Supreme Court Rules for White Firefighters on Job-Test Case

A narrow majority of the Supreme Court ruled on Monday, June 29, that New Haven, Connecticut, could not justify throwing out the results of employment tests that would have promoted only white firefighters to the rank of lieutenant or captain.

The 5-4 majority said that the city had to show a “strong basis in evidence” that the exams were not job related or that another, less discriminatory test existed.

The decision is sure to have an impact on the private sector, where employment tests are increasingly popular. Experts are urging companies to be careful when using them in the wake of the Supreme Court’s ruling.

After administering the promotion tests in November and December of 2003, the city decided not to certify the results because of concerns that it was not fair to African-American candidates and could leave the city open to a lawsuit.

Based on the tests, all the top 10 candidates for lieutenant were white and seven of the top nine for captain were white, along with two Hispanics.

The white firefighters, led by Frank Ricci, sued New Haven, arguing that they were unfairly denied promotions. A district court granted summary judgment in favor of New Haven, and the ruling was upheld by the 2nd Circuit Court of Appeals, where Supreme Court nominee Judge Sonia Sotomayor participated in the decision.

The Supreme Court majority overruled the 2nd Circuit, holding that New Haven effectively discriminated against the white firefighters in order to prevent discrimination against the African- American applicants. The former, “disparate treatment,” and the latter, “disparate impact,” are both prohibited by federal discrimination laws.

But the court ruled that in order to protect minorities against disparate impact, the city had to demonstrate that there was something wrong with the test, which it failed to do.

“[T]here 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 and less discriminatory tests were available to the city,” wrote Justice Anthony Kennedy for the majority that included Chief Justice John Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel Alito Jr.

“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,” Kennedy wrote.

In a dissent, Justice Ruth Bader Ginsburg said that the majority ignored evidence of flaws in the New Haven tests.

Ginsburg also noted that the court’s decision would prevent New Haven from achieving a

diverse workforce. Despite having a population that is nearly 60 percent African-American and Hispanic, the city “must today be served … by a fire department in which members of racial and ethnic minorities are rarely seen.”

Writing for Justices David Souter, John Paul Stevens and Stephen Breyer, Ginsburg argued that an employer that scotches a test that disadvantages a minority group does not commit disparate treatment. In fact, the employer could only use such a test if it is a “business necessity.”

The majority’s position will make it harder for companies to stay within discrimination laws, according to Ginsburg.

“The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture,” Ginsburg wrote.

Employment lawyers cautioned companies to proceed warily now that the Supreme Court has made it more likely that they must live with the results rather than change the test.

“Undertaking employment tests should be well thought out before [they] are utilized,” said Linda Cavanna-Wilk, of counsel to Ford & Harrison in New York. “The decision significantly increases the legal risk associated with the use of selection devices or employment tests. An employer’s back is somewhat against the wall.”

Companies must be prepared to show that exams are relevant in the hiring process.

“Employers really need to be careful to the way they design these tests to ensure that the questions in fact relate to the duties of the position,” said Peter Mina, an associate at Tully Rinckey in Washington.

In a pre-emptive strike against opponents of Sotomayor, Sen. Charles Schumer, D-New York and a member of the Senate Judiciary Committee, downplayed the fact that her position on the case was overturned by colleagues she may soon join if the Senate confirms her to replace the retiring Souter.

The Supreme Court majority “merely chose to look at the record in a different way,” Schumer said.