

FREQUENTLY ASKED QUESTIONS: The Ricci Case

1. I've heard that the Supreme Court has issued an employment discrimination decision called *Ricci v. DeStefano*? What was the case about?

In *Ricci v. DeStefano*, 129 S. Ct. 2658 (June 29, 2009), the Supreme Court addressed when an employer may take a race-based action in order to correct a potentially discriminatory employment practice. Specifically, *Ricci* addressed whether the City of New Haven, Connecticut discriminated against a group of white firefighters in violation of Title VII of the Civil Rights Act when the City failed to certify and use the results of a test given to employees vying for promotions within the fire department. The City did not use the test results because they had an unintentional adverse impact on minorities and the City believed it would be liable for discrimination against minorities if the promotions were awarded. The City's decision negatively affected the white candidates, who had expected to be promoted but were not.

In its decision, the Supreme Court held that the City's action constituted intentional race-based discrimination that was not justified by a valid defense, in violation of Title VII. The Court found that New Haven's desire to avoid or remedy unintentional adverse impact on minority candidates, without more, was not a sufficient justification for its challenged action. Rather, the Court ruled, to justify such a race-based selection decision, an employer was required to demonstrate "a strong basis in evidence" that its challenged employment action was necessary to prevent unintentional disparate impact against minority candidates. The Court held that the City did not demonstrate that it had a strong basis in evidence that it would have been liable for disparate impact discrimination if it had certified the test results.

2. Does the Supreme Court's decision in the *Ricci* case change how OFCCP will conduct compliance evaluations of contractors' employment practices?

No. The *Ricci* decision does not affect how OFCCP examines the use and impact of selection procedures, such as tests. OFCCP will therefore continue to assess whether a contractor's use of its particular selection procedures complies with the Uniform Guidelines on Employee Selection Procedures (UGESP) at 41 CFR Part 60-3, available on-line at http://www.dol.gov/dol/allcfr/Title_41/Part_60-3/toc.htm.

3. Does the *Ricci* decision change contractors' affirmative action obligations or their obligations regarding the use and validation of tests?

No. *Ricci* does not change a contractor's affirmative action obligations under the mandates enforced by OFCCP. Likewise, a contractor's obligation to comply with

UGESP when using a test as part of its selection process remains the same. If a test has a disparate impact on a particular race, ethnic group or gender, the test must be validated as to the particular job for which it is being used. The contractor must also investigate alternative selection procedures, and must use an alternative procedure if it would result in less adverse impact and would be valid for the job in question.

4. What should contractors do in light of the *Ricci* decision?

To comply with its nondiscrimination obligations, a contractor must examine its tests and other selection procedures to identify whether there are any problem areas in terms of adverse impact on a particular race, ethnic group, or gender, and to prevent prohibited discrimination from occurring. The *Ricci* decision indicates that an employer's failure to conduct an appropriate job analysis, or to validate a test or other selection procedure prior to its implementation, places an employer in a position that may be difficult to defend should the test be found to have an adverse impact after it is used.

On the other hand, contractors that are proactive and subject their tests and selection procedures to validity studies performed in compliance with the technical standards of UGESP prior to implementation will be more likely to avoid problems and successfully defend against any claim of disparate impact. Contractors may also wish to "pre-test" their tests to determine if they would result in adverse impact. The test results would not be made known to candidates or hiring officials, and if adverse impact is revealed, the contractor will have the opportunity to make appropriate adjustments or find a suitable alternative before using the procedure to make actual selections.

5. How will OFCCP address an allegation of discrimination, like that in *Ricci*, based on a company's decision not to use test/selection procedure results because of possible adverse impact?

Although OFCCP might learn of a *Ricci* situation during a compliance review, it is more likely that such an allegation would be raised in the context of a discrimination complaint filed with OFCCP or the EEOC. Under a Memorandum of Understanding regarding complaint processing, OFCCP generally refers individual complaints to the EEOC for investigation and resolution, but retains and processes class complaints. If OFCCP receives a class complaint from applicants or employees who believe that they were discriminated against when a contractor refused to use the results of a selection procedure, OFCCP will investigate the complaint using established complaint procedures. Where the contractor defends its action by asserting that using the selection procedure could result in liability for an unlawful adverse impact based on race, ethnicity, or gender, OFCCP will evaluate whether, as prescribed by *Ricci*, there is a strong basis in evidence for the contractor's claim.