



## *Employment Discrimination—Race*

### **Hype After *Ricci* Was Handed Down Fizzles As Opinion Proves to Have Limited Impact**

**F**or all the ballyhoo about the effect the U.S. Supreme Court's holding in *Ricci v. DeStefano*, 77 U.S.L.W. 4639 (U.S. 2009), was supposed to have on employment discrimination cases, the opinion seems to have had a limited impact in the 17 months since it was handed down.

Daniel A. Schwartz, who is a partner at Pullman & Comley LLC, Hartford, Conn., and who is also the publisher of the Connecticut Employment Law Blog, told BNA Nov. 9 that "*Ricci* is not the ground-breaking case that its proponents or its critics claimed it would be." He said that the case "is limited in its area of focus—disparate impact," and that he has not "seen the flood gates open on litigation."

Even so, Edward C. Dawson, partner, Yetter Coleman LLP, Austin, Texas, who was one of the attorneys who represented Frank Ricci, one of a group of white and Hispanic New Haven, Conn., firefighters, before the Supreme Court, told BNA Nov. 10 that the case is important because it "introduced the strong-basis-in-evidence test under Title VII" of the 1964 Civil Rights Act. He added, however, that "[h]ow exactly that will affect employment discrimination cases is still shaking out."

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." An employee can prove a prima facie disparate impact claim under the statute by presenting evidence that his employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."

**Unlawful Race Discrimination.** The *Ricci* court held that New Haven engaged in unlawful race discrimination under Title VII when it discarded the results of firefighter promotional exams that favored white and Hispanic test-takers because it feared a lawsuit by black candidates who did not score as well.

The court said that an employer's fear of litigation by racial minorities cannot justify intentional racial discrimination against white employees absent a "strong basis in evidence" for believing racial minorities could prevail on a disparate impact claim. Even though black

firefighters were much less successful on the promotional exams at issue, New Haven could not show it would have been liable to minority firefighters under a disparate impact theory, because there was no evidence the test was not job-related or that a particular less-discriminatory alternative was available, the court said.

Specifically, the court said that "under Title VII, 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." It added that the city "could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."

At the time the decision was handed down, civil rights groups characterized it as a step backward for minority job prospects. Lawyers who represent employers, on the other hand, said that the strong basis in evidence standard needed to be fleshed out (77 U.S.L.W. 1818).

The ruling also was a prominent topic of discussion during the confirmation hearings of Justice Sonia Sotomayor in the summer of 2009 (78 U.S.L.W. 2050). Sotomayor, who did not participate in deciding *Ricci* in the Supreme Court, sat on the panel of the U.S. Court of Appeals for the Second Circuit whose ruling was overturned by the Supreme Court.

**Not Necessarily Limited to Public Employers.** Although the issues in *Ricci* seem to crop up most often when government entities are involved, the holding is not so limited. Nevertheless, Eddie Isler, partner, Isler Dare Ray Radcliffe & Connolly PC, Vienna, Va., who represents management in labor and employment cases, and who is the current chair of the Virginia Bar Association's labor and employment law section, told BNA Nov. 8 that *Ricci* is mostly an issue for public employers.

Paul W. Mollica, a partner with Meites, Mulder, Mollica & Glink, Chicago, who writes the blog Daily Developments in EEO Law, also told BNA Nov. 5 that the "decision is primarily directed at public employers because (in practice) they are far more likely to use competitive exams to allocate limited spots than private employers."

Schwartz said that *Ricci* "is not explicitly limited to public employers, [but] there aren't a lot of private employers who rely on testing to make their employment decisions—a central focus of the court's decision." He

added, however, that the case has clarified the applicable standards so that several cases are now getting a fresh look from the courts.

Dawson said that the court's analysis is "not limited to public employers. The holding is limited to the scenario when an employer gives a test and then abandons it based on the results. However, the court's reasoning has implications for what an employer should do before giving a test, and how an employer should make decisions once it gives a test and gets numbers that show racial or gender disparity."

Dawson added that the Supreme Court's holding "has implications for other sorts of selection devices besides tests. How far it will reach beyond its holding will depend how lower courts treat it and whether and if the Supreme Court take[s] up cases to clarify or expand *Ricci*."

An example of *Ricci*'s analysis not being limited to employment tests is *National Association for the Advancement of Colored People v. North Hudson Regional Fire & Rescue*, D.N.J., No. 07-1683 (DRD), 9/21/10. In that case, the U.S. District Court for the District of New Jersey cited *Ricci*'s business necessity defense while invalidating a regional fire department's residence requirement. Under that defense, if an employment practice that operates to exclude minorities cannot be shown to be related to job performance, it is prohibited.

Looking at whether *Ricci* applies outside the context of employment tests, Schwartz explained that in its opinion the Supreme Court "suggested that it will still allow an employer's voluntary compliance efforts under Title VII and that 'affirmative efforts' can be made to ensure that all groups have a fair opportunity. So [the case] has some applicability to a company's diversity ef-

forts." He also said, however, that it has not been decided "whether there are some 'affirmative efforts' that go too far. We've yet to see something definitive on that issue."

Dawson also said that, "[p]resumably, whenever an employer develops and uses an objective selection method or criteria, [*Ricci*] could be applied."

**'Island Unto Itself.'** Mollica said that "as far as reported opinions or practice experience is concerned, [*Ricci*] appears to have been an island unto itself." He said that he has seen "very little of it filtering back into ordinary employment cases." He explained that the "facts were highly refined and unlikely to be repeated." He added, however, that while the "discussion of the uses of statistical evidence in the backstretch of the majority opinion might give defense lawyers a few more tools to peel-off detrimental expert reports in the future," he has not seen any significant impact there, either.

Elise C. Boddie, a professor at the New York Law School who coauthored an amicus brief for the Racial Justice Project supporting New Haven Mayor John DeStefano in *Ricci*, agrees with Mollica. She told BNA Nov. 8 that "*Ricci* ultimately is a narrow case involving a relatively unique set of circumstances." She added that from her viewpoint the case "has not had a substantial impact in employment discrimination cases."

**Employment Tests Still Okay.** According to Schwartz, the Supreme Court in *Ricci* did not rule out the use of employment tests. Instead, he said that the "court suggests that as long as an employer designs a test that is job related and consistent with business necessity, that might be enough to defend itself against a disparate impact claim." He also said, though, that "employers need

## New York City Wrestling With Firefighter Testing

**L**ike New Haven, New York City has been stymied in finding a nondiscriminatory test to hire firefighters.

On Oct. 19, the U.S. District Court for the Eastern District of New York issued an injunction barring New York from using the results of a recent exam to hire firefighters (*United States v. New York, N.Y.*, E.D.N.Y., 07-cv-2067 (RLM), 10/19/10).

The city has two classes of at least 300 candidates to fill for its firefighters academy. To meet its needs, the city intended to use the results from Exam 6019 to appoint entry-level firefighters. On Aug. 4, 2010, however, the court determined that "the City's use of Exam 6019 as a rank-order and pass/fail device with a cutoff score of 70 was inconsistent with Title VII [of the 1964 Civil Rights Act]

because it had a disparate impact on black and Latino applicants and was not job-related."

After the parties met with Special Master and former U.S. Attorney Mary Jo White to develop criteria that would allow the city to use the list to hire at least one new class of firefighters, the special master submitted a number of options to the court. After receiving that report, on Sept. 13, the court, in an opinion by Judge Nicholas G. Garaufis, issued an opinion giving the city several options for hiring new firefighters. It said that the city could either use a random selection process from a rank-adjusted pool of applicants, or use one of several methods to hire a class off of the Exam 6019 eligibility list that will reflect the racial diversity of the applicant pool.

Instead of making a choice, the city balked, saying, among other things, that the court's options created an illegal quota system.

The court responded by accusing the city of repudiating earlier positions, and developing "shifting and contradictory positions." Among the changes cited by the court was the city's current argument that its need for new firefighters is safety based, rather than financial, as it originally claimed.

Citing its authority under Title VII to craft relief from discriminatory practices, as well as general principles of equity, the court issued a permanent injunction preventing the city from hiring any firefighters "based on the results of Exam 6019, except under one of the interim approaches already endorsed by the court."

to look to alternative practices that may have less of a disparate impact while still serving the employer's business needs. Ultimately, an employer that uses tests should look at the alternatives out there."

Dawson said that employers can avoid running afoul of *Ricci* by developing "a good, valid test/criteria on the front end, and then stick[ing] with it. Don't let the numbers the test produces drive the decisionmaking after the fact."

**Lessons of *Ricci*.** According to Boddie, "[t]he lesson of *Ricci* for employers is don't throw out test results based on the racial distribution of those who passed and failed. Figure out whether there is a problem with the test before it is administered and avoid using tests that are not job related."

Mollica said that the lesson of *Ricci* "seems to have been that employers can go to every reasonable length to draft up a hiring or other policy that does not disadvantage racial minorities, but that once the policy is launched—once test-takers start filling in the bubble-sheets—the employer can't take it back (if they don't like the outcome) without attracting a lawsuit."

In the end, Schwartz said that whether the opinion is considered important in the area of employment dis-

crimination depends on the definition of "important" used. "Certainly, if the employer is using testing, then this case rises to the top of considerations by employers about making sure the test is run accurately and fairly. But for the day-to-day employment decisions that employers make, this decision probably doesn't change much," he said.

Schwartz concluded that "[t]aken in conjunction with other Supreme Court cases . . . what *Ricci* demonstrates is that the prohibitions on race discrimination don't apply just to minorities, but to all who believe that they are being discriminated against. As the demographics of the United States continue to change, that legal application will have an impact on claims to come in the future."

Dawson contended that *Ricci* is important because it "made clear for the first time that an employer has to have a strong basis in evidence in order to abandon an objective selection device based on numerical disparate impact, or based on a stated fear of being sued for discrimination." He said that "[i]f the decision is followed faithfully, it should mean that the process is less numbers-driven and becomes more about the validity of selection criteria."

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