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NATIONAL EMPLOYMENT LAW COUNCIL
15TH ANNUAL CONFERENCE
APRIL 2010

STATE OF DIVERSITY INITIATIVES & REVERSE DISCRIMINATION: AN ANALYSIS POST-*RICCI*

Presented By

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I. INTRODUCTION[1]

The United States Supreme Court has been very active during recent terms in deciding cases related to race relations and affirmative action law, particularly in the areas of education and labor and employment. Noteworthy cases of the last few terms include: *Gratz v. Bollinger and Grutter v. Bolligner* (the Michigan affirmative action cases), *Parents Involved in Community Schools v. Seattle School District* (case involving creating a racial balance in Seattle schools), *Ledbetter v. Goodyear Tire & Rubber Co.* (discrimination in pay based on race or gender- leading to the Ledbetter Fair Pay Act), and now most recently *Ricci v. DeStefano* (the Connecticut firefighters reverse discrimination case). The *Ricci* decision, rendered in June 2009, represents a significant decision regarding Title VII. *Ricci* held that an employer may not use race as a factor to invalidate a promotion exam even when the employer believes that the promotion exam disparately impacts minorities. Effectively, *Ricci* held that it is reverse discrimination to refuse to promote majority-group firefighters even when the promotion was made possible by a test which unfairly disadvantaged minority firefighters.

In the 10 months since *Ricci* was decided, there have been countless articles written, debates hosted, panels moderated, and decisions rendered attempting to grasp at the practical implications and reach of *Ricci*. Currently before the Supreme Court are cases which cite *Ricci*—in which litigants either are challenging affirmative action programs as going too far to promote the welfare of minorities at the expense of the majority, or in which litigants are arguing that affirmative action has not done enough to eradicate the decades of differential treatment towards minorities in the workplace. The myriad of arguments demonstrate the complexities brought to the forefront in the post-*Ricci* critical analysis, and point to the fiery debate still taking place between those in favor of diversity initiatives and those who oppose them. It is clear that the decision currently has, and will continue to have, an impact.

This paper will analyze the *Ricci* decision, beginning with the important facts and findings of *Ricci*, and including an analysis of the majority and dissenting opinions. The paper will also analyze *Ricci*'s progeny cases throughout the courts, including how lower courts are interpreting *Ricci*'s standards, and the practical implications those decisions are having on employers. Finally, the paper will conclude by offering recommendations that employers can take away to better navigate the legal parameters of the post-*Ricci* workplace.

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II. *Ricci* Analyzed

A. Factual Background[2]

The City of New Haven Civil Service Board ("CSB") used an objective test to promote firefighters to the ranks of lieutenant and captain. The 2003 examination revealed that of the applicants who took the test, the results disproportionately favored white firefighters for promotion over minorities, particularly over African American firefighters. The CSB was concerned over the disparate results—particularly that the test possibly discriminated against minorities and subjected the City to a disparate impact claim. The CSB held several meetings with the contractor in charge of developing and managing the test, and with its counsel, its human resources director, and other City officials. The contractor, Industrial/Organizational Solutions, Inc. ("IOS") stood by the design and results of the exam and favored certifying the results. On the other hand, the City's counsel was concerned that the exam discriminated against minorities, and advised the CSB that it should consider not certifying the results. Specifically, counsel informed the CSB that:

> [A] statistical demonstration of disparate impact, constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies-even . . . race-conscious remedies."[3]

Counsel was concerned that the disparate impact was too great to certify the exam and that there were other "equally valid" ways to test for promotion that would have resulted in less of an adverse impact. Counsel was of the belief that the results, if certified, would lead to the City being sued under the disparate impact standards.[4]

In addition to meeting with the contractor and its own counsel, CSB met with other parties to determine its course of action. There were several meetings with representatives of professional organizations, and with consultants and experts from around the country. The CSB also held public debate on whether to certify the results, with some of the actual examinants present to voice their opinions. Without knowing their actual results, the examinants were split on their opinion of the test—some favored certifying the results, arguing that the questions were fair, came from the study materials, and were based on the fire department's procedures and materials that the examinants should know. Other examinants favored discarding the results, arguing that the questions were not relevant to firefighting practice in New Haven, and arguing that the study materials were too long and expensive.

Adding to the debate, the Mayor of New Haven, through the City's chief administrative officer, argued against certifying the exam, relying on the City counsel's opinion that there were "more appropriate ways to assess one's ability to serve [as a lieutenant or captain] . . . ."

As the public debate ensued, some firefighters threatened to sue, claiming that the test results should be discarded and were discriminatory. Other firefighters, threatened to sue the City if the results were not certified, claiming that the test was fair and that the passers should be promoted. After considering the options, and examining the evidence and witnesses, the CSB voted on whether to certify the results. The vote resulted in a deadlock—meaning that the results would not be certified.

Overall, the results showed:

	Candidates Taking Exam	Candidates Passed	Candidates Eligible for Promotion[5]
Lieutenant	77	34	10
White	43	25	10
Black	19	6	0
Hispanic	15	3	0
Captain	41	22	9
White	25	16	7
Black	8	3	0
Hispanic	8	3	2

B. District Court and Court of Appeals

Seventeen white firefighters and one Hispanic firefighter who passed the exam, but who were not promoted when the results were not certified, sued. Frank Ricci was one of the more vocal examinants during the public meetings, and became the named plaintiff.[6] The plaintiffs sued in the District Court of Connecticut under various statutes, the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act, and also filed a complaint with the EEOC.[7] Plaintiffs' argument was that the race-based decision to refuse to certify the results violated Title VII's disparate treatment provision, and was unconstitutional, regardless of any good faith on defendants' part.

The defendants included the City of New Haven, Mayor DeStefano, and various members of the city administration (including counsel), and members of the CSB who voted against certification. The defendants argued that they had a "good faith belief that they would have violated the disparate impact prohibition in Title VII § 2000e-2(k), had they certified the examination results."[8] Based on this good faith belief, the defendants argued that they could not be held liable for violation of Title VII's disparate treatment provision.[9]

The District Court granted summary judgment for the defendants. The court held that the defendants' "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent under Title VII."[10] The District Court also concluded that there was no race-based animus because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."[11] The District Court credited the City's evidence and arguments that it considered all the options carefully and came to the best option under the premise of Title VII. The City chose to discard the discriminatory test because it knew of its negative impact against minorities. The District Court found this permissible and protected under the law.

The Second Circuit Court of Appeals affirmed *per curium*.[12]

The Supreme Court granted certiorari based on the fact that few courts of appeals had interpreted the two pertinent provisions of Title VII—disparate impact and disparate treatment—in question in the case. The Court analyzed the various implications of Title VII, and reversed the District Court and Court of Appeals.

C. Supreme Court

Justice Kennedy delivered the opinion of the Court. As with most hotly-debated cases of recent, the decision was 5-4. Focusing on the statutory Title VII claim, the Court began by noting that the City engaged in "express, race-based decisionmaking" which "violates Title VII's comment that employers cannot take adverse employment actions because of an individual's race."[13] Only if the City had a justification for its actions could it avoid liability. The Court held that the City's justification—the desire to avoid certifying a discriminatory test—"however benevolent it might have seemed"—was not a valid reason to make an employment decision based on race. Particularly, for the Court, the desire to avoid disparate-impact liability did not "excuse[s] what otherwise would be prohibited disparate-treatment discrimination." To reconcile the competing notions of disparate treatment and disparate impact, the Court adopted a "strong basis in

evidence standard"—meaning that before an employer can engage in intentional discrimination to avoid or remedy a 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 race-conscious, discriminatory action."[14] The Court did not actually define or give examples of what qualifies as a "strong basis is evidence standard," but nonetheless concluded that the City's decision to discard the test did not meet this standard.

In analyzing the City's actions, the Court and Petitioners (*Ricci et al*) conceded that the City was faced with a dilemma, and had "prima facie evidence of disparate impact liability."[15] The Court even noted that "based on the degree of adverse impact reflected in the results, respondents were compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact."[16] However, statistics alone, without more, was not enough to form a strong basis in evidence. The City could only be liable for disparate impact discrimination if the tests were not "job-related and consistent with business necessity," or if "there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."[17] Taking this prescription directly from Title VII, the Court concluded that the City did not have a strong basis in evidence for either of these defenses because the tests were actually job-related and consistent with a business necessity (based on testimony concerning how the test was developed and administered), and because there was not sufficient evidence in the record that alternative methods for testing were available to the City.

With respect to the "job-related and consistent with business necessity" prong, the Court granted petitioners summary judgment, crediting the evidence of the IOS consultants' testimony that the test was developed after "painstaking analysis of the lieutenant and captain positions-analysis in which IOS made sure that minorities were overrepresented."[18] Importantly, the IOS consulted with the lieutenants and captains already on the job, and they developed questions after conducting field rides with them. The IOS also formulated the exam questions based on the Fire Department policies and procedures, and all the source and training materials were available to examinants before the exam. Also, at least one of the consultants that the CSB interviewed when deciding whether to certify the exam stated that the exam questions were "reasonably good." Finally, the Court noted that the City did not take advantage of the technical report that IOS was to provide after the exam—a report which would show how the exam was administered and which would provide other information to establish the validity of the exam. In sum, the Court found that this evidence collectively showed that

the IOS succeeded in developing a fair exam which was consistent with the types of questions that were valid and necessary for promotion within the Department.

As to the second prong—that the City have a strong basis in evidence that there were equally valid and less discriminatory tests were available to the City—the Court held that the City failed to meet this standard."[19] The City argued that it could have utilized a different weighting system between the written and the oral parts of the exam, which would have had less of a disparate impact on black firefighters. The test as given, weighted written as 60% of the score; oral as 40% of the score. The City demonstrated that a 70%/30% weighting would have produced at least 2 black candidates for the lieutenant position, and one black candidate for the captain position.[20] The Court rejected this argument. It held that the 60%/40% breakdown was presumptively fair because it was negotiated as part of the collective bargaining agreement; and that at any rate, the City did not show that the 60%/40% system was "arbitrary."[21]

Next, the Court rejected the City's argument that it could have developed a better "rule of three" that would have produced less discriminatory results. The Court held that had the City instituted changes to the rule of three system—it would have been in violation of Title VII's proscription against adjusting test scores based on race after the results.

Finally, the City also argued, based on the comments of one of the consultants it hired in investigating whether to certify the test, that it could have evaluated the candidates differently, focusing more on "candidates' behavior in typical job tasks."[22] The City argued that an alternative testing method would have had less of an adverse impact on black candidates. The Court rejected this argument because it found that there was no evidence that alternatives would have produced less adverse results, or that any alternative testing arrangement was available to the city at the time.

Having rejected all the respondents' arguments, perhaps one of the most important statements in the opinion, is the Court's statement that "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[23] The Court recognized that the City had a difficult and competing dilemma, which pit the two prongs of Title VII—disparate treatment and disparate impact—at odds with each other. The Court resolved the dilemma by stating the general principal that: if the City certifies the test and faces a disparate impact suit, then the City could avoid disparate impact liability based on a "strong basis in evidence that,

had it not certified the results, it would have been subject to disparate treatment liability."[24]

In concurrence, Justice Scalia noted that the Court's resolution simply "postpones the evil day on which the Court will have to confront the question: Whether or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?" For Justice Scalia, instead of resolving the dilemma, the Court postponed resolution of the dilemma. He predicted that "the war between disparate impact and equal protection will be waged sooner or later . . . ."

In a separate concurrence, Justice Alito (joined by Justices Scalia and Thomas), focused mostly on the fact that New Haven did not present sufficient evidence to show that it had a legitimate "objective substantial basis in evidence to find the tests inadequate." Justice Alito questioned seriously the adequacy of the City's investigation into the tests, and regarded the process by which the CSB decided not to certify the results as tainted by the political sway that the Mayor and his supporters (including prominent members of the African American community in New Haven) intended to have on the ultimate decision. Justice Alito essentially accused the opponents of certification of attempting to exert improper influence over the CSB's decision, and that the CSB, instead of gathering the facts and making an objective decision concerning the test results, was prevented from "evenhandedly assessing the reliability of the exams and rendering an independent, good faith decision on certification."[25]

Justice Alito noted that the petitioners (white firefighters) "made personal sacrifices" and were "denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam." Essentially, Justice Alito's concurrence emphasized the wronged firefighters who were denied promotions (the disparately-treated petitioners) over the firefighters who were denied a fair opportunity to test for promotion based on a flawed testing procedure. (the disparately-impacted respondents). He joined with the majority based on the idea that the City engaged in pretextual fact-gathering—it pretended to be concerned with the possibility of disparate impact liability, when in fact the City actually desired to discriminate on the basis of race.

At polar opposite, Justice Ginsburg's dissent begins with the prediction that the Court's order "will not have staying power."[26] Justice Ginsburg (joined by Justices Souter, Breyer, and Stevens) noted that while the white firefighters who scored high on the exam were sympathetic, they "had no vested right to

promotion," because the City had good cause to believe that it would be sued for disparate impact. Justice Ginsburg stated:

> The majority pretends that '[t]he City rejected the test results solely because the higher scoring candidates were white.' That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used.[27]

For the dissenters, the real question was one of comparing options—the City could certify a test which it had serious reservations about or it could refuse to certify the test with the idea to develop a better and fairer way to adjudge the adequacy of candidates for promotion. In fact, the dissent explains that "Neither Congress' enactments nor this Court's Title VII precedents offer even a hint of 'conflict' between an employer's obligations under the statute's disparate treatment and disparate impact provisions." The dissent considered these the "twin pillars of Title VII" which advance "the same objectives: ending workplace discrimination and promoting genuinely equal opportunity."[28] The majority created a false conflict which need not exist, for Title VII does not compel an employer to hire or promote applicants based on a test which the employer knows is flawed. Instead, Title VII's objective is to allow an employer to eradicate systems and tests which promote discrimination, thus empowering the employer to "prevent exclusionary practices from 'operat[ing] to freeze the status quo.'"[29]

Also a major sticking point for the dissent was the fact that the Court reversed, and granted petitioners (defendants below) summary judgment, instead of remanding to determine whether the City could meet the newly-announced strong-basis-in-evidence standard. The dissent noted that the ordinary course would be to allow the lower courts to apply the standard to the facts, and that the Court deviated from this usual course for "no good reason." The dissent concluded that the City had "ample cause to believe its selection process was flawed and not justified by business necessity."[30] The pertinent facts showed that: (1) minorities had half the passage rate of non-minority examinants; (2) virtually no minorities would have been eligible for promotion; (3) the CSB gathered evidence and held hearings to investigate its concern about the exam; and (4) the City knew it did not consider alternative tests. These findings correspond with Title VII's administrative guidelines, and with courts who have repeatedly criticized written promotion exams as being less indicative of the "firefighting or supervisory knowledge and abilities."[31] Also, the dissent explained that based on EEOC and other federal agency guidelines, there was ample evidence that the use of written tests constituted a less-than-perfect

measure of fitness for promotions, which is why most "municipal employers do not evaluate their fire-officer candidates as New Haven does."[32]

The dissent concluded that the "record solidly establishes that the City had good cause to fear disparate impact liability."[33] The major flaw was that the City "did not utilize a better selection process in the first place." The dissent's stance is tellingly summarized in Justice Ginsburg's assessment of the majority's ultimate decision to favor disparate treatment over disparate impact:

> It is indeed regrettable that the City's non-certification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of *Griggs* that groups long denied equal opportunity would not be held back by tests 'fair in form, but discriminatory in operation.'[34]

The polarizing nature of the opinion points to the difficulty in the overall debate on how to fashion diversity initiatives in the face of growing opposition. The Court decided that despite New Haven's good faith basis that it had propagated a discriminatory promotion system, it was nevertheless more important to certify the results in line with the examinants' pre-test expectations rather than to assist in eradicating the discriminatory system.

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III. *Ricci* and its Progeny

Since June 2009, several cases have come through the lower courts examining Title VII in light of *Ricci*'s holding. Below are some notable decisions.

A. ***Briscoe v. City of New Haven, 2009 WL 5184357 (D. Conn. Dec. 23, 2009)***

A related case to *Ricci*, in which Plaintiff Briscoe is seeking limited discovery to challenge the promotional exam weighting system of the written and oral portions (60%/40%). Briscoe's claim is that the weighting system has a disparate impact on minority applicants, is not job-related and justified by business necessity, and is likely to have an adverse impact greater than is required by business necessity. Plaintiff essentially

challenges the same tests in question in *Ricci*. Plaintiff claims that a different exam, or a different weighting system for the exam, would be a better system of determining good firefighter candidates than the current system.

Final disposition of the motion is pending.

B. ***United States v. City of New York, 637 F. Supp. 2d 77 (E.D.N.Y. 2009) and United States v. City of New York, 2010 WL 234768 (E.D.N.Y. Jan. 13, 2010)***

Plaintiff the Federal Government and various intervenors sued the FDNY to enforce the right of black and Hispanic applicants to be treated fairly in applying for positions with the FDNY. The FDNY administered two written exams to entry-level applicants to the New York City Fire Academy, and the FDNY used these exams from 1999-2007. Plaintiffs argue that the City's reliance on the exams have a disparate impact on black and Hispanic candidates, thus violating Title VII. The intervenors also claim that the City, including the Mayor and Fire Commissioner "have long been aware of the discriminatory impact on blacks and their examination process," and that their "continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional race discrimination . . . ." The plaintiffs and intervenors seek an injunction against the City from continuing to engage in discriminatory practices against blacks and Hispanics, and for appropriate "make whole" relief.

The District Court noted that "this is not the first time the City has been brought to federal court to defend its entry-level firefighter examinations against charges of discrimination." The court granted plaintiffs summary judgment, and concluded that the plaintiffs established a prima facie case that the exams had a disparate impact on black and Hispanic applicants. Citing *Ricci*, the Court explained that the present case was distinguishable from *Ricci* because it involves a question of whether the "City's use of the exams has *actually had* a disparate impact upon black and Hispanic applicants . . . ." (emphasis in original). The court further noted that the City of New York had taken "significantly fewer steps than New Haven took in validating its examination." Importantly, the court also explained that "[W]hen an employment test is not adequately related to the job for which it tests—and when the test adversely affects minority groups—we

may not fall back on the notion that better test takers make better employees."

After extensive analysis of the test creation and development, the testing procedures, the scoring system, and the empirical evidence and statistics, the court concluded that the exams "have had an undeniable adverse impact on black and Hispanic candidates, excluding them from open positions as entry-level firefighters, and closing the doors of opportunity for public service to large segments of the City's population." The court further held that the City failed to demonstrate "a sufficient relationship between the tasks of a firefighter and the abilities it intended to test on the [exams]." . . . .

In a later related opinion (Jan. 13, 2010), the district court considered whether the continued use of the biased tests by the City constituted intentional discrimination. Engaging in a disparate treatment analysis, and again citing *Ricci*, the intervenors argued that "intentional discrimination was the [City's] standard operating procedure," and that the statistical evidence of pass/fail rates, along with the flawed ranking system, and anecdotal and testimonial evidence established that indeed the "City, its agencies, and relevant decisionmakers have been aware that the FDNY's hiring procedures discriminate against blacks applicants and have nonetheless refused to take steps to remedy the discrimination.[35] The court granted summary judgment to the intervenors, holding that:

> What the Intervenors have demonstrated-and what the City has failed to rebut-is that the City's use of written exams with discriminatory impacts and little relation to the job of firefighter was not a one-time mistake or the product of benign neglect. It was part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects. The consequences that this illegal policy had for blacks who wished to serve their city as firefighters have already been levied; the consequences that this illegal policy will have for the City will be addressed at the remedial stage.[36]

In sum, the continued use of discriminatory exams and other processes collectively demonstrated the City's intentional discrimination against black candidates, for which the City was liable.

Following this opinion, the court fashioned remedies to deal with the intentional discrimination findings, including mandating that the City develop a new test for entry-level firefighters, granting priority hiring and monetary compensation to the victims of the discrimination, and granting seniority for delay victims.[37]

This case represents a significant ruling in light of *Ricci.* It finds that willful blindness on the part of the City will lead to a finding of intentional discrimination. If other courts take a similar stance, such could create great exposure to public and private employers, who could be found in violation of the statute if they were aware of a pattern of discrimination but failed to remedy it.

C. ***NAACP v. North Hudson Regional Fire & Rescue, 2010 WL 691201 (3d Cir. Mar. 1, 2010)***

Plaintiff NAACP filed a class action suit against Regional Fire & Rescue for geography-based discrimination against African Americans who reside outside of certain New Jersey counties, thus making them ineligible for entry into various state fire departments. Regional is a municipal fire department consisting of 300 employees. Regional restricts hiring to individuals living within the member municipalities that it services. The complaint alleges that the population within the member municipalities that Regional services is disproportionately Hispanic and white, and that the geographic requirement has a discriminatory disparate impact on blacks.

The District Court ruled that NAACP had proven a substantial likelihood of success on the merits of the claim, sufficient to proceed with the class action. The Court concluded that the residency requirement discriminated against African Americans, and issued an injunction against the practice. Regional appealed.

The Third Circuit remanded to the District Court in light of *Ricci*, asking the District Court to consider the issues by the standards Justice Kennedy set forth in *Ricci*.

Disposition is pending.

D. ***Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland, 2009 WL 2602366 (N.D. Ohio 2009)***

Court addressed the continuance of a consent decree reaching back to 1975 involving discriminatory hiring practices of African Americans into the fire department for the City of Cleveland. After several amendments and extensions of the original consent decree, the Court was faced with whether the consent decree had actually worked to eradicate long-standing discrimination and barriers to entry for blacks.

The Court refused to continue the consent decree. The Court found that the City of Cleveland had made a "good faith effort to comply with the remedy designed to right [previous] wrongs." The City of Cleveland had not met its goals/quotas of hiring enough blacks into the department; but the Court excused this as being because of "circumstances beyond [the City's] control."[38] The Court concluded that the consent decrees at least established a "framework that allows the City to establish a hiring procedure and process that is nondiscriminatory and fair to *ALL* applicants . . . ." (emphasis in original).[39]

This decision is important post-*Ricci* because it introduces the possibility that some courts may limit their involvement in diversity efforts when those efforts are challenged. If other courts take the line of the Ohio court, such could hamper efforts by municipalities and public and private employers to secure the courts' cooperation in establishing and promoting diversity and affirmative action goals.

E. ***Lewis v. City of Chicago, 528 F. 3d 488 (7th Cir. 2009) (certiorari granted by Lewis v. City of Chicago, 130 S. Ct. 47 (Sept. 30, 2009))***

Supreme Court granted certiorari to decide the question: when does the time to file an EEOC complaint begin? Is the plaintiff required to file an EEOC complaint for unlawful employment practices within 300 days of the announcement of the practice; or is the plaintiff required to file an EEOC complaint within 300 days of the employer's use of the discriminatory practice?

Plaintiffs are African American applicants to the City's Fire Department, and brought a Title VII action alleging that the written tests had a disparate impact on African American applicants. Plaintiffs took the written test, and were placed in the qualified category—meaning they

would not be hired. Plaintiffs are challenging the test and ranking system as having a disparate impact on them. Under then-existing law, Plaintiffs had 300 days from the day their claim accrued to file an EEOC complaint. Plaintiffs filed 420 days after the notice of the test results was made public. The City argues that the claims are time-barred, because they accrued from the date that the results were made public. Plaintiffs argue that their claims for discrimination are not time-barred, as these claims accrue each time the City uses the flawed test and ranking system (i.e. each time a discriminatory decision is made). Thus, each time the City selects a firefighter from the "highly qualified" group over the candidates in the "qualified group" based on the discriminatory test, such is a new discriminatory act which resets the statute of limitations.

The District Court granted judgment in Plaintiffs' favor. The Seventh Circuit Court of Appeals Reversed. The Court of Appeals held that the doctrine of continuing violation did not apply to plaintiff's case, and that their claim against the City for the allegedly discriminatory test accrued when they were initially discriminated against—which is when they were notified that they were placed in the qualified category, which essentially meant they would not be hired.

Oral argument was held on February 22, 2010. The Court's decision is pending.

This case is one to watch because it presents nearly the identical question addressed in *Ledbetter v. Goodyear Tire & Rubber*—namely, when does the statute of limitations begin to accrue for cases involving discriminatory practices? It will be interesting to observe how the Supreme Court will handle the issues in light of how Congress stepped in to overrule the Court following its decision in *Ledbetter*. (*See infra*, Section IV, D).

<u>Summary</u>

The recently-decided cases and cases pending before the Supreme Court will help define the impact of *Ricci*. The case has already been heavily cited. As plaintiffs continue to challenge entry-level and promotion exams as being discriminatory, the district court and courts of appeals will establish whether Ricci's was a groundbreaking reverse discrimination opinion, or whether it will be more limited in its application.

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IV. What Can We Take Away From *Ricci*—The Practical Consequences

Ricci is a polarizing opinion, evidenced by the Court's sharp division down liberal-conservative lines. This division mirrors the division which exists in the general debate on affirmative action and diversity initiatives in education, the workplace, and even beyond.

As polarizing as it may be, *Ricci* does offer some important points that employers can take away to guide them on what is permissible in their everyday practices.

A. The Conundrum

One of the main problems identified by the *Ricci* dissent is the practical choices available to an employer who knows it has a flawed testing system, but who is faced with a choice between keeping the flawed test at the risk of having to defend against a disparate impact claim, versus scrapping the test with the risk of having to defend against a disparate treatment claim. The choices are limited. *Ricci* makes clear that the employer has a dilemma if it uses a test which has a discriminatory impact. The only way for an employer to legitimately challenge test results post-hoc is to essentially admit, by a substantial basis in evidence, that its test was flawed initially, or that it could have done more to establish a fairer test that would have resulted in a less adverse impact. This essentially was the position the City of New Haven faced.

A viable method of dealing with this conundrum is for an employer to engage in extensive upfront research and planning ***prior*** to adopting a test that becomes the general standard in the workplace. In fact, Justice Ginsburg advises this in dissent, noting that the City of New Haven could have avoided the consequences of the decision "had it utilized a better selection process in the first place."[40] Taking this advice, employers need to invest resources into its testing options to determine the probable outcomes of its test, and to identify any flaws in the test prior to rolling it out on an official basis. Options include:

- Hiring consultants and experts to help develop fair and widely-validated tests and procedures

- Consulting other employers and experts (even in other jurisdictions) on their testing options and ideas

- Consulting legal counsel with expertise in the area of testing, hiring and promotion practices

- Pre-testing or sampling with focus groups, representative populations, or even actual employees on a trial basis

- Assuring that the test is the best measure of the job duties for the position at issue

B. Reduction in Force

Ricci also has implications for employers engaged in a reduction of their workforce. Based on *Ricci*, it stands to reason that employers must be substantially more careful in how they develop their reduction criteria. An employer could face exposure if they implement a criteria for termination, find out that too many members of a protected class are affected, and then change the criteria to alter the practical impact. *Ricci* implies that once the process has begun, the employer is limited in its options after the fact. Therefore, if the employer wishes not to disadvantage members of a suspect class, it needs to carefully consider the options, *at the outset*, which allow it to maintain its goals and objectives without creating a disparate impact.

C. Seeking Advice of Counsel

It should be clear from *Ricci* that advice of counsel is important in the post-*Ricci* workplace. While the respondents relied heavily on the advice of the New Haven City counsel, yet lost its case, much can be said about the importance of seeking counsel's advice prior to making decisions about hiring, promotion, testing, and reduction in force. The 5-4 nature of the decision underscores that the City presented a good argument which was almost sufficient to carry the decision in its favor. Key to the City's position was its counsel's knowledge of Title VII's requirements and proscriptions, and options that were available to the City. In the end, it is clear that it is necessary for any actions taken or systems being utilized by an employer to be thoroughly vetted and analyzed to determine any possible considerations of disparate impact or treatment.

Having experienced counsel with specific expertise in testing, hiring, promotion, termination, reduction in force, and collective bargaining could prove invaluable in formulating the questions and developing the record that is likely needed to meet the substantial basis in evidence test. Employers should consider counsel's

advice prior to implementing a new testing procedure, when deciding whether to validate or invalidate an already-administered test.

D. Congressional Action—The Ledbetter Example

An interesting question is whether post-*Ricci*, Congress will react in the same fashion that it did after the Court issued the unpopular *Ledbetter v. Goodyear Tire & Rubber* decision.[41] The *Ledbetter* Court, 5-4, held that later effects of past discriminatory practices do not restart the statute of limitations for filing an EEOC complaint. Rather, an employee has 180 days within the initial discriminatory act to file an EEOC complaint, even if the discriminatory act resulted in several years of unfair and illegal treatment. The decision worked to bar many an employee who received paycheck after paycheck at discriminatorily low wages from proceeding with an EEOC claim because of the restrictive 180-day period. They essentially only had 180 days from the date of the first paycheck they received at discriminatorily low wages in order to file the EEOC complaint.

Shortly after *Ledbetter* was decided, Congress responded emphatically against the decision by amending the Civil Rights Act of 1964 to provide that each discriminatory act that resulted in a discriminatorily low pay rate being paid would result in a restart of the statute of limitations. Essentially, the new statute provided that each paycheck that an employee received that reflected a discriminatory pay rate (a pay rate lower than he/she would have received had there been no discrimination) would be considered a separate discriminatory act, thus resetting the 180 day statute of limitations from the date of the last paycheck.

Just as in *Ledbetter*, *Ricci* is a 5-4 opinion which runs down the Court's liberal-conservative line.[42] What makes the scenario even more interesting is *Lewis v. City of Chicago,* which was just argued before the Court, involving nearly the same question as *Ledbetter*. Given the new and higher standards that the *Ricci* court established for employers who wish to eradicate faulty and knowingly-discriminatory tests, Congress could seize the opportunity to amend Title VII to allow employers more leeway in invalidating such tests when the employer has a good-faith objective belief that the test is discriminatory in practice, and/or to confirm the protections against disparate impact under Title VII.

Summary

Ricci presents a myriad of possibilities that will greatly shape labor and employment law and employer-employee relations. There appears to be

momentum for challenging discriminatory exams and procedures which some minority applicants have long-known to stand as barriers to access to professions such as police officers, firefighters, and other public servants. However, *Ricci's* lessons apply to private employers as well, and private employers need pay close attention to how the lower courts more fully develop *Ricci* in order to assess their compliance with the state of the law regarding the implications of disparate impact vs. disparate treatment.

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V. Recommendations

It is difficult to know the full impact of *Ricci*, being only within the first year of its existence. However, while the lower courts continue to parse out *Ricci*'s terms, employers can still glean practical tools from the decision to help protect diversity initiatives from attack. Below are a few suggestions that employers should find useful in developing its testing, hiring, promotion, and termination qualifications, tests, and procedures.

1. An employer should take a fast and hard look at its procedures for hiring and promotion and ask the following questions:

    - Do the rules/tests for hiring or promotion reasonably relate to a specified business purpose or business necessity?

    - What are the job duties being tested? Does the test accurately promote the job functions identified?

    - Is the test the best measure of the present job duties of the position at issue?

    - Are the procedures and standards well known to applicants or candidates for promotion?

2. *Ricci* applies to private employers as well as public employers. All employers should determine whether their testing and other procedures:

    - Are fair, objective, well-known and well-communicated to the workforce

- Are the result of significant pre-implementation development and consideration, and result from consultation with experts and counsel

- Are reviewed and analyzed by validation studies if they exist

- Are developed while considering alternatives that may result in less of an adverse impact on certain populations of workers

- Properly consider other alternatives to written tests v. oral tests, including tests which judge practical on-the-job skills

3. Both public and private employers should invest in pre-development resources to help establish a test's validity prior to implementation

   - Engage consultants, experts, and current employees to establish procedures which are related to and necessary to the job functions in question

   - Develop test questions for focus groups or current employees to test the functionality of the test, and to glean a sense of the distribution of results prior to actual administration

   - Consider alternatives to testing ideas and options, including seeking the advice of other jurisdictional counterparts (other managers, agencies, or departments)

   - Consider factors other than written and oral exams, as a basis for judging promotability and management potential

4. Fear of litigation alone does not justify disregarding otherwise valid test results

   - Once tests are administered, they must be administered fairly and passage and promotion criteria may not be altered post-examination

   - This applies to all tangible actions, including but not limited to, hiring, promotion, and reduction in force decisions

5. Knowledge of and continued ratification of discriminatory tests may be a predicate for finding intentional discrimination

- *Ricci* does not limit an employer's ability to discard a knowingly flawed test prior to implementation and administration

Endnotes

[1] I would like to acknowledge Shawanna L. Johnson, Associate at Arent Fox, for assisting with the research, writing and production of this paper.

[2] Facts referenced from: *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664-72 (2009).

[3] *Id.* at 2665-2667.

[4] In fact, the City of New Haven was sued in December 2009 for disparate impact. *See infra* Section III, A—*Briscoe v. City of New Haven*, 2009 WL 5184357 (D. Conn. Dec 23, 2009).

[5] Candidates were promoted based on the rule of three and the number of available positions. The rule of three indicates that the vacancies must be filed by choosing one candidate from the top three scorers on the list of passers. For the lieutenant exam, there were 8 positions available, and the rule of three resulted in 10 candidates being eligible for promotion. For captain, there were 7 positions available, and the rule of three resulted in 9 candidates being eligible for promotion. None of those that were eligible for promotion were African Americans. *See Id.* at 2665-2666.

[6] Frank Ricci, for the Petitioners, represented the ideal name plaintiff. He suffered from learning disabilities, including dyslexia, and to prepare for the exam, he spent significant time and money to purchase the materials, seek the assistance of others to help him study, and spent 8-13 hours per day for weeks studying for the exam. *See* 129 S. Ct. at 2667.

[7] District Court opinion at 554 F. Supp. 2d 142 (D. Conn. 2006).

[8] 129 S. Ct. at 2671.

[9] The City's good faith belief that it would face liability from a disparate impact suit was supported by the fact that EEOC standards provide that in the context of testing, if the pass rates of minority examinants is below 80%, then such is prima facie evidence of a violation of Title VII disparate impact provision. The dissent highlights this point by noting that "New Haven thus had cause for concern about the prospect of Title VII litigation and liability." *See id.* at 2692.

[10] *Id.*

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[11] *Id.*

[12] 530 F.3d 87 (2d Cir. 2008).

[13] 129 S. Ct. at 2673.

[14] *Id.* at 2677.

[15] *Id.* at 2677-78.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 2678.

[19] *Id.* at 2681.

[20] *Id*. at 2679.

[21] One factor facing the City was that the 60%/40% weighting system was part of the Collective Bargaining Agreement in force at the time. The City could not have changed this weighting without bargaining over this topic with the Union, and essentially amending the Collective Bargaining Agreement. Therefore implementing the 70%/30% weighting system was not really an option.

[22] *Id.* at 2679.

[23] *Id*.

[24] *Id.*

[25] *Id.* at 2688.

[26] *Id.* at 2690.

[27] *Id.*

[28] *Id.* at 2699.

[29] *Id.* at 2702.

[30] *Id.* at 2703.

[31] *Id.* at 2704.

[32] *Id.* at 2705.

[33] *Id.* at 2707.

[34] *Id.* at 2710.

[35] *United States v. City of New York*, 2010 WL 234768 at *17 (E.D.N.Y. Jan 13, 2010).

[36] *Id.* at *38.

[37] *United States v. City of New York*, 2010 WL 318087 at *31 (E.D.N.Y. Jan. 21, 2010).

[38] *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 2009 WL 2602366 at *16 (N.D. Ohio 2009).

[39] *Id.*

[40] See *supra* n. 34.

[41] *Ledbetter v. Goodyear Tire & Rubber Co.*, 549 U.S. 1029, 127 S. Ct. 617 (2007) (superseded by statute Pub. L. 111-2, 123 Stat. 5, Jan. 29, 2009) (also known as the "Lilly Ledbetter Fair Pay Act of 2009").

[42] Justice Alito wrote for the majority, which included Justices Scalia, Thomas, Kennedy, and Roberts. Justice Ginsburg wrote for the dissent, joined by Justices Souter, Stevens, and Breyer.

Other sources used include:

American Constitutional Society, *Assessing the Practical Repercussions of Ricci*, available at http://www.acslaw.org/node/13829, last accessed April 6, 2010.

Ruzicho, Andrew & Jacobs, Louis, Application of Policies and Procedures, Chap. 5- Measuring Actual Performance. 1 Employment Practices Manual, § 5:3: Testing applicants and employees—Controlling law (March 2010).

Various online research and legal alerts