

Supplement 1

Ricci v. DeStefano

A Very Brief Summary

by

Robert C. Forst

Ricci v. DeStefano is a 2009 decision of the United States Supreme Court arising from a lawsuit brought against the city of New Haven, Connecticut by 18 city firefighters alleging that the city discriminated against them with regard to promotions. The firefighters, seventeen of whom are white and one of whom is Hispanic, had all passed the test for promotions to management. City of New Haven officials invalidated the test results because none of the black firefighters who passed the exam had scored high enough to be considered for the positions.

Ricci and sixteen other white test takers, plus one Hispanic, all of whom would have qualified for consideration for the promotions, sued the city including Mayor John DeStefano, Jr. Ricci has been a firefighter at the New Haven station for 11 years. Ricci gave up a second job to have time to study for the test. Because he has dyslexia, he paid an acquaintance \$1,000 to read his textbooks on to audiotapes.

Lt. Ben Vargas, a native Puerto Rican and the lone Hispanic petitioner, was attacked by unknown African-American assailants in 2004. He stated that he believes the attack was orchestrated by the African-American firefighters in retribution for bringing the legal case; his account is disputed.

Among other things, the suit alleged that, by discarding the test results, the City discriminated against the Plaintiffs based on their race, in violation of Title VII of the Civil Rights Act of 1964. The City defended its position, arguing that if it had certified the results, it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.

The federal district court ruled for the City, granting its motion for summary judgment.

On appeal, a three-judge panel of the Second Circuit Court of Appeals, which included Judge Sotomayor, affirmed the federal district court's ruling in summary order without giving a written opinion.

The Supreme Court, by a five to four vote that broke along conservative and liberal lines, upheld the validity of the test. Justice Kennedy wrote the Court's opinion, and Justices Scalia and Alito concurred. Justice Ginsburg wrote a dissent

The case involved the application of Title VII of the 1964 Civil Rights Act. The test results produced a significant racial adverse impact, and confronted the City with a prima facie case of disparate impact liability. That the test had a disparate impact was easily shown by the City merely by showing a significant statistical disparity and nothing more.

That finding, however, does not end the matter as claimed by the City. The City would not be liable for disparate impact discrimination if the examinations were job related and consistent with business necessity and if so that there did not exist an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt.

Put another way to be liable under Title VII it has to be shown that the test results produced a significant racial adverse impact. Once shown the burden would shift to the defendant to defend the test on the ground that the test is job-related for the positions in question and consistent with "business necessity," by which is meant that it was a device that the city had to use in order to sort out those firefighters who were properly eligible for promotion from those who were not. There was evidence that tended to prove that: (1) The test preparations were meticulous; (2) Elaborate precautions were taken to root out all potential forms of bias; and (3) The test does predict effective job performance and that effective performance in the relevant job is necessary for the operations of the fire department. If any of these matters were not proven, then the business necessity defense would fail.

So this moved the question to the third stage, which is whether there was some alternative employment practice that is less discriminatory than the challenged practice. To put it another way, was there some alternative means that could have achieved the same result without the discriminatory impact. Again, the only way to make this case out would be to claim that all these tests, no matter how constructed, are not job-related so that promotions should turn on subjective intangibles.

The majority of the Supreme Court found no genuine dispute that the examinations were job related and consistent with business necessity. The Court also found that the City lacked a strong basis in evidence of an equally valid, less discriminatory testing alternative.

The dissent of Justice Ginsburg focused its attention on two issues. The first was its recitation of the past injustices in hiring firefighters in New Haven, dating back over 30 years. It was just that history of evasion that spawned the creation of the disparate impact test in *Duke Power v. Griggs* decided in 1971. The argument was that intentional discrimination was difficult to ferret out, so that objective evidence of a racial skew was needed to guard against underhanded schemes.

Justice Ginsburg's second issue was her belief that the operative question was whether New Haven had "good cause" to invalidate the test.