

LEGAL UPDATES

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Supreme Court Rules in Reverse Bias Case

In 2003, 118 firefighters in New Haven, Connecticut, took an examination to qualify for promotions into lieutenant or captain positions. The examination results showed that white candidates outperformed minority candidates, which created a rancorous public debate in the city of New Haven. Lower-scoring minority firefighters threatened lawsuits, arguing that the results should be discarded because those results showed that the tests were discriminatory. Other firefighters contended the tests were fair and neutral and threatened to bring a discrimination lawsuit if the tests were discarded. New Haven sided with the lower-scoring minority firefighters and discarded the results. As threatened, the firefighters who lost out on promotions filed a reverse discrimination suit, alleging that New Haven discriminated against them based on their race, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The U.S. District Court for the District of Connecticut granted summary judgment to the City of New Haven, and the U.S. Court of Appeals for the Second Circuit affirmed. (Included on the Second Circuit's panel was Judge Sonia Sotomayor, President Obama's choice to replace Justice David Souter on the U.S. Supreme Court.) On June 29, 2009, the U.S. Supreme Court held that New Haven's excuse for discarding the test results -- to avoid disparate-impact liability -- did not satisfy the "strong basis in evidence standard" as set forth in the Court's precedent. In particular, the majority emphasized that certain government actions to remedy actions based on race are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary.

In its opinion, the Court held that statistical disparity alone does not meet the requirement of a strong basis in evidence in order to remedy racial discrimination. The Court found substantial evidence that New Haven could

have avoided disparate-impact liability by demonstrating that the exams at issue were job-related and consistent with business necessity, and the city did not show that less-discriminatory alternatives were available that it refused to adopt. Instead, the Court found that New Haven turned a blind eye toward evidence supporting the exam's validity. In the end, fear of litigation alone was not enough to justify New Haven's reliance on race, to the detriment of those firefighters who passed the examination and qualified for promotions.

What This Means to You

Employers should not rely on statistical disparities alone in analyzing the disparate impact of an exam. Employers must be able to demonstrate their examinations are job-related and consistent with legitimate business requirements. The practical effect of this decision is that employers who use qualifying exams that can be *proven* to be job-related and consistent with business necessity may do so with less legal uncertainty.

Contact Info

If you have any questions about this or any other labor & employment matters, please contact your Husch Blackwell Sanders attorney.

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