PUBLICATION

Out of the Frying Pan and into the Fire: Supreme Court Issues Favorable Ruling forWhite Firefighters in Reverse Discrimination Case

June 30, 2009

Query: May an employer make a race-based employment decision when it discovers that one of its employment tests or policies has the unintended effect of creating an adverse impact on another racial classification?

In *Ricci v. DeStefano*, the United States Supreme Court answered ***no*** - unless the employer can show that there was a ***strong basis in evidence*** that its neutral employment test or policy would have had an impermissible, *i.e.*, unlawful disparate impact on the other racial classification.

The *Ricci* case involved an employment test developed and conducted by a third-party that contracted with the City of New Haven, Connecticut to examine firefighters desiring to qualify for promotion to the rank of lieutenant or captain. Promotions were infrequent and the results of the test would determine, for the next two years, who would be considered for any open positions and the order in which they would be considered. More than 100 firefighters took the exam, and many studied for months at considerable financial and personal cost.

The independent company that developed the firefighters' test specialized in these types of exams and had performed job analyses, interviewed incumbent lieutenants and captains and their supervisors, oversampled minority firefighters to guard against unintentionally favoring white candidates, and assembled a pool of 30 assessors from outside Connecticut (at the City's insistence), two-thirds of which were minorities. Nevertheless, despite all of the care in developing a fair, race-neutral promotional exam, minority firefighters failed the test at a rate which could infer that the test had an impermissible adverse impact on minority candidates.

Based on the results of the test, the City grew concerned that it could be charged with using an employment device that unlawfully violated Title VII's prohibition against adverse impact discrimination. Therefore, the City's Civil Service Board (CSB) conducted several meetings and heard testimony from the test developer's representative, the City's counsel, and several other witnesses including a couple of firefighters who had taken the exam, to determine whether to certify the results of the test. Ultimately, the CSB decided not to certify the test results, which effectively denied 17 white firefighters and one Hispanic firefighter a chance at promotion. These firefighters sued the City, and the individuals involved in the decision not to certify the test results, under Title VII's prohibition against intentional discrimination on the basis of race.

It would be the rare employer that is unaware of Title VII's prohibitions against intentional employment discrimination on the basis of race, color, religion, sex, or national origin. In addition, the Supreme Court has prohibited employers from utilizing a facially neutral practice that is "discriminatory in operation" on these protected characteristics since 1971 (*Griggs v. Duke Power Co.*), and in 1991, Title VII was amended to codify the prohibition on disparate impact discrimination. So is an employer excused from what is otherwise intentional discrimination to avoid what it fears may lead to disparate impact liability? The Supreme Court answered that question in yesterday's *Ricci* decision.

The Court adopted a standard from cases involving the Equal Protection Clause that held that actions to remedy past discrimination are constitutional *only* when there is a "strong basis in evidence" that the remedial

actions are necessary. The Court noted that this standard, although restraining employers' discretion to cases in which there is a strong basis in evidence of disparate-impact liability, is not so restrictive that an employer can act only when there is a provable, actual violation. On the other hand, the employer can not act based solely on reliance of race-based statistical disparity (or other protected characteristic). Of note in this regard, the Supreme Court found severe adverse impact against minority firefighters based solely on the 80% "rule of thumb" without further statistical analyses.

The Court noted that this standard allows the prohibition on disparate impact to work in a manner consistent with other provisions of Title VII. For example:

- Employment tests, like the one at issue, create legitimate expectations and are an important part of a neutral selection system that safeguards against the racial animosities that Title VII was intended to prevent.
- Since Title VII prevents an employer from rescoring a test based on the candidates' race, it follows that an employer may not discard the test altogether to achieve the desired race-based results - ***unless*** there is a ***strong basis in evidence*** that the test was deficient and discarding the results is necessary to avoid violating the disparate impact provision.

What should employers do in light of *Ricci*?

- It is still permissible for employers to develop processes and selection criteria by which all groups have a fair opportunity to apply for promotions or hiring.
- Employers may consider, before administering the test or practice, how to design the test or practice in order to provide a fair opportunity for all individuals apart from race (or other protected characteristic).
- Employers can invite comments and open discussion at the test design stage to ensure the test is fair.
- Employers should make sure that all employment tests, policies and practices are job related and consistent with business necessity.
- Employers should consider, *before administering the test or practice*, whether there exists equally valid tests or practices that could serve its needs with less disparate impact.

Once the above processes are properly established, employers should not invalidate the results of the test or practice thereby destroying the employees' legitimate expectations not to be judged on the basis of race (or other protected characteristic).

Baker Donelson stands ready to assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys in the Firm's Labor & Employment Department, located in *Birmingham, Alabama*; *Atlanta, Georgia*; *Baton Rouge*, *Mandeville* and *New Orleans, Louisiana*; *Jackson, Mississippi*; and *Chattanooga*, *Johnson City*, *Knoxville*, *Memphis* and *Nashville, Tennessee*.

Baker Donelson gives you what boutique labor and employment firms can't: a set of attorneys who are not only dedicated to the practice of labor and employment issues, but who can reach into an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs. We set ourselves apart by valuing your entire company. And when it comes to your company's most valuable asset - your employees - we're committed to counseling with and advocating for you every step of the way.