued its decision in the *Ricci* case and therefore could not have been applied by Judge Sotomayor or her colleagues at the time that they ruled in the case.

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[24] P.L. 111-2.

[25] 550 U.S. 618 (2007).