

## Reverse Discrimination Quashed

By Anne Freedman  
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Reverse-discrimination suits may increase, but diversity initiatives should not be greatly affected by the Supreme Court's decision to rule in favor of white firefighters who lost their chance for promotions after the city of New Haven, Conn., threw out the results. HR leaders must make sure that objective business-related criteria are used for job selection and promotion.

HR leaders will not find a great deal of insight in the 5-4 decision by the U.S. Supreme Court that found that city officials in New Haven, Conn., violated Title VII of the Civil Rights Act of 1964 by discarding a promotion test after only white and Hispanic firefighters did well on it.

"Fear of litigation alone cannot justify the city's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions," writes Justice Anthony Kennedy on June 29, who was joined by Chief Justice John Roberts and Justices Clarence Thomas, Antonin Scalia, and Samuel Alito, the latter two of whom filed individual concurring opinions.

The dissenting opinion in *Ricci vs. DeStefano*, written by Justice Ruth Bader Ginsberg, was joined by Justices John Paul Stevens, David Souter and Stephen Breyer.

City officials, she writes, "were no doubt conscious of race during their decisionmaking process ... but this did not mean they had engaged in racially disparate treatment."

Minorities had been "pervasively discriminated against," and it "took decades of persistent effort, advanced by Title VII litigation, to open firefighting posts to members of racial minorities," she writes.

The city threw out its promotion test to fill vacant lieutenant and captain positions when white firefighters "outperformed minority candidates," according to the majority opinion. The "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, alleging discrimination based on race. Lower courts had dismissed the case.

The city was between a rock and a hard place, says John Myers, chairman of the labor and employment law department and a partner at Eckert Seamans Cherin and Mellott in the firm's Pittsburgh, Pa., office.

"I think most people had always thought, as did the defendants in this case, that so long as there was a good faith belief that you were correcting a manifest imbalance in an act, in a test result, for example, that it was OK to do that, but it's not," Myers says.

"If you have a valid test, you don't change the result after the fact, even if that result produces a disparate impact" on minority employees, he says.

While promotion tests are more common in municipalities for fire and police departments, similar situations could occur when HR leaders review criteria for mass layoffs or reductions in force, he says.

More significant, says Brian LaFratta, an associate in the Chicago office of Fisher and Phillips, a national labor and employment-law firm, is that employers may think about the threat of employee litigation differently because of the decision.

"What this decision seems to be doing, on one part, is saying that an employer can't use the threat of litigation as a basis for discriminating against other employees," LaFratta says. "I think that portion of the case will have a big impact on employers."

He says the decision "may embolden white employees to file more lawsuits" if they question their company's hiring or promotion decisions. "Now, [employers] are in a position where they will get sued by both [white and minority] groups."

Peter E. Mina, an employment-law associate with Tully Rinckey in Washington, advises employers to be even more careful to validate the objectivity of all employee-screening tools and tests "because they don't want to risk disparate-impact suits on either side."

The decision places more of the burden of proof on the "entity seeking to impose this discriminatory act [by] invalidating the test," he says. "That burden is now fairly high in terms of what an agency or an employer would have to show to do something like the city of New Haven did in invalidating these tests."

The NAACP Legal Defense and Educational Fund agrees the decision "imposes new burdens on employers and makes it more difficult to maintain a discrimination-free workplace," says John Payton, LDF president and director counsel.

The organization issued a statement saying it was "disappointed that five justices departed from well-established precedents that were properly applied by the courts below."

The decision should not lead employers to stop diversity initiatives, says Katharine Parker, co-chair of the employment-law counseling group and the government relations and contract compliance practice for Proskauer Rose in New York, "but [they] should ensure that their selection criteria are job related and consistent with business necessity."

"The majority decision suggests that diversity initiatives that are taken to ensure that all applicants and employees have an equal opportunity for promotion are acceptable and should be continued," Parker says.

Janet Crenshaw Smith, co-founder and president of the Ivy Planning Group, a diversity consultancy in Rockville, Md., agrees.

"We really need to understand those things that are really related to success," she says. "We need to measure those things objectively," noting, however, that organizations "also need to pay attention to the subjective."

HR leaders, she says, need to make sure that company policies and procedures "do no harm."

"The intent should be no discrimination. Racial discrimination, period, is wrong," she says.

Should the High Court's decision be "perceived as we no longer have racial discrimination [occurring] and that we should now move forward because the playing field is level, then it will do harm for diversity initiatives," she says.

Instead, she says, companies "really need to pay attention to how we measure performance to make sure we are measuring true performance." If that occurs, the decision "could actually be helpful for diversity initiatives."

The ruling does not make it easy for employers, Myers says, especially those "who are trying conscientiously, who are trying hard, to avoid unlawful discrimination."

He notes that New Haven "still doesn't know what it's permitted to do if they are faced with this identical situation next year."