

## Employment Alert

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### Ricci Decision May Have Broad Implication For Title VII Claims

By the end of June, the U.S. Supreme Court is expected to rule in *Ricci v. DeStefano* on what is probably its most contentious issue of the year. As you may have heard in news reports, this is the case where white firefighters in New Haven, Connecticut sued the New Haven Civil Service Board (CSB) and its officials for reverse race discrimination, claiming that their civil rights were violated when the CSB failed to certify test results needed for the white firefighters' promotion to Lieutenant and Captain.

The CSB invalidated the test results because only white firefighters would have been promoted. The United States District Court in Connecticut upheld the CSB's actions and ruled that although "race was taken into account in the decision not to certify the test results," the outcome was "race-neutral" because no one was promoted. A three judge panel of the Second Circuit, including Supreme Court nominee Sonia Sotomayor, affirmed the District Court ruling.

How this case is decided by the Supreme Court could profoundly change how employers deal with potential disparate impact claims under Title VII. Since the Supreme Court's 1971 ruling in *Griggs v. Duke Power Co.*, courts have widely allowed the use of a facially neutral employment selection practice, such as a promotion exam, to establish a *prima facie* case of discrimination **if** the practice disproportionately disqualifies employees of either gender or of any particular racial or ethnic group in a statistically significant manner. Indeed, it is almost always a *per se* violation of Title VII to use such a selection practice, even in the absence of any intent by the employer to discriminate, unless doing so is proven to be job-related **and** necessary for the operation of the employer's business. Because of the difficulty in meeting such a high legal standard, employers, fearing disparate impact claims, typically cease using any test or selection process the moment that they determine that it adversely affects any particular gender, ethnic or racial group.

*Ricci* may change that practice, and depending on how the Court rules, an employer could unwittingly find itself between a rock and a hard place. Based on comments made during oral argument, members of the Supreme Court are clearly concerned that if, as in *Ricci*, an employer stops using a facially neutral promotion test or selection process simply because it would cause too many people of one racial group to be selected for promotion, that action, taken to avoid an impermissible adverse impact, may very well be evidence in and of itself that the employer took race into account in the promotion process. If the Supreme Court decides that under Title VII an employer must carry out promotion selections based on a completed test even if it knows the test has a racial imbalance, an employer may have no choice but to then deal with a disparate impact claim brought by non-selected candidates which will be difficult to defend.

Because of the potentially far-reaching effect this decision may have on employers, we will continue to monitor this case, and inform you when the Court issues its decision.

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For further information about this topic, please contact Paul Garry at (312) 474-7900.

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