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EMPLOYMENT ALERT
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Avoiding Discrimination May Discriminate: A Warning for Employers

The U.S. Supreme Court recently held that the City of New Haven discriminated against white firefighters by discarding the results of a promotion exam that the city felt discriminated against minority firefighters. The case holds important lessons for employers. Even if you go out of your way to avoid discriminatory hiring and employment practices, your very efforts may be used against you.

The Case

The facts of the case are well-chronicled—this is the same case that was at the center of the Sotomayor hearings. In brief, the city issued a promotion-qualifying exam to its firefighters. But when the city learned that white test takers passed at a significantly higher rate than African-American and Hispanic test takers, it refused to certify the results. Subsequently, 17 white and one Hispanic test takers who were denied consideration for a promotion filed suit. The city won at the trial and appellate levels, but the Supreme Court reversed, holding that the city had intentionally discriminated against the non-minority firefighters.

What Went Wrong For New Haven

The city maintained that the exam had a disparate impact on minorities and that, if it certified the test scores, it would likely have been sued by the minority test takers. But the Court held that before an employer can engage in intentional discrimination for the purpose of remedying unintentional discrimination, the employer must show a "strong basis in evidence" that it would be sued for the unintentional discrimination *and* that it would lose such a suit. An employer's "good-faith fear" of liability is legally insufficient for taking race-based action.

In applying this newly articulated standard, the Court found that the city did not meet the "strong basis in evidence" test because it failed to demonstrate that it would have faced liability if it had certified the test results. The city's showing of a statistical disparity in the test results, without more evidence, would not necessarily result in liability and was therefore insufficient to meet this burden. An employer can avoid this kind of liability—called "disparate impact" liability—if the practice that causes the disparate impact is job-related and consistent with business necessity *or* if there is no alternative practice that would serve the employer's purpose with less adverse impact.

For example, a requirement that a prospective pilot pass a vision test would have a discriminatory impact on a blind applicant. But the employer would not run afoul of anti-discrimination laws because a pilot must have excellent vision in order to fly a plane, and there is no alternative.

Since the City failed to demonstrate that its test was *not* job-related or that an equally valid and less discriminatory test was available, it failed to demonstrate a strong basis in evidence that it would be liable had it certified the test results. So, by discarding the test

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results for racial reasons, the city had discriminated against the non-minority candidates for promotion.

What You Can Do To Protect Yourself

Although *Ricci* involved public employees, the decision will likely affect private employers as well because the law involved—Title VII of the Civil Rights Act—applies to both public and private employers. Employers who use tests or other selection methods for hiring and promotion decisions should take steps to avoid having to discard a test or selection method because it has a disproportionate adverse impact on one race. Here are some proactive steps to consider:

- **Carefully create and vet all proposed selection and screening methods.** Once an employer implements a test or selection process, *Ricci* limits its ability to discard the test or process based on the results. Employers should ensure that their tests and other selection methods are racially neutral, job-related, consistent with business necessity and do not have a disproportionately negative impact on any minority.

- **Assume that the ruling will apply to any method.** Although *Ricci* involved a written cognitive exam, the decision conceivably applies to any type of test or other selection procedure employers may use in making employment decisions, such as physical ability tests that measure strength and stamina; sample job tasks that assess performance and aptitude on particular tasks; and English proficiency tests used to determine fluency.

- **Review the Uniform Guidelines on Employee Selection Procedures.** These procedures, adopted by the Equal Employment and Opportunity Commission, Department of Labor and the Department of Justice, help employers create selection procedures that comply with Federal discrimination laws.

- **Consider retaining outside experts** to analyze your tests and selection methods.

If you already find yourself in a position similar to the City of New Haven's, seek counsel. This is a complicated issue. The city went out of its way to protect itself, but ended up with the opposite result.

For more information on this issue or other employment matters, please contact **Carol Goodman** at cgoodman@herrick.com or **(212) 592-1465** or **Mara B. Levin** at mlevin@herrick.com or **(212) 592-1458**.