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Reverse Discrimination: What You Need to Know in Light of the Ricci Supreme Court Decision

In a controversial 5-4 decision likely to have a major impact on corporate affirmative action and diversity efforts, the U.S. Supreme Court ruled on Monday that an employer cannot throw out the results of a promotion test passed by a disproportionate number of white applicants, absent strong evidence of an unlawful adverse impact on minority applicants.

Further, according to the majority opinion issued in [Ricci v. DeStefano, No. 07-1428 \(June 29, 2009\)](#) ("*Ricci*"), the mere threat of litigation from one group of employees alleging that such an adverse impact is discriminatory does not justify directly discriminating against other groups without strong evidence such litigation would be successful.

Summary of the Ricci Decision

The plaintiffs in *Ricci*, 17 white and one Hispanic firefighter, argued that the City of New Haven, Connecticut, violated Title VII of the Civil Rights Act of 1965 ("Title VII") by throwing out the results of a 2003 promotion test that made a disproportionate number of white firefighters eligible for promotion. The City justified its actions as necessary to prevent disparate impact claims from minority applicants challenging the lopsided results of the test, which resulted in no "black candidates for any of the then-vacant lieutenant or captain positions."

Both the lower court and the Court of Appeals for the Second Circuit sided with the City. The Supreme Court, however, reversed. In the majority opinion written by Justice Anthony Kennedy, the Court determined that there was not a "strong basis in evidence" for concluding that the City's test was racially biased, unrelated to the job, or that there was some other equally valid, non-discriminatory test the City could have administered in its place.

Under those circumstances, the City would have won any potential disparate impact suit brought by minority applicants. Thus, the City could not rely on the threat of such litigation to justify its failure to promote the applicants who passed the test. Further, in failing to promote those applicants because of their race, the City engaged in unlawful discrimination against them.

"Without some other justification," Justice Kennedy concluded, "this express, race-based decision-making is prohibited."

Impact of Ricci on Employers

Although *Ricci* resulted in a victory for employees against their employer, the decision provides additional guidance to employers in an area of law that is often difficult to navigate: the extent to which an employer may lawfully rely on affirmative action and diversity considerations to promote a diverse workforce without opening itself up to viable claims of reverse discrimination.

Specifically, under *Ricci*, employers arguably should have fewer concerns about the use of job promotion and selection tests unless there is strong evidence that a particular test has an unfair and illegal impact on minorities. The mere fact that "raw racial statistics" show unequal passage rates is not sufficient to meet this standard, according to the Court.

To the contrary, employers must use caution when considering race or other protected characteristics in correcting for a potential risk of disparate impact on one group because doing so may constitute intentional discrimination against other groups.

On the other hand, as argued by Justice Ruth Bader Ginsberg in the dissent in *Ricci*, the majority opinion arguably ignored the "multiple flaws in the tests New Haven used," and thus downplayed the difficulty the City would have faced in defending against a disparate impact claim brought by minorities.

Regardless of whether one agrees with the assessment of the majority or the dissenting opinion, since even the members of the Supreme Court could not agree on the validity of the test at issue in *Ricci*, employers will likely continue to find it difficult to determine when fears of a potential disparate impact claim are sufficiently justified to alter their practices – or when doing so will only render them vulnerable to claims of reverse discrimination.

If you have questions about the impact of *Ricci* on your employment practices, please contact the labor and employment attorney at Venable with whom you usually work. Venable attorneys have considerable experience helping employers navigate these complex legal issues.

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