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All Eyes on Kennedy in Firefighters Discrimination Case at High Court

Tony Mauro
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When the city of New Haven, Conn., in 2003 tossed out a promotion test for firefighters after learning that no African-Americans had passed, was it striking a blow for or against civil rights?

The Supreme Court heard vigorous debate on that question Tuesday in the case of *Ricci v. DeStefano*, with Justice Anthony Kennedy likely holding the key vote in deciding the answer.

Kennedy's central role was so evident at one point that Justice Stephen Breyer, apparently hoping to win him over, posed a hypothetical based on Kennedy's concurrence in a related 2007 civil rights case. "I think you're giving examples from Justice Kennedy's" opinion, replied [Gregory Coleman](#), lawyer for the white (and one Hispanic) firefighters who did not get promoted because of New Haven's actions.

"That's just what I'm doing exactly," Breyer said unabashedly. For his part Breyer seemed to favor New Haven's position in the case.

Kennedy, the object of all the attention, did not explicitly tip his hand, but overall seemed sympathetic to the white firefighters who claim they were discriminated against on the basis of race, in violation of Title VII of the Civil Rights Act, when the city did not give them the promotions.

Kennedy reacted sharply when Deputy Solicitor General Edwin Kneedler offered what he viewed as contradictory arguments. Kneedler said New Haven acted reasonably in withdrawing the test because of its disparate impact on minority applicants, but he also said that in doing so, the city was not drawing racial distinctions. "It looked at the results, and it classified the successful and unsuccessful applicants by race," Kennedy said. "And you want us to say this isn't [about] race? I have trouble with this argument."

The firefighters who were deprived of their promotions have lost both at the district court and appeals court level, with rulings that found the city's withdrawal of the test to be a valid way to remedy an employment practice that was having a disparate impact on minorities -- itself a violation of Title VII.



Before the high court Coleman, a partner at Yetter, Warden & Coleman in Texas, was calm and persistent in making the case that racial classifications are "inherently pernicious," and that New Haven's actions harmed specific individuals -- not hypothetical future victims -- on the basis of race. Coleman repeatedly referred to the damage to "individual dignity" involved when the city decided not to certify the exam after his clients had passed it.

Kennedy asked Coleman whether the city could, prospectively, choose a test to give candidates in the future that had been shown likely to pass a more diverse array of candidates. His question was designed, Kennedy said, "to ask you the question whether race consciousness is ever permissible."

Coleman said that under his theory of the case, a city could make that choice prospectively, because nobody who had already won promotion would have it taken away. Kennedy seemed mollified.

Representing New Haven, Christopher Meade of Wilmer Cutler Pickering Hale and Dorr also stuck to his main argument that the city, far from violating Title VII, believes it was upholding Title VII by eliminating a test that appeared to have a disparate impact on minority applicants.

"This race consciousness is race consciousness that's mandated by federal law," Meade insisted. "When an employer learns that a practice has a severe adverse impact such that it creates an inference of discrimination ... the employer should be granted some limited degree of flexibility to act."

Chief Justice John Roberts Jr. questioned Meade skeptically, at one point asserting that the city was looking for "a blank check to discriminate."

After the arguments were over, many of the attorneys involved went outside to speak to the media about the argument. Coleman did not appear before the cameras, deferring instead to Karen Torre, the New Haven attorney who had represented the non-African-American firefighters for years. She was surrounded by her uniformed clients as she spoke.

The Court's session Wednesday began with Roberts calling new Solicitor General Elena Kagan to the lectern so she could introduce the new Attorney General Eric Holder Jr. to the Court.

Roberts welcomed Holder as the nation's chief law enforcement officer and as an officer of the Court. Holder thanked the chief justice and sat down.

Then Roberts announced the title of only decision of the day, *Nken v. Holder*, with emphasis on Holder's name.

The ruling wasn't exactly a welcome gift to Holder. The Court ruled 7-2 against the government in the immigration case, making it easier for aliens to block or delay deportation orders.