



## **AFFIRMATIVE ACTION UPDATE: NEW HAVEN FIREFIGHTERS CASE**

*This bulletin provides an update on issues for Affirmative Action subscribers. Please contact us if you have any questions about this case or about their effects on your business.*

### **QUESTION FOR THE SUPREME COURT: IF WE CAN'T FIX ADVERSE IMPACT, WHAT CAN WE DO?**

As with many issues, the answer is probably to ask the question in a different way. The better questions are perhaps how should you address adverse impact and when should you address the possibility of adverse impact. As you likely have heard by now, the Supreme Court ruled in favor of white firefighters in a case we have been watching with great interest. On Monday, June 29, a narrow majority of the Supreme Court ruled in *Ricci v. DeStefano*, a.k.a. “the New Haven firefighter case,” that New Haven, Connecticut could not justify throwing out the results of employment tests that would have largely left Black candidates ineligible for promotions to the rank of firefighter lieutenant or captain. The case is garnering much press because Supreme Court nominee Sonia Sotomayor sits on the Second Circuit Court of Appeals and was part of the three-judge panel that affirmed the opinion of the Second Circuit – and that Court’s ruling was overturned by the Supreme Court. However, for our affirmative action clients, the case has much larger implications: just what are we *supposed* to do in the event of a finding of adverse impact?

### **FACTS**

Like many cities throughout the United States, the City of New Haven historically has had very few minorities in the upper ranks of its fire department. Also like many cities, New Haven has had to deal with protracted lawsuits over this issue. In the hope of making objective decisions and avoiding future lawsuits, New Haven developed a selection procedure for promotions which consisted of a written test and structured oral examination. After investing extensive time and money into developing the testing process and ensuring it was closely based on the actual job skills at issue, New Haven administered the exam. The applicants hunkered down and studied. The results of the test would determine which firefighters would be considered for promotion during the next two years, and also would determine the order in which they would be considered. The stakes were high.



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In 2003, 118 New Haven firefighters took the promotion qualification examinations. When the results came back, Black and Hispanics candidates had performed miserably on the test. In fact, only one Hispanic and no Black candidates scored well enough to be considered for an immediate promotion to captain. The City was understandably concerned. Results this lopsided would surely spawn a lawsuit attacking the test based upon its adverse impact. The City's attorney did the City no favors by making repeated conclusive statements along the lines of "a statistical demonstration of disparate impact . . . standing alone . . . constitutes a sufficiently serious claim of racial discrimination." *Ricci*, 2009 U.S. LEXIS 4945 at \*17.

The City's Civil Service Board held hearings to decide whether to use the results or start over. They heard complaints that White employees whose families had been firefighters for generations had access to expensive and lengthy study materials that other minority candidates did not. They heard complaints that some of the test did not accurately predict the ability to make leadership decisions at the scene of a fire. They listened to experts who spoke out for and against the usefulness of the exam. And their attorney told them that because the skewed results constituted an adverse impact, if sued (and they would be), the City would have to prove that the test was job-related and consistent with business necessity. They might also have to prove that there were no alternatives to the test which did not have the same impact. All of this would take time and money.

After these hearings, the City decided to throw out the test results and start the promotion process over. No good deed goes unpunished. Several of the White promotion candidates sued, claiming that the City's decision to toss out the results based upon the fact that no Black candidates had passed was discriminatory against them. The City explained that it didn't certify the test results out of fear of being sued by minority applicants over the disparate impact – which was dramatic. Both the trial judge and the Second Circuit Court of Appeals agreed that the City was justified in throwing out the results.

### **THE OPINION**

The Supreme Court was not so sympathetic to the employer's dilemma. Acknowledging that there was disparate impact, the high court said that that the very real risk of being sued was not enough because the City had a potential defense to that lawsuit. That



defense was that, even though the results were lopsided, the written test was job-related and consistent with business necessity. In essence, serious concern over being sued for disparate treatment is not enough by itself to permit a race-based decision to prevent a disparate impact claim.

The Court's opinion puts the employer in a peculiar and uncomfortable position, holding that the employer must show "a strong basis in evidence" that it would have been held liable if sued for disparate impact by the minority applicants. In other words, in order to, for example, throw out a test that had statistically-significant adverse impact, the employer must prove that using the results would be discriminatory! The Court noted the City's significant efforts to develop a good test and determined that the City could not prove it would lose a case brought by minority candidates who didn't pass the test.

The Court stated clearly:

Nor do we question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. **But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.**

*Ricci*, 2009 U.S. LEXIS 4945 at \*46-47 (emphasis added). The Court concluded that an employer could only make such a change in its established process once it has this "strong basis in evidence" that the practice would be a *provable* disparate impact violation. Because New Haven had only shown that it might lose a lawsuit by minority applicants, the White firefighters prevailed.

### OBSERVATIONS

Decisions have to be "race blind." They must be "color blind." They must be "gender blind." You get the point. Absent some sort of over-riding justification, these protected statuses cannot be the bases of employment decisions. The Court stated this clearly: "Whatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race." *Ricci*, 2009 U.S. LEXIS 4945 at \*38. This has long been one of the mantras we have repeated and cautioned government contractors about in our training: affirmative action does not allow preferences



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or any race-based decisions – even when the motivation may be to increase diversity. Such race-based decisions can be used against the employer, and that’s just what happened here. Affirmative action for our purposes is about outreach, casting a broad recruiting net, and monitoring employment decisions to ensure non-discrimination. When it comes to selection decisions, the ultimate deciding factor must be determining who is the best candidate for the job.

Remember that, although this opinion focused on written and oral testing, the Uniform Guidelines on Employment Selection Procedures (“UGESP”) define “selection procedure” very broadly to include any “measure, combination of measures, or procedure” used as a basis for any employment decision. As indicated in the EEOC’s Interpretation and Clarification, the UGESP are more broad than applying only to written tests and instead “apply to all selection procedures used to make employment decisions, including interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance.” When you, as a government contractor, conduct your annual adverse impact analysis (or disparate impact analysis or impact ratio analysis), you are testing your entire hiring process as a whole; that may include actual pen and paper tests, oral tests, judgments based on resumes and applications, interview results, etc. You are testing your entire process. Arguably, the *Ricci* ruling can be expanded to affect all selection procedures – not just tests. Once you establish your selection process and procedures, you cannot invalidate those practices on the basis of some protected class – unless you have a strong basis in evidence that the practice you wish to abandon would be a provable disparate impact violation.

If you continue to use actual tests, however, please do so with extreme caution. This has long been our advice to clients. Employment trends come and go, and it seems testing was somewhat out of vogue for many years, but I am getting an increasing number of calls from clients who want to implement testing. This may well result from the current hiring market – with more applicants than ever, employers are struggling to find tools to help them select the best fit for open positions. But testing has been moving closer to the center of the EEOC’s targeting radar for the past several years, and now this case will put it right in the middle of everyone’s target zone. If you must test, keep your tests closely tied to the job



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requirements and have your tests validated. The UGESP allow criterion-related, content, or construct validation studies, and provide detailed technical standards for those techniques. (And remember that true validation studies are complex, lengthy documents, not four-page self-serving statements drawn up by test vendors).

This case also exemplifies the kind of litigation we have been warning about for years: your affirmative action efforts can be used against you by prospective plaintiffs. Never forget that there are numerous audiences for your Affirmative Action Plan and related programs; the OFCCP is only one of them. Portions of the third paragraph from the *Ricci* Court's opinion set the stage for how this case came to be – and also carry important lessons for how government contractors should NOT address highly-sensitive adverse impact issues:

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well.

*Ricci*, 2009 U.S. LEXIS 4945 at \*9. Never let it be said that I am not in favor of open and honest discussions of race relations, but such a public discussion over statistically-significant adverse impact results should be something all employers seek (with vigor) to avoid.

Given the facts of this case and the public hiring process involved in municipal government,<sup>1</sup> this public airing of potential discrimination may have been unavoidable, but it *is* avoidable for most of you; conduct your adverse impact under attorney-client privilege. While you cannot use the privilege to shield unlawful actions, you can evaluate your selection process, the job-relatedness and business necessity of your selection process, and potential data issues under the cloak of privilege. You can determine whether some applicants should be omitted from the analysis because they were not minimally qualified, you can determine whether the sample size is too small to make for meaningful statistical analysis, you can analyze whether any minority candidates were offered positions but turned them down –

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<sup>1</sup> This promotion selection process was also subject to a collective bargaining agreement, which made it that much more complicated, public and open to scrutiny.



these and other factors can turn a statistically-significant adverse impact result into one that passes muster. And your initial drafts – which were flawed but still confess arguably unlawful impact – in most cases would be protected.

Finally, and perhaps most importantly, there's the matter of timing. One of the reasons the City decided not to certify the test results was that another consultant (a direct competitor of the company who developed the initial test, but I'm sure that didn't lead to any conflict of interests) pointed out that there were other tests out there that could help with the selection process without adverse impact. Seems to me the better time to be analyzing other options and evaluating approaches recommended by competitors would be back before investing significant time and money into developing and implementing the test in the first place. Assuming due diligence on the front end, employers shouldn't have buyer's remorse after a test is implemented, wondering if there was a better option out there. The Court's opinion makes clear that once an employer implements a selection procedure which results in an adverse impact, it faces the specter of lawsuits, OFCCP enforcement, and possible liability whether it uses the questionable results or tosses them out. Instead, do that analysis on the front end, before implementing your processes.

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