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Detecting Race Bias in Workplaces

A Clear Win for the Deserving

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The Supreme Court has ruled and justice has been served: Frank Ricci, the lead plaintiff in the New Haven firefighters case, will get his well-deserved promotion to lieutenant—and municipalities have been put on notice that race should have no role in hiring decisions save in narrowly tailored circumstances. The American ideal is colorblind justice—and colorblind employment.

The issue in *Ricci* was simply stated by Judge José Cabranes, dissenting from the Second Circuit's cursory, unenlightening opinion. "At its core," he wrote, "this case presents a straight-forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another?"

The 17 whites and one Hispanic who sought promotion to lieutenant and captain had sued on statutory and constitutional grounds. The Court deferred the serious constitutional issues raised by discarding test results and instituting, in effect, a racial quota for advancement within the fire department. But on the Title VII question, it was a clear win for the firefighters—as well as a needed clarification of statutory law.

The district court did not even bother with a trial on the facts; instead, it issued a summary judgment based on the record presented and its understanding of the applicable law. The Second Circuit Court of Appeals signed off on the district court's ruling with one substantive paragraph that barely qualified as a judicial opinion. The high Court could have remanded the case, as the Justice Department urged, ordering the trial that never occurred; it didn't. It said, in effect, this case is not even a close call.

Frank Ricci deserved our empathy—a point that was frequently made in briefs supporting the firefighters. He had been a firefighter for 11 years and was determined to become a lieutenant. All applicants were given three months to prepare for the exam and provided with a detailed reading list. Mr. Ricci is dyslexic, so he paid an acquaintance more than $1,000 to read textbooks onto audiotapes, made flashcards, took practice tests, worked with a study group and participated in mock interviews. He gave up a second job in order to study long hours. His work paid off: He came in sixth among the 77 candidates who took the exam. By any measure, he earned this promotion—and was denied it because of the color of his skin.

If you believe in empathy as a basis for deciding cases—as Judge Sonia Sotoymayor does—then Frank Ricci should have won hands down in her view. But empathy was

never—and should never have been—the question. Ricci's personal history was relevant only in one respect. As the Court said, once the process "has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.

The Court's decision was 5-4. Four Justices thought it was legally just fine to discriminate against whites—with no serious inquiry into the legitimacy of doing so. The Court today demanded a serious assessment in future cases of the evidence presented in support of a race-conscious employment policy. This is an important victory for justice in America.

Abigail Thernstrom's most recent book is *Voting Rights—and Wrongs The Elusive Quest for Racially Fair Elections* (AEI Press, June 2009). She is the vice-chair of the U.S. Commission on Civil Rights and an adjunct scholar at the American Enterprise Institute.

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