SUPREME COURT OF THE UNITED STATES

Nos. 07–1428 and 08–328

FRANK RICCI, ET AL., PETITIONERS
07–1428 *v.*
JOHN DESTEFANO ET AL.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 29, 2009]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

I join the Court's opinion in full. I write separately only because the dissent, while claiming that "[t]he Court's recitation of the facts leaves out important parts of the story," *post,* at 2 (opinion of GINSBURG, J.), provides an incomplete description of the events that led to New Haven's decision to reject the results of its exam. The dissent's omissions are important because, when all of the evidence in the record is taken into account, it is clear that, even if the legal analysis in Parts II and III–A of the dissent were accepted, affirmance of the decision below is untenable.

I

When an employer in a disparate-treatment case under Title VII of the Civil Rights Act of 1964 claims that an employment decision, such as the refusal to promote, was based on a legitimate reason, two questions—one objective and one subjective—must be decided. The first, objective question is whether the reason given by the employer is

one that is legitimate under Title VII. See *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 506–507 (1993). If the reason provided by the employer is not legitimate on its face, the employer is liable. *Id.*, at 509. The second, subjective question concerns the employer's intent. If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable. See *id.*, at 510–512.

The question on which the opinion of the Court and the dissenting opinion disagree concerns the objective component of the determination that must be made when an employer justifies an employment decision, like the one made in this litigation, on the ground that a contrary decision would have created a risk of disparate-impact liability. The Court holds—and I entirely agree—that concern about disparate-impact liability is a legitimate reason for a decision of the type involved here only if there was a "substantial basis in evidence to find the tests inadequate." *Ante*, at 26. The Court ably demonstrates that in this litigation no reasonable jury could find that the city of New Haven (City) possessed such evidence and therefore summary judgment for petitioners is required. Because the Court correctly holds that respondents cannot satisfy this objective component, the Court has no need to discuss the question of the respondents' actual intent. As the Court puts it, "[e]ven if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear there is no support for the conclusion that respondents had an objective, substantial basis in evidence to find the tests inadequate." *Ibid.*

The dissent advocates a different objective component of the governing standard. According to the dissent, the objective component should be whether the evidence provided "good cause" for the decision, *post*, at 19, and the

dissent argues—incorrectly, in my view—that no reasonable juror could fail to find that such evidence was present here. But even if the dissent were correct on this point, I assume that the dissent would not countenance summary judgment for respondents if respondents' professed concern about disparate-impact litigation was simply a pretext. Therefore, the decision below, which sustained the entry of summary judgment for respondents, cannot be affirmed unless no reasonable jury could find that the City's asserted reason for scrapping its test—concern about disparate-impact liability—was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency.

II

A

As initially described by the dissent, see *post*, at 2–12, the process by which the City reached the decision not to accept the test results was open, honest, serious, and deliberative. But even the District Court admitted that "a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African-American community." 554 F. Supp. 2d 142, 162 (Conn. 2006), summarily aff'd, 530 F. 3d 87 (CA2 2008) *(per curiam)*.

This admission finds ample support in the record. Reverend Boise Kimber, to whom the District Court referred, is a politically powerful New Haven pastor and a self-professed "'kingmaker.'" App. to Pet. for Cert. in No. 07–1428, p. 906a; see also *id.*, at 909a. On one occasion, "[i]n front of TV cameras, he threatened a race riot during the murder trial of the black man arrested for killing white Yalie Christian Prince. He continues to call whites racist if they question his actions." *Id.*, at 931a.

Reverend Kimber's personal ties with seven-term New Haven Mayor John DeStefano (Mayor) stretch back more than a decade. In 1996, for example, Mayor DeStefano testified for Rev. Kimber as a character witness when Rev. Kimber—then the manager of a funeral home—was prosecuted and convicted for stealing prepaid funeral expenses from an elderly woman and then lying about the matter under oath. See *id.*, at 126a, 907a. "Reverend Kimber has played a leadership role in all of Mayor DeStefano's political campaigns, [and] is considered a valuable political supporter and vote-getter." *Id.*, at 126a. According to the Mayor's former campaign manager (who is currently his executive assistant), Rev. Kimber is an invaluable political asset because "[h]e'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." *Id.*, at 908a (internal quotation marks and alteration omitted).

In 2002, the Mayor picked Rev. Kimber to serve as the Chairman of the New Haven Board of Fire Commissioners (BFC), "despite the fact that he had no experience in the profession, fire administration, [or] municipal management." *Id.*, at 127a; see also *id.*, at 928a–929a. In that capacity, Rev. Kimber told firefighters that certain new recruits would not be hired because "'they just have too many vowels in their name[s].'" Thanawala, New Haven Fire Panel Chairman Steps Down Over Racial Slur, Hartford Courant, June 13, 2002, p. B2. After protests about this comment, Rev. Kimber stepped down as chairman of the BFC, *ibid.;* see also App. to Pet. for Cert. in No. 07–1428, at 929a, but he remained on the BFC and retained "a direct line to the mayor," *id.*, at 816a.

Almost immediately after the test results were revealed in "early January" 2004, Rev. Kimber called the City's Chief Administrative Officer, Karen Dubois-Walton, who "acts 'on behalf of the Mayor.'" *Id.*, at 221a, 812a. Dubois-

Walton and Rev. Kimber met privately in her office because he wanted "to express his opinion" about the test results and "to have some influence" over the City's response. *Id.*, at 815a–816a. As discussed in further detail below, Rev. Kimber adamantly opposed certification of the test results—a fact that he or someone in the Mayor's office eventually conveyed to the Mayor. *Id.*, at 229a.

B

On January 12, 2004, Tina Burgett (the director of the City's Department of Human Resources) sent an e-mail to Dubois-Walton to coordinate the City's response to the test results. Burgett wanted to clarify that the City's executive officials would meet "sans the Chief, and that once we had a better fix on the next steps we would meet with the Mayor (possibly) and then the two Chiefs." *Id.*, at 446a. The "two Chiefs" are Fire Chief William Grant (who is white) and Assistant Fire Chief Ronald Dumas (who is African-American). Both chiefs believed that the test results should be certified. *Id.*, at 228a, 817a. Petitioners allege, and the record suggests, that the Mayor and his staff colluded "sans the Chief[s]" because "the defendants did not want Grant's or Dumas' views to be publicly known; accordingly both men were prevented by the Mayor and his staff from making any statements regarding the matter." *Id.*, at 228a.[1]

The next day, on January 13, 2004, Chad Legel, who had designed the tests, flew from Chicago to New Haven to meet with Dubois-Walton, Burgett, and Thomas Ude, the City's corporate counsel. *Id.*, at 179a. "Legel outlined the merits of the examination and why city officials should be confident in the validity of the results." *Ibid.* But

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[1] Although the dissent disputes it, see *post*, at 33–34, n. 17, the record certainly permits the inference that petitioners' allegation is true. See App. to Pet. for Cert. in No. 07–1428, pp. 846a–851a (deposition of Dubois-Walton).

according to Legel, Dubois-Walton was "argumentative" and apparently had already made up her mind that the tests were "'discriminatory.'" *Id.*, at 179a–180a. Again according to Legel, "[a] theme" of the meeting was "the political and racial overtones of what was going on in the City." *Id.*, at 181a. "Legel came away from the January 13, 2004 meeting with the impression that defendants were already leaning toward discarding the examination results." *Id.*, at 180a.

On January 22, 2004, the Civil Service Board (CSB or Board) convened its first public meeting. Almost immediately, Rev. Kimber began to exert political pressure on the CSB. He began a loud, minutes-long outburst that required the CSB Chairman to shout him down and hold him out of order three times. See *id.*, at 187a, 467a–468a; see also App. in No. 06–4996–cv (CA2), pp. A703–A705. Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private. App. to Pet. for Cert. in No. 07–1428, at 188a.

Four days after the CSB's first meeting, Mayor DeStefano's executive aide sent an e-mail to Dubois-Walton, Burgett, and Ude. *Id.*, at 190a. The message clearly indicated that the Mayor had made up his mind to oppose certification of the test results (but nevertheless wanted to conceal that fact from the public):

> "I wanted to make sure we are all on the same page for this meeting tomorrow. . . . *[L]et's remember, that these folks are not against certification yet. So we can't go in and tell them that is our position;* we have to deliberate and arrive there as the fairest and most cogent outcome." *Ibid.*

On February 5, 2004, the CSB convened its second public meeting. Reverend Kimber again testified and threatened the CSB with political recriminations if they

voted to certify the test results:

> "I look at this [Board] tonight. I look at three whites and one Hispanic and no blacks. . . . I would hope that you would not put yourself in this type of position, *a political ramification that may come back upon you* as you sit on this [Board] and decide the future of a department and the future of those who are being promoted.
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> . . . . .
>
> "(APPLAUSE)." *Id.*, at 492a (emphasis added).

One of the CSB members "t[ook] great offense" because he believed that Rev. Kimber "consider[ed] [him] a bigot because [his] face is white." *Id.*, at 496a. The offended CSB member eventually voted not to certify the test results. *Id.*, at 586a–587a.

One of Rev. Kimber's "friends and allies," Lieutenant Gary Tinney, also exacerbated racial tensions before the CSB. *Id.*, at 129a. After some firefighters applauded in support of certifying the test results, "Lt. Tinney exclaimed, 'Listen to the Klansmen behind us.'" *Id.*, at 225a.

Tinney also has strong ties to the Mayor's office. See, *e.g.*, *id.*, at 129a–130a, 816a–817a. After learning that he had not scored well enough on the captain's exam to earn a promotion, Tinney called Dubois-Walton and arranged a meeting in her office. *Id.*, at 830a–831a, 836a. Tinney alleged that the white firefighters had cheated on their exams—an accusation that Dubois-Walton conveyed to the Board without first conducting an investigation into its veracity. *Id.*, at 837a–838a; see also App. 164 (statement of CSB Chairman, noting the allegations of cheating). The allegation turned out to be baseless. App. to Pet. for Cert. in No. 07–1428, at 836a.

Dubois-Walton never retracted the cheating allegation, but she and other executive officials testified several times before the CSB. In accordance with directions from the

Mayor's office to make the CSB meetings appear deliberative, see *id.*, at 190a, executive officials remained publicly uncommitted about certification—while simultaneously "work[ing] as a team" behind closed doors with the secretary of the CSB to devise a political message that would convince the CSB to vote against certification, see *id.*, at 447a. At the public CSB meeting on March 11, 2004, for example, Corporation Counsel Ude bristled at one board member's suggestion that City officials were recommending against certifying the test results. See *id.*, at 215a ("Attorney Ude took offense, stating, 'Frankly, because I would never make a recommendation—I would not have made a recommendation like that'"). But within days of making that public statement, Ude privately told other members of the Mayor's team "the ONLY way we get to a decision not to certify is" to focus on something other than "a big discussion re: adverse impact" law. *Id.*, at 458a–459a.

As part of its effort to deflect attention from the specifics of the test, the City relied heavily on the testimony of Dr. Christopher Hornick, who is one of Chad Legel's competitors in the test-development business. Hornick never "stud[ied] the test [that Legel developed] at length or in detail," *id.*, at 549a; see also *id.*, at 203a, 553a, but Hornick did review and rely upon literature sent to him by Burgett to criticize Legel's test. For example, Hornick "noted in the literature that [Burgett] sent that the test was not customized to the New Haven Fire Department." *Id.*, at 551a. The Chairman of the CSB immediately corrected Hornick. *Id.*, at 552a ("Actually, it was, Dr. Hornick"). Hornick also relied on newspaper accounts—again, sent to him by Burgett—pertaining to the controversy surrounding the certification decision. See *id.*, at 204a, 557a. Although Hornick again admitted that he had no knowledge about the actual test that Legel had developed and that the City had administered, see *id.*, at 560a–561a,

the City repeatedly relied upon Hornick as a testing "guru" and, in the CSB Chairman's words, "the City ke[pt] quoting him as a person that we should rely upon more than anybody else [to conclude that there] is a better way—a better mousetrap."[2] App. in No. 06–4996–cv (CA2), at A1128. Dubois-Walton later admitted that the City rewarded Hornick for his testimony by hiring him to develop and administer an alternative test. App. to Pet. for Cert. in No. 07–1428, at 854a; see also *id.*, at 562a–563a (Hornick's plea for future business from the City on the basis of his criticisms of Legel's tests).

At some point prior to the CSB's public meeting on March 18, 2004, the Mayor decided to use his executive authority to disregard the test results—*even if* the CSB ultimately voted to certify them. *Id.*, at 819a–820a. Accordingly, on the evening of March 17th, Dubois-Walton sent an e-mail to the Mayor, the Mayor's executive assistant, Burgett, and attorney Ude, attaching two alternative press releases. *Id.*, at 457a. The first would be issued if the CSB voted not to certify the test results; the second would be issued (and would explain the Mayor's invocation of his executive authority) if the CSB voted to certify the test results. *Id.*, at 217a–218a, 590a–591a, 819a–820a. Half an hour after Dubois-Walton circulated the alternative drafts, Burgett replied: "[W]ell, that seems to say it all. Let's hope draft #2 hits the shredder tomorrow nite." *Id.*, at 457a.

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[2]The City's heavy reliance on Hornick's testimony makes the two chiefs' silence all the more striking. See *supra*, at 5. While Hornick knew little or nothing about the tests he criticized, the two chiefs were involved "during the lengthy process that led to the devising of the administration of these exams," App. to Pet. for Cert. in No. 07–1428, at 847a, including "collaborating with City officials on the extensive job analyses that were done," "selection of the oral panelists," and selection of "the proper content and subject matter of the exams," *id.*, at 847a–848a.

Soon after the CSB voted against certification, Mayor DeStefano appeared at a dinner event and "took credit for the scu[tt]ling of the examination results." *Id.*, at 230a.

C

Taking into account all the evidence in the summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked—as things turned out, successfully—to persuade the CSB that acceptance of the test results would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB was not persuaded, the Mayor, wielding ultimate decisionmaking authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency. It is noteworthy that the Solicitor General—whose position on the principal legal issue in this case is largely aligned with the dissent—concludes that "[n]either the district court nor the court of appeals . . . adequately considered whether, viewing the evidence in the light most favorable to petitioners, a genuine issue of material fact remained whether respondents' claimed purpose to comply with Title VII was a pretext for intentional racial discrimination . . . ." Brief for United States as *Amicus Curiae* 6; see also *id.,* at 32–33.

III

I will not comment at length on the dissent's criticism of my analysis, but two points require a response.

The first concerns the dissent's statement that I "equat[e] political considerations with unlawful discrimination." *Post*, at 36. The dissent misrepresents my position: I draw no such equation. Of course "there are many ways in which a politician can attempt to win over a constituency—including a racial constituency—without engaging in unlawful discrimination." *Post*, at 36–37. But—as I assume the dissent would agree—there are some things that a public official cannot do, and one of those is engaging in intentional racial discrimination when making employment decisions.

The second point concerns the dissent's main argument—that efforts by the Mayor and his staff to scuttle the test results are irrelevant because the ultimate decision was made by the CSB. According to the dissent, "[t]he relevant decision was made by the CSB," *post*, at 34, and there is "scant cause to suspect" that anything done by the opponents of certification, including the Mayor and his staff, "prevented the CSB from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification," *post*, at 36.

Adoption of the dissent's argument would implicitly decide an important question of Title VII law that this Court has never resolved—the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision. There is a large body of court of appeals case law on this issue, and these cases disagree about the proper standard. See *EEOC* v. *BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F. 3d 476, 484–488 (CA10 2006) (citing cases and describing the approaches taken in different Circuits). One standard is whether the subordinate "exerted influenc[e] over the

titular decisionmaker." *Russell* v. *McKinney Hosp. Venture*, 235 F. 3d 219, 227 (CA5 2000); see also *Poland* v. *Chertoff*, 494 F. 3d 1174, 1182 (CA9 2007) (A subordinate's bias is imputed to the employer where the subordinate "influenced or was involved in the decision or decision-making process"). Another is whether the discriminatory input "caused the adverse employment action." See *BCI Coca-Cola Bottling Co. of Los Angeles*, *supra*, at 487.

In the present cases, a reasonable jury could certainly find that these standards were met. The dissent makes much of the fact that members of the CSB swore under oath that their votes were based on the good-faith belief that certification of the results would have violated federal law. See *post*, at 34. But the good faith of the CSB members would not preclude a finding that the presentations engineered by the Mayor and his staff influenced or caused the CSB decision.

The least employee-friendly standard asks only whether "the actual decisionmaker" acted with discriminatory intent, see *Hill* v. *Lockheed Martin Logistics Management, Inc.*, 354 F. 3d 277, 291 (CA4 2004) (en banc), and it is telling that, even under this standard, summary judgment for respondents would not be proper. This is so because a reasonable jury could certainly find that in New Haven, the Mayor—not the CSB—wielded the final decisionmaking power. After all, the Mayor claimed that authority and was poised to use it in the event that the CSB decided to accept the test results. See *supra*, at 9. If the Mayor had the authority to overrule a CSB decision *accepting* the test results, the Mayor also presumably had the authority to overrule the CSB's decision *rejecting* the test results. In light of the Mayor's conduct, it would be quite wrong to throw out petitioners' case on the ground that the CSB was the ultimate decisionmaker.

* * *

Petitioners are firefighters who seek only a fair chance to move up the ranks in their chosen profession. In order to qualify for promotion, they made personal sacrifices. Petitioner Frank Ricci, who is dyslexic, found it necessary to "hir[e] someone, at considerable expense, to read onto audiotape the content of the books and study materials." App. to Pet. for Cert. in No. 07–1428, at 169a. He "studied an average of eight to thirteen hours a day . . . , even listening to audio tapes while driving his car." *Ibid.* Petitioner Benjamin Vargas, who is Hispanic, had to "give up a part-time job," and his wife had to "take leave from her own job in order to take care of their three young children while Vargas studied." *Id.*, at 176a. "Vargas devoted countless hours to study . . . , missed two of his children's birthdays and over two weeks of vacation time," and "incurred significant financial expense" during the three-month study period. *Id.*, at 176a–177a.

Petitioners were denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam. The District Court threw out their case on summary judgment, even though that court all but conceded that a jury could find that the City's asserted justification was pretextual. The Court of Appeals then summarily affirmed that decision.

The dissent grants that petitioners' situation is "unfortunate" and that they "understandably attract this Court's sympathy." *Post*, at 1, 39. But "sympathy" is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII's prohibition against discrimination based on race. And that is what, until today's decision, has been denied them.