Guard Against Unfair, Disparate Impact

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Q. Does the Supreme Court's decision in Ricci v. DeStefano have implications for associations?

A. In Ricci, the Supreme Court ruled that an employer may not engage in improper disparate treatment simply to avoid potential claims for improper disparate impact — "absent a strong basis in evidence" that the employer would actually be subject to disparate impact liability. Essentially, the Court found that an employer's good faith belief that action was necessary to avoid a disparate impact was an insufficient basis to justify race-based employment decisions.

The Riccicase involved the validity and appropriateness of a job-promotion examination. The case resulted from the decision by the City of New Haven's Fire Department to develop a standardized examination to be used to fill Lieutenant and Captain positions. The applicant pool for the open positions was racially diverse — over one-third of the applicants were either African-American or Hispanic. However, the examination scores resulted in promotions for nearly all white candidates. Some firefighters asked that the test results be discarded because the use of the test had an unlawful discriminating impact on minority candidates for promotion. The City, fearful of having to defend a lawsuit challenging the test as fundamentally flawed and one which would have resulted in an unlawful "disparate impact," threw out the test. As a result, the City was sued by 17 white and 2 Hispanic firefighters claiming that the City's actions resulted in unlawful disparate treatment of those white candidates who passed the test. The Supreme Court held as follows:

- We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.

Thus, the Supreme Court ruled that an employer's fear of a disparate impact claim alone is not sufficient to justify disparate treatment against a group of employees as a result. Rather, an employer can only take intentional, race-based actions (such as refusing to promote qualified white candidates) if the employer can satisfy the "strong-basis-in-evidence" test set forth by the Court.

Under the facts in Ricci, the Supreme Court ruled that the City officials could not, in fact, demonstrate a "strong basis in evidence" that a disparate impact claim by minority firefighter candidates would have succeeded. In reaching its ruling, the Supreme Court explained that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

Clearly, any association that uses examinations for hiring and promotions should exercise care to assure that a test designed to be valid and fair doesn't unintentionally produce an unfair, disparate impact. Interestingly, in upholding the promotion exam in Ricci, the Court relied heavily on the process the City of New Haven had undertaken to develop and administer the test to assure its fairness. Many associations already are familiar with the need to establish the validity of examinations used for certification purposes — and the process to be followed in order to establish both validity and fairness. Such experience, and the processes used to establish validity, should be applicable to properly developing and implementing valid hiring and promotion examinations.

Though the Riccidecision is favorable for employers, and has been hailed by some as one of the most important employment law cases in the last decade, the Court nevertheless has adopted an inherently uncertain standard which almost certainly will be subject to interpretation on a case-by-case basis. In addition, the Ricciruling, not surprisingly, was the result of a sharply decided 5-4 vote and, interestingly, overturned a Court of Appeals decision by a panel on which Supreme Court nominee Sonya Sotomayor served. The dissenters went to great lengths to explain how Ricci may be limited by its facts — which they felt failed to take into account the "starkly disparate results" of the promotion exam. In addition, the dissenters hinted that they thought Congress might overturn the decision with new legislation. If the dissent's predictions are given credence, the decision may have limited usefulness for employers in the future.

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