Ricci's "Color Blind" Standard in a Race-Conscious Society: A Case of Unintended Consequences?

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In *Ricci v. DeStefano*, the Supreme Court, in an opinion by Justice Kennedy, ruled as a matter of law that the City of New Haven had committed intentional disparate treatment discrimination. The City had violated Title VII by deciding not to use the results of a test given to promote firefighters to openings as lieutenants and captains. Plaintiffs were 17 whites and one Hispanic who would have been promoted if the test results were used. The City defended its decision by asserting that it acted to avoid Title VII disparate impact liability to African-American and Hispanic testtakers who would not be promoted if the test scores were used. Because the Court found a conflict between disparate treatment law and disparate impact law – a conflict that had not previously existed — it created a defense to a disparate treatment claim based on disparate impact law. To rely on the potential disparate impact liability as a defense to disparate treatment liability, the defendant would have to prove that it had a "strong basis in evidence" that it would be liable for disparate impact discrimination.

Despite finding that it faced a prima facie case of disparate impact discrimination, the Court found as a matter of law that the City had failed to prove it had that strong basis in evidence that it would violate the disparate impact provisions of Title VII if it used the test scores for promotions. The decision has already drawn significant and interesting commentary. This article will principally focus on the threshold issue of disparate treatment law, on which the Court spent little attention, rather than on the disparate impact issues on which the Court devoted most of its opinion.

The thesis of this article is that it is possible that a conservative majority of the Supreme Court inadvertently may have created new arguments for civil rights advocates representing women and minority group men, the groups for whose protection antidiscrimination statutes were enacted in the first instance. The palpable empathy the majority felt for the *Ricci* plaintiffs may have caused a majority of the Court to leap to a finding of discrimination as a matter of law, thereby transforming disparate treatment law to now make it easier for all plaintiffs to prove their cases. In short, the Court appears to have established essentially a "color-blind" standard of disparate treatment liability for Title VII. A "color-blind" standard requires that an employer not know the racial consequences of the employment actions it takes. The violation of the "color-blind" standard leads to disparate treatment liability if the plaintiff proves that (1) the defendant knew the racial consequences of its decision and (2) it then made that decision in light of that knowledge, thus making the decision "because of race" and (3) the plaintiff suffered

the effect of an adverse employment action. The Court accepted that the City's motivation for its action was to avoid disparate impact liability to minority group testtakers. In other words, the City decided not to use the test scores was "because of" the effect their use would have on African-American and Hispanic testtakers. The fact that the City was assumed to have acted benevolently as to some of the members of all three racial groups affected -- or at least members of the two minority groups affected -- was irrelevant to liability to a different group, the *Ricci* plaintiffs. The defendant was liable to these plaintiffs who were adversely affected by the decision even though the decision was made in spite of their race, not because of it.