



Ricci v. DeStefano Holds Statistical Disparities Cannot Justify Race-Based Employment Decisions Where There's Smoke but No Fire

The publicity following the Supreme Court's decision in *Ricci v. DeStefano*,¹ can be attributed to the then-pending nomination of Sonia Sotomayor to the Supreme Court. The publicity tends to overshadow the actual holding in *Ricci*, which is not easy to grasp even

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without the hype. This article addresses the holding in *Ricci* and explains the practical impact it will have in employment discrimination law.

Summary of the Case

In *Ricci v. DeStefano*, the city hired a company to design and administer a job-related, statistically valid test that would be given to firefighters who wanted to be promoted. Despite the attempts to ensure that the test would not favor white candidates, the test results produced a statistically significant disparity between the more successful white candidates and the not-as-successful black and Hispanic candidates. Under EEOC rules, the disparity alone created the legal presumption (prima facie case) of a disparate impact.² Both sides threatened to sue the city. Ultimately, the city discarded the test results "in sole reliance upon race-based statistics."³ The white firefighters sued, losing in the lower courts.

The Supreme Court reversed in a 5-4 decision that contained two important holdings. First, the court held that the city's decision to discard the test because whites fared better than minorities was a race-based decision that violated Title VII,⁴ without some other justification. Second, the court held that the race-based decision could nonetheless be sustained if the city had an "objective, strong basis in evidence" that its action was necessary to avoid

disparate impact liability.⁵

To understand *Ricci* it is necessary to explain the difference between disparate treatment and disparate impact claims. Disparate treatment is intentional discrimination; liability depends on whether the protected trait actually motivated the employer's decision.⁶ Disparate impact claims, however, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."⁷ Different (though similar) rules apply in age-based disparate impact claims,⁸ though it seems impossible for the *Ricci* scenario to arise in an age discrimination context.⁹

A statistical disparity alone can (as the court assumed) establish a prima facie case of disparate impact, but cannot alone constitute a strong basis in the evidence for an employer's rejection of test scores. Thus, employers must do more than determine that hiring and promotion tests scores create a statistical disparity. Employers must conduct a complete and accurate disparate impact analysis, one which identifies a "neutral policy" that has caused the disparity, examines whether the policy is job-related and consistent with business necessity, and, if so, whether there is a less restrictive alternative that the employer rejected.

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Strong Basis in Evidence

The city's reasons for why it thought there was a risk of disparate impact liability were so weak that the court found them insufficient as a matter of law. Unfortunately, this means the court had no meaningful opportunity to define when an employer could have a strong basis in the evidence for concluding that there is a risk of disparate impact liability.

The court's decision simply defines the outer boundaries. Clearly, a statistical disparity alone is not a "strong basis in evidence."¹⁰ Even a "good-faith fear"¹¹ of disparate impact litigation is insufficient. On the opposite end, however, the court rejected the arguments that (1) "it cannot be permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability — even if the employer knows its practice violates the disparate-impact provision";¹² and (2) "an employer in fact must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit."¹³

Practical Steps for Advising Employers

Employers, both public and private, need the advice of qualified counsel whenever the employer intends to rely upon promotion or hiring tests. Counsel should review the testing

methodology with a qualified expert to minimize the risk that the tests might produce a statistical disparity. Counsel must do more, however, for, as in *Ricci*, the test was carefully designed and the city relied upon its counsel for advice. Where the city (and its counsel) faltered, the court held, was in concluding that the statistical disparity alone constituted a serious enough claim of race discrimination so as to justify the city's voluntary remedy of rejecting the test results.

Counsel advising employers post-*Ricci* must consult with qualified experts, perform the four-part analysis required for a disparate impact claim (under Title VII), asking: (1) is there a statistically significant disparity; (2) is there a neutral policy that caused the disparity, (3) has the employer shown the neutral policy that causes the disparity is job-related and consistent with business necessity; and (4) can the employee show that an alternative policy would have a lesser statistical impact but still serve the employer's legitimate business needs.¹⁴ Bear in mind an employer's refusal to adopt an alternative practice provides an employee with a victory on a disparate impact claim.

Identifying the neutral policy or practice that causes a statistical disparity is often difficult and usually disputed. As such, counsel should insist that their clients conduct employment tests that measure job-related qualifications that are required by business

necessity. Before tests are given, the client should identify alternatives (such as different pass-fail rates, weighing of test results) that, if implemented, could affect the testing results. Of course, why the employer decided against alternative policies or practices should be carefully documented.

It is vital to resolve these issues before the test. Once a test has been administered, Title VII prohibits employers from adjusting test scores or using different cutoff scores or otherwise altering the results of employment-related tests used in hiring or promotion if the change is designed to achieve a different result because of race (gender, religion or national origin).¹⁵ *Ricci* permits a limited departure from this but only when the employer conducts a complete and accurate disparate impact analysis.

Affirmative Action?

Ricci raises many questions. The court refused to decide whether it would be constitutional for Title VII to authorize race-based disparate treatment when there is "strong evidence" of a valid disparate impact claim. If racial discrimination is prohibited by the constitution, so the argument goes, then Congress has no constitutional authority to authorize intentional discrimination.

Perhaps one of the most interesting and uncharted questions *Ricci* raises is the effect on affirmative action. The court explained it was not questioning voluntary efforts "to ensure that all groups have a fair opportunity to apply for promotions." It cautioned, however, "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."¹⁶

The court will also need to resolve whether (and how) *Ricci* affects *United Steelworkers v. Weber*,¹⁷ which held that Title VII did not forbid private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that established hiring goals which were "designed to eliminate conspicuous racial

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imbalances in [the employer's] then almost exclusively white craftwork forces." *Weber* (and *Johnson v. Transportation Agency*¹⁸) permitted employers to adopt hiring goals based solely on a statistical disparity in the existing workforce (within other limits). *Ricci*, however, prohibits employers from making race-based decisions based solely on statistical imbalances. Perhaps *Weber* will survive to permit "hiring goals" when the "manifest racial imbalance" in the workforce was caused by past discrimination. To be clear, however, affirmative action plans, which seek to broaden the pool of minority candidates, as opposed to hiring goals, have little to fear from *Ricci*.

Conclusion

When a test is utilized that appears to be neutral on its face and in its application, and yet produces a statistical disparity, it is inappropriate to reject the test results based solely on the statistical results. After *Ricci*, all employers (public and private) must engage in a complete

and accurate disparate impact analysis before the employer can discard otherwise valid test results.

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Notes

1. *Ricci v. DeStefano* 129 S. Ct. 2658 (2009).
2. See 29 C.F.R. § 1607.4 (D) (2008).
3. *Id.* at 2676.
4. 42 U.S.C. § 2000e-2.
5. *Id.* at 2677.
6. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).
7. *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

8. See *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. ___, 128 S. Ct. 2395 (2008).

9. This is because the ADEA is not violated by reverse age discrimination. *General Dynamics Land System Inc. v. Cline*, 540 U.S. 581 (2004).

10. *Id.* at 2677.

11. *Id.* at 2675.

12. *Id.* at 2674.

13. *Ibid.*

14. The four-part test is found in 42 U.S.C. §2000e-2(k)(1)(A)(ii) and (C). For age discrimination claims, the third (and final) step of the analysis changes to whether the employer can prove any statistical disparity is justified by a reasonable factor other than age. The fourth part of the test applies only in Title VII and Americans with Disabilities Act, 42 U.S.C. § 12001 claims.

15. 42 U.S.C. § 2000e-2(l).

16. *Id.* at 2677.

17. 443 U.S. 193, 201, 209 (1979)

18. 480 U.S. 616, 632-33 (1987) (interpreting *Weber* as focusing on a "statistical imbalance" and not being concerned with the "past discrimination by the employer").



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