

## Promotional Testing: *Ricci* and Title VII Trends

Clarissa M. Rodriguez  
Denton, Navarro, Rocha & Bernal P.C.  
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## Public Safety Testing is Fun!

- Promotional testing involves balance and good professional practice
- *Ricci*- what is all the hoopla about this case and what the heck does it mean?
- The guidelines, validation, KSA's, job analysis, assessment centers, situational judgment, cognitive testing, 4/5ths Rule, statistical significance- **HUH?**
- Chapter 143 and Collective Bargaining Agreements- Don't think you are immune from liability!
  - MUST COMPLY WITH ALL
    - Chapter 143 Civil Service
    - Chapter 174 CBA
    - 143.300 Meet & Confer
    - Title VII
    - Chapter 21 TCHR




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## EEOC Uniform Guidelines

- Uniform Guidelines for Employment Selection Procedures—established in 1978 by the EEOC— “The Guidelines”
  - 29 C.F.R. §1607
  - EEOC Q & A- 1979, 1980
- Provide uniform guidance for employers about how to determine if selection procedures are lawful and not violative of Title VII and create a disparate impact
  - UGESP outlines three different ways employers can show their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called “test validation.” UGESP provides detailed guidance about each method of test validation.

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## Ricci v. DeStefano

- Factual Background
  - New Haven, CN Fire Department promotional exam for Lieutenant and Captain ranks; promotions based on "Rule of 3" in 2003
  - Reverse Discrimination
  - Rank order eligibility list
- The Test
  - Contract provided for oral and written components
  - Weighted 60% written/40% oral—as directed by the City
  - City hired I/O Solutions to assist with test development
    - IOS oversampled minorities during job analysis to ensure no unintentional racial bias
- Test Results
  - Significant racial adverse impact
  - Pass rate for minorities 1/2 that of White candidates, violating 80% Rule for disparate impact

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## Ricci con't...

- City concerned about the disparate impact
  - Consulted with testing experts- internal and external; Civil Service hearings; consulted with own and outside firefighters
  - Civil Service Commission—decided *not* to certify exam results
- Lawsuit-top candidates, sued under Title VII disparate treatment
  - 19 Plaintiffs: 17 White; 2 Hispanics
  - Alleged City failed to certify results and they were denied the opportunity for promotion based on race
- Court's Holding
  - Supreme Court held that the City of New Haven violated Title VII disparate treatment because it decided not to certify results
  - Strong Basis In Evidence Standard established

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## Recent Developments

- *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010)
  - The City of Chicago required applicants for firefighter positions to complete a written exam and, based on the score, sorted these into three categories
  - It used the list of applicants with a cut-off score of at least 89 out of 100 to fill vacancies
  - Minority applicants who were not hired filed suit in 1997, alleging that the City's selection practice had a disparate impact
  - U.S. Supreme Court held that a plaintiff who did not file a timely charge challenging the adoption of a practice could still assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice, as long as he or she alleged each of the elements of a disparate-impact claim

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## Recent Developments cont...

- *US v. Brennan*, 2011 WL 1679850 (2d Cir. 2011)
  - Between the New York City Department of Education and U.S. Department of Justice that afforded different types of seniority points to African Americans and Hispanics based on findings of disparate impact on hiring tests and recruitment methods
  - The Court in *Brennan* interpreted the standard as applied in *Ricci* as a balanced standard in between the upper and lower extremes of employers being allowed to only act when there is a provable, actual violation and a preponderance of the evidence of an actual disparate impact violation
  - Holding also extended the strong basis in evidence standard in *Ricci* to apply not only to disparate impact liability, but also to the necessity if an employer's race or gender conscious action is necessary for remedying the disparate impact
  - The *Brennan* Court held that *Ricci* does not require an "actual violation" for an employer to take voluntary action

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## Practical Effects of *Ricci* & Progeny

- Cannot alter scores or scoring system ex post facto violates Title VII
- Cannot set aside test outcomes without S.B.E.
- Review validation procedures & document
- Cannot pre-judge selection procedures
- Design and develop properly validated selection procedures even in the wake of Civil Service, Chapter 143 and Collective Bargaining Agreements

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## Test Development

- Job Analysis & KSA's
- Components of Exam
  - Multiple Choice Tests (MC)
  - Situational Judgment Tests (SJT)
    - Written
    - Computer
    - Composite in parts
    - Live interview
  - Assessment Centers (AC)
    - Assessment exercises
    - Assessment centers
- Validation
- Alternative Selection Measures
  - Duty to seek these out where disparate impact is found State law notwithstanding
- Statistical Analyses
  - 4/5's Rule/ 80%
  - Statistical Significance—Chi square; Standard Deviation

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## Hiring & Testing Dilemmas

- Importance of forensic an I/O consultant to review existing and prepare new selection procedures
  - Not cheap, but worth it in the long run
    - Internal
    - Capability
    - Competence
- Change things early; strong basis in evidence is supported with factual review & expert testimony to support it
- Scoring and weighting must be determined during test development
  - Elimination of law fidelity answers
- Civil Service and Collective Bargaining Agreements do not shield municipalities from Title VII liability
  - Negotiate flexibility into contracts for selection procedures based on disparate impact results

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## Bazile v. City of Houston

- 7 African American Fire Fighters sued City of Houston for disparate impact based on the promotional exams
- Exam results yielded disparate impact for Captains; Senior Captains had a statistical significance
- Mediation led to an agreement
  - Changes to Captain exam include situational judgment (SJT) & Multiple Choice (MC) written
  - Changes to Senior Captain included MC, SJT, Assessment Center
  - City joined Houston Professional Firefighters Association
- November Captain Exam
  - Results
- January 2011 Evidentiary Hearing for Senior Captain exam
  - City, Plaintiffs, HPFFA
  - Still awaiting ruling from Court

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## Captain (Eligibility List)

- Of the 156 candidates promoted, 10 were African American, 35 were Hispanic and 111 were Caucasian

Candidates

Ethnicity	Count
African American	10
Hispanic	35
White	111

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### Senior Captain (Eligibility List)

- Of the 70 candidates who were promoted, 2 were African-American, 8 were Hispanic, 1 was a Pacific Islander and 59 were Caucasian

Candidates

Ethnicity	Count	Percentage
African American	2	2.9%
Hispanic	8	11.4%
White	59	55.7%

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### Moving Forward

- Employ I/O Consultants
- Good Professional Practice
  - Collaboration with all parties
- Follow and use employment law guidelines
- Create a paper trail
- Revisit employment practices often to ensure compliance with the Guidelines, Title VII and explore all alternative selection measures if necessary

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Clarissa M. Rodriguez

TCAA Summer 2011

Denton, Navarro, Rocha & Bernal P.C.  
2517 N. Main Avenue  
San Antonio, Texas 78212  
210/227-3243

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