

United States Court of Appeals, Second Circuit

Frank RICCI

v.

John DESTEFANO

Argued: Dec. 10, 2007.

Decided: June 9, 2008.

Before POOLER, SACK and SOTOMAYOR, Circuit Judges.

PER CURIAM:

We withdraw our Summary Order of February 15, 2008. *Ricci v. DeStefano*, 2008 U.S.App. LEXIS 3293, 2008 WL 410436 (2d Cir. Feb. 15, 2008).

Plaintiffs appeal from a judgment of the United States District Court for the District of Connecticut (Arterton, J.) granting the defendants' motion for summary judgment on all counts.

We affirm, for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below. *Ricci v. DeStefano*, 2006 U.S. Dist. LEXIS 73277, 2006 WL 2828419 (D.Conn., Sept. 28, 2006). In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

CONCLUSION

The judgment of the district court is **AFFIRMED**.

United States District Court for the District of Connecticut

Frank RICCI, et al., Plaintiffs,

v.

John DeSTEFANO, et al., Defendants.

Sept. 28, 2006.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

JANET BOND ARTERTON, District Judge.

In March 2004 the New Haven Civil Service Board (“CSB”) refused to certify the results of two promotional exams for the positions of Lieutenant and Captain in the New Haven Fire Department. This lawsuit arises from the circumstances leading to that decision and its consequences.

Plaintiffs are seventeen white candidates and one Hispanic candidate who took the promotional exams, on which they fared very well, but received no promotion because without the CSB's certification of the test results, the promotional process could not proceed. Defendants are the City of New Haven, Mayor John DeStefano, Chief Administrative Officer Karen Dubois-Walton, Corporation Counsel Thomas Ude, Director of Personnel Tina Burgett, and the two members of the CSB, Malcolm Weber and Zelma Tirado, who voted against certification. Plaintiffs assert that defendants' actions in voting or arguing against certification of the examination results violated their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000eet seq., the Equal Protection Clause, the First Amendment, and 42 U.S.C. § 1985; plaintiffs also allege a common law claim of intentional infliction of emotional distress. The parties have cross-moved for summary judgment on the Title VII and Equal Protection claims, and defendants additionally move for summary judgment on plaintiffs' other claims.

For the reasons that follow, defendants' motion for summary judgment will be granted as to plaintiffs' federal claims; plaintiffs' cross-motion for summary judgment will be denied; and the Court will decline jurisdiction over plaintiffs' state law claim.

I. Factual Background

While the parties strenuously dispute the relevance and legal import of, and inferences to be drawn from, many aspects of this case, the underlying facts are largely undisputed. In November and December 2003, the New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain. The City's Department of Human Resources issued a Request for Proposal for these examinations, as a result of which I/O Solutions (“IOS”), a seven-year-old Illinois company that specializes in entry-level and promotional examinations for public safety (police and fire) departments, designed the examinations. Under the contract between the City and the New Haven firefighters' union, the

written exam result counted for 60% of an applicant's score and the oral exam for 40%. Those with a total score above 70% on the exam would pass.

Forty-one applicants took the Captain exam, of whom 25 were white, 8 black, and 8 Hispanic. Twenty-two of those applicants passed, of whom 16 were white, 3 black, and 3 Hispanic. Given that there were 7 Captain vacancies in the department when the tests were administered, and that the "Rule of Three" in the City Charter mandates that a civil service position be filled from among the three individuals with the highest scores on the exam, it appeared at that time that no blacks and at most two Hispanics would be eligible for promotion, as the top 9 scorers included 7 whites and 2 Hispanics.

Seventy-seven applicants took the Lieutenant exam, of whom 43 were white, 19 black, and 15 Hispanic. Thirty-four passed, of whom 25 were white, 6 black and 3 Hispanic. There were 8 vacancies, but because all of the top 10 scorers were white, it appeared that no blacks or Hispanics would be promoted. Certified promotional lists remain valid for two years.

The CSB held five hearings between January and March 2004 on the issue of whether to certify the test results. . . .

* * *

On February 11, 2004, the CSB heard from Chad Legel, Vice President of IOS, who was the "project manager" in charge of developing the exams at issue. . . .

Legel described the way in which the test was developed. First, the company interviewed a random sample of current New Haven Fire Department Lieutenants, Captains and Battalion Chiefs to determine basic information concerning the structure of the department, the tasks required of individuals at each rank, and the materials the department generally utilizes for training. Based on the interviews, IOS developed a written job analysis questionnaire ("JAQ") that asked all incumbents in the positions of Lieutenant and Captain "to provide information about how important they feel a specific task, knowledge area, skill or ability is . . ." The JAQ asked how important each task was to successful performance on the job and how frequently it was necessary to perform it. Importance and frequency were merged into a metric called "criticality or essentiality." Tasks above a certain criticality threshold were designated for testing on the written and oral portions of the exam. In response to the question of whether he has generally found a difference between information tested in various departments "based on the racial content of the city and the force," Legel stated, "definitely no."

Legel further stated that all the questions were firmly rooted in the study materials on the syllabus, which was distributed with the promotion applications. Once the test was completed, an "independent reviewer," a Battalion Chief from the Cobb County, Georgia, Fire Department, "reviewed the written exam for content and fidelity to the source material." Another independent reviewer, a retired Fire Chief from outside Connecticut, reviewed the oral exam questions. IOS refrained from utilizing reviewers from Connecticut because the RFP had specified that examiners must come from outside Connecticut, due to concerns that utilizing internal personnel could potentially facilitate cheating on the test.

Likewise, IOS selected the panelists for the oral examination panels from departments outside Connecticut, making an effort “to gain maximum diversity.” . . .

Legel concluded by “implor[ing] anyone that had ... concerns [about disparate impact] to review the content of the exam. In my professional opinion, it's facially neutral.”

* * *

At the next hearing on March 11, 2004, the CSB heard from Christopher Hornick, Ph.D., an industrial/organizational psychologist from Texas who runs a consulting business in competition with IOS.

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When asked about the reasons behind any possible disparate impact, Dr. Hornick answered, “I'm not sure that I can explain it,” but suggested that perhaps the 60%/40% breakdown mandated by the collective bargaining agreement could be responsible, and further suggested that there were “perhaps different types of testing procedures that are much more valid in terms of identifying the best potential supervisors in your fire department.” . . . Finally, Dr. Hornick identified as an alternative to traditional written and oral testing processes “an assessment center process, which is essentially an opportunity for candidates to demonstrate their knowledge of the ... standard operating procedures, to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test. For example, there's concepts of situation judgment tests that can be developed and designed, customized within organizations that demonstrate dramatically less adverse impacts. . . .”

At the same hearing, Vincent M. Lewis, a Fire Program Specialist for the U.S. Department of Homeland Security, and a retired career firefighter from Michigan, testified that he believed the test was appropriate. . . .

The last expert witness was Dr. Janet Helms, a professor of counseling psychology and the Director of the Institute for the Study and Promotion of Race and Culture at Boston College. . . . First, “[w]e know for a fact that regardless of what kind of written test we give in this country that we can just about predict how many people will pass who are members of underrepresented groups. And your data are not that inconsistent with what predictions would say were the case.” Second, Dr. Helms suggested that because 67% of the respondents in the JAQ survey were white, the questions may have been skewed toward their job knowledge, as “most of the literature on firefighters show that the different [racial and gender] groups perform the job differently.” Relying on information she had read in newspaper accounts of the situation in New Haven, she stated that the difference in performance may have been due to differences in opportunities for training and “informal mentoring” available to minorities. With respect to the oral exam, Dr. Helms suggested that people who are bilingual or “speak accented speech” may elicit more negative reactions from evaluators. As general concerns, Dr. Helms mentioned that test takers may score lower if they are expected not to perform well, or if tests focus on “traditional ways of doing the job and the test-taker, in fact, uses innovative approaches.”

Additionally, she suggested that “removing” “socioeconomic status” from test scores “reduces the disparate impact to some extent.”

At the final hearing on March 18, 2004, defendant Ude, the Corporation Counsel, strongly advocated against certifying the exam results. . . . As a primary reason not to certify the results, Ude argued that the “results of previous exams in this department and in other departments have not had this kind of a result, which is one of the reasons why these results were so startling when they came down. These results were different.” . . .

* * *

The board split two to two on the question of certifying each exam, as a result of which the promotional lists were not certified.

. . . Plaintiffs' theory is that the defendants urged the CSB not to certify the results in the interest of pleasing minority voters and other constituents in New Haven whose priority was increasing racial diversity in the ranks of the Fire Department. Plaintiffs further argue that this pattern of political manipulation is in keeping with prior actions by the City of New Haven disregarding the Charter-mandated Rule of Three in promotional decisions in the City's police and fire departments. . . . Plaintiffs argue that the apparent racial disparity in the results of the Lieutenant and Captain exams was due to the fact that hiring into, and promotion within, the Fire Department historically has been based on political patronage and promotion of racial diversity rather than merit; and they argue that the higher-scoring firefighters simply studied harder. In addition, they argue that the evident disparity was not appreciably worse on the 2003 examinations than other past promotional examinations.

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III. Discussion

A. Title VII

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Defendants' motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim. Accordingly, the Court will grant defendants' motion and deny plaintiffs' motion for summary judgment on this claim.

B. Equal Protection Claim

Plaintiffs argue that defendants violated the Equal Protection Clause either by employing a race-based classification system for promotion or, alternatively, by applying facially neutral promotion criteria in a racially discriminatory manner. Defendants counter that they did not employ any racial classifications because every applicant was treated the same when the CSB

decided that nobody would be promoted off the lists, and there was no discriminatory intent against whites motivating their non-certification decision.

* * *

2. Racial Classification/Discriminatory Intent

Plaintiffs' Equal Protection claim, however, lacks merit, with respect to both the racial classification and disparate treatment arguments. As the Second Circuit held in *Hayden* when rejecting plaintiffs' classification argument, if an exam is "administered and scored in an identical fashion for all applicants," there is no racial classification. Further, a "desire" "to design an entrance exam which would diminish the adverse impact on black applicants ... does not constitute a 'racial classification.'" Here, all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted. This does not amount to a facial classification based on race. Likewise, where a test is administered and scored in the same manner for all applicants, plaintiffs cannot make out a claim that the exam was a facially neutral test used in a discriminatory manner.

Plaintiffs argue that their equal protection rights were violated because they passed the tests and therefore were not similarly-situated to minority applicants who failed. Plaintiffs argue that if a black employee "shows up for work and works a full day" and a white employee does not, and the black employee complains "that he was due his wages," the employer cannot be heard to defend the complaint on the ground that the employees were treated the same because neither was paid. Plaintiffs' analogy is faulty because performing well on the exam does not create an entitlement to promotion, whereas working entitles an employee to be paid. Second, a presumptively flawed test result may not be a proper measure for determining whether anyone should be promoted.

Finally, plaintiffs cannot show that defendants acted out of an intentionally discriminatory purpose. "Discriminatory purpose 'implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'" Nothing in the record in this case suggests that the City defendants or CSB acted "because of" discriminatory animus toward plaintiffs or other non-minority applicants for promotion. Rather, they acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend. "[T]he intent to remedy the disparate impact of [the tests] is not equivalent to an intent to discriminate against non-minority applicants." None of the defendants' expressed motives could suggest to a reasonable juror that defendants acted "because of" animus against non-minority firefighters who took the Lieutenant and Captain exams.

Accordingly, defendants' motion for summary judgment on this claim will be granted and plaintiffs' motion will be denied.

