



Ricci v. DeStefano: Balancing Title VII Disparate Treatment and Disparate Impact

Leveraging the Supreme Court's Guidance on Employment Testing and its Impact on Voluntary Compliance Actions

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Teresa R. Tracy, Partner, **Berger Kahn**, Los Angeles

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Thursday, July 30, 2009

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***Ricci v. DeStefano*: Balancing Title VII Disparate Treatment and Disparate Impact**

Leveraging the Supreme Court's Guidance on Employment Testing and its Impact on Voluntary Compliance Actions

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***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE CLAIM

- THE *RICCI* FIREFIGHTERS CHALLENGED THE CITY'S DECISION TO THROW OUT THE RESULTS OF CERTAIN PROMOTIONAL EXAMINATIONS UNDER WHICH WHITE CANDIDATES HAD OUTPERFORMED AFRICAN-AMERICAN CANDIDATES.
- THE WHITE AND HISPANIC FIREFIGHTERS ASSERTED A DISPARATE TREATMENT CLAIM ALLEGING THAT THE CITY'S DECISION WAS MOTIVATED BY THEIR RACES.



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(2009)***

THE DEFENSE

- THE CITY ASSERTED THAT IT FEARED A DISPARATE-IMPACT LAWSUIT BY AFRICAN-AMERICAN FIREFIGHTERS IF IT USED THE TEST RESULTS TO MAKE THE PROMOTIONS.



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THE FACTS

THE PROMOTION PROCESS

- WAS GOVERNED BY THE CITY CHARTER, WHICH HAD ESTABLISHED A MERIT SYSTEM.
- REQUIRED THE CITY TO FILL VACANCIES IN ITS CIVIL SERVICE RANKS WITH THE MOST-QUALIFIED INDIVIDUALS, AS DETERMINED BY JOB-RELATED EXAMINATIONS



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE FACTS (cont.)

THE CIVIL SERVICE BOARD

- CERTIFIED A RANKED LIST OF APPLICANTS WHO PASSED THE TEST AFTER EACH EXAMINATION.
- CERTIFIED PROMOTIONAL LISTS REMAINED VALID FOR TWO YEARS.



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THE FACTS (cont.)

THE CITY / FIREFIGHTERS UNION CONTRACT

- SPECIFIED ADDITIONAL REQUIREMENTS OF THE PROMOTION PROCESS.
- APPLICANTS FOR LIEUTENANT AND CAPTAIN POSITIONS WERE TO BE SCREENED USING WRITTEN AND ORAL EXAMINATIONS, WITH THE WRITTEN EXAM ACCOUNTING FOR 60 % OF AN APPLICANT'S TOTAL SCORE.



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THE FACTS (cont.)

THE BID

- AFTER REVIEWING BIDS FROM VARIOUS CONSULTANTS, THE CITY HIRED INDUSTRIAL/ORGANIZATIONAL SOLUTIONS, INC. ("IOS") TO DEVELOP AND ADMINISTER THE EXAMINATIONS AT A COST OF \$100,000.
- IOS SPECIALIZED IN DESIGNING ENTRY-LEVEL AND PROMOTIONAL EXAMINATIONS FOR FIRE AND POLICE DEPARTMENTS.



RICCI V. DESTEFANO, 129 S. Ct. 2658 (2009)

THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS

- IOS PERFORMED JOB ANALYSES TO IDENTIFY THE TASKS, KNOWLEDGE, SKILLS, AND ABILITIES ESSENTIAL TO THE LIEUTENANT AND CAPTAIN POSITIONS.
- INTERVIEWED INCUMBENT CAPTAINS AND LIEUTENANTS AND THEIR SUPERVISORS, AND RODE WITH AND OBSERVED OTHER ON-DUTY OFFICES.
- WROTE JOB-ANALYSIS QUESTIONNAIRES AND ADMINISTERED THEM TO MOST OF THE INCUMBENT BATTALION CHIEFS, CAPTAINS, AND LIEUTENANTS.



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THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- DEVELOPED MULTIPLE-CHOICE WRITTEN EXAMINATIONS, WHICH WERE WRITTEN BELOW A 10TH GRADE READING LEVEL.
- COMPILED A LIST OF TRAINING MANUALS, DEPARTMENT PROCEDURES, AND OTHER PROCEDURES TO USE AS SOURCES FOR THE TEST QUESTIONS.



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THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- IOS ALSO DEVELOPED THE ORAL EXAMINATIONS, CONCENTRATING ON JOB SKILLS AND ABILITIES.
 - ASSEMBLED A POOL OF 30 ASSESSORS WHO WERE SUPERIOR IN RANK TO THE POSITIONS BEING TESTED, AND TRAINED THEM ON HOW TO ADMINISTER THE ORAL EXAMINATIONS.
 - AT THE CITY'S INSISTENCE, ALL ASSESSORS CAME FROM OUTSIDE OF CONNECTICUT BECAUSE OF CONTROVERSY OVER PREVIOUS EXAMINATIONS.



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THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- THE ASSESSORS WERE BATALLION CHIEFS, ASSISTANT CHIEFS, AND CHIEFS FROM DEPARTMENT OF SIMILAR SIZES TO NEW HAVEN'S THROUGHOUT THE COUNTRY.
- 66 % OF THE PANELISTS WERE MINORITIES, AND EACH OF THE NINE PANELS CONTAINED TWO MINORITY MEMBERS.



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THE FACTS (cont.)

THE RESULTS

- WHITE CANDIDATES PERFORMED BETTER THAN AFRICAN-AMERICAN CANDIDATES ON THE EXAMS.
 - ALL 10 CANDIDATES ELIGIBLE FOR IMMEDIATE PROMOTION TO LIEUTENANT WERE WHITE (ALTHOUGH SUBSEQUENT VACANCIES WOULD HAVE ALLOWED AT LEAST 3 BLACK CANDIDATES TO BE CONSIDERED FOR PROMOTION TO LIEUTENANT).
 - 9 CANDIDATES — 7 WHITES AND 2 HISPANICS, BUT NO AFRICAN-AMERICANS — WERE ELIGIBLE FOR AN IMMEDIATE PROMOTION TO CAPTAIN.



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THE FACTS (cont.)

THE AFTERMATH

- THE CITY'S CONTRACT WITH IOS CONTEMPLATED THAT, AFTER THE EXAMINATIONS, IOS WOULD PREPARE A TECHNICAL REPORT THAT ANALYZED THE RESULTS.
- CITY OFFICIALS REQUESTED A MEETING WITH IOS'S VICE PRESIDENT INSTEAD
- CITY OFFICIALS EXPRESSED CONCERNS THAT THE TESTS HAD DISCRIMINATED AGAINST MINORITY CANDIDATES, BUT IOS'S VICE PRESIDENT DEFENDED THE VALIDITY OF THE EXAMS.



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE FACTS (cont.)

POLITICS

- LOTS AND LOTS OF POLITICS — 7-1/2 PAGES OF THE COURT'S OPINION.



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE FACTS (cont.)

THE CITY'S DECISION

- THE CIVIL SERVICE BOARD VOTED NOT TO CERTIFY THE RESULTS OF THE EXAMINATIONS.
- THE CITY ARGUED THAT THE DECISION WAS BASED ON A GOOD-FAITH BELIEF THAT IT FEARED BEING SUED BY AFRICAN-AMERICAN EMPLOYEES ON A DISPARATE IMPACT CLAIM UNDER TITLE VII.



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE FACTS (cont.)

THE LAWSUIT

- THE CITY ARGUED THAT IT COULD NOT BE HELD LIABLE UNDER TITLE VII'S DISPARATE-TREATMENT PROVISION FOR ATTEMPTING TO COMPLY WITH TITLE VII'S DISPARATE-IMPACT PROVISION
- THE *RICCI* FIREFIGHTERS COUNTERED THAT THE CITY'S GOOD-FAITH BELIEF WAS NOT A VALID DEFENSE TO ALLEGATIONS OF DISPARATE TREATMENT.
- FOLLOWING DISCOVERY, THE PARTIES FILED CROSS-MOTIONS FOR SUMMARY JUDGMENT.



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THE FACTS (cont.)

- THE DISTRICT COURT GRANTED SUMMARY JUDGMENT FOR THE CITY, FINDING THAT THE CITY'S ACTION WERE NOT "BASED ON RACE" BECAUSE THE TEST RESULTS WERE DISCARDED AND NO ONE WAS PROMOTED.
- THE DISTRICT COURT CONCLUDED THAT THE CITY'S MOTIVATION TO AVOID MAKING PROMOTIONS BASED ON A TEST WITH A RACIALLY DISPARATE IMPACT DID NOT, AS A *MATTER OF LAW*, CONSTITUTE DISCRIMINATORY INTENT UNDER TITLE VII.
- THE DISTRICT COURT'S HOLDING WAS AFFIRMED BY THE SECOND CIRCUIT WITHOUT ANALYSIS

***RICCI V. DESTEFANO*, 129 S. Ct. 2658
(2009)**

THE ISSUE BEFORE THE SUPREME COURT

- WHETHER THE CITY'S STATED PURPOSE OF AVOIDING DISPARATE-IMPACT LIABILITY EXCUSES WHAT OTHERWISE WOULD CONSTITUTE PROHIBITED DISPARATE-TREATMENT DISCRIMINATION.



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(2009)**

THE HOLDING

THE SUPREME COURT HELD

- THAT THE CITY'S ACTION IN DISCARDING THE RESULTS OF THE PROMOTIONAL EXAMS WERE BASED ON RACE
- THEREFORE, THE COURT HELD, THE CITY'S ACTION WOULD VIOLATE TITLE VII'S DISPARATE-TREATMENT PROHIBITION ABSENT SOME VALID DEFENSE



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE HOLDING (cont.)

THE SUPREME COURT HELD

- FEAR OF LITIGATION – BY ITSELF – COULD NOT JUSTIFY THE CITY'S RELIANCE ON RACE TO THE DETRIMENT OF THOSE FIREFIGHTERS WHO HAD PASSED THE EXAMS AND QUALIFIED FOR PROMOTIONS.
 - THE COURT SPECIFICALLY **REJECTED** THE CITY'S ARGUMENT THAT AN EMPLOYER'S GOOD-FAITH BELIEF THAT ITS ACTION WERE NECESSARY TO COMPLY WITH TITLE VII'S DISPARATE IMPACT PROVISION – WITHOUT MORE – SHOULD BE ENOUGH TO JUSTIFY RACE-CONSCIOUS CONDUCT

***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE HOLDING (cont.)

THE SUPREME COURT HELD THAT

- ***UNDER TITLE VII***, AN EMPLOYER CAN ENGAGE IN INTENTIONAL DISCRIMINATION FOR THE ASSERTED PURPOSE OF AVOIDING (OR REMEDYING) AN UNINTENTIONAL DISPARATE IMPACT ***ONLY IF*** THE EMPLOYER HAS ***AN OBJECTIVE, STRONG BASIS IN EVIDENCE*** TO BELIEVE IT WOULD BE SUBJECT TO DISPARATE IMPACT LIABILITY IF IT FAILED TO TAKE THE RACE-CONSCIOUS, DISCRIMINATORY ACTION.



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THE HOLDING (cont.)

- THE COURT SPECIFICALLY ***REJECTED*** THE PLAINTIFFS' ARGUMENT THAT THE CITY COULD NOT TAKE ANY RACE-BASED ADVERSE EMPLOYMENT ACTION IN ORDER TO AVOID DISPARATE-IMPACT LIABILITY – EVEN IF THE EMPLOYER KNOWS ITS PRACTICE VIOLATES THE DISPARATE-IMPACT PROVISION.
- THE COURT ALSO ***REJECTED*** THE PLAINTIFFS' ARGUMENT THAT AN EMPLOYER MUST, IN FACT, BE IN VIOLATION OF THE DISPARATE-IMPACT PROVISION BEFORE IT COULD USE COMPLIANCE AS A DEFENSE IN A DISPARATE-TREATMENT SUIT.



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE HOLDING (cont.)

THE SUPREME COURT HELD

- THE CITY OF NEW HAVEN'S RACE-BASED REJECTION OF THE PROMOTION TEST RESULTS COULD NOT SATISFY THE STRONG-BASIS-IN-EVIDENCE STANDARD.
- REVERSED THE LOWER COURT'S HOLDING
- ENTERED SUMMARY JUDGMENT FOR THE PLAINTIFFS *IN A DISPARATE TREATMENT CASE*.

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(2009)**

THE HOLDING (cont.)

THE SUPREME COURT ACKNOWLEDGED

- THE CITY HAD STATED A PRIMA FACIE CASE OF DISPARATE-IMPACT LIABILITY (*i.e.*, HAD MADE A THRESHOLD SHOWING OF A SIGNIFICANT STATISTICAL DISPARITY)
 - THE PASS RATE OF MINORITIES FELL WELL BELOW THE 80% (OR 4/5'S) STANDARD SET BY THE EEOC TO IMPLEMENT THE DISPARATE IMPACT PROVISION OF TITLE VII.



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(2009)**

THE HOLDING (cont.)

- HOWEVER, THE COURT HELD THAT A THRESHOLD SHOWING OF SIGNIFICANT STATISTICAL DISPARITY -- WITH NOTHING MORE -- IS "FAR FROM" A STRONG BASIS IN EVIDENCE THAT THE CITY WOULD HAVE BEEN LIABLE UNDER TITLE VII HAD IT CERTIFIED THE TEST RESULTS.



***RICCI V. DESTEFANO*, 129 S. Ct. 2658 (2009)**

THE HOLDING (cont.)

THE SUPREME COURT HELD THAT THE CITY HAD TO *FURTHER* SHOW A STRONG BASIS IS IN EVIDENCE FOR BELIEVING

- THAT THE EXAMS AT ISSUE WERE NOT JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY; OR
- THAT THERE EXISTED AN EQUALLY VALID, LESS-DISCRIMINATORY ALTERNATIVE THAT SERVED THE CITY'S NEEDS BUT THAT THE CITY REFUSED TO ADOPT.

THE COURT, HOWEVER, FOUND THAT THERE WAS NO "SUBSTANTIAL BASIS IN EVIDENCE" THAT THE TEST WAS DEFICIENT IN EITHER RESPECT.



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THE HOLDING (cont.)

THE COURT HELD THAT THERE WAS NO SUBSTANTIAL BASIS IN EVIDENCE THAT THE TEST WAS NOT JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY BECAUSE

- OF THE STEPS TAKEN BY IOS TO DEVELOP AND ADMINISTER THE TESTS AND THE "PAINSTAKING ANALYSES" OF THE QUESTIONS ASKED TO ASSURE THEIR RELEVANCE TO THE PROMOTIONAL POSITION; AND
- THE CITY'S TURNING "A BLIND EYE" TO EVIDENCE SUPPORTING THE VALIDITY OF THE EXAMS.



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THE HOLDING (cont.)

THE COURT ALSO HELD THAT THERE WAS NO STRONG BASIS IN EVIDENCE SHOWING AN EQUALLY-VALID, LESS-DISCRIMINATORY TESTING ALTERNATIVE THAT THE CITY, BY CERTIFYING THE TEST RESULTS, WOULD HAVE REFUSED TO ADOPT.

- THE CITY PRODUCE NO EVIDENCE THAT THE WRITTEN / ORAL WEIGHTING ACTUALLY USED WAS INDEED ARBITRARY, OR THAT A DIFFERENT WEIGHTING WOULD BE AN EQUALLY-VALID WAY TO DETERMINE CANDIDATES ARE QUALIFIED FOR PROMOTION



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THE HOLDING (cont.)

- A DIFFERENT INTERPRETATION OF THE CHARTER PROVISION LIMITING PROMOTIONS TO THE HIGHEST-SCORING APPLICANTS WOULD HAVE PRODUCED LESS-DISCRIMINATORY RESULTS WOULD HAVE VIOLATED TITLE VII'S PROHIBITION OF RACE-BASED ADJUSTMENT OF TEST RESULTS
- AN ASSESSMENT CENTER WAS NOT AN OPTION BASED ON THE STATEMENTS IN EVIDENCE.

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CONSTITUTIONAL IMPLICATIONS

THE COURT HELD THAT BECAUSE THE CITY HAD NOT MET ITS BURDEN UNDER TITLE VII, THE COURT DID NOT NEED TO DECIDE WHETHER A LEGITIMATE FEAR OF DISPARATE IMPACT IS EVER SUFFICIENT TO JUSTIFY DISCRIMINATORY TREATMENT UNDER THE CONSTITUTION.

- THE *RICCI* FIREFIGHTERS ALSO HAD ASSERTED A CLAIM OF RACE DISCRIMINATION UNDER THE EQUAL-PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION
 - QUESTION: COULD THEY HAVE STATED A CLAIM UNDER 42 U.S.C. § 1981?



EMPLOYMENT TESTS AND OTHER EMPLOYMENT STANDARDS

EMPLOYEE SELECTION PROCEDURES INCLUDE

- PEN-AND-PAPER TESTS
- PERFORMANCE TESTS
- INFORMAL OR CASUAL INTERVIEWS
- UNSCORED APPLICATION FORMS
- TRAINING PROGRAMS
- PROBATIONARY PERIODS
- PHYSICAL, EDUCATIONAL, AND EXPERIENCE REQUIREMENTS



EMPLOYMENT TESTS AND OTHER EMPLOYMENT STANDARDS

EMPLOYMENT DECISIONS INCLUDE

- HIRING
- MEMBERSHIP (e.g., Unions)
- RECRUITING AND REFERRALS
- SELECTION FOR TRAINING
- TRANSFER
- PROMOTION
- RETENTION



DISPARATE IMPACT CLAIMS

- ATTACK FACIALLY-NEUTRAL EMPLOYMENT PRACTICES THAT NEVERTHELESS OPERATE TO EXCLUDE DISPROPORTIONATE NUMBERS OF STATUTORILY-PROTECTED PERSONS.
- DO NOT REQUIRE PROOF OF INTENT TO DISCRIMINATE



CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. S § 2000e-2(k)

AN UNLAWFUL EMPLOYMENT PRACTICE BASED ON
DISPARATE IMPACT IS ESTABLISHED IF

- THE PLAINTIFF DEMONSTRATES THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN; AND
- THE DEFENDANT *FAILS* TO DEMONSTRATE THAT THE CHALLENGED EMPLOYMENT PRACTICE IS JOB RELATED FOR THE POSITION IN QUESTION AND CONSISTENT WITH BUSINESS NECESSITY.



CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. S § 2000e-2(k)

- THE PLAINTIFF MUST DEMONSTRATE THAT EACH PARTICULAR CHALLENGED EMPLOYMENT PRACTICE CAUSES A DISPARATE IMPACT
 - EXCEPTION: IF THE PLAINTIFF CAN DEMONSTRATE THAT THE ELEMENTS OF A DEFENDANT'S DECISIONMAKING PROCESS ARE NOT CAPABLE OF SEPARATION FOR ANALYSIS, THE DECISIONMAKING PROCESS MAY BE ANALYZED AS ONE EMPLOYMENT PRACTICE.
- IF THE EMPLOYER DEMONSTRATES THAT A SPECIFIC EMPLOYMENT PRACTICE DOES NOT CAUSE THE DISPARATE IMPACT, THE EMPLOYER IS NOT REQUIRED TO DEMONSTRATE THAT SUCH PRACTICE IS REQUIRED BY BUSINESS NECESSITY.



CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. S § 2000e-2(k)

ALTERNATIVELY, AN UNLAWFUL EMPLOYMENT PRACTICE
BASED ON DISPARATE IMPACT IS ESTABLISHED IF

- THE PLAINTIFF DEMONSTRATES THAT THERE IS AN ALTERNATIVE EMPLOYMENT PRACTICE AVAILABLE THAT ACHIEVES THE SAME BUSINESS GOALS WITH LESS DISCRIMINATORY IMPACT; AND
- THE PLAINTIFF DEMONSTRATES THAT THE EMPLOYER REFUSES TO ADOPT SUCH ALTERNATIVE EMPLOYMENT PRACTICE.

THE PLAINTIFF'S DEMONSTRATION WITH RESPECT TO THE CONCEPT OF AN "ALTERNATIVE EMPLOYMENT PRACTICE" SHALL BE IN ACCORDANCE WITH THE LAW AS IT EXISTED ON JUNE 4, 1989 (i.e., PRIOR TO *WARDS COVE*)



CLAIMS OF DISPARATE IMPACT UNDER THE ADEA ARE GOVERNED BY CASE LAW

AN UNLAWFUL EMPLOYMENT PRACTICE BASED ON DISPARATE IMPACT IS ESTABLISHED IF

- THE PLAINTIFF DEMONSTRATES THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT ON THE BASIS OF AGE; AND
- THE EMPLOYER *FAILS* DEMONSTRATE THAT THE ADVERSE IMPACT IS BASED ON OR OTHERWISE ATTRIBUTABLE TO A REASONABLE FACTOR(S) OTHER THAN AGE DISCRIMINATION.



CLAIMS OF DISPARATE IMPACT UNDER THE ADEA ARE GOVERNED BY CASE LAW

LIKE TITLE VII,

- THE PLAINTIFF MUST ISOLATE AND IDENTIFY A SPECIFIC EMPLOYMENT PRACTICE THAT IS ALLEGEDLY RESPONSIBLE FOR ANY STATISTICAL DISPARITY RISING TO THE LEVEL OF AN ADVERSE IMPACT.

UNLIKE TITLE VII, HOWEVER,

- THE BUSINESS-NECESSITY TEST HAS NO PLACE IN AN ADEA DISPARATE-IMPACT ANALYSIS
- SO LONG AS THE EMPLOYER'S ONE SELECTED WAY WAS NOT UNREASONABLE, WHETHER THERE ARE OTHER REASONABLE WAYS FOR THE EMPLOYER TO ACHIEVE ITS GOAL IS IRRELEVANT



DISPARATE IMPACT CLAIMS — TITLE VII vs. ADEA

- ADEA — JURY TRIAL
- ADEA — LIQUIDATED DAMAGES AWARD ARE NOT SPECIFICALLY EXCLUDED BUT, THEORETICALLY, THE "WILLFUL" STANDARD OF PROOF SEEMINGLY WOULD MAKE RECOVERY DIFFICULT
- TITLE VII — NO JURY TRIAL
- TITLE VII — NO COMPENSATORY OR PUNITIVE DAMAGES AVAILABLE
- TITLE VII — SUPREME COURT TO ADDRESS TIMELINESS ISSUE NEXT TERM



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

EMPLOYERS ALSO CONDUCT DISPARATE-IMPACT ANALYSES IN PREPARING FOR REDUCTIONS IN FORCE

- RACE / ETHNICITY
- AGE
- SEX



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

TITLE VII APPLIES EQUALLY TO ALL PROTECTED GROUPS:

- ALL RACES / ETHNIC GROUPS
- BOTH SEXES
- A CLAIM OF DISCRIMINATION BASED ON A RIF MAY BE ASSERTED BY ANY PERSON BASED ON ONE OR MORE PROTECTED CHARACTERISTICS UNDER TITLE VII -- PROVIDED THE EMPLOYER IS SUBJECT TO THE STATUTE



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

RICCI IS A DISPARATE-TREATMENT CASE

- INTENT IS KEY
- SUPREME COURT IN *RICCI* EMPHASIZED EMPLOYEE'S EXPECTATIONS BASED ON TIME, MONEY AND EFFORT DEDICATED TO STUDYING FOR EXAMS
- GOOD FAITH WILL BE REWARDED (HOPEFULLY)



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

RICCI SPECIFICALLY LIMITS ITS HOLDING TO CLAIMS UNDER TITLE VII

- TITLE VII HAS A DISPARATE-IMPACT PROVISION
- SUPREME COURT IN *RICCI* WAS REQUIRED TO GIVE FULL EFFECT TO BOTH THE DISPARATE-TREATMENT AND DISPARATE-IMPACT PROVISIONS OF THE STATUTE



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

EMPLOYERS OBVIOUSLY SHOULD SEEK TO AVOID TAKING EMPLOYMENT ACTIONS THAT WOULD VIOLATE EITHER THE DISPARATE-TREATMENT PROVISION OR THE DISPARATE-IMPACT PROVISION OF TITLE VII.

- LESSONS FROM *RICCI*

- TITLE VII PROTECTS ALL EMPLOYEES
- TITLE VII DOES NOT PERMIT FAVORING ONE PROTECTED GROUP OF EMPLOYEES OVER ANOTHER



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

IN *TAXMAN v. BOARD OF EDUCATION OF TOWNSHIP OF PISCATAWAY*, THE THIRD CIRCUIT HELD THAT THE EMPLOYER'S DESIRE TO MAINTAIN RACIAL DIVERSITY WAS AN IMPERMISSIBLE FACTOR WHEN IT WAS NOT INTENDED TO EITHER REMEDY DISCRIMINATION OR THE EFFECT OF PAST DISCRIMINATION.

- BOARD LAID OFF WHITE TEACHER AND RETAINED AFRICAN-AMERICAN TEACHER
- UNITED STATES FILED AMICUS BRIEF ARGUING THAT TITLE VII PERMITS RACIAL PREFERENCES IN LAYOFFS
- THE SUPREME COURT GRANTED THE BOARD'S PETITION FOR CERT, BUT THE PARTIES SETTLED
- RICCI* WOULD APPEAR TO SUPPORT *TAXMAN*'S HOLDING



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

RISK ASSESSMENT

RICCI TITLE VII DISPARATE-TREATMENT CLAIM:

- COMPENSATORY DAMAGES
- PUNITIVE DAMAGES
- JURY TRIAL

TITLE VII DISPARATE-IMPACT CLAIM:

- NO COMPENSATORY DAMAGES
- NO PUNITIVE DAMAGES
- NO JURY TRIAL



IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

RICCI ARGUABLY SHOULD HAVE A MORE LIMITED
IMPACT UNDER THE ADEA

- UNLIKE TITLE VII, ADEA EFFECTIVELY CREATES AN UNPROTECTED CATEGORY OF EMPLOYEES
- MAY BE MORE PROBLEMATIC FOR STATE AGE-DISCRIMINATION STATUTES THAT COVER EMPLOYEES OF ALL AGES



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

WHAT HAPPENS IF EMPLOYER DETERMINES THAT ITS RIF SELECTION PROCEDURE HAS RESULTED IN A DISPARATE IMPACT UNDER TITLE VII?

- EMPLOYER TYPICALLY DOES NOT HAVE THE OPTION OF SIMPLY NOT PROCEEDING WITH A REDUCTION-IN-FORCE AS THE CITY OF NEW HAVEN CHOSE TO DO WITH ITS PROMOTIONS.
- CAN YOU ADDRESS DISPARATE-IMPACT WITHOUT CREATING A *RICCI* CLAIM?



IMPACT OF *RICCI* ON REDUCTIONS-IN-FORCE

IF THERE IS A DISPARATE IMPACT:

- RETRIEVE ALL MATERIALS PREVIOUSLY USED BY MANAGERS OR SUPERVISORS IN MAKING RIF SELECTIONS
- DETERMINE WHAT PROCEDURES NEED TO BE CHANGED
- APPLY NEW PROCEDURES AS MODIFIED
- CONDUCT DISPARATE-IMPACT ANALYSIS AGAIN

Ricci v. DeStefano:

**Balancing Title VII Disparate
Treatment and Disparate
Impact Testing and Its Impact
on Voluntary Compliance
Actions**

Strafford Publications
July 30, 2009

Presented by Teresa R. Tracy

II. Impact of Ruling on Employment Standards and Voluntary Compliance Programs

A. Use of Employment Tests

- Tests remain permissible but must be carefully constructed and validated
- Disparate impact remains an important issue

B. Other Employment Standards

- Evaluated against the same standards as an employment test
- Some have more tendency to result in disparate impact than others
- *Uniform Guidelines on Employee Selection Procedures*

II. Impact of Ruling on Employment Standards and Voluntary Compliance Programs (cont.)

D. Affirmative Action Plans

- Controversial Issue
- Focus: Outreach and Barrier Removal
- Basis: Facts and Information
- OFCCP stepping up its enforcement

E. Diversity Plans

- Voluntary diversity plans remain subject to challenge

III. Impact of Decision on Future Litigation

- Advocates on both sides are likely to find helpful language
- Actual impact on litigation may be minimal
- Open issue for government employers: equal protection under U.S. Constitution

B. Standards for Motion for Summary Judgment

Steps in evaluating disparate impact case remain largely unchanged:

- Demonstrate disparate impact
- Employer must show practice or policy was job-related and consistent with business necessity

III. Impact of Decision on Future Litigation (cont.)

- Show that the employer refused to adopt alternative that would have less disparate impact and serve the employer's legitimate needs
- If employer makes discriminatory decision to avoid potential disparate impact, must be able to show "strong basis in evidence"

Subsequent Cases:

Baron v. New York City Department of Education

United States v. City of New York

United States v. City of New York (firefighter case)

III. Impact of Decision on Future Litigation (cont.)

C. Privilege Issues

- Planning can be critical
- “Advice of Counsel” defense is dangerous but tempting
- Assume that information provided to the government will be disclosed
- Deliberative process privilege
- Work product doctrine
- Attorney-client privilege

Teresa R. Tracy

Teresa Tracy is chair of Berger Kahn's Labor & Employment Group. She has practiced exclusively in labor and employment law for 28 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles. She has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the "Top 75 Women Litigators" by the Los Angeles Daily Journal.

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