

June 30, 2009

***Ricci v. DeStefano*: New Supreme Court Case Addresses Conflict Between Title VII's Anti-Discrimination and Disparate-Impact Provisions**

In a 5-4 decision issued on June 29, 2009, the U.S. Supreme Court held that white firefighters in New Haven, Conn., were unfairly denied promotions because of their race when the city discarded the results of promotional exams because too few minority candidates passed. See *Ricci v. DeStefano*, Case No. 07-1428 (U.S. June 29, 2009) (slip opinion) (click [here](#) for the opinion).

Employers have eagerly anticipated a decision from the Supreme Court that would provide more clarity on the apparent conflict between Title VII's disparate-treatment provision (which forbids employers from making employment decisions based on race) and disparate-impact provision (which requires employers to justify a testing or measuring procedure on which minority candidates do not perform as well as white candidates). *Ricci* makes clear that Title VII's disparate-treatment provision forbids "remedial" race-based actions absent strong evidence of a disparate-impact violation. While the decision is important for governmental employers, it also has significant implications for private employers that use testing or other objective criteria for hiring and promotion decisions.

The *Ricci* Case

In *Ricci*, a group of white and Hispanic firefighters alleged that the city of New Haven discriminated against them when it discarded the results of promotional exams because too few minority candidates passed. City officials discarded the results because of concerns that the city would be forced to defend a disparate-impact Title VII discrimination suit if the results were certified.

The firefighters brought an action in Connecticut District Court claiming that the city and several municipal officers engaged in "reverse discrimination," in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment, when they discarded the exam results.

The District Court dismissed the action on grounds that the city had not discriminated against anyone, but had been motivated by a desire to ensure race-neutral tests and comply with Title VII. The U.S. Court of Appeals for the Second Circuit—in a three-judge panel that included Supreme Court nominee Sonia Sotomayor—affirmed the lower court's decision to dismiss the firefighters' lawsuit.

In a majority opinion written by Justice Anthony M. Kennedy, the Court held that the city had, in fact, discriminated against the white firefighters in violation of Title VII's disparate-treatment provision when it discarded the exam results because "too many whites and not enough minorities" had passed. *Ricci*, slip op. at 19. Addressing the conflict between Title VII's disparate-treatment and disparate-impact provisions, the Court held that an employer must have a "strong basis in evidence" of a disparate-impact violation to justify a race-based decision. *Id.* at 26. The Court concluded that in the absence of evidence that the exams were flawed because they were not job-related or that equally valid and less discriminatory tests were available, "[f]ear of litigation alone" did not justify the city's race-based decision. *Id.* at 33.

In dissent, Justice Ruth Bader Ginsburg argued that the city acted appropriately by rejecting a test that may have a disparate impact on minority candidates and predicted that the majority decision "will not have staying power." Dissent at 2.

© 2009 Sutherland. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Employers Can Expect the Supreme Court and Congress to Continue Addressing Tensions Within Anti-Discrimination Laws in Coming Years

The *Ricci* decision did not address a larger issue at stake—namely, whether Title VII’s disparate-impact provision violates the Equal Protection Clause. In a concurring opinion, Justice Antonin Scalia criticized Title VII’s disparate-impact provision for “requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.” Concurrence at 2.

The *Ricci* decision was issued by a five-judge conservative majority that currently exists on the Court: Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito, Jr., Antonin Scalia, Clarence Thomas and (more often than not) Anthony M. Kennedy. This majority has sided with employers over employees in several major cases, including the decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which limited the time frame in which employees can file wage discrimination suits against their employers. The decision proved controversial and was subsequently overturned by the Lilly Ledbetter Fair Pay Act of 2009, which was the first act of Congress signed by Barack Obama as President.

Although the majority in *Ricci* sided with the employees, one result of the decision will be to make employers’ legitimate use of employment testing easier to defend. It will be increasingly important, however, for employers to take appropriate steps to validate objective criteria used for hiring and promotion decisions. The Supreme Court did not provide additional guidance beyond the current disparate-impact test, which requires that a practice be job-related and that there not be an equally valid but less discriminatory practice available.

If Justice Ginsburg’s prediction is correct, Congress could act to redress the *Ricci* decision. In addition, Associate Justice David H. Souter’s recent announcement of his retirement has provided President Obama the opportunity to select the first Democratic nominee to the Court in fifteen years. Although Justice Souter’s replacement will not shift the balance of power on the Supreme Court away from the current conservative majority, subsequent Obama nominees will likely result in a liberal majority that will be more likely to side with employees.

The Court’s decision has been widely anticipated because Supreme Court nominee Sotomayor reached the opposite result—and held in favor of the city of New Haven—as an appeals court judge in a decision that has now been reversed. The decision could play a significant role in Sotomayor’s upcoming confirmation hearings.



If you are interested in more information about these developments, please contact any of the following attorneys or the Sutherland attorney with whom you regularly work.

Thomas R. Bundy, III	202.383.0716	thomas.bundy@sutherland.com
Nathan D. Chapman	404.853.8079	nathan.chapman@sutherland.com
Nicholas T. Christakos	202.383.0184	nicholas.christakos@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Christopher W. Hammond	202.383.0249	christopher.hammond@sutherland.com
Lisa Combs Jern	404.853.8474	lisa.jern@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
Francesca Danielle Lewis	404.853.8173	danielle.lewis@sutherland.com
Jamala S. McFadden	404.853.8448	jamala.mcfadden@sutherland.com

SUTHERLAND

Abigail J. Politzer
S. Gail Reid
Steuart H. Thomsen
Jessica S. Wang
Gail L. Westover

404.853.8565
404.853.8167
202.383.0166
404.853.8226
202.383.0353

abigail.poltizer@sutherland.com
gail.reid@sutherland.com
steuart.thomsen@sutherland.com
jessica.wang@sutherland.com
gail.westover@sutherland.com