

LEGAL ADVISORY

Office of the General Counsel

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SUMMARY

The U.S. Supreme Court holds that employers must have a “strong basis in evidence” that an employee selection test will violate the disparate impact prohibition of Title VII before invalidating the results of a test after it has been administered. This showing is not satisfied merely by demonstrating that the test will have a statistically adverse impact on one race or sex.

If you have questions regarding how the Ricci decision may affect University selection procedures, please contact:

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This legal advisory is issued by the Office of the General Counsel to provide updates regarding important legal and regulatory developments that affect the University. For additional information or assistance with a specific legal matter, please contact the Office of the General Counsel.

SUPREME COURT RULES ON DISPARATE IMPACT

On June 29, 2009, the United States Supreme Court issued a decision in the closely-watched case of *Ricci v. DeStefano*, which limits employers' use of race-based remedies to avoid disparate impact discrimination lawsuits. Title VII of the Civil Rights Act prohibits employers from (1) engaging in “disparate treatment” discrimination, that is, intentionally treating employees differently because of their race, sex or national origin and (2) employing criteria for selection or promotion that result in a disparate adverse impact on a particular race or sex if use of those criteria cannot be justified by the employer's business needs. In *Ricci*, the City of New Haven, Connecticut refused to certify the results of a promotion examination for firefighters because they would have allowed no African Americans and only one Hispanic firefighter to be promoted to lieutenant or captain. The City of New Haven was concerned that it would be subject to a lawsuit claiming the examination violated the disparate impact prohibition of Title VII. Instead, white and Hispanic firefighters who received passing scores on the examination sued, claiming New Haven's refusal to certify the test constituted intentional racial discrimination in violation of Title VII.

In a 5-4 decision, the Supreme Court ruled in favor of the white and Hispanic firefighters. The Court held that once the promotion process “has been established and employers have made clear their selection criteria,” invalidating test results based on the race of the successful candidates violates the intentional discrimination prohibition of Title VII “absent some valid defense.” The Court held that the need to comply with Title VII's disparate impact prohibition can constitute a valid defense, but required that employers demonstrate a “strong basis in evidence” that invalidating the test is, in fact, necessary to avoid a disparate impact violation. This standard, the Court held, is not satisfied merely by demonstrating that the test produced racial disparities, since statistical disparities alone do not violate Title VII. Instead, the employer must demonstrate that the test was not job-related or was otherwise inconsistent with the employer's business needs.

As an employer, the University is subject to the disparate treatment and disparate impact provisions of Title VII. Moreover, as a recipient of federal funding, the University is also subject to analogous disparate treatment and disparate impact provisions of Title VI of the Civil Rights Act, which apply to many University operations in addition to employment (e.g., student admissions). *Ricci* did not alter the test for establishing a disparate impact claim under Title VII or Title VI. Instead, its holding is limited to setting forth the circumstances under which an employer may use race-based remedies to avoid disparate impact liability. The decision is consistent with advice that the Office of the General Counsel (OGC) has given for some time: that statistical disparities in selection outcomes, standing alone, do not constitute a violation of the disparate impact prohibition and cannot justify race-based remedies. Also consistent with prior OGC guidance is the Court's statement that “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”

The Court's opinion can be found at:

<http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf>