

## Court Limits Employer Options For Avoiding Bias Claims

### Companies Need to Be Watchful in Promotion Standards

A central focus of Supreme Court nominee Judge Sonia Sotomayor's confirmation hearing is her decision in a controversial reverse discrimination case brought by white firefighters in Connecticut. The U.S. Supreme Court ruled in favor of the white firefighters, whereas Judge Sotomayor was part of a 3 judge panel which rejected that claim. Here's what happened and why you should be concerned.

When a group of white firefighters came out on top in a promotional exam, a Connecticut fire department became worried about possible racial bias in the exam. The reason for their concern was that nearly all of the minority candidates failed to qualify for promotion, while nearly all of the successful candidates were white.

To remedy the perceived problem, the fire department threw out the test results and searched for a new test that would not favor white candidates. The white firefighters who were denied the promotion sued, arguing they were the true victims of race discrimination. The Supreme Court agreed with the white firefighters.

Federal job bias laws prohibit employers from engaging in intentional job bias (known as "disparate treatment"), based on race, sex and other listed factors. It also outlaws certain practices that are not intended to discriminate, but nevertheless screen out a disproportionate number of minorities.

In the *Ricci v. DeStefano* case, the Supreme Court ruled that when the city refused to certify the test results, it was engaging in illegal race discrimination toward the White candidates.

New Haven's City Charter requires that vacancies for promotions be filled by job-related examinations. Under the charter, only the top three scorers are eligible for a given promotion. The City hired an Illinois company to design and administer exams that firefighter promotion candidates took in 2003. The exams were intended to measure candidates' job-related knowledge.

When the 2003 exams were scored, all 10

candidates eligible to be promoted to lieutenant, and seven of the nine candidates eligible to be promoted to captain, were white. Remarkably, none were African American. Under federal guidelines, such statistics raised a legal presumption of disparate impact discrimination against African-Americans and Hispanics.

The City sought opinions from three outside experts. After hearing from these witnesses and others, the City's Civil Service Board ruled that the test results should not be certified.

A federal trial court judge ruled the city did not act with discriminatory intent because it took the action in good faith to avoid basing the promotions "on a test with a racially disparate impact."

On appeal, the Second Circuit U.S. Court of Appeals upheld this ruling in an unpublished, one-paragraph order. Notably, one of the three judges on the appellate panel was Supreme Court nominee Sonia Sotomayor.

By a 5-4 vote, the majority of the Supreme Court ruled that the White firefighters were indeed victims of intentional race discrimination, no matter how well intentioned the City's actions may have been. The Court rejected the City's claim that it was immune from suit because its stated motivation was to avoid basing promotions on an exam with a racially disparate impact. The Supreme Court stated that although the City's aim might have been "well intentioned or benevolent," it still "rejected the test results solely because the higher scoring candidates were white."

In doing so, the Court came up with a new and much more difficult standard to follow. It said that in order to avoid liability, an employer must have a "strong basis in evidence" that its actions were necessary to avoid disparate impact liability. In other words, the Court will require more than a mere suspicion by the employer that the test discriminates, but less than actual certainty.

Although the Court did not further define this "strong basis in evidence" standard, it nevertheless found that the City failed to satisfy it.



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Even though the Court conceded "[t]he racial adverse impact here was significant," it found no "objective, strong basis in evidence" for the City to justify its fear that the test illegally discriminates against minority applicants.

The Supreme Court concluded "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The *Ricci* decision still allows employers to adjust their standards for future promotion or hiring decisions so as to minimize the risk for disparate impact liability. However, the Court's decision dramatically reduces employers' options for avoiding litigation based on statistical evidence of disparate impact after a test or other qualification standard is used.

Supreme Court nominee Sotomayor has been on the hot seat this week over her decision to dismiss the white firefighters' claims. It is possible that the Democratic controlled Congress will consider legislation that would overrule the case. Some commentators have even gone so far as to suggest that this is the beginning of the end of affirmative action as we know it.

For the time being, area employers will need to be proactive to ensure in advance that all promotion and qualification standards are not biased, and do not screen out a disproportionate number of minorities.

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