Promotional Testing:
Ricci And Title VII Trends

Presented by:

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Ricci v. DeStefano[1] received a great deal of publicity, both in the legal and political context. The case requires careful analysis to have any significant lessons for those responsible for promotion testing and promotions in public safety departments, as there are many potential practical effects of this and other pending Title VII cases. *Ricci* involves a different perspective on the structure and balance of Title VII's provisions and protections, serving as a good study in the requirements of the law in a new application. It presents the opposite scenario of the usual challenge to an employment or promotional examination, as the plaintiffs attacked not the use of allegedly racially discriminatory exam results, but defendants' reason for their *refusal* to use the results.

Perhaps because *Ricci* is a reverse discrimination case, many illegitimate conclusions or assumptions surround the discussion of the case, and it has been hyped to further the agendas of various public safety groups.[2] This paper uses *Ricci* as a roadmap in reviewing principles for promotional testing compliance, including the promotional examination standards established by the Equal Opportunity Employment Commission ("EEOC"), and the Supreme Court's ruling. This paper also serves as a practical guide for municipal employers to develop selection and scoring procedures in a public safety context and how the *Ricci* case underscores the necessity of the employer to carefully design and develop those procedures prior to the implementation of the selection method.

A. The EEOC Uniform Guidelines.

As the key to the successful development of promotional exams, the EEOC established the Uniform Guidelines for Employee Selection in 1978 ("Guidelines"),[3] which require an employer to establish, by study and documentation, a correlation between the knowledge, skills, and abilities ("KSA's") required for success in a position, and the outcome of the selection device used to make choices or rankings. The degree of correlation and accuracy must be evaluated and established, and this becomes more critical if the selection device is used to determine a rank order for hiring, as opposed to the creation of a pool or group of qualified applicants which are hired on more subjective criteria or additional exercises.

These Guidelines establish a process of developing, documenting, analyzing, administering, and evaluating post-administration, and of continuing to implement an employee selection process which minimizes possible adverse impact on protected minority groups. The Guidelines prescribe three different forms of validation: content validation, construct validation, and criterion validation.[4] Most employers use the content validation model, which evaluates the knowledge required to perform in a particular position. Any selection procedure that is used that has an adverse impact will be considered discriminatory unless the procedure has been validated.[5] Compliance with the validity study includes "an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible."[6]

The Guidelines provide a process of evaluating the job, customizing the examination process to develop a selection procedure that focuses effectively on what the job requires, and determining whether or not the test is truly predictive of success in the positions which are gained as a result of the selection process—better known as a "job analysis." They require a legitimate study, analysis, and documentation based on standards of the testing profession. The purpose of a job

analysis is to establish the work behaviors and other information relevant to the job.[7] The KSA's that are established in the job analysis are also instructive on the types of selection methods that should be employed for the specific job at issue. Understanding the job duties is essential for an employer to make an informed decision on the types of selection procedures to use.

The documentation requirements of the Guidelines include not just the work done, but an evaluation of the work in the context of the standards, resulting in conclusions and actions taken. An employer is required to determine if the selection devices have an adverse impact; if so, it has an affirmative duty to explore and evaluate alternative selection devices—ones that are equally capable of measuring the knowledge, skills, and abilities, but which have less adverse impact.

Once a test is administered, the EEOC's "four-fifths rule" provides that a selection tool that yields "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths ("4/5's") (or eighty percent—80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than 4/5's rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."[8]

Significantly, this standard refers to a "selection or promotion rate," not a "pass rate." This can be confusing, since *Ricci* is about pass rates and scores, and not about ultimate selection rates. It is only when a promotional list is exhausted that a "selection rate" becomes available. Initial statistical analysis will tell whether the test appears to have an adverse impact, but the 4/5's rule only applies to the true ultimate selection rate. Since the statistical significance of these calculations depends on one or two selections, more or less that can be critical.

The law clearly imposes a duty on employers to minimize adverse impact in the testing process. *Ricci* answers a very narrow decision about that responsibility. In most public safety testing scenarios, the reality is that the employer chooses to promote using the selection device even if adverse impact is present, and addresses improvements, changes, or revisions to the testing process in future examinations. Further, while the EEOC Guidelines are not law but "rules of thumb," an employer has a duty to follow the Guidelines.

B. Ricci v. DeStefano.

ii. **Factual Background.**

In late 2003, 18 plaintiffs took the competitive examinations for promotions to the rank of lieutenant or captain in the City of New Haven Fire Department. (Seventeen of the plaintiffs were White; one was Hispanic.) The City had a merit-based civil service system established by the City Charter, which mandated a strictly competitive process for hiring and promotion, expressly prohibited the favoring or disfavoring of any candidate because of race or political affiliation, and restricted political patronage-based hiring and promotions. Promotions were to be from a ranked eligibility list under the time and court-honored mechanism known as the "Rule of Three."

The City's contract with the firefighters' union provided for written and oral examinations, with an applicant's score being based 60 percent on the written exam, and 40 percent on the oral exam. Candidates for lieutenant needed 30 months experience in the department, a high school diploma, and certain vocational training courses. Candidates for captain needed one year's service in the department as a lieutenant, a high-school diploma, and certain vocational training courses.

The City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations. IOS conducted a test-design process with job analyses to identify the tasks, knowledge, skills, and abilities. At every stage of the job analyses, IOS oversampled minority firefighters to ensure that the results would not unintentionally contain a racial bias. IOS also developed the written exams (to measure the candidates' job-related knowledge) and the oral exams (which concentrated on job skills and abilities). Finally, IOS assembled a pool of 30 assessors, superior in rank to the positions being tested, and trained them for several hours on how to score the candidates' responses consistently, using checklists of the desired criteria. Much of the test development process was dictated by the city and the collective bargaining agreement and the testing consultant was limited in the selection procedures it could investigate.

Seventy-seven candidates completed the lieutenant examination: 43 Whites, 19 Blacks, and 15 Hispanics. The thirty-four candidates who passed were 25 Whites, 6 Blacks, and 3 Hispanics. Because 8 lieutenant positions were vacant at the time and based on "rule of three," the top 10 candidates were eligible for an immediate promotion. All 10 were White. (Subsequent vacancies would have allowed at least 3 Black candidates to be considered for promotion to lieutenant.) On the captain examination, forty-one candidates completed the exam: 25 Whites, 8 Blacks, and 8 Hispanics. The 22 who passed were 16 Whites, 3 Blacks, and 3 Hispanics. As seven captain positions were vacant, under the rule of three 9 candidates were eligible for an immediate promotion: 7 Whites and 2 Hispanics.

The racial adverse impact was significant. On the captain exam, the pass rates were 64 percent for White candidates and 37.5 percent for both Black and Hispanic candidates. On the lieutenant exam, the pass rate for White candidates was 58.1 percent; for Black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates for minorities, which were approximately one-half the pass rates for White candidates, fell well below the 80% standard set by the EEOC to implement the disparate-impact provision of Title VII.[9] The city was clearly faced with a prima facie case of disparate-impact liability.

City officials met with IOS to express concern about the tests discriminating against minorities.[10] Specifically, the city's counsel raised the issue of disparate impact and indicated employer-initiated, even race-conscious, remedies could be employed.[11] Based on these concerns, the Civil Service Board held multiple hearings. It heard from other test experts, as well as from firefighters, who testified both in favor of certifying the results and not certifying the results.[12] Ultimately, because the Civil Service Board deadlocked 2-2, the test results were not certified.[13] The plaintiffs then sued under Title VII for disparate treatment based on the failure to certify the results,[14] alleging that the city and its officials denied them opportunities for promotion on the basis of race.

ii. The Ruling.

The U.S. Supreme Court concluded that the action taken by the City was "impermissible under Title VII unless the employer [could] demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[15]

The Court began by stating that, absent a valid defense, the City's action of not certifying the examination results violated the disparate treatment provision of Title VII because it constituted a race-based decision.[16] The Court then addressed whether avoiding disparate-impact liability excused disparate treatment discrimination.[17] Turning to precedent under the Equal Protection Clause and the Fourteenth Amendment, the Court relied on a "strong basis in evidence" standard to justify remedial actions for past racial discrimination.[18] It reasoned that this would allow flexibility without requiring employers to "act only when there [was] a provable, actual violation."[19] The employer could ensure an equal opportunity for all applicants to apply for promotions but, once the process and the selection criteria had been established, it could not then reject the test results, absent a strong basis in evidence of an impermissible disparate impact.[20]

The City did not meet this "strong basis in evidence" standard.[21] Although the pass rates for minorities (approximately one-half the rate for Whites) violated the 80 percent rule set by the EEOC to determine the existence of a disparate impact,[22] the Court determined that a prima facie case of disparate-impact liability was "far from a strong basis in evidence that the city would have been liable under Title VII."[23] Because the city's evidence did not show that the test was not job-related or that there existed an equally valid, less-discriminatory alternative that served the city's needs but that the city refused to adopt, it did not meet its burden.[24] As a result, the Court determined the plaintiff firefighters were entitled to summary judgment on their Title VII claims.[25]

On the Court's finding that no "equally valid and less discriminatory tests were available,"[26] this outcome was mostly a failure of the evidence in the context of the record, and should not be taken as a factual principle which transports to other cases. The Court noted that the 40/60 formula was presumed to be for a rational reason; that "banding" scores, post-test administration, to make the minority test scores appear higher would violate the prohibition of adjusting test results on the basis of race; and that the evidence showed an assessment center was not available for the 2003 examinations.[27] The Court assumed that had the city provided a "technical report," it would have satisfied the missing evidence necessary to meet the strong basis in evidence test.[128]

In reaching its decision, the Court indicated that, as enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produced a disparate impact. This changed with the ruling in *Griggs v. Duke Power Co.*,[29] where the Court interpreted the Act to prohibit, in some cases, an employer's facially neutral practices that were, in fact, "discriminatory in operation."[30] The *Griggs* Court stated that the "touchstone" for

[1] While the *Ricci* court made these assumptions, the technical report or a casual report summarizing testing consultant opinions is not likely to satisfy the relevant standards for validity and job relatedness as applied by the Guidelines and case law; specific and sufficient proof is required. 29 C.F.R. §1607.9(A).

disparate-impact liability was the lack of "business necessity": if an employment practice which operated to exclude minorities could not be shown to be related to job performance, the practice was prohibited.[31] The employer's burden was to demonstrate that the practice had "a manifest relationship to the employment in question."[32] Under these precedents, if an employer met its burden by showing that its practice was job-related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination.[33]

Under the disparate-impact statute, a plaintiff established a prima facie violation by showing that an employer used "a particular employment practice that cause[d] a disparate impact on the basis of race, color, religion, sex, or national origin."[34] An employer could defend against liability by demonstrating that the practice was "job related for the position in question and consistent with business necessity."[35] Even if the employer met that burden, however, a plaintiff could still succeed by showing that the employer refused to adopt an available, alternative employment practice that had less disparate impact and served the employer's legitimate needs.[36]

The evidence in *Ricci* showed that the city failed to certify the examination results because of the statistical disparity based on race—how minority candidates performed compared to White candidates. Because the decision was based on race—the specific adverse impact standard created by the statute—the Court concluded that it violated the disparate-treatment prohibition of Title VII, absent some valid defense:

> "Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action."[37]

By codifying the disparate-impact provision in 1991, Congress expressly prohibited both types of discrimination—disparate treatment and disparate impact. The Court had to interpret the statute to give effect to both provisions, where possible. The Court rejected the argument that an actual *violation* of the disparate-impact provision had to exist before an employer could use its compliance as a defense in a disparate-treatment suit, finding that this was overly simplistic and too restrictive of Title VII's purpose. Such a rule "would run counter to what we have recognized as Congresses intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII.'"[38]

The Court also concluded that a "good faith" test was not enough. Allowing 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 a disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even when there was little, if any, evidence of disparate-impact discrimination. This could amount to a "*de facto* quota system" in which a "focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures."[39] This operational principle could not be justified, as Title VII expressly disclaimed any interpretation of its requirements as calling for outright racial balancing.[40] The purpose of Title VII "is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[41]

The Court made clear that there was great flexibility at the "front end" of the process to assure racial fairness, as Title VII did 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 a common ground for open discussions toward that end."[42]

Once that process had been established and employers made clear their selection criteria, they could not invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.[43]

C. Practical Effects and Hiring Dilemmas

Ricci highlights the dilemma facing employers—to develop a selection device that minimizes adverse impact but remains truly predictive of success in public safety positions—and illustrates the expectations once a process is in place and a test has been conducted. Every employer should review the basic fundamentals of selection device validation—from the job analysis to weighting to exploring alternative selection procedures with comparable validity and less adverse impact. Cut-off score determinations and test processes may comply with State law and collective bargaining agreements, but, without proof of validation, there is a risk the process may violate Title VII. *Ricci* provides guidance for employers in ensuring they do not pre-judge selection procedures and ensure they design and develop selection procedures even where those procedures are mandated by State law or collective bargaining agreements. The *Ricci* Court made clear that State law, civil service laws, and charter provisions do not insulate an employer, or a union for that matter, in the way of Title VII compliance: a "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."[44] Government entities must strike a careful balance with promotional selection procedures and civil service and/or contractual obligations.

Changes necessary in test designs to avoid an adverse impact need to be addressed at the beginning of the process, rather than retrofitted to achieve a racial balance. Further, the EEOC Guidelines require specific and detailed compliance, and an evidentiary record of analysis and research.[45] These can only be of value in the hands of qualified and knowledgeable witnesses, as there is a great deal of mythology and misunderstanding in the day-to-day human resources discipline about test validation, at least in terms of what happens at the courthouse when a challenge occurs. In order for employers to meet the *Ricci* strong basis in evidence standard, employers must provide sufficient evidence that the selection procedure had an adverse impact and was not valid or that there was an alternative selection procedure that had a less adverse impact. This can be accomplished with a fact based review supported with expert testimony.[46] Professional standards and the Guidelines proscribe what produces the most qualified candidates, development of a job analysis rather than predetermined requirements as set out by State law or union contracts. It is important for employers to consider hiring an Industrial/Organizational psychologist who specializes in test development to assist with the development of a promotional

process. While there may be cost issues, civil service, collective bargaining agreements, or other considerations, there is a definite advantage to engaging a professional testing consultant. The employer should also allow the testing consultant to do their job, perform the job analysis and not prevent them from exploring all the possible options of what type of test to use or how to weight it, rather than mandating them to specific types of testing or weighting.

There has been a recent shift in public safety promotional processes for supervisory positions. The shift is from traditional written multiple choice tests to procedures that employ methods that measure work behaviors such as "command presence" and other characteristics that are essential to supervisory positions. Employers should evaluate their current practices and the outcomes to make sure that they are not vulnerable to Title VII liability.

D. Recent Developments.

In May 2010, the U.S. Supreme Court held, in *Lewis v. Chicago,*[47] 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. In *Lewis*, the City of Chicago required applicants for firefighter positions to complete a written exam and, based on the score, sorted these into three categories. Starting in 1995, it used the list of applicants with a cut-off score of at least 89 out of 100 to fill vacancies.[48] Minority applicants who were not hired filed suit in 1997, alleging that the City's selection practice had a disparate impact.[49] The City responded that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act, which was the sorting the scores into eligibility categories.[50] The Court held that no limitations period applied for a disparate impact claim where the plaintiff could prove each element of a disparate impact claim and a discriminatory "employment practice."[51] The issue was not based on when a claimant's claim accrued, but whether the claim could accrue at all.[52] Although Title VII did not define "employment practice," the Court found it encompassed excluding applicants on a pass list that exhibited a disparate impact.[53] The city made use of the "practice" of excluding those who scored 88 or below each time it filled a new class of firefighters.[54] Unfortunately for the city, its "business necessity" defense under Title VII did not succeed; thus, each appointment from the list presented a disparate impact claim.[55]

Since the *Ricci* decision was handed down, there are few cases interpreting its holding and the strong basis in evidence standard in the circuit courts. But recently, the Second Circuit in *US v. Brennan*[56] applied it to a reverse discrimination suit based on certain provisions of a settlement agreement 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.[57] Disparate impact liability, as the Court stated, is "an objectively reasonable basis to fear such liability" at the time an employer makes a race conscious decision.[58] In line with the

evidentiary requirement in *Ricci*, real evidence is required as opposed to fear or speculation of evidence; rather the evidence must be objectively strong evidence or actual evidence of a prima face case combined with objectively strong evidence of non-job relatedness or a less discriminatory alternative.[59]

The *Brennan* 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.[60] The employer's belief that it is necessary to take steps to remedy the adverse impact must be objectively reasonable.[61]

Finally, the *Brennan* Court held that *Ricci* does not require an "actual violation" for an employer to take voluntary action.[62] Notably, the plaintiffs in the *Brennan* case argued that the "actual violation" should apply to those where the voluntary action violated the contractual rights of those who do not benefit from the race or gender conscious action. The *Brennan* Court rejected that concept stating that *Ricci* did not in any way limit the strong basis in evidence standard to all disparate impact and disparate treatment claims, regardless of whether contractual rights are involved.[63]

E. Conclusion.

Many employers may not be effectively following these minimum requirements, and some who are following them cannot, if pressed, prove it. The recent decisions in *Ricci*, *Lewis*, and *Brennan* illustrate a trend by the Supreme Court that suggests local government entities are required to re-focus on the requirements of Title VII to prevent discriminatory practices, especially with civil service and public safety forces. Local governmental entities should face the challenge of employing good professional practices coupled with employment law guidelines to consider all employment selection measures and reduce adverse impact while selecting the best candidates. These events are a good reminder to revisit ones employment practices and paper trail.

Notes

[1] *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009).
[2] *U.S. v. Vulcan Society*, 637 F. Supp.2d 77 (E.D.N.Y. 2009). (resisting an attempt to have *Ricci* govern all discrimination cases).
[3] 29 C.F.R. § 1607.1 *et seq*. (1978).
[4] *Id*. at § 1607.5 (general standards for validity studies).
[5] *Id.*
[6] *Id*. at §1607.3(B).
[7] *Id*. at §1607.16(k).
[8] *Id*. at § 1607.4 (D).
[9] *Id*.
[10] *Ricci*, 129 S.Ct. at 2666.
[11] *Id.* at 2666-67.
[12] *Id.* at 2667-71.
[13] *Id.* at 2671.
[14] *Id.*
[15] *Id*. at 2664.
[16] *Id.* at 2673.
[17] *Id.* at 2674.
[18] *Id*. at 2675.
[19] *Id.* at 2676.
[20] *Id.* at 2677.
[21] *Id.* at 2676.
[22] *Id.* at 2678.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 2681.
[26] *Id.* at 2679-81.
[27] *Id.*
[28] *Id.* at 2679.
[29] 401 U.S. 424 (1971).
[30] *Id*. at 431.
[31] *Id*. at 431-32.
[32] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).
[33] *Id.* (allowing complaining party to show "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest").
[34] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (West 2010).
[35] *Id*.
[36] 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) and (C) (West 2010).
[37] *Ricci*, 129 S.Ct. at 2674.
[38] *Id.*
[39] *Id*. at 2675.
[40] 42 U.S.C. §2000e-2(j) (West 2010).
[41] 129 S.Ct. at 2675.
[42] *Id*. at 2677.

[43] *Id*.
[44] 129 S.Ct. at 2680. The Court added that it did not need to resolve the point, as banding was not a valid alternative in this case.
[45] 29 C.F.R. § 1607.15 (documentation of impact and validity evidence).
[46] D.A. Biddle & R.E. Biddle: *New Opportunities for Employers to Correct Disparate Impact Using Croson Studies*, Lab. L. J. (2010).
[47] 2010 WL 2025206 (U.S. May 24, 2010).
[48] Applicants who scored between 65 and 88, designated as "qualified," were kept on the list but told it was unlikely they would be hired. *Id*. at *1.
[49] Although African-Americans accounted for nearly half of all applicants, just over eleven percent of the "well-qualified" applicants were black.
[50] 42 U.S.C. § 2000e-5(e)(1) required filing within 300 days "after the unlawful employment practice occurred."
[51] 2010 WL 2025206 at *6.
[52] *Id*. at *5.
[53] *Id*. at *5.
[54] *Id*.
[55] The district court had rejected the City's business necessity argument; *see Lewis v. City of Chicago*, 2005 WL 693618 (N.D. Ill. Mar. 22, 2005).
[56] 2011 WL 1679850 (2d Cir. 2011)
[57] *Id.* at *36-37.
[58] *Id*. at *37.
[59] *Id.*
[60] *Id*.
[61] *Id.*
[62] *Id*. at *39.
[63] *Id*.