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Sea Change or Limited Holding: Will *Ricci v. DeStefano* Affect "Disparate Impact" Claims Beyond its Unique Facts?

In the 2009 case of *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d. 490 (2009), the U.S. Supreme Court was called upon to address a conflict between the "disparate treatment" and "disparate impact" theories of unlawful discrimination under Title VII of the Civil Rights Act of 1964. The Court held that an employer's mere fear or belief of potential "disparate impact" liability did not, standing alone, provide the employer with an affirmative defense to a claim of "disparate treatment." The case was highly controversial and garnered a great amount of media attention, discussion, and criticism.

As significant—and controversial—as *Ricci* may be, litigants' initial attempts to extend *Ricci* beyond its precise holding have proven unsuccessful. These efforts have been met with resistance from the lower courts, which have declined to extend *Ricci*'s reach.[1] This article examines two such unsuccessful attempts to extend *Ricci*: efforts to use *Ricci* as a defense to disparate *impact* claims, and efforts to extend *Ricci* to universities' admissions policies. The early judicial reaction to these efforts to extend *Ricci* strongly suggests that *Ricci* will be limited to its unique facts, unless and until the Supreme Court holds otherwise.

Background: *Ricci*

The facts in *Ricci* are as follows. The Fire Department in New Haven, Conn., used a written examination to determine which firefighters would be promoted to positions as lieutenants and captains. White and Hispanic candidates outperformed African-American candidates on the exam, and the city chose to reject the results of the tests because of this racial disparity. As a result, white and Hispanic firefighters who would have been promoted based on the results of the examination filed suit, alleging unlawful disparate treatment under Title VII. In its defense, New Haven argued that it acted out of a legitimate fear that, if it had relied on the test results, the city would have been exposed to a disparate impact claim from unsuccessful African-American applicants. New Haven essentially argued that its fear of disparate impact liability was a defense to the plaintiffs' claim of disparate treatment.

In rejecting New Haven's argument, the Supreme Court held that, before an employer can engage in intentional discrimination for the asserted purpose of avoiding disparate impact liability, the employer must have a "strong basis in evidence" to believe that it would be subject to disparate impact liability if it fails to take the purported act of disparate treatment.

Title VII prohibits discrimination based on "disparate treatment" as well as "disparate impact." Civil Rights Act of 1964, § 701 et seq., 42 U.S.C. 2000e, et seq. "Disparate treatment" is intentional discrimination; "disparate impact" requires the plaintiff to prove that application of a facially neutral standard causes a significantly discriminatory hiring pattern by showing a statistically significant racial disparity, and demonstrating that the disparity results from one or more of the employer's employment practices. Intent to discriminate is not a required element of proof in a case that claims discrimination based on disparate impact.

The Supreme Court held that the mere fear or belief of potential disparate impact liability, even if done in good faith, is an insufficient defense to a claim of disparate treatment. Only a showing of a "strong basis in evidence" to believe that failing to engage in disparate treatment would lead to disparate impact liability would be a defense. In its ruling, the Court asserted the following:

> Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Ricci, 129 S. Ct. at 2681.

Justice Ruth Bader Ginsburg dissented and was joined by Justices Stevens, Souter, and Breyer in the dissent. The dissenters reasoned that the city had not rejected the results of the examination solely because the candidates with higher scores were white and Hispanic, but that the city had also relied on substantial evidence of multiple flaws in the examinations themselves. Other cities used better testing procedures that yielded outcomes that were less racially skewed than those used by New Haven. The dissenters accused the majority of equating "political considerations with unlawful discrimination" and of ignoring the line of decisions arising from *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849 (1971), which hold that Title VII "proscribes not only

overt discrimination but also practices that are fair in form, but discriminatory in operation." Justice Ginsburg asserted that "only by ignoring *Griggs* could one maintain that intentionally disparate treatment alone was Title VII's 'original foundational prohibition' and disparate impact a mere afterthought." The dissenters concluded that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity, and that the plaintiffs had not shown that New Haven's failure to certify the examination results violated Title VII's disparate treatment provision.

"Reverse *Ricci*": Attempts to Use *Ricci* as a Defense to Disparate Impact Claims

Second Circuit: Briscoe v. New Haven

Among the notable decisions declining to extend *Ricci* is the Second Circuit's ruling in *Briscoe v. New Haven*, 654 F.3d 200, 201 (2d Cir. 2011). *Briscoe* was a disparate impact claim brought by African-American applicants in New Haven in the aftermath of the *Ricci* decision. The *Briscoe* plaintiffs alleged that the examinations used for promoting firefighters that were in dispute in *Ricci* were arbitrarily weighted, thereby yielding an impermissible disparate impact.

Citing *Ricci*, the city of New Haven asserted as a defense that there was a "strong basis in evidence" to conclude that failing to certify the test results would lead to disparate treatment liability. In other words, the city sought to import the *Ricci* defense to disparate treatment (that is, a "strong basis in evidence" to fear that disparate impact liability would otherwise result) into a defense to disparate impact liability (that is, a "strong basis in evidence" to fear that disparate treatment liability would result if the alleged disparate impact is not permitted to stand).

In holding for the plaintiffs, the Second Circuit recognized that the *Ricci* ruling had established a new standard for disparate treatment claims, but the circuit court refused to extend *Ricci*'s "strong basis in evidence" defense to disparate impact claims. "[I]t is difficult to see how a 'strong basis in evidence' can be established for a disparate-treatment claim."

The *Briscoe* court also found such a defense to be unnecessary. The question whether an employment practice that would otherwise trigger disparate impact liability is excusable because of concern over disparate treatment is answered by the statutory affirmative defense to a disparate impact claim; specifically, a neutral standard or criterion that is "job related" and "consistent with business necessity" is permissible even if it causes a disparate impact. In such a case, the employer will prevail unless the plaintiffs demonstrate that there exists a less discriminatory employment practice that would also serve the employer's job-related business needs. Because this established defense to disparate impact claims already exists, there was no need to stretch *Ricci* to muddle that which, in the *Briscoe* court's opinion, was already clear. Moreover, unlike disparate treatment liability, in which intent is a central consideration, disparate impact liability involves quantitative measures that correspond to an objective "strong basis in evidence" standard.

The *Briscoe* court concluded that to find in favor of New Haven on this issue, it would need to conclude that in deciding *Ricci*, the Supreme Court had intended to bring about a substantial change in Title VII disparate impact litigation. The *Briscoe* court declined to reach this conclusion.

Third Circuit: NAACP v. N. Hudson Regional Fire and Rescue

In *NAACP v. North Hudson Regional Fire and Rescue*, 665 F.3d 464 (3d Cir. 2011), the Third Circuit upheld a district court's entry of a preliminary injunction barring North Hudson, a regional fire district, from maintaining its requirement that all applicants for firefighting positions be residents of its constituent communities. The district court found, and the Third Circuit agreed, that the residency requirement had an unlawful disparate impact upon African-Americans in violation of Title VII. In so holding, the Third Circuit rejected the argument presented by the employer and by several intervening Hispanic applicants that *Ricci* provided North Hudson with a defense against disparate impact liability on the ground that the remedy would treat Hispanic applicants in a disparate manner.

The North Hudson Regional Fire and Rescue agency was formed in 1998 as a consortium of the fire departments previously operated by five separate communities in Hudson County, N.J. Because each of the predecessor fire departments had required firefighter applicants to be residents, North Hudson adopted a similar requirement.

The NAACP challenged the residency requirement under the disparate impact theory of discrimination. North Hudson defended the claim, joined by several Hispanic applicants who benefited from the residency requirement and were likely to be hired if the requirement were allowed to stand.

On appeal, in addition to challenging the district court's findings as to statistical disparity and business necessity, North Hudson and the Hispanic applicants argued that the Supreme Court's decision in *Ricci* offers a "safe harbor" to disparate impact liability. Citing *Ricci* in an attempt to establish a defense in the converse situation in which an employer is charged with disparate impact discrimination but fears disparate treatment liability if it ceases the challenged employment practice, North Hudson and the Hispanic applicants argued that terminating the residency requirement to benefit African-Americans would result in disparate treatment liability to Hispanics.

After analyzing *Ricci* at length, the Third Circuit rejected the argument. *Ricci* was distinguishable because the employer in that case had already administered the purportedly disparate examination, had then attempted to remedy the disparate result through arguably

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disparate treatment of white firefighters, and therefore had to choose "between irreconcilable alleged errors before it secured judicial guidance regarding the merits of the competing discrimination claims." In contrast, North Hudson's "only action is the use of its Residents-Only List," and it had taken "no steps to eliminate the residency requirement or otherwise adjust its policies to reduce the adverse effect" on African-Americans. North Hudson was therefore confronted merely with a run-of-the-mill disparate impact case, not the unique circumstances faced by the employer in *Ricci*.

In addition, North Hudson had no basis for believing that it would be liable under a disparate treatment theory. The court, rather than North Hudson, was responsible for eliminating the residency requirement, thereby obviating any claim that North Hudson's intentional discrimination was the motivating factor. North Hudson also would have a legitimate nondiscriminatory reason for discontinuing the residency requirement—namely, attracting higher quality applicants by hiring more broadly. Finally, the mere fear of disparate treatment litigation is not sufficient under *Ricci*; only a "demonstrated potential for liability" would trigger the *Ricci* defense even if it applied.

Ricci and Universities' Admissions Policies

Fifth Circuit: Fisher v. University of Texas at Austin

In *Fisher v. Univ. of Texas at Austin*, 2012 WL 538328, 80 BNA USLAW 3144, the Fifth Circuit held that *Ricci* did not apply in the academic setting. The appellants, Texas residents who were denied admission to the University of Texas, filed suit alleging that the university's admissions policies discriminated against them on the basis of race. The University of Texas' academic program acts upon a university applicant pool shaped by a legislatively mandated parallel diversity initiative that guarantees admission to Texas students who are in the top 10 percent of their high school class. The Fifth Circuit confirmed the constitutionality of the program as it was administered at the time the appellants applied to the university. The Fifth Circuit analyzed the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), which held that the Equal Protection Clause did not prohibit a university's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The district court in *Fisher*, as affirmed by the Fifth Circuit, wrote that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*," and, "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."

When they appeared before the Fifth Circuit Court, the appellants argued that the "strong basis in evidence" standard of review from *Ricci* should apply, but the Fifth Circuit rejected this argument. The goals of a university in determining admissions to its academic program are different from those of an employer seeking to employ qualified persons. *Grutter* permits race-conscious measures so long as the university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system. Therefore, the "strong basis in evidence" standard that *Ricci* found to be applicable to employment determinations should not be extended to a university's admissions policies.

Conclusion

Based on the early returns, those who expected *Ricci* to trigger substantial changes in disparate impact litigation are being proven wrong. The lower courts appear inclined to limit *Ricci* to its unique facts and have resisted efforts to extend *Ricci* beyond it precise holding. The concern of the *Ricci* dissenters that disparate impact would be treated as a "second class" or disfavored theory of discrimination liability does not appear to be justified at this juncture. Further guidance from the Supreme Court will ultimately be required before it can be determined whether *Ricci* augers a major sea change in discrimination jurisprudence or was merely a unique response to a specific set of facts. **TFL**

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Endnotes

[1]*See, e.g., Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011); *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2009); *U.S. v. Vulcan Soc. Inc.*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009); *Bowdish v. Federal Express Corp.*, 699 F. Supp. 2d 1306 (W.D. Okla. 2010); *Lupescu v. Napolitano*, 700 F. Supp. 2d 962 (N.D. Ill. 2010); *Gainey v. BlueCross and BlueShield of South Carolina*, 2010 WL 3702587 (D.S.C. 2010); *Howe v. City of Akron*, 789 F. Supp. 2d 786 (N.D. Ohio 2010); *Palmquist v. Shinseki*, ___ F. Supp. 2d ___ (D. Me. 2011); *Doe ex rel. Doe v. Lower Merion School Dist.*, ___ F.3d ___ (3rd Cir. 2011); and *EEOC v. GKN Driveline North America Inc.*, 2010 WL 5093776 (M.D.N.C 2010).