

SPECTRUM

The Supreme Court Decides the New Haven Firefighter Case

By Michael C. Dorf

Excerpted from FindLaw.com

The Supreme Court handed down the most closely-watched case of the current Term: [Ricci v. DeStefano](#). Ricci posed a difficult question of employment discrimination law: When can an employer toss out the results of a promotion test because those results favor white over minority applicants?

The Court ruled 5-4 for the eighteen white (including one Hispanic) firefighter plaintiffs.

Title VII of the 1964 Civil Rights Act offers two main avenues for plaintiffs complaining about discrimination in hiring, promotion, or the conditions of employment. First, a plaintiff who can directly prove that the employer used an impermissible criterion—such as race or sex—in a covered employment decision will bring a "disparate treatment" case. Dis-

parate treatment cases are difficult for plaintiffs to win, because there will rarely be a smoking gun demonstrating intentional discrimination.

Accordingly, plaintiffs often bring the second sort of claim: disparate impact. To oversimplify somewhat, a disparate impact plaintiff must show that the challenged selection mechanism disproportionately underselects members of his or her group. If that showing is made, then the burden shifts to the employer to show that the use of the test or other selection mechanism was justified by the nature of the job or business in question.

In Ricci, however, the two theories of liability were in conflict.

In late 2003, in order to decide who was eligible for promotions to lieutenant and captain, the New Haven fire department administered a writ-

ten multiple-choice test, which accounted for sixty percent of a test-taker's score, and an oral exam, which accounted for the remaining forty percent. Under the city's rules, promotions could only then be given to those who ranked among the top three test-takers. Although six African-Americans earned passing scores on the lieutenant's test, and three passed the captain's test, none of these was among the top scorers eligible for promotion to any of the open slots. After much public discussion, the department therefore decided not to use the test results.

When the white firefighters who would have been eligible for promotions according to the original test results sued, alleging disparate treatment, the department asserted Title VII itself as a defense: The department pointed out that if it had simply used the test results, it

would have been vulnerable to litigation by the African-American firefighters, complaining about disparate impact discrimination; yet, having voided the test results, it had been sued by other firefighters claiming that they had thereby suffered disparate treatment race discrimination. Thus, the department found itself between a rock and a hard place.

The lower courts credited this reasoning, but the Supreme Court did not. An employer does not face a Hobson's choice, Justice Kennedy said for the Court, because the aim of avoiding disparate impact litigation can be a defense to a charge of intentional discrimination. But he added that an employer cannot merely assert a fear of litigation. Instead, for the defense to succeed, there must be a "strong basis in evidence" to fear liability for disparate impact.