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CIVIL RIGHTS

NEWSLETTER

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Ricci v. DeStefano: U.S. Supreme Court Addresses Employer's Assessment of Disparate Impact Liability

John B. Dudrey
Barran Liebman LLP

The United States Supreme Court's recent decision in *Ricci v. DeStefano*, No. 07-1428, — U.S. —, 129 S. Ct. 2658 (2009), has a little something for everyone. A new rule for evaluating disparate impact liability under Title VII? Check. Another window into how the Roberts Court will balance diversity in workplaces and schools with the requirement of individual treatment? Check. Or how about high-stakes judicial politics, as commentators debated the decision's impact on the Supreme Court nomination of Judge Sonia Sotomayor, who sat on the Second Circuit panel that decided *Ricci* and was sworn in last week as a justice on the Supreme Court? Check, check, and check.

Ricci has a lot to offer, to be sure. But what is the decision *really* about? At bottom, it purports to clarify the standard for employers to use when evaluating whether they can ignore the results of a standardized exam (or other neutral employment practice) because of potential Title VII disparate impact liability. Post-*Ricci*, employers may do so only when they have a "strong basis in evidence" that disparate impact liability will follow if they keep a particular policy in place. This article examines the Court's analysis of the new standard, with heavy emphasis on the facts in *Ricci*, to provide a sense of how future courts might apply the *Ricci* decision.

Overview of Title VII Disparate Impact Liability

Understanding the import of the *Ricci* decision requires a passing familiarity with Title VII's disparate impact protections. In addition to prohibiting intentional employment discrimination on the basis of a protected classification (race, color, sex, religion, or national origin), Title VII of the Civil Rights Act of 1964 prohibits the adoption of neutral employment policies that have a "disparate impact" on members of a protected classification. A prima facie disparate impact case requires proof that (1) a particular employment practice (2) caused a legally significant adverse impact on the protected group in question. To establish the second element, many courts apply the EEOC's so-called 80% rule, which holds that an adverse impact is established when the protected group's selection rate under the challenged policy is less than 80% of the selection rate for the majority group.

If the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer either to attack the validity of the plaintiff's statistical analysis or to assert one of four established defenses:

1. The employment policy is job-related for the position in question and justified by business necessity (the "business necessity defense").
2. The employment policy is part of a bona fide seniority system.
3. The employment policy is part of a bona fide merit system.
4. The employer relied on the results of a professionally validated examination, which, under Supreme Court case law, must meet the requirements of the business necessity defense.

Because the seniority and merit system defenses are relatively rare in disparate impact litigation, an employer generally must rely on the business necessity defense (under the first or fourth defenses listed above) to defeat a prima facie case for disparate impact liability. Even if the employer successfully asserts the business necessity defense, a plaintiff may still prevail if she can show that a less discriminatory alternative would satisfy the employer's business needs.

Factual Background

The *Ricci* case started with a deceptively innocuous question: how would the New Haven, Connecticut, Fire Department select rank-and-file firefighters for promotion to captain or lieutenant?

Like many government entities, the city of New Haven is required by charter to award vacant civil service

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Supreme Court Update

Jennifer Nelson
Fisher & Phillips LLP

Kyle Busse
Busse & Hunt

Decided

***Arizona v. Gant*, No. 07-542 (April 21, 2009)**

In a 5–4 decision, the U.S. Supreme Court upheld the Arizona Supreme Court's ruling that the warrantless search of a defendant's car subsequent to his arrest violated his Fourth Amendment rights. Police apprehended defendant Rodney Gant in his driveway on an outstanding warrant for driving with a suspended license. After handcuffing him, police searched his vehicle and found drugs and a handgun. The trial court denied the defendant's motion to suppress that evidence on Fourth Amendment grounds, and the Arizona Supreme Court reversed. The U.S. Supreme Court agreed, holding that police may search the vehicle of its recent occupant after his arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest.

***District Attorney's Office for the Third Judicial District v. Osborne*, No. 08-6 (June 18, 2009)**

The Supreme Court reversed the Ninth Circuit in this 5–4 decision, holding that the Fourteenth Amendment's due process clause does not afford the right to obtain postconviction access to DNA evidence. Convicted of kidnapping, assault, and sexual assault in Alaska state court, defendant William Osborne filed suit to obtain DNA evidence found at the scene. The district court granted the defendant summary judgment. The Ninth Circuit upheld the district court's decision, finding that a defendant need only show a "reasonable probability" that the DNA testing could prove exculpatory in order to gain access to the evidence. The Supreme Court reversed, finding that the defendant had no constitutional right to gain postconviction access to DNA evidence and deferring to the Alaska state legislature to set up procedures by which that access could be gained.

***Forest Grove School District v. T.A.*, No. 08-305 (June 22, 2009)**

In a 6–3 decision, the Supreme Court affirmed the Ninth Circuit's holding that the Individuals with Disabilities Education Act (IDEA) authorizes reimbursement for the cost of private special education services when a school district fails to provide a free, appropriate education—regardless of whether the child previously received special education or related services through the public school. T.A.'s parents withdrew him from the Forest Grove School District and enrolled him in a private residential school after the district determined that T.A. did not have a learning disability and was therefore ineligible for special education. An administrative hearing officer ruled that T.A. was disabled and eligible for special education under the IDEA and § 504 of the Rehabilitation Act of 1973, and that the school district was therefore responsible for the costs of sending T.A. to private school. The U.S. District Court for the District of Oregon reversed the hearing officer's decision, the Ninth Circuit reinstated it, and the Supreme Court affirmed.

***Gross v. FBL Financial Services*, No. 08-441 (June 18, 2009)**

In this 5–4 decision, the Supreme Court held that in an Age Discrimination in Employment Act (ADEA) claim, the burden of persuasion does not shift to the defendant employer to prove that it would have taken the challenged action regardless of the plaintiff's age, even when evidence is introduced showing that age was one motivating factor in its decision. The district court had issued a mixed-motive jury instruction that

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Supreme Court Avoids Constitutional Issue in Voting Rights Case

Mary Ellen Page Farr

The decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*, No. 08-322, — U.S. —, 129 S. Ct. 2504 (2009), issued in June, was eagerly awaited, and some people expected the Supreme Court to declare unconstitutional § 5 of the Voting Rights Act of 1965. Chief Justice John Roberts's majority opinion, however, joined by seven justices, sidestepped the constitutional issue, remanding the case on non-constitutional grounds. Nonetheless, the Court's opinion and Justice Clarence Thomas's dissent demonstrate that the Court doubts that Congress made sufficient findings of continued need for congressional oversight of state electoral procedures when it reauthorized the Voting Rights Act in 2006, and that the justices themselves question whether that need, in fact, continues.

Voting Rights Act, § 5

Congress passed the Voting Rights Act under the Fifteenth Amendment to the U.S. Constitution, which protects the right to vote of every citizen, regardless of "race, color, or previous condition of servitude." Section 5 suspends changes in state procedures until those changes are approved by the U.S. District Court for the District of Columbia or the U.S. attorney general, and allows only those changes that have neither the purpose nor the effect of abridging the right to vote on account of race or color. These "preclearance" requirements apply only to states with a history of disenfranchising black voters. Those states may also bring a declaratory "bailout" suit to terminate preclearance requirements under certain conditions. Although the Court noted that the act's terms were "expected to be in effect for only five years," Congress has continually reauthorized the act, most recently in 2006 for 25 more years.

Northwest Austin Asks for Bailout

Northwest Austin Municipal Utility District Number 1 (Northwest Austin) was organized to deliver city services to about 3,500 people. It did not register voters but was responsible for the election of its board of directors. Although there was no evidence that Northwest Austin had ever discriminated on the basis of race, it is subject to § 5 of the Voting Rights Act because Texas is subject to § 5.

Northwest Austin brought a bailout action to terminate its obligations under the act, or, alternatively, to declare the reauthorized act unconstitutional. The district court never reached the merits of Northwest Austin's suit, concluding that even though Northwest Austin was subject to the act's terms, it was not eligible for bailout because it was not a "State or political subdivision." The district court also concluded that the reauthorized act was constitutional. The Supreme Court reversed the district court's decision on the first issue and left the second, the constitutional issue, unresolved.

Supreme Court Avoids Constitutional Issue

The Supreme Court pointed out that it had upheld the Voting Rights Act several times over the years, noted that the act was certainly needed when it was first passed, and commented on the improvements that have occurred in voter turnout and registration rates and in the election of minority candidates. The Court, however, cautioned that "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements." Citing federalism concerns, the Court stated that because the act departs from the fundamental principle of "equal sovereignty" and differentiates between various states, Congress must show that the "disparate geographic coverage is sufficiently related to the problem that it targets." The Court noted that the statute's coverage formula is based on data more than 35 years old and that the current "racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide," raising serious constitutional questions.

The Court came within a hair's breadth of declaring § 5 unconstitutional. Because Northwest Austin brought its claims in the alternative, however, the Court decided the case on the non-constitutional ground, citing the principle of constitutional avoidance. The Court remanded the case to the district court to determine the merits of Northwest Austin's bailout request, presumably leaving it to Congress to take action before future cases arise. The Court held merely that "all political subdivisions . . . are eligible to file a bailout suit."

Justice Thomas argued in dissent that Northwest Austin could not receive complete relief with the remand to the district court because the court could deny the request on subjective grounds. Therefore, he argued that the Court should have declared the Voting Rights Act unconstitutional. Justice Thomas asserted that Congress must show "the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." Otherwise, the act upsets the tension between the Tenth Amendment, which allows states to control their own elections, and the Fifteenth Amendment.

Although the Court may have sidestepped an important issue in *Northwest Austin*, the opinion serves as a warning to Congress that statutes that upset the balance between the states and the federal government in areas as fundamental as voting must be examined in light of specific and current evidence of the wrong that Congress seeks to correct. ✦

Mary Ellen Page Farr is an attorney in private practice in Portland, representing individuals and small businesses in litigation.

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Recent Decisions

Richard F. Liebman
Amy L. Angel
Barran Liebman LLP

Ninth Circuit Court of Appeals

***NLRB v. C&C Roofing Supply, Inc.*, 569 F.3d 1096 (9th Cir. 2009)**

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the U.S. Supreme Court held that the NLRB may not order back pay for an unauthorized alien even if a discharge was in violation of the NLRA. In *C&C Roofing Supply*, the company originally settled the case with the NLRB for "liquidated damages." The Ninth Circuit enforced the settlement agreement, stating that liquidated damages would not violate immigration law "because they are not predicated on an employee's availability for work." (The EEOC also allows for the recovery of general damages based on this same distinction.)

***Smith v. T-Mobile*, No. 08-55535, 2009 WL 1651531 (9th Cir. June 15, 2009)**

The named employee brought a putative collective action under the Fair Labor Standards Act but then settled the individual claim before any other employees could "opt-into" the action. The Ninth Circuit held that the action was moot and dismissed for lack of subject matter jurisdiction because the individual plaintiff did not retain a personal stake in the appeal. The right to continue a class action depended entirely on whether other plaintiffs had already opted-in as of the time the named plaintiff settled his claims.

***Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (9th Cir. 2009)**

The plaintiff filed a complaint with the Oregon Bureau of Labor and Industries (BOLI) alleging that gay and lesbian employees in her department received preferential treatment from her supervisor. While investigating another matter, the plaintiff's supervisor and county human resources staff uncovered evidence that the plaintiff had made derogatory comments about homosexuals in her county email and had misused county property. The department director terminated the plaintiff's employment. The plaintiff filed a federal civil rights suit against the county and her former supervisor, alleging that the defendants violated the First Amendment by firing her for filing a BOLI complaint.

To state a First Amendment claim, a public employee must show that her protected speech caused the employer to take adverse employment action against her. Applying this standard, the Ninth Circuit dismissed the claim against the former supervisor. The court reasoned that even if the former supervisor had a retaliatory motive when she began investigating the plaintiff's conduct, the decision to terminate the plaintiff rested with the department director. Thus, the former supervisor did not cause the plaintiff a First Amendment injury.

***EEOC v. Boeing Co.*, No. 07-16903, 2009 WL 938862 (9th Cir. April 8, 2009)**

The Ninth Circuit held that two female engineers whose jobs were eliminated in a reduction in force (RIF) stated a claim for sex discrimination under Title VII. To determine who would be affected by the RIF, Boeing assigned employees a "RIF score," designed to quantify the employee's value to the company. Boeing argued that each plaintiff was eliminated for a legitimate, nondiscriminatory reason, that is, each received a lower RIF score than comparable male engineers. In response, the EEOC successfully argued that there was evidence to suggest that the plaintiffs' lower RIF scores were a pretext for sex discrimination: both plaintiffs had made sexual harassment claims within a year of the RIF, both plaintiffs received much higher RIF scores during previous layoffs, and the supervisor for one of the plaintiffs had openly made derogatory comments about women (although not about the plaintiff specifically).

***Green v. Comm'r of Internal Revenue*, No. 07-73111, 312 Fed. Appx. 29, 2009 WL 453264 (9th Cir. Feb. 24, 2009)**

The Ninth Circuit held that Green, a taxpayer, was required to pay income tax on statutory attorneys' fees awarded under the California Fair Employment and Housing Act (FEHA). The court found that Green either had a de facto contingency fee arrangement with her attorney to pay him 40% of her recovery or, in the absence of an agreement, was deemed under California law "to have promised to pay the attorney the reasonable value of the services performed in [her] behalf and with [her] consent and knowledge." Therefore, the attorneys' fees that Green's employer (the defendant in the FEHA case) paid to Green's attorney (whether court-ordered or not) reduced Green's own payment obligation and was constructive income received by Green. The fact that the FEHA treats the fees as belonging to the attorney was irrelevant.

Oregon Court of Appeals

***Heiple v. Henderson*, 04C15392, A131454, — Or. App. —, 2009 WL 2032032 (July 15, 2009)**

When an employee was terminated for refusing to undergo an independent medical examination (IME) following "bizarre" behavior at work, she sued under the Oregon disability discrimination statute, claiming discrimination based on a disability and a perceived disability. The court ruled that an employer could order an IME to determine the cause of an employee's aberrant behavior if the IME is both "job related" and "consistent with business necessity." The court also held that the Oregon statute is essentially the same as the ADA with regard to the balance between employer and employee interests in the ordering of an IME.

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Civil Rights Laws Enacted by the 2009 Oregon Legislative Assembly

Steven C. Burke
Steven C. Burke PC

The 2009 Oregon legislative session was dominated by bills pertaining to budget and revenue due to the economic downturn, which, unfortunately, led to the demise of a great deal of legislation in committee. Other issues that received particular attention from the legislature involved Oregonians serving in the military and their families. The following is a highlight of what passed in the realm of civil rights legislation. Each bill takes effect on January 1, 2010, unless otherwise noted.

HB 3162. Provides that discrimination against employees who report violations of state or federal laws, rules, or regulations is an unlawful employment practice. The law amends ORS 659A.885. The bill will affect all claims commenced on or after its effective date, January 1, 2010.

HB 2744. Requires employers of 25 or more individuals in Oregon to provide leave to spouses of military service members prior to deployment or during leave from active duty during periods of military conflict. This law took effect on June 25, 2009.

HB 3256. Creates protection for uniformed service members from unlawful employment practices on the basis of service commitments.

SB 928. Prohibits employers from taking certain employment actions against individuals who are victims of domestic violence, sexual assault, or stalking. The bill requires employers to make "reasonable safety accommodations," which may include transfers, reassignments, modified work schedules, unpaid leaves, changed telephone numbers, installation of locks, and other adjustments to ensure personal safety. The refusal to make reasonable accommodations follows the same test for undue hardship provided in ORS 659A.121.

SB 519. Prohibits employers from taking adverse employment actions against employees who decline to attend meetings or participate in communication regarding the employer's opinion about religious or political matters.

SB 874. This bill conforms Oregon disability law to the federal ADA Amendments Act of 2008, and strengthens protections for individuals with disabilities.

SB 875. Prohibits charging fees or deposits for assistance animals residing in rental properties. This law took effect on June 23, 2009.

HB 2600. Requires certain lodging facilities with 175 or more units to provide a lift system for people with disabilities to access bed, toilet, and bathing facilities. The law pertains exclusively to transient housing, such as hotel and motels where periods of occupancy are less than 30 days. The law took effect on July 28, 2009.

SB 56. This bill amends ORS 659A.820 and requires the complainant to sign the complaint alleging an unlawful practice of discrimination. While it is an odd change, practitioners in this field should note the requirement. The prior language provided that the complaint "may" be signed by the complainant; it now says the complaint "must" be signed by the complainant.

SB 786. Requires an employer to provide reasonable accommodation for the religious observance or practice of an employee, unless providing the accommodation will impose an undue hardship on the employer. ✦

Steven C. Burke, a sole practitioner, operates a business litigation law practice, with specialties in employment, construction, and bankruptcy law. He has represented plaintiffs and defendants in civil rights litigation, and regularly advises small businesses.

RECENT DECISIONS

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***Reddy v. Cascade General*, 227 Or. App. 559, 206 P.3d 1070 (2009)**

Common-law claims for wrongful discharge may be dismissed if there is an "adequate" statutory remedy for the same claim. Adequacy is determined by the provision of both legal and equitable remedies needed to make the employee whole, including general damages for personal injuries. The court held that the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948(a), contains a retaliation provision, but its remedy is inadequate to displace common-law wrongful discharge claims because the statutory remedy does not include general damages for emotional distress.

***Hall v. Douglas County*, 226 Or. App. 276, 203 P.3d 360 (2009)**

The plaintiff, an employee in the county's juvenile probation department, alleged that he was disciplined and ultimately terminated after he complained about working in a hostile work environment. The plaintiff sued under ORS 659A.203, which protects public employees from retaliation based on reporting "mismanagement" of a public body. The Oregon Court of Appeals held that the former employee presented sufficient evidence to get to a jury on his 659A.203 claim. Although the statute does not reach routine workplace complaints, the court determined that a reasonable jury might find that the conduct plaintiff complained of was so severe that it undermined the county's ability to provide adequate services and thus constituted "mismanagement." ✦

Richard Liebman and Amy Angel, of Barran Liebman LLP, represent employers in labor and employment law.

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positions to the most qualified individuals, as determined through job-related standardized exams. Under the charter's so-called rule of three, the city must hire one of the top three scorers on the relevant civil service exam.

The city also had a collective bargaining agreement (CBA) with its firefighters that required applicants for vacant lieutenant and captain positions to be screened using both written and oral examinations, with the written exam results counting for 60% of the total score and the oral exam the remaining 40%. The firefighters' CBA also stipulated that applicants for the lieutenant positions have 30 months' experience with the department, a high school diploma, and certain vocational certifications; potential captains needed one year's experience as a lieutenant, plus the high school diploma and vocational certification requirements.

After soliciting bids from several employment-testing consultants, the city paid Industrial/Organizational Solutions, Inc. (IOS) $100,000 to develop and administer the exams. According to the Court's review of the facts, IOS specifically tailored the test to the city's needs. The Court also found that at every step of its analysis, IOS oversampled minority firefighters to verify that the exam did not favor white candidates. After conducting the job analysis, IOS used the fire department's training manuals and procedural guidelines to develop a 100-question multiple choice exam for each position, and submitted them to the city's fire chief and assistant fire chief for approval. The fire department then opened a three-month review period for applicants to study the source material in preparation for the written exams.

IOS also developed the materials for the oral exams, which required applicants to respond to a series of hypothetical situations regarding command skills, firefighting tactics, and general management ability. In addition, IOS assembled the graders, with significant input from the city. The graders, two-thirds of whom were minorities, consisted of 30 high-level leaders (fire chiefs, assistant chiefs, and battalion chiefs) from fire departments around the country.

Finally, in November and December 2003, the applicants sat for the exams. The results, broken down by race, were as follows:

Exam Pass Rates

	Black	White	Hispanic
Lieut.	6/19 (32%)	25/43 (58%)	3/15 (20%)
Captain	3/8 (38%)	16/25 (64%)	3/8 (38%)

No. of people who passed/no. of applicants (Percentage that passed)

The top ten scores on the lieutenant exam belonged to white applicants, making all ten eligible for immediate promotion to one of the eight vacant lieutenant positions under the city's rule-of-three policy. The department had seven captain positions open, making the top nine applicants (seven white, two Hispanic) eligible for promotion.

As part of its contract, IOS had agreed to prepare a technical report describing the exams' methodologies and analyzing the results. After reviewing the test results, however, the city's attorneys and its five-member Civil Service Board (CSB) opted not to ask IOS to prepare the report; they were concerned that implementing the results would expose the city to disparate impact claims by black and Hispanic applicants. The CSB then held a series of meetings to review the exams. The CSB heard from several sources, including the following:

- The city's human resources director and chief administrative officer, both of whom opined that the exam results showed "a significant disparate impact"
- Several of the applicants, some of whom (without yet knowing whether they had passed) favored certifying the exams and some of whom opposed certification
- An industrial/organizational psychologist from a rival testing agency, who criticized the test as having a "relatively high adverse impact" on black applicants but described the test as "reasonably good" and advised that it be certified
- A fire program specialist for the U.S. Department of Homeland Security, who stated unequivocally that he had reviewed the exam questions at length and that they covered material the applicants should know as fire department lieutenants and captains
- The city's attorney, who recognized that the statistical disparity between white and black applicants was "the beginning, not the end" of a disparate impact case, but advised that adopting the exam results would likely violate Title VII's disparate impact provisions

The CSB vote on whether to certify the exam results deadlocked at 2 to 2, with one member recusing himself. Under the city's rules, the tie vote meant that the exam results would not be certified and none of the applicants would be promoted.

Litigation History

The applicants who passed the exams but did not receive promotions sued the city under Title VII for intentional discrimination. Under the plaintiffs' theory of the case, the city committed intentional discrimination because it set aside the exam results based on the race of the successful candidates. In other words, not enough black and Hispanic applicants passed the exams, so the city elected to abandon the results.

The city responded that because it had a good faith belief that adopting the exam results would have violated Title VII's disparate impact rules, it could not be liable for violating Title VII's disparate treatment rules. For that matter, the city argued, it could

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not have intentionally discriminated against the white and Hispanic applicants on the basis of race because its motivation to set aside the exam results was to avoid disparate impact liability, not to favor or disfavor a particular protected group.

The district court agreed with the city and granted summary judgment, and a Second Circuit panel affirmed in a one-paragraph per curiam opinion. The active judges of the Second Circuit voted 7–6 to deny rehearing en banc, and the Supreme Court granted certiorari on January 9, 2009.

Supreme Court Decision

The Supreme Court, by a 5–4 vote, reversed the lower court's decision and remanded the case with instructions to grant summary judgment for the plaintiffs.

In an opinion by Justice Kennedy, the Court began its legal analysis by recognizing the conflict between Title VII's disparate impact and disparate treatment theories. The Court recognized that Title VII "impose[s] liability on employers for unintentional discrimination in order to rid the workplace of practices that are fair in form, but discriminatory in operation." Nonetheless, the Court rejected the city's contention that concern about disparate impact liability insulated its decision not to certify the exam results. According to the Court, "[w]hatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race." 129 S. Ct. at 2674.

But how should employers balance the two theories when it suspects that adopting a particular employment practice might lead to disparate impact liability? To put it more directly, when can an employer expressly consider the protected classification of the employees who are negatively affected by the policy as the basis for setting it aside?

The plaintiffs suggested that the employer must have something close to actual knowledge that an employment policy violates Title VII's disparate impact provisions before it can expressly take the protected classification into account and ignore the policy. The Court disagreed. Requiring such a high standard, it reasoned, would stymie employers' voluntary attempts to foster more diverse working environments.

The city argued that the appropriate standard was whether the employer had a good-faith belief that adoption of a particular policy would lead to disparate impact claims. The Court likewise rejected this argument, finding that the more liberal good-faith standard would "encourage race-based action at the slightest hint of disparate impact" and might allow an employer to "discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance." *Id*. at 2675.

In other words, the plaintiffs' porridge was too hot and the city's porridge was too cold. Instead, the Court held that Title VII requires "a strong basis in evidence" that an employment policy will create disparate impact liability before it may rely on a protected classification to disregard the policy because of its impact on a particular protected class.

The Court borrowed the standard from its affirmative action decisions, in which it has held that "certain government actions to remedy past racial discrimination . . . are constitutional only where there is a strong basis in evidence that the remedial actions were necessary." *Id*., citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (internal quotations omitted). The Court found affirmative action to be a useful analogy because, like Title VII's disparate treatment and disparate impact rules, it straddles the line between systemic responses to discrimination and the requirement, under the equal protection clause, that individuals be treated without regard to a protected classification.

Justice Kennedy made it abundantly clear that an employer cannot meet the "strong basis in evidence" standard simply by determining that a group of potential plaintiffs could state a prima facie disparate impact case. Rather, an employer must also examine whether it can meet its burden of persuasion on the business necessity defense, and whether the potential plaintiffs can prove that there is no less-discriminatory alternative.

Title VII requires "a strong basis in evidence."

Applying the new standard, the Court held that the city did not have a strong basis in evidence to conclude that certifying the exam results would create disparate impact liability. No one disputed that the black and Hispanic applicants could establish a prima facie case of disparate impact: on both the lieutenant exam and the captain exam, their pass rates were far lower than the pass rates for white applicants, and significantly below the EEOC's 80% threshold.

The Court held, however, that the city lacked the required evidentiary basis for concluding that it could not successfully establish the business necessity defense or rebut a claim that there was a less-discriminatory alternative. On the business necessity defense, the Court concluded that there was no issue of material fact that the exams were job-related, pointing to the testimony of the Department of Homeland Security fire program specialist and the industrial/organizational psychologist, both of whom supported certifying the exams. This conclusion sparked a heated dissent from Justice Ginsburg (joined by Justices Stevens, Breyer, and Souter), who objected to the majority's conclusion that the validity of the exam results was a foregone conclusion.

Regarding a rebuttal of a less-discriminatory-alternative claim, the city's primary argument was that it

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the plaintiff had the burden to prove that his age was a motivating factor in the defendant's decision to demote him and that the verdict should be for the defendant if the defendant proved it would have demoted him regardless of age. The Eighth Circuit reversed the judgment and remanded for a new trial, holding that the mixed-motive instruction was incorrect because it shifted the burden of persuasion on a central issue in the case. The Supreme Court vacated and remanded the decision, finding that the plaintiff must prove by a "preponderance of the evidence" that age was the "but-for" cause of the defendant's action.

***Northwest Austin Municipal Utility District No. 1 v. Holder*, No. 08-322 (June 22, 2009)**

The Supreme Court reversed the U.S. District Court for the District of Columbia in this 8–1 decision, holding that the utility district was eligible to seek exemption from § 5 of the Voting Rights Act. Please see page 3 for details.

***Ricci v. DeStefano*, No. 07-1428 (June 29, 2009)**

In a 5–4 decision, the Supreme Court reversed the Second Circuit, holding that municipalities cannot decline to certify results of an exam that would make disproportionately more white applicants eligible for promotion than minority applicants due to fears that certifying the results would lead to charges of racial discrimination. Please see page 1 for details.

***Safford United School District No. 1 v. Redding*, No. 08-479 (June 25, 2009)**

By a vote of 8–1, the Supreme Court affirmed in part and reversed in part the Ninth Circuit, holding that 13-year-old Savana Redding's constitutional rights were violated when officials at the Safford Middle School conducted a strip search of her for prescription-strength Ibuprofen. Redding was accused by a classmate of possessing the Ibuprofen, sent to the school nurse's office, and instructed to strip to her undergarments. School officials contended that the search was reasonable because similar pills had been found on campus and another student had been sent to the hospital after ingesting them. The U.S. District Court for the District of Arizona ruled for the school district, but the Ninth Circuit reversed, finding that the strip search was neither justified at its inception nor reasonably related in scope to the circumstances giving rise to its initiation. The Supreme Court affirmed the decision that the search was unreasonable, finding insufficient evidence to indicate that Redding possessed the drugs or that there was any danger to students from the power of the drugs or their quantity. ✦

Jennifer Nelson is an associate at the Portland office of Fisher & Phillips LLP, representing employers in labor and employment law.

Kyle Busse is an associate of Busse & Hunt, which represents employees in employment cases, including civil rights, discrimination, and fraud.

Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935

could have accomplished the same goal (ensuring that lieutenants and captains were familiar with principles of fire department management) by recalibrating the weighting of the written and oral exam scores and by adopting a different interpretation of the city charter's rule of three. The Court disagreed, pointing to Title VII's prohibition against adjusting test results on the basis of a protected class's performance as a persuasive indication that neither of the city's approaches constituted a lawful alternative.

Conclusions

Notwithstanding Justice Ginsburg's objections, the record evidence that the exams were valid allowed the Court to use *Ricci* as a "test case" for what is not a strong basis in evidence that disparate impact liability may be present. In future cases with closer factual questions, *Ricci* will probably create more questions than it answers. How is a "good-faith belief" that an employment policy or practice will violate Title VII's disparate impact rules different from "a strong basis in evidence"? Given that the business necessity defense is highly fact dependent, will an employer ever be able to predict with confidence that it can (or cannot) meet its burden?

These specific questions, and a host of others, are left to the district courts and the courts of appeal. However, it seems clear from the Court's analysis that it expects the lower courts to look very closely at an employer's claim that it had to abandon an employment policy because of disparate impact concerns. ✦

John Dudrey is an associate at Barran Liebman LLP, representing employers in labor and employment law.

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