CLIENT ALERT: Supreme Court Issues Ruling in Reverse Discrimination Suit

In a highly anticipated decision, the United States Supreme Court ruled in favor of Caucasian firefighters in their "reverse discrimination" suit against the City of New Haven Connecticut. The case is *Ricci v. DeStefano*.

In 2003, the City of New Haven discarded the results of a promotional exam for firefighters when it became clear that no African American firefighter scored high enough to be promoted. This result called into question the validity of the exam. The City made its decision to discard the exam in order to avoid potential liability from minority firefighters who took the exam, who would likely claim that the test had a detrimental disparate impact on them.

Following the City's decision, several Caucasian and Hispanic test takers who likely would have been promoted based on their good test performance, sued the City, claiming illegal "reverse discrimination." The lawsuit was dismissed by the lower courts, but on June 29, 2009, the Supreme Court reversed, upholding the claim of the Caucasian firefighters. The Court held that race-based action like the City's in this case is impermissible under Title VII of the Civil Rights Act of 1964 as amended, unless the employer can demonstrate a strong basis in evidence that had it not taken the action, it would have been liable for disparate impact.

Rationale

Title VII of the Civil Rights Act of 1964 as amended prohibits both intentional discrimination on the basis of race, color, religion, sex, or national origin (disparate treatment) and in some cases, practices that are not intended to discriminate but have a disproportionately adverse effect on minorities (disparate impact). In the latter case, an employer's facially neutral act which nevertheless has a disparate impact on a minority group can be considered discriminatory unless the employer can show that the practice is job related for the position in question and consistent with business necessity. Even if an employer can present such evidence, however, an employee may still prevail if the employee can, in turn, demonstrate that the employer could have used an alternative means that would have had a less

discriminatory impact.

In New Haven, the City claimed that the skewed results of the exam alone were enough of a justification to discard the exam and start from scratch –even though the Caucasian and Hispanic firefighters who achieved qualifying scores would be adversely affected. The fact that no African American firefighter scored high enough to be promoted revealed, in the City's judgment, that the exam was not reliable.

The Supreme Court ruled that the City's determination regarding the test results, standing alone, was not enough of a justification to take the action which negatively affected the Caucasian firefighters. Rather, an employer must have a "strong basis in evidence," to believe it will be subject to disparate impact liability, *i.e.,* some independent indication of a test's invalidity over and above results that simply suggest disparate impact. The Court found that the exams in the New Haven case were job related and consistent with business necessity, and the City did not show that less-discriminatory alternatives were available.

Conclusion

The Court's decision may give some relief to employers who have concerns about the validity of their qualifying exams. The ruling makes it more difficult to win a disparate impact claim without a solid showing of evidence of discrimination beyond skewed test results. Nonetheless, employers should consult with counsel when analyzing the legality of both qualifying exams and potentially questionable results.

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This publication was prepared on July 1, 2009.

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