

MICHAEL NEWMAN AND FAITH ISENHATH

Reflections on the Supreme Court's *Ricci* Decision

R*icci v. DeStefano*,¹ the “New Haven Firefighters” case, received intense scrutiny both before and after the U.S. Supreme Court issued its 5-4 opinion on June 29, 2009. It is likely that much of this attention stemmed from the fact that Justice Sonia Sotomayor, President Obama’s nominee to the Supreme Court at that time, had served on the panel of the U.S. Court of Appeals for the Second Circuit that previously heard the case. In addition, the case involved municipal hiring, which has a history of racial tension in the United States. For example, during the 1970s, African-American firefighters brought successful discrimination suits in cities such as Cleveland, Birmingham, St. Louis, New York, Newark, Bridgeport, Buffalo, Philadelphia, San Francisco, Baltimore, and Minneapolis, as well as statewide in Massachusetts.² As opposed to those cases, in *Ricci*, it was white and Hispanic firefighters who alleged racial discrimination. The shifting conditions in *Ricci* not only demonstrate that race remains a divisive issue when it comes to hiring practices, but also emphasize the difficult balance that both public and private employers must maintain between permissible racial consciousness and impermissible racial discrimination.

The dispute in *Ricci* centered on an examination for promotion that was used by the Fire Department in New Haven, Conn. To design the exam, the city of New Haven

hired a third-party contractor, who took measures to ensure that the test would not favor white candidates. Despite those measures, the only candidates who were deemed eligible for immediate promotion after completing the exam were white. Based on the test results, the city feared that it could be liable for a disparate-impact discrimination claim brought under Title VII of the Civil Rights Act of 1964. Accordingly, the New Haven Civil Service Board decided not to certify the test results. As a result, 17 white firefighters and one Hispanic firefighter—all of whom had passed the exam—filed suit alleging violations of Title VII and the Equal Protection Clause of

the Fourteenth Amendment.

In an opinion written by Justice Kennedy, the U.S. Supreme Court resolved the case according to a Title VII analysis and refrained from deciding the constitutional question. The key issue for the Court was to reconcile the tension between disparate-treatment discrimination and disparate-impact discrimination. The firefighters argued that, when the city “refused to certify the ... exam results based on the race of the successful candidates, it discriminated against them in violation of Title VII’s disparate-treatment provision.”³ The city, on the other hand, argued that the decision not to certify the results was permissible, because the test appeared to violate the disparate-impact provision of Title VII. In order to resolve competing expectations under the disparate-treatment and disparate-impact provisions, the Court adopted a “strong-basis-in-evidence standard,” which it drew from its Equal Protection Clause jurisprudence.⁴ In applying that standard to Title VII, the Court held that “before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”⁵

The strong-basis-in-evidence standard falls between a standard that would only require a good faith belief that race-conscious action was necessary to comply with the disparate-impact provision of Title VII, and a standard that would require an employer to actually be in violation of Title VII’s disparate-impact provision before it could use compliance as a defense for taking race-conscious action. In *Ricci*, the city failed to meet the strong-basis-in-evidence standard. Although the results of the examination supported a prima facie case of disparate-impact discrimination, the city could face liability only under that theory if the tests “were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the [city’s] needs but that the [city] refused to adopt.”⁶ According to the Court, the city did not have a strong basis in evidence showing that it would be unable to establish those factors.

As *Ricci* demonstrates, promotional exams used by public employers are frequently challenged in the federal courts under Title VII. The city of Chicago, for example, recently agreed to a settlement of



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\$6 million dollars with a group of 75 white firefighters who alleged reverse discrimination after they took an exam used for promotions in 1986.⁷ In St. Louis, the U.S. Court of Appeals for the Eighth Circuit ruled that the promotion tests used by the city's Fire Department did not have a disparate impact on African-Americans, nor did the city intentionally discriminate against African-American firefighters.⁸ After it decided *Ricci*, the Supreme Court remanded *Oakley v. City of Memphis* to the U.S. Court of Appeals for the Sixth Circuit.⁹ In *Oakley*, the Memphis Police Department had declined to promote any lieutenants after administering a promotion exam, because the city believed that the exam had an adverse impact on female candidates as well as African-American candidates.¹⁰ The Sixth Circuit ruled that the city's decision was not discriminatory.

In a case decided after *Ricci*, *United States v. City of New York*, African-American and Hispanic firefighters challenged, under Title VII, New York City's exams used for entry-level firefighters.¹¹ The U.S. District Court for the Eastern District of New York ruled that the tests resulted in a disparate impact on African-American and Hispanic firefighters, and that the city had failed to present sufficient evidence showing a business necessity for the test. The court also explained that *Ricci* did not control the outcome of the *United States v. City of New York*, because the latter presented "the entirely separate question of whether ... the [c]ity's use of [e]xams has *actually had* a disparate impact upon black and Hispanic applicants."¹²

The U.S. Supreme Court's decision in *Ricci* will have a direct impact on many public employers, as seen in cases like *Oakley*, but it will also affect how *all* employers covered by Title VII make certain decisions. In order to remedy a disparate-impact claim after an employment practice is in effect, employers must now meet a high burden and be able to show a strong basis in evidence that they would be subject to disparate-impact liability. Although *Ricci* specifically involved an examination, the Court's holding extends to other employment practices, such as procedures used for hiring or promotion.¹³ In addition, the principles set forth in *Ricci* apply to all the classes protected by Title VII—that is, cases involving discrimination because of race, color, religion, sex, and national origin. Given the lack of specific guidance from the Court, however, employers may find it difficult to design employment practices that properly avoid both disparate-impact and disparate-treatment discrimination. In this ambiguous context, legal advice becomes especially important.

Future decisions made by lower federal courts will provide clarification and guidance for interpreting the Supreme Court's strong-basis-in-evidence standard. Congressional action that codifies a standard different from the one set forth by the majority of the Supreme Court is also possible. In her dissent, Jus-

tice Ginsburg highlighted the importance of the Civil Rights Act of 1991, through which Congress codified the disparate-impact provision of Title VII in response to Supreme Court decisions "that sharply cut back on the ... effectiveness of [civil rights] laws."¹⁴ Whether Congress responds to the Court's decision in *Ricci* in a similar way remains to be seen, but Sen. Patrick Leahy (D-Vt.), the chairman of the Senate Judiciary Committee, issued a statement that the Supreme Court "interpret[ed] the critical protections of Title VII in a way never intended by Congress."¹⁵

In the meantime, if employers have not already done so, it is important for them to develop employment practices that give all individuals—regardless of race, color, religion, sex, or national origin—a fair opportunity when it comes to hiring and promotion. The standard set forth in the *Ricci* decision applies if an employer wants to avoid or remedy unintentional disparate-impact by taking race-conscious action after the employment practice has been put into effect. In that situation, the employer must have a strong basis in evidence that it will be subject to disparate-impact liability if it does not take race-conscious action. An employer can be liable for disparate-impact liability if the practice in question is not job-related and is not consistent with business necessity, or if the employer refused to adopt an equally valid, but less discriminatory, alternative. Given the difficulty of abandoning or changing unintentionally discriminatory practices after *Ricci*, employers should ensure that their practices are carefully designed to avoid a disparate-impact in the first place. **TFL**

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Endnotes

¹*Ricci v. DeStafano*, 129 S. Ct. 2658 (June 29, 2009).

²Brief for NAACP Legal Defense and Educational Fund Inc. as *Amicus Curiae* Supporting Respondents, at 19, *Ricci v. DeStefano* at 2658 (Nos. 07-1428 & 08-328).

³*Id.* at 2673.

⁴*Id.* at 2677.

⁵*Id.*

⁶*Id.* at 2678.

⁷*White Firefighters to Share \$6M Settlement: Reverse Discrimination Lawsuit Concerns 1986 Lieutenants' Exam*, NBC Chicago News Broadcast (Mar. 11, 2009),

Language for Lawyers

In her “Language for Lawyers” column in the June 2009 issue of *The Federal Lawyer*, Gertrude Block seems to have forgotten the existence of nonhuman animals. First, she writes that “only persons can have mixed feelings.” It seems reasonable, however, to infer from various animals’ behavior that they too can have mixed feelings (about a new brand of cat food, for example). Then, she writes that the adjective *suspect* “cannot have a nonhuman subject,” so that it was incorrect for a local official to say, “I am suspect of . . .” instead of “I am suspicious of . . .” But surely it would also be incorrect for a parrot to say, “I am suspect of . . .” Finally, she writes, “Both *amiable* and *amicable* apply to only persons, not things. . . .” But a dog can be both amiable and amicable. **TFL**

Henry Cohn
Baltimore, Md.

Book Review

The review of *JFK and the Unspeakable: Why He Died and Why It Matters* that appeared in the July 2009 issue of *The Federal Lawyer* has serious shortfalls given the author’s view on the

Kennedy assassination. Certainly some comment should have been made on the author, James W. Douglass’, background, as well as the background of Orbis Books, the publisher.

The Wikipedia biographical sketch of the author, including his previous writing, suggests he lacks the qualifications to analyze, and then comment on, the history of the Kennedy administration’s initiatives, which he says led to the President’s assassination. As to the publisher, Wikipedia describes the book as well outside Orbis Books’ normal range of publications and also states that Orbis Books commissioned the book. These facts suggest something should have been said about all this so your readers might better assess the book’s contents.

In all, the fact of the review and its considerable length gives credibility to what is really a highly tendentious view of one of the great tragedies of our generation. **TFL**

Avern Cohn
Detroit, Mich.

The Reviewers’ Response

Judge Avern Cohn criticizes the review for not giving information about

author James Douglass’ qualifications. The review did explain that Douglass, along with Thomas Merton, had been active in the peace movement, and that Douglass wrote a book entitled *The Non-Violent Cross* in 1968. But, more important, we think Douglass’ qualifications are manifest in the quality of work he produced, as reflected in our conclusion that the book is “skillfully written, carefully researched, and extensively documented, both as to Kennedy’s presidency and as to his assassination.” That someone who is not a professional historian has produced a work of this quality may be of interest, but we chose not to emphasize that point. Judge Cohn also suggests that we should have included information about the publisher, Orbis Books. We disagree, although we are grateful to Orbis for publishing this outstanding work. But readers shouldn’t take our word for the quality of the book; we believe that readers can best “assess the book’s contents” by reading the book. **TFL**

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available at www.nbcchicago.com/news/local/White-Firefighters-to-Share-6M-Settlement.html.

⁸*Stewart v. City of St. Louis*, 532 F.3d 939, 940 (8th Cir. 2008).

⁹*Oakley v. City of Memphis*, No. 08-744, 2009 U.S. Lexis 4950 (June 29, 2009).

¹⁰*Oakley v. City of Memphis*, No. 07-6274, 2008 U.S. App. Lexis 19377, at **3-4 (6th Cir. Sept. 8, 2008), *vacated* 2009 U.S. Lexis 4950 (June 29, 2009).

¹¹*United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist. LEXIS 63153 (E.D.N.Y. July 22, 2009).

¹²*Id.* at **14–15 (emphasis in original).

¹³See Labor & Employment Law Blog, www.labor-employmentlawblog.com (July 10, 2009).

¹⁴*Ricci*, 129 S. Ct. at 2698 (Ginsburg, J., dissenting) (quoting H. R. Rep. No. 102-40, pt. 2, p. 2 (1991)).

¹⁵Comment of Sen. Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On the Supreme Court’s Decision in *Ricci v. DeStefano* (June 29, 2009), available at leahy.senate.gov/press/200906/062909a.html, last visited Aug. 25, 2009.

