

**TITLE VII DISPARATE TREATMENT AND DISPARATE IMPACT  
CASES AFTER RICCI**

The United States Supreme Court set the standard for Title VII disparate treatment and disparate impact cases in Ricci v. DeStefano, 129 S.Ct. 2658 (2009). In a 5-4 decision, the high Court clarified the burdens of the parties and demonstrated that it is addressing the hot issues of the day. This New Haven firefighter's case will be remembered not just for appearing to confront what appeared to be reverse discrimination but also for clarifying the standards to assess disparate impact claims in all protected areas.

I. FACTS

The City of New Haven, Connecticut, for the purpose of filling vacancies for lieutenant and captain positions in the New Haven Fire Department, formulated an examination to identify the best qualified candidates. The process for hiring and promoting firefighters was governed by the city charter, which used a merit-based system. Ricci, 129 S.Ct. at 2665. Under the charter, the City is required to fill vacancies with the most-qualified candidates based upon job-related examination results. The charter also required, under a provision called the "rule of three," that the hiring authority fill each vacancy with one individual selected from the top three scorers on the examination for that position. The City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examination for lieutenant and captain firefighter positions. The examination, pursuant to the New Haven firefighters' union contract, was to consist of written and oral tests with the written exam accounting for 60 percent and the oral exam 40 percent of the total score.

In developing the exam, IOS performed job analyses to identify the essential "tasks, knowledge, skills, and abilities" for lieutenant and captain positions. Id. IOS representatives interviewed incumbent lieutenants and captains, and accompanied and observed on-duty officers. Using this first-hand information, IOS drafted job-analysis questionnaires, which were provided to most of the incumbent battalion chiefs, captains and

lieutenants in the Department. At every point in the job analysis, IOS deliberately over-sampled minority firefighters to ensure that the results would not unintentionally favor white firefighters. Id.

After completing the job analyses, IOS used the information it gathered to develop the written examination, which was intended to test the job-related knowledge of the candidates for promotion. The written examination consisted of 100 multiple choice questions written at a 10th grade reading level. IOS used Department manuals, procedures and other materials as sources for the questions, which were approved by the New Haven fire chief and assistant fire chief. Id. at 2666.

The oral examination was also developed using the job analysis information. This portion of the examination was intended to test the job skills and abilities of each candidate. IOS developed hypothetical situations that would be posed to officer candidates to test “incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things.” Id. The candidates would respond to these hypothetical situations in front of a panel of three assessors. Thirty assessors with a rank higher than the positions being tested were assembled, with all coming from outside Connecticut. Sixty-percent of the panelists were minorities, and each three-person panel contained two minorities. The resumes of the panelists were submitted to the City for approval, and the panelists went through several hours of training the day before the test was administered. Id.

In November and December 2003, the examinations were administered to the candidates. Id. Seventy-seven candidates sat for the lieutenant examination: 43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed: 25 whites, 6 blacks, and 3 Hispanics. At the time, eight lieutenant positions were vacant. By operation of the City’s “rule of three,” the individuals with the top 10 scores on the examination were eligible for the lieutenant vacancies--all 10 candidates were white. Id. Forty-one candidates sat for the captain examination: 25 whites, 8 blacks and 8 Hispanics. Of those candidates, 22 passed: 16 whites, 3 blacks, and 3

Hispanics. There were seven captain positions vacant at that time. Under the “rule of three,” 9 candidates were eligible for the vacant positions--7 whites and 2 Hispanics. Id.

Afterward, the City expressed concern that the examination discriminated against minority candidates based upon the raw test results, and that the statistical evidence of the tests, standing alone, “constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated voluntar[y] remedies--even . . . race-conscious remedies.” See id. at 2666-67. IOS was steadfast in its assurance that the test was not discriminatory and that the disparate results were the product of external factors and were in-line with the Departments prior promotional examinations. Id. at 2666, 2668. Several meetings were held by City officials. At the first meeting, firefighters that took the tests expressed their opinion on the test results. Some spoke in favor of certifying the test results and promoting those who passed and were eligible for promotion, including Frank Ricci, the named plaintiff in this matter. Id. at 2667. Ricci explained that he has several learning disabilities, including dyslexia. In order to study for the examination, he spent \$1,000 on study materials and paid his neighbor to read the materials on tape so his dyslexia would not impair his ability to study. Ricci was not sure whether he passed, but he felt that those who passed and were eligible should be promoted because, “[w]hen your life’s on the line, second best may not be good enough.” Id. at 2667. Other firefighters spoke against certifying the results, arguing that the test questions were outdated or not relevant to firefighting in New Haven, or that the study materials were too expensive. Id.

At subsequent meetings, other interested parties and witnesses were invited or allowed by the City to speak, including subject-matter experts, City officials, union leaders and community members. See id. at 2667-2669. The New Haven firefighters union asked that a validation study be conducted. The petitioners’ counsel requested that the results be certified. Some individuals present urged the City to throw out the test results or adjust them so that a certain amount of minorities may be promoted. Id. at 2667.

In another meeting, the City called the previously mentioned subject-matter experts to testify to obtain their professional opinions on the examinations results. One witness, Christopher Hornick, who operates a consulting business that is a competitor of IOS, opined the adverse impact of the written exam was “somewhat higher,” but within the average range that he has seen in his profession. Id. at 2668-2669. Hornick, admittedly, did not study the test at length or in detail. Nonetheless, Hornick advised of different methods by which the examinations could have been conducted or improved, such as conducting examinations at an assessment center as opposed to written and oral examinations. Id. at 2669. In the end, however, Hornick advised that the best option may be to certify the tests and change the process for future tests. Id. A second witness, Vincent Lewis, was a fire program specialist for the Department of Homeland Security and a retired fire captain. Lewis, who is black, reviewed the lieutenant exam “extensively” and opined that the candidates should have known the test material. Id. He felt that the disparate impact was due to a pattern that “usually whites outperform some of the minorities on testing,” or that “more whites . . . take the exam.” Id. Janet Helms, a professor at Boston College focusing on the influence of race and culture on test performance, also was invited to speak. Helms did not review the examinations, but attempted to provide possible reasons for the disparate impact. She explained that the test questions may have favored white candidates because a majority of the candidates were white, and literature on firefighters suggests that different groups perform the same job differently. Id. Helms concluded that regardless of what test the City administered, the results would have revealed a disparity between minority candidates and white candidates, particularly on the written test. Id.

With the threat of impending lawsuits by minority firefighters who took the exam and in light of the disparate test results, the City voted to not certify the examination results for use in promoting the firefighters.

## II. PROCEDURAL HISTORY

After the City voted to not certify the test results, the plaintiffs sued the City of New Haven and the City officials who voted against certification, claiming that the decision to not certify the test results violated the

Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. Id. at 2671. Upon cross-motions for summary judgment filed by both parties, the trial court granted summary judgment for the City. Id. The district court concluded that “notwithstanding the shortcomings in the evidence on the existing, effective alternatives, it is not the case that [the City] must certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method.” Ricci v. DeStafano, 554 F.Supp. 2d 142, 156. The court also held that the City’s motivation to not base promotions on a test that resulted in a racial disparate impact “does not, as a matter of law, constitute discriminatory intent under Title VII.” Id. at 160.

Further, the district court ruled that the City’s actions did not violate the Equal Protection clause because the City did not exhibit discriminatory animus towards the plaintiffs. As explained by the district court, the City’s actions were not “based on race” because “all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted.” Id. at 161. In a one-paragraph per curiam opinion, the U.S. Court of Appeals for the Second Circuit affirmed the decision, adopting the district court’s reasoning. 530 F.3d 87 (2d. Cir. 2008).

### III. ANALYSIS

The Supreme Court determined that race-based action by an employer taken in an attempt to avoid disparate impact is impermissible under Title VII unless there is a strong basis in evidence that the employer would have been liable under a disparate impact theory if such action was not taken. Accordingly, the district court’s order granting summary judgment was reversed. The majority, including Justices Kennedy, Scalia, Alito and Thomas, and Chief Justice Roberts, explained that Title VII prohibits both intentional discrimination, otherwise known as disparate treatment, and unintentional discrimination where a facially nondiscriminatory practice has a disproportionately adverse effect on minorities, commonly known as “disparate impact.” Ricci, 129 S.Ct. at 2672. In a disparate treatment action, the plaintiff has the burden of proving that the defendant’s

job-related action was motivated by a discriminatory intent to establish a prima facie case. Id. Conversely, where the conduct of an employer is shown to have a disparate impact, the employer has the burden of proving that the action or practice is job-related and a business necessity. Even if the practice is a business necessity, the plaintiff may still succeed on his or her Title VII claim if the employer refused to adopt a legitimate alternative that would have minimized or prevented the discriminatory result while serving the employer's business needs. Id. at 2673.

With this framework in mind, the opinion, written by Justice Kennedy, described that the City's act of refusing to certify the exam results based on the race of the candidates who passed would constitute intentional discrimination in violation of Title VII, unless it had a valid defense. Id. at 2673. Kennedy noted that all the evidence of record showed that the City's decision to not certify the results was motivated by a "statistical disparity based on race." In other words, the City rejected those results because too many white candidates and not enough minority candidates would be promoted if the results were certified. Id. The majority concluded that the evidence clearly demonstrated intentional discrimination based on race by the City, and rejected the district court's misguided reasoning that refusing to certify the test results in an effort to avoid disparate impact based on race did not constitute discriminatory intent as a matter of law. Id.

As Kennedy observed, the decisive "question is not whether that conduct was discriminatory but whether the city had a lawful justification for its race-based action." Id. at 2674. The majority contemplated whether the purpose of avoiding disparate impact liability excuses an otherwise prohibited act of intentional discrimination. Understanding the predicament of employers in attempting to comply with both the disparate treatment and disparate impact statutes, the Court sought to forge a balanced standard. Taking a page from Equal Protection precedent, the Court noted that it has previously held certain government actions based on race that are taken to combat or remedy past racial discrimination are permissible only where there is a "strong basis

in evidence” that the remedial actions are necessary. Id. (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

The Court quoted Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 290 (1986), where Justice Powell, writing for a plurality, recognized the tension between ending segregation and discrimination while seeking to end all government imposed discrimination based on race. Justice Powell stated that these “related constitutional duties are not always harmonious,” and “reconciling them requires . . . employers to act with extraordinary care.” Id. at 1842. As Justice Powell explained, a strong basis in evidence is required because “evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees.” Id.

The same interplay of competing interests are present under Title VII. The Court noted that Congress, in enacting Title VII, has prohibited practices that result in an unintentional disparate impact, but has also imposed liability for intentional adverse employment actions based on race. Ricci, 129 S.Ct. at 2676. Using the “strong basis in evidence” standard gives effect to both the disparate treatment statute and disparate impact statute. The majority reasoned that “the standard appropriately constrains employers’ discretion in making race-based decisions: it limits that discretion to cases in which there is a strong basis in evidence of disparate impact, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.” Id.

In this case, the Court held that the City did not meet the strong basis in evidence standard. The Court concluded that the evidence of record created no genuine dispute that the examinations were job-related and consistent with business necessity. Id. IOS informed the City officials of the painstaking process it employed to ensure the tests effectively represented the skills and knowledge lieutenants and captains needed to possess in performing their duties. Moreover, IOS made sure that minorities were over-represented at every step in formulating and administering the test. Of the outside witnesses, the Court noted that only Vincent Lewis carefully reviewed the examination and had firefighting experience, and he concluded that the questions on both

tests were relevant. Id. at 2678. The Court also stated that the City “turned a blind eye to evidence that supported the exams’ validity,” and did not request a technical report on the results, as provided in the City’s contract with IOS, which could have established the validity of the results. Id. at 2679.

The City also failed to show that there was a strong basis in evidence that a less-discriminatory test alternative existed that the City refused to adopt. The Court stated that adjusting the weighting of the tests to 30/70 in favor of the oral examination portion, as suggested by the City, would likely have violated Title VII because such a decision would have been based on race. The weighting of the tests was not arbitrary. The formula was the result of the union-negotiated collective bargaining agreement. Id. Another alternative suggested by the City was that the “rule of three” could have been interpreted differently to enable the promotion of more minorities. Once again, the Court rejected this argument because such action would have violated Title VII because it would have constituted racially based conduct. Id. Finally, the City argued that the use of assessment centers, as mentioned by Hornick, were reasonable alternatives to the promotion examination. The majority, however, declared that this argument also had no merit. Kennedy stated that, Hornick’s brief mention of alternative testing methods, standing alone, does not raise a genuine issue of material fact that assessment centers were available to the City at the time of the examinations and that they would have produced less adverse impact.” Id. at 2680. The Court declared that Hornick’s testimony, for the most part, supported certification of the test results. Hornick acknowledged that while New Haven’s test results were higher, they were within the average range. Id.

In sum, the majority concluded, “there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City.” Id. at 2681. As the Court reasoned, fear of litigation, absent a strong basis in evidence of liability under Title VII, does not justify an employer engaging in race-based

disparate treatment in an effort to avoid a disparate impact. See id. Therefore, the City's act of not certifying the results was prohibited under Title VII.

Justice Ginsburg, in delivering the dissent, opined that the majority left out important facts and failed to consider the context of the facts of this case. Ginsburg spoke of the long history of discrimination in fire departments, and that minorities are especially under-represented in the officer ranks. Id. at 2691. Ginsburg, in effect, set forth the dissent's own recitation of the relevant facts and remarked on the significance of certain facts that the dissent believed the majority failed to adequately acknowledge.

Without detailing the dissent's opposing view of the facts, Justice Ginsburg disagrees with the majority's view that the disparate treatment and disparate impact statutes are at odds. Id. at 2699. Justice Ginsburg reasoned that an employer that rejects a business practice because it has reasonable doubts as to the reliability of the results of the practice has not engaged in race discrimination. As Justice Ginsburg explains, she would hold that an employer that decides to forego a job selection device that results in a disproportionate racial impact does not violate Title VII as a matter of law, so long as the employer has "good cause" to believe the selection practice would not withstand the test of business necessity. Id. (citing Faragher v. Boca Raton, 524 U.S. 775 (1998)). To support its assertion that the two statutes are not in conflict, the dissent points to prior precedent where the Court has held that an employer's voluntary affirmative action plan did not violate the disparate treatment statute. Id. at 2700 (citing Johnson v. Transportation Agency, 480 U.S. 616 (1987)).

The dissent takes issue with the majority's ruling and use of the Equal Protection clause's "strong basis in evidence" standard. For one, the dissent noted that the Equal Protection clause does not contain a disparate impact provision, and applies only to intentional discrimination. Id. at 2700. On the other hand, Title VII aims to end all discrimination, including instances of unintentional discrimination. Id. Moreover, the dissent argues that the majority's holding contradicts a dominant theme of Title VII, which is that the statute should not be construed so as to punish an employer's efforts at voluntary compliance. Id. at 2701. Justice Ginsburg states

