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TESTING

The U.S. Supreme Court recently held in *Ricci v. DeStefano*, (7 WLR 903, 7/3/09), that employers may not take race-based employment actions based solely on fear of litigation. The following article by Barbara E. Hoey of Kelley Drye & Warren analyzes the ruling and suggests that *Ricci* provides valuable guidance and support for employers that rely on objective, job-related testing to make hiring and promotion decisions.

Employment Testing After *Ricci:* Where Do We Go From Here?

BY BARBARA E. HOEY*

When presented with the results of an employment test that seems skewed in favor of one protected group of employees, or which does not reflect the racial diversity of its testing group, employers are faced with a ''Hobson's choice''—do they set aside the test results, or apply them and face potential class lawsuits? Some might say the employer in such a situation is between a rock and a hard place, as whatever choice they make is bound to anger or harm some employee.

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In 2003, the city of New Haven, Conn., was faced with this choice and, fearing a lawsuit, elected to set aside the results of a promotion exam given within its fire department. In a cruel twist of fate, New Haven ended up with five years of litigation anyway, *and* in the recent Supreme Court decision in *Ricci v. DeStefano*[2] discovered that it was liable under Title VII of the 1964 Civil Rights Act for having discriminated against the employees who had passed the test. Moreover, the city ended up before the Supreme Court in the ironic position of arguing that a test that it had developed was fundamentally flawed. To borrow a phrase from *Alice in Wonderland*, New Haven stepped ''through the looking glass'' into a world where roles had been reversed and logic had been upended, as it stood before the Supreme Court essentially attacking itself!

The *Ricci* decision garnered national attention, due both to its controversial subject matter and Supreme Court Justice Sonia Sotomayor's role in deciding the

[2] 129 S. Ct. 2658 (2009), 106 FEP Cases 929, 7 WLR 928, 7/3/09.

	Black	White	Hispanic	Total
Lieutenant Candidates	19	43	15	77
Candidates Passed	6	25	3	34
Percentage Passed	32%	58%	20%	44%
Captain Candidates	8	25	8	41
Candidates Passed	3	16	3	22
Percentage Passed	38%	64%	38%	54%

U.S. Court of Appeals for the Second Circuit appeal. Also, the issues surrounding employment testing are not going away, as demonstrated by a July 22 decision by the U.S. District Court for the Eastern District of New York, finding that the New York Fire Department had violated Title VII when it used a test that discriminated against minority applicants.[3]

More important than all of that hoopla . . . What lessons can all employers take from *Ricci* and how can you avoid the quagmire the cities of New York and New Haven have found themselves in?

Contrary to many pundits, I do not believe *Ricci* was a change in the law, and I also believe there is a simple lesson one can take from the decision, namely: don't make employment decisions based on race and don't make employment decisions solely to avoid lawsuits.

Do your homework before you take action and base your decisions on objective facts— i.e., test results, job performance, the most qualified applicant, the appropriate group to be laid off— and not on race or fear of litigation.

If you have done that, and you are confident that your decision was objective, stand by it and do not step through the looking glass in order to avoid litigation. That is the takeaway from the *Ricci* decision.

Fire Department's Plan for Promotions

In 2003, New Haven administered promotion exams to 118 firefighters seeking to fill 15 vacant lieutenant and captain positions. The exams were designed by an outside consulting firm, Industrial/Organizational Solutions Inc (''IOS''). The city paid IOS $100,000 to develop a test that would focus only on skills relevant for promotion and minimize any adverse impact on minority test takers.

As required by city regulations, the test consisted of 100 written questions, accounting for 60 percent of an applicant's total score, and an oral examination, accounting for the other 40 percent. In order to design the exam, IOS interviewed, rode along with, and observed current lieutenants and captains in the department. Using the information gleaned from those interviews, ride alongs, and observations, IOS developed questionnaires that it administered to most of the lieutenants, captains, and their supervisors in the department. They used these questionnaires to develop the test administered to the applicants.

Throughout the process of designing the test, IOS oversampled minority lieutenants and captains, in an effort to develop examinations that would be free from hidden racial bias. IOS also created diverse panels to administer the oral examinations. The panels consisted of battalion chiefs, assistant chiefs, and chiefs from similar-sized departments. Sixty-six percent of those panelists were minorities. The panelists administered the oral examinations in groups of three. For each examination, two of the three panelists were minorities.

Despite the city's best efforts to avoid any bias in the promotional examination process, the pass rate for minority candidates was substantially lower than the rate for white candidates. As the table below reflects, while approximately two-thirds of white candidates passed each exam, approximately one-third of minority candidates passed.

Furthermore, the city observed a policy, dubbed the ''rule of three,'' which required that any candidate who is offered a position have one of the top three scores on the exam. Eight lieutenant and seven captain positions were vacant at the time the tests were administered. Thus, only the top 10 and top nine scorers on each respective exam were eligible for promotion. When this policy was applied, all 10 of the potential lieutenants and seven of the nine potential captains were white. The other two potential captains were Hispanic.

Danger of Disparate Impact Liability

Given these results, the city became concerned about its potential liability in a disparate impact suit. Faced with political pressure from minority groups, attorneys for the city recommended that its civil service board set aside this test and administer a new one. After considering the potential consequences, the board came to a 2-2 split. The tie vote did not certify the test and effectively set aside the results.

Later, New Haven would concede openly that it set aside the test results to avoid a disparate impact lawsuit by the minority firefighters. By way of background, over 30 years ago, in *Griggs v. Duke Power*[4], the Supreme Court found that an employment practice that has a disproportionately adverse impact on a protected group of workers could potentially violate Title VII. The violation may occur even if there was no intent to discriminate by the employer. This holding was later codified in the 1991 amendments to the Civil Rights Act.

However, and even under *Griggs*, a statistical disparity alone is not enough for a plaintiff to prevail on a disparate impact claim. In other words, the fact that the pass rate was higher for Caucasians in New Haven was not sufficient for the minority applicants to make out a case. The statistical disparity is only ''round one'' in the inquiry. The employer, New Haven, can then rebut any

[3] *United States v. New York*, 07-CV-02067 (E.D.N.Y. 2009), 7 WLR 1056, 7/31/09.

[4] 401 U.S. 424, 91 S. Ct. 849, 3 FEP Cases 175 (1971).

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discrimination claims with proof that the test in question is ''job related'' and consistent with ''business necessity''—in other words, related to some objective aspect of the job in question. Furthermore, even if the employer can show job relatedness, it may still be liable if a plaintiff can show that the employer refused to adopt ''an available alternative employment practice'' that does not produce a disparate impact and would have satisfied the employer's business needs.

New Haven Steps Through the Looking Glass

Back to New Haven. The city's decision to set aside the test results prompted the 18 firefighters who had passed the test and were denied promotions to file a Title VII action against the city claiming race discrimination. The ''reverse discrimination'' litigation forced the city into what must have been a difficult position. New Haven had to attack the validity of its own test in order to defeat the lawsuit.

Before the U.S. District Court for the District of Connecticut, the city argued that its decision not to certify the test results was mandated by Title VII and its ''good faith belief'' that its test was faulty, and that it had discriminated against minority applicants.

In essence, the district court found that the affected firefighters made a *prima facie* case, by showing that the city and other individual defendants were motivated by a concern that too many white firefighters would be promoted. However, it held that the defendants' desire to avoid relying on a test that would have a disparate impact on minorities was ''race neutral,'' because it impacted all who took the test equally. Hence, the district court granted summary judgment in favor of the city.

The plaintiff firefighters appealed to the Second Circuit. After a panel that included Judge (now Supreme Court Justice) Sotomayor heard arguments in the case, the circuit court essentially punted on the controversial issue, handing down a single paragraph unpublished decision deferring to ''the thorough, thoughtful, and well-reasoned opinion of the court below.'' The summary nature of the decision prompted Second Circuit Judge Jose Cabranes to comment that the Second Circuit panel had ''failed to grapple with the questions of exceptional importance raised in this appeal.'' The Supreme Court agreed and chose to hear the case.

Is *Ricci* a New Standard for Employers?

In a 5-4 decision issued on June 29, 2009, on the eve of the Sotomayor confirmation hearings—the Supreme Court reversed both lower courts, holding that the plaintiff firefighters were entitled to summary judgment on their Title VII claim. At its core, the court's ruling was based on the finding that the city had admitted that it set aside the test solely because of the statistical adverse impact on the minority applicants. Thus, the city had made a decision that was adverse to the plaintiff firefighters on the basis of race. Justice Kennedy, who wrote the majority opinion, explained very succinctly that ''race-based action like the city's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute.''

Justice Anthony Kennedy wrote for the majority in *Ricci* that ''[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.''

While the city may have had good intentions in setting aside the results, the court found that its desire to promote diversity and avoid Title VII disparate impact liability did not justify explicit discrimination. The court expressed concern that ''[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.'' Justice Kennedy went on to state, ''[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.''

Using this reasoning, the court endeavored to provide guidance for employers to use in crafting tests and other employment policies, and when trying to navigate between disparate impact and disparate treatment claims.

The court held that, when faced with a result that seems to show a statistical disparate impact, an employer should not set aside that result unless there is a ''strong basis in evidence'' that the employer will be subject to disparate impact liability.[5] The employer should then go to Step 2 of the *Griggs* test. The *Ricci* court stated that the employer would then be liable for discrimination only if it could be shown that the promotion exams were not ''job-related or consistent with business necessity,'' or if it was proven that ''the City refused to adopt equally valid, less discriminatory alternatives.'' Absent such a showing, an employer should not reject the results of a job related employment test.

In New Haven's case, Justice Kennedy agreed that, looking at the 2003 test results, ''the City was faced with a *prima facie* cause of disparate impact liability.'' Where New Haven went wrong was *it stopped there* and, based on those numbers alone, rejected the test. The Supreme Court held that there was no evidence in the record that would support the finding that the New Haven firefighter test was not job-related, and that ''the City had turned a blind eye toward evidence that supported the exam's validity.'' The court noted that the city had used experts to design the test, had vetted the test, and that even after the results were in, there was no expert who could identify a better test or a better means of testing. Thus, there was no showing by the city that there was an equally valid and less discriminatory test available. Based on all of the above facts, Justice Kennedy found that ''the City lacks a strong basis

[5] This was not a new rule, as the ''strong basis in evidence'' standard was established in *Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706, 53 FEP Cases 197 (1989).

in evidence to believe it would face disparate impact liability. . . Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the exam and qualified for promotions.''

The case presented an odd situation, one where an employer in effect had to attack itself. Despite the fact that the city spent a substantial amount of time and money preparing the test, and its firefighters had rigorously prepared for it, the city then spent a huge amount of time and resources seeking to have the results set aside. Out of fear of disparate impact liability, the city engaged in intentional discrimination and, in doing so, fought tooth and nail against its own carefully designed employment practices.

The FDNY Situation

The New York Fire Department has been involved in similar litigation over its promotional examinations for years, pitted against the Justice Department. In the ''reverse'' to the New Haven case, a class of minority applicants is challenging firefighter tests New York gave in 1999 and 2002, alleging that they discriminated against minorities.[6]

As in the New Haven case, a disproportionate number of minority applicants failed the test. The core issue and the legal standard is the same one in *Ricci*: was the New York test sufficiently related to the firefighter job? The district court judge found that the city had not proven that the construction of the test (mostly written questions) and the content were truly ''testing'' the skills needed to be a firefighter. New York staunchly defended its tests, and still maintains that—despite the decision by the court—they were lawful.

Design a Fair Test and Trust Your Results

Where do employers go or what should they do, when faced with ''bad'' test results? As noted by dissenting Justice David Souter at the oral argument in *Ricci*, New Haven was in a ''damned if you do, damned if you don't situation.'' While that may seem true at first blush, it is not totally accurate. Clearly, *Ricci* holds that an employer should not engage in ''disparate treatment'' against one group, in order to avoid disparate impact liability to another. In order to avoid that scenario, employers must be certain that the test or the policy they have is objective and job-related.

The lessons to take from *Ricci* and the New York case are clear: the time to determine whether a test is valid is *before* it is administered—not *after*. Sometimes the results of even a valid, unbiased test will show disparities among groups, but that does not mean that there was bias within the test itself or that it was unlawful. However, if faced with such a statistical imbalance, you must then be able to defend the ''job-relatedness'' of the test. If in developing a test the employer used established practitioners, lawyers, test consultants, *and* experts in the field, who developed objective criteria to determine whether a test's content was a true measure of the skills needed for the job—the *Ricci* decision should actually give that employer a good defense. *Ricci* will allow that employer to rely on its test, and not to bend to pressure and throw out what may be a perfectly lawful result. Assuming the employer can satisfy the ''strong basis in evidence'' test, the mere fact of some statistical disparity and the fear of disparate impact litigation should not prompt an employer to throw out its test. In fact, under the *Ricci* ruling, an employer can argue that it cannot throw out its test, unless it is presented with ''strong evidence'' that it will be subject to disparate impact liability.

With this opinion, the Supreme Court pulled employers back through the looking glass. Employers may now rely on tests and other employment screening mechanisms that have been designed to eliminate bias, without fear of being held liable in a disparate impact suit. As always, careful planning is required when designing tests, and other employment mechanisms, to ensure that they are job related and do not show a bias towards any protected class. However, given the court's decision, careful planning will serve employers by protecting them from tenuous disparate impact claims.

[6] New York has since changed its firefighter testing significantly, has launched a firefighter recruitment campaign, and minorities now make up 38 percent of the passing candidates.

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