

him and replaced him with an African American following complaints that blacks were underrepresented in senior management levels. Note that this case did not involve affirmative action.



case 20.2 >>



RICCI v. DESTEFANO 557 U.S. (2009)

New Haven, Conn. (City), uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, inter alia, Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed. Justice Sotomayor was on the Second Circuit at the time of that decision. Justice Kennedy wrote the majority opinion in which Chief Justice Roberts, and Justices Scalia, Thomas and Alito joined.

Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter and Breyer joined. In her dissent, Justice Ginsburg notes that firefighting is “a profession in which the legacy of racial discrimination casts an especially long shadow” and that the facts of this case should be assessed “against this backdrop of entrenched inequality.”

KENNEDY, J.: In the fire department of New Haven, Connecticut—as in emergency-service agencies throughout the Nation—firefighters prize their promotion to and within the officer ranks. An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the

intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best-qualified candidates. In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It threw out the examinations.

Certain white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials. Theirs is the suit now before us. The suit alleges that, by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate

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impact on the minority firefighters. The District Court granted summary judgment for the defendants, and the Court of Appeals affirmed.

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. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII. In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause. . . .

Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Title VII prohibits both intentional discrimination (known as "disparate treatment") as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact"). . . . The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact. But in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are "discriminatory in operation." *Id.*, at 431. The *Griggs* Court stated that the "touchstone" for disparate impact liability is the lack of "business necessity": "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." . . . Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. That provision is now in force along with the disparate-treatment section already noted. Under the disparate-impact statute, a plaintiff establishes a *prima facie* violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *Ibid.* Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. . . . Petitioners allege that when the CSB refused to certify the captain and lieutenant exam results based on the race of the successful

candidates, it discriminated against them in violation of Title VII's disparate-treatment provision. The City counters that its decision was permissible because the tests "appear[ed] to violate Title VII's disparate impact provisions." . . . The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII. Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of "practices that are fair in form, but discriminatory in operation." *Griggs, supra*, at 431. But it has also prohibited employers from taking adverse employment actions "because of" race. §2000e-2(a)(1). Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. See *Firefighters, supra*, at 515. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.

Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. . . . The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a *prima facie* case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII. . . .

There is no genuine dispute that the examinations were job-related and consistent with business necessity. . . . On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid

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and less discriminatory tests were available to the City. 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. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim. . . . Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw

racial statistics at the end of the process was all the more severe. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the tests based solely on the racial disparity in the results.

Reversed.

>> CASE QUESTIONS

1. Explain how the case involved both issues of disparate treatment and disparate impact?
2. If you were representing the City of New Haven, would you have certified the test results? Why or why not?
3. What is the basis for the Supreme Court's holding?

>> sidebar 20.2

Abercrombie & Fitch's \$40 Million Diversity Lesson

In 2005, Abercrombie & Fitch (A&F) settled a discrimination lawsuit with over 10,000 class members. The suit alleged hiring discrimination against Latino, African American, and Asian American applicants. The checks ranged from several hundred to several thousand dollars each, totaling \$40 million. The settlement agreement also requires A&F to:

- Set "benchmarks" (not quotas) for hiring and promotion of women, Latinos, African Americans, and Asian Americans.
- Stop targeting fraternities, sororities, or specific colleges for recruitment.

- Hire 25 recruiters who will focus on seeking women and minority employees.
- Implement a new internal complaint procedure.
- Create marketing materials reflecting diversity.

What is A&F saying about diversity now? According to Mike Jeffries, A&F's Chairman and CEO, "Diversity and inclusion are key to our organization's success."

In 2011, Abercrombie was sued again for discrimination. This time, a Muslim woman claims that she was fired for refusing to remove her hijab at work.

4. DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN

Title VII's prohibition against national origin discrimination protects various ethnic groups in the workplace. In a recent case, the court ruled that Title VII had been violated when a bakery employee of Iranian descent was called "Ayatollah" in the workplace by the assistant manager and other employees. After he complained, he was fired. In 2005, the EEOC reported that employees of Middle Eastern descent had filed almost a thousand

Approximately 1.2 million Americans are of Middle Eastern or Arab descent, according to the U.S. Census.