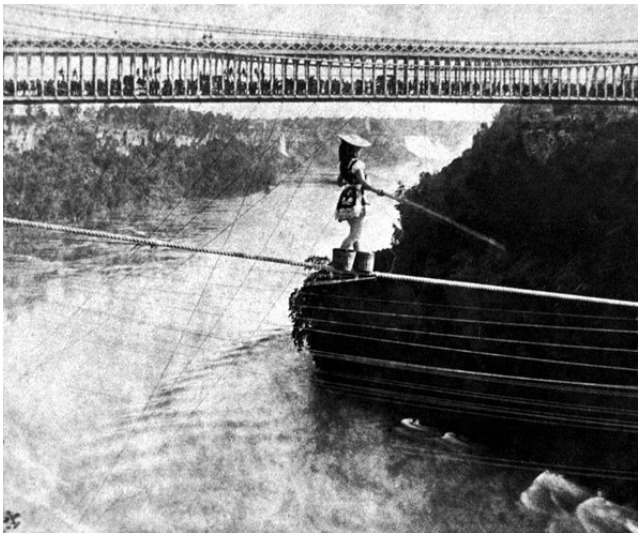
# LABOR AND EMPLOYMENT LAW UPDATE



## EMPLOYMENT DISCRIMINATION: THE THINNING TIGHT ROPE FOR EMPLOYERS

Two federal court decisions this year are sobering news for employers who frequently walk a tight rope between potentially competing claims of employment discrimination.

### *SASSAMAN V. GAMACHE*

Dutchess County, New York faced an all too common quandary for employers. A female employee complained to the County of sexual harassment by a male supervisor; the supervisor denied the harassment. Rather than going forward with the investigation regarding the complaint, the County forced the male supervisor to resign with the following explanation:

> "I really don't have any choice. [The female employee] knows a lot of attorneys. I'm afraid she'll sue me. And besides, you probably did what she said you did because you're male and nobody would believe you anyway."

The male supervisor sued the County for sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"). *In Sassaman v. Gamache*, the Second Circuit determined that the foregoing explanation was sufficient evidence to survive a summary judgment motion filed by the County.

**SEXUAL STEREOTYPING:** The Court found that the perceived propensity of men, as a group, to sexually harass women was an "invidious sex stereotype" and evidence that the forced resignation was tainted by gender bias.

**MINIMAL INVESTIGATION EFFORTS:** The Court also found that the failure of the County to make any significant efforts to verify the female employee's complaint could be evidence of discriminatory intent against the male supervisor.

**FEAR OF A LAWSUIT:** As to the alleged fear of a lawsuit by a female employee, the Court found:

> ". . . when an employer considers how to respond to an employee's allegation of discrimination, it may take into account the risk that the complaining employee might file an action against the employer. An employer may not, however, rely on its alleged fear of a lawsuit as a pretext for making an employment decision that violates Title VII."

### *RICCI V. DESTEFANO*

The New Haven Fire Department had a no win decision. A racial disparity plagued the results of exams conducted to fill vacant captain and lieutenant positions. Of the 77 candidates - 43 whites, 19 African Americans, and 15 Hispanics - who took the lieutenant's exam, for instance, only 34 passed – 25 whites, 6 African Americans and 3 Hispanics. The top 10 candidates, who were all white, became immediately eligible for promotion.

The minority firefighters threatened a suit alleging race discrimination claim under Title VII if the Department certified the exam results. The white firefighters threatened a race bias suit if the exam results were not certified. No matter the decision by the Department, a lawsuit would result.

Believing that a suit by the minority firefighters had greater merit, the Department opted to disregard the exam results. Several white and Hispanic firefighters sued. In a 5-4 decision, the Supreme Court in *Ricci v. Destefano* found that the Department had discriminated against the white and Hispanic firefighters in violation of Title VII.

**DISPARATE TREATMENT VS. DISPARATE IMPACT:** Title VII prohibits both intentional race discrimination (known as" disparate treatment") as well as, in some cases, neutral employment practices that are not intended to discriminate but in fact have a disproportionately adverse affect on minorities (known as "disparate impact"). The minority firefighters had threatened a disparate impact claim, while the white firefighters threatened and ultimately filed a disparate treatment claim.

**BURDEN OF DEFENDING DECISION:** As to the white firefighters' claim, the Court noted the absence of any dispute as to the motive for discarding the exam results ─ the successful candidates were primarily white. Its analysis thus began with the premise that the Department's actions violated Title VII "absent some valid defense." From the outset, the Department was on the defensive.

**BURDEN TO SHOW RIGHT DECISION WAS MADE:** The Court rejected as an invalid defense the assertion by the Department that it believed in good faith that discarding the exam was necessary to comply with Title VII's prohibition of disparate impact discrimination against the minority firefighters. Instead, the Department had to show "a substantial basis in evidence" that such remedial action was necessary. In other words, to avoid liability to the white firefighters, the Department needed to prove it made the right decision.

**DEPARTMENT MADE WRONG DECISION:** The Court conceded that, because of the racial disparity in the exam results, the minority firefighters could have stated a disparate impact claim. The Court, however, noted that the Department could have defended and won such a suit by proving that each of the exams was "job related for the position in question and consistent with business necessity." The Department's belief that a suit by the minority firefighters had greater merit was thus misguided.

## THE TIGHTROPE FOR EMPLOYERS

*Sassaman* and *Ricci* each demonstrate that an employer's response to an actual or perceived threat of a discrimination suit by some employees can *itself* be evidence of discrimination against other employees. *Ricci* also shows that a resolution by an employer of potential competing claims can require an intricate factual and legal analysis with little or no room for error. With these decisions, the legal tightrope for employers has definitely thinned.

As never before, employers are encouraged to consult legal counsel before effecting any decision where potential competing discrimination claims are possibilities.

## QUESTIONS

Questions regarding employment discrimination or any other labor and employment issues can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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