

July 2009**U.S. Supreme Court Issues Two Important
Employment Decisions*****I. Ricci v. DeStefano:
Court Reignites Firefighters' Claims****By Ivan B. Perkins and Anthony J. Amendola*

Title VII of the U.S. Civil Rights Act proscribes both "disparate treatment" and "disparate impact" discrimination. "Disparate treatment" discrimination occurs when an employer consciously treats applicants or employees differently *because* of race, gender, or any other protected characteristic. There are only very narrowly defined defenses to such intentional discrimination. "Disparate impact" discrimination, on the other hand, occurs when an employer's facially neutral conduct disproportionately adversely affects one group (such as African-Americans) more than another group (such as Caucasians). Because such conduct is not intentional, it is not unlawful *if* the employer can establish "business necessity" for its actions and no less discriminatory alternative exists. Although many neutral criteria (such as height, lifting, and educational requirements) may result in disparate impact, most of the litigation in this area has involved written tests. Thus, in order to establish that utilizing a written test for hiring or promotion is justified by "business necessity," an employer must go to great lengths to ensure that the test has been properly validated to assess necessary job skills or to predict success in the job. In *Ricci v. DeStefano*, the Supreme Court was called upon to address the conflict that sometimes arises when an employer makes an intentional race-based decision in order to avoid disparate impact.

At issue in *DeStefano* was an exam used by the City of New Haven, Connecticut, to make promotion decisions in the City's fire department. Based on the facts as recited by the Supreme Court's majority, the City appeared to have done everything right, ensuring that the test was properly developed, validated, and fairly administered. Similarly, the named plaintiffs in the case, Frank Ricci and Benjamin Vargas, also appeared to have done everything right. Ricci bought the available study materials and, because of a learning disability, even paid a neighbor to tape record them. For three months, he studied eight to thirteen hours a day and listened to the tapes while driving. Similarly, Vargas gave up another part-time job and his wife took leave from her own job to care for their three young children so that Vargas could devote himself to studying. Both Ricci and Vargas did well on the exams and therefore qualified for promotion, as did others.

**Q: WHAT IMPACT WILL *RICCI V. DESTEFANO* HAVE ON
EMPLOYMENT LAW?**

A: *RICCI V. DESTEFANO* REINFORCES THE FUNDAMENTAL PRINCIPLE THAT PREVENTING INTENTIONAL DISCRIMINATION IS "THE ORIGINAL, FOUNDATIONAL PROHIBITION OF TITLE VII." AS THE MAJORITY STATED, IF AN EMPLOYER COULD ENGAGE IN DISPARATE TREATMENT BASED ON A "MERE GOOD-FAITH FEAR" OF DISPARATE IMPACT LIABILITY, THAT WOULD "AMOUNT TO A *DE FACTO* QUOTA SYSTEM." THUS, BECAUSE OF THE DIFFICULTIES ASSOCIATED WITH ESTABLISHING A VALID WRITTEN TEST, EMPLOYERS THAT USE THEM MAY FIND THEMSELVES BETWEEN A ROCK AND A HARD PLACE. ONCE A TEST IS ADMINISTERED, AN EMPLOYER WILL BE UNABLE TO JETTISON THE RESULTS TO ACHIEVE DIVERSITY.

**Q: IS *RICCI V. DESTEFANO* THE
END OF VOLUNTARY
AFFIRMATIVE ACTION BY
PRIVATE EMPLOYERS?**

A: FOR MANY YEARS, IN A SERIES OF EQUALLY CONTENTIOUS SPLIT DECISIONS, THE COURT HAS

However, after the test was administered, a political furor erupted because the test resulted in a significantly higher passage rate for whites than for Hispanics and Blacks. The Mayor came out against certifying the results of the test, and the City's General Counsel opined that the results could subject the City to a disparate impact lawsuit. The City's Civil Service Board deadlocked at a vote of 2-2, effectively nullifying the examinations. So Ricci, Vargas, and other high-scoring firefighters brought suit, alleging that the City engaged in unlawful disparate treatment discrimination by disregarding the results on racial grounds. The District Court disagreed, granting summary judgment to the City, holding that the motive to avoid a racially disparate impact does not constitute discriminatory intent as a matter of law. A Second Circuit Court of Appeals panel (including Supreme Court nominee Sonia Sotomayor) summarily affirmed the District Court in a one-paragraph opinion.

The U.S. Supreme Court, siding with the firefighters, reversed. Writing for a 5-4 majority, Justice Anthony Kennedy held that making a race-based employment decision (such as nullifying a test) in order to avoid adverse impact is only justified when an employer can demonstrate a "strong basis in evidence" that disparate impact liability would otherwise result. "All the evidence," Kennedy noted, "demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race - i.e., how minority candidates had performed when compared to white candidates." However, said the Court, there was not a "strong basis in evidence" of liability because the exam was "job-related and consistent with business necessity," and the City had no "equally valid, less-discriminatory alternative." As the majority summarized: "Whatever the City's ultimate aim - however well intentioned or benevolent it might have seemed - the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."

II. Gross v. FBL Financial Services, Inc.: Court Nixes Mixed Motive Under ADEA

By Taylor S. Ball and Suzanne Steinke

In *Gross v. FBL Financial Services, Inc.*, the Supreme Court held that an employee bringing a disparate treatment claim under the U.S. Age Discrimination in Employment Act ("ADEA") must prove, by a preponderance of the evidence, that age was the "but for" cause of the employer's adverse employment action. As a result, an ADEA plaintiff may no longer rely on the shifting burdens analysis applicable to "mixed-motive" cases under Title VII. However, as discussed in ASK MSK (see sidebar), this decision is unlikely to be of much significance to California employers facing age discrimination claims brought under the state's Fair Employment and Housing Act ("FEHA").

In the case, plaintiff Jack Gross alleged that his reassignment and

GENERALLY FROWNED UPON VOLUNTARY AFFIRMATIVE ACTION PROGRAMS THAT FAVOR ONE GROUP WHILE RESULTING IN TANGIBLE HARM TO ANOTHER. *RICCI* IS CONSISTENT WITH THESE CASES, MAKING IT EASIER FOR PLAINTIFFS TO MOUNT SO-CALLED "REVERSE-DISCRIMINATION CASES."

Q: WILL *RICCI V. DESTEFANO* BE THE LAST WORD ON THIS ISSUE?

A: "THE COURT'S ORDER AND OPINION, I ANTICIPATE, WILL NOT HAVE STAYING POWER," WROTE JUSTICE RUTH BADER GINSBURG IN DISSENT. SHE MAY BE RIGHT. FIRST, PRESIDENT OBAMA MAY ULTIMATELY REPLACE ONE OR MORE OF THE FIVE PREVAILING JUSTICES. SECOND, JUST AS CONGRESS OVERTURNED THE SUPREME COURT'S 2007 *LEDBETTER V. GOODYEAR TIRE COMPANY* RULING ON PAYCHECK DISCRIMINATION, IT MAY WELL DECIDE TO LEGISLATIVELY REVERSE *RICCI*.

the transfer of some of his job duties to another employee in the course of a corporate restructuring violated the ADEA. Gross had no direct evidence of age discrimination, relying instead on circumstantial evidence to support his claim that his reassignment was based, at least in part, on his age. At the close of trial, the court instructed the jury based on the burden shifting analysis applied in "mixed-motive" discrimination cases under Title VII. In mixed-motive cases, an employee need only show that his or her protected characteristic, be it race, sex, national origin, etc., was "**a** motivating factor" (rather than **the** motivating factor) in the employer's decision, even if other legitimate factors also played a role. The burden then shifts to the employer to show that it would have taken the same action regardless of the protected characteristic. If the employer can meet this burden, the remedies available to the plaintiff may be limited. After the jury returned a verdict for Gross, the employer appealed.

The Supreme Court concluded that, unlike Title VII, the ADEA does not authorize shifting the burden of persuasion to the party defending an alleged mixed-motive discrimination claim. The Court held that the only way an employee bringing a disparate treatment claim may succeed under the ADEA is to prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action - meaning that but-for the claimant's age, the decision would not have been made. Thus, under the ADEA, the burden of persuasion never shifts to the employer to show that it would have taken the same action regardless of age.

The Supreme Court largely based its decision on textual differences between the ADEA and Title VII. Although both are designed to protect employees against discrimination "because of" a protected characteristic, the ADEA and Title VII differ in one key respect. Title VII was amended to expressly allow burden-shifting in a mixed-motive case. The ADEA, however, is devoid of such language, as Congress did not similarly amend that statute. As a result of this difference, the Court relied on the ordinary meaning of the statute's prohibition against taking adverse action "because of" age to conclude that the employee must prove that age was the "but-for" reason the employer acted.

By refusing to apply the burden-shifting framework for mixed-motive disparate treatment claims to the ADEA, the Court ensures that an employee, in order to prevail, must prove that age was the "but-for" reason for the employer's action. This may prove too high of a burden for some employees and thereby increase employers' chances for succeeding on motions for summary judgment and at trial.

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Q: WILL GROSS V. FBL FINANCIAL SERVICES, INC., APPLY TO CLAIMS BROUGHT UNDER THE FEHA?

A: ALTHOUGH CALIFORNIA COURTS SOMETIMES LOOK TO FEDERAL PRECEDENT WHEN APPLYING THE STATE'S FEHA, IT IS UNLIKELY THAT THIS DECISION WILL HAVE ANY IMPACT ON AGE CLAIMS BROUGHT UNDER CALIFORNIA LAW. UNLIKE FEDERAL LAW, WHICH HAS A SEPARATE ANTI-DISCRIMINATION STATUTE FOR AGE, CALIFORNIA'S FEHA PROHIBITS DISCRIMINATION "BECAUSE OF" NUMEROUS CHARACTERISTICS, INCLUDING AGE, RACE, GENDER, NATIONAL ORIGIN, ETC. CURRENT CASE LAW INTERPRETING THE FEHA PROVIDES THAT AN EMPLOYEE MAY PROVE A DISPARATE TREATMENT CLAIM BASED ON AGE OR OTHER PROTECTED STATUS BY SHOWING THAT IT WAS "**A** MOTIVATING REASON" BEHIND THE CHALLENGED ACTION. IN OTHER WORDS, UNDER THE FEHA, AN EMPLOYEE NEED NOT PROVE THAT HIS OR HER PROTECTED CHARACTERISTIC WAS THE SOLE MOTIVATION, BUT RATHER THAT THERE EXISTS A CAUSAL CONNECTION BETWEEN THE EMPLOYEE'S PROTECTED STATUS AND THE ADVERSE EMPLOYMENT ACTION, EVEN THOUGH OTHER REASONS ALSO MAY HAVE CONTRIBUTED TO THE DECISION.

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**Q: WILL GROSS V. FBL
FINANCIAL SERVICES, INC., BE
THE LAST WORD ON THIS
ISSUE?**

A: BOTH SUPPORT FOR AND
CRITICISM OF THE COURT'S
DECISION HAS BEEN SWIFT,
AND THE DECISION WILL
LIKELY FACE CHALLENGES IN
CONGRESS. SENATOR
PATRICK LEAHY ALREADY HAS
ISSUED A STATEMENT
CRITICIZING THE DECISION
AND COMPARING IT TO THE
COURT'S 2007 DECISION IN
LEDBETTER. THAT DECISION,
WHICH INTERPRETED THE
EQUAL PAY ACT, WAS
EFFECTIVELY OVERTURNED
BY THE LILLY LEDBETTER FAIR
PAY ACT OF 2009 ("FAIR PAY
ACT"), THE FIRST LAW SIGNED
BY PRESIDENT OBAMA AFTER
TAKING OFFICE.

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