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## Bias Case Remanded in Light of High Court's Reverse Discrimination Ruling

Mark Hamblett

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The U.S. Court of Appeals for the Second Circuit yesterday applied a major U.S. Supreme Court case on reverse discrimination to a long-running dispute over the hiring of custodians and custodial engineers who oversee 1,200 schools in New York City.

Analyzing challenges to a consent decree that provided permanent appointments and retroactive seniority to dozens of black, Hispanic, Asian or female individuals, the Second Circuit remanded the case of *United States v. New York City Department of Education*, lead number 08-5171-cv, to Eastern District Judge Frederic Block.

Judge Block did not have the benefit of the 2009 U.S. Supreme Court ruling in *Ricci v. DeStefano*, 129 S. Ct. 2658, when he upheld the city's voluntary 1999 settlement with the federal government, according to Judges Guido Calabresi, Reena Raggi and, sitting by designation, Judge Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit.

*Ricci*, which challenged disparate treatment under Title VII §703(a) was brought by white New Haven, Conn., firefighters who claimed they were discriminated against by that city's decision to throw out the results of promotional tests in which black and Hispanic firefighters scored lower than white firefighters.

New Haven rejected the results because they created a statistical racial disparity and the city feared minorities would bring a disparate impact suit, an action the *Ricci* Court held made out a prima facie case of disparate treatment for the white plaintiffs.

The *Ricci* Court found that New Haven "rejected the test results solely because the higher scoring candidates were white" so the burden shifted to New Haven to show whether it could provide a legitimate justification for the adverse employment action. The Court found that it had not.

The custodians case before Judge Block was launched by the federal government in 1996 at a time when 99 percent of custodians or custodial engineers, who supervise school handymen and cleaners, were men and 92 percent were white. The government claimed three exams administered to either custodians or custodial engineers had a disparate impact on blacks and Hispanics, and alleged that the city' recruiting practices had a disparate impact on blacks, Hispanics, Asians and women.

The U.S. government and New York City defendants entered into a settlement that was approved by a magistrate judge in 1999 and the city began implementation. Fifty-nine "offerees" who accepted the settlement were given permanent status, retroactive seniority or both, with seniority giving them the edge on transfers to more desirable schools, access to temporary care assignments and preference when it came time for layoffs.

Incumbent employees, referred to by the circuit as Brennan plaintiffs, who felt aggrieved by the new status filed one of two lawsuits claiming the settlement violated §703(a) of Title VII and 42 U.S.C. 1983.

When the government changed its position in 2002 and 2003 on which part of the settlement it would defend, two sets of offerees intervened: the so-called Arroyo intervenors, who defended the settlement for offerees who failed a challenged exam; and the Caldero intervenors, who sought to defend the settlement for offerees who did not take any challenged exam.

Judge Block issued three opinions in September 2006, April 2007 and May 2008.

Oral arguments on the appeal were heard by the Second Circuit panel on Feb. 1, 2010.

Judge Calabresi wrote the circuit's 128-page decision. Judge Raggi issued an opinion concurring in the judgment but not the majority opinion.

#### Affirmative Action

Judge Calabresi said Judge Block's pre-*Ricci* Title VII analysis was based on the "affirmative action" framework of *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979), as reaffirmed and expanded upon by *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987).

In *Weber*, the Court held, in part, that an temporary affirmative action training plan to open job opportunities to blacks at a steel plant did not "unnecessarily trammel the interests of the white employees" because it did not require the discharge of white workers or create an absolute bar to their entry.

In *Johnson*, the Court upheld an affirmative action plan for women where "none of the 238 positions was occupied by a woman," or what the Court called a "manifest imbalance," and the rights of males were not "unnecessarily trammelled."

Under these two cases, Judge Block agreed with the Arroyo and Caldero intervenors when he held that, except for layoff seniority, the custodian settlement was driven by a manifest imbalance and did not unnecessarily trammel the rights of the Brennan plaintiffs.

But Judge Calabresi said the "city defendants' implementation of the settlement agreement was not affirmative action at all, let alone permissible affirmative action," and the lower court should not have applied an affirmative action defense to the Brennan plaintiffs' claims.

"The Supreme Court's recent decision in *Ricci* indicates that not all voluntary or race- or gender-conscious employer action is properly analyzed under *Weber* and *Johnson*," he said.

"*Ricci* is not limited to cases where the employer seeks to avoid a current violation," he said. "As the *Ricci* court itself stated, its core holding applies whenever an employer takes race-conscious action 'for the asserted purpose of avoiding *or remedying* an unintentional disparate impact."

The Court was holding, he said, that §703(a) "draws a distinction between *affirmative action* plans, which are intended to provide *ex ante* benefits to all members of a racial or gender class and *make-whole* relief, which is intended to provide *ex post* benefits to specified individuals who have suffered discrimination."

Under the latter, he said, an employer may not invoke the affirmative action defense of *Johnson* and *Weber*.

The panel then held that the city defendant's second defense, that the retroactive seniority awards were intended as make-whole relief for testing and recruiting practices that had a disparate impact, was to be governed by *Ricci* on the remand to Judge Block.

Under the "strong-basis-in-evidence standard," the city on remand needs to show three things in order to win on the defense recognized by the Supreme Court in *Ricci*: a strong-basis-in-evidence of (1) a prima facie case of disparate impact; (2) that the employment practice was not job-related or there was a less discriminatory alternative, and (3) that each offeree "was a victim of the challenged practice and received no more than make-whole relief."

Michael E. Rosman of the Center for Individual Rights, who argued for the Brennan and other plaintiffs, said yesterday that, "On the whole I think we're pretty happy" with the decision.

The court remanded the case for an analysis that will require "a significantly harsher standard than the one Judge Block used and it will focus to some degree on whether the specific individuals were likely victims. They don't have to show actual victims but they have to show something more than they were the right race," Mr. Rosman said.

He said he was also pleased that the circuit felt it did not need to reach its equal protection arguments.

Gregory B. Friel argued for the U.S. Department of Justice.

Ariela Migdal of American Civil Liberties Union's Foundation's Women's Rights Project argued for the Caldero intervenors.

Matthew Colangelo of the NAACP Legal Defense and Education Fund argued for the Arroyo intervenors.

A spokesperson for the City Corporation Counsel's office said its attorneys are reviewing the decision.

@|Mark Hamblett can be contacted at [mhamblett@alm.com](mailto:mhamblett@alm.com).