

**RICCI V. DESTEFANO—A TEMPEST IN A TEAPOT**

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White Papers



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### INTRODUCTION

Since the U.S. Supreme Court issued its opinion regarding whether the City of New Haven could cancel the results of its fire department's promotional examinations in *Ricci v. De Stefano* (June 30, 2009), there has been an extensive amount of conjecture regarding the impact of this holding on employers. Pundits' speculation has ranged from the decision being unfavorable to very positive for employers. Some commentators have speculated that the opinion mandates greater validation efforts for testing than under prior law and does away with the 80% disparate impact rule of thumb. The intent of this article is to provide some background regarding the Ricci case and its issues, as well as clarify that the decision probably has no impact on a typical employer's use of assessments or other hiring practices.

### FACTS

While this case has commonly been mischaracterized as a testing case, the promotional process actually included various oral job simulations. Specifically, the City of New Haven, CT is required to promote fire department employees to the positions of lieutenant and captain on the basis of written and oral examinations. As a result, the City retained a consulting firm of industrial psychologists to develop such examinations. This firm conducted a thorough job analysis, ensuring that it included insight from both minority and non-minority workers. Based thereon, the psychologists created a 100-question written examination that was designed to assess a candidate's job-related knowledge. Before administering the test, the City allowed candidates three months to study for it and provided fairly specific source material as an aid to studying.

Based on the job analysis, the consulting firm also developed an oral examination. This examination employed hypothetical situations in order to evaluate command skills, firefighting tactics, interpersonal skills, leadership skills and other important components of the job. Candidates were required to provide oral responses to the situational challenges presented by the hypotheticals. Candidate responses were evaluated by a team of three assessors—two of which were minorities.

After administering and scoring the examination, the City ascertained that the results of the test exhibited a significant disparate impact on African American candidates. That is, the African Americans that were tested performed substantially less favorably on the examination and hence would have received very few promotions. As a result of the disparate impact exhibited by the examination, the City refused to certify the results, which led Mr. Ricci, one of the candidates who did perform well on the test, to file suit against New Haven.

### LEGAL ISSUES

Under Title VII of the Civil Rights Act there are two forms of employment discrimination—disparate treatment and disparate impact. The former entails intentionally discriminating against a protected subgroup, while the latter occurs when a facially neutral employment tool (e.g., background check, examination, drug test) has a substantial negative impact on the basis of subgroup status.

In the case at hand, the plaintiffs alleged that the City engaged in disparate treatment by refusing to certify the results of the



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examination merely because the exam exhibited a statistical disparate impact on African Americans. The City countered that its actions were justified insofar as it assumed the statistical disparity in performance would lead to litigation challenging the promotional examination, as well as potential liability.

In deciding in favor of the promotional candidates, the Court stated: “We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action.” The Court reasoned that the statistical disparity in results certainly created a prima facie case of disparate impact discrimination, but the City would only be liable for unlawful discrimination if the examination was not job related and consistent with business necessity or if there existed an equally valid, less discriminatory promotional procedure that equally served the City’s needs.

Thus, the Court held that the mere observation that a hiring procedure exhibits a statistical disparate impact does not create a strong basis in evidence that an employer will be subject to disparate impact liability. Effectively, the City would have needed to show that the examination was flawed because it was not job-related or that a less discriminatory practice with equal validity was available in order to reach the strong basis of evidence standard. Given the evidence presented at trial regarding the City’s validation efforts and

its consideration of alternative employment practices, the Court determined that “... there is no evidence—let alone the required strong basis of evidence...” for discarding the examination results.

Specifically, from an evidentiary standpoint, the City offered little documentation to substantiate that the examination was not valid. In fact, the Court even stated that the City “...turned a blind eye to evidence that supported the exam’s validity” when it expressed no interest in receipt of the technical report prepared by the consulting firm. As a result, the Court concluded that there was no genuine dispute that the examinations were job-related and consistent with business necessity. Noting that: “The City’s assertions to the contrary are ‘blatantly contradicted by the record.’”

In terms of potential alternatives, the Court determined that the City was unable to identify a legal and equally valid alternative to the examination, which would have lesser disparate impact. Here, the Court noted the rather vacillating commentary provided by a psychologist that the City had questioned regarding the issue, and that this individual was a direct competitor of the consulting firm which New Haven had retained to develop the examinations. According to the Court, the City failed to create a genuine issue of fact with respect to the viable alternatives issue based on a few stray and contradictory statements contained in the record.

### WHAT DOES THIS MEAN TO EMPLOYERS?

New Haven’s approach to hiring and attempting to void the examination results is not an issue encountered by the vast



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majority of organizations. Most private employers do not set up a hiring process where all candidates can only compete for a position at a specific and limited examination seating that will yield results which will be in effect for a number of years. Moreover, an extremely small number of employers ever consider tossing out the results of employment evaluations in reaction to results with disparate impact. Certainly, hiring and promotional processes evolve over time, but a sudden voiding of employment practice results is extremely atypical.

The bottom line of the Court's holding is that if an employer wants to throw out the results of its hiring/promotional procedures that exhibit disparate impact it may only do so if it is likely to be liable under the disparate impact doctrine. This means that any hiring or promotional practice an employer wishes to disregard because of its disparate impact on a protected subgroup: 1) Must NOT be job-related OR 2) Must be able to be replaced by an equally valid practice with less disparate impact. In other words, if an employer sets up a hiring/promotional procedure without exercising any diligence in the process, then the employer may throw the results out if the procedure exhibits disparate impact.

However, most organizations today, develop and implement their hiring/promotional processes due to their documented relationship to the job and in an attempt to minimize disparate impact. In these cases, the employer cannot void the results of the process simply due to the existence of disparate impact. Effectively, an employer can engage in disparate treatment discrimination only if it has been haphazard

and sloppy in identifying and setting up its hiring procedures—such an approach to developing and implementing hiring practices is not typical of prudent employers.

In summary, the Ricci case has little or no impact on the vast majority of employers and their employment practices. It doesn't raise the standard for validating or justifying the use of hiring or promotional practices—even those practices that tend to exhibit adverse impact (e.g., background checks, credit checks, physical requirements, drug tests, certain written tests, educational requirements) and it has no impact on the 80 percent rule. As for testing per se, the Court's only comment apparently exclusive to this area was quite positive: "Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent."

If you have any questions regarding this article, please feel free to contact Wonderlic's General Counsel (Dr. David W. Arnold).