Supreme Court upholds white firefighters' discrimination claims

John Andrews
30 June 2009

In a closely watched decision issued on the last day of its 2008 term, the US Supreme Court ruled that the city of New Haven, Connecticut, engaged in purposeful discrimination against a group of white firefighters when it refused to promote them according to results of an examination in which all the black and most of the Hispanic candidates placed too low to qualify.

Reversing two lower court decisions, the 5-4 vote in Ricci v. DeStefano fell along the now familiar reactionary versus moderate lines, with Associate Justice Anthony M. Kennedy, who wrote the majority opinion, joined by the right-wing bloc comprised of Chief Justice John G. Roberts, Jr., and Associate Justices Clarence Thomas, Antonin Scalia, and Samuel A. Alito, Jr., the latter two penning separate concurring opinions.

Associate Justice Ruth Bader Ginsburg's dissent, which she read from the bench to display the degree of her displeasure over the ruling, was joined by the three other moderates, John Paul Stevens, David H. Souter and Stephen G. Breyer. It was Souter's last day on the high court. Sonia Sotomayor, president Obama's nominee to fill his seat, was one of the appellate judges whose decision to affirm the district court ruling rejecting the white firefighters' claim was overturned.

One hundred eighteen New Haven firefighters took an examination in 2003—60 percent of which was written and 40 percent oral—to qualify for promotions to the rank of lieutenant or captain. Seventeen white and two Hispanic firefighters finished with the highest scores, qualifying them for immediate promotions. The results were challenged as unfair—due to long entrenched cultural and educational disparities black candidates tend to score lower on written examinations—and after contentious public hearings, New Haven set aside the results.

The white firefighters, joined by one Hispanic, filed suit in federal court, claiming intentional discrimination. The United States District Court issued a 47-page analysis dismissing their claim, which a three-judge appellate panel affirmed in a one paragraph ruling. By a 7-6 vote the entire Second Circuit refused to hear the case "en banc," with two judges issuing lengthy dissents from that decision, sharply criticizing the panel for not making an independent analysis.

The Supreme Court accepted review and heard arguments before Sotomayor's nomination. Most observers were expecting a sharp denunciation of so-called "reverse discrimination"—favoring minority workers and applicants over white ones.

But Kennedy's majority opinion deliberately avoided the larger question of whether New Haven violated the constitutional guarantee of equal protection. Instead, he focused on the contradiction in Title VII of the Civil Rights Act of 1964, the federal equal employment law, between its prohibition of intentional racial discrimination, which is referred to as "disparate treatment," and the injunction against practices that have disproportionately adverse effects on minority workers and job applicants, which are known as "disparate impact" cases.

Scalia's concurring opinion tweaks Kennedy for avoiding the constitutional question by postponing "the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" Scalia's sudden concern for constitutional guarantees may come as a surprise to those who recall his defense of torture [US Supreme Court Justice Scalia defends torture], opposition to habeas corpus for Guantánamo Bay prisoners [Antonin Scalia and police-state rule], and key role in blocking the counting of Florida votes, stealing the 2000 presidential election for George W. Bush [Supreme Court halts Florida vote count: A black day for American democracy].

Kennedy's analysis began "with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense." As "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," according to Kennedy, the case turned on "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."

To escape this legal conundrum which is inherent in the very framework of affirmative action, Kennedy fashioned a new legal rule, that an employer can carry out purposeful discrimination to prevent its policies from having a disparate impact against minority workers and applicants only where there is a "strong basis in evidence" for doing so. Finding no such evidence here, Kennedy concluded, "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

Alito wrote a bizarre dissent, joined by Scalia and Thomas, claiming in a seven-page-long rant that New Haven rejected the examination results to avoid "the wrath of Rev. Boise Kimber and

other influential leaders of New Haven's African-American community." With none-too-subtle race baiting, Alito interjected a wholly gratuitous reference to a 1996 criminal case in which Kimber "was prosecuted and convicted for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath," and then slammed New Haven Mayor John DeStefano for treating Kimber as "an invaluable political asset because 'he's very good at organizing people and putting together field operations, as a result of his ties to labor, his prominence in the religious community and his long-standing commitment to roots.'"

Bourgeois politics lead to many unusual bedfellows. Making such a minor figure as Kimber the centerpiece of a judicial opinion on the legality of race-based employment decisions is without precedent.

Ginsburg's dissent, after reviewing the history of overt and pervasive discrimination in the New Haven Fire Department, persisting well into the 1980s, challenged the premise of Kennedy's decision, that "the City rejected the test results solely because the higher scoring candidates were white." She claimed there to be "substantial evidence of multiple flaws in the tests New Haven used," and that there were "better tests used in other cities, which have yielded less racially skewed outcomes."

Expressing considerable sympathy for the white firefighters, Ginsburg concluded that "it is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers."

The issues raised in *Ricci* are complex, and the policies conflicting. While certainly the majority ruling provides red meat for the Republican Party's increasingly neo-fascistic base and will be used to attack the nomination of Sotomayor from the right, at a more fundamental level the case exposes the futility of trying to address the legacy of racial discrimination within the framework of capitalist society.

Without giving the slightest quarter to Kennedy, Scalia or Alito, one can only sympathize with the frustration of the white firefighters who followed all the rules and scored highest on the exam, only to be denied promotion because of their race. Nor is it right to overlook the plight of black firefighters, who were disadvantaged during the examination procedure because, unlike many of their white colleagues, decades of invidious racial discrimination precluded them from growing up in a family which included firefighters.

Discrimination against white workers is no answer, however. Affirmative action, as the *World Socialist Web Site* has repeatedly observed, was first enacted by the Nixon administration in response to the urban riots of the 1960s. Its purpose was not to further the interests of black Americans generally, which are inextricably intertwined with the crisis of the working class population as a whole, but to cultivate a thin, privileged layer within minority populations to help administer state and local governments and keep the working class masses in check.

In short order, black politicians, overwhelmingly Democratic, were elevated to run the cities—for example Los Angeles, Detroit and Newark—most closely identified with the rioting. Affirmative action has led to the emergence of figures such as Condoleezza Rice and Clarence Thomas while it allowed bourgeois demagogues to poison public debate with the promotion of identity politics.

Rather than extending the democratic ideals that animated the civil rights movement of the 1950s and 1960s, affirmative action represents their opposite. While those struggles, conducted under the banner of freedom and equality, sought to elevate the social and cultural conditions of all people, black and white, affirmative action is about something quite different: the distribution of privileges among a small section of the minority population. That is why it attracts political charlatans like the Reverend Boise Kimber and his national counterparts Jesse Jackson and Al Sharpton.

The demand for affirmative action is divisive and reactionary, pitting one section of the working class against another for a shrinking number of good-paying jobs, promotions, slots at elite colleges and so on. It is impossible to convince white workers in New Haven or anywhere else that they must accept being discriminated against for the supposed benefit of blacks or other minorities.

The real solution to the "disparate impact" of exams such as New Haven's cannot be found within capitalist politics, but requires the widespread implementation of socialist policies to raise the living standards and expand the democratic rights of all sections of working people.

The documented discrepancies among workers taking written exams reflects decades of indifference in public education, which can only be reversed through the infusion of massive resources, especially into urban schools, to elevate the intellectual and cultural levels of the working class youth.

Rather than cutting back, jobs and promotional opportunities in fire departments and other such workplaces must be greatly expanded. Given the tremendous resources available through a rational allocation of social wealth there is no need for white and black workers to be fighting over a handful of opportunities.

In opposition to affirmative action, which pits workers against each other along racial, ethnic or gender lines, the working class must unite its forces in the struggle for a socialist program that places the vast productive resources under the democratic control and collective ownership of society as a whole.