

Labor & Employment

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Race Discrimination

Heads, I Win; Tails, You Lose: The Dilemma of Conflicting Disparate-Impact and Disparate- Treatment Claims in the Wake of *Ricci v. DeStefano*



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In its decision in *Ricci v. DeStefano*, [129 S. Ct. 2658](#) (2009), the Supreme Court sought to resolve a conflict between the “twin pillars of Title VII,” the Act’s disparate-impact and disparate-treatment provisions. *Ricci* involved a promotional examination administered by the City of New Haven. After candidates took the examination, the City refused to certify the test results because of a concern that the test had a disparate impact on African-American candidates and would lead to the promotion of white

candidates. In *Ricci*, a majority of the Supreme Court found that the City had engaged in “race-based decision-making” and that “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.” Because a majority of the Supreme Court found that there was no such “strong basis in evidence” to conclude that the test was invalid, the Court ordered the City to certify the test results.

What about an employer who faces a disparate-impact claim because it acted to avoid disparate-treatment liability? In response to that hypothetical question, a majority of the Supreme Court in *Ricci* stated, in *dicta*, “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.” While that might have been clear to a majority of the Supreme Court in *Ricci*, it was not at all clear to the Second Circuit Court of Appeals in *Briscoe v. City of New Haven*, [654 F.3d 200](#) (2d Cir. 2011). In that case the Court of Appeals permitted a plaintiff to pursue a disparate impact claim challenging the validity of the very same test whose results were certified by order of the Supreme Court in *Ricci*.

The Second Circuit’s opinion in *Briscoe* reveals that the risk of both disparate-impact and disparate-treatment attacks on the same hiring or promotion practice is anything but hypothetical. To understand the risk of such a dual attack, it is worthwhile to study *Ricci* in some detail and then to consider the rationale for the Second Circuit’s decision in *Briscoe*. Nor is the risk of competing claims limited to New Haven; a similar contest was resolved by the Third Circuit in *NAACP v. North Hudson Regional Fire & Rescue*, [2011 BL 313100](#) (3d Cir. 2011), as discussed below.

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***Ricci v. DeStefano* – The Factual Background**

In 2003, the fire department of the City of New Haven (“the City”) had eight vacancies for promotion to lieutenant, and seven vacancies for promotion to captain. In accordance with the city charter and pursuant to a contract between the City and the firefighters’ union, the City used an examination that had written and oral components. The City hired a third-party to develop the examination with the goal that the examination would measure the candidates’ job-related knowledge. The oral examinations, which counted for 40 percent of the overall score, were conducted by assessment panels, and each panel of three had two minority members.

After the City administered the examination, it learned that all ten of the firefighters eligible for promotion to lieutenant were white, and the nine candidates eligible for promotion to captain included seven whites and two Hispanics. The ensuing controversy was “rancorous” and political, generating competing threats of litigation. One side threatened to sue if the City ignored the test results; the other side threatened to sue if the City made promotions based on the test results. Ultimately, the City decided not to certify the test results, and 17 white and one Hispanic firefighters brought suit under the Equal Protection Clause of the [Fourteenth Amendment](#), and later amended their pleadings to assert disparate-treatment claims under Title VII of the Civil Rights Act of 1964 (Title VII), [42 U.S.C. § 2000e](#), *et seq.*

***Ricci v. DeStefano* – The Supreme Court’s Decision**

The majority opinion was written by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito. The first leg of the majority’s rationale was the observation that when it refused to certify the test results, “the City made its employment decision because of race. The city rejected the test results solely because the higher scoring candidates were white.”

Justice Kennedy then proceeded to evaluate the justification for the City’s action: an effort, purportedly, to avoid disparate-impact liability. The firefighters challenging the City’s action asserted that in order to justify the race-based decision, the City should be required to demonstrate that it would be actually “in violation” of the disparate-impact provisions if it certified the test results. The City argued that its actions were justified because it had a good faith belief that its actions were necessary to comply with Title VII. Justice Kennedy rejected both of those suggested standards, and adopted “a 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.”

Justice Kennedy then analyzed whether the City had a strong basis in evidence for concluding that it would have been subject to disparate-impact liability if it had certified the test results.

Although it was undisputed that “the racial impact [of the test] was significant,” and, as such, a *prima facie* case of disparate impact could be established, the mere existence of a *prima facie* case “is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.” Rather, the City was required to establish a strong basis in evidence that the tests “were not job related and consistent with business necessity,” or “there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.” Reviewing the summary judgment record, the Supreme Court determined “[t]here is no genuine dispute that the examinations were job-related and consistent with business necessity,” and that there was no strong basis in evidence that an equally valid method existed “to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions.” In particular, Justice Kennedy stated that any effort to modify the test results would violate “Title VII’s prohibition of adjusting test results on the basis of race” found in [42 U.S.C. § 2000e-2\(l\)](#). Thus, rather than attempt to alter the test results after the fact, an employer should scrutinize its selection process in advance because, “once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race.”

***Briscoe v. City of New Haven* – The Second Circuit’s Decision**

One of the proffered alternative selection methods assessed in *Ricci* was to change the weight given to the written part of the examination. Under the method selected by the City, the written component accounted for 60 percent and the oral component 40 percent of an applicant’s total score. During the debate that led the City to refuse to certify the test results, some advocated that the written examination should account for only 30 percent of the total score, and that the oral exam should be weighted 70 percent.

After the Supreme Court required the City to certify the test results, *Briscoe* brought “the anticipated lawsuit, alleging that the weighting of the written and oral sections of the test . . . as dictated by the collective bargaining agreement between the city and the firefighters’ union was arbitrary and unrelated to job requirements.” The City argued that it was entitled to judgment on preclusion grounds because “[w]hat the Court held in *Ricci* and what it said in doing so squarely forecloses *Briscoe*’s claim.” The Second Circuit Court of Appeals first held that because *Briscoe* was not a party in the *Ricci* litigation, he was not bound by its outcome. The Court then painstakingly analyzed the *dicta* in *Ricci* and determined that it did not rule out *Briscoe*’s claim. Although the decision in *Ricci* determined “when an act that would otherwise trigger disparate-treatment liability

is excusable due to concern over disparate impact,” the Court concluded that it did not answer “the corresponding question for a disparate-impact claim – when an employment practice that would otherwise trigger disparate-impact liability is excusable due to concern over disparate treatment.” The Court reasoned that this question is “answered by the statutory definition of the claim: Conduct that is ‘job related and ‘consistent with business necessity’ is permissible even if it causes a disparate impact (unless there is an ‘alterative employment practice’ that would reduce the disparate impact, which the employer refused to adopt).” Based on this statutory test, “[t]here is no need to stretch *Ricci* to muddle that which is already clear.”

Accordingly, Briscoe was permitted to pursue his claim that he was a victim of discrimination when the City complied with the Supreme Court’s directive that it certify the 2003 test results. In pursuing that claim, however, Briscoe’s potential equitable relief is limited “insofar as it may interfere with the relief-present and future – afforded to the *Ricci* plaintiffs by the certification of the exam results.”

NAACP v. North Hudson Regional Fire & Rescue – The Third Circuit’s Decision

In the *North Hudson* case, the Third Circuit Court of Appeals considered a residency requirement applicable to applicants to a fire department that served five municipalities. Plaintiffs alleged that the residency requirement had a disparate impact on African-Americans who lived in the vicinity but outside the boundaries of those municipalities. Plaintiffs’ expert compared the number of African-Americans employed in North Hudson’s fire department to the qualified candidates in the relevant labor market, and concluded that there were statistically significant disparities that were not the result of chance. Having determined that plaintiffs made their *prima facie* case, the Court then rejected North Hudson’s business necessity defense. North Hudson argued that “a critical aspect of firefighting is the ability to respond quickly and that familiarity with the streets and buildings of a locale is important to achieving that goal.” Even though the Court conceded that this was a valid point, it could not be “reconciled with the fact that North Hudson does not require its firefighters to reside in the North Hudson municipalities after they are hired.”

The Court then turned to North Hudson’s argument that “the Supreme Court’s decision in *Ricci* offers it safe harbor.” According to North Hudson, because nearly 70 percent of the residents of the five municipalities were Hispanic, the removal of the residency requirement would expose the fire department to disparate-treatment claims from the Hispanic residents. The Third Circuit distinguished *Ricci* by observing that North Hudson was not making a decision to remove the residency requirement; the Court was invalidating the requirement. Thus, Hispanic residents could not validly sue North Hudson because “[a] government employer’s compliance with a judicial mandate

does not constitute an official policy or employment practice of the employer” Further, “[r]emoval of the residency requirement can hardly be viewed as a race-based decision when it is motivated by the imperative to comply with a judicial order.” Accordingly, the Court concluded that “*Ricci* is unavailing to North Hudson.”

Tools to Avoid Dual Disparate Impact and Disparate Treatment Attacks on a Single Employment Practice

Given these cases and inconsistent standards, how then can an employer evade the horns of this dilemma? The first step could be to validate properly any selection criteria before the employer establishes the selection process and makes “clear [its] selection criteria.” The City of New Haven attempted but failed to invalidate its selection criteria after-the-fact, rather than scrutinize the examination before its use. Had the City thoroughly evaluated the test before adopting it, the City could have either rejected the test having determined that it was not job related and consistent with business necessity, or it could have determined that the test was valid and certified its results with less reason to fear disparate-impact claims.

The second step could be to take advantage of 42 U.S.C. § 2000e-2(n), the provision in Title VII that permits the trial court to give actual notice of a proposed judgment or order to persons who might be adversely affected so that those persons have an opportunity to object or otherwise be heard. If such notice is given, a subsequent judgment would have preclusive effect even over nonparties.

Similarly, an employer could make use of Rule 19 of the Federal Rules of Civil Procedure and join all interested parties. Such a procedure would enable, for example, *Ricci* and Briscoe to be heard in the same case rather than in different lawsuits.

These options, of course, increase expense and would likely protract any litigation. Given the risk of competing disparate-impact and disparate-treatment claims, however, the expense may be both unavoidable and justified.

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