

# Employer • Alert

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## **SUPREME COURT ANSWERS CITY'S QUANDARY AND UPHOLDS PROMOTIONAL TEST DESPITE ADVERSE IMPACT**

The City of New Haven was caught in a dilemma. It had hired a consultant to carefully prepare a written and oral exam for promotions within the fire department only to find that when the test results came back, minority candidates were not among those with a reasonable chance of being promoted. There was then an outcry. A vocal group wanted the test results thrown out because the results indicated that minorities were adversely impacted by the testing. Others wanted the test results certified so that those who did well could be promoted. Both groups threatened to sue the City. One group threatened to sue the City claiming that the results established an adverse impact on minority firefighters and therefore violated the Civil Rights laws. <sup>1</sup> Those who had done well on the test threatened to sue claiming that to throw out the test would be discrimination against them because of their race.

After hearings to examine the test and to hear arguments about accepting or rejecting the test results, the City decided to not certify the results of the test and to start the promotional process again.

Seventeen white firefighters and one Hispanic firefighter who had scored well on the test sued, claiming that the City discriminated against them based on race in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment.<sup>2</sup> The City defended its action, asserting that it had a good-faith belief that certifying the examination results would have violated the disparate impact provisions of Title VII.



The plaintiffs attacked the City's position asserting that the City's good-faith belief was not a valid defense to claims of intentional discrimination. The trial court agreed with the City and granted summary judgment. That decision was upheld by the Second Circuit Court of Appeals in a short, unsigned decision finding that the district court had followed previous decisions in finding for the City.

The case then went to the Supreme Court where the Court announced a new approach to reconciling what appears to be a conflict between disparate treatment and disparate impact analyses.

The Court found that the decision to throw out the test was illegal discrimination against the plaintiffs based on race. The Court then looked to see whether there was a valid defense to this unlawful treatment. That review focused on whether the City's reliance upon its desire to avoid disparate impact liability under Title VII constituted a legally sufficient excuse for the intentional discrimination.

The Court found that the fear of litigation, without more, could not justify a race-based decision to discard the exam results. The Court adopted a new standard - a "strong basis in evidence" standard - to determine if the City's actions were justified. Under the new standard, the City must demonstrate a strong basis in evidence that certifying the test results would result in disparate impact discrimination. The threat of being sued is not sufficient. The Court examined whether the promotional test was inadequate, holding that it was not as the test was job-related and consistent with business necessity, and whether there was an alternative test that would have addressed the allegations of adverse impact, which there was not.

The Court's ruling sends a clear message about testing. Employers using any type of job placement or promotional exam must be sure that both the process of developing the test, and the test itself, are fair, neutral, and job-related. If the test meets that standard, but the results still have a disparate impact on a protected group, the test should not be thrown out simply because there is a statistical imbalance and because there is a threat of a lawsuit. To dismiss the results on these bases will expose the employer to a claim of disparate treatment. If the test truly is legally sound, it will provide a valid defense against a disparate impact case.<sup>4</sup>

Additionally, if the test results indicate a disparate impact, the employer may only escape that liability if it can demonstrate that the test is business-related, and there is no available alternative test that will serve the employer's legitimate business needs and have a lesser disparate impact.

In the future, employers must ensure that their tests are valid, that they are business-related, and that there are no alternative tests that would have less of an adverse effect on a protected group. Such precautionary steps will insulate the employer from disparate impact lawsuits and will provide a defense in such claims.

#### QUESTIONS OR ASSISTANCE?

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1The disparate impact protections of Title VII apply when an employer uses a policy or test that appears to be neutral but when it is implemented it has an adverse effect of a protected group of people. The theory was first applied when a company had a requirement that employees had to be high school graduates to be hired for even the most menial of jobs, and that in the area blacks' high school graduation rates were under 20%. The rule essentially barred blacks from obtaining jobs in that company.

2The plaintiffs claimed that the City violated the disparate treatment provision of Title VII and Equal Protection Clause of the 14th Amendment to the Constitution. Disparate treatment requires a finding that someone was been the victim of intentional discrimination.

3While the court was focused on race, the same analysis would apply to other protected classifications - for example - sex, handicap, age, or religion.

4The Court did not address whether the Equal Protection Clause makes the disparate impact approach unconstitutional, but Justice Scalia cautioned that the day will come when that issue will have to be addressed.

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