RICCI V. DESTEFANO: DILUTING DISPARATE IMPACT AND REDEFINING DISPARATE TREATMENT

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on an individual's sex, race, color, national origin, and/or religion.[1] The statute permits plaintiffs to bring discrimination cases under two different theories: disparate treatment, which requires a showing of the employer's discriminatory intent, and disparate impact, which holds the employer liable absent intent to discriminate if it uses neutral employment policies or practices that have a disparate impact on a protected group. *Ricci v. DeStefano* significantly affects the interpretation of both of these theories of discrimination.[2]

The case arose out of written and oral examinations that the City of New Haven gave in 2003 to its firefighters who applied for promotions to lieutenant and captain positions.[3] Despite the City's hiring of an independent consultant, I/O Solutions (IOS), to create a fair, job related evaluative instrument, the results of the exam were disconcerting.[4] In a City where more than one third of

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[1] It states:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2006).

[2] *See, e.g.*, Mark S. Brodin, Ricci v. DeStefano: *The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161 (2011); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci: *Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010); Melissa Hart, *From* Wards Cove *to* Ricci: *Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261 (2011); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

[3] Ricci v. DeStefano, 129 S.Ct. 2658, 2664 (2009); Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

[4] *Ricci*, 129 S. Ct. at 2665.

the population is black and more than one fourth is Hispanic,[5] no blacks and only two Hispanics would be eligible for promotions. The rest of the promotions would go to white firefighters.[6] This result obtained even though twenty-seven blacks and twenty-three Hispanics took the promotional exams.

City leaders, especially the Corporation Counsel, Thomas Ude, worried that the test had an illegal disparate impact on blacks and Hispanics.[7] Because of a history of discrimination and lawsuits by minority firefighters,[8] the City's concern was justifiable. Like other fire departments across the country, white men—predominately Irish, Italian, and German—had historically dominated the New Haven Fire Department.[9] Generation upon generation of male firefighters had handed the jobs down to family members who were almost invariably of the same ethnic heritage.[10] This structure led to extreme racial underrepresentation in the fire department. For example, in 1973, firefighters were less than four percent black, and none was Hispanic, even though minorities represented approximately thirty percent of the City's population.[11] While prospects for men of color have improved significantly as a result of a number of lawsuits filed against the New Haven Fire Department, there is still significant underrepresentation of blacks at the higher ranks and of Hispanics in firefighter and upper level positions. Today, while thirty-seven percent of the City's population is black, approximately thirty percent of the firefighters, twenty-two percent of the lieutenants, and four percent of the captains are black.[12] Twenty-six percent of the New Haven population is Hispanic; thirteen percent of firefighters, fourteen percent of lieutenants, and sixteen percent of captains are Hispanic.[13]

By city charter, the Civil Service Board (CSB) was responsible to certify the exam results. After the results of the 2003 exam became public, the CSB

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[5] *ACS Demographic and Housing Estimates: 2008,* U.S. CENSUS BUREAU (2010), *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_08_1YR_DP5&prodType=table.

[6] Seventy-seven candidates took the lieutenant's exam: 43 whites, 19 blacks, and 15 Hispanics. *Ricci*, 554 F. Supp. 2d at 145. Thirty-four passed: 25 whites, 6 blacks, and 3 Hispanics. *Id.* Forty-one applicants took the captain's exam: 25 whites, 8 blacks, and 8 Hispanics. *Id.* Twenty-two passed the exam: 16 whites, 3 blacks, and 3 Hispanics. *Id.* But passing the test was not enough. *Id.* Because the City hired from a list which used a "rule of three" (meaning that the City would consider the top three candidates for each position) only those at the top of the list were eligible for promotion. *Id.* For the lieutenant's position, 10 were eligible for promotion to fill 8 positions: all were white. *Id.* For the captain's position, 9 were eligible for promotion to fill 7 spots: 7 whites and 2 Hispanics. *Id.* In total, no blacks and 2 Hispanics were eligible out of the 27 blacks and 23 Hispanics who took the test. *Id.*

[7] *Id*.

[8] *See* Ann C. McGinley, Ricci v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 591 (2010).

[9] For a discussion of this history, see *id*. at 588–95.

[10] *Id.* at 589.

[11] Nicole Allan & Emily Bazelon, *The Ladder - Entry 4: Is There a Better Way to Decide Who Gets Promoted?*, SLATE, June 25, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_4_is_there_a_better_way_to_decide_who_gets_promoted.single.htmlhttp://www.slate.com/id/2221250/entry2221298/.

[12] *See* Chart provided by Victor Bolden (Dec. 9, 2009) (on file with the *Nevada Law Journal*).

[13] *Id.*

held five hearings,[14] heard testimony from various sources, and ultimately voted not to certify the results.[15] This vote rankled many of the white members of the fire department who believed the CSB's vote deprived them of an opportunity for promotions they had earned by doing well on the exam. These promotions come up rarely, and it could be years before they would have another opportunity.

Backed by the firefighters' union, seventeen white firefighters and one Hispanic firefighter who sat for the promotional exams sued, alleging that the City violated Title VII of the 1964 Civil Rights Act and the Equal Protection Clause of the 14th Amendment to the United States Constitution when it threw out the exam results. The plaintiffs alleged that because the City's decision to throw out the test results was based on the race of the successful test takers,[16] the City had acted improperly. It did not matter, according to the plaintiffs, that the City may have acted in good faith to avoid an illegal disparate impact on protected minorities.[17] The mere consideration of race when the City refused to certify the test was sufficient evidence of disparate treatment under Title VII. The federal district court disagreed with the plaintiff's theory; it granted the defendant's motion for summary judgment,[18] and the Second Circuit panel affirmed summarily.[19]

Eventually, the case made its way to the United States Supreme Court.[20] In a 5–4 decision, the Supreme Court reversed, holding that a good faith belief that the testing created an illegal disparate impact on racial minorities is insufficient as a defense to a disparate treatment claim that arose as a result of the City's overt use of race to throw out the results.[21] Instead, over a strong dissent, the Court concluded that the City must have "a strong basis in evidence that,

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[14] Ricci v. DeStefano, 554 F. Supp. 2d 142, 145–50 (D. Conn. 2006).

[15] *Id*. at 150.

[16] *Id*. at 144.

[17] The plaintiffs also argued a more nefarious motive on the City's part. They argued that the City was pressured by a black minister who used significant political power to influence the City to throw out the results. Ricci v. DeStefano, 129 S. Ct. 2658, 2683–89 (2009) (Alito, J., concurring). While this second version of the events leading to the rejection of the results is not credited by the majority opinion, Justice Alito's concurrence appears to take it as fact. *Id.*

[18] *Ricci*, 554 F. Supp.2d. at 145.

[19] Ricci v. DeStefano, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam), *rev'd* 129 S. Ct. 2658 (2009). In a per curiam opinion, the Second Circuit panel stated in part:

> In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

Id. Later, the Second Circuit voted not to hear the case en banc. *Id.* at 88.

[20] It also figured prominently in the Senate confirmation hearings for then Judge Sonia Sotomayor's nomination to the United States Supreme Court because Judge Sotomayor had sat on the Second Circuit Court of Appeals panel that decided the case against the plaintiffs. For a discussion of the impact of the case on the hearings, see McGinley, *supra* note 8, at 613–18.

[21] *Ricci*, 129 S. Ct. at 2663–64.

had it" certified the results, "it would have been liable under [Title VII] disparate-impact" theory; the Court concluded as a matter of law that the defendants did not meet the necessary threshold standard.[22] Because it decided the case under Title VII, the Court did not reach the question of whether the City's behavior was unconstitutional under the Equal Protection Clause.[23]

Ricci is important because it redefines discrimination. It adopts a restrictive interpretation of the disparate impact theory that is inconsistent with Congressional intent and purpose, and signals that intentional discrimination is more important than disparate impact. Simultaneously, it appears to broaden the disparate treatment theory, but this new interpretation of disparate treatment is selective: it expands the definition of discriminatory intent to include any overt consideration of a protected characteristic. By its literal interpretation of intent—intent means any conscious, explicit consideration of race in making employment decisions—it appears to disregard unconscious discrimination or implicit bias as supporting a possible cause of action under disparate treatment law.[24]

These changes in both disparate impact and disparate treatment, which ignore history and the changing nature of discrimination, make *Ricci* one of the worst recent cases decided by the Supreme Court. *Ricci* endorses finding discrimination against white men who have been privileged by history and the structure of the fire department while simultaneously ignoring the history and practices that led to the low numbers of minority men in supervisory positions in the fire department. It also appears to credit obvious and explicit discrimination over the less obvious but implicit biases caused by structures and attitudes that hinder the progress of women and minority men in the workplace.

II. *RICCI*'S HARMS

A. Upsetting the Balance between Treatment and Impact

One of the unfortunate aspects of *Ricci* is the Court's treatment of disparate impact as the illegitimate stepsister of the disparate treatment cause of action. The Court held that even if the City had discarded the test results in good faith to avoid liability under the disparate impact clause of Title VII, it would still face liability because it considered the race of the individuals who would have been eligible for promotion based on the test. The only escape from liability for disparate treatment against the plaintiffs would be proof of a "strong basis in evidence" that the City would be liable under disparate impact

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[22] *Id.* at 2664–65. The Court did not reach the question of whether the disparate impact provision violates the Equal Protection Clause of the Fourteenth Amendment. For an interesting discussion of this issue, see Primus, *supra* note 2.

[23] Nonetheless, Justice Scalia argued in his concurrence that the disparate impact provision of Title VII violates the Equal Protection Clause. *Ricci*, 129 S. Ct. at 2681–83 (Scalia, J., concurring).

[24] This conclusion is supported by the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011). For a discussion of the science of implicit bias, see Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 445–49 (2010); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005).

theory if it chose to award promotions based on the test results. The Court held further that, as a matter of law, there was no strong basis in evidence supporting the City's refusal to certify the test results. This treatment of the relative importance of disparate treatment and disparate impact is particularly problematic because of the history of Title VII.

1. History of Disparate Impact Provisions

The original language of Title VII of the 1964 Civil Rights Act mentioned neither intent nor impact. Rather, it stated that it is illegal to discriminate "because of" a person's race or other protected characteristics. Early on, courts interpreted this language to require a showing of an intent to discriminate because of an individual's membership in a protect class. Soon after Congress passed the Civil Rights Act, however, activists and key personnel at all levels of the Equal Employment Opportunity Commission (EEOC) recognized that a focus on intentional discrimination under Title VII would limit the statute's usefulness in combating racial inequalities in the workplace.[25] They began to bring cases in the lower courts to clarify that disparate impact was a legitimate theory under Title VII. One of these cases, *Griggs v. Duke Power Co.*,[26] reached the Supreme Court by 1971.

Plaintiff Griggs challenged the defendant's use of intelligence tests and diploma requirements for particular positions within the power company. The lower court dismissed the case, holding that there was no evidence of intentional discrimination and therefore a cause of action under Title VII did not exist.[27] The Supreme Court reversed and held that an employer who, absent an intent to discriminate, used a neutral policy that created a disparate impact on members of a protected class would be liable under Title VII unless it could prove that its policy had a "demonstrable relationship to successful performance of the jobs for which [they were] used."[28] The Court declared that the "touchstone is business necessity," and assigned the employer with the burden of proving "that any given requirement must have a manifest relationship to the employment in question."[29] This interpretation was the law of the land until 1989.

In 1989, eighteen years after *Griggs*, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*, a case that made it much more difficult to prove a disparate impact cause of action and that held that the burden of proof never shifted to the employer to prove business necessity.[30] Instead, the plaintiff had to prove the absence of a business justification. In large part because of substantial opposition to *Wards Cove*, Congress enacted the 1991 Civil Rights Act,[31] which restored the disparate impact cause of action. The amended Act included a disparate impact provision in the statute for the first time. It stated:

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[25] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 24, 73, 78 (1994).
[26] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[27] Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970), *rev'd* 401 U.S. 424 (1971).
[28] Griggs, 401 U.S. at 431.
[29] *Id*. at 431–32.
[30] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652–58 (1989).
[31] 42 U.S.C. § 2000e *et seq.* (2006).

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> (ii) the complaining party makes the demonstration described in paragraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[32]

For our purposes, the most important lessons we should learn from this history are: first, Congress considered the disparate impact cause of action so important that it chose to amend the statute to overrule the Supreme Court's narrow interpretation of the disparate impact cause of action; second, when Congress amended the statute, it broadened significantly the interpretation of the disparate impact provision and restored the job relatedness and business necessity as affirmative defenses to be proved by the defendant; third, Congress codified case law before *Wards Cove* that permitted the plaintiffs to win even if the employer proved job relatedness and business necessity of the practice in question if the plaintiff could prove that an alternative policy was available to the employer that would have a less discriminatory effect.

To what extent is *Ricci* untrue to this Congressional intent and purpose in passing the Civil Rights Act of 1991? As noted above, *Ricci* appears to see disparate impact as a less important form of discrimination, one that should yield to disparate treatment. This conclusion quietly contradicts the Congressional purpose in amending the Act to assure the important place of disparate impact in the statutory scheme. Second, the Court concludes as a matter of law that there is no strong basis in evidence that the test the firefighters took in *Ricci* was not business related or consistent with business necessity or that there were any viable alternatives.

But, the Court's conclusions occur in an unusual procedural setting that deprived the City an opportunity to take discovery and present a full defense. The Court, in essence, overstepped the bounds of its power by granting judgment to the plaintiffs without remanding to permit the defendant to prove its case or for a jury to hear the case.

2. *The Procedural Posture in* Ricci

To understand the harm in *Ricci*, we must consider the procedural posture of the case. It is particularly complicated and few have paid close attention notwithstanding the high profile of the case in general. First, the case was decided below on motions for summary judgment. The federal district court granted summary judgment to the defendant City in response to the parties' cross motions for summary judgment. It concluded that throwing out a test based on its disparate impact on minority firefighters did not prove animus or intent to discriminate. On appeal, the Second Circuit panel affirmed. The Second Circuit then refused to hear the case *en banc*.

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[32] *Id.* § 2000e-2(k)(1)(A). Paragraph (C) states: "The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" *Id.* § 2000e-2(k)(1)(C).

On review, the United States Supreme Court not only established a new test but also granted summary judgment to the plaintiffs. Ordinarily, when the Supreme Court announces a new evidentiary standard, it remands the case to the lower court to consider the evidence. It would have been appropriate in this case to permit the parties to develop the evidence through discovery because the Court had announced a new applicable standard. Instead, the Supreme Court moved forward even though there was no trial below and no fact finding by the lower court that the Supreme Court could rely upon. The Supreme Court then placed the defendant City in the position of proving that it met a standard for which it had never had the opportunity to develop the evidence or to prove that it met the standard in the lower court below. Further, the Court in essence required the City to make out the case of its own culpability—the case that potential minority plaintiffs would have made in a hypothetical disparate impact suit against the City if it had used the test results.

Let's clarify this point. Under the 1991 Act, the plaintiffs must prove that the defendant's neutral employment policy created a disparate impact on a protected group. Once that burden is met, the burden of persuasion shifts to the defendant to prove its affirmative defense that the policy—here, the test—was job-related and consistent with business necessity by a preponderance of the evidence.[33] Once the defendant meets that burden, the burden shifts again to the plaintiffs to prove that alternative less discriminatory selection criteria exist that the defendant refused to adopt.[34] If the defendant does not meet its burden of proof on its affirmative defense, or if the plaintiff can prove less discriminatory alternatives exist, the plaintiffs—members of the protected class who bring the suit alleging disparate impact—will prevail.

In this case, the Court tossed these ordinary procedural rules upside down. There was no dispute that the test created a disparate impact on blacks and Hispanics, but that was not sufficient for the Court. In an ordinary case, where the plaintiffs are those suffering from the disparate impact, at this point, the burden of proof would shift to the defendant to prove job relatedness and business necessity. Here, however, the Court placed the defendants in the position of proving the existence of strong evidence that the test was *not* job related and *not* consistent with business necessity. Because the City was, in essence, standing in for the minority test takers, the Court also required it to prove that there was strong evidence that an equally valid alternative existed that the City had not adopted. Remember that in this case there had never been a trial so the evidence had not been developed before it reached the Supreme Court. Based on the evidence in the record, the Supreme Court granted judgment to the plaintiffs. This ruling, then, determines that as a matter of law there was insufficient evidence from which a reasonable fact finder could have concluded that: 1) there was strong evidence that the test was not job related and consistent with business necessity; and 2) there was strong evidence that alternative less discriminatory testing mechanisms existed.

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[33] *Id.* § 2000e(m); *Id.* § 2000e-2(k)(1)(A)(i).

[34] *Id.* § 2000e-2(k)(1)(A).

3. Disputing the Evidence on Job Relatedness and Business Necessity

Remember that the evidence considered here was testimony before the Civil Service Board, offered by the defendant to prove its good faith and lack of discriminatory animus when it threw out the test. It had not been prepared to respond to the Court's newly adopted standard. Nonetheless, there was significant evidence that the test was not job related or consistent with business necessity. Although some white firefighters, including Frank Ricci, testified that the test was fair and job related, other firefighters testified that some of the questions tested for knowledge that was not relevant to firefighting in New Haven.[35] A number of firefighters complained about several questions that were obviously taken from exams for other cities whose practices differed from those in New Haven.[36] This failure was exacerbated by IOS's use, at the City's suggestion, of reviewers before administering the test who were not from New Haven and who were not familiar with New Haven Fire Department practices.[37] There was also testimony that the materials were available more readily and earlier to the white firefighters because of their extensive connections to family and friends.[38]

The CSB also heard from the representative from IOS, who explained the care the company took to assure a fair test, and from Christopher Hornick, a testing consultant, who criticized the test.[39] Hornick expressed surprise at the disparity in the scores between the whites and the minority candidates and stated that the statistical disparity might have resulted from the collective bargaining agreement's 60/40 percent weighting of written and oral examinations.[40] He also posited that the differential may have resulted from the City's failure to review the test for relevancy before it was administered and that "there [were] more appropriate ways to assess [a person's] ability to serve as a captain or lieutenant."[41] Another witness, "Vincent Lewis, a fire program specialist from the Department of Homeland Security," testified that he believed the candidates should know the materials and that "the questions were relevant."[42]

Moreover, evidence suggested that it was not the test alone that created the problematic results. Because of an old provision in a collective bargaining agreement (negotiated between the City and the predominately white union), the City had required IOS to create a written test that would count for 60 percent and an oral exam that would count for 40 percent of the total. IOS never considered altering this ratio, even though a representative of the black firefighters' professional association testified that there was something wrong with the test, and advised the CSB to look at nearby Bridgeport, Connecticut's

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[35] Ricci v. DeStefano, 554 F. Supp. 2d 142, 146 (D. Conn. 2006), *aff'd per curiam* 530 F.3d 87 (2d. Cir. 200), *rev'd* 129 S. Ct. 2658 (2009).

[36] *Id*.

[37] *Id*. at 147.

[38] *Ricci*, 129 S.Ct. at 2693 (Ginsburg, J., dissenting).

[39] *Ricci,* 554 F. Supp. 2d at 147–49.

[40] *Ricci,* 129 S. Ct. at 2668.

[41] *Id.* at 2670 (internal quotation marks omitted).

[42] *Id.* at 2669 (internal quotation marks omitted).

criteria for promotions.[43] Evidence suggested that Bridgeport, a neighboring community, had achieved diversity throughout its ranks by weighing the oral portions of the promotional exams more heavily.

Testimony also suggested that the City's required treatment of the results might be partially at fault for the results. The City Charter's "Rule of Three" required that for each open position, the City consider the top three candidates. That meant only the top ten candidates for the lieutenant's position would be considered for eight open jobs; only the top nine candidates for the captain's position would be considered for seven openings in the captain's jobs. Thus, even though a number of black and Hispanic firefighters passed the tests, they would not receive consideration for the open positions because their test scores did not rank them among the very top. Some jurisdictions use "banding" rather than hiring from a list in which scores within a range are considered equal for purposes of consideration. This practice may have permitted the consideration of some of the black or Hispanic firefighters who passed the test. Janet Helms, an expert in how race and culture influence test performance, testified that, regardless of the type of written test administered, members of under-represented groups will fare worse than whites.[44]

4. Considering Less Discriminatory Alternatives

Even assuming the test was job related and consistent with business necessity as a matter of law, much of the testimony in the subsection above would also be relevant to the proof of less discriminatory alternatives. The evidence suggested, for example, that differential weighting of the oral and written tests might have a less discriminatory effect. Use of "banding" rather than a list with a "rule of three" would also be a valid less discriminatory alternative. Finally, there was testimony that, rather than pen and paper tests, other departments used "assessment centers" to assess command presence, and that use of these centers eliminated the disparate results sometimes obtained from written exams while simultaneously assessing more accurately how the firefighter would perform in the actual job itself.

5. Ricci*: What Result Should Have Obtained?*

Certainly, especially given that the Supreme Court had established a new standard and there had never been a trial, this evidence should have been sufficient for a remand with an opportunity for adequate discovery on the issues in question. This evidence, presented by the defendant, appears to create at least genuine issues of material fact on the question of whether a strong basis in evidence exists as to whether the test was job related and consistent with business necessity and whether a less discriminatory alternative existed.

The Supreme Court's conclusion that as a matter of law the defendant's proof was insufficient appears to create a very high standard for determining whether an employer can defend its decision to throw out the results of a promotional test. This opinion will therefore create incentives for employers to use tests that have disparate results because of the difficulty of defending a decision

[43] *Ricci,* 554 F. Supp. 2d at 146.
[44] *Ricci*, 129 S. Ct. at 2669.

not to use the test. While it may also create an interest in employers to get it right before administering the testing mechanisms, it appears to raise the bar for plaintiffs in future disparate impact cases, and may therefore discourage employers from attempting to assure that its testing mechanisms do not have a disparate impact on minorities. It will likely be much more difficult for minority plaintiffs to prove disparate impact cases in the future. Thus, *Ricci* tips the balance toward white, non-minority plaintiffs who have not suffered from structural discrimination, a type of discrimination that is better remedied by disparate impact than disparate treatment claims.[45]

Ricci thus qualifies easily for a list of "worst" Supreme Court decisions. But nonetheless, a more generous reading of the Supreme Court's decision, one that rehabilitates it to a degree, may be in order.

B. Saved by the Second Circuit? Interpreting Ricci *for Reasonable Results in a Disparate Impact Case*

In *U.S. v. Brennan*,[46] the Second Circuit interpreted "strong basis in evidence" to include evidence of: 1) a prima facie case of disparate impact or a strong basis in evidence of a disparate impact; and 2) a strong basis in evidence either that the employment test was neither job related nor business necessity or that there was an equally valid, less discriminatory alternative that the employer refused to adopt.[47] A strong basis in evidence, according to the Second Circuit, requires more than speculation or a few strands of evidence but less than a preponderance of evidence required for liability.[48] It is an objective test that is measured at the time the public entity made its race- or gender-conscious decision.[49] The court stated:

> We think *Ricci* suggests that a strong basis in evidence is a balanced standard that falls somewhere in the middle between these upper and lower extremes. In borrowing the strong-basis-in-evidence standard from a line of Equal Protection cases, the *Ricci* Court stated that those cases 'recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other.' Balancing those two goals requires 'evidentiary support for the conclusion that remedial action is warranted . . . .'[50]

The Second Circuit continues to explain that a strong basis in the evidence is not the same standard as used to assess a claim under the Equal Protection Clause. Title VII, the court notes, unlike the Equal Protection Clause, "has repeatedly been construed so as not to undermine employers' ability to undertake 'voluntary compliance,' which is 'the preferred means of achieving objectives of Title VII.'"[51] Thus, according to *Brennan*, in Title VII cases the defendant need not prove its own violation in order to prevail.

The Second Circuit also interpreted another requirement imposed by *Ricci*: that the employer prove that race conscious action is *necessary* to avoid

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[45] *See* Harris & West-Faulcon, *supra* note 2, at 83–85.
[46] United States v. Brennan, 650 F.3d 65 (2d Cir. 2011).
[47] *Id*. at 109.
[48] *Id*. at 109–10.
[49] *Id*.
[50] *Id*. at 112–13 (citation omitted).
[51] *Id*. at 113.

liability.[52] According to the Second Circuit, this proof is also established by demonstrating a strong basis in the evidence that race conscious action was necessary to avoid litigation and the employer's exposure to liability. In sum, the employer's good faith belief is not sufficient proof in order for the defendant to avoid liability, and the employer needs to prove objectively that its race conscious action was justified in order to defeat a "reverse-discrimination" claim. Nonetheless, the employer need not prove an actual violation of Title VII in order to show a strong basis in the evidence that it was necessary to use the race conscious remedy.[53]

The Second Circuit's interpretation should help guide employers who attempt to protect themselves from both disparate treatment and disparate impact litigation. It creates a balance between the requirements of disparate treatment and disparate impact, a balance that employers should consider in determining whether to discard results of promotional tests or other sorting mechanisms in the workplace. Of course, the Court in *Ricci* seemed to say that the timing matters. Employers who are at the front end of the process—who are creating promotional tests, for example—still seem to be permitted to consider race or gender in creating the tests.[54] But an unfortunate employer who is faced with disparate results of a promotional test need not despair. *Ricci* and *Brennan*, when considered together, should encourage the employer who is in this position to collect evidence carefully before making a decision to throw out the test results. If the employer can find significant evidence to support the position that the test is not job related and consistent with business necessity or that there are good alternatives to the test given, that employer may still disregard the test results. It is far safer, however, for the employer to anticipate the potential problems before administering the test and not to announce or administer the test if there may be problems with it.

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[52] *Id*. at 114.

[53] *Id*.

[54] Reva Siegel, for example, argues that Justice Kennedy, the fifth vote for the majority and the author of the opinion, joined the majority not out of allegiance to a colorblind approach but because of a more moderate fear of public balkanization that would result from upholding the lower courts' orders. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1332–48 (2011). This argument makes sense, in light of decisions by other moderates on the Court with reference to the cases decided under the Equal Protection Clause. Thus, Justices Powell's, O'Connor's, and Kennedy's jurisprudential leanings may be explained more accurately by considering the antibalkanization principle. For Title VII interpretation, to the extent antibalkanization is the underlying theory of the moderate justices in a case like *Ricci*, we can attribute *Ricci*'s focus on the stage in the proceedings—throwing out the test after the results are in—as key to its decision. The opinion has strong language focusing on the expectations of the firefighters who studied hard for and passed the test. Thus, at least the moderate wing of the Supreme Court—i.e., Justice Kennedy—might not concern himself with a race conscious approach to creating the tests in advance in order to avoid a disparate impact that harms black and Hispanic firefighters. Until a fifth conservative justice is appointed to the Supreme Court, then, lower courts should seriously consider the position of the moderate justices and should be careful in asserting the colorblind approach.

C. Disparate Treatment—Does it Benefit from Ricci*?*

In Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, Michael Zimmer acknowledges damage done to disparate impact theory but sees a potential silver lining in easing of Title VII requirements to prove disparate treatment.[55] He explains that before *Ricci* mere consideration of a person's race or gender was insufficient to constitute race or sex discrimination. The employer must have a purpose to discriminate because of an individual's membership in the protected class. Now, Zimmer argues, consideration alone of the individual's race or membership in a protected group is sufficient to trigger liability under the disparate treatment theory of discrimination.

While I acknowledge that Zimmer might be right, I am skeptical that lower courts will read *Ricci* as permitting a lesser showing in intentional discrimination cases, especially those cases brought by women and minorities. This conclusion is bolstered by the Court's most recent employment discrimination case, *Wal-Mart Stores, Inc. v. Dukes*,[56] in which the five member majority expressed skepticism at the importance and use of "social frameworks theory" which explains why supervisors' subjective decision making can be infused with bias.[57]

Although the issue before the Court in *Dukes* was the propriety of a class certification under Federal Rule of Civil Procedure 23(b)(2) where the plaintiffs had demanded backpay, the majority in *Dukes* reached out to question the underlying theory of discrimination that Wal-Mart was responsible for the discriminatory results of subjective decision making of its supervisors when promoting in-store managers or giving pay raises. In *Dukes* the differential between men and women was substantial: women constituted 70 percent of the hourly jobs but only 33 percent of management and women were paid less than men in every region; the salary gaps between men and women widened over time even when they were performing the same job.[58] While the more liberal justices suggested during oral argument that this difference may be sufficient to hold an employer liable for discriminatory intent, the justices in the majority found this evidence unconvincing.[59] Instead, the majority opinion clung to the importance of the retailer's formal written policy against sex discrimination. Without an overall policy of discrimination or significant evidence of common treatment, the Court refused to allow the plaintiffs to develop their case.

Both *Ricci* and *Dukes* thus advocate an approach that heightens the importance of formal policies and direct evidence of explicit conscious discrimination. I am more concerned about the viability after *Ricci* and *Dukes* of implicit bias as constituting intentional discrimination in a systemic disparate treatment case or its use in a disparate impact case where the neutral practice is subjective decision making. The failure to recognize implicit bias and unconscious dis-

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[55] Michael J. Zimmer, Ricci's *"Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?,* 2010 BYU L. REV. 1257, 1307 (2010).
[56] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 (2011).
[57] *Id.* at 2553–55.
[58] *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).
[59] Transcript of Oral Argument. at 6–7, 10–13, 29–31, 36, 40, 42, Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277).

crimination in a world where the face of discrimination is changing is troublesome, and it, too, makes it more difficult for those originally intended as the beneficiaries of Title VII. Because of a fear of litigation and liability and society's aversion to racism and to a lesser extent, sexism, there is less overt evidence of discrimination against women and persons of color. But, the statistics and anecdotal evidence in *Dukes* make clear that everything is not alright. We have not overcome racial or sex discrimination in employment.

III. Conclusion

In concluding that the defendants violated the statute's ban on disparate treatment, *Ricci* emphasizes an ahistorical view of discrimination. It views the only wrong as the defendants' overt and conscious use of race to overturn the test results. It ignores, however, the defendants' reason for doing so and the history of racial discrimination in the country that has led to practices and structures causing a disparate impact on persons of color. At the same time, the Court narrowed the definition of disparate impact. It concluded that as a matter of law the defendant did not have a strong basis in evidence to support its failure to use the concededly disparate results from a promotional test. This conclusion occurred in response to a new standard for which the defendants had not prepared. All of the evidence presented by the defendant, at a minimum, seems to point to questions of fact for jury determination.[60]

The Court's emphasis on overt discrimination in disparate treatment cases and its failure to take seriously the disparate impact of the test and the possibility of less discriminatory alternatives make it significantly easier for whites than racial minorities to bring race discrimination cases.[61] This is because racial minorities have historically been harmed by structural discrimination that is better addressed by disparate impact cases.

Because many of the structures challenged were designed with white men in mind, they tend to favor whites, even if the benefit may not be intentional. A limitation on disparate impact cases will, therefore, harm persons of color. Where a race-conscious remedy is considered intentional discrimination as it was in *Ricci*, white men are benefitted, and persons of color lose. This result fosters a narrow definition of discrimination that embodies overt conscious acts, a definition that ignores the most recent social science research demonstrating the prevalence of subconsciously held negative attitudes by whites towards members of racial minorities. Besides minorities, women of all races will also lose from a redefinition of discrimination that disregards historical discrimination and that ignores implicit bias in favor of men.

But there may be some hope for employers who are trying to assure diversity in all ranks of their workplaces. Employers need carefully to consider all

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[60] Justice Alito, joined by Justices Scalia and Thomas, gives a different reading of the facts in the record. He cites to evidence that the City's motivation was not to avoid disparate impact litigation but merely to discriminate on the basis of race. *See* Ricci v. DeStafano, 129 S.Ct. 2658, 2683–89 (Alito, J., concurring). This evidence, however, appears to point to the necessity of a trial because there appear to be genuine issues of material fact concerning the motivation of the City.

[61] *See* Harris &West-Faulcon, *supra* note 2, at 83.

the evidence before they put into place promotional tests and other employment criteria. If they are surprised by a disparate impact resulting from a test or other neutral policy, they need to gather significant evidence of the impact and of possible alternatives to the test or policy so they can make out the strong basis in evidence defense. Employers should also become aware of the structures and systems that encourage subjective decision making that may result in unconscious bias or prejudice and attempt to overcome these systems and practices. *Ricci* definitely makes this effort more difficult, but perhaps not impossible.