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# The Obama Administration, the New Haven Firefighters Case, and More

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The Obama administration filed an amicus brief with the Supreme Court on February 26 in *Ricci v. DeStefano*, a much-watched case that the Court will decide this year (the case will be argued on April 22). In it, the City of New Haven threw out the results of its firefighter-promotion exam because of its results (too many whites, and not enough African Americans, did well). The firefighters who did well on the test sued, alleging violations of Title VII of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment, but lost in the district court and court of appeals.

The Obama Administration's brief (with lawyers from the Justice Department and the Labor Department and Equal Employment Opportunity Commission) argues that the city should be permitted to throw out the results of the test so long as it was motivated by a "reasonable" belief that using the results "may" have subjected it to liability under Section 703(k) of Title VII of the 1964 Civil Rights Act. Section 703(k) makes it illegal for employers to use selection devices that have a "disparate impact" on racial groups unless those devices are "job related for the position in question and consistent with business necessity." So long as an employer has this belief, says the brief, there is no violation of Title VII or the Constitution. But, concludes the brief, it is not clear that the lower courts looked carefully enough into whether this belief was reasonable, nor indeed whether this was the real reason for the city's action at all, and so it asks the Court to reverse the decision and remand for further proceedings.

There are three potential issues presented by the administration's brief. The first is whether it should have acknowledged that, if the city was motivated in part, even if not entirely, by political rather than legal reasons, then, under Section 703(m) of Title VII, that should be enough to establish liability.

Second, critics question whether mere "reasonable" belief that not throwing out the test results "may" result in Title VII liability ought to be the correct standard for allowing the city's disparate treatment of individuals based on their skin color. The central focus of Title VII is on preventing employers from making employment decisions with an eye on favoring some and disfavoring others based on race (and sex, religion, and national origin). For that to be excused, is it enough that the city have a belief that it "may" be in violation of another part of the statute—or must it be able to show the court that it indeed would be liable? Thus, the question is whether the test proposed by the Obama administration is the correct one.

Third, the administration suggests that choosing selection devices with an eye on the racial bottom line does not trigger "strict scrutiny" under the Equal Protection Clause. The brief then argues that, in any event, such discrimination would be permissible so long as the city "has a strong basis in evidence for believing that the decision is reasonably necessary to comply with Title VII." But, again, is that the correct standard?

There is a tough problem in this case: What is an employer to do when Congress has written a statute that mostly tells him *not* to weigh race in deciding whom to hire or promote, but in a secondary part tells him that he may be liable unless he *does* consider race? The courts need to decide whether it makes sense to interpret the second part of the statute narrowly, so as not to swallow the first, important part.

In employment matters, if the desire to avoid a disproportionate result always allows employers to engage in disparate treatment, then Title VII and the Constitution permit quotas. And since the Constitution applies to nonemployment matters, would this approach also allow, for instance, a university deliberately to fine-tune its selection devices with an eye to putting a ceiling on the number of "overrepresented" groups (say, Asians and Jews)?

On the same day it filed its *Ricci* brief, the Justice Department also entered into a settlement that "requires the city of Dayton [Ohio] to hire up to five eligible African-American claimants as police officers and up to nine eligible African-American claimants as firefighters" (quoting the Department's press release). Again, the challenge was based on the city's use of tests and certifications.

Also the same day, the Department of Health and Human Services published in the *Federal Register* an initiative that targets "ethnic and racial minority groups at risk for substance use and HIV/AIDS …." The day before that, HHS also proposed a scholarship program open "only" to Native American Indians and Native Alaskans.

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*http://www.fed-soc.org/publications/id.157/author.asp*

**Related Materials:**

"Thoughts on *Ricci* v. *DeStefano*," by Roger Clegg, *Bench Memos:*
http://bench.nationalreview.com/post/?q=ZTEyYWMzNzFjYTk3OGEwZDRiNjMyZWE1YWY1ZGQzNGU

Brief for the United States as Amicus Curiae Supporting Vacatur and Remand.
http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-328_VacaturandRemandAmCuUSA.pdf

Docket Sheet Case # 07-1428. http://www.supremecourtus.gov/docket/07-1428.htm

Docket Sheet Case # 08-328. http://www.supremecourtus.gov/docket/08-328.htm

"Justices to Hear White Firefighters' Bias Claims," by Adam Liptak, *New York Times,* April 10, 2009:
http://www.nytimes.com/2009/04/10/us/10scotus.html

"A Missed Opportunity to Put Skills above Race," by John Yoo, *The Philadelphia Inquirer,* March 1, 2009:
http://www.philly.com/inquirer/currents/20090301_A_missed_opportunity_to_put_skills_above_race.html

"Grant of Certiorari in *Ricci v. DeStefano*," by Ed Whelan, *National Review Online,* January 9, 2009:
http://bench.nationalreview.com/post/?q=NGEyNWRlMjkwZTc4MTYyMjI2ZDFmYzhlNmUxYzI1NWY