



# Supreme Court Rules In Favor Of Firefighters In Reverse Discrimination Case

EMPLOYERS AND EMPLOYEES BOTH FIND COMFORT IN DECISION

Insights

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In one of the most important employment law cases of the decade, the U.S. Supreme Court handed employees a 5-4 victory by recognizing that even good-faith employment decisions can sometimes lead to results that give rise to lawsuits if those results fall more harshly on one class of employees than on another.

But the news is certainly not all bad for employers – the Supreme Court's ruling provides justification for those tough decisions that might otherwise have led to concerns about claims of discrimination, and allows employers the freedom to make such decisions without fear of reprisal.

*Ricci v. DeStefano*

## Promotion Exam Results Skewed Heavily Against Minority Applicants

In 2003, a group of 118 New Haven, Connecticut, firefighters took promotion exams seeking to advance to the ranks of Lieutenant and Captain. The exams were administered by the City of New Haven after much effort to ensure that they would measure the applicants' ability to perform the work at issue, and that they would be neutral in every other respect. Despite the fact that the group of applicants which took the exams was racially diverse (over 1/3 of the applicants were either African American or Hispanic), the results of the exam were anything but – of the 15 vacancies that would be filled by exam placement, none of them were black and only 2 were Hispanic.

The Civil Service Board held a series of public meetings to determine whether they should certify the exam results and issue the promotions, and listened to opposing testimony about the matter. Several of the white firefighters who passed the test and were therefore in line for the promotions testified about the hardships they endured studying for the exam. Frank Ricci studied 8 to 13 hours a day to prepare for the exam and incurred over \$1,000 in costs, including purchasing study-aid books and paying for someone to read them to tape because he is dyslexic and studies better by listening than reading; Christopher Parker studied in his wife's hospital room as they awaited delivery of their son. The Board also heard testimony from the company which drafted the exam and other experts who testified that the tests were designed to be racially neutral.

From the opposing viewpoint, experts pointed to other jurisdictions which placed different weight on certain parts of their respective exams and thus achieved better racial diversity in promotions. Most

importantly, the Board heard testimony from its own attorney, who testified that the City would almost certainly face a "disparate impact" lawsuit from those black and Hispanic firefighters who did not pass the exam should the test results be certified. Such a claim can be brought when, even though an employer does not make a conscious discriminatory decision (for example, "I'm firing you because you are black"), its decisions tend to have a more adverse impact on one group of employees than another.

### **City Tosses Out Promotions Due To Concerns About Discrimination**

The Board voted 2-2 on the issue (a fifth member of the Board recused herself because her brother was one of the affected firefighters). Because a majority did not agree to certify the results, no promotions were made. A group of 17 white firefighters and one Hispanic firefighter brought a Title VII discrimination lawsuit against the City, alleging that the decision not to issue the promotions amounted to reverse discrimination – making an adverse employment decision based on the applicants' color (in this case, white).

The U.S. District Court in Connecticut rejected their claims and dismissed the lawsuit, ruling that the employer had a right to rely on the good faith belief that its actions could have resulted in a finding of discrimination. It rejected the reverse-discrimination argument of the firefighters, holding that there was no evidence that the decision was motivated by discriminatory animus. In an unusual maneuver, the U.S. Court of Appeals for the Second Circuit (including Supreme Court nominee Judge Sonia Sotomayor) affirmed the district court's 48 page written opinion with a single paragraph, drawing the ire of the firefighters and their many supporters across the country. An appeal to the U.S. Supreme Court was accepted, eventually leading to today's opinion.

### **Supreme Court Rules In Favor Of Firefighters**

A fractured Supreme Court issued a 5-4 decision reversing the Second Circuit and handing the firefighters a victory. It began by adopting a new standard for Title VII cases: when an employer engages in intentional discrimination ("I'm not hiring you because of the color of your skin") for the claimed reason that it wants to avoid or remedy unintentional discrimination, the employer must have a "strong basis in evidence" to believe that it will be exposed to a disparate impact claim if it fails to take that action.

The Supreme Court initially ruled that the City of New Haven did, in fact, make an intentional decision to discriminate against the white firefighters when it chose not to promote them. It then examined whether the City had a "strong basis in evidence" to have made that decision, deciding that there were four reasons why there was not:

1. The City cannot simply rely on a showing of statistical evidence when claiming that it would be fearful of a disparate-impact claim. Even though the racial adverse impact in this case was significant, numbers alone will not satisfy the strong-basis-in-evidence test.
2. The firefighters and test administrators proved that "detailed steps" were taken to develop the tests in an unbiased manner, including "pilot-testing" analyses to ensure that the tests were relevant

tests in an unbiased manner, including painstaking analyses to ensure that the tests were relevant to show whether the applicants were qualified for the promotions.

3. Although the City argued that there may have been other testing alternatives that might have led to a more diverse pool of qualified promotion candidates – such as weighing the scores differently, using a different test, or otherwise adjusting the results – the Court held that such alternatives were not proven to be necessary and, in fact, could have also been intentionally discriminatory.

4. Finally, fear of litigation alone cannot justify an employer's decision to discriminate against non-minority employees. The Court held that the City could have properly defended its actions and avoided disparate-impact liability by showing the unbiased nature of the promotion exams, and could not use the specter of possible litigation to rationalize the mistreatment of the qualified applicants.

### **What Does This Mean For Employers?**

This is the rare Supreme Court case where a ruling against employers might actually serve to provide ammunition when defending against claims of discrimination. Moreover, by adopting a strict test for disparate-impact claims, this decision may quell the tide of employee victories in unintentional discrimination lawsuits, which could be welcome relief for employers in this era of downsizing and layoffs.

Employers now have a bright line standard to follow when implementing any action that might serve to unintentionally impact any certain class of employees more than another class – is there a "strong basis in evidence" that the employer will lose a claim of disparate impact litigation if it makes such a decision? If the answer is yes – and only if the answer is a clear yes – the employer is allowed to adopt an "affirmative action" type of approach and favor the minority employees or applicants. Otherwise, employers can expect to get hit with a reverse-discrimination lawsuit.

Employers should now feel confident that, as long as they take a reasoned and rational approach to such decisions, they will not be caught up in competing litigation worries, and can implement whatever workforce configuration they choose. Whether it is in the context of hiring or promotion, terminations or layoffs, you will want to take proactive steps to ensure that each decision leading to the action is based on a job-related reason (Does that employee really need that license or certificate to do the job? Do we need to offer that specific test to each applicant?) and that each decision is consistent with business necessity (Do we need to eliminate all employees in that department? Can we show that we have fired everyone else who has failed to meet that production standard?).

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*This Supreme Court Alert discusses highlights of a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*