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Ricci v. DeSteffano: Talk about A Rock And A Hard Place: Employers Required To Pick Between Disparate Treatment and Disparate Impact Claims

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On June 29, 2009, Justice Kennedy, writing for a 5-4 majority of the U.S. Supreme Court, issued the long-awaited decision in *Ricci v. DeSteffano*, a "reverse race discrimination" case arising out of the City of New Haven, Connecticut's Civil Service Board's ("CSB") decision *not* to use the results of promotional examinations. The Court held that CSB engaged in disparate treatment race discrimination against white firefighters when it decided not to certify test results showing a disparate impact on certain firefighters of color.[1] In making its decision, the CSB considered evidence that the selection process may not have been job-related and consistent with business necessity and that an alternative employment practice having less of a disparate impact and serving its legitimate business needs could have been utilized.

Because establishing the aforementioned factors would be critical to CSB's ability to fend off a future disparate impact claim by minority firefighters and there was apparent concern about CSB's ability to do so, it elected not to use the examination results. The U.S. Supreme Court held that CSB's evidence was insufficient to support its concerns about potential disparate impact liability and, consequently, the test results should have been certified.

Background

In 2003, 118 New Haven firefighters took tests (with written and oral components) seeking to qualify for promotions to lieutenant or captain. In order to calculate the composite score, the firefighters' collective bargaining agreement required a "weighting" of the examination components: 60% for the written and 40% for the oral. Seventy-seven candidates completed the lieutenant examination. The composition of test-takers and pass rates were: 43 Caucasians (25 passed); 19 African Americans (6 passed); and 15 Hispanics (3 passed). Similarly, for the captain's examination, the following occurred: 25 Caucasians (16 passed); 8 African Americans (3 passed); and 8 Hispanics (3 passed). As a result, the "promotion lists" contained 34 candidates for lieutenant and 25 for captain. Eight lieutenant and seven captain positions were vacant at the time of the examinations.

Based on the City's Charter, each vacancy must be filled by choosing one candidate from the top three scorers (based on the composite score) on the promotion list. Because of the "rule of three," the top 10 candidates scoring highest on the lieutenant's examination would be eligible for immediate consideration for the 8 lieutenant vacancies; all 10 highest scoring candidates were Caucasian. Similarly the 9 candidates scoring highest on the captain's examination would be eligible for consideration for the 7 captain vacancies; 7 of the highest scorers were Caucasian and 2 were Hispanic/Latino. Consequently, for the immediate future, the overwhelming majority of promotions would be awarded to Caucasian firefighters and no African American firefighters would be promoted.[2]

In analyzing whether to certify the *test results* (thereby paving the way for the selection of eligible candidates for promotion) and guided by the advice of its legal counsel, the CSB considered whether it could successfully defend a future disparate impact claim raised by firefighters of color based on its *selection process* (an inquiry, quite frankly extending beyond just the test results). In essence, the CSB was concerned that components of its selection process (a combination of the test results, test "weighting" procedure (60 v. 40%) and the application of the "rule of three") were vulnerable to subsequent challenge.

The testing results established a *prima facie* case of disparate impact against the firefighters of color, but a question arose as to whether there was sufficient evidence to support the remaining elements of a potential disparate impact claim. In short, the fundamental issues were whether a potential class of African American plaintiffs challenging the selection process could demonstrate that: (a) the City's selection process was not "job related for the position in question and consistent with business necessity"; or (b) there was an available alternative practice that would have less disparate impact and serve the City's legitimate needs.

The City held five public hearings to obtain feedback regarding job-relatedness and alternative practices. The company developing the oral and written tests provided detailed information about its processes and the numerous steps taken to minimize the potential for bias. Others discussed the lack of access to the study materials, the use of information not relevant to the work done by the New Haven firefighters and alternatives that other fire departments used that resulted in less disparate impact (e.g. a different allocation between the oral and written components of the examination and/or using testing centers where candidates' decision-making and performance of

job-related tasks could be observed.) At the conclusion of the hearings and in a 2-2 vote, the City "decided" to discard the test results.[3]

Seventeen Caucasian and one Hispanic/Latino firefighters passing the examinations sued, claiming discrimination under both Title VII of the Civil Rights of 1964, as amended, and the Equal Protection Clause of the 14th Amendment. A federal district court granted summary judgment to the CSB and the U.S. Court of Appeals for the Second Circuit affirmed. The plaintiff firefighters then appealed to the U.S. Supreme Court.

Supreme Court's Analysis

The Supreme Court reversed, holding that the City's jettisoning of the selection process constituted intentional race discrimination against the Caucasian and Hispanic firefighters eligible for promotion. Further, the Court held that the City failed to proffer a strong basis in evidence that had it not discarded the tests, it would have been liable for future disparate impact claims asserted by certain African American and Hispanic/Latino firefighters.

In so holding, the Court determined that not certifying the tests because the results demonstrated disparate impact against African American and Hispanic firefighters essentially means the City made a race-based decision. Further the Court stated, "Without some other justification, this express, race-based decision making violates Title VII's command that employers cannot take disparate employment actions because of an individual's race."

Setting aside whether remedying disparate impact by not certifying test results necessarily means a race-based decision has been made, Justice Kennedy nonetheless framed the issue as one requiring a determination about "whether the purpose to avoid disparate-impact liability excuses what would otherwise be prohibited disparate-treatment discrimination." The Court's job was to provide "guidance to employers and courts for situations when" the prohibition against disparate impact discrimination and the prohibition against disparate treatment discrimination "could be in conflict absent a rule to reconcile them." In short, the Court recognized that remedying workplace "practices that are fair in form, but discriminatory in operation" (potential disparate impact claims) necessarily requires halting certain employment practices benefiting employees outside of the disparately impacted group (thereby spawning potential disparate treatment claims). According to Justice Kennedy, both types of discrimination are prohibited, and Title VII must be interpreted to give effect to both provisions.

In doing so, the Court issued a new rule claiming to balance the competing interests. Under Title VII, it is impermissible to take race-based actions 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 prohibition in Title VII. The Court then determined that the City's actions did not meet this standard.

As a preliminary matter, the Court concluded that the pass rate percentages at issue demonstrated that "the racial adverse impact here was significant."[4] The Court then analyzed whether the City had demonstrated a "strong basis in evidence" that it would have been liable had the African American and Hispanic/Latino firefighters sued for disparate impact. In concluding that it had

not, the Court made several, critical determinations.

First, the Court held there was no genuine dispute that the written and oral examinations were job related and consistent with business necessity because the testing company's test-design process included "painstaking analyses of the captain and lieutenant positions." The Court also noted specifically that these design processes "made sure that minorities were overrepresented." For example, regarding the written test preparation, the testing company performed job analyses and "ride alongs" to "identify the tasks, knowledge, skills and abilities that are essential for the ... positions," interviewed captains and lieutenants and their supervisors, wrote job analysis questionnaires and administered them to most of the incumbent chiefs, captains and lieutenants. Notably, "[a]t every stage of the job analyses...by deliberate choice, [the testing company] oversampled minority firefighters to ensure that the results – which ... would [be] use[d] to develop the examinations – would not unintentionally favor white candidates." Further, the testing company identified source materials that could be used as study guides, obtained departmental approval to use those guides and then devised questions based on them. Finally, the testing company wrote the examinations below the 10th grade reading level and the City provided candidates three months to study for the examination and identified the specific chapters from the testing guides where the test questions would be derived.

Regarding the oral test design procedures, the testing company used the job analysis data and wrote hypothetical situations to "test incident-command skills, firefighting tactics, interpersonal skills, leadership and management ability, among other things." Candidates answered these questions before a panel of three assessors. Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members (one African American and one Hispanic/Latino.) The testing company trained the panelists for several hours, "teaching them how to score the candidates' responses consistently using checklists of desired criteria."

The Court further noted that the testing company's contract with the City required the company to provide a technical report – after the testing – describing the examination processes and methodologies and analyzing the results. According to the testing company's representative, the tests were valid and "any numerical disparity between white and minority candidates were likely due to various external factors and was in line with results of the Department's previous promotional examinations." The City did not request a technical report.

Second, the Court held there was no strong basis in evidence that an equally valid, less discriminatory alternative existed. The City asserted that weighting the composite score calculation differently (*i.e.* 30% written and 70% oral) "would have allowed the City to consider two black candidates for then-open lieutenant positions and one black candidate for then-open captain positions." The Court countered that there was no evidence that the 60/40% weighting was arbitrary, especially since it was contained in the collective bargaining agreement and had arguably been negotiated during the bargaining process. Further, it stated the record did not contain any evidence that a modified weighting formula "would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions." Finally, the Court opined that changing the weighting formula "could well have violated Title VII's prohibition of altering test scores on the basis of race." As a result the

Court noted "this record" was insufficient to conclude that a "30/70 weighting was an equally valid alternative the City could have adopted."

The Court also found the City's assertions that considering the "rule of three" differently or applying an "assessment centers process" rather than written examinations as legitimate alternatives equally unavailing. Regarding the "rule of three," the City proffered that "rounding up scores" to the nearest whole number (*e.g.* "banding") would allow candidates with the same whole-number score to be considered "one rank." The City claims that employing banding would have made four black and one Hispanic candidates eligible for then-open lieutenant and captain positions. Notably, the Court indicated that a previous state court's prohibition of banding as a matter of municipal law under the charter "may not eliminate banding as a valid alternative under Title VII," it declined to rule on the issue. Rather, the Court held that banding was not a valid alternative in this instance – after the scores were known and the City was considering whether to certify the examination results – because adjusting minority scores upward "would have violated Title VII's prohibition of adjusting test results on the basis of race."

As for the assessment centers, the Court concluded there was no evidence such facilities were available to the City when these examinations were taken and that they would have produced less adverse impact. Further, the City could not rely on representations made by a competing testing company because that representative also said that he was not suggesting that the testing company creating and scoring the examinations had "somehow created a test that had adverse impacts that it should not have had." In short, the Court held the record was insufficient to demonstrate that assessment centers were an appropriate alternative.

Effect of the Court's Decision

There is no doubt that the Supreme Court is "raising the ante" on the types of proactive, preventive steps an employer may take to avoid potential disparate impact liability. The Court's decision to frame the facts as evidencing "tension" between disparate treatment and disparate impact theories of discrimination and to apply a standard heretofore reserved for constitutional challenges asserted under the Equal Protection Clause of the Fourteenth Amendment further evidences that fact. The Court's decision has broad-based application – to "other claims" (not just promotions) and private employers (because decided under Title VII).

Employer Considerations

There are several issues prudent employers should consider as a result of this decision:

1. Review, in an attorney-client privileged manner (where possible), all selection procedures (*i.e.* hiring, compensation, promotions, terminations, job assignments, etc) immediately to determine whether policies and procedures describing the criteria for such decisions are job-related and consistent with business necessity. Make sure position requisitions, interview questions and job descriptions, for example, support the job relatedness/business necessity inquiry;
2. Determine whether the overall objectives the company is seeking to attain

(*i.e.* diversity at all levels of the organization) are accounted for when considering how to structure a decision-making process. These issues must be considered *before* a selection process begins. For example, identify the critical skill sets needed to perform particular jobs, determine if experience in particular "feeder jobs" really is necessary for the next level of promotion and, if so, determine for what length of time that experience is necessary (6 months vs. 1 yr vs. 2 years). Determine whether qualifications criteria and selection processes allow for an expansive pool of qualified applicants. If all persons passing a test are deemed qualified for a position, then design selection criteria permitting selection of anyone from that "qualified group" as compared to selection criteria limited to a subset of that group. Similarly, make the test only a factor in the decision-making process instead of automatic disqualifier.

3. Examine whether there are documents impacting a selection process (*i.e.* collective bargaining agreements) and whether they contain terms and conditions that impair – in some way – a company's selection objectives. If so, ensure they are the topic of future bargaining discussions.
4. Contract with testing companies willing to share both background information about successful and unsuccessful litigation challenges to their methodologies and analyses as well as detailed validity and adverse impact studies. The latter data is available but is often not shared with an employer unless specifically requested (frankly, this reticence of sharing such data by testing companies is understandable – technical validity data is complex and many employers do not have the ability to evaluate it fairly). Seek qualified counsel to help in evaluating this information.
5. Discuss with testing companies their proposed methodologies for designing tests appropriate to your company and be willing to consider undertaking a job-relatedness analysis. Many employers resist such an analysis because of additional expense, but a job-relatedness evaluation specific to the employer is very helpful in litigation.
6. Gain insight on which testing options are likely to minimize the occurrence of disparate impact and be supportable through validation. Understand how these testing instruments work for your particular industry.
7. Refrain from modifying selection procedures to affect a difference in results for minorities once a selection process begins.[5] Certainly testing can be modified for a variety of reasons related to job changes, more recent validity analysis and other data. However, "changing course" in midstream to deal solely with adverse impact may well violate Title VII;[6]
8. Check diversity and EEO policies requiring the inclusion of diverse candidates in the selection process. Take steps to build diverse candidate pools, but try to do that in advance. There is some danger in holding up employment decisions solely because diverse candidates have not applied.
9. Evaluate other factors in the selection process that may have contributed to the disparate impact on examinations and then devise proactive strategies for remedying the same (*i.e.* ensure study aids are provided to all candidates

in a timely manner, provide a longer "study period" for the examination, offer examination tutorials at times where all candidates can participate, etc.). The problem may not be with the test, but with providing support for those taking the test (assuming, as in *Ricci*, that a promotion is being evaluated as opposed to an initial hiring decision).

10. Do not fear testing. What employers should fear instead are tests that are not job-related, properly validated or that create unjustified or excessive adverse impact. Choose carefully in regard to tests – there are great providers and there are those that are not. Get advice from counsel regarding the legal use of any test that is being considered. Then discuss how best to use those tests.

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[1] The terms "minority" and "firefighters of color" will be used interchangeably. In this instance, the terms refer to African American and Hispanic/Latino firefighters taking the lieutenant and captain promotional examinations.

[2] Notably, the composition of the New Haven community was nearly 60% African American and Hispanic/Latino.

[3] By rule apparently, a tie meant the results could not be certified.

[4] The Supreme Court recognized that the pass rates for firefighters of color "... were approximately one-half the pass rates for white candidates[and] fall well below the 80-percent standard (4/5's rule) set by the EEOC to implement the disparate-impact provision of the TitleVII. 29 CFR § 1607.4 (D) (2008). On the captain's examination, the pass rates were 64% for Caucasians and 37.5% for both African Americans and Hispanic/Latino candidates. The lieutenant's pass rate was 58.1% for Caucasians, 31.6% for African Americans and 20% for Hispanics/Latinos.

[5] Notably, the *Ricci* Court concluded that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide common ground for the open discussions toward that end."

[6] As the *Ricci* Court indicated, "[We do not] question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed...."

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