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MCLE Self-Study

Ricci: The Title VII Conundrum

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RICCI HOLDING AND BACKGROUND

In *Ricci v. DeStefano*,[1] the U.S. Supreme Court created a new standard for resolving the apparent conflict between the disparate-impact and disparate-treatment provisions of Title VII. The Court determined that an employer cannot justify race-based actions on fear of litigation alone, but must instead be able to demonstrate a strong basis in evidence that, had it not taken the questionable action, it would have been liable under a disparate impact analysis.[2] The *Ricci* decision is significant for a number of reasons, including, as discussed below, the Court's view of "race-conscious" decisions, the strong-basis-in-evidence standard, and the potential impact of the case on employers' motivation to voluntarily comply with Title VII.

Ricci involved a dispute over the results of a test administered by the Civil Service Board of the City of New Haven (the City) to select the top candidates for promotion in the City's fire department. When the results showed that the exam disparately impacted minority firefighters, there was a public outcry from various local officials and community members. Some minority firefighters threatened the City with discrimination lawsuits based on the adverse impact, while some non-minority firefighters threatened discrimination lawsuits if the City, relying on the racial disparity, ignored the test results and denied promotions to candidates who had performed well. The City held public hearings and subsequently determined not to certify the test results.

Seventeen white firefighters and one Hispanic firefighter who passed the exams but were denied possible promotions sued the City and others for disparate-treatment discrimination. The firefighters claimed, among other things, that the City's consideration of race in its decision to refuse certification was prohibited under Title VII. The City countered that it had a good faith belief that it would have violated the disparate-impact prohibition of Title VII if it had certified the results.

The district court granted summary judgment for the City, ruling that its "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent" under Title VII.[3] The Second Circuit Court of Appeals affirmed with a per curiam opinion adopting the district court's reasoning.[4] The Supreme Court reversed, granting summary judgment for the firefighters who were denied a chance of promotion.[5]

DISPARATE-IMPACT LIABILITY

The Civil Rights Act initially contemplated only disparate-treatment cases. In a case of first impression, the Supreme Court determined that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[6] Congress codified this disparate-impact theory in the Civil Rights Act of 1991, which provides that liability may be proven if "a complaining party demonstrates that . . . a particular employment practice causes a disparate impact . . . and the respondent fails to prove that the . . . practice is job related . . . and consistent with business necessity."[7] Even if the employer meets this burden, a plaintiff may still succeed by showing that an alternative practice is available and the respondent refused to adopt that alternative.[8] A claim of disparate-impact discrimination requires proof that a policy or practice, although neutral on its face, has an adverse impact on a category of individuals protected under Title VII.

RACE-CONSCIOUS DECISIONS IN DISPARATE-TREATMENT CASES

In contrast, as part of a plaintiff's prima facie case of disparate-treatment discrimination, he or she must prove discriminatory intent.[9] Some courts have declined to view race-conscious decisions designed to comply with the disparate-impact provisions of Title VII as grounds for a finding of discriminatory intent. For example, the Second Circuit in *Hayden v. County of Nassau* stated that, "[a] desire to reduce the adverse impact on [minority] applicants . . . is not analogous to an intent to discriminate against non-minority candidates."[10] Similarly, in *Bushey v. New York State Civil Service Commission*, the court found that "a showing 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 employer-initiated, voluntary race-conscious remedies."[11] Moreover, the Supreme Court has determined that a public employer's attempt to rectify historical race and sex imbalances by voluntarily adopting an affirmative action plan that was necessarily race-and-gender conscious did not violate Title VII.[12]

The district court in *Ricci* adopted this analysis and, as noted above, found that the motivation to avoid violating the disparate-impact provisions of Title VII did not, *as a matter of law*, violate the disparate-treatment provision. The circuit court affirmed this approach. The Supreme Court rejected this analysis, finding a prima facie case of disparate-treatment discrimination: "Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[13] Distinguishing between the City's objective and its

continued on page 18

Ricci: The Title VII Conundrum

continued from page 3

conduct in reaching that objective, the Court said that the real question was not whether the City's conduct "was discriminatory but whether the City had a lawful justification for its race-based action."[14] The Court thus assumed that the race-conscious decision was, on its face, discriminatory.

After *Ricci*, one must ask whether there is a difference between intending not to discriminate against minority candidates and intending to discriminate against white candidates. It is understandable that the *Ricci* Court might be concerned that any statistical imbalance could lead to the adjustment of test scores with the goal of implementing an employer's preferred racial balance. However, it is troubling that a race-conscious action, made with the intent to avoid disparate impact liability, might now be equated with intentional discrimination. The dissent rejects the notion that an employer's action to avoid disparate-impact liability qualifies as a presumptively improper race-based employment decision.[15] According to the dissent, when an employer attempts to avoid disparate-impact liability it does not, as a result, encounter liability for disparate treatment.[16]

In addition, it seems unclear what employer actions may be considered impermissibly "race-based." The *Ricci* holding could arguably affect numerous employment-related decisions, including hiring, terminations and reductions in force. For example, if an employer analyzes the racial composition of a planned layoff and finds an adverse impact, under what circumstances will it be liable for disparate-treatment discrimination if it decides that the layoff selection criteria should be changed to have a lesser adverse impact? In defending itself against a claim for disparate-treatment discrimination, won't every employer be creating a trail of evidence for suits under a disparate-impact theory?

THE EMPLOYER'S BURDEN

One of the central disputes in *Ricci* involved the appropriate standard for evaluating the City's failure to certify the test results. The Supreme Court rejected the notion that an employer can justify race-conscious conduct based on a good-faith belief that its actions are required to ensure compliance with the disparate-impact provisions of Title VII.[17] According to the Court, such a good-faith exception was not recognized by Congress when the disparate-impact provision was codified in 1991.[18] Moreover, "[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact."[19] The Court, borrowing from an equal protection analysis, found that the strong-basis-in-evidence standard strikes a more appropriate balance.[20] The Court suggested that this standard is necessary to protect employees' legitimate expectations and to avoid the creation by employers of de facto quota systems.[21] The Court determined that despite the significant statistical disparity demonstrated by the test results, the City did not have a strong basis in evidence for believing that it would be liable for disparate-impact discrimination.[22]

The dissent objected to this analysis on a number of bases. The dissent stated that "[t]he cases from which the Court draws its strong-basis-in-evidence standard are particularly inapt; they concern the constitutionality of absolute racial preferences. . . . [O]bservance of Title VII's disparate-impact provision, in contrast, calls for no racial preference, absolute or otherwise."[23] The dissent suggested that the appropriate standard should be whether an employer had good cause to believe that the device in question would not withstand examination for business necessity.[24] Nonetheless, according to the dissent, there was ample evidence presented during the multiple hearings conducted by the City to determine that the City had met the strong-basis-in-evidence standard.[25]

Articulating the defense required by the Supreme Court seems difficult at best. As noted by the dissent, "an employer attempting to overcome a disparate treatment claim based on setting aside a questionable selection process must be able to make a "'strong' showing that (1) its selection method was 'not job related and consistent with business necessity,' or (2) that it refused to adopt 'an equally valid, less-discriminatory alternative.' It is hard to see how these requirements differ from demanding that an employer establish a 'provable actual violation' *against itself*."[26] If a showing of significant statistical disparity, along with the other evidence presented by the City, is insufficient to meet the strong-basis-in-evidence standard, then what would be sufficient? As noted by the dissent, "[o]ne is left to wonder what cases would meet the standard and why the Court is so sure this case does not."[27]

VOLUNTARY COMPLIANCE

The effect of the Supreme Court's determination that the City's race-conscious decision was discriminatory and its adoption of the strong-basis-in-evidence standard may undermine employers' willingness to voluntarily comply with Title VII. If this is the impact of *Ricci*, it seems inconsistent with the Court's prior support of voluntary compliance. For example, in *Local 93, International Association of Fire Fighters v. City of Cleveland*,[28] the Court considered whether Title VII rendered invalid a negotiated consent decree that benefited individuals who were not actually harmed by the employer's discrimination. The Court noted that it had, "on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."[29] The Court went on to state, "[i]t is equally clear that the voluntary action available to employers . . . seeking to eradicate race discrimination may include reasonable race-conscious relief. . . ."[30]

Similarly, in a private contractual setting in *United Steelworkers v. Weber*,[31] the Supreme Court concluded that:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-

> conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[32]

The *Weber* Court held that Title VII allowed employers and unions voluntarily to make use of reasonable race-conscious affirmative action.[33]

The Equal Employment Opportunity Commission (EEOC) has similarly supported voluntary compliance with Title VII. The EEOC's guidelines provide:

> The Commission believes that by enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation.[34]

The Supreme Court has given great deference to the EEOC's interpretation of the Act.[35]

It is unclear why the *Ricci* Court deviated from its support of race-conscious decisions as a mechanism to further voluntary compliance with Title VII. However, what does seem clear is the likelihood that the decision will confuse and potentially discourage employers from voluntarily complying with Title VII. It seems a difficult conundrum—an employer may either be liable for the disparate impact of a facially neutral practice or, in attempting to remedy that adverse impact, but failing to meet the strong-basis-in-evidence requirement, be liable for disparate treatment. Moreover, if employers are no longer motivated to remedy adverse impacts in the workplace, this would seem to thwart the very purpose of Title VII, to "achieve equality of employment opportunities and remove barriers that have operated in the past . . . "[36] As noted by the dissent, the strong-basis-in-evidence test "makes voluntary compliance a hazardous venture."[37]

OPEN QUESTIONS

The *Ricci* decision leaves open a number of questions. As Justice Scalia suggested in his concurrence, one question is whether, or to what extent, the disparate-impact provision of Title VII is consistent with the Equal Protection Clause of the U.S. Constitution. As noted by the dissent, the Equal Protection Clause prohibits intentional discrimination, but it does not contain a disparate-impact component. The Court's adoption of the strong-basis-in-evidence standard may suggest that future cases will demonstrate increasing consistency between the two. Another open issue that was discussed during oral argument, but not addressed by the Court, is the circumstances in which an employer may be held liable for the discriminatory intent of subordinate employees who influence the outcome of an employment decision but are not the decision-makers. As noted by Justice Alito in his concurrence, there is a large body of case law on this issue, but the courts disagree on the proper standard. In addition, in the dissent to the denial of en banc review, Circuit Judge Cabranes asks whether the *McDonnell Douglas*[38] approach for analyzing claims of pretextual discrimination or the mixed motive analysis enunciated in *Price Waterhouse*[39] is applicable when discrimination is overt. This issue also was not addressed in the *Ricci* decision. However, in another recent decision, the Court stated that "[i]t has become evident in the years since [*Price Waterhouse*] was decided that its burden-shifting framework is difficult to apply."[40] Finally, does the *Ricci* decision vitiate an employers' ability to claim that it acted in good faith and in reliance upon a written interpretation or opinion of the EEOC?[41] As noted in the dissent, the Court's refusal to remand for further proceedings deprived the City of the opportunity to invoke this defense.

ENDNOTES

1. 129 S. Ct. 2658 (2009).
2. *Id.* at 2681.
3. 554 F. Supp. 2d 142, 159 (D. Conn. 2006).
4. 530 F.3d 87 (2nd Cir. 2008), *reh'g en banc denied*, 530 F.3d 88 (2nd Cir. 2008).
5. *Ricci*, 129 S. Ct. at 2681.
6. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).
7. 42 U.S.C. § 2000e-2(k).
8. *Id.*
9. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993).
10. *Hayden v. County of Nassau*, 180 F.3d 42, 51 (2nd Cir. 1999).
11. *Bushey v. New York State Civil Service Comm'n*, 733 F.2d 220, 228 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985), *reh'g denied*, 470 U.S. 1024 (1985) (footnotes omitted).
12. *Johnson v. Transportation Agency*, 480 U.S. 616, 640-42 (1987).
13. *Ricci*, 129 S. Ct. at 2673.
14. *Id.* at 2674.
15. *Id.* at 2709.
16. *Id.*
17. *Id.* at 2675.
18. *Id.*
19. *Id.*
20. *Id.* at 2675-76.
21. *Id.*
22. *Id.* at 2678.
23. *Id.* at 2701 (citations omitted).
24. *Id.* at 2699.
25. *Id.* at 2707.
26. *Id.* at 2701 (emphasis in original; citation omitted).
27. *Id.* at 2700.
28. 478 U.S. 501 (1986).
29. *Id.* at 515 (citation omitted).
30. *Id.* at 516.
31. 443 U.S. 193 (1979).
32. *Id.* at 204 (citation omitted).
33. *Id.* at 208.
34. 29 C.F.R. § 1608.1(a).
35. *Albemarle Paper Co. v. Halifax Local No. 425*, 422 U.S. 405, 431 (1975).
36. *Griggs*, 401 U.S. at 430.
37. *Ricci*, 129 S. Ct. at 2701.
38. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
39. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
40. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009).
41. 42 U.S.C. § 2000e-12(b).