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Ricci v. DeStefano: A Cautionary Tale for Employers

By Jill Pedigo Hall, Esq.

On June 29, 2009, the United States Supreme Court rendered a 5-4 majority opinion in the long-awaited case of [*Ricci v. DeStefano*](#), (Nos. 07-1428 & 08-328). The Court decided that the City of New Haven, Connecticut had violated Title VII disparate treatment proscriptions by choosing to reject test examination results designed for promotion purposes for New Haven firefighters. The City rejected the test results because of its concern that if it promoted firefighters on the basis of the test results - only one non-white test taker passed - it would be charged with using a test that violated Title VII's prohibition against adverse impact discrimination. Writing for the majority, Justice Kennedy said a threshold finding of significant statistical disparity combined with a threat of litigation did not meet the standard of a "strong basis in evidence" that a neutral selection device would have unlawful disparate impact sufficient to justify a race-based employment decision.

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The case has been widely vetted by legal commentators, with some viewing the decision as a "win" for employers because of an initial appearance that it may give more "credence" to employers' use of testing. Others have pointed out that the amorphous "strong basis in evidence" Title VII standard created in the case provides no clear guidance as to when an employer can lawfully abandon the results of a test and thus will be difficult to apply as a practical matter. In her dissent, Justice Ginsberg speculated that the decision "will not have staying power." While all these and more contradictory views are viable, it seems clear that *Ricci* carries more basic messages. First, it reinforces the necessity for employers to adhere to already-existing and well-developed validation and reliability standards in the development and administration of employer selection processes. Second, it requires employers to carefully consider alternative selection methodologies if the validity or reliability of a selection process is in question.

The *Ricci* Facts

Under an existing collective bargaining agreement (CBA) between the City of New Haven, Connecticut and the New Haven's Firefighters Union, promotions to lieutenant and captain were to be based on promotional testing. The *Ricci* case involved the City's use of a promotional test for this purpose that was created and administered by a third-party testing company. Promotion meant relatively significant increases in compensation and authority so that more than 100 firefighters took the exams. In rendering its decision, the Court found significant the fact that many of the firefighters "studied for months at considerable financial and personal cost."

The company that created the firefighters' tests specialized in creating employment examinations for police and fire departments throughout the country. The tests were developed to have weighted scoring of 60% written test/40% oral examination as required by the City. The testing company designed the examinations only after conducting an extensive background investigation. Steps the company took included interviewing existing lieutenants and captains and their supervisors, conducting job analyses, oversampling minority firefighters on the job analyses to guard against unintentionally favoring white candidates, and also assembling a pool of 30 assessors of superior rank from outside Connecticut (at the City's insistence), two-thirds of which were minorities. Somewhat counterintuitive to the carefully executed efforts at race-neutral creation, no qualified firefighting personnel reviewed the final test product prior to its administration. In that regard, the City told the testing company that no one within the Department should review the tests to protect the integrity of the exams in light of past alleged security breaches. Thus, no "trial testing" was conducted, and no validation studies were conducted prior to administration of the tests.

Despite the specific efforts taken to develop race-neutral exams, minority firefighters failed both tests at a statistically significant rate, which could allow the inference that the tests had

illegal adverse impact on minority firefighters taking the test. Even though under the City's contract with the testing company, the company would prepare a technical report that described the examination processes and methodologies and analyzed the results, the City did not request the technical report following scoring of the tests.

Based upon the result of the examinations, the City became concerned that it could be charged with race discrimination if it certified the test results. The City's Civil Service Board (CSB) conducted several public meetings and heard testimony from the leader of the team that developed the test, the City's counsel, and several other witnesses, including two firefighters who had taken the exam, to determine whether to certify the results of the test. Other than the results themselves, the hearings yielded no clear indication that the test content or procedure was unfair to minority candidates. Again, the City did not seek the validation or reliability studies from the testing company. Instead, the City's counsel issued an opinion to the CSB that, under federal law, "a statistical demonstration of disparate impact constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntary remedies - even...race-conscious remedies." Ultimately, the CSB chose not to certify the test results, denying 17 white firefighters and one Hispanic firefighter promotions. These firefighters brought a Title VII discrimination claim against the City, alleging the decision not to issue the promotions, because the City wanted more minorities to qualify, amounted to illegal discrimination based upon their race.

Adverse Impact and Business Necessity

Since its 1971 decision in *Griggs v. Duke Power Co.*, the Supreme Court has prohibited employers from applying facially neutral employment practices that are "discriminatory in operation." *Griggs'* ban against disparate impact discrimination was subsequently codified in the 1991 amendment to Title VII. Title VII now provides: "notwithstanding any other provision . . . it shall not be an unlawful employment practice for . . . an employer to give and to act upon the results of any professionally developed ability test *provided* that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h). (Emphasis added.) Historically, the EEOC has taken the position that a test having a selection rate that is less than 80% "of the rate for the group with the highest rate will be regarded as evidence of adverse impact." 29 CFR § 1706.4(D) (2008) Despite this, if an employer can show that the selection device is "job-related and consistent with business necessity" and there is no available equally valid, alternate procedure that has a lesser adverse impact on a particular race, sex or ethnic group, the employer's use of the method will not be found discriminatory. The *Ricci* Court adopted this "rule of thumb" test as an approved method to support its finding that, because the promotion test results failed the 80% test, the results demonstrated "significant" adverse impact.

The issue presented by the Court was whether the City was

justified in refusing to certify the test results - which it characterized as intentional discrimination against the white firefighters - because of the City's concern over the risk of adverse impact litigation due to statistical adverse impact found. The Court found that facing a *prima facie* claim of adverse impact discrimination is *not* enough to support an employer engaging in "intentional discrimination" for the asserted purpose of avoiding or remedying that unintentional impact. To legally justify taking race-based remedial action (such as discarding a test), an employer must be able to show that it has a "strong basis in evidence" that the employer will be liable under Title VII disparate impact prohibitions if it did not take the action. While the Court found that the City did not have a "strong basis in evidence" to justify discarding the promotion test to achieve desired race-based results, it provided vague guidance as to what will meet the standard. What is clear is that if a selection process is job-related and consistent with business necessity, or there is a less discriminatory alternative available, taking race-based remedial action may be considered prohibited discrimination.

What should employers do after *Ricc?*

The Court stated that an employer does not need to determine that it has a "provable, actual violation" of disparate impact proscriptions to support race-based remedial action. However, it did not identify what *would* meet its standard, beyond suggesting that if an employer has a viable defense to an adverse impact claim, such action would not be supported. Rather than speculating on criteria which will now be established through litigation, more practical guidance can be found in two additional key ideas commented upon by the Court. First, the Court acknowledges that selections tests can be important neutral processes "true to the promise of Title VII." Second, its decision rested largely upon the idea that candidates participating in the testing have "justified" expectations and that injury is inflicted upon those candidates who have gone through the process if the results are then rejected. The following guidance and cautions for employers are apparent:

- Ensure the process selected is job-related and necessary to achieve the purpose for which it is employed
- Consider how to design the selection process so that all individuals have an equal opportunity to succeed
- Consider historical findings and outside gender and ethnicity studies regarding alternative testing methods
- Invite relevant stakeholders to provide feedback when designing any selection process as to job-relatedness and fairness
- Make sure the selection criteria tested by the process are truly job-related
- Before using any selection process, evaluate alternative methods to determine whether the same selection goals can be achieved with a concurrent lesser effect on minority

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- Do not utilize a selection process without assessing significant disparate impact and examining whether the process is job-related and whether there is an alternative that would have less of a disparate impact
- Ensure that once thoroughly vetted, the process will be followed absent *strong evidence* that there is no defense to adverse impact liability

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