Firefighter Promotional Exam Makes Grade Under Title VII Despite Statistical Disparate Impact on Minority Firefighters

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On June 29, 2009, the U.S. Supreme Court ruled that the City of Grand Haven, Connecticut violated Title VII when it disregarded promotional exam results showing white firefighters scoring higher than minority firefighters.

Normally, the Supreme Court would not decide a constitutional question if there is some other ground upon which to dispose of a matter, in this case the statutory basis of Title VII, which is the federal law that prohibits workplace harassment and discrimination. Title VII covers all private employers, state and local governments, as well as educational institutions with 15 or more employees.

In *Ricci v. DeStefano,* 557 U.S. ___, (2009), white and Hispanic firefighters, who passed promotional exams, claimed they were denied a chance at promotions when the city refused to certify the promotional exam results. They sued the city and its officials, claiming reverse racial discrimination under federal constitutional and statutory authority.

Prior to *Ricci* reaching the Supreme Court, the federal trial court in the underlying case granted summary judgment to the city and the U.S. Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed the lower courts and granted the cross summary judgment motion of the plaintiff firefighters who were adversely affected by the city's refusal to certify the promotional exam results.

Arriving at its decision, the court's majority relied on the Strong-Basis-in Evidence (SBE) standard to reconcile the inherent inconsistencies between the disparate-impact and disparate-treatment provisions of Title VII when applied to two separate employee groups. The Supreme Court held that the city did not satisfy the SBE standard when it decided against certifying the exam results, which showed a statistical racial disparity, based on the belief that minority firefighters would bring a disparate-impact suit.

To invalidate the city's decision, the Supreme Court's majority reviewed the city's employment testing preparation, implementation and evaluation efforts, which included hiring a consulting firm that engaged in extensive steps to design and implement a bias free testing procedure.

In addition, the consulting firm conducted job analyses, interviewed incumbent supervisors and established culturally diverse oral interview panels. The firm also created written examination materials, accommodating 10th grade or below reading levels. The content of the written examination materials was drawn from the reference sources readily available to all of the test takers.

Despite these and other alleged bias free testing precautions, the exam results still favored white firefighters more so than minority firefighters, triggering the disparate-impact controversy. City officials engaged in an extensive post-testing evaluative process, including holding public hearings and receiving testimonials from not only the affected firefighters, but experts in employment testing and in culture and race matters who opined on the affects of the promotional exam results. After receiving this input, city officials refused to certify the promotional exam results, because of the disparate-impact litigation threat from the minority firefighters.

While the Supreme Court recognized the laudable goals of the city to achieve parity, the court's majority ruled that a threshold showing of a significant statistical disparity with nothing more, as in this case, "is far from a strong basis in evidence that the city would have been liable under Title VII had it certified the results."

The city's liability, if sued by the minority firefighters, would have been established only if the exams had been shown to be not job-related and inconsistent with business necessity or if there was a less-discriminatory alternative testing procedure that the city refused to adopt. The court's majority found no genuine dispute regarding the test's job-relatedness or business necessity. The majority also concluded that the city failed to show a less-discriminatory alternative existed.

This decision for employers means that any employment testing process must be thoroughly reviewed to avoid the "disparate-impact" and "disparate-treatment" pitfalls presented in the federal fair practices laws.