Case at a Glance

The Civil Service Board of the City of New Haven refused to certify the test results of exams administered to determine promotions within the fire department because the exams had an adverse impact on both African Americans and Hispanics. A group of candidates who had taken the tests filed a lawsuit claiming the refusal to certify the results discriminated against them based on their race in violation of both Title VII and the Equal Protection Clause.

Testing Testing: Is Compliance with Title VII a Defense to a Claim of Intentional Discrimination?

by Barbara J. Fick

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Title VII prohibits facially neutral practices (such as tests), which have a statistically significant adverse impact on a protected class (such as race), unless such practices are justified as job-related and no lesser discriminatory alternative exists. Title VII, as well as the Equal Protection Clause of the Constitution, also prohibits intentional discrimination because of race. In this case the Civil Service Board of New Haven refused to certify the results of a promotional examination because a statistically significant number of minorities who had taken the exam would have been excluded from consideration for a promotion. Candidates who had taken the exam claimed that this refusal was based on racial considerations—too many white candidates and too few minority candidates would receive promotions. They sued the City alleging that the refusal to certify was based on race in violation of Title VII and the Equal Protection Clause. The City responded that the refusal was not based on race but rather its good-faith belief that the exam violated Title VII and its desire to voluntarily comply with the statutory mandate. The Supreme Court will decide whether, and under what circumstances, an employer's concern for the adverse impact of an employment practice is a defense to a claim of intentional discrimination.

Issue

Can an employer's concern for the adverse impact of an employment practice be a defense to a claim of intentional discrimination?

Facts

In 2003 the New Haven Fire Department had vacancies for promotion to captain and lieutenant. The city personnel department contracted with an outside company to design oral and written examinations for purposes of determining the most qualified candidates. The Rule of Three in the City Charter requires positions to be filled from among the three candidates with the highest scores on the exam. After the tests were administered, the city's corporation counsel determined that the exam results had produced a significant disparate impact on both Hispanic and African American test takers, excluding all but one Hispanic

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candidate from consideration for promotion, and excluding all African American candidates. The Civil Service Board (CSB) held five hearings to decide whether to certify the results.

At these hearings various parties spoke both in favor of, and against, certifying the results. Several firefighters stated that the tests were fair and the questions were drawn from nationally recognized books. Other firefighters complained, however, that some of the questions were not relevant to the skills necessary for the positions in question. The firefighters' union urged the city to conduct a validation test of the examinations to determine whether they were job-related. A representative of the Black Professional Fire Fighters, however, noted that previous promotion exams used by the city had not disproportionately excluded minorities from promotion opportunities and suggested that something was wrong with this test because minorities did not score well. A representative of the company that had designed the tests described how the tests had been developed and stated that the content of the exams was facially neutral. An industrial psychologist who operates a consulting business which also designs testing materials reviewed the results of the exams; he noted a relatively high adverse impact and discussed several alternative methods for assessing candidate qualifications.

At the final hearing, the corporation counsel argued against certifying the results, stating that promotions made from the tests would not be consistent with federal law given their significant adverse impact and that it would be the city's burden to justify the use of the tests if a lawsuit were filed under Title VII. A representative of the mayor also spoke at this final hearing urging that the results be discarded because they had excluded all African Americans from promotion opportunities for both captain and lieutenant positions and excluded all Latinos from promotion opportunities to lieutenant.

When they voted on the question, the board members split 2-2. The exam results were therefore not certified, and no promotions were made. Seventeen white candidates and one Hispanic candidate (Frank Ricci) who had taken the exams filed a lawsuit in federal district court in the district of Connecticut against the City of New Haven, the mayor, the corporation counsel, the chief administrative officer, and two members of the CSB (hereinafter the city), alleging that the failure to certify the results violated their rights under, among other things, Title VII and the Equal Protection Clause of the Constitution. Both parties filed motions for summary judgment; the court denied plaintiffs' motion and granted defendants' motion, thereby dismissing the case. *Ricci v. DeStefano,* 554 F. Supp.2d 142 (D. Conn. 2006).

The district court judge applied the burden-shifting test articulated by the Supreme Court in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), to the plaintiffs' Title VII claim that the decision to refuse to certify the results was intentional racial discrimination. The judge found that the city's reasons for refusing to certify were related to the racial distribution of the results, and that a jury could infer that the city was motivated by a concern that too many whites and too few minorities would be promoted. Thus, the plaintiffs were found to have met the requirements for establishing a prima facie case under *McDonnell-Douglas,* thereby shifting the burden to the defendants to produce evidence of a legitimate, nondiscriminatory reason for the refusal.

The defendants argued that their desire to comply with Title VII by not using an exam which had an adverse impact on minorities was a legitimate, nondiscriminatory reason for their action. Title VII prohibits not only intentional discrimination, but also employment practices that are facially neutral but have a statistically significant adverse impact on a protected class. All parties agreed that the test results in this case met the threshold under the adverse impact theory as having the requisite forbidden statistical impact.

The plaintiffs argued, however, that the desire to comply with Title VII was pretextual because the defendants failed to complete a validation study to determine whether the tests were justified as job-related. Under the adverse impact theory, employers are allowed to utilize tests, even if they have an adverse impact, if the employer can prove that the tests are sufficiently related to the requirements of the job in question and if there is no lesser discriminatory alternative available for determining candidate ability. The plaintiffs asserted that the city failed to conduct the study because it did not like the test results; if the tests had been proven valid, too few minorities would have been promoted. In effect, the plaintiffs argued, the city's refusal to validate the results constituted reverse discrimination against the nonminority testtakers.

While the district court agreed that a validation study can be used to defend an otherwise prohibited test, it noted that the statute does not require an employer to conduct such a study. Validation is required *only if* the employer intends to use the test. In this case the city had

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decided *against* using the test. The court noted that "proof of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies." While race was taken into account in the decision not to certify the results, the remedy arrived at by the city was race-neutral—the tests were discarded and no one was promoted. All candidates were affected by the city's decision equally. No one was deprived of a promotion; indeed, under the Rule of Three, even the top-scoring candidates were not guaranteed a promotion. Therefore, the court found that the city's motivation not to utilize a test with an adverse impact did not, as a matter of law, constitute intentional discrimination, and granted defendants' summary judgment motion on the Title VII claim.

On the equal protection claim, the city initially argued that the plaintiffs lacked standing to pursue this claim because they had not suffered any injury. The court found no merit to this argument, noting that the claim stated by the plaintiffs is not based on the failure to promote but rather on the failure to be treated equally on the basis of race. However, on the substance of the argument that plaintiffs had not been treated equally, the court found that the plaintiffs' claim lacked merit.

According to the court, the city's actions in this case did not amount to classifying any individual based on race: All candidates took the same test; the refusal to certify the results affected all candidates equally; and nobody received a promotion. Moreover, plaintiffs failed to prove that the city had acted with an intentionally discriminatory motive. The reasons for refusing to certify were that the adverse impact of the test would have subjected the city to a Title VII lawsuit, and that promoting from the results of the test would undermine the city's goal of diversity and subject the city to public criticism. None of these reasons indicated that the city acted "because of" discriminatory animus toward nonminority candidates. The court therefore granted defendants' summary judgment motion on the equal protection claim.

Plaintiffs appealed the district court's dismissal of their lawsuit to the Second Circuit Court of Appeals. The appellate court summarily affirmed the district court decision in a per curiam ruling that essentially adopted the reasoning stated in the district court opinion. *Ricci v. DeStefano,* 530 F.3d 87 (2d Cir. 2008), *rehearing en banc den.* 530 F.3d 88 (2d Cir. 2008). The Supreme Court then granted Ricci's petition for a writ of certiorari and will decide whether, and under what circumstances, an employer's concern for the adverse impact of an employment practice is a defense to a claim of intentional discrimination. *Ricci v. DeStefano,* 129 S.Ct. 894 (2009).

Case Analysis

The Title VII Claim

Ricci asserts that the city's interest in avoiding Title VII liability under the adverse impact theory is not a defense to a claim of intentional discrimination. Mere statistical disparities do not, by themselves, violate Title VII; rather such a showing only constitutes a prima facie case of a violation. There is only a violation if the employer is unable to validate the test or if there is a lesser discriminatory alternative. In effect, Ricci argues, the district court has ruled that the city's assertion of a good-faith desire to avoid an adverse impact lawsuit is a complete defense to an intentional discrimination claim. More should be needed, however, before an employer is justified in engaging in intentional discrimination. At the very least, Ricci says, there must be a "strong basis in evidence" that use of the tests would constitute a violation of the adverse impact theory—evidence that goes well beyond a mere prima facie case.

According to Ricci, the evidence in this case falls far short of a strong basis for believing a violation occurred. The outside testing contractor indicated at the CSB hearing that it designed the test in accordance with EEOC guidelines for job-relatedness. The city could have requested a report from the company proving that the tests were valid, but it failed to do so. Neither was the city presented with any specific evidence that lesser discriminatory alternatives existed.

Ricci notes that the city's stated defense—its desire to voluntarily comply with Title VII—was not supported by any evidence. Not only was the "fear" of an adverse impact lawsuit unfounded, there was no evidence of a history of racial discrimination by the city which it needed to remedy, nor any claim of a conspicuous racial imbalance in the job categories at issue sufficient to justify the race-conscious action of discarding the test results ostensibly to comply with Title VII.

Lastly, Ricci points to § 703(l) of Title VII, which prohibits employers from adjusting the scores of, using different cutoff scores for, or otherwise altering the results of, employment-related tests on the basis of race. Congress added this section to prevent employers from manipulating test results on the basis of race. Certainly, a wholesale discarding of a test because of the racial distribution of the results

constitutes just such a manipulation. Thus, he concludes, the city's action is specifically prohibited by this section.

The Bridgeport Firefighters for Merit Employment, one of the amici in support of Ricci, makes an additional argument. They note that while Title VII is a federal law, it was not intended to preempt state law and that the federal courts should respect state laws and interests when adjudicating Title VII cases. In particular, the State of Connecticut has an interest in ensuring that employment in civil service positions is based on merit selection determined by competitive examination where possible. On more than one occasion the Connecticut Supreme Court has cautioned municipalities not to circumvent civil service requirements by manipulating the examination process. Allowing the city in this case to discard the results of a competitive exam based solely on statistical disparities undermines the foundations of the civil service system.

The city, on the other hand, asserts that its obligation to comply with Title VII is a justification for declining to certify the test results. It cites two Title VII cases concerning an employer's use of voluntarily adopted affirmative action plans (*Johnson v. Transportation Agency,* 480 U.S. 616 (1987) and *USW v. Weber,* 443 U.S. 193 (1979)), wherein the Supreme Court rejected the argument that there must be an actual violation of Title VII before an employer can take voluntary remedial action. Indeed, the Supreme Court has noted that Congress's intent in enacting Title VII was to encourage voluntary compliance as the preferred means of achieving the statute's objectives. Thus, the city was justified in declining to certify the test results upon a showing of the statistical disparity the tests produced.

Assuming, for the sake of argument, that the Court were to adopt the "strong basis" standard advocated by Ricci, the city contends that it satisfied that standard in any case. In several cases, the Supreme Court has suggested that a "strong basis" standard is met when the "threshold conditions" for liability are present. In this case, a "strong basis" is met because the evidence supports a prima facie case of adverse impact based on the statistical disparities, and there is also evidence raising concerns about flaws in the tests as well as suggestions that alternatives were available. During the hearings, the CSB heard testimony questioning whether the exams accurately tested relevant knowledge, as well as evidence of alternative ways to use the same type of tests and the possibility of using different testing mechanisms.

In response to Ricci's argument based on § 703(l), the city notes that the statutory language prohibiting altering test scores only applies to test scores that will be used to make an employment decision. It is thus inapplicable in this case where the scores were not used at all.

The States of Maryland et al., one of the amici supporting the city, argues that Ricci cannot even make out a prima facie case of a violation of Title VII because none of the plaintiffs suffered an adverse employment action. Before a claim can be cognizable under Title VII, an individual must have suffered an adverse employment action, which has been defined as a significant change in employment status. In this case no one has been denied a promotion, no individual has lost a job; the CSB merely decided that no one would be promoted at this time.

Another amicus, the Society for Human Resources Management, points out that if the city had been sued by African American and Hispanic candidates for making promotions based on the examinations administered in this case, the city could have settled the lawsuit by agreeing to discontinue use of the test. Given the statute's focus on voluntary compliance, there is no reason to require that a lawsuit be filed in order to reach the same result.

Voluntary compliance is also the focus of another amicus, Opportunity Agenda. They assert that a statistically disparate impact acts as a red flag to alert the employer that discrimination may be present. The goal of voluntary compliance is achieved when employers are given the latitude to investigate and respond to indicators of discrimination, particularly where overt discrimination, prevalent in the years immediately after the passage of Title VII, has largely been replaced with more subtle, covert forms of discrimination and institutional or systemic bias.

Lastly, the United States filed an amicus brief, not in support of either party, outlining its position on the issues raised in the case. Initially it emphasizes that refusing to use a test that has an adverse impact does not equate with intentional discrimination. Title VII prohibits both adverse impact and disparate treatment discrimination equally and there is a statutory preference for voluntary compliance. A decision made in good faith to discard a test that has an adverse impact is based on the judgment that the test itself may be racially discriminatory.

According to the United States, the "Court should accord substantial breathing room for employers to decide whether or not to certify test results when faced with results that establish a prima face case" of

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adverse impact. Compliance with Title VII as the employer's defense should only be found to be a pretext for a discriminatory motive if the plaintiff can prove that the employer's compliance motive is unreasonable. The circumstances in which compliance motivation would be deemed unreasonable would vary with the facts of the case. Failing to conduct a validation study may be reasonable in some circumstances; temporarily suspending the use of a test in order to investigate alternatives may also be reasonable. In any event, employers should be permitted to err on the side of compliance.

The Equal Protection Claim

Ricci begins his equal protection argument by stating the constitutional standard under the Equal Protection Clause: any race-based government action is subjected to strict scrutiny. Strict scrutiny requires the government to prove that its action is narrowly tailored to achieve a compelling government interest. In this case Ricci argues that the refusal to promote the candidates who scored well on the test was based on the race of the successful candidates. The decision to cancel the promotions was made because too many white candidates had qualified.

Having shown that the city's action was based on race, Ricci asserts that the city has failed to meet its burden to prove that the cancellation was narrowly tailored to achieve a compelling government interest. The desire to avoid a lawsuit under Title VII cannot be a compelling interest. The Equal Protection Clause only prohibits intentional racial discrimination—not adverse impact. Thus, the need to avoid a statutory disparate-impact lawsuit cannot be a compelling government interest sufficient to justify a constitutional violation.

Even if the need to avoid Title VII liability could qualify as a compelling government interest, Ricci argues that the government actor must have a strong evidentiary basis to conclude that the use of the test in question actually violates Title VII. In this case the city lacked any such strong evidentiary basis. There was no evidence other than statistical disparities to believe the test was discriminatory. It had been designed by a professional testing firm and no solid evidence of alternative methods was presented.

According to Ricci, other possible reasons that may have influenced the city to cancel the promotions do not satisfy the requirement of compelling interests. The Supreme Court in both *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), rejected the argument that the need to develop minority role models was a sufficiently compelling government interest. Achieving racial diversity within the fire department also fails as a compelling government interest; the Court has found diversity to be a defense only in the context of higher education. *Grutter v. Bollinger,* 539 U.S. 306 (2003). Nor is fear of public criticism or an unwillingness to defend a Title VII lawsuit for political reasons a compelling government interest.

Assuming, for the sake of argument, that the Court finds that the city has proven a compelling government interest, Ricci argues that cancelling the promotions was not a narrowly tailored method of achieving that interest. The city could have taken steps before administering the test to help minority candidates maximize their results by providing tutoring programs and study aids and by encouraging more minority candidates to take the exam.

The city takes exception to Ricci's contention that its refusal to certify the results constituted a racial classification. The refusal to certify applied to all candidates, both white and black. The fact that the group with the higher scores was disproportionately white does not render noncertification a racial classification; rather the race-neutral conduct of noncertification for all candidates merely had a disproportionate effect on white candidates. As the Court held in *Washington v. Davis,* 426 U.S. 229, disproportionate effects only constitute a racial classification if caused by discriminatory intent. Moreover, even the evident disproportionate effect in this case assumes that the results of the test were valid in the first place; if the test was not valid then the high scores were not valid either.

The city notes that characterizing its intent to comply with Title VII as a race-based reason requiring strict scrutiny is contrary to Supreme Court cases indicating that the prohibited discriminatory intent does not extend to *any* consideration of race. In *Grutter* the Court indicated that a university could devise methods to increase diversity within the student body. Justice Kennedy stated in *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007), that race-conscious mechanisms do not lead to different treatment based on race and thus would be unlikely to be subjected to strict scrutiny. Moreover, consciousness of a race-based impact is not the same as creating a race-based classification. Thus, the city's race-neutral action of noncertification should not be subjected to strict scrutiny just because it was triggered by the realization that the test had an adverse impact based on race and thus could violate Title VII. Efforts to comply with a statutory mandate enacted by Congress should not be deemed discriminatory.

The city contends that the other motivations advanced by Ricci were not supported by the record and thus do not raise a genuine issue of material fact sufficient to overcome summary judgment.

Assuming, for the sake of argument, that the Court applies the strict scrutiny test, the city asserts that complying with Title VII's prohibitions against adverse impact constitutes a compelling government interest. The Court has repeatedly affirmed the legitimacy of the adverse impact cause of action, noting the necessity for proscribing "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The fact that the Equal Protection Clause does not itself prohibit adverse impact does not mean that avoiding unintentional discrimination that has a discriminatory impact is not a compelling interest. Indeed, in *Davis* the Court observed that even though adverse impact was not prohibited by the Equal Protection Clause, Congress could prohibit such unintentional discrimination, which it did in Title VII. On many occasions the Court has assumed, without deciding, that compliance with a federal statute constitutes a compelling governmental interest.

The city claims that it satisfies the compelling interest requirement of compliance with a federal statute by showing a strong basis in evidence for believing that the tests it administered may violate Title VII. In this case the evidence of statistical disparity was extreme, and there was testimony concerning flaws in the design of the tests. Finally, the CSB heard evidence of a number of less discriminatory alternatives. This is sufficient to satisfy the "strong basis" showing required for proving a compelling interest.

Finally, the city contends that the action of declining to certify the results was narrowly tailored to achieve the government interest in avoiding a violation of Title VII. The suggestions offered by Ricci are aimed at actions to be taken before the tests would be given; once faced with the results, however, those suggestions were moot.

The United States, in its amicus brief, also addresses the Equal Protection claim. It asserts that discriminatory intent requires more than mere proof that a government was aware that its action would have certain consequences for members of a particular racial group. Rather, intent requires proof that the government acted "because of" those consequences. The refusal to certify the test because of concerns about adverse impact does not mean that the city acted with a discriminatory intent.

Significance

New Haven is not the first, nor will it be the last, employer to struggle with the problem of devising valid and nondiscriminatory methods of selecting suitable candidates for employment and promotion. Indeed the interest of two of the amici in this case is based on the fact that they were subjected to similar treatment by their municipal employers. The Bridgeport Firefighters for Merit Employment Inc. note in their amicus brief that a group of Bridgeport firefighters sued the Civil Service Commission and personnel director after he re-weighted and re-scored an examination that he had determined would otherwise have had an adverse impact on minorities. The director in that case relied on the lower court's decision in the present case to justify his decision. Amicus Joe Oakley et al. currently have their own petition for certiorari pending before the Court seeking a review of a Sixth Circuit decision involving the City of Memphis's abandonment of a promotion test that had an adverse impact on minorities.

These issues are not limited to public sector employers; private employers also use tests and other facially neutral mechanisms in making employment decisions that may have an adverse impact on some candidates. The Court's decision in this case will provide valuable guidance to all employers concerning how to comply with the statutory mandate to avoid adverse impact without running afoul of a lawsuit from disappointed candidates claiming intentional discrimination.

That part of this case that focuses on the Equal Protection claim, while applicable only to governmental (not private sector) actors, also has the potential for far-reaching effect. While this case concerns the government acting in its capacity as employer, any interpretation of the Equal Protection clause will have wide-ranging application to all government conduct. If the Court determines that race-conscious (as opposed to race-based) action is subject to strict scrutiny review, this will impose restraints on governmental decisionmaking regarding a host of issues, from siting public schools, to allocating educational resources, to redistricting, to minority outreach recruiting efforts, to name a few. Moreover, if the Court agrees with Ricci that a refusal to use a mechanism that causes an adverse impact is a race-based decision subject to strict scrutiny under the Equal Protection Clause, and that compliance with Title VII's mandate to refrain from actions causing adverse impact does not constitute a compelling government interest, this could have the effect of invalidating the adverse impact theory as it applies to government employers.

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In the final analysis, the impact of this decision will depend not only on how the Court decides the actual issues involved in the case but also on how broadly or narrowly the justices write the underlying opinion.

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